



FEDERAL HIGHWAY ADMINISTRATION OFFICE OF REAL ESTATE SERVICES

INFORMATIONAL GUIDE

FINAL RULE REALTY REGULATIONS

23 CFR 710 and 635



U.S. Department of Transportation

Federal Highway Administration

EFFECTIVE SEPTEMBER 22, 2016

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Subject: DUE DATE: Effective September 22, 2016; GUIDANCE: Final Rule Publication Governing the Acquisition, Management, and Disposal of Real Property-23 CFR Parts 635, 710 & 810
Date: Tuesday, August 23, 2016 2:40:23 PM

TO THE ATTENTION OF: DIRECTORS OF FIELD SERVICES, DIVISION ADMINISTRATORS, ASSISTANT DIVISION ADMINISTRATORS AND DIVISION REALTY OFFICERS

DUE DATE: EFFECTIVE SEPTEMBER 22, 2016

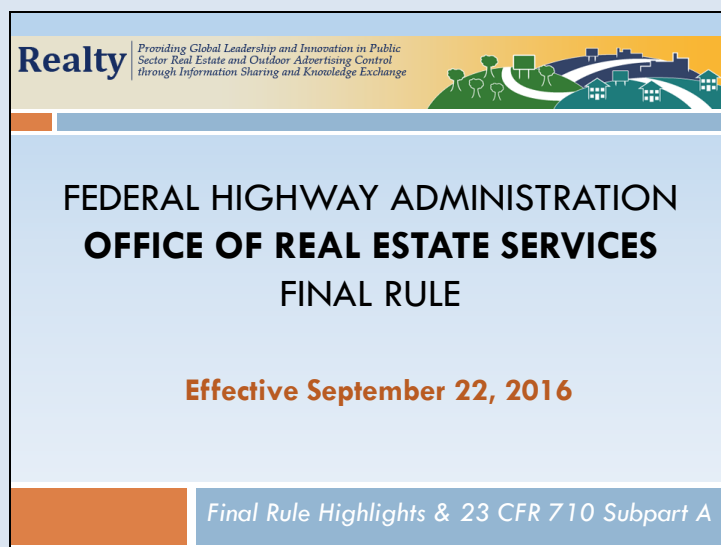
The Final Rule governing the acquisition, management and disposal of real property on title 23 transportation projects and programs has been published in the Federal Register and is available at the following link. <https://www.gpo.gov/fdsys/pkg/FR-2016-08-23/pdf/2016-19475.pdf> The effective date of the final rule is September 22, 2016.

The Office of Real Estate Services is currently developing four webinars to assist you with implementation of this new rule. As we are continuing to finalize the presentations and will need to obtain the necessary approvals, we will be in touch to share a timeline in the coming weeks. A red-line copy of the final rule revisions will not be provided since the nature of the revisions make a redline unusable; rather we are developing a side-by-side comparison of the old rule to the new rule to assist you with tracking and understanding the revisions. In addition, new FAQs and publication updates are being developed as part of the roll out of the rule. So please provide any questions you may have on this Final Rule to your Realty POCs so your questions can be incorporated into the webinars.

Please forward this information to your State partners and local public agencies.

Thank you

Introduction



The Federal Highway Administration Office of Real Estate Services welcomes you to the 23 CFR 710 Final Rule training. You are attending today because these Federal regulations affect how you do your job. No matter if you work at a FHWA Division office, at a SDOT or a local public agency. You realize if Federal Funds are used on your project, you must abide by the Federal regulations. The FHWA is always looking for ways to improve and streamline the regulations and the ROW acquisition process. As you will see in these training sessions, we are implementing several options and flexibilities that will make your job easier.

Key Topics

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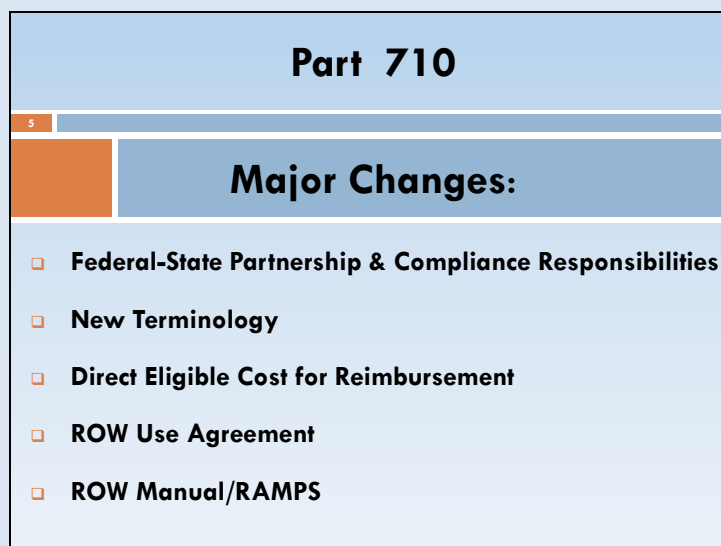
- **Final Rule Highlights**
 - Review major changes
- **23 CFR 710 Subpart A – General**
 - Applicability
 - Definitions (27)
 - Poll Questions

All participants in the 710 final rule webinars are encouraged to use their final rule “side-by-side” chart to aid in comparing the old and new rules. The side-by-side will also aid you to follow along with the discussion and fully understand the revisions being discussed.

Final Rule Highlights

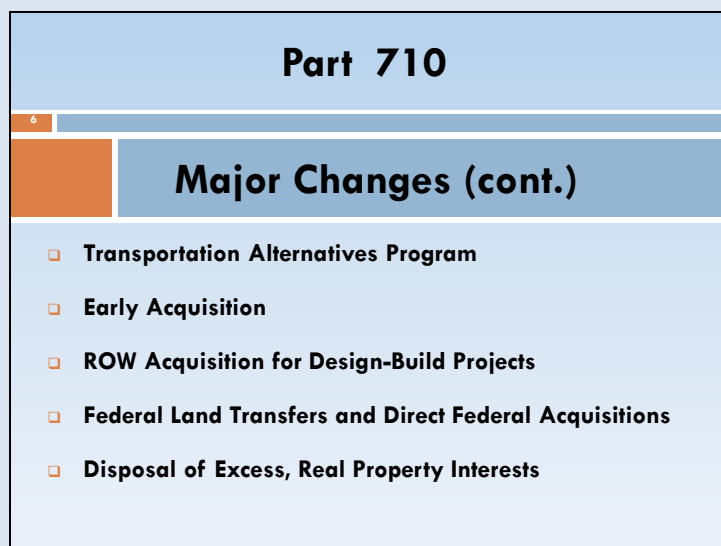
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- ❑ Incorporates MAP-21 real property acquisition changes;
- ❑ Adds new real property acquisition authorities and flexibilities;
- ❑ Clarifies new Federal-aid eligibilities for real property interests that constitute less than full fee ownership;
- ❑ Streamlines program requirements;
- ❑ Clarifies Federal-State partnership;
- ❑ Provides a comprehensive update of part 710; and
- ❑ Revises certain related regulations—23 CFR 635 and 810.



Major Changes Under Part 710

- **Federal-State Partnership and Compliance Responsibilities**
 - Clarifies roles and responsibilities;
 - Discusses the roles of grantees and subgrantees; and
 - Clarifies use of Stewardship/Oversight Agreements.
- **New Terminology** (Subpart A)
 - Discusses new terms such as grantee, subgrantee, real property interests, RAMPS, etc.
- **Direct Eligible Cost for Reimbursement** (Subpart B)
 - Clarifies and revises “Direct Eligible Costs” to conform to MAP-21.
- **ROW Use Agreements** (Subpart D)
 - Clarifies Property Management revisions regarding non-highway use of the ROW.
- **ROW Manual and RAMPS** (Subpart B)
 - Discusses new options for documenting processes and procedures;
 - Clarifies how the ROW manual is used; and
 - Helps grantees understand the approval authorities and requirements for a RAMP.



□ Transportation Alternatives Program and Acquisitions by Conservation Organizations (Subpart E)

- Incorporates changes to the Transportation Alternatives program;
 - The MAP-21 eliminated Transportation Enhancements Program and was replaced by Transportation Alternatives Program; and
 - The Fast Act moved Transportation Alternatives under the Surface Transportation Block Grant Program 23 USC 133.
- Adds new language addressing conservation organizations and requirements for compliance with the Uniform Act.

□ Early Acquisition (Subpart E)

- Implements early acquisition provisions of MAP-21; and
- Adds Flexibilities to improve State's ability to acquire or preserve real property for a transportation facility; and
- Addresses applicability of NEPA.

□ ROW Acquisition for Design Build (Subpart C)

- Streamlines the ROW process requirements for Design Build projects; and
- Adds new requirements for documenting Design Build requirements in right-of-way manuals.

