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Part II

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Federal Highway Administration

23 CFR Parts 635, 710, and 810

Right-of-Way and Real Estate; Proposed 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:** Notice of proposed rulemaking (NPRM).

**SUMMARY:** The FHWA is proposing to amend 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 proposal is intended to develop regulations on the use of those new early acquisition flexibilities. The FHWA is also proposing to update the real estate regulations to reflect the agency's experience with the Federal-aid highway program since the last comprehensive rulemaking, which occurred more than a decade ago. The updates include clarifying the Federal-State partnership, streamlining processes to better meet current Federal-aid highway program needs, and eliminating duplicative and outdated regulatory language. This notice of proposed rulemaking provides interested parties with the opportunity to comment on proposed changes to the regulations.

**DATES:** Comments must be received by January 23, 2015. Late-filed comments will be considered to the extent practicable.

**ADDRESSES:** To ensure that you do not duplicate your docket submissions, please submit them by only one of the following means:

- *Federal eRulemaking Portal:* Go to <http://www.regulations.gov> and follow the online instructions for submitting comments.
- *Mail:* Docket Management Facility, U.S. Department of Transportation, 1200 New Jersey Ave. SE., W12-140, Washington, DC 20590-0001.
- *Hand Delivery:* West Building Ground Floor, Room W12-140, 1200 New Jersey Ave. SE., between 9 a.m. and 5 p.m., Monday through Friday,

except Federal holidays. The telephone number is (202) 366-9329.

• *Instructions:* You must include the agency name and docket number or the Regulatory Identification Number (RIN) for the rulemaking at the beginning of your comments. All comments received will be posted without change to <http://www.regulations.gov>, including any personal information provided.

**FOR FURTHER INFORMATION CONTACT:** Arnold Feldman, Office of Real Estate Services, (202) 366-2028, email address: [Arnold.Feldman@dot.gov](mailto:Arnold.Feldman@dot.gov); or Robert Black, Office of the Chief Counsel (HCC), (202) 366-1359, email address: [Robert.Black@dot.gov](mailto: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:****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>.

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**I. Executive Summary***A. Purpose of the Regulatory Action*

Many provisions in MAP-21 (Pub. L. 112-141, 126 Stat. 405) are designed to improve efficiency, effectiveness, and accountability in the development and delivery of Federal-aid transportation projects. This NPRM would implement section 1302 of MAP-21 by adding the new authorities for early acquisition of property to part 710, and clarifying the Federal-aid eligibility of a broad range of real property interests that constitute less than full fee ownership. This NPRM also proposes to streamline program requirements, clarify the Federal-State partnership, and carry out a comprehensive update of part 710. Corresponding revisions are proposed for related regulations in 23 CFR parts 635 and 810.

The FHWA proposes updating 23 CFR parts 635, 710, 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 proposed rule would implement 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 regulations proposed in this NPRM cover a broad range of subjects. That breadth required FHWA to carefully consider which entities are affected by each new and revised provision. In general, the proposed regulations would apply to all grantees, their subgrantees, and other parties that carry out title 23 grant-funded programs and projects. However, some provisions in this NPRM would apply only to a subset of title 23 grantees. This typically occurs where a regulatory provision implements a part of title 23, United States Code, that applies only to the SDOTs.

As a result of all these factors, FHWA concluded there was not a single term that could be used through the proposed regulation to identify the parties subject to the various provisions. The agency decided to use specific terms of reference in the NPRM, defined in proposed section 710.105, to distinguish the regulatory provisions that are applicable to title 23 grantees generally (thus affecting all title 23 grantees and subgrantees, as well as any parties working on their behalf), from provisions applicable only to the State and or its SDOT. For example, when a provision in this NPRM uses only the term "SDOT," that provision applies only to the SDOT as defined in section 710.105 ("the State highway department, transportation department, or other State transportation agency or commission to which title 23, United States Code, funds are apportioned"). By contrast, when this NPRM uses the term "State" or "State agency," the provision in question applies more broadly to agencies, political subdivisions, and instrumentalities of a State, but does not apply to every grantee or subgrantee of title 23 funds. This NPRM proposes definitions for the terms "grantee" and "subgrantee." Those terms are used when the proposed provision applies to all parties receiving title 23 grant funding directly (grantees) or indirectly (subgrantees). For example, if an SDOT passes title 23 funds through to a local public agency as part of a subgrant agreement under which the local public agency will perform part or all of the project work, this proposed rule would refer to the local public agency as a subgrantee.

The FHWA requests comments on how it can simplify and clarify the

scope and applicability of the regulatory requirements in this NPRM, including those suggesting alternative terminology or regulatory organization.

### *B. Summary of the Major Provisions of the Regulatory Action in Question*

#### 1. Conditional Right-of-Way (ROW) Certification

This NPRM proposes revising section 635.309(c)(3) to provide broader authority to proceed with construction contract bidding in situations where the grantee has not yet acquired all real property interests needed for the project. The proposed regulation would allow the use of a conditional ROW certification procedure when the grantee has acquired all but a few of the necessary properties and would like to proceed with construction bidding. Unless FHWA finds it would not be in the public interest to do so, the new procedure would permit advertisement of a project as long as assurances are in place to protect property owners' and tenants' rights. Currently, the regulation provides that use of a conditional ROW certification for bidding and construction is permitted only under very limited circumstances. The FHWA believes the current regulation is more restrictive than necessary with respect to contract bidding, and that allowing earlier contract bidding as a standard flexibility would better meet project delivery needs while still protecting owners and tenants. However, FHWA still believes that in most cases, proceeding with construction work should occur only when all necessary ROW has been secured. For that reason, proceeding with construction under a conditional ROW certification should be permitted only under exceptional circumstances. The proposed regulation clarifies this strict limitation.

The FHWA recognizes that expanding the use of conditional certifications could increase risks of compensation claims from contractors if completing acquisition or relocation activities for remaining parcels delays contract work. The proposed rule clarifies that Federal participation in the cost of such delay claims is subject to 23 CFR 635.124, and will be determined on a case-by-case basis, including consideration of whether the SDOT followed approved processes and procedures.

#### 2. Federal-State Partnership and Compliance Responsibilities

This NPRM proposes a number of revisions to clarify the roles and responsibilities of SDOTs, their subgrantees, and those carrying out a Federal-aid project on behalf of the

SDOT. The FHWA believes these clarifications will help avoid confusion among the parties involved in activities funded under title 23. The changes, such as those proposed in sections 710.103 (Applicability) and 710.201(a) (Program oversight), also will better reflect the importance FHWA places on the role of its grantees in assuring subgrantee and contractor compliance with Federal requirements. Similar clarifications of grantee and subgrantee obligations are made throughout the regulation.

This NPRM also proposes several revisions, including in sections 710.201(i), 710.403(a), and 710.409(a), to clarify the use of Stewardship/Oversight Agreements between FHWA and the SDOT. Those agreements describe the roles and responsibilities of FHWA and the State in carrying out the Federal-aid highway program. Stewardship and Oversight Agreements specify which FHWA approvals required under part 710 are assigned to the SDOT.

#### 3. The ROW Manual

The use of FHWA-approved procedures, such as those in the SDOT ROW manual, is critical to the ability of title 23 grantees and subgrantees to meet their compliance and oversight responsibilities. As the number of projects carried out by entities other than the State increased in recent years, FHWA recognized a need to identify ways that entities other than the SDOTs could demonstrate their intention to use acceptable ROW procedures. In proposed section 710.201(d), this NPRM proposes three methods for establishing approved ROW procedures for entities other than SDOTs. As proposed, the methods would be to follow the approved SDOT ROW manual, submit a ROW manual for FHWA approval, or submit a Real Estate Acquisition Management Plan (RAMP) for FHWA approval. The FHWA believes that the proposed changes will achieve the desired stewardship and oversight outcomes while providing practical options the SDOT, its partners, and other grantees and subgrantees may utilize.

The NPRM also proposes to clarify how the approved ROW manual is used, and the topics it must cover. Among the proposed provisions is an explicit requirement that the approved ROW manual contain the procedures for determining when proposed alternative uses of ROW will not impact the safe operation of the facility (see proposed section 710.403(c)), a provision clarifying the applicability of 23 CFR part 771 environmental review

requirements to disposals and agreements for the non-highway use of real property (see proposed section 710.403(d)), and a requirement that the ROW manual contain a section describing the criteria for evaluating requests for real property disposals at less than fair market value for social, environmental, or economic purposes (see proposed section 710.403(e)(1)). In each case, FHWA is responding to recurring experiences showing a need for more information in the regulations to help grantees understand the nature and scope of the requirements.

#### 4. ROW Acquisition for Design-Build Projects

In 2002, FHWA added provisions in 23 CFR 710.311 to address ROW procedures applicable to design-build projects. (67 FR 75935, December 10, 2002). Since that time, States have used design-build contracting extensively and the experiences around the country have convinced FHWA that section 710.311 should be updated to simplify its requirements. The revisions proposed in this NPRM (proposed section 710.309) would eliminate many of the detailed requirements that address individual ROW activities. Under the proposal, a design-build contractor handling acquisitions directly would be required to certify that it will comply with the SDOT ROW manual or an approved RAMP. Most often, the design-build contractor would certify it will comply with the SDOT ROW manual. The FHWA believes this approach will provide the same protections as the current regulation because the approved ROW procedures, whether in an SDOT ROW manual or an approved RAMP, include the full range of applicable procedures and requirements.

This NPRM also proposes to simplify the regulatory provisions in existing section 710.311(d) on required measures when a design-build contractor starts construction before all acquisition and relocation activities have been completed. This NPRM would replace the itemized listing with a statement that contractor activities must be limited to those that do not have a material adverse impact on the quality of life of those in occupied properties that have been or will be acquired. The FHWA believes this change will help ensure that potential impacts not currently listed in regulation are addressed, and that the SDOT and contractor focus on outcomes rather than technical compliance issues.

## 5. Non-Highway Use and Disposal of Real Property Interests

Management of real property acquired for highway purposes is an important aspect of the real estate function. Title 23 requirements focus on protecting the Federal investment, both in terms of safe and efficient operation of the transportation facility, and from the perspective of the Federal financial investment. Part 710 presently reflects a regulatory structure developed decades ago, when FHWA and SDOTs held a strong view that the highway ROW should be protected against non-highway uses to the greatest extent possible. That vision has evolved toward providing greater flexibility in determining when an alternate use of ROW can be compatible with the transportation use. Accordingly, this NPRM proposes to update the regulations by acknowledging this change in policy, simplifying the categories of transactions, and clarifying the applicable requirements when a grantee allows a non-highway use of ROW or wants to dispose of an excess real property interest altogether because it is no longer needed for highway purposes. This update includes elimination of the concepts of air space and air rights agreements from the current regulation's definitions (section 710.105) and section 710.405. This NPRM also would eliminate the separate section on leasing now in section 710.407. Instead, the proposed regulation would rely on the concept of ROW use agreements to handle leases and other time-limited non-highway uses. The process of deciding whether to grant or approve a ROW use agreement would continue to include consideration of whether the proposed use will interfere with the transportation facility in any way. The FHWA intends that this evaluation process will embody the same considerations the current regulation calls for in its air space, air rights agreements, and leasing provisions.

This NPRM proposes corresponding changes to clarify that when a real property interest is not needed for the transportation facility now or in the foreseeable future, the grantee may determine its excess and dispose of it in whole or in part. The NPRM proposes to continue authorizing the use of the FHWA-SDOT Stewardship/Oversight Agreements to assign approval of some disposals to SDOTs, but this NPRM does not propose any change to the requirement that disposals of real property that are part of Interstate ROW be approved by FHWA. This NPRM proposes to add a definition of "excess

real property." The NPRM also proposes changes to the definition of "disposal" to clarify that a disposal involves the conveyance of permanent rights in excess real property, and must meet the requirements in proposed 23 CFR 710.403 that protect the title 23-funded facility. This NPRM also proposes revisions to section 710.409, which details the requirements for carrying out a disposal. The changes in section 710.409 primarily are proposed to align the section with the new approach described above and to provide additional clarity about existing requirements, such as compliance with 23 CFR part 771.

## 6. Early Acquisition

The term "early acquisition" describes real property acquisition activities carried out prior to completion of the review process required under the National Environmental Policy Act of 1969 (NEPA) for the project for which the property would be used. This NPRM would implement early acquisition provisions in section 1302 of MAP-21. Section 1302 broadens the ability of States to carry out early acquisition activities eligible for Federal-aid reimbursement or credit toward a State's share of project costs. This flexibility improves the State's ability to acquire or preserve real property for a transportation facility. This NPRM is proposing to revise and reorganize section 710.501, which presently covers early acquisitions, to address the changes arising from section 1302 and to generally clarify the early acquisition process pursuant to 23 U.S.C. 108 and 323.

The reorganized section will include an introductory paragraph describing the circumstances that support the use of early acquisition, and paragraphs covering each of the options for early acquisition: State-funded early acquisition without Federal credit or reimbursement, State-funded early acquisition eligible for future credit, State-funded early acquisition eligible for future reimbursement from title 23 apportioned funds, and federally funded early acquisition using title 23 apportioned funds.

This NPRM also addresses the applicability of NEPA and other environmental laws in the early acquisition context. As further detailed in the Section-by-Section discussion, the NPRM proposes to retain the distinction in the current regulation between early acquisitions in section 710.501, and hardship acquisition and protective buying in section 701.503, with respect to the treatment of properties subject to 23 U.S.C. 138

(commonly known as "section 4(f)" properties). Those properties would not be subject to early acquisition under 710.501, but could be acquired under the section 710.503 hardship acquisition and protective buying provisions if the necessary evaluations and determinations are completed.

In this NPRM, FHWA interprets the term "State," as used in 23 U.S.C. 108, as including agencies, political subdivision, and instrumentalities of the State. Accordingly, this NPRM uses the term "State agencies" in the early acquisition section to identify those parties authorized by the statute to exercise early acquisition authorities.

