

Regulatory Procedures*Executive Order 12866*

We have consulted with the Office of Management and Budget (OMB) and have determined that these proposed rules do not meet the criteria for a significant regulatory action under Executive Order 12866. Thus, they are not subject to OMB review.

Regulatory Flexibility Act

We certify that these proposed regulations will not have a significant economic impact on a substantial number of small entities. Thus, a regulatory flexibility analysis as provided in the Regulatory Flexibility Act, as amended, is not required.

Paperwork Reduction Act

These proposed regulations will impose no additional reporting or recordkeeping requirements requiring OMB clearance.

(Catalog of Federal Domestic Assistance Program Nos. 96.001 Social Security Disability Insurance; 96.002 Social Security Retirement Insurance; 96.004 Social Security Survivors Insurance.)

List of Subjects*20 CFR Part 404*

Administrative practice and procedure, Blind, Disability benefits, Old-Age, Survivors, and Disability Insurance, Reporting and recordkeeping requirements, Social Security.

20 CFR Part 422

Administrative practice and procedure, Freedom of information, Organization and functions (Government agencies), Social Security.

Dated: December 14, 1998.

Kenneth S. Apfel,

Commissioner of Social Security.

For the reasons set forth in the preamble, we propose to amend subpart M of Part 404 and subpart B of Part 422 of Chapter III of the Code of Federal Regulations as follows:

PART 404—FEDERAL OLD AGE, SURVIVORS AND DISABILITY INSURANCE (1950—)**Subpart M—[Amended]**

1. The authority citation for subpart M of part 404 continues to read as follows:

Authority: Secs. 205, 210, 218 and 702(a)(5) of the Social Security Act (42 U.S.C. 405, 410, 418 and 902(a)(5)); sec. 12110, Pub. L. 99-272, 100 Stat. 287 (42 U.S.C. 418 note); sec. 9002, Pub. L. 99-509, 100 Stat. 1970.

2. Section 404.1220 is amended by revising paragraph (a) to read as follows:

§ 404.1220 Identification numbers.

(a) *State and local governments.*
When a State submits a modification to its agreement under section 218 of the Act, which extends coverage to periods prior to 1987, SSA will assign a special identification number to each political subdivision included in that modification. SSA will send the State a Form SSA-214-CD, "Notice of Identifying Number," to inform the State of the special identification number(s). The special number will be used for reporting the pre-1987 wages to SSA. The special number will also be assigned to an interstate instrumentality if pre-1987 coverage is obtained and SSA will send a Form SSA-214-CD to the interstate instrumentality to notify it of the number assigned.

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PART 422—ORGANIZATION AND PROCEDURES**Subpart B—[Amended]**

3. The authority citation for subpart B of part 422 continues to read as follows:

Authority: Secs. 205, 232, 702(a)(5), 1131, and 1143 of the Social Security Act (42 U.S.C. 405, 432, 902(a)(5), 1320b-1, and 1320b-13).

4. Section 422.112 is amended by revising paragraph (b) to read as follows:

§ 422.112 Employer identification numbers.

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(b) *State and local governments.*
When a State submits a modification to its agreement under section 218 of the Act, which extends coverage to periods prior to 1987, SSA will assign a special identification number to each political subdivision included in that modification. SSA will send the State a Form SSA-214-CD, "Notice of Identifying Number," to inform the State of the special identification number(s). The special number will be used for reporting the pre-1987 wages to SSA. The special number will also be assigned to an interstate instrumentality if pre-1987 coverage is obtained and SSA will send a Form SSA-214-CD to the interstate instrumentality to notify it of the number assigned.

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DEPARTMENT OF TRANSPORTATION**Federal Highway Administration****23 CFR Parts 710, 712, and 713**

[FHWA Docket No FHWA-98-4315]

RIN 2125-AE44

Right-of-way Program Administration

AGENCY: Federal Highway Administration (FHWA), DOT.

ACTION: Notice of proposed rulemaking (NPRM); request for comments.

SUMMARY: The FHWA is proposing to amend its right-of-way regulations for federally assisted transportation programs. The FHWA requests comments on the proposed regulations and any other issues believed to be relevant to the administration