□ Federal Land Transfers and Direct Federal Acquisitions (Subpart F)

- Clarifies process and simplifies land transfer procedures;
- Aligns regulation to existing practices; and
- Clarifies FHWA's role when carrying out acquisitions on others behalf.

□ Disposal of Excess Real Property Interests (Subpart D)

- ☐ Provides more flexibility in determining when an alternate use of ROW can be permitted;
- ☐ Eliminates concepts of air space and air rights agreements;
- ☐ Eliminates separate section on leasing; and
- ☐ Provides clarifications and streamlines existing requirement.

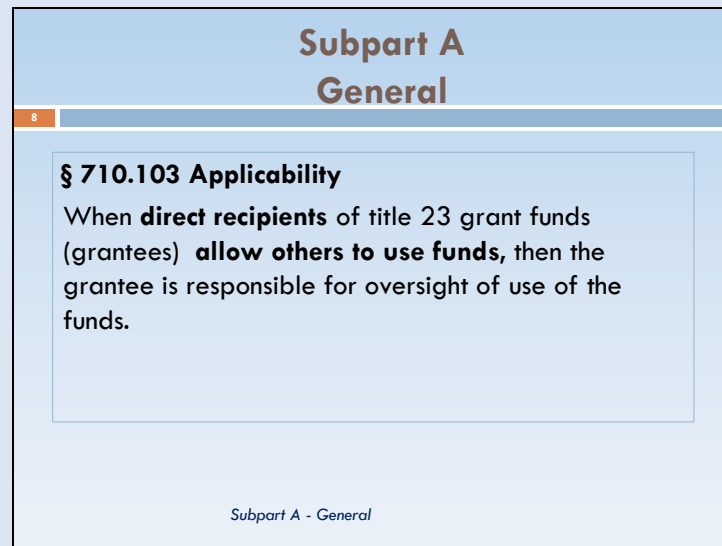
Part 710	
7	
	Major Topics Covered:
Subpart A - General	
	<ul style="list-style-type: none">□ Applicability□ Definitions (27)□ Conclude with Q&As

Under Subpart A, we will discuss when 23 CFR 710 applies. FHWA has addressed a number of questions about applicability in the past. The clarifications included in this section incorporate previously addressed questions and resolve new questions.

Also, we will be discussing 27 new and revised definitions. As we discuss each new or revised definition, we will address why the change was necessary and how it will affect implementation.

After reviewing all the definitions, we will conclude by entertaining questions on Subpart A.

23 CFR 710 Subpart A



In recent years, FHWA has addressed several questions about the applicability of 23 CFR part 710 requirements 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.

To address these questions, the Final Rule

- ☐ Clarifies 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;
- ☐ Clarifies that grantees of funds, under this part, who allow others to use the funds are responsible for oversight of the use of the funds to ensure that applicable requirements and rules have been followed; and
- ☐ Changes the term "apportioned funds" as used in the previous regulations to the new term "grant funds" to allow for a more accurate description of how funds are provided without changing the underlying requirements or applicability.

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Definitions

- **Access rights** – clarifies the right of ingress to and egress from a property to a public way.
- **Air rights** – eliminates definitions for air rights and air space. Instead uses the term “real property interests”.
- **Damages** – clarifies that damages apply to real property only.

Subpart A - General

§ 710.105

- Updates terms that are used throughout the regulation such as the reference to the SDOT (rather than the current “STD”);
- Adds terms to clarify the regulation and to incorporate changes enacted in MAP-21 such as the early acquisition options for States;
- Clarifies the meaning and applicability of definitions from the previous final rule.

The FHWA believes that the clarifications were necessary to respond to questions and comments from our partners in recent years.

Access rights - This definition substitutes “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. Example: public way = alley way, gravel road.

Air Rights and Air Space – These definitions are eliminated as part of an overall update of the approach to property management by consolidating and simplifying the categories of transactions involving management of real property acquired for a title 23-funded facility. The FR replaces the term “air space,” with “real property interests”; and “air rights” with a new definition for “ROW use agreement.” ROW use agreements may allow non-highway use of highway ROW. These agreements cover all non-highway uses (leases) in the ROW except permanent conveyances of real property interests. This new approach is discussed in more detail in the summaries of changes to § 710.405-409. (Subpart D)


Damages - This definition clarifies that damages under this part apply to **real property only**. This clarification is necessary since there have been instances where the previous rule’s definition of “damages” have been misread as applying to either real or **personal** property.

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Definitions (cont.)

- **Disposal** – revises the definition to clarify that disposals include all actions that will result in permanent transfer of real property rights.
- **Donation** – revises the definition to clarify that property owners must be informed **in writing** of their rights and potential benefits under the Uniform Act.
- **Early Acquisition** – eliminates the reference to Federal authorization and focuses on options available prior to the environmental review.



Subpart A - General

Disposal - This definition clarifies that disposals involve the transfer of permanent rights in real property and are subject to the requirements in § 710.403(b). This rule also clarifies 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.

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 - This definition clarifies that property owners must be informed **in writing** of their **rights** and potential **benefits** under the Uniform Act prior to donating. This requirement can be met by using informational tools, such as pamphlets currently available on the FWHA website that are used to provide property owners with information on the Uniform Act and the real estate acquisition procedures. § 710.505(a).

Early Acquisition - This definition conforms to the MAP-21 revisions and ensures the definition will cover the full range of early acquisition options now available. The reference to acquisitions prior to “**Federal authorization**” in the previous definition is eliminated and instead the focus is now on the range of early acquisition activities which may be carried out. The options include hardship and protective buying which continue to be an available option prior to the completion of the “**environmental review**” for the transportation project for which the acquired real property interests would be used.

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Definitions (cont.)

- **Early Acquisition project** – describes new acquisition flexibility that allows early acquisition activities to be treated as a Federal-aid project eligible for reimbursement from title 23. (Separate from a “transportation project”)
- **NHS definition** – deletes definition instead use 23 U.S.C. 101(a).
- **Excess real property** – clarifies that excess real property may be disposed of and also eliminates confusion between “ROW Use Agreements for alternate use of ROW” and “Excess real property”.

Subpart A - General

Early Acquisition Project -

- This new definition describes the new flexibilities for carrying out real property acquisitions in advance of a Federal environmental decision on a **proposed transportation project**. Early acquisitions may now be a separate Federal-aid project, eligible for reimbursement from title 23 apportioned funds if applicable requirements, including required NEPA review, 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.
- It is important to note that the “Early Acquisition Project” under § 710.501 is different from the proposed “transportation project” for which the early-acquired property maybe used.

NHS – This FR deletes 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.

Excess Real Property – This new 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. 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 (an ROW use agreement under this FR) and property that is no longer needed (excess real property under this FR).

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Definitions (cont.)

- **Federal-aid** – clarifies that this type of project is funded under 23 USC Chapter 1.
- **Federally assisted** – clarifies that this type of project is funded under 23 USC.
- **Grantee** – clarifies that the term applies to all parties directly receiving title 23 grant funding.

Subpart A - General

Federal-aid/federally assisted – The new definitions for “Federal-aid” and “federally-assisted” distinguish between projects receiving funds under chapter one of title 23 (highway project), and projects receiving funds from any part of title 23 (recreation trails, bicycle/pedestrian, tribal program).

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

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Definitions (cont.)

- **Mitigation Property** – adds new definition to clarify that this term applies to real property interest acquired to mitigate for impacts of a project.
- **Option** – adds new definition to clarify that the cost of acquiring an option and other types of real property interests is eligible for reimbursement under title 23.
- **RAMP** – adds new definition describing the process a **subgrantee or contractor may use** to carry out a title 23 project.

Subpart A - General

Mitigation property - 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. Examples of mitigation properties are wetland mitigation, wet lands banking, natural habitat, etc.

Option - This FR adds 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-aid 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 FR clarifies that the cost of acquiring an option and other types of real property interests is eligible for reimbursement under title 23.

Real Estate Acquisition Management Plan (RAMP) - This FR adds 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 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 § 710.201(d).**

A properly developed and approved RAMP can provide sufficient information and direction to assure that applicable title 23 and Uniform Act requirements are met. 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 RAMP must address relocation assistance and related procedures. (Optional) (Subpart B)

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Definitions (cont.)

- **Real Property or Real Property Interests** – revises definition to include any interest in land including fee and less-than-fee interests and contractual rights to acquire an interest in land, **including options, temporary development rights & rights-of-first-refusal.**
- **Right-of-way (ROW)** – revises definition to include specific mention of mitigation property.
- **ROW Manual** – adds definition to support the new operation manual that establishes a **grantee's** ROW requirements and procedures which has been approved by FHWA.
Subpart A - General

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)). The previous Part 710 regulations used both terms interchangeably in its various subparts.

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 FR adds such interests to the definition of “real property.” This clarifies 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.