## 7. Transportation Alternatives Program and Acquisitions by Conservation Organizations

The MAP-21 eliminated the Transportation Enhancements Program (formerly authorized under 23 U.S.C. 133(b)(8)) and enacted a new Transportation Alternatives Program (TAP), codified in 23 U.S.C. 213. This change necessitates a revision to 23 CFR 710.511, which currently is a section specific to the Transportation Enhancements Program. This NPRM proposes rewriting section 710.511 to make it consistent with TAP. A major change resulting from the MAP-21 elimination of the Transportation Enhancements Program is the termination of authority to exclude transactions by conservation organizations from compliance with 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). This exclusion was contained in section 315 of the National Highway System Designation Act of 1995 (Pub. L. 104-59, 109 Stat. 588), and part 710 subsequently incorporated it at 710.511(b)(4). With the termination of the exclusion, acquisitions by conservation organizations for TAP projects will be subject to the Uniform Act, including the provisions for voluntary acquisitions in the 49 CFR part 24 implementing regulations. This NPRM reflects that change.

Another proposed change to section 710.511 involves adding to the regulation a provision embodying FHWA's long-standing policy on the treatment of real property interests acquired for Transportation Enhancements Program projects. Often those projects involve issues about the adequacy of the real property interest to be acquired because the projects envision lease agreements or other time-limited arrangements that do not ensure

the facility can remain in operation permanently. This situation, which FHWA anticipates will continue with TAP projects, raises a question about how to protect the Federal financial investment in the project. This NPRM proposes adding section 710.511(c), requiring a TAP property agreement through which FHWA and acquiring agency establish an agreed-upon methodology for determining any required repayment of Federal funds in the event the TAP-funded facility is compromised or eliminated.

#### 8. Federal Land Transfers and Direct Federal Acquisitions

The proposed revisions to section 710.601 (Federal land transfers) are intended to clarify the process and to simplify the land transfer procedures that apply when land owned by a Federal agency is needed for a project. The changes proposed will incorporate a conforming amendment made in section 1104(c)(6) of MAP-21 (see proposed section 710.601(a)), which clarified that Federal land transfers are available for title 23-eligible highway projects that are not on a Federal highway system.

The NPRM also proposes clarifying revisions to section 710.603 (Direct Federal acquisition), which addresses direct Federal acquisition of property for title 23 highway projects. The changes in paragraph (a) are intended to clarify that the provisions are applicable to property needed for Interstate highway or Defense Access Road projects, and related application requirements are relocated to (a). The proposed new section 710.603(b), would cover the use of Federal direct acquisition authority for projects administered by the FHWA Office of Federal Lands Highways that are not covered by 710.603(a). The proposed regulation would better align the regulation to the existing practices and the needs of the programs carried out by FHWA's Federal Lands Highway Divisions under chapter 2 of title 23. The proposed language also clarifies that FHWA, when it carries out direct Federal acquisitions on behalf of a grantee or another Federal agency, does not acquire or retain any land management rights or responsibilities.

#### C. Costs and Benefits

The FHWA estimated the incremental costs associated with two new requirements proposed in this NPRM that represent a change to current practices for State DOTs and Metropolitan Planning Organizations (MPO). These costs will be primarily incurred by SDOTs. The FHWA derived

the costs<sup>1</sup> of the two components by assessing the expected increase in level of effort from labor to update ROW manuals, and the increase in level of effort required to comply with new early acquisition requirements.

To estimate costs, FHWA first considered the costs associated with updating the SDOT ROW manual. The FHWA multiplied the level of effort, expressed in labor hours, with a corresponding loaded wage rate for the professional staff necessary to complete updates to the ROW manual. Following this approach the undiscounted incremental costs to comply with this rule are \$890,000.<sup>2</sup> Approximately 80 percent of these costs represent one time costs to implement this rule.<sup>3</sup>

Similarly, to estimate costs associated with complying with the new early acquisition requirements, FHWA multiplied the level of effort, expressed in labor hours, with a corresponding loaded wage rate for the professional staff necessary to comply with those requirements and additional effort that may be associated with the new early acquisition flexibilities. Following this approach, the annual undiscounted incremental costs to comply with this rule are \$950,000.<sup>4</sup> The FHWA does not believe that any of these costs represent one time costs to implement this rule.

The FHWA could not directly quantify the expected benefits due to data limitations and the amorphous and qualitative nature of the benefits from the proposed rule. The FHWA believes that significant new flexibilities in early acquisition will allow SDOTs to acquire real property interests earlier, ensuring parcel availability, ROW cost control and cost certainty, and expected reductions in project delay claims due to ROW not being available. The FHWA believes that the expected qualitative and quantitative benefits from the use of the early acquisition flexibilities alone

<sup>1</sup> The FHWA used salary data from Indeed Salary Search ([www.indeed.com](http://www.indeed.com)) which represents an index of salary information from job postings over the past 12 months to estimate labor costs.

<sup>2</sup> This estimate assumes that it will take an additional 225 hours to complete necessary updates to a ROW manual, that a loaded rate of \$76 per hour (Hourly rate \$47.60 for a ROW manager; estimated loaded rate of 160% of hourly rate) for labor will be incurred and by estimating the costs to update 52 ROW manuals.

<sup>3</sup> After updating the ROW manual to incorporate this rulemaking changes, the States will resume their normal process of updating their manuals.

<sup>4</sup> The FHWA calculated this by estimating that there would be 240 Early Acquisition Projects per year which would require approximately 40 hours of time each to comply with requirements associated only with Early Acquisition Projects. The FHWA used a loaded rate \$76 per hour (Hourly rate \$47.60 and an estimated loaded rate of 160% of hourly rate) for labor will be incurred (based on the cost of a ROW manager's loaded hourly rate).

will exceed the cost of implementing the rule. In addition, FHWA believes that significant benefits may accrue because this proposal clarifies and streamlines additional requirements including property management requirements, stewardship and oversight requirements, and Federal Land transfer requirements.

The FHWA invites comments on its cost estimates and discussion of benefits.

#### II. Background

The FHWA provides funds to States and other grantees under title 23 for reimbursement of costs incurred in acquiring the real property needed for highways and other transportation-related projects. The primary regulations dealing with real property interests, reimbursement, and management of ROW are in 23 CFR part 710. Additional regulations in 23 CFR parts 635 and 810 address ROW certification and use of ROW by a transit agency, respectively. On July 6, 2012, President Obama signed into law MAP-21. One of the primary purposes of this NPRM is to provide regulatory direction on the use of new flexibilities contained in section 1302 of MAP-21. This proposed rule would clarify and streamline program requirements. The proposed rule also would help accelerate project delivery and enhance the Federal-State partnership. Both of these objectives are consistent with MAP-21 goals, as articulated in section 1302 and other provisions.

This NPRM also proposes revisions to reduce duplication in the existing regulations and to clarify and update the real property regulations based on the FHWA's experience with administration of the current regulations. The FHWA proposals for changes to 23 CFR parts 635, 710, and 810 will better ensure consistency in interpretation and better align the language of the regulations with current program needs and best practices. In developing this NPRM, FHWA considered public input received during the Office of Management and Budget's recently completed Retrospective Regulatory Review. In August 2011, the DOT published its Final Plan for Implementation of Executive Order 13563, Retrospective Review and Analysis of Existing Rules. This Final Plan outlines the DOT efforts to review existing regulations, expand public participation in the regulatory process, and enhance oversight of regulatory development and review. As part of the development of the DOT Final Plan, the DOT held a public meeting in March 2011 on its preliminary plan and solicited public

input on specific rules that should be reviewed. As a result of this outreach, FHWA received public comments on 13 topic areas.

In the August 2011 Final Implementation Plan, the DOT identified 23 CFR part 710 as an area for future study and possible regulatory action. The FHWA received comments covering use of Federal real property acquisition funds for early acquisition, addressing use of Federal financial support for corridor preservation acquisitions, and requesting new flexibilities in environmental review requirements and fiscal constraints as they pertain to federally funded early acquisition. As a result of the public comments on early acquisition of ROW, FHWA re-examined the regulations on early acquisition to identify beneficial changes. The FHWA believes that the new flexibilities provided in MAP-21 for federally funded early acquisition provide most of the flexibilities that the commenters sought.

The evolution of the Federal-aid highway program in recent years, including changes in the parties involved in carrying out the program and in funding eligibilities under title 23, produced a number of challenges in drafting the real estate regulations. Historically, the Federal-aid highway program has been a federally assisted State program administered through SDOTs. The SDOTs remain the primary grantees of Federal-aid highway funds, and the FHWA-SDOT structure is the principal mechanism for administration of the Federal-aid highway program. However, there are instances when other entities receive funding under title 23 and are grantees under Federal law. In addition, SDOTs frequently enter into subgrant agreements with cities, towns, and other governmental entities, collectively often referred to as "local public agencies" or "local transportation agencies," under which those non-SDOT public agencies develop and construct facilities funded under title 23. This NPRM makes a number of changes to emphasize that the SDOT remains legally responsible to FHWA for compliance with title 23 requirements even when the SDOT delegates project activities to other public agencies. While the terms "local public agencies" and "local transportation agencies" are frequently used in SDOT and FHWA publications, FHWA proposes to continue to use the term "State agency" in part 710 to include these local entities, as the definition of "State agency" in section 710.105(b) has long included all public agencies.

In this proposed rule, FHWA continues the philosophy of relying on an approved ROW manual as one of the primary tools for implementing the Federal-State partnership and ensuring compliance by all grantees and subgrantees with applicable requirements. The SDOT ROW manual would continue to be the ROW manual most often used in the program, guiding the work of the SDOT and its subgrantees and contractors. However, this NPRM also would authorize non-SDOT entities to adopt or develop a ROW manual or a RAMP, and provides proposed procedures for those actions in proposed section 710.201(c). The approved ROW manual provides the detail needed to successfully carry out an acquisition program with consistency, and to ensure compliance with applicable statutes, regulations, and policies. The manual also serves to document a grantee's ROW procedures and practices for use by its ROW personnel, other public agencies, and individuals working with the grantee, and the FHWA.

### III. Section-by-Section Discussion of the Proposals

The proposed revisions to 23 CFR parts 635, 710, and 810 are described below. The FHWA filed a redline version of parts 635, 710, and 810 in the docket to show all proposed changes to the regulatory text and facilitate public review and comment. In addition to these changes, FHWA proposes to make minor changes throughout the regulations to eliminate outdated references, such as the change from "STD" to "SDOT," and clarify meaning without changing the intended scope or effect of the regulations. The FHWA proposes retaining the current order of the sections in part 710, which are ordered in the sequence agencies follow when developing and implementing a Federal-aid project. This will assist the public and grantees in locating regulations applicable to a specific point of interest.

#### PART 635—CONSTRUCTION AND MAINTENANCE

##### Subpart C—Physical Construction Authorization

###### Section 635.309 Authorization

Over the course of the last several years, FHWA has identified and deployed innovations and flexibilities that can accelerate project delivery. Most recently, FHWA has promoted a number of these opportunities through the "Every Day Counts" (EDC) initiative. Information on the flexibilities in ROW

practices and procedures is available at <http://www.fhwa.dot.gov/everydaycounts/projects/toolkit/row.cfm>. One of the EDC flexibilities promoted was the use of a conditional ROW certification. This NPRM proposes more flexible procedures for the use of conditional ROW certifications as a basis for authorizing construction contract bidding to proceed, while retaining necessary protections for owners and occupants.

The FHWA's traditional approach to authorizing the advertising for construction bids and the beginning of construction has been to require that all necessary real property has been acquired for the entire project, with limited exceptions. This approach ensures that property owners' rights are protected, but FHWA's experience shows the current requirements in section 635.309(c)(3) are too stringent and can unnecessarily delay the advertisement for bids and consequently, the commencement of construction. The FHWA believes that when most properties for a project have been acquired, advertising for construction bids while the SDOT finalizes the acquisition of a small remaining number of needed real property interests is not detrimental to the goal of protecting property owners' rights. The FHWA review of current practice and project delivery needs, including discussions with SDOTs during EDC presentations around the United States, concluded that it is possible to protect the rights of owners and occupants without delaying advertising when only a few acquisitions remain incomplete. These rights can be protected on a parcel-by-parcel basis by including provisions in the conditional certification to ensure those who have not yet moved from properties needed for construction are protected against unnecessary inconvenience or any action that is coercive in nature.

Accordingly, FHWA proposes to revise section 635.309(c)(3) to provide broader authority for funding grantees to use a conditional ROW certification procedure in order to permit advertisement of a project provided that assurances are in place for taking adequate care and precautions to protect the rights of property owners and tenants. This rule proposes removing existing language that limits State requests for authorization for advertisement on this basis to very unusual circumstances and removing the statement that this exception must never become the rule. The use of the conditional certification will still be an exception to the requirement in

635.309(c)(1) that legal and physical possession must have been acquired for all necessary rights-of-way for the project, but this change will allow bidding to proceed unless FHWA finds it would not be in the public interest. The use of a conditional certification to support authorization for construction would continue to be limited. The NPRM proposes language clarifying that FHWA will not approve construction based on a conditional certification unless there are exceptional circumstances that make such action in the public interest. This proposed rule would require that SDOTs provide FHWA with an update on the status of any properties not available and a realistic date when such properties will be available prior to FHWA approval of a notice to proceed with construction.

While the proposed rule would provide broader flexibility, FHWA believes grantees will need to exercise caution in using this authority, given the risk it could create for delay claims from contractors during construction. The proposed rule identifies this risk and provides limitations on FHWA participation in such claims. The proposed rule clarifies that Federal participation in the cost of such delay claims is subject to 23 CFR 635.124, including consideration of whether the SDOT followed approved processes and procedures. The NPRM would also mitigate the risk of increased construction delay claims by requiring that advertisements for bids must specify whether all ROW has been obtained for the project.

This NPRM proposes, in 635.309(h), to replace an outdated reference to FHWA directives with a reference to the requirements of 49 CFR part 24, the Uniform Act implementing regulations. References to the FHWA Division Administrator in various parts of section 635.309 would be changed to simply "FHWA." This is consistent with the usage in part 710 and better supports FHWA's efforts to adjust internal delegations of authorities when needed.

## **PART 710—RIGHT-OF-WAY AND REAL ESTATE**

### **Subpart A—General**

#### *Section 710.103 Applicability*

This rule proposes several changes to the current section 710.103, which provides information on when 23 CFR part 710 applies. The changes are proposed to clarify when these rules would apply. In recent years, FHWA has addressed a number of questions about the applicability of 23 CFR part 710 in instances where no Federal funds were

used for acquisition of real property, where there was limited title 23 funding in planning or environmental portions of the project, and where the property was acquired in advance of a title 23-eligible project. The FHWA believes that the proposed clarifications will resolve these questions on the applicability of part 710.