Right-of-way – This definition is revised to now include specific mention of the use of real property for mitigation for a transportation-related facility. This change clarifies that mitigation is an eligible expense when it is a required part of an approved transportation project under title 23.

ROW Manual – This FR adds a definition for the term “ROW manual.” This definition supports the changes made in § 710.201(d) that discuss ROW manuals and alternate documentation procedures for non-SDOT parties.

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Definitions (cont.)

- **ROW Use Agreement** – adds new definition to clarify that this term **includes** any **non-permanent transfer** of real property interest in the highway ROW including leases, licenses or permits, for the use of real property interests within a highway for non-highway purposes.
- **Settlement**
 - modifies definition to **include agreements resulting from mediation** and stipulated settlements approved by a court and reached by an authorized official of the acquiring agency or a responsible official of the acquiring agency-allowed by state law.
 - changes term from “compensation” to “**just compensation**”.

Subpart A - General

ROW Use Agreement – The new definition “ROW use agreement” encompasses 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 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 § 710.405 contains additional information on ROW use agreements and the changes relating to the use and disposal of real property in this FR.

Settlement - This FR includes two changes to the definition of “settlement.” The definition of “legal settlement” includes 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 changes “compensation” to “just compensation” in the definition of a court settlement or award.

§ 710.105

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Definitions (cont.)

- **Stewardship/Oversight Agreement** – replaces definition of “Oversight Agreement” with Stewardship/Oversight Agreement and better defines the intended meaning of the term.

- **Subgrantee** – refers to parties **receiving funding indirectly**. For example, when an SDOT passes title 23 funds to a local public agency as part of a subgrant agreement.

Subpart A - General

Stewardship/Oversight Agreement - A definition of “Stewardship/Oversight Agreement” is added to this FR and it replaces the definition of “oversight agreement.” This change eliminates an 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. This change also clarifies 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.

Subgrantee - This definition clarifies the roles and responsibilities of those using, receiving or otherwise managing Federal-aid funds. As used in this regulation it means “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.”

Example of SUBGRANTEE: LPA, Consultant, Design/Build Contractor, P3.

§ 710.105

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Definitions (cont.)

- **State department of transportation (SDOT)** – applies to “the State highway department, transportation department, or other State transportation agency or commission to which title 23, United States Code, funds are apportioned”.

Previously STD

Subpart A - General

SDOT – The FR revises the abbreviation “STD” for a “State transportation department” to “SDOT” for a “State department of transportation”. This change is consistent with the form of reference preferred by the State departments of transportation. Corresponding changes are found throughout part 710, revising “STD” to “SDOT.”

§ 710.105

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Definitions (cont.)

- **Temporary Development Restriction** – includes new definition to clarify that purchasing the right to temporarily control or **restrict development** or redevelopment of real property for an agreed to time period is a type of real property interest.
- **Transportation Project** – makes clear distinction between an early acquisition project and a transportation project.

Subpart A - General

Temporary development restriction – This new definition clarifies 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.

Transportation project - This FR adds a new definition for “transportation project”, and the definition includes the terms “highway project,” “public transportation capital project,” and “multimodal project,” to draw a clear distinction between the undertaking for a “early acquisition project” under § 710.501 and the project for which the real property may be used (the “transportation project”).

23 CFR 710 Subpart B

Subpart B

Program Administration

4

§ 710.201 Grantee and Subgrantee Responsibilities

(a) For Federal aid projects, the SDOT is responsible for compliance with title 23 requirements including projects where an SDOT delegates project activities to other public agencies or contractors.

Subpart B – Program Administration

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 to ensure that grantee obligations for program compliance and oversight responsibility are clearly stated in the FR.

This section is retitled as “Grantee and subgrantee responsibilities”. This section is substantially reorganized and rewritten to clarify the roles and responsibilities of grantees and their subgrantees in carrying out title 23 real property-related activities. These changes 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 FR includes a new paragraph on program oversight which includes an introductory sentence that describes how Federal-aid funds flow to the SDOT; a clarification 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; a clarification that non-SDOT grantees of title 23 funds must comply with part 710 and are responsible for compliance by their subgrantees and contractors.

§ 710.201(c)

5

ROW Manual

- ❑ Clarifies topics to be included in the ROW Manual including the functions and procedures for all phases of ROW;
- ❑ Lists the methods entities other than an SDOT may use to demonstrate and certify that they will follow the FHWA approved ROW procedures; and
- ❑ **Clarifies the SDOT must submit to FHWA (Division) an up-to-date ROW manual reflecting the final rule for FHWA review and approval by no later than August 23, 2018.**

Subpart B – Program Administration

§ 710.201(c) ROW Manual

This Rule makes several revisions to § 710.201(c). Grantees continue to be required to have an approved ROW manual that is up to date. One of the changes in this section is an emphasis on oversight including a requirement that 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. **SDOTs must submit a revised ROW manual** reflecting the provisions of this final rule to FHWA for review and approval not later than two years after publication of the FR-- **August 23rd, 2018.**

This section also includes a clarification that grantees, subgrantees and their contractors must comply with current FHWA requirements whether the requirements are included in the FHWA-approved ROW manual.

§ 710.201(d)

6

ROW manual alternatives

- ❑ **SDOT ROW manual** (FHWA-approved)
- ❑ **ROW manual** (approved for subgrantee use by SDOT)
- ❑ **RAMP** (approved by an SDOT or FHWA)
 - ❑ **Non-SDOT Parties who may use a RAMP include**
 - ❑ Subgrantees,
 - ❑ design-build contractors, and
 - ❑ other acquiring agencies carrying out a project funded by a grant under title 23.

201(d) ROW manual alternatives

Appropriate ROW procedures are critical to the performance of other parties working to deliver projects funded under title 23. For non-SDOT parties, section 701.201(d) contains three options for establishing approved ROW procedures:

- Submission of a written certification that the party agrees to use and adopt the FHWA-approved SDOT ROW manual;
- Submission to SDOT of agencies ROW manual for review and approval; or
- Submission to SDOT of a RAMP for review and approval.

The FHWA believes that the number of non-SDOT grantees carrying out projects and programs using Title 23 funds will continue to increase. Effective oversight and stewardship are crucial on all title 23 projects and programs. The final rule provides several methods to achieve the desired stewardship and oversight outcomes while providing practical, easily achievable options for grantees and their partners.

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

§ 710.201(e) – (k)

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Redesignated sections

- **(e)** (adequacy of Real Property Interests) incorporated into Acquisitions (§ 710.305);
- **(f) as (e)** (recordkeeping);
- **(g) as (f)** (procurement);
- **(h) as (g)** (use of public land acquisition organizations, conservation organizations or private consultants);
- **(i) as (h)** (assignment of approval actions); and
- **(j) and (k) as § § 710.305(c) and (d)** (approval of just compensation and the acquisition process).

Subpart B – Program Administration

You should note that:

- “The FHWA retains responsibility for any approval action not expressly assigned to the SDOT in the Stewardship/Oversight Agreement”;
- Approvals and property-related oversight that will be made by the SDOT instead of FHWA must be documented in the applicable Stewardship/Oversight Agreement; and
- The SDOT ROW manual cannot be used to assign or delegate decision-making authority to the SDOT, or to expand decision-making authority transferred to the SDOT under the Stewardship/Oversight Agreement.

There are many ROW oversight and project development activities that SDOTs carry out that do not involve an approval or property related oversight under the law (including regulations). These types of actions are documented in the SDOT ROW manual, which details how such responsibilities will be carried out by the SDOT, but will not typically be included in the Stewardship/Oversight Agreement.

14	<p style="text-align: center;">§ 710.203(a)</p> <p style="text-align: center;">Title 23 Funding & Reimbursement</p>
	<p>General conditions</p> <ul style="list-style-type: none"> ❑ Includes mitigation property as eligible for Federal funding; ❑ Documents other than the traditional FHWA project agreement may be used in some instances; ❑ Clarifies appraisals and appraisal waiver valuations can be performed prior to NEPA completion; and ❑ Clarifies negotiations must be deferred until after NEPA. <p style="text-align: right;"><i>Subpart B – Program Administration</i></p>

This FR makes several changes to the current § 710.203 provisions on funding and reimbursement. These changes are made to conform to provisions in MAP-21 section 1302, to clarify some aspects of the existing regulation, and to simplify the regulatory text by reorganizing or combining parts of the rule.

(a) A clarification is made to this section by specifically listing mitigation property along with real property as eligible for Federal funding if conditions are met. As mentioned earlier, in addition to the clarification and streamlining, the rule includes a definition of mitigation and a definition of “right-of-way” which was modified to include the use of real property for mitigation as an eligible expense when it is a required part of an approved transportation project under title 23.

(a)(2) This section inserts 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. This revision provides needed flexibility, especially in the case of a non-SDOT grantee. In many cases a non-SDOT grantee may use a document other than a “project agreement”.