The first clarification is that this rule applies whenever title 23 grant funds are expended, including when the funds are used to pay for activities carried out by contractors or others on behalf of a grantee or subgrantee. This NPRM also includes a terminology change when referring to title 23 funding. Previously, the regulations used the term "apportioned funds" to describe how funds were provided to SDOTs and local public agencies. The use of the term "grant funds" will allow for a more accurate description of how funds are provided without changing the underlying requirements or applicability.

The second change involves adding proposed language to clarify that grantees of funds under this part who allow others to use the funds are responsible for oversight of the use of the funds. This oversight is intended to ensure that applicable requirements and rules have been followed. This NPRM also proposes adding language to this section to alert readers to the distinctions inherent in the terminology used to refer to various parties affected by part 710.

#### *Section 710.105 Definitions*

This NPRM proposes a number of revisions to the definitions in section 710.105(b). The proposed rule includes several changes to update terms that are used throughout the proposed regulation, such as the reference to the SDOT (rather than the current "STD"). In addition, FHWA proposes adding terms to clarify the regulation and to carry out changes enacted in MAP-21, which expanded the acquisition options for States. Several changes are being proposed to clarify the meaning and applicability of definitions in the current regulation. The FHWA believes that the proposed clarifications are necessary to respond to questions and comments from our partners in recent years.

For terms not specifically defined in proposed section 710.105 (Definitions), this NPRM proposes to replace 23 CFR part 1 with 23 U.S.C. 101(a) as the alternate source for definitions. The FHWA concluded that the list of definitions in the statute was more current and more complete than those in 23 CFR part 1.

This NPRM proposes a revision to the definition of "access rights" to substitute "public way" for "street or highway." The purpose of this revision is to clarify that access rights to allow for ingress and egress include access to a public way and are not restricted to a street or highway.

The FHWA proposes to eliminate the definitions of "air rights" and "air space," as part of an overall effort to update the approach to property management by consolidating and simplifying the categories of transactions involving real property acquired for a title 23-funded facility. The FHWA has received some questions in the past about when and how these definitions and the requirements are applied. The proposed rule would no longer use the term "air space," and would instead use the term "real property interests." The proposed rule replaces the term "air rights" with a new definition for "ROW use agreement," which refers to agreements for the use of real property interests for non-highway uses. As explained further in the preamble summary of the definition of "ROW use agreement," these agreements cover all land transfers in the ROW except permanent conveyances of real property interests. This new approach is discussed in more detail in the summaries for proposed changes to sections 710.405-409.

This rule proposes a clarification to the definition of "damages," to clearly state that damages under this part apply to real property only. Because the current definition refers to remainder property, without explicitly limiting it to real property, the current definition may be misread to apply to either real or personal property.

This NPRM proposes clarifying the definition of "disposal" by adding language confirming that disposals involve the transfer of permanent rights in real property and are subject to the requirements in 23 CFR 710.403. This rule also proposes a revision to the definition to clarify that disclaiming or informally abandoning ROW or real property interests that were either purchased with title 23 funds or incorporated into a title 23-funded project is a form of real property disposal. As such, that disclaimer or abandonment is subject to the real property disposal regulations contained in this regulation. The FHWA has received questions in the past about how this definition applied where an action was proposed that was not a sale of real property, but would result in a conveyance or other permanent change in ownership or use of real property. The FHWA believes that the proposed

change eliminates any confusion that has arisen over when the regulations apply.

This rule proposes to revise the definition of “donation” to ensure that it is clearly understood property owners must be informed in writing of their rights and potential benefits under the Uniform Act prior to making a donation. The FHWA believes written notice has always been an inherent aspect of effective compliance with the Uniform Act, but the agency has concluded a specific statement would be useful to avoid any possible confusion. The FHWA believes that this requirement can be met by using informational tools, such as pamphlets currently available on the FHWA Web site,<sup>5</sup> that are currently used to provide property owners with information on the Uniform Act and the real estate acquisition procedures.

This NPRM proposes to update the definition of “early acquisition” to eliminate the existing reference to project authorization and to instead focus the definition on the relationship between the early acquisition and the completion of the environmental review for the transportation project for which the acquired real property interests would be used. This change also will make the definition conform to revisions under MAP-21, and ensure the definition will cover the full range of early acquisition options now available.

In addition, this NPRM proposes adding a new definition, “Early Acquisition Project.” As explained more fully in the description of changes to 23 CFR 710.501, section 1302 of MAP-21 provides new flexibilities for carrying out real property acquisitions in advance of a Federal environmental decision on a proposed transportation project. One of those flexibilities is to treat the early acquisition itself as a Federal-aid project, eligible for reimbursement from title 23 apportioned funds if applicable requirements are satisfied. The MAP-21 section 1302 amends 23 U.S.C. 108 to allow States to develop a project that consists solely of the early acquisition of real property (23 U.S.C. 108(d)). An Early Acquisition Project can consist of the acquisition of real property interests in a specific parcel, a portion of a transportation corridor, or an entire transportation corridor. This new authority for federally funded early acquisition, added to the authorities for early acquisition under pre-MAP-21

law, enhanced the need for terms in the regulation that would clearly distinguish projects for the early acquisition of real property under section 710.501 (an “Early Acquisition Project”) from the proposed projects for which the early-acquired property would be used (a “transportation project”).

This NPRM proposes to add a new definition, “excess real property.” The proposed definition defines excess real property interests as those not needed currently or in the foreseeable future for transportation purposes or other uses eligible under title 23. The FHWA believes that this new definition will help eliminate confusion that has existed about the appropriate use of disposal procedures, and about the differences between agreements for the alternate use of real property that may be needed in the future for transportation purposes (a ROW use agreement under this NPRM) and property that is no longer needed (excess real property under this NPRM).

The proposed rule would add new definitions for the terms “Federal-aid project,” “federally assisted,” “grantee,” and “subgrantee.” The FHWA concluded there is a need for each of these defined terms in order to clarify the meaning and applicability of certain parts of the regulation. “Federal-aid” and “federally assisted” distinguish between projects receiving funds under chapter one of title 23 and projects receiving funds from any part of title 23. The term “grantee,” as proposed in this NPRM, would mean 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. This NPRM proposes to define “subgrantee” as “a governmental agency or other 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.”

This NPRM proposes a definition for “mitigation property.” This term is used in the proposed definition for real property, discussed below. The FHWA believes including a definition of “mitigation property” will avoid confusion in the future about the intended scope of the term when it appears in later sections of the regulation. This proposal also is consistent with the FHWA’s proposal, as described later in this NPRM, to delete section 710.513 on environmental mitigation, and instead to insert references to environmental mitigation or mitigation property where relevant in the regulatory text.

This NPRM proposes to delete the definition of National Highway System

(NHS) from this regulation. The FHWA believes that the definition of NHS in 23 U.S.C. 101(a) provides the needed definition.

This NPRM proposes to add a new definition for “option.” Section 1302 of MAP-21 in part redefines and expands the types of real property acquisitions that are eligible for Federal reimbursement. The MAP-21 changes all references in 23 U.S.C. 108 from “real property” to “real property interests” and defines real property interests to include a contractual right to acquire an interest in land. The new definition of “option” in the NPRM will clarify that the cost of acquiring an option and other types of real property interests is eligible for reimbursement under title 23.

This NPRM is proposing to add a definition of “person” to this regulation. This definition is taken directly from 49 CFR part 24. The addition of a definition of a “person” is proposed to clarify to whom this NPRM applies when persons are acting for an SDOT or other agency on a project or program receiving title 23 funds. The proposed definition also defines those entitled to protections under this part and the Uniform Act. The definition is consistent with the definition of the term in the implementing regulations for the Uniform Act at 49 CFR 24.2(a)(21).

This NPRM is proposing the addition of a definition for “Real Estate Acquisition Management Plan (RAMP).” A RAMP is a document describing the process a subgrantee (for example a local public agency receiving title 23 funds from an SDOT), non-SDOT grantee, or design-build contractor may use to carry out a title 23 grant program or project. A RAMP describes how such party will comply with title 23 requirements. A RAMP is used in lieu of developing a ROW manual or adopting the FHWA-approved SDOT ROW manual. The FHWA believes that 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. A RAMP may only be used with the approval of FHWA or the SDOT, as discussed in section 710.201(d). The FHWA believes that a properly developed and approved RAMP can provide sufficient information and direction to assure that applicable title 23 and Uniform Act requirements are met.

This NPRM proposes to revise the definition of “real property.” Section 1302 of MAP-21 clarifies the types of

<sup>5</sup> [http://www.fhwa.dot.gov/real\\_estate/practitioners/uniform\\_act/acquisition/real\\_property.cfm](http://www.fhwa.dot.gov/real_estate/practitioners/uniform_act/acquisition/real_property.cfm).



real property interests that can be acquired prior to completion of the NEPA review for a Federal-aid project by revising 23 U.S.C. 108 to replace the terms “real property” and “right-of-way” with “real property interests.” Prior to MAP–21, the statute used the terms “right-of-way” and “real property” when describing eligibility (in 23 U.S.C. 108(a)) and Federal-aid participation (in 23 U.S.C. 108(b) and (c)). Part 710 currently uses both terms in its various subparts. The FHWA proposes to modify the existing definition of “real property” to incorporate the term “real property interests,” as adopted in MAP–21, as an equivalent term. This NPRM uses the terms “real property” and “real property interests” interchangeably.

Under the definition of “acquisition of a real property interest” in 23 U.S.C. 108(d)(1), as enacted in MAP–21, real property interests include contractual rights to acquire an interest at a later date, and rights that restrict certain uses of the property for a specified period of time. Accordingly, this NPRM proposes adding such interests to the definition of “real property.” This will clarify that grantees may acquire limited, less-than-fee interests in property, including options, temporary development rights, and rights-of-first-refusal, that permit a grantee to ensure it can later purchase the real property needed for a project eligible for title 23 funding.

This NPRM is proposing to revise the definition of “right-of-way” to include the use of real property for mitigation for a transportation-related facility. The FHWA believes that this change will clarify that mitigation property is an eligible expense when it is a required part of an approved transportation project under title 23.

This NPRM proposes to add a definition for the term “ROW manual.” The FHWA believes it would be helpful to have the definition to support the changes proposed for section 710.201(d) that discuss ROW manuals and alternate procedures for non-SDOT parties.

This NPRM proposes a new definition, “ROW use agreement.” With this rulemaking, FHWA is proposing to use the term “ROW use agreement” to encompass any non-permanent transfer of real property interests in the highway ROW. This definition covers use agreements for the use or occupancy of real property interests in the ROW short of a permanent conveyance. For example, this definition would cover leases, licenses, or permits for the use of real property interests within a highway ROW. The proposed definition includes clarifying language stating that these agreements are for time-limited non-

highway purposes and that the proposed use of the real property interests covered by the agreement must not interfere with the highway facility. The discussion for section 710.405 contains additional information on ROW use agreements and the changes relating to the use and disposal of real property proposed in this NPRM.

This NPRM proposes two changes to the definition of “settlement.” The FHWA proposes that the definition of “legal settlement” be modified to include agreements resulting from mediation and stipulated settlements approved by a court. The FHWA believes that this addition will clarify that agreements resulting from mediation and stipulated settlements are allowable under the current definition of legal settlement. The second revision is to change “compensation” to “just compensation” in the definition of a court settlement or award.

The NPRM proposes to change the abbreviation adopted for “State transportation department” from “STD” to “SDOT.” This will be consistent with the form of reference preferred by the State transportation departments. Corresponding changes are proposed throughout part 710, to revise “STD” to “SDOT.”

This NPRM is proposing to add a definition of “Stewardship/Oversight Agreement” that will replace the current definition of “oversight agreement.” This change will eliminate inconsistency in the use of language in the regulation, will better define the intended meaning of the term, and better reflects current FHWA policy on the use of such agreements. The FHWA believes that this will clarify that any assignment of FHWA’s Part 710 approvals or other responsibilities to the SDOT will be authorized by FHWA through provisions in the Stewardship/Oversight Agreement executed between FHWA and the SDOT. How such responsibilities will be carried out will be discussed in the SDOT ROW manual, but the authority for the SDOT to exercise the responsibilities derives from the Stewardship/Oversight Agreement.

This NPRM includes a proposal to add a new definition, “temporary development restriction.” The purpose of this addition is to clarify that purchasing the right to restrict an activity on real property is a type of real property interest as defined in MAP–21 section 1302. The FHWA believes that this type of acquisition will be a valuable early acquisition tool.

This NPRM is proposing to add a new definition, “transportation project.” The

proposed definition, which uses the terms “highway project,” “public transportation capital project,” and “multimodal project,” will ensure that there is a clear distinction between the undertaking for the early acquisition of real property under section 710.501 (the “Early Acquisition Project”) and the project for which the real property would be used (the “transportation project”).

This NPRM proposes adding a statutory reference to the existing definition of “Uniform Act.”

## Subpart B—Program Administration

### *Section 710.201 Grantee and Subgrantee Responsibilities*

This NPRM proposes revising the title of section 710.201, which is currently “State responsibilities,” to “Grantee and subgrantee responsibilities,” and substantially reorganizing and rewriting the section to clarify the roles and responsibilities of grantees and their subgrantees in carrying out real property-related activities under title 23. These changes would recognize the increasing instances in which FHWA works with title 23 grantees other than SDOTs. However, the changes do not alter the basic nature of the Federal-aid highway program under chapter 1, title 23. In that program, the SDOT is the primary grantee and retains its special role and accompanying obligations.

This NPRM proposes moving the discussion of program oversight from paragraph (b) to (a). The text in the new (a) would be revised, while the text in the newly-designated (b), relating to organizational requirements, would be unchanged except for updated references.

The proposed revisions in the new paragraph (a) on program oversight include an introductory sentence that describes how Federal-aid funds flow to the SDOT. A sentence is added to clarify that SDOTs are responsible for ensuring that activities by subgrantees and contractors on Federal-aid projects are carried out in compliance with State and Federal legal requirements. The proposed changes include the addition of a new sentence at the end of the paragraph clarifying that non-SDOT grantees of title 23 funds must comply with part 710 and are responsible for compliance by their subgrantees and contractors.

Program oversight is a critical part of the title 23 program. Over the last several years, non-SDOT grantees, local public agencies, and other subgrantees have increasingly carried out and delivered title 23 programs and projects. The FHWA believes that it is important

that this NPRM clarify grantee obligations for program compliance and oversight responsibility when subgrantees are performing project work, and to clarify the requirements and oversight relationship that subgrantees will be subject to when using or receiving title 23 funds or carrying out title 23-funded work. These clarifications do not create new requirements, but are intended to ensure that each grantee and subgrantee of title 23 funds understands the requirements and oversight roles attached to those funds.

This NPRM proposes several revisions to section 710.201(c). The proposed language requires grantees to have an approved ROW manual that is up to date. The manual must include a section on oversight of subgrantees and contractors. In the case of SDOTs, this includes provisions on oversight of local public agencies.

The proposed rule would require SDOTs to submit a revised ROW manual reflecting the provisions of the final rule to FHWA for review and approval not later than 2 years after publication of a final rule. The FHWA believes that the SDOT ROW manual is one of the primary tools of the Federal-State partnership. The approved SDOT ROW manual provides the detail needed to successfully carry out a ROW acquisition program and to ensure compliance with applicable statutes, regulations, and policies. The SDOT ROW manual also serves to document ROW processes and practices for use by State ROW personnel, local public agencies, affected individuals, and the FHWA.

Appropriate ROW procedures are equally critical to the performance of other parties working to deliver projects funded under title 23. For non-SDOT parties, proposed section 701.201(d) contains three options for establishing approved ROW procedures. The first option is submission of a written certification that the party will use and adopt the FHWA-approved SDOT ROW manual. The second option is for the party to submit its own ROW manual for review and approval. Third, the party may submit a RAMP for review and approval. The FHWA believes that the number of non-SDOT grantees will continue to increase, as will the SDOTs' use of local public agencies to develop projects. The FHWA believes that effective oversight and stewardship are crucial on all title 23 projects and programs. The FHWA believes that the proposed changes provide several methods to achieve the desired stewardship and oversight outcomes while providing practical, easily

achievable options for grantees and their partners.

This NPRM proposes to relocate and revise the requirements of section 710.201(e) of the existing rule, which addresses adequacy of real property interests acquired for a project. The provision would become part of the acquisition provisions in proposed section 710.305. The FHWA believes this general provision more logically relates to acquisition than to the administrative provisions of section 710.201. This change is discussed in more detail in the analysis of section 710.305(b).

This NPRM proposes to redesignate existing section 710.201(f) (record keeping) as (e), and to clarify that the requirements apply to all acquiring agencies, as defined in 710.105. The NPRM also proposes revising the property management record keeping requirements to make them applicable to properties acquired with title 23 funds or incorporated into a title 23-funded program or project, regardless of whether such properties are managed by the SDOT. As previously noted, FHWA believes the role of non-SDOT parties in title 23 projects and programs will continue to evolve and grow. These proposed regulatory changes are designed to ensure that real property acquired with title 23 funding is effectively and accurately recorded, and that title 23 grantees carry out property management programs consistent with the requirements of this part.

This NPRM proposes to redesignate existing section 710.201(g) (procurement) as (f), and to clarify that the provision is applicable to non-SDOT grantees. The FHWA believes that it is necessary to ensure that other grantees of title 23 funds meet the same requirements that SDOTs currently meet. This revision will further safeguard that title 23 funds are used appropriately.

This NPRM proposes to redesignate existing section 710.201(h) (use of public land acquisition organizations or private consultants) as (g). The proposed rule also would change the reference from "SDT" to "acquiring agency" and add "persons," as defined in this rule, as another party that an acquiring agency could use to carry out its acquisition authority. The FHWA believes that these revisions will provide additional flexibility to acquiring agencies and better reflect the range of resources agencies may use. This NPRM also proposes adding conservation organizations to the list of parties, to recognize what is likely to be a permanent role of such parties in

projects such as those funded under TAP.

This NPRM proposes to redesignate existing section 710.201(i) (approval actions) as (h). The NPRM proposes to retitle the provision as "Assignment of FHWA approval actions to an SDOT." The proposed rule also would delete the existing references to the Interstate and to refocus the discussion on FHWA's responsibilities and the responsibilities that FHWA may assign to an SDOT under a Stewardship/Oversight Agreement. The FHWA believes that these changes are needed to ensure that there is a clear understanding of the means by which SDOTs may assume performance of certain FHWA approval and other responsibilities under part 710, and to clarify the process that will be used to carry out the assumptions of responsibility under this part. These changes, together with the proposed clarifications to approval provisions such as those in subpart D (Real Property Management), will help resolve questions that have arisen since FHWA eliminated detailed real estate regulations through rulemakings spanning 1995 through 1999.<sup>6</sup> Those rulemakings resulted in FHWA adopting a system that permits SDOTs to assume responsibility for many of the required FHWA approvals required under earlier versions of the regulations governing real estate and ROW. The 1999 final rule, which in substance is the existing part 710, was designed to place primary responsibility for most Federal-aid project ROW approvals at the SDOT level. In practice, the regulation has proven insufficiently clear as to the needed approvals and related requirements. The changes proposed in this NPRM are intended to continue the practice of assigning the approvals to the SDOT, but to clarify the approvals that are needed.

This NPRM proposes to relocate and revise existing sections 710.201(j) (approval of just compensation) and 710.201(k) (description of the acquisition process). The sections would be moved to section 710.305, becoming sections 710.305(c) and 710.305(d), respectively. The FHWA proposed the relocation because it believes these sections more logically relate to execution of the acquisition process than to the program administration topics covered in section

<sup>6</sup> See 60 FR 56004 (November 6, 1995) (Advanced Notice of Proposed Rulemaking for Right-of-Way Program Administration); 61 FR 18246 (April 25, 1996) (Interim Final Rule for Right-of-Way Program Administration); 63 FR 71238 (December 24, 1998) (Notice of Proposed Rulemaking for Right-of-Way Program Administration); and 64 FR 71284 (Final Rule for Right-of-Way Program Administration).

710.201. These sections are discussed in more detail in the analysis of section 710.305.

### *Section 710.203 Funding and Reimbursement*

This NPRM proposes several changes to the current section 710.203 provisions on funding and reimbursement. These changes are needed to conform to provisions in MAP-21 section 1302, to clarify some aspects of the existing regulation, and to simplify the regulatory text where the existing text no longer serves a necessary function. This NPRM proposes to revise section 710.203(a) (General conditions), by inserting a reference to title 23 funds and adding a specific reference to mitigation property to the regulation's description of property acquisition costs that may be eligible for funding participation. This is consistent with FHWA's proposal, as described later in this NPRM, to delete section 710.513 on environmental mitigation, and instead to insert references to environmental mitigation or mitigation property where relevant in the regulatory text. The FHWA believes that streamlining this regulation by deleting the longer discussion of mitigation properties in section 710.513, and incorporating simple references at appropriate points in the regulation, will improve the clarity of the regulation.

The proposed rule also would revise section 710.203(a)(2) by inserting a reference acknowledging that documents other than the traditional FHWA form for a "project agreement" may be used to embody the terms and conditions for title 23 funding. The FHWA concluded this revision would provide needed flexibility, especially in the case of a non-SDOT grantee.

This NPRM proposes revising section 710.203(a)(3), which describes acquisition activities that can occur prior to completion of a NEPA decision for a project subject to title 23. In part, these changes are proposed for consistency with the early acquisition provisions in 23 U.S.C. 108, as amended by section 1302 of MAP-21. Section 108 expressly permits certain acquisition activities prior to the completion of NEPA review for the overall project, and includes a provision on NEPA reviews for Early Acquisition Projects.

The revisions to section 710.203(a)(3) also are intended to clarify the extent to which property valuation activities can occur prior to the NEPA decision. The proposed changes will add preparation of appraisals and appraisal waiver valuations to the list of activities that can be performed prior to the NEPA

decision on the project. The NPRM proposes to delete "necessary for the completion of the environmental process" from that first part of paragraph (a)(3) as an outdated provision in light of MAP-21 and other changes and clarifications in the requirements governing the timing of activities on title 23 projects. The NPRM proposes adding a reference to 23 CFR 646.204 after the term "preliminary engineering," because section 646.204 now provides a definition of preliminary engineering. The FHWA believes the proposed changes in section 710.203(a)(3) language relating to valuation work is an important clarification that will encourage grantees to begin preparation of appraisal and appraisal waiver documents early in the project development process. In many cases, beginning appraisal work early can result in time and cost savings later in the project development process, and those savings can outweigh the risk that some appraisals may not be needed or may need some revision as a result of final NEPA review and project alignment selection.

This NPRM also proposes changes to section 710.203(a)(3), clarifying that negotiations must be deferred until after the NEPA decision, except in two cases: early acquisitions under section 710.501, and hardship or protective acquisitions under section 710.503. The FHWA has responded to a number of requests for clarification on the timing of personal contact and appraisal preparation. In some cases, SDOTs have interpreted the existing regulation to prohibit early appraisal preparation because it prohibits contacting property owners. Contact with potentially affected property owners is required in order to prepare an appraisal. The FHWA believes that the revision is necessary to clarify that contact with potentially affected property owners is permissible for the purposes of developing an appraisal of real property.

This NPRM is proposing some revision and clarification of sections 710.203(b) (Direct eligible costs) and 710.203(d) (Indirect costs). The FHWA believes that it is important to clarify what constitutes eligible direct costs in the context of real property acquisition activities. The NPRM proposal clarifies that eligible direct costs associated with acquiring real property include costs typically incurred in acquiring real property interests, such as costs to prepare valuations and documents necessary to acquire the property, cost of negotiations, cost associated with closing, and costs of finalizing the acquisition. These ROW acquisition

costs must be adequately documented as required by 2 CFR part 225 Appendix A, Section (1). The FHWA also proposes to clarify that allowable indirect costs under an approved indirect cost allocation plan may be claimed consistent with 2 CFR part 225. The current regulation has been interpreted as allowing participation only in the cost of the real property. The FHWA has issued guidance in the form of questions and answers in the past that has restricted the eligibility of real property acquisition costs. The FHWA will revise that guidance to be consistent with the discussion in this NPRM and the final rule.

The NPRM proposes to make the costs for real property interests such as options and temporary development rights eligible direct costs in section 710.203(b)(1)(iii). However, FHWA also believes that grantees and subgrantees likely will need additional guidance on the valuation of less-than-fee real property interests, such as options and other contractual rights to acquire an interest in land, rights to control use or development, leases, licenses, and any other similar action to acquire or preserve ROWs for a transportation facility. The FHWA believes the fact-specific and detailed nature of such questions is best handled through best practices-style guidance. If a final rule is adopted, the FHWA intends to develop guidance addressing approaches to valuation of the types of property interests listed above after the publication of the final rule.

This NPRM proposes to revise section 710.203(b)(1)(iv) by adding language to include an acquiring agency's attorney's fees and to exclude other attorney's fees unless required by State law (including orders issued by courts of competent jurisdiction) or approved by FHWA. The FHWA believes that costs for outside counsel to represent the acquiring agency are a reasonable expense which can be incurred in the course of acquiring necessary real property.

This NPRM proposes to revise section 710.203(b)(1)(v) by using the term "waiver valuation" instead of "appraisal waiver," by adding "ROW" to describe the manual referenced in the existing regulation and by inserting a reference to the RAMP alternative to a ROW manual. The FHWA believes that use of the term "appraisal waiver" is no longer accurate because the Uniform Act regulation at 49 CFR 24.2(a)(33) defines the term "waiver valuation" and notes that a waiver valuation is not an appraisal.

This NPRM proposes to revise section 710.203(b)(5) (Payroll-related expenses) to update the reference to the Federal

Office of Management and Budget (OMB) regulations. The OMB regulations have been codified at 2 CFR part 225 (formerly OMB Circular A-87). The proposed rule would add language recognizing the eligibility of a grantee's salary-related expenses when the grantee's employees work with an acquiring agency or a contractor on a particular project. Grantees must document such costs in accordance with 2 CFR part 225. This NPRM proposes to delete the last sentence in existing section 710.203(b)(5) because technical guidance, including oversight of subgrantee and contractor compliance or performance, is generally an overhead expense. Those types of expenses are reimbursable under the indirect costs section of the regulations.

This NPRM proposes to revise section 710.203(b)(6) (Property not incorporated into a project funded under title 23) by deleting the reference in paragraph (i) to the Transportation Enhancement Program and replacing it with a reference to the new TAP. Congress did not reauthorize the Transportation Enhancements Program in MAP-21, but instead included elements of that program in the newly enacted TAP, as described in MAP-21 Sections 1103 and 1122. Proposed changes related to TAP are discussed in more detail below in the summary of proposed changes to section 710.511.

This NPRM proposes to revise section 710.203(b)(6)(ii) by adding a reference to alternate access points. The FHWA believes that this addition will further clarify that construction or maintenance of a title 23 eligible project may create the need to provide access outside the ROW to maintain access to that property. This would be treated as an eligible project activity.

This NPRM proposes to revise section 710.203(d) (Indirect costs) to update the reference to OMB regulations which have been codified at 2 CFR part 225 (formerly OMB Circular A-87). The proposed rule also would revise the paragraph to clarify that an SDOT may approve an indirect cost plan for its subgrantee unless the subgrantee has a rate approved by a cognizant Federal agency.

### Subpart C—Project Development

This NPRM proposes to modify subpart C on project development to streamline and clarify this subpart by eliminating redundant sections covering topics that are more appropriately addressed elsewhere in this regulation or are the subjects of other parts of title 23 CFR. The FHWA notes that these proposed revisions are not intended to

substantively change the applicability or scope of the regulatory requirements pertaining to the project development process.

The FHWA proposes to delete existing sections 710.303 (planning) and 710.305 (environmental analysis). The FHWA believes that the general discussion currently included in these sections neither adds to nor improves upon the information on the planning and environmental analysis found in 23 CFR part 450 and 23 CFR part 771.

The FHWA proposes to renumber the sections in subpart C that follow section 710.305 in the existing regulation and revise all sections remaining in subpart C, as discussed below.