(a)(3) Previously there was confusion whether it was permissible for a SDOT to contact a property owner for appraisal preparation prior to NEPA. The revision to this section clarifies that contact with potentially affected property owners is permissible for the purposes of developing an appraisal of real property.

Appraisal and waiver preparation

This revision also describes acquisition activities that can occur prior to completion of a NEPA decision for a project subject to title 23. In part, these changes ensure consistency with the early acquisition provisions in 23 U.S.C. 108, as amended by section 1302 of MAP-21. This rule adds 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 changes 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.

Negotiations

23 U.S.C. Section 108 expressly permits certain acquisition activities prior to the completion of NEPA review for the project, and includes an exception allowing for negotiations under the provisions of early acquisition in § 710.501 and hardship and protective acquisition in § 710.503. This rule made changes to this section to clarify that negotiations must be deferred until after the NEPA decision, except in two cases: early acquisitions under § 710.501 and hardship or protective acquisitions under § 710.503.

§ 710.203(b)

16

Direct eligible costs

- ❑ Includes cost typically incurred in **acquiring real property interests**;
- ❑ Includes cost of real property interest such as **options and temporary development rights**;
- ❑ Includes cost for acquiring agency's **attorney fees** in order to represent the agency in administrative settlements necessary to acquire real property interests;

Subpart B – Program Administration

Title 23 funding and reimbursement

(b) Direct eligible costs – 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)).

(b) (1) (iii) Eligible direct costs include cost of real property interest such as options and temporary development rights. However, FHWA 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 rights-of way for a transportation facility. The FHWA is currently developing guidance addressing approaches to valuation of these types of property interests.

(b)(1)(iv) – Changes to this section allow that **acquiring agency's** attorney's fees necessary for administrative settlements to acquire real property interests are eligible expenses. The allowable fees **exclude other attorney's fees** unless required by State law (including orders issued by courts of competent jurisdiction) or approved by FWHA.

§ 710.203(b)

17

Direct eligible costs (cont.)

- ❑ Replaces the term “appraisal waiver” with “**waiver valuation**”;
- ❑ **Updates payroll related expenses** by referencing the OMB regulation and adds eligibility of grantee’s salary and related expenses when the grantee’s employees work with an acquiring agency or contractor on a Title 23 project;

Subpart B – Program Administration

(b)(1)(v) Language is revised to use the term “waiver valuation” instead of “appraisal waiver,”. 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.

(b)(5) Updates payroll related expenses by referencing the Federal Office of Management and Budget (OMB) regulations. (The OMB regulations have been codified at 2 CFR part 220 (formerly OMB Circular A-87)). Adds 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 Title 23 project.

The references to 2 CFR 225 are now out-of-date; the new requirements are in 2 CFR 200, but more importantly salary costs associated with an eligible Fed-aid activity/project are eligible for reimbursement as a direct cost. Grantees must document such costs in accordance with 2 CFR part 200 and must demonstrate that the work was dedicated to a specific project. Supervisory costs associated with a activity that are not readily assignable are eligible as an indirect cost, but the entity must have an approved indirect cost rate to be able to recover those kinds of indirect costs. Sometimes states whose agencies budget for their personnel with State funds absorb those salary costs and “stretch” the Federal funding by not applying the funding to salary and compensation even though if documented, they could do so.

§ 710.203

18

Direct eligible costs (cont.)

- ❑ Deletes reference to **Transportation Enhancement** Program (TA); and
- ❑ Adds reference to **alternate access points** and clarifies that it may be an eligible project activity.

Indirect costs

- ❑ (d) Clarifies that an SDOT may approve an indirect cost plan for its subgrantee unless the subgrantee has a rate approved by a recognized Federal Agency.

Subpart B – Program Administration

Title 23 funding and reimbursement

(b)(6) This rule deletes the reference in paragraph (i) to the Transportation Enhancement Program and replaces it with a reference to the new Transportation Alternatives set-aside (TA) (23 USC 133(h). Changes related to TA are discussed in more detail when we discuss changes to § 710.511.

(b)(6)(ii) Adds a reference to alternate access points. 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.

(d) This rule revises this paragraph to clarify that an SDOT may approve an indirect cost plan for its subgrantee unless the subgrantee has a rate approved by a recognized Federal agency.

23 CFR 710 Subpart C

4	<h3 style="text-align: center;">Subpart C</h3> <h3 style="text-align: center;">Project Development</h3>
	<p>§ 710.301 General Lists the key steps in the project development process.</p> <p>§ 710.303 Project Authorization & Agreements</p> <ul style="list-style-type: none"> □ Uses the phrase “Federal funding under title 23” instead of “Federal aid” to clarify that provision applies to all title 23 funded grants; □ Retitles heading; and □ Adds new reference. <p style="text-align: right;"><i>Subpart C – Project Development</i></p>

Subpart C - This Final Rule modifies subpart C on project development. To streamline and clarify this subpart, redundant sections are eliminated since these topics are more appropriately addressed elsewhere in this regulation. The FHWA notes that these revisions do not substantively change the applicability or scope of the regulatory requirements pertaining to the project development process.

§ 710.301 The FR has been revised by listing each of the key steps in the project development process in the last sentence of the paragraph. This description of the key steps will give sufficient information to provide a general understanding of the overall process.

Former §710.303 (planning) and **710.305** (environmental analysis) have been deleted. The general discussion previously included in these sections neither added to nor improved upon the information on the planning and environmental analysis found in 23 CFR part 450 and 23 CFR part 771.

§ 710.303 (new FR) The FHWA substituted the phrase “Federal funding under title 23” for “Federal-aid” in the first sentence of this section. This change clarifies that the provision applies to all title 23-funded grants.

The FHWA retitled this section, which appears as § 710.307 in the previous 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 to set forth the terms and conditions of funding and authorize project work.

- ☐ The section is also revised by adding new references to early acquisition provisions in § 710.501(d) and 710.501(e). This reflects the new early acquisition provisions in section 1302 of MAP-21.
- ☐ The rule also deletes the last sentence of the existing provision, which contains transition language dating from a prior rulemaking.

§ 710.305

5

Acquisitions (old section § 710.309)

- ❑ Clarifies that grantees are responsible for ensuring compliance with the oversight and other requirements in this section; and
- ❑ **(b) Adequacy of real property interest** – Requires that real property interest acquired must be adequate for purpose of project. Less than fee types of interest may be adequate for early Acquisition projects.

Subpart C – Project Development

This § **710.305**, which appears as § 710.309 in the previous regulation, is revised to add a more complete description of the acquisition process and clarifies 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.

A new § 710.305(b) has been added, which clarifies the requirement for acquiring an **adequate** interest in real property interests for a project. The long-standing agency position 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 later**, or by **acquiring an interest that restricts certain activities on real property for a specific period of time**.

To address this additional flexibility, the revisions clarify that the real property interests acquired must be **adequate for the project**. **Less-than-fee types of interests may be adequate when carrying out an Early Acquisition Project**, as defined in § 710.105. Before beginning the transportation project, 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. Both early acquisition project and transportation project are defined in § 710.105 of this regulation.

§ 710.305

6

Establishment and offer of just compensation

- (c) Replaces the phrase “believed to be just compensation” rather than “determined to be just compensation”; and
- (d) Clarifies 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.

Subpart C – Project Development

§ 710.305(c) - The FR relocates old § 710.201(j) to 710.305(c), and revised the heading “Approval of just compensation” to “Establishment and offer of just compensation.” The revised language in this section also includes the phrase “**believed to be** just compensation” rather than “**determined to be** just compensation.” This new language correctly describes 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 § 710.305(c) expressly requires 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. These changes provide a correct, clear, and concise discussion of requirements which ensure that **responsible officials** in governmental agencies appropriately establish offers of just compensation.

§ 710.305(d) - The FR relocates old § 710.201(k) to § 710.305(d). The revised language clarifies that the requirements of 49 CFR 24.5 (manner of notices), § 24.102(b) (notice to owner) and § 24.203 (relocation notices) apply to transactions advanced under title 23. The 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. The 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.

§ 710.307

7

Construction advertising

- Describes parties affected by section.
- Updates the description of responsibilities that may be covered in stewardship and oversight agreement.

Subpart C – Project Development

This FR revises the newly redesignated § 710.307, which appears in the old regulations as § 710.311. The references are updated throughout to more accurately describe the parties affected by the section. The description of the types of responsibilities that may be covered in the Stewardship/Oversight Agreement between FHWA and the SDOT are also included in this section. The changes were made to be consistent with MAP-21 revisions to 23 U.S.C. 106.

§ 710.309

8

Design-build Projects

- **(c)** Revises options for design build - Grantee may allow construction to be phased to allow ROW activities to be completed on individual or group properties with ROW certifications
- **(d) (1)** Removes detailed description of ROW procedures and instead requires design-builder to certify that it will comply with FHWA approved ROW manual or RAMP

Subpart C – Project Development

This newly redesignated § 710.309, formerly section § 710.313, has been updated in several ways.