#### *Section 710.301 General*

This NPRM proposes to revise 710.301 by listing each of the key steps in the project development process in the last sentence of the paragraph. The FHWA believes that this description of the key steps in the project development process will give sufficient information to provide a general understanding of the overall process.

#### *Section 710.303 Project Authorization and Agreements*

The FHWA proposes to retitle this section, which appears as section 710.307 in the existing regulation, by changing the existing header "Project Agreements" to "Project Authorization and Agreements." The change recognizes that project agreements no longer are the sole form of document used by FHWA to set forth the terms and conditions of funding and authorize project work.

The proposed rule also would revise the section by adding new references to proposed early acquisition provisions in 710.501(d) and 710.501(e). The result would be that section 710.303 would reflect the new early acquisition provisions in section 1302 of MAP-21. The NPRM proposes striking the last sentence of the existing provision, which contains transition language dating from a prior rulemaking. There should no longer be a need for the outdated transition provision.

The NPRM proposes substituting the phrase "Federal funding under title 23" for "Federal-aid" in the first sentence of the existing section. This change would make it clear that the provision applies to all title 23-funded grants.

#### *Section 710.305 Acquisition*

This section, which appears as section 710.309 in the existing regulation, would be revised to add a more complete description of the acquisition process. This NRPM proposes adding

language to clarify that grantees are responsible for ensuring compliance with the oversight and other requirements in this section. The FHWA believes that program oversight is a critical part of the title 23 program and that it is more likely in the future that non-SDOT grantees and subgrantees will be active in delivering title 23-funded projects.

This NPRM proposes a new section 710.305(b), inserting the provisions relating to the required acquisition of adequate real property interests for a project. The long-standing agency interpretation of the provision, formerly in 710.201(e), is that the project owner must own or control adequate real property interests to support the project. This view has not changed, but MAP-21's revisions to 23 U.S.C. 108 have made it necessary to address how paragraph (b) applies in the context of Early Acquisition Projects under 23 U.S.C. 108(d) and 23 CFR 710.501. For example, States can now carry out reimbursement eligible early acquisitions by acquiring an option to purchase the real property at a later date, or by acquiring an interest that restricts certain activities on real property for a specific period of time.

To address this additional flexibility, the proposed revisions would clarify that the real property interests acquired must be adequate for the purpose of the project. Less-than-fee types of interests may be adequate when carrying out an Early Acquisition Project, as defined in proposed section 710.105. Before beginning the transportation project, as defined in this NPRM, the grantee would still need to acquire adequate real property interests necessary for the construction, operation, and maintenance of the resulting facility and for the protection of both the facility and the traveling public.

Proposed section 710.305(c), relocated from existing section 710.201(j), addresses the approval of just compensation for acquired real property interests. The proposed rule would revise the heading to "Establishment and offer of just compensation." The revised language would include the phrase "believed to be just compensation" rather than "determined to be just compensation." This new language would more appropriately and correctly describe what it is that an acquiring agency approves. An acquiring agency's process, as set forth in its approved ROW manual, should lead it to a good faith offer that it believes represents just compensation. In some cases, when there is a disagreement about just compensation, a court ultimately establishes just

compensation after hearing all of the facts. The revised language in proposed section 710.305(c) would expressly require the process to be done in accordance with the Uniform Act regulation at 49 CFR 24.102(d), which requires establishment and offer of an amount believed to be just compensation. The FHWA believes that these changes will provide a correct, clear, and concise discussion of requirements which will ensure that agencies appropriately establish offers of just compensation.

Proposed section 710.305(d), relocated from existing section 710.201(k), addresses the description of the acquisition process that acquiring agencies must provide to persons affected by title 23-funded acquisitions. This NPRM proposes to revise the existing language to clarify that the requirements of 49 CFR 24.5 (manner of notices), 24.102(b) (notice to owner) and 24.203 (relocation notices) are applicable to transactions advanced under title 23. The FHWA believes that the proposed changes provide clear, understandable references to the Uniform Act provisions that define the processes used to acquire real property, and delineate the owner's rights, privileges, and obligations. These Uniform Act provisions are critical to the real property acquisition process. In particular, FHWA has noted that providing written descriptions of Uniform Act rights and benefits in languages other than English is necessary due to the variety of languages spoken by the owners and tenants that an acquiring agency may encounter during the acquisition of real property.

#### *Section 710.307 Construction Advertising*

This NPRM proposes to revise the newly redesignated section 710.307, which appears as section 710.311 in the current regulation, by updating references throughout to more accurately describe the parties affected by the section. The proposed rule also would update the description of the types of responsibilities that may be covered in the Stewardship/Oversight Agreement between FHWA and the SDOT. The changes will make the section consistent with MAP-21 revisions to 23 U.S.C. 106.

#### *Section 710.309 Design-Build Projects*

This newly redesignated section 710.309, which appears as section 710.313 in the current regulation, would be updated in several ways. Paragraph (a) would be modified to update terms. The proposed terms would more

accurately identify the parties affected by the section and would be consistent with the other revisions throughout part 710. Similarly, technical corrections would be made to references and language in paragraph (b).

This NPRM proposes to revise redesignated section 710.309(c) by deleting the first sentence, which presently discusses incorporation of ROW and clearance services into the design-build contract. The remainder of paragraph (c) would be revised to focus on options for ROW actions and approvals in the design-build setting. In all situations, the grantee is responsible for ensuring that construction activities do not have a material adverse impact on property owners whose property has not been acquired, whose relocation has not been completed, or who lawfully remain in the project area.

This NPRM proposes to revise the redesignated section 710.309(d), to streamline it and focus on the role of the grantee (normally, the SDOT) in ensuring design-build contractors comply with applicable requirements. The NPRM proposes removing the detailed descriptions of ROW procedures in the existing (d)(1)(i)–(ii). In place of those paragraphs, the NPRM proposes to insert a new 710.309(d)(1) that would require the contractor to certify it will comply with an FHWA-approved ROW manual or RAMP in accordance with the provisions on ROW manuals and alternatives in sections 710.201(c) and (d). The FHWA believes that the current regulation in large part duplicates detailed material contained in SDOT ROW manuals, and the agency thinks it is appropriate to redirect the focus of the regulation to the use of an FHWA-approved ROW manual or RAMP. Under the proposed rule, an approved ROW manual or RAMP will provide direction as to what is required of a design-build contractor for the project. The FHWA believes these changes provide additional clarity to this section and will put proper emphasis on the use of an approved ROW manual or RAMP.

This NPRM proposes to delete paragraph (d)(2) from the existing regulation, removing the discussion on acquisition and relocation plans and project tracking systems. This language is no longer necessary in light of the proposed revision of paragraph (d)(1) to require the design-builder to submit written certification that it will comply with the procedures in an approved ROW manual or RAMP.

This NPRM proposes to redesignate the succeeding paragraph in the new section 710.309 to reflect the deletion of existing paragraph (d)(2). The NPRM

proposes to revise the new section 710.309(d)(2), concerning the establishment of hold off zones, by making the creation of hold off zones mandatory rather than permissive when the relocation of displaced persons has not been completed. The FHWA believes that it is critical that a design-build project use a process to address and enforce protections that ensure that displaced persons are not subject to unwanted or harmful impacts or effects of construction.

This proposed rule would eliminate the existing paragraphs (d)(4), (5), and (6), which address how to handle specific issues when relocations have not been completed. In place of those provisions, FHWA proposes to adopt a more general standard that focuses on the expected outcome when ongoing construction occurs in proximity to owners and tenants still in occupancy. The new language, which would appear in the redesignated 710.309(d)(3), would limit contractor's activities to those that the grantee determines do not have a material adverse impact on the quality of life of those occupying properties that have been or will be acquired for the project, but who have not yet relocated. The FHWA believes that the new language includes by implication the kinds of protections previously detailed in the existing regulation. The new language would also encompass other types of adverse impacts on such owners and tenants. These protections are the types of requirements that typically would be addressed in the approved ROW manual or RAMP, which design-build contractors now will have to follow. The FHWA believes project-specific aspects of these requirements are best addressed either in the project's contract documents, or as part of a project work plan.

This NPRM would redesignate the remaining paragraph (d)(7) in the existing regulation as section 710.309(d)(4), and would update the terms used in the paragraph.

This NPRM proposes to update the references in the redesignated section 710.309(e) to reflect the new section number for the regulatory language relating to construction advertising, section 710.307.

#### **Subpart D—Real Property Management**

This NPRM proposes to restructure Subpart D by eliminating and revising the sections of this part of the regulation that currently cover air space, air rights, leasing and disposal. The FHWA believes that this part can be updated, clarified, and streamlined by consolidating and reorganizing the

requirements applicable to the management of real property interests, including alternate uses and permanent disposition of ownership rights. This NPRM proposes to update the real property management regulations by simplifying the categories of transactions and clarifying the applicable requirements when a grantee wishes to allow an alternate use of ROW or dispose of a real property interest altogether because it is not needed for highway purposes. Because the project owner typically is the grantee or subgrantee, the term "grantee" is used throughout this subpart where provisions are applicable to owners of real property interests purchased with title 23 funds or incorporated into a facility funded under title 23.

#### *Section 710.401 General*

This NPRM proposes to revise 710.401 by eliminating the language about the change of access control and use of real property interests along the Interstate because that topic is addressed in sections 710.403 and 710.405. The proposed rule would add language to this section that clarifies that grantees have oversight responsibilities for compliance of subgrantees with real property management requirements. This includes situations where the ROW is owned by the subgrantee.

#### *Section 710.403 Management*

This NPRM proposes to revise 710.403 by inserting a new paragraph (a) before the existing paragraph (a) and redesignating the existing parts of this section accordingly. The new paragraph (a) would discuss the option for assignment to the SDOT of FHWA approval authorities through the use of the Stewardship/Oversight Agreement between FHWA and the SDOT. The FHWA believes that, in particular, disposal authority for actions off of the Interstate may be assigned to the SDOTs through the Stewardship/Oversight Agreement, provided that the assignments are written and that they specifically enumerate the approval authorities that are being assigned. Disposal and use of Interstate real property interests, and disposals at less than fair market value, will continue to require direct FHWA approval.

This NPRM proposes to revise the redesignated section 710.403(b) (currently section 710.403(a)) by replacing "boundaries" with the phrase "approved ROW limits or other project limits." This change acknowledges the evolution of title 23-funded projects to include some projects that are not linear, land-based highways. The NPRM

would add a more detailed description of the standards that must be satisfied in order to permit non-highway uses of real property. The proposed language is consistent with the requirements in 23 CFR 1.23. The FHWA believes the changes would clarify the considerations that a grantee must take into account when evaluating potential alternate uses.

This proposed rule would revise the redesignated section 710.403(c) (section 710.403(b) of the existing regulation) by adding language clarifying the reference to "manual" is to the approved ROW manual. The proposed rule also revises the regulatory text to clarify that the ROW manual or approved RAMP must have procedures for determining whether a real property interest is excess real property, which this NPRM proposes to define as a real property interest not needed currently or in the foreseeable future for transportation purposes or other uses eligible under title 23. Excess real property may be sold or otherwise permanently disposed of by the grantee. The new provision also would require the ROW manual to contain procedures for determining when a real property interest may be made available under a ROW use agreement for an alternate use that is consistent with the requirements described in proposed section 710.403(b). The NPRM would eliminate the explicit list of organizational units with which the grantee must coordinate when considering whether property is excess or can be made available for an alternate use. The FHWA believes grantees are best qualified to determine what type of internal coordination is appropriate.

This NPRM proposes to revise redesignated section 710.403(d) (currently section 710.403(c)) to update the language on environmental review of ROW use agreements and disposals and clarify the scope of the provision. The NPRM proposes eliminating the reference to FHWA approval. This change is made to better reflect FHWA's use of the Stewardship/Oversight Agreement to permit an SDOT to assume responsibility for certain ROW use agreement and disposal determinations. The new paragraph retains the requirement for environmental review of such transactions pursuant to 23 CFR part 771. The changes to this paragraph would not affect any assignment of environmental review responsibilities entered into by FHWA and the SDOTs.

This NPRM proposes to revise redesignated section 710.403(e) (currently section 710.403(d)) by adding language to clarify that the requirement

to charge fair market value, except as provided in paragraph (e), applies to the use and disposal of all real property interests obtained with the assistance of title 23 funds. This revision is needed to eliminate confusion that has occasionally occurred in administration of the existing regulation. The NPRM proposes to delete language describing the principles guiding disposals. The principles and the requirements for fair market value and use of net proceeds are covered in detail in other parts of this and other sections in part 710, making this language redundant. The NPRM also proposes clarifying the language in the paragraph relating to FHWA approval of a disposal at less than fair market value, as further described below.

This NPRM proposes to revise newly numbered 710.403(e)(1) (currently 710.403(d)(1)) by rewording the language to clarify its intent and the long-standing FHWA interpretation of this exception to the fair market value requirement. The revised provision would state, in part, that the exception applies when it is in the overall public interest based on social, environmental, or economic benefits. The revision would use the word "benefits" in place of the current term "purposes." The FHWA believes that the change in language from "purposes" to "benefits" more accurately describes how the public interest is determined and the type of effect that FHWA and the grantee reasonably must expect will result from this type of disposal in order to approve the less-than-fair-market-value transaction. The current regulation allows the SDOT or other grantee to use its ROW manual to describe the criteria for evaluating requests for less-than-fair-market-value disposals on social, environmental, or economic grounds. The NPRM proposes to change from the current permissive language to a requirement that the approved ROW manual contain such criteria. The FHWA believes that 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 proposed rule would eliminate the current regulation's reference to 23 U.S.C. 142(f) in the existing section 710.403(d)(1). This change would be part of the creation of a paragraph in new section 710.403(e)(5) that consolidates the regulatory provisions in part 710 that address the issue of fair

market value when ROW will be used for publicly owned mass transit purposes. This proposed rule would use the regulatory text at 710.405(c) of the existing regulation for the new section 710.403(e)(5). The new regulation would change the numbering of the current sections 710.403(d)(2) through (4) to sections 710.403(e)(2) through (4), respectively.

The NPRM would redesignate existing section 710.403(d)(5) as 710.403(e)(6), and insert the word “other” into the text to clarify that the intent of the provision is to cover types of projects not otherwise listed in 710.403(e)(2) through (5). The proposed rule would modify the language in section 710.403(e)(6) to clarify that concession agreements affecting title 23-funded facilities are not exempt from fair market value requirements. The FHWA believes that this clean-up and reorganization will make it easier for grantees and other to understand and apply this part of the regulations.

This NPRM proposes to revise section 710.403(f) (currently section 710.403(e)) by clarifying that the Federal share of the net income from any alternate use or disposal of a real property interest obtained with title 23 funds must be used for title 23 eligible activities. This language implements 23 U.S.C. 156. The NPRM also proposes modifying the language at the end of paragraph (f) to more clearly state that the use of net income described in this part does not cause title 23 requirements to apply to such use. The FHWA believes that these clarifications are necessary to ensure grantees clearly understand the requirements of 23 U.S.C. 156 that are reflected in section 710.403(f).

This NPRM proposes to relocate the provision in the current regulation (now 710.403(f)) concerning the disposal of excess real property outside the ROW when no Federal funds were used to acquire it. The FHWA proposes to move the provision to a revised section 710.409 that consolidates the provisions of the regulation relating to disposal of excess property. This change is proposed for purposes of clarity and streamlining.

#### *Section 710.405 ROW Use Agreements*

This NPRM proposes to change the title of section 710.405 from “Air rights on the Interstate” to “ROW use agreements.” This change supports other proposed changes to the section, discussed below.

This NPRM would change the approach to property management by eliminating the current regulation’s discussion of air space and air rights agreements in section 710.405. This

NPRM also would eliminate the separate section on leasing in section 710.407. Instead, the proposed regulation would rely on the concept of “ROW use agreements” to handle leases and other time-limited non-highway uses both inside and outside of the approved ROW limits of all Federal-aid highways and transportation facilities, including Interstates. The process of deciding whether to grant a ROW use agreement would continue to include consideration of whether the proposed use will interfere with the transportation facility. The FHWA expects this 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.

The new section 710.405 proposed in this NPRM would eliminate use of the term “airspace,” and instead use “real property interests,” which is a term this NPRM proposes to make synonymous with the term “real property.” As defined in section 710.105 of the current regulation, “air space” is the space located above and/or below a highway or other transportation facility’s established grade line, lying within the horizontal limits of the approved ROW or project boundaries. Thus, “air space” is a subset of the entirety of the real property interests that make up full fee ownership of real property.

This NPRM also proposes to eliminate use of the term “air rights.” An “air rights” agreement under the existing section 710.405 is the method used to convey time-limited and/or permanent rights for an alternate use of air space. Under this NPRM, the regulation would use the term “ROW use agreement” when referring to a time-limited agreement to permit an alternate use of real property that is part of a title 23-funded facility or was acquired with title 23 funds. A conveyance of permanent rights would be handled as a disposal.

As discussed earlier in this NPRM, FHWA is proposing these changes because it believes the continued use of the terms “air space” and “air rights” is unnecessarily confusing. In current title 23 real estate practice, the terms “air space” and “air rights” rarely describe the true nature and scope of the alternate use rights being granted. In addition, FHWA believes it is no longer necessary to call out air space separately from the remaining parts of the facility, as the agreement for the use should specify in detail the parts of the facility affected by the alternate use. In the agency’s experience, the existing regulatory scheme involving “air space”

and “air rights” is often challenging to administer, and FHWA believes it will be more effective for the regulations to focus on distinguishing between a grant of time-limited rights (ROW use agreements) and a conveyance of permanent rights (disposal).

Accordingly, this NPRM proposes to rewrite section 710.405 to reflect proposed provisions on ROW use agreements. Language in the existing section that FHWA believes should apply to such agreements would be retained or updated. Proposed section 710.405(a) would contain a description of ROW use agreements and a number of general requirements applicable to those agreements. The proposed rule also would change section 710.405(a) by adopting a reference to highways, as defined in 23 U.S.C. 101(a), that received title 23 funds.

Existing section 710.405 governs FHWA approval of air rights on the Interstate system and contains a list of transactions excluded from the section. This NPRM proposes retaining those listed exclusions that would remain in effect under the proposed ROW use agreement provisions in 710.405. The exclusion for non-Interstate highways now in section 710.405(a)(2)(i) would be deleted, as it is no longer needed given the restructuring of this subpart. The deletion would not eliminate the authority to assign non-Interstate ROW use agreement approvals to SDOTs through the FHWA–SDOT Stewardship and Oversight Agreement. These changes in 710.405(a) are consistent with the NPRM’s proposed simplified approach to management of alternate uses for all real property interests that are part of a Federal-aid facility or were acquired with Federal-aid funds.

The deletion of the exception for non-Interstate highways would result in redesignating the remaining exceptions in 710.405(a)(2). This NPRM proposes to revise the redesignated section 710.405(a)(2)(ii) (section 710.405(a)(2)(iii) in the current regulation) by adding references to additional parts of the title 23 regulation that apply to the relocation of railroads or utilities. The FHWA believes that adding the additional references to this section provides clarity and additional detail, and makes it easier to determine when this section of the regulation applies.

Section 710.405(b) is rewritten to reflect the applicability of the ROW use agreements to only time-limited rights, and to articulate a number of provisions such agreements must include. The requirements cover such topics as the term of the ROW use agreement, the design and location of the alternate use,

insurance to protect FHWA and the State, and compliance with nondiscrimination requirements. The FHWA considers this information as the minimum necessary to protect the Federal interest in facilities that would become subject to a ROW use agreement. The agency recognizes this type of detail was eliminated from FHWA real estate and ROW regulations in earlier rulemakings, previously referenced, based on the assumption the requirements would be embodied in other types of agency directives. However, FHWA has found the absence of this information from the regulations has made it more difficult for grantees and others to understand what is required.

Proposed sections 710.405(c) and (d) set forth language taken from the leasing provision in section 710.407 of the current regulation. Those provisions, from existing sections 710.407(b) and (c), respectively, prohibit the use of Federal funds if an alternate use requires a change in the transportation facility, and require alternate uses to conform to design standards and safety criteria. The FHWA believes it is logical to place these provisions with the other requirements affecting ROW use agreements, since such agreements include lease transactions.

This NPRM proposes addition of a new provision in section 710.405(e) that incorporates into the regulation the application requirements that FHWA and the SDOTs have been using for some time when a third party wishes to obtain use rights in a Federal-aid facility. The requirements include submission of the identity of the party responsible for developing and operating the alternate use, a description of the proposed use and why it would be in the public interest, and information demonstrating the design and location of the proposed use will meet the requirements in section 710.405. The FHWA considers this information as the minimum necessary to allow adequate review of proposed alternate uses. As previously discussed, the agency recognizes this type of detail was eliminated from FHWA real estate and ROW regulations in earlier rulemakings. However, FHWA has found the absence of this information from the regulations has made it more difficult for grantees and others to understand what is required.

#### *Section 710.407 Reserved*

As stated above, this NPRM proposes to delete existing section 710.407, on leasing, and reserve the section for future use. The rationale for the

proposal is discussed in detail in the discussion of section 710.405.

#### *Section 710.409 Disposal of Excess Real Property*

This NPRM proposes changing the title of section 710.409 from “Disposals” to “Disposal of excess real property.” This change is part of the proposed update in approach to real property management. This NPRM proposes to clarify that when a real property interest is not needed for the transportation facility now or in the foreseeable future, the grantee may determine it is excess real property and dispose of it in whole or in part. As previously mentioned, this NPRM also proposes changes to the definition of “disposal” in section 710.105, to clarify a disposal involves the conveyance of permanent rights in excess real property, and that a disposal must meet the requirements in proposed 23 CFR 710.403(b). The proposed revisions to section 710.409 detail the requirements for carrying out a disposal. Much of the language in sections 710.409(a) through (d) is retained, although some changes are proposed to align the language with the new approach described above and to update the terminology and regulatory references.

This NPRM proposes to delete the last sentence of existing section 710.409(b), concerning SDOT use of a disposal listing to notify other Federal, State, and local agencies of a proposed disposal of excess real property. The FHWA believes the language is no longer necessary. The FHWA understands that SDOTs may decide to continue to use the disposal notification listing as a method of notifying State agencies of real property interests which the SDOT is considering disposing of and which may be of use to another State agency. The FHWA believes that SDOTs and other grantees may effectively use a number of other methods to meet the notification requirements of this paragraph.

This NPRM proposes to delete the last sentence in section 710.409(d) as duplicative of other parts of this regulation. The FHWA believes the requirements for disposals at less than fair market value are covered in the proposed section 710.403(e) and do not need to be restated in this paragraph.

As discussed earlier in this NPRM, this proposed rule would move the provisions in existing section 710.403(f), concerning disposal of excess real property outside the approved ROW limit or project boundary, to a new section 710.409(e). The FHWA believes it is more logical to place the provision in this specific section on disposals,

than to have it in section 710.403, which covers a broad range of management topics. This NPRM does not propose to substantively change existing section 710.403(f). For similar reasons, this NPRM proposes to relocate the provision on relinquishments from section 710.403(g) in the existing regulation, to a new section 710.409(f).

This NPRM proposes adding a new section 710.409(g) to incorporate into the regulation the information required in order to approve a request for a disposal. This information largely mirrors the types of information that would be required to support a request for a ROW use agreement under proposed section 710.405(e). To avoid duplication, proposed section 710.409(g) would incorporate certain submission requirements by reference to provisions in 710.405(e)(1)–(9). The FHWA has found the absence of this information from the regulations has made it more difficult for grantees and others to understand what is required.

#### **Subpart E—Property Acquisition Alternatives**

##### *Section 710.501 Early Acquisition*

The MAP–21 provides new and revised methods for early acquisition of real property, with potential for either reimbursement or credits of real property acquisition costs. The FHWA is proposing to revise and reorganize this section of the regulation to add the new authorities and the accompanying requirements for early acquisition authorized in section 1302 of MAP–21 (codified in 23 U.S.C. 108), and to better describe the early acquisition process. The new organization includes an introductory paragraph describing the options for early acquisition, a paragraph for State-funded early acquisition without Federal credit or reimbursement, a paragraph for State-funded early acquisition eligible for future credit, a paragraph for State-funded early acquisition eligible for future reimbursement, and a paragraph for federally funded early acquisition.

The authorities for early acquisition in 23 U.S.C. 108 are granted to “States.” The FHWA acknowledges this limiting language. However, FHWA also considered how the States have administered the Federal-aid highway program over the years. The States have used their SDOTs as the primary title 23 grantee, but the SDOTs have worked through subgrantees such as local public agencies to deliver title 23-funded projects. Based on this history, FHWA concluded the use of the term “State” in section 108 was intended to be read broadly, to include political



subdivisions and instrumentalities of the State. Proposed section 710.501 uses the term "State agency" to make it clear the early acquisition authorities apply not only to SDOTs, but also to other State and local governmental agencies.

The NPRM proposes to retain the distinction in the current regulation between early acquisitions in section 710.501, and hardship acquisition and protective buying provisions in section 701.503, with respect to the treatment of properties subject to 23 U.S.C. 138 (commonly known as "section 4(f)" properties). A section 4(f) property is 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. Early acquisition provisions have not allowed early acquisition of section 4(f) properties. By contrast, such properties may be acquired under hardship acquisition or protective buying provisions in 710.503 if the necessary reviews and determinations have been completed under 23 U.S.C. 138 and 16 U.S.C. 470(f) (commonly known as "section 106" and relating to historic properties). The FHWA believes this distinction is still appropriate because early acquisitions often occur before sufficient information about the transportation project is available to support the necessary evaluations and decisions. Hardship and protective purchases typically occur when the proposed transportation project for which the property would be needed is well into NEPA and other required environmental reviews, and substantially more information is available about the location, design, alternatives, and other factors that could affect the evaluations and decisions.

This proposed rule would revise existing section 710.501(a) by changing the title to "General," describing the various early acquisition alternatives available, and adding language to affirm that all early acquisition carried out under this section must conform to the requirements for real property acquisition for a title 23-funded project or program. The FHWA believes that it is necessary to add the language concerning the requirement that property acquired under this section conform to title 23 acquisition rules in order to avoid any confusion about whether the authorities in section 108 create exceptions to those requirements. If a grantee is acquiring property for a title 23-eligible project, then that property must be acquired in conformance with title 23 requirements in order to preserve eligibility for title

23 funding. In most cases, the requirements to preserve eligibility for funding are already being met by SDOTs and others when they acquire properties under the current provisions.

This NPRM proposes to add a new section 710.501(b), State-funded early acquisition without Federal credit or reimbursement. Paragraph (b) clarifies long-standing acquisition requirements that a State agency must meet in order to maintain future project eligibility under title 23 if the State agency carries out early acquisitions without seeking credit or reimbursement for the costs from title 23 funds. The SDOTs increasingly choose to use their limited title 23 funds on other phases or parts of a project or program, and often do not seek credit or reimbursement for their early acquisition costs. In fact, those acquisitions can affect the eligibility of the entire project, making it important to ensure the SDOTs and other State agencies are aware of applicable requirements. If a State agency wants a project to be eligible for title 23 funds in any phase, title 23 acquisition requirements, including compliance with the Uniform Act, must be met. The FHWA believes that States already understand this point, but that it is important to remove any potential for confusion by expressly including the requirements and conditions in section 710.501(b) so that States can effectively ensure that a project remains eligible for Federal aid when carrying out State-funded early acquisitions.

As a result of the new section 710.501(b), this NPRM proposes to redesignate existing sections 710.501(b) and 710.501(c) as sections 710.501(c), and 710.501(d), respectively.

This NPRM proposes to revise the redesignated section 710.501(c) to better describe the credit option for State-funded early acquisition. This section describes the requirements that must be met in order to maintain eligibility to use real property costs as a credit toward the State's share on a project or program receiving funds from the Highway Trust Fund. The NPRM proposes changing the wording in the first sentence from "prior to executing a project agreement with the FHWA" to "prior to completion of the environmental review process for the transportation project." The FHWA believes this will be clearer and will better conform to the intent of 23 U.S.C. 108, as amended by MAP-21. The NPRM does not propose any substantive changes to the list of conditions that must be met, although some minor updates in language are proposed. For clarity, this NPRM proposes adding cross-references in 710.501(c) to related

provisions in 710.505(b) (Credit for donations) and 710.507 (State and local contributions).