(a) and (b) have been modified to update terms and technical corrections.

(c) Paragraph (c) is 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.

(d) This paragraph has been streamlined to focus on the role of the grantee (normally, the SDOT) in ensuring design-build contractors comply with applicable requirements. The FR removed the detailed descriptions of ROW procedures in the previous regulations. In place of those paragraphs, the FR inserted 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 §§ 710.201(c) and (d). The FHWA believes that the previous regulation, in large part, duplicated detailed material contained in SDOT ROW manuals. The focus of the regulation has been redirected to the use of an FHWA-approved ROW manual or RAMP. An approved ROW manual or RAMP will provide direction as to what is required of a design-build contractor for a project. These changes provide additional clarity to this section and will put proper emphasis on the use of an approved ROW manual or RAMP.

§ 710.309

9

Design-build Projects (cont.)

- ❑ **(d) (2)** Requires the creation of “hold off zones” when displaced persons have not yet been relocated.
- ❑ **(d) (3)** Limits contractors’ activities 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.

Subpart C – Project Development

§ 710.309(d)(2) is revised by removing the discussion on acquisition and relocation plans and project tracking systems on design-build projects. This language is no longer necessary in light of the 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.

Also, this paragraph now requires the creation of “hold off zones” when displaced persons have not yet been relocated. 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.

The FR eliminates previous paragraphs (d)(4), (5), and (6), which addressed how to handle specific issues when relocations had not been completed. In place of those provisions, the final rule adopts 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 appears in the redesignated § 710.309(d)(3), and limits 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 new language includes by implication the kinds of protections previously detailed in the previous regulation. The new language in this section also encompasses 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.

Paragraph (d)(7) in the old regulation is redesignated as § 710.309(d)(4), and updates the terms used in the paragraph have been made.

The references to construction advertising are now in § 710.307) (previously § 710.311).

23 CFR 710 Subpart D

<p style="text-align: center;">Subpart D Real Property Management</p>	
22	<p>§ 710.401 General</p> <ul style="list-style-type: none"> □ Clarifies that grantees have oversight responsibilities for subgrantees compliance with real property management requirements; including when ROW is owned by a subgrantee. <p style="text-align: right;"><i>Subpart D – Real Property Management</i></p>

§ 710.401 (General) Eliminates the language about the change of access control and use of real property interests along the Interstate because that topic is addressed in §§ 710.403 (Management) and 710.405 (ROW Use Agreements). Provides clarification 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.

§ 710.403	
23	
Management	
<ul style="list-style-type: none"> □ (a) FHWA may assign to an SDOT, its approval authority for some property management approvals through the Stewardship/Oversight Agreement; □ (b) Replaces the word “boundaries” with the phrase “approved ROW limits or other project limits”; 	
<i>Subpart D – Real Property Management</i>	

§ 710.403 Revises section by inserting a new paragraph (a), and redesignates the other parts of this section accordingly. The new paragraph (a) discusses the option for assignment to the SDOT of certain FHWA property management and disposal approval authorities using the Stewardship/Oversight Agreement between the FHWA and the SDOT. In particular, disposal authority for actions off the Interstate ROW 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. **However, the requirement for direct FHWA approval for disposal and use of Interstate real property interests and disposals at less than fair market value are two approval authorities that may not be delegated.**

This FR revises the redesignated § 710.403(b) (previously § 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. A more detailed description of the standards that must be satisfied to permit non-highway uses of real property is also added to this section. The language is consistent with the requirements in 23 CFR 1.23. These changes clarify the considerations that a grantee must consider when evaluating potential alternate uses.

§ 710.403(c)

25

Management (cont.)

- Grantees must **specify procedures** in their approved **ROW Manual or RAMP** for determining...
 - When real property is excess to their needs and may be disposed of;
 - When real property interest may be made available for an alternative use; and
 - What type of internal coordination is appropriate when determining whether a property is excess to their needs.
- Removes the list of organizational units in which the grantee must coordinate the determination of excess;

Subpart D – Real Property Management

§ 710.403(b) and § 710.403(c) (of the old regulation) adds language clarifying the reference to “state manual” is referring to the “FHWA approved ROW manual”.

The 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.

This FR defines real property interest as “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 requires the ROW manual to contain procedures for determining when a real property interest may be made available under an ROW use agreement for an alternate use that is consistent with the requirements described in § 710.403(b).

The FR eliminates 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.

§ 710.403

27

Management (cont.)

- (d) Updates language and clarifies that disposal actions and ROW use agreements, including leasing actions, **require environment review**; (23 CFR part 771)
- (e) Clarifies that the requirement to **charge fair market value** applies to the use and disposal of all real property interests acquired with Title 23 funds except as provided in paragraph (e)(1) through (6) of this section;

Subpart D – Real Property Management

§ 710.403(d) (previously § 710.403(c)) Updates the language on environmental review of ROW use agreements and disposals and clarifies the scope of the provision. The reference to FHWA approval is eliminated. This change is made to better reflect that the Stewardship/Oversight Agreement can be used 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 will not affect any assignment of environmental review responsibilities entered by the FHWA and the SDOTs.

The revised predesignated § 710.403(e) (old § 710.403(d)) adds 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 will eliminate confusion that occasionally occurred when disposing of real property. The language describing the principles guiding disposals is deleted. 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.

§ 710.403(e)(1) (previously § 710.403(d)(1)) is revised 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 states, in part, that the exception applies when it “. . . is in the overall public interest based on social, environmental, or economic benefits . . .” The revision uses the word “benefits” in place of the previous term “purposes.” The change in language from “purposes” to “benefits” more accurately describes how the public interest is determined and the type of effect that the FHWA and grantee reasonably must expect will result from this type of disposal to approve the less-than-fair-market-value transaction. The previous rule allowed that the SDOT or other grantee to could use its ROW manual to describe the criteria for evaluating requests for less-than-fair-market-value disposals on social, environmental, or economic grounds. This regulation revises the old permissive language requiring 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 to clearly

document the specific positive benefits that the grantee and public will be receiving as a result of the disposal.

§ 710.403

28

Management (cont.)

- **(e)(5)** Eliminates reference to 23 U.S.C. 142(f) in old rule § 710.403(d)(1) and moves the reference to § 710.403(e)(5);
- **(e)(6)** Clarifies that concession agreements affecting title 23 funded facilities are not exempted from fair market value requirements; and
- **(f)** The use of net income described in this part does not cause title 23 requirements to apply to such use.

Subpart D – Real Property Management

(e)(5) The rule eliminates the reference to 23 U.S.C. 142(f) in the old rule at § 710.403(d)(1) and moves the reference to § 710.403(e)(5) that addresses the issue of fair market value when ROW will be used for publicly owned mass transit purposes.

(e)(6) Redesignates previous § 710.403(d)(5) as § 710.403(e)(6), and inserts 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 FR modifies the language in § 710.403(e)(6) to clarify that concession agreements affecting title 23-funded facilities are not exempt from fair market value requirements.
- This FR revises § 710.403(f) (old § 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 the requirements of 23 U.S.C. 156.
- (f)** The FR also modifies the language at the end of paragraph (f) to more clearly state that the use of net income described in this part does not create a title 23 project and that the requirements of this part would not apply to such use.

The requirements, concerning the disposal of excess real property outside the ROW when no Federal funds were used to acquire it, are moved to a revised § 710.409 (e). This consolidates the provisions of the regulation relating to disposal of excess property.

§ 710.405

29

ROW Use Agreements

- Changes title of this section from “Air Rights on the Interstate” to “ROW use agreements”;
- (a) ROW use agreements for non-highway use may be executed with public entity or private party and require an approval by FHWA and determination by FHWA that it is in the public interest (must meet the same considerations as was required for air rights). Some approvals may be delegated to the SDOT;

Subpart D – Real Property Management

The FR changes the title of section 710.405 from “Air rights on the Interstate” to “ROW use agreements.” This change supports consistency with other changes to the section including eliminating the terms air space and air rights agreements in section 710.405.

The regulation relies 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 approve a ROW use agreement would continue to include the consideration of whether the proposed use will interfere with the operation of the transportation facility or the safety of the traveling public. This evaluation process embodies the same considerations for protecting the transportation facility that the previous regulation required under its air space, air rights agreements, and leasing provisions.

Section 710.405 eliminates use of the term “airspace,” and instead uses “real property interests.” The previous regulation defined “air space” as 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 FR also eliminates the use of the term “air rights.” An “air rights” agreement under the previous regulation was used to convey time-limited and/or permanent rights for an alternate use of air space. Under this regulation, the term “ROW use agreement” is used when referring to a time-limited agreement to permit an alternate use of real property that is part when the facility received or utilized title 23 funds in any way. A conveyance of permanent rights would be handled as a disposal.