This NPRM also proposes to revise the redesignated section 710.501(d) to better describe the option for State-funded early acquisition eligible for future reimbursement from apportioned title 23 funds. This section incorporates requirements that State agencies must meet when carrying out early acquisition of real property interests and the State agency wishes to request reimbursement from title 23 apportioned funds for the acquisition costs after the NEPA review for the entire project is complete. The NPRM substantially revises the existing regulation (now 710.501(c)) to conform to 23 U.S.C. 108(c), as amended by MAP-21. Under the NPRM, the detailed requirements of 23 U.S.C. 108(c)(3), as well as the requirements of section 710.203(b) (relating to direct eligible costs), would be included by reference rather than described in a detailed list. The FHWA believes this is the best method to ensure that State agencies understand the requirements that must be met in order to successfully request reimbursement for acquisition costs under this authority.

This NPRM proposes to add a new 710.501(e) to provide the requirements for using the new authority in 23 U.S.C. 108(d) for federally funded early acquisition of real property (an "Early Acquisition Project"). Section 108(d), added by MAP-21 section 1302, gives States the ability to develop federally assisted projects or programs comprised solely of the early acquisition of real property interests that will be used for a proposed transportation project that has not yet completed the environmental review process. Section 108(d) requires the State agency to certify to the existence of eight conditions prior to FHWA authorization of title 23 apportioned funds to carry out early real property acquisition. This NPRM proposes a section 710.501(e)(2) that follows the language in 23 U.S.C. 108(d)(3). This section would require the State agency to submit a certification stating each of the required conditions has been or will be satisfied.

The FHWA would decide whether to concur with a certification based on the content of the certification and FHWA's knowledge of the project. The FHWA would request additional information to complete its evaluation of the certification, if needed. The FHWA does not believe it is practical to try to capture in regulation every scenario for complying with the requirements in 23 U.S.C. 108(d)(3)(B) and proposed 710.501(e)(2). If implementation of these

provisions raises new questions, future guidance may be needed to answer specific questions that arise about the certification requirements and the FHWA concurrence determination processes. With the exception of the two areas discussed below, NEPA and condemnation, FHWA expects to wait until it has more experience administering the certification process before it considers issuing implementing guidance.

The FHWA understands there are existing questions about how FHWA will evaluate the certifications relating to NEPA. The State agency must certify the proposed federally funded Early Acquisition Project will not cause any significant adverse environmental effects (23 U.S.C. 108(d)(3)(B)(ii)), will not limit the choice of reasonable alternatives or influence the decision on the overall project (section 108(d)(3)(B)(iii)), and does not prevent an impartial decision as to whether to accept an alternative being considered for the overall project (section 108(d)(3)(B)(iv)). This NPRM provides information on some of the considerations FHWA believes may be relevant to a decision whether to concur in the certification, but this discussion is not intended to be exhaustive or to limit future FHWA actions.

As part of its determination whether to concur with the environmental aspects of a State agency certification under proposed 710.501(e), FHWA may consider a number of factors such as:

(1) Whether the Early Acquisition Project may cause negative or reduced public/agency confidence in the environmental review process for the proposed transportation project;

(2) Potential impacts of financial and time commitments for the Early Acquisition Project(s) on the proposed transportation project's costs and schedule if an alternative ultimately is selected that will not require or use the properties acquired early; and

(3) Possible effects of the Early Acquisition Project on the alternatives evaluation and selection process for the proposed transportation project, such as:

(a) How the investment in Early Acquisition Project(s) affects the presentation of the alternatives in the proposed transportation project's environmental documents;

(b) How the Early Acquisition Project(s) might affect early coordination with the public and participating agencies, and collaboration with participating agencies on the range of alternatives for the proposed transportation project and impact methodologies for alternatives analysis;

(c) Whether the Early Acquisition Project(s) can reasonably be expected to cause lead agency decisionmakers to disproportionately support one alternative, while giving insufficient weight to information supporting other alternatives.

Another certification requirement that may raise interpretive questions is the provision that federally funded early acquisition must be accomplished without the use, or threat of use, of eminent domain (23 U.S.C. 108(d)(3)(B)(vii) and proposed section 710.501(e)(2)(viii)). It is important to note that several States follow a process under which they use eminent domain to clear or quiet title to a property. The FHWA believes that after the property owner and the agency have reached a binding agreement on the purchase/sale of the real property for a project or program using the new federally funded early acquisition authority, States may use condemnation to clear or quiet title on the affected parcel without violating the statutory provision on condemnation.

Consistent with 23 U.S.C. 108(d)(4) and NEPA, this NPRM proposes adding section 710.501(e)(4), concerning the environmental review process for an Early Acquisition Project funded under title 23. The NEPA evaluation should include consideration of both the impacts of the particular acquisition under review, and the impacts of other Early Acquisition Projects that will be carried out in connection with the same proposed transportation project. The FHWA's expectation is that, where multiple Early Acquisition Projects are carried out, the environmental reviews for all Early Acquisition Projects will meet NEPA requirements for evaluating cumulative impacts of both past, present, and reasonably foreseeable future Early Acquisition Projects. Information on the direct, indirect, and cumulative impacts of the early acquisition will be relevant to determining the NEPA class of action for the Early Acquisition Project, the acceptability of the impacts, and whether an Early Acquisition Project will cause significant adverse environmental effects under 710.501(e)(2)(iii). Consistent with 23 U.S.C. 108(d), under the proposed rule the NEPA review of an Early Acquisition Project would not include consideration of the direct, indirect, or cumulative impacts of the proposed transportation project for which the property is being purchased. The purpose of the new authority in 23 U.S.C. 108(d) is to allow an Early Acquisition Project to proceed even though NEPA is not complete for the proposed transportation project. Requiring NEPA evaluation of the impacts of the proposed transportation project before proceeding with the Early Acquisition Project would render the

new authority in section 108(d) meaningless.

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 approach is consistent with the limitation in 23 U.S.C. 108(d)(6), enacted under MAP-21. That provision does not allow federally assisted early acquired properties to be developed in anticipation of the proposed transportation project until the NEPA review process for the proposed transportation project is concluded. To facilitate understanding of the scope of this statutory language, this NPRM proposes a new section 710.501(f) that describes the types of development activities FHWA considers prohibited by the statute. This new section provides direction on what "developed in anticipation of a project" means. The proposed regulatory description of prohibited activities includes 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. The FHWA believes that there may be very limited instances in which development activities may be appropriate. Accordingly, this NPRM proposes specific instances when it may be appropriate for FHWA to approve limited development activity based on public health or safety considerations.

The NPRM also proposes adding language in 710.501(e)(4) stating that an Early Acquisition Project must comply with all applicable environmental laws. The MAP-21 changes to 23 U.S.C. 108 affect the NEPA review process, but do not alter or amend other environmental laws.

This NPRM proposes adding a new 710.501(g), reflecting the reimbursement provisions in 23 U.S.C. 108(d)(7), as added by MAP-21 section 1302. This new paragraph 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.

Early acquisition provisions in both section 108(c) and (d) of title 23, as amended by MAP-21 section 1302, contain provisions designed to ensure early acquisitions fully satisfy Uniform Act requirements. Section 108(d)(3)(B)(viii) expressly states that the early acquisition may not reduce Uniform Act benefits or assistance to a displaced person. Consistent with that mandate, FHWA interprets the early acquisition provisions as subject to Uniform Act requirements in 49 CFR part 24, and concludes that early acquisitions are not voluntary transactions within the meaning of 49 CFR 24.101. This NPRM proposes to add a new section, 710.501(h), addressing the timing of relocation assistance eligibility in the context of early acquisitions under section 710.501. The proposed section 710.501(h) provides that persons are eligible for relocation assistance when there is a binding written agreement between the acquiring agency and the property owner for the early acquisition of the real property interests. This would include tenants on properties acquired as an early acquisition, who would be eligible for relocation assistance when there is a binding written agreement between the acquiring agency and the property owner for the acquisition of any interests in the real property. The proposed section excludes situations, such as the use of an option agreement, that do not create an immediate commitment by the State agency to acquire and do not require an owner or tenant to relocate. In those cases, relocation eligibility does not occur until the State agency legally commits itself to acquiring the real property interest(s).

#### *Section 710.503 Protective Buying and Hardship Acquisition*

This NPRM proposes updating references in section 710.503 and changing the term “SDOT” to “grantee” in several places. The NPRM also proposes revising section 710.503(d), relating to environmental decisions for proposed acquisitions under the protective buying and hardship acquisition provisions in 710.503, by adding new language clarifying that acquisitions under this section are

subject to environmental review under part 771. This is a clarification of existing regulations. Often, such acquisitions meet the requirements for a categorical exclusion under 23 CFR 771.117(d)(12).

#### *Section 710.505 Real Property Donations*

This NPRM proposes to revise 710.505(a), relating to the donation of real property for a title 23 project, by adding a requirement that the mandatory notification to the real property owner must be in writing. The FHWA believes that this type of documentation will help ensure that the property owners are fully and fairly informed, and will ensure the acquiring agency has the documentation necessary to support title 23 eligibility. The description of the required contents of the notice has been updated by revising the language describing valuation methods that can be used by an acquiring agency to develop an estimate of just compensation. This NPRM also changes the description of the notice requirements to include notice of financial and non-financial assistance available under applicable State law, as well as assistance available under the Uniform Act, to make this paragraph consistent with the cost eligibility provisions in section 710.203(b)(2)(ii). This NPRM proposes adding references in section 710.505(b) to the underlying statutory provision on donations.

#### *Section 710.507 State and Local Contributions*

This NPRM proposes to revise section 710.507 to clarify that the requirements of 23 U.S.C. 323 must be met in cases involving State and local contributions. The proposed rule would reflect the 2005 repeal of 23 U.S.C. 323(e), which was a special provision for contributions by local governments. The provisions governing credit for real property interests contributed to a project are now the same for State and local governments. This NPRM would implement this change by consolidating the provisions on local governments into 710.507(a) and (b).

The NPRM proposes to modify existing section 710.507 by deleting paragraph (b), which contained an effective date related to a prior rulemaking, and redesignating paragraphs (c) through (e), accordingly. The FHWA believes that because nearly 15 years have passed since publication of this rule, the existing paragraph (b) is no longer relevant. However, if SDOTs are still carrying out projects or programs under agreements executed before June 9, 1998, the rules governing

credits at the time of the project agreement for those projects would continue to apply. The NPRM also proposes to update references to other regulations in this part to conform to other proposed revisions to this regulation.

#### *Section 710.509 Functional Replacement of Real Property in Public Ownership*

In addition to updating terms throughout the section, this NPRM proposes to modify section 710.509(b)(4), which governs the notices that must be provided when the acquiring agency considers the functional replacement of a publicly owned real property in lieu of paying fair market value for the property. The revision would add a requirement that notification to the owner agency of its right to receive just compensation must be in writing. This type of documentation will help ensure that the property owners are fully and fairly informed, and that the acquiring agency has the documentation necessary to support title 23 eligibility.

#### *Section 710.511 Transportation Alternatives Program*

Congress did not reauthorize the Transportation Enhancements Program in MAP-21, but instead included elements of that program in the newly enacted TAP as described in MAP-21 Sections 1103 and 1122 (codified at 23 U.S.C. 133(b)(11) and 213). This NPRM proposes to replace all references to transportation enhancements in the existing regulation with references to TAP and to rewrite this section to conform to TAP provisions. Any projects authorized under the former Transportation Enhancement Program will continue to be subject to the existing requirements.

This NPRM proposes to revise and reorganize section 710.511(b). The requirements for Uniform Act compliance and applicability that are in sections 710.511(b)(1) and (2) of the existing regulation are consolidated and incorporated into proposed section 710.511(b)(1). This NPRM proposes to delete the exemption for acquisitions by conservation organizations that is contained in existing section 710.511(b)(2). This exclusion was contained in section 315 of the National Highway System Designation Act of 1995 (Pub. L. 104-59, 109 Stat. 588), and subsequently incorporated into part 710 at 710.511(b)(4). The reason for the proposed deletion is that this exemption from the Uniform Act requirements was eliminated when MAP-21 was enacted. Under MAP-21 amendments to 23

U.S.C. 213(e), TAP projects are subject to Federal-aid highway requirements under title 23, with a limited exception for recreational trails projects. The Uniform Act provisions for voluntary acquisitions in the 49 CFR part 24 implementing regulations will continue to apply to such transactions.

This NPRM proposes to modify section 710.511(c) by updating the description of the applicability of the Subpart D Real Property Management rules to TAP properties, by requiring the use of a TAP property agreement between the grantee and FHWA that specifies the expected useful life of the project and establishes a pro rata repayment if the acquired property in whole or part is used for another purpose. This requirement is needed to ensure TAP projects comply with the long-standing FHWA interpretation that this type of project, which often involves the use of leases and other time-limited property rights, must guarantee a project life of sufficient length to support the use of title 23 funds; and that if the project terminates early, title 23 funds that were approved for use for the stated project purpose are recovered.

#### **Subpart F—Federal Assistance Programs**

##### *Section 710.601 Federal Land Transfers*

This NPRM proposes to revise section 710.601(a) to incorporate a conforming amendment in section 1104(c)(6) of MAP-21, which clarified that Federal land transfers are available for eligible highway projects that are not on a Federal highway system. This NPRM propose to revise section 710.601(b) to refer to the acquisition of “real property” rather than “lands or interests in lands” for consistency with the rest of part 710. This terminology change does not change the type of interests that can be acquired. The FHWA also proposes language in paragraph (b) on the eligibility for the use of authorities under 23 U.S.C. 107(d) and 317, which permit FHWA to transfer real property from the United States to non-Federal owners. The change is to recognize that the two statutes have slightly different eligible entities, although both statutes make SDOTs eligible.

In section 710.601(e), the qualifier “For projects not on the Interstate System” is proposed to be added to the second sentence, before the limitation that the 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. Under section 107(d) of title 23, transfers of Federal property for the Interstate System are not subject to the designation of conditions or certification by the land-management agency. Finally, a new section 710.601(f) is proposed to clarify that FHWA can participate in costs incurred by the grantee and associated with Federal land transfers when the transferring Federal land-management agency is required to assess such costs as a condition of transfer. Current paragraphs (f) through (h) would be redesignated (g) through (i), and language would be added to clarify the process for carrying out a transfer of Federal lands. The NPRM proposes the addition of language in redesignated section 710.601(i), relating to property no longer needed for the title 23 project, to recognize the authority for alternate agreements when other Federal law does not permit a reversion of the property back to the United States or the original land-management agency.