The FHWA is making these changes because it believes the continued use of the terms “air space” and “air rights” is unnecessarily confusing. In current 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

previous regulatory scheme involving “air space” and “air rights” was often challenging to administer, and the 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).

(a) Section 710.405(a) contains a description of ROW use agreements and a number of general requirements applicable to those agreements. Existing § 710.405 governs FHWA approval of air rights on the Interstate system and contains a list of transactions excluded from the section. This FR retains those listed exclusions that would remain in effect under the ROW use agreement provisions in § 710.405.

The exclusion for non-Interstate highways is deleted, as it is no longer needed given the restructuring of this subpart. This change does 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 FR’s 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.

This FR revises the redesignated § 710.405(a)(2)(ii) (previously § 710.405(a)(2)(iii) by adding references to additional parts of the title 23 regulation that apply to the relocation of railroads or utilities.

§ 710.405

33

ROW Use Agreements (cont.)

- (b) Lists the minimum information needed to **protect the Federal interest in facilities** that would become subject to a ROW use agreement;
- (c)(d) Revises references and renumbered these subparts. Provisions remain substantially the same as previous regulation;

Subpart D – Real Property Management

(b) This section is revised to reflect that “ROW Use Agreements” must be time-limited. It articulates several 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 the 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 an ROW use agreement. The FHWA 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.

(c)(d) Sections 710.405(c) and (d) set forth language taken from the leasing provision in § 710.407 of the previous regulation. Those provisions, from existing § 710.407(b) and (c), respectively, prohibit the use of Federal funds if an alternate use requires a change in the transportation facility, and requires that 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.

§ 710.405

36

ROW Use Agreements (cont.)

- **(d)** Clarifies that proposed use must **conform to current design and safety standards;**
- **(e)** Application requirements:
 - Identifies party;
 - Describes proposed use and why it will be in the public interest;
 - Documents that the proposed use would not impair highway flow or traffic;
 - Provides design for the use of the space including facilities to be constructed;
 - Maps, plans, sketches;
 - Lists the provisions for maintenance access;
 - Provides general provisions: term of use, insurance requirements, design limitations, safety, and accessibility maintenance; and
 - Provides 3D presentation unless it is to be used for leisure activity, then a metes and bound description, plans, cross sections may be provided in lieu of.

Subpart D – Real Property Management

(d) This FR adds language to clarify that the proposed use of the ROW must conform to current design and safety standards.

(e) This FR adds a new provision in § 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 § 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.

§ 710.409	
37	<p>Disposal of excess real property</p> <ul style="list-style-type: none"> □ Changes the title; □ (b) Deletes requirement to notify Federal, state and local agencies of a proposed disposal; □ (d) Deletes last sentence –duplicative language; □ (e) Relocates § 710.403(f) to § 710.409(e); □ (f) Relocates § 710.403(g) to § 710.409(f); and □ (g) Lists required information needed in order to approve a request for a disposal. Mirrors the type of info needed for a ROW use agreement. <p><small>Subpart D – Real Property Management</small></p>

This FR changes the title of § 710.409 from “Disposals” to “Disposal of excess real property.” This FR clarifies 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 and according to the revised definition of “disposal” in § 710.105. As we mentioned earlier, the definition clarifies a disposal involves the conveyance of permanent rights in excess real property, and that a disposal must meet the requirements in 23 CFR 710.403(b).

The revisions to § 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 were made to align the language with the new approach described above and to update the terminology and regulatory references.

(b) This FR deletes the last sentence of previous § 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. 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 several other methods to meet the notification requirements of this paragraph.

(d) This FR deletes the last sentence in § 710.409(d) as duplicative of other parts of this regulation.

(e) This FR moves the provisions concerning disposal of excess real property outside the approved ROW limit or project boundary, to a new § 710.409(e). The FHWA believes it is more logical to place the provision in this specific section on disposals.

(f) This FR relocates the provision on relinquishments to a new § 710.409(f).

(g) This FR adds a new § 710.409(g) to incorporate into the regulation the information required to approve a request for a disposal. This information largely mirrors the types of information

that would be required to support a request for an ROW use agreement under § 710.405(e). To avoid duplication, § 710.409(g) incorporates certain submission requirements by reference to provisions in § 710.405(e)(1)-(9).

23 CFR 710 Subpart E

<div style="text-align: center;"> Subpart E Property Acquisition Alternatives </div>
<div style="background-color: #f0f0f0; padding: 5px;"> § 710.501(a) Early Acquisition <u>General</u> Requirements <ul style="list-style-type: none"> □ Early Acquisition authorities apply not only to SDOTS, but also to other State and local governmental agencies; □ The FR requires compliance with all requirements for acquisition of real property interest for federally assisted transportation projects; </div>

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 revises and reorganizes this section of the regulation to better describe the early acquisition process, and 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).

The new organization includes

- a) an introductory paragraph describing the options for early acquisition,
- b) a paragraph for State-funded early acquisition **without** Federal credit or reimbursement,
- c) a paragraph for State-funded early acquisition **eligible for future credit**,
- d) a paragraph for State-funded early acquisition **eligible for future reimbursement**, and
- e) a paragraph for federally-funded early acquisition project.

The authorities for early acquisition in 23 U.S.C. 108 are granted to “States.” The FHWA acknowledges this limiting language. However, the 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. § 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 FR retains the distinction in the current regulation between early acquisitions (§ 710.501), and “hardship acquisition” and “protective buying” provisions (§ 710.503) with respect to the

treatment of section 4F properties (subject to 23 U.S.C. 138). Talk more about these Advance Acquisition Options in 710.503.

This FR revises existing § 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 this language to avoid any confusion about whether the authorities for early acquisition 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 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.

§ 710.501(a)

8

Early Acquisition General Requirements(cont.)

- State agency may **initiate acquisition** of real property interests at **any time it has legal authority** to do so;
- State agency may fund early acquisition entirely with State funds but may **seek title 23 credits or reimbursement** when the property is incorporated into the project eligible for Federal funds; and
- State agency **may use** a Federal-aid project agreement and **reimbursement processes** for Early Acquisition Project.

<p>§ 710.501(b)</p>	<input checked="" type="radio"/> STATE FUNDED - NO CREDIT, MATCH OR REIMBURSEMENT
	<input type="radio"/> STATE FUNDED - CREDIT ONLY
	<input type="radio"/> STATE FUNDED - FEDERAL REIMBURSEMENT
	<input type="radio"/> FEDERALLY FUNDED EARLY ACQUISITION PROJECT

9

State-funded early acquisition without Federal credit or reimbursement.

In order to **maintain eligibility** for future Federal assistance on a project, State funded early acquisition must comply with the requirements of § 710.501(c) (1) through (5).

This FR adds a new paragraph § 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 to maintain future project eligibility under title 23. The State Agencies 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 that the State Agency is aware of applicable requirements. If a State Agency wants a project to be eligible for title 23 funding in any phase, title 23 acquisition requirements including compliance with the Uniform Act must be met. The addition of this specific language removes any potential for confusion. The requirements and conditions are expressly listed in § 710.501(b) so that State Agencies can effectively ensure that a project remains eligible for Federal aid funding.

§ 710.501(c)

STATE FUNDED – NO CREDIT, MATCH OR REIMBURSEMENT

STATE FUNDED – CREDIT ONLY

STATE FUNDED – FEDERAL REIMBURSEMENT

FEDERALLY FUNDED EARLY ACQUISITION PROJECT

10

State-funded early acquisition eligible for future credit.

Early acquisition costs incurred by a State agency at its own expense prior to completion of environment review for **transportation project** are eligible for a credit toward the nonfederal share of the total project cost.

This FR revises the redesignated § 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 FR changes 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 FR does not require any substantive changes to the list of conditions that must be met, although some minor updates in language were made. For clarity, this FR adds cross-references in § 710.501(c) to related provisions in § 710.505(b) (Credit for donations) and § 710.507 (State and local contributions).

§ 710.501(c)

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<input type="radio"/>	FEDERALLY FUNDED EARLY ACQUISITION PROJECT

11

In order to maintain eligibility for future CREDIT, the following conditions must be met.

- ☐ Land lawfully obtained by State Agency;
- ☐ Is not a 4F property;
- ☐ Property acquired in accordance with the Uniform Act;
- ☐ State complied with Title VI of the Civil Rights Act; and The early acquisition did not influence NEPA for the Project.

§ 710.501(d)

STATE FUNDED - NO CREDIT, MATCH OR REIMBURSEMENT

STATE FUNDED - CREDIT ONLY

STATE FUNDED - FEDERAL REIMBURSEMENT

FEDERALLY FUNDED EARLY ACQUISITION PROJECT

13

State-funded early acquisition eligible for future reimbursement.

- Costs incurred by a State Agency **prior to completion of environment review** for a transportation project are eligible for reimbursement, once the real property interests are incorporated in the transportation project **if all applicable requirements have been met;**

This FR revises the redesignated § 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 transportation project is complete.

§ 710.501(c) is revised to conform to 23 U.S.C. 108(c), as amended by MAP-21. Under the FR, the detailed requirements of 23 U.S.C. 108(c)(3) is listed, as well as the requirements of § 710.203(b) (relating to direct eligible costs), are included by reference rather than described in a detailed list.

§ 710.501(d)

STATE FUNDED - NO CREDIT, MATCH OR REIMBURSEMENT

STATE FUNDED - CREDIT ONLY

STATE FUNDED - FEDERAL REIMBURSEMENT

FEDERALLY FUNDED EARLY ACQUISITION PROJECT

14

Early Acquisition – Reimbursement Requirements

- ❑ Complies with the **Uniform Act**;
- ❑ Complies with **Title VI** of the Civil Rights Act;
- ❑ State has **mandatory, comprehensive and coordinated land use, environment, and transportation planning process under state law** and the acquisition was determined in advance by the **Governor as consistent with the State transportation planning process**;
- ❑ **Alternative** for which the real property interest is acquired **is selected** by the State pursuant to NEPA;
- ❑ Acquisition **does not influence NEPA**;
- ❑ Prior to approval for Federal participation, **NEPA is completed**;
- ❑ Land is **lawfully obtained** by State Agency; and
- ❑ The acquisition is **not a 4F property**.

In addition to the requirements on this slide, this FR deletes from this section the requirement that the SDOT obtain concurrence for EPA.

3rd bullet: FHWA is completing a research project to examine several States that have processes that may be consistent with these requirements. The FHWA will share the research findings on its Web site as soon as the final report is completed. The FHWA believes that providing examples of processes will give interested SDOTs a starting point in determining if they have a process that meets the requirements for statewide and nonmetropolitan planning contained in 23 U.S.C. 108(c)(3). Aug 17, 2016

§ 710.501(e)

STATE FUNDED - NO CREDIT, MATCH OR REIMBURSEMENT
STATE FUNDED - CREDIT ONLY
STATE FUNDED - FEDERAL REIMBURSEMENT
FEDERALLY FUNDED EARLY ACQUISITION PROJECT

16

Federally Funded Early Acquisition Project

State agency certifies and FHWA concurs the following requirements have been met:

- State has authority to acquire under State law;
- The acquisition of the real property interests **meet the criteria at (§ 710.501(e)(2)(i-viii))**; (listed in next slide)
- The Early acquisition project is included as a **project in an applicable transportation improvement plan; and**
- **Environmental review approved** for “early acquisition project”.

Federally Funded Early Acquisition Project requirements next 3 slides.

This FR adds 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 8 conditions prior to FHWA authorization of title 23 apportioned funds to carry out early real property acquisition. This FR includes § 710.501(e)(2) that follows the language in 23 U.S.C. 108(d)(3). This section requires the State agency to submit a certification stating each of the required conditions has been or will be satisfied.

The FHWA will decide whether to concur with a certification based on the content of the certification and FHWA’s knowledge of the project. The FHWA will 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 § 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. Except for NEPA and condemnation, the 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 the 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)). The NPRM Preamble provides information on some of the considerations the 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 § 710.501(e), the FHWA may consider a number of factors such as:

- ☐ Whether the Early Acquisition Project may cause negative or reduce public/agency confidence in the environmental review process for the proposed transportation project;
- ☐ 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
- ☐ Possible effects of the Early Acquisition Project on the alternatives evaluation and selection process for the proposed transportation project, such as:
 - ☐ How the investment in Early Acquisition Project(s) affects the presentation of the alternatives in the proposed transportation project's environmental documents;
 - ☐ 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;
 - ☐ Whether the Early Acquisition Project(s) can reasonably be expected to cause lead agency decision makers to disproportionately support one alternative, while giving insufficient weight to information supporting other alternatives.

Environmental Review

Consistent with 23 U.S.C. 108(d)(4) and NEPA, this FR adds § 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 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 this 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.

§ 710.501(e)(2)(i-viii)

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<input type="radio"/>	STATE FUNDED - FEDERAL REIMBURSEMENT
<input checked="" type="radio"/>	FEDERALLY FUNDED EARLY ACQUISITION PROJECT

17

Federally Funded Early Acquisition Project

Must meet the following criteria:

- ❑ Is for a **title 23 eligible transportation project** and does **not** involve **4F properties**;
- ❑ Will **not cause significant adverse environmental impacts** as a result of the EA project or from cumulative effects of multiple EA projects;
- ❑ Will not limit the choice or otherwise **influence** the **NEPA** decision of FHWA;
- ❑ Will not prevent the lead agency from making an **impartial decision** as to **alternatives**;

§ 710.501(e)(2)(i-viii)

STATE FUNDED – NO CREDIT, MATCH OR REIMBURSEMENT
STATE FUNDED – CREDIT ONLY
STATE FUNDED – FEDERAL REIMBURSEMENT
FEDERALLY FUNDED EARLY ACQUISITION PROJECT

18
Federally Funded Early Acquisition Project

Must meet the following criteria:

- ❑ Is **consistent** with the State transportation **planning process** under 23 U.S.C. 135
- ❑ **Complies** with other applicable **Federal laws** (including regulations).
- ❑ 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.
- ❑ Will be acquired through negotiation, **without** the threat of, or use of, **condemnation**.

In addition to the above slide, 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. (23 U.S.C 108(d)(3)(B)(vii) and § 710.501(e)(2)(viii))

§ 710.501(f)

STATE FUNDED – NO CREDIT, MATCH OR REIMBURSEMENT
STATE FUNDED – CREDIT ONLY
STATE FUNDED – FEDERAL REIMBURSEMENT
FEDERALLY FUNDED EARLY ACQUISITION PROJECT

Prohibited Activities.

- ❑ Real property interests acquired **cannot be developed** in **anticipation** of the “**transportation project**” until a NEPA decision for Transportation project has been completed.
- ❑ **No** development activity related to **demolition, site preparation, or construction** that is not necessary to protect health or safety.
- ❑ With prior approval, State Agency **may** carry out **limited activities** such as limited clearing and demolition activity if necessary to protect public health and safety and activities are considered during NEPA.

(f) - This new section provides direction on what “developed in anticipation of a project” means. The 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. These instances where limited development activities would be appropriate are those necessary to protect public health or safety. The development activities would need to be included in the environmental review of the “early acquisition project”.

This new 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 “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 acquisition” 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, a new § 710.501(f) 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 regulatory description of prohibited development 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 regulation proposes specific instances when it may be appropriate for FHWA to approve limited development activity based on public health or safety considerations.

§§ 710.501(g) and (h)

STATE FUNDED – NO CREDIT, MATCH OR REIMBURSEMENT

STATE FUNDED – CREDIT ONLY

STATE FUNDED – FEDERAL REIMBURSEMENT

FEDERALLY FUNDED EARLY ACQUISITION PROJECT

24

Early Acquisition

- ▣ **Reimbursement** – if reimbursement is made and the real property interests are **not incorporated in the project** within **20 years**, FHWA must off set the amount **against funds apportioned** to the state.
- ▣ **Relocation Assistance Eligibility** – A person is considered **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. **Options to purchase** and similar agreements do not create an immediate commitment and **do not create eligibility**.

(g) - This FR adds 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 interests 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.

(h) - 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 acquisition projects” fully satisfy Uniform Act requirements. Section 108(d)(3)(B)(viii) expressly states that the “early acquisition” will 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 FR adds a new § 710.501(h), addressing the timing of relocation assistance eligibility in the context of early acquisitions under § 710.501. The § 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 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).

§ 710.503(d)

29

Protective Buying and Hardship Acquisition

- Acquisition is subject to environmental review under part 771 of this chapter.
- Distinction
 - Early Acquisition--4F properties **not** allowed.
 - Protective Buying and Hardship Acquisition--4F properties **maybe** acquired.

This FR updates references in § 710.503 and changes the term “SDOT” to “grantee” in several places. The FR also revises § 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 acquisitions under this section are subject to environmental review under part 771. Often, such acquisitions meet the requirements for a categorical exclusion under 23 CFR 771.117(d)(12).

The FR retains the distinction in the current regulation between early acquisitions (§ 710.501), and “hardship acquisition” and “protective buying” provisions (§ 710.503) with respect to the treatment of section 4F properties (subject to 23 U.S.C. 138). 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. However, “hardship acquisition” and protective buying” typically occurs 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.

§ 710.505(a)

30

Real Property donations

Mandatory notification to the real property owner must be **in writing** and must inform him/her of the right to receive just compensation, right to an appraisal or waiver valuation and other applicable financial or non-financial assistance under the Uniform Act and state law.

This FR revises § 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 revised requirement will help ensure that 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 FR 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 § 710.203(b)(2)(ii). This FR adds references in § 710.505(b) to the underlying statutory provision on donations.