##### *Section 710.603 Direct Federal Acquisition*

This rule proposes to revise and reorganize paragraphs (a)–(c) to clarify when FHWA may make a direct Federal acquisition from non-Federal owners, and to clarify the slight differences in the processes to be followed for projects for the Interstate System and Defense Access Road projects, and other types of projects carried out by the FHWA Office of Federal Lands Highways. Proposed 710.603(a) would cover direct Federal acquisitions for Interstate System and for Defense Access Road projects. Proposed 710.603(b) would address other types of Federal acquisition of real property from non-Federal owners.

The MAP-21 made several changes to the names of programs funded under chapter 2 of title 23 and this NPRM proposes to eliminate the list of program names in existing section 710.603(a). Language is proposed in new paragraphs (b) and (h) clarifying that FHWA may not accept jurisdiction for any property acquired, even temporarily. This addition is made to address questions that have arisen in connection with such transfers. The FHWA carries out these transactions solely as a means of placing the property needed for a project into the ownership of the State or the applicant agency. There is no intention for FHWA to accept or retain land management authority, and the agency does not have

the administrative means to manage or oversee such properties.

In reorganizing section 710.603, FHWA considered eliminating the Federal acquisition provisions contained in proposed 710.603(b), which apply to projects other than Interstate Highways and Defense Access Roads. The FHWA asks for comments on whether the provision is needed, given that it is seldom used and the underlying statutory authority for Federal condemnation actions would remain available in appropriate situations.

#### **Subpart G—Concession Agreements**

This NPRM proposes to change the “State transportation department” reference in 710.703(f) to “SDOT,” for consistency with the proposed reference changes throughout part 710.

#### **PART 810—MASS TRANSIT AND SPECIAL USE HIGHWAY PROJECTS**

##### **Subpart A—General**

##### *Section 810.212 Use Without Charge*

This NPRM proposes to revise section 810.212 by striking the word “shall” in the regulation and replacing it with “may” to eliminate an inconsistency between existing section 810.212 and other parts of applicable law. This will address a recurring question in recent years, which has been whether an SDOT is required to provide land needed for transit projects or programs 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 as is currently stated in section 810.212. Section 142(f) of title 23 U.S.C., states that a State shall be authorized to provide the land needed with or without charge. The existing regulation at 23 CFR 710.405(c) contains language that is consistent with the statute. This NPRM proposes to revise the language in section 810.212 to make it consistent with the statute and the part 710 regulation. Each State will continue to determine when State law, regulation, or policy allows or prohibits a conveyance without charge to a publicly owned mass transit authority for public transit purposes. This change will not in any way prohibit a State from providing land needed for transit projects or programs with no charge.

##### **Rulemaking Analyses and Notices**

All comments received before the close of business on the comment closing date indicated above will be

considered and will be available for examination in the docket at the above address. Comments received after the comment closing date will be filed in the docket and will be considered to the extent practicable. In addition to late comments, the FHWA will also continue to file relevant information in the docket as it becomes available after the comment period closing date, and interested persons should continue to examine the docket for new material. A final rule may be published at any time after close of the comment period and after DOT has had the opportunity to review the comments submitted.

The FHWA filed a redline version of parts 635, 710, and 810 in the docket to show all changes to the regulation text and facilitate public review and comment.

#### **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 preliminarily 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 would be minimal. The changes that this rule proposes 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 NPRM also proposes to streamline program requirements, clarify the Federal-State partnership, and carry out a comprehensive update of part 710. Corresponding revisions are proposed for 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 proposed rule would implement 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 proposed streamlining and updating in this NPRM 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 proposed rule in a manner that balances stake holders 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 will be non-controversial due to the scope and nature of the proposed additions and changes to the regulation.

The FHWA estimated the incremental costs associated with two new requirements proposed in this NPRM that represent a change to current practices for SDOTs and MPOs. These costs will be primarily incurred by SDOTs. The FHWA derived the costs<sup>7</sup> of the two components by assessing the expected increase in level of effort from labor to update ROW manuals, and the increase in level of effort required to comply with new early acquisition requirements.

To estimate costs, FHWA first considered the costs associated with updating the SDOT ROW manual. The FHWA multiplied the level of effort, expressed in labor hours, with a corresponding loaded wage rate for the professional staff necessary to complete updates to the ROW manual. Following this approach the undiscounted incremental costs to comply with this rule are \$890,000.<sup>8</sup> These costs represent one time costs to implement this rule.<sup>9</sup>

Similarly, to estimate costs associated with complying with the new early acquisition requirements, FHWA multiplied the level of effort, expressed in labor hours, with a corresponding loaded wage rate for the professional staff necessary to comply with those requirements and use the new early

<sup>7</sup> The FHWA used salary data from Indeed Salary Search ([www.indeed.com](http://www.indeed.com)) which represents an index of salary information from job postings over the past 12 months to estimate labor costs.

<sup>8</sup> This estimate assumes that it will take approximately 225 hours to complete necessary updates to a ROW manual, that a loaded rate of \$76 per hour (Hourly rate \$47.60 for a ROW manager; estimated loaded rate of 160% of hourly rate) for labor will be incurred and by estimating the costs to update 52 ROW manuals.

<sup>9</sup> After updating the ROW manual to incorporate this rulemaking changes, the states will resume their normal process of updating their manuals.

acquisition flexibilities. Following this approach, the annual undiscounted incremental costs to comply with this rule are \$950,000.<sup>10</sup>

The FHWA could not directly quantify the expected benefits due to data limitations and the amorphous and qualitative nature of the benefits from the proposed rule. The FHWA believes that significant new flexibilities in early acquisition will allow SDOTs to acquire real property interests earlier, ensuring parcel availability, ROW cost control and cost certainty, and fewer project delay claims due to ROW not being available. 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, the FHWA believes that significant benefits may accrue because this proposal clarifies and streamlines additional requirements including property management requirements, stewardship and oversight requirements, and Federal land transfer requirements. The FHWA invites comments on its cost estimates and discussion of benefits.

These proposed changes are not anticipated to adversely affect, in a material way, any sector of the economy. In addition, these changes would not interfere with any action taken or planned by another agency and would not materially alter the budgetary impact of any entitlements, grants, user fees, or loan programs. Consequently, a full regulatory evaluation is not required.

#### **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 proposed rule on small entities and anticipates that this action would not have a significant economic impact on a substantial number of small entities which includes SDOTs, Local Public Agencies, and other State governmental agencies.

#### **Unfunded Mandates Reform Act of 1995**

This proposed rule would not impose unfunded mandates as defined by the Unfunded Mandates Reform Act of 1995 (Pub. L. 104-4, 109 Stat. 48). This proposed rule will not result in the

<sup>10</sup> The FHWA calculated this by estimating that there would be 260 Early Acquisition Projects per year which would require approximately 40 hours of time each to comply with requirements associated only with Early Acquisition Projects. The FHWA used a loaded rate \$76 per hour (Hourly rate \$47.60 and an estimated loaded rate of 160% of hourly rate) for labor will be incurred (based on the cost of a ROW manager's loaded hourly rate).

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). Further, in compliance with the Unfunded Mandates Reform Act of 1995, FHWA would evaluate any regulatory action that might be proposed in subsequent stages of the proceeding to assess the effects on State, local, and tribal governments and the private sector. 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 proposed action has been analyzed in accordance with the principles and criteria contained in Executive Order 13132, and FHWA has preliminarily determined that this proposed action would not warrant the preparation of a federalism assessment. The FHWA has also determined that this proposed 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 the proposed action would not have substantial direct effects on one or more Indian tribes; would 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 proposed 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 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 contains amendments to the existing information collection requirements previously approved under OMB Control Number 2125–0586. As required by the PRA, the FHWA has submitted these proposed information collection amendments to OMB for its review. This proposal rule requires additional information in the SDOT ROW manual. The FHWA estimates that the additional requirements will increase the total burden hours by 11,700, or an average of 225 hours per grantee.

The FHWA invites interested parties to send comments regarding any aspect of this information collection, including: (1) Whether the collection of information is necessary; (2) the accuracy of the estimated burden; (3) ways to enhance the quality, utility, and clarity of the collection of information; and (4) ways to minimize the collection burden without reducing the quality of the information collected.

#### **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/environmental/environmental\\_justice/ej\\_at\\_dot/order\\_56102a/index.cfm](http://www.fhwa.dot.gov/environmental/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](http://www.fhwa.dot.gov/legsregs/directives/orders/664023a.htm)).

The FHWA has evaluated this proposed rule under the Executive Order, the DOT Order, and the FHWA Order. The FHWA has determined that the proposed regulations, if finalized, would not cause disproportionately high and adverse human health and environmental effects on minority or low income populations. The proposed regulations, if finalized, would establish 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 proposed action would 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 proposed action 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)). The proposed action is the adoption of regulations that provide the 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 proposed action has no potential for environmental impacts until the regulations, if adopted, 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 proposed 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 proposed action would involve unusual circumstances or extraordinary circumstances and has determined that this proposed action would not involve such circumstances. As a result, FHWA finds that this proposed rulemaking would not result in significant impacts on the human environment.

#### **Regulation Identification Number**

A 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: November 6, 2014.

#### **Gregory G. Nadeau,**

*Acting Administrator, Federal Highway Administration.*

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

#### **Title 23—Highways**

### **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. § 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 § 635.309(c), 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 ROWs, 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 ROWs have not been fully acquired, the right to occupy and to use all ROWs 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 FHWA to authorize actions based on a conditional certification as provided in this paragraph (c)(3).

(i) The State may request approval for the advertisement for bids based on a conditional certification. The Federal Highway Administration (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 of the United States Code 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 23 CFR 645.119(b) 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 Act of 1987.

(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 23 CFR 636.109).

(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 Relocation and Real Property Acquisition Policies Act of 1970, as amended, 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) 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; 49 CFR 1.48(b) and (cc), 18.31, and 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 Program.

**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 of the United States Code 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* means 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). 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 § 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. 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 of the United States Code 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 of the United States Code.

*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 United States Code 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 project 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 23 CFR part 620, subpart B.)

*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 of the United States Code.

*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:

(i) 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.

(ii) A *legal settlement* is a settlement reached by an authorized legal representative 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.

(iii) 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 of the United States Code 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 assuring 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) of this section to meet the requirements in this paragraph. 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 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 2 years after the publication of this rule.

(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 three procedures outlined in paragraphs (d)(1) through (3) of this section. 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.

(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 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) 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).

(e) *Recordkeeping.* 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 of the United States Code 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 49 CFR 18.36, 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 of the United States Code 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 action not expressly assigned to the SDOT in the Stewardship/Oversight Agreement.

#### **§ 710.203 Title 23 of the United States Code 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 of the United States Code 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 of the United States Code 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 and preliminary property map preparation can be advanced under preliminary engineering, as defined in 23 CFR 646.204, prior to completion of NEPA (42 U.S.C. 4321 *et seq.*) review, while other work involving contact with affected property owners for purposes of negotiation 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; and

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

(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 of the United States Code 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 Program (TAP) 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, 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 of the United States Code, 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 of the United States Code 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 of the United States Code 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 § 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 of the United States Code funds. The grantee shall assure 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 whether to allow any ROW use agreements 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 (a) 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 of the United States Code 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).

(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, or is a real property interest that may be made available for an alternate use under a ROW use agreement. 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 of the United States Code 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). 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, 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.

Note to paragraph (b). Additional terms and conditions appropriate for inclusion in ROW use agreements are described in FHWA guidance at [http://www.fhwa.dot.gov/real\\_estate/practitioners/right-of-way/corridor\\_management/airspace\\_guidelines.cfm](http://www.fhwa.dot.gov/real_estate/practitioners/right-of-way/corridor_management/airspace_guidelines.cfm).

(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, 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. 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 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 and this section, and must address the items in §§ 710.405(b)(1), (3), (5), (6), (7), and (8), and 710.405(c) and (d). 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 all 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 of the United States Code 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 of the United States Code 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 of the United States Code 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 23 U.S.C. 108(c)(3), the requirements of § 710.501(c)(1)–(5), and the requirements of § 710.203(b) (direct eligible costs) have been met.

(e) *Federally funded early acquisition.* The FHWA may authorize the use of funds apportioned to a State under title 23 of the United States Code 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 of the United States Code;
  - (ii) Does not involve land described in 23 U.S.C. 138;
  - (iii) 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;
  - (iv) 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;
  - (v) 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;
  - (vi) Is consistent with the State transportation planning process under 23 U.S.C. 135;
  - (vii) Complies with other applicable Federal laws (including regulations);
  - (viii) Will be acquired through negotiation, without the threat of, or use of, condemnation; and
  - (ix) 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)(iii) 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 (f), “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 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 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 16 U.S.C. 470(f) (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 of the United States Code project may donate the property. Donations may be made at any time during the development of a project. 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 State's matching share of total project cost. A credit cannot exceed the State'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 § 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 § 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 of the United States Code, 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 Program.**

(a) *General.* 23 U.S.C. 133(b) (11) and 213 authorize the expenditure of surface transportation funds for TAP projects. The TAP 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 TAP projects are subject to the Uniform Act.

(2) When a person or agency acquires real property for a project receiving title 23 of the United States Code 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 of the United States Code 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 TAP projects.* Subpart D of this part applies to the management and disposal of real property interests acquired with TAP funds, including alternate uses authorized under ROW use agreements. A TAP project involving acquisition of any real property interest must have a TAP property agreement between FHWA and the grantee that identifies the expected useful life of the TAP 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 TAP project purposes for which it was acquired; or

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

#### **Subpart F—Federal Assistance Program**

##### **§ 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.

(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. 4332, *et seq.*) and any other applicable Federal environmental laws, including the National Historic Preservation Act (16 U.S.C. 470(f)), 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 (a) may be applied to any real property that is not 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. (42 U.S.C. 4601, *et seq.*)

(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.

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

**§ 710.703 Definitions.**

\* \* \* \* \*

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

**PART 810—MASS TRANSIT AND SPECIAL USE HIGHWAY PROJECTS**

■ 4. 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).

■ 5. 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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