§ 710.507

31

State and local contributions

- **Deletes effective date** of the old rule for use of **credits**; and
- Provision governing **credit** for real property interests contributed to a project is the **same for state and local governments**.

This FR revises § 710.507 to clarify that the requirements of 23 U.S.C. 323 must be met in cases involving State and local contributions. The rule reflects 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 FR implements this change by consolidating the provisions on local governments into § 710.507(a) and (b).

References to an effective date related to the old rule for use of credits, are deleted and paragraphs are redesignated accordingly. The FHWA believes that because nearly 15 years have passed since publication of the previous Final Rule the reference to a previous effective date 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, from previous rules, at the time of the project agreement for those projects would continue to apply. The FR also updates references to other regulations in this part as necessary.

§ 710.509(b)(4)

33

Functional replacement of real property in public ownership

Modifications of notice requirements –Notification to the “owner agency” of its right to receive just compensation must be in **writing**.

This FR modifies § 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 adds a requirement that notification to the owner agency of its right to receive just compensation must be in writing. This requirement will help to ensure that the property owners are fully and fairly informed, and that the acquiring agency has the documentation necessary to support title 23 eligibility.

§ 710.511(b)(1)

34

Transportation Alternatives Program (TA)

- **Replaces** all **references** to transportation enhancements with references to TA and **rewrote this section** to conform to TA provisions;
- **Deletes the exemption**, for **Uniform Act requirements**, for acquisitions by **conservation organizations** which was eliminated by MAP-21; and
- TA projects are **subject to Federal-aid highway requirements** under title 23 with limited exception for recreational trail projects.

MAP-21 eliminated the Transportation Enhancements Program and replaced it with the Transportation Alternatives Program. The FAST Act inserted Transportation Alternatives into the Surface Transportation Block Grant Program (23 USC 133). This FR replaces all references to transportation enhancements in the existing regulation with references to “TA” and rewrites this section to conform to TA provisions. Any projects authorized under the former Transportation Enhancement Program will continue to be subject to the existing requirements.

This FR revises and reorganizes § 710.511(b). The requirements for Uniform Act compliance and applicability that are in § 710.511(b)(1) and (2) of the previous regulation are consolidated and incorporated into § 710.511(b)(1). This FR deletes the Uniform Act exemption for acquisitions by conservation organizations. 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 in the previous regulation at § 710.511(b)(4). Under MAP-21 amendments to 23 U.S.C. 213 (e), TA 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.

§ 710.511(c)

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Transportation Alternatives Program (TA)

Requires the use of a TA property agreement between the grantee and FHWA that specifies the expected useful life of the project and establishes a requirement for pro rata repayment if the acquired property in whole or part is used for another purpose before the end of the expected useful life.

This FR modifies § 710.511(c) by updating the description of the applicability of the Subpart D Real Property Management rules to TA properties, by requiring the use of a TA 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 TA 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.

23 CFR 710 Subpart F

Subpart F Federal Assistance Program
<div style="background-color: #f0f0f0; padding: 2px; margin-bottom: 5px;">39</div> <p>§ 710.601 Federal Land Transfers</p> <ul style="list-style-type: none"> □ (a) Clarifies that this provision applies to any project constructed on a Federal-aid highway or under Chapter 2 of title 23; and applies to highway projects that are eligible for Federal funding under Chapters 1 and 2 of title 23. □ (b) Revises language to permit FHWA to transfer real property from the US to non-Federal owners including SDOTs; □ (e) Adds the qualifier “for projects not on the Interstate”. Under 23 USC 107(d) transfers of Federal property for the Interstate system are not subject to the designation of conditions or certification by the land-management agency; <p style="text-align: right; font-size: small; color: #000080;"><i>Subpart F – Federal Assistance Program</i></p>

- This FR revises section 710.601(a) to incorporate a conforming amendment in section 1104(c)(6) of MAP-21, which clarifies that this subpart applies to any project constructed on a Federal-aid highway or under Chapter 2 of title 23 U.S.C., and the provision applies to highway projects that are eligible for Federal funding under Chapters 1 and 2 of title 23 of the U.S. C.
- This FR revises 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 types of interests that can be acquired. The FHWA also includes 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 address slightly different eligible entities, although SDOTS have eligibility under both statutes.
- In section 710.601(e), the qualifier “For projects not on the Interstate System” is added to the second sentence, before the limitation that “the land-management agency shall have a period of four 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 of the US Code, transfers of Federal property for the Interstate System are not subject to the designation of conditions or certification by the land-management agency.

§ 710.601

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Federal Land Transfers (cont.)

- (f) Clarifies that FHWA can participate in costs incurred by the grantee associated with the Federal land transfer when the Federal land management agency is **required to assess such cost as a condition of the transfer**; and
- (i) Includes additional language 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 US** or the original land management agency.

Subpart F – Federal Assistance Program

Current paragraphs (f) through (h) are redesignated (g) through (i), and language is added to clarify the process for carrying out a transfer of Federal lands.

(f) This FR clarifies that FHWA can participate in the payment of FMV or functional replacement of impacted facilities and reimbursement of reasonable direct costs incurred by the grantee for the transfer when reimbursement is required by the Federal Agency's governing laws as a condition of the transfer.

(i) The FR adds language in redesignated § 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.

§ 710.603

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Direct Federal Acquisition

- **a)** Covers direct Federal acquisitions for Interstate Systems and for Defense Access Road projects;
- **b)** Includes language to clarify when FHWA may make a **direct Federal acquisition from non-Federal owners**; and
- **(b) and (h)** Includes language to clarify that FHWA **may not accept jurisdiction** for any property acquired, even temporarily.

Subpart F – Federal Assistance Program

This rule revises and reorganizes sections (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 Interstate System and Defense Access Road projects, and other types of projects carried out by the FHWA Office of Federal Lands Highways.

§ 710.603(a) covers direct Federal acquisitions for Interstate Systems and for Defense Access Road projects.

***** Note: There is a mistake in the Final Rule. Under Direct Federal Acquisition § 710.603(a) The wording “may not” is incorrect. Rather the first sentence under (a) should read, “The provisions of this paragraph may be applied to any real property that is owned by the United States...” This will be rectified shortly.**

The MAP-21 makes several changes to the names of programs funded under chapter 2 of title 23 USC and this FR eliminates the list of program names in existing § 710.603(a).

(b) Adds new language to paragraph (b) to clarify when FHWA may make a direct Federal acquisition from non-Federal owners.

(b) and (h) New language in paragraphs (b) and (h) clarifies that FHWA may not accept jurisdiction for any property acquired, even temporarily. This addition is made to address questions that have arisen about 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.

23 CFR 635 Subpart C

Revisions to the Regulations	
11	
	Part 635
Construction and Maintenance	
Major changes	
§ 635.309 – Authorization	

Conditional ROW Certifications

12

§ 635.309 (c)(3)

- Allows conditional ROW certifications in order to proceed with advertising for construction bidding as long as assurances are in place to protect property owners and tenants.
- Clarifies that proceeding to physical construction under a conditional ROW cert is allowed only under **exceptional circumstances**.

The final rule also includes new requirements that limit State construction authorization while acquisitions are still under way unless there are exceptional circumstances.

The use of the conditional certification will still be an exception to the certification requirement that legal and physical possession must have been acquired for all necessary rights-of-way for the project. § 635.309(c)(1)

The changes to this section will allow bidding to proceed unless FHWA finds it would not be in the public interest. However, FHWA will not authorize construction based on a conditional certification unless there are exceptional circumstances that make such action in the public interest. SDOTs must 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.

Example 1

A SDOT may have a project where all the necessary real property interests on one section of a project have been acquired but on the other end of the project there are a few outstanding parcels. In this scenario, a conditional certification may be approved permitting advertising of the project for construction bidding, which will also allow time for the State to acquire the few remaining parcels. The contractors must be provided notice in their bid package about the status of real property acquisition so they may understand the risk and bid accordingly.

Example 2

A SDOT may have a project like that described in example one. The contract has been let, and a contractor has been selected. If the SDOT requests permission to authorize construction, it must demonstrate what the exceptional circumstance is and why proceeding with construction is in the public interest. Generally, a justification that cost savings will result from authorizing construction would not qualify as an exceptional circumstance. If a SDOT could demonstrate a public health or safety implication of not proceeding to construction for this project that likely would meet the standard of an exceptional circumstance.

Conditional ROW Certs-Delay Claims

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§ 635.309 (c)(3)(v) Participation of title 23 funds in construction delay claims will be determined in accordance with § 635.124 of this title.

While this rule provides 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. Federal participation in the cost of such delay claims is subject to § 635.124, including consideration of whether the SDOT followed approved processes and procedures. The risk of increased construction delay claims is addressed in the final rule by requiring that advertisements for bids must specify whether all ROW has been obtained for the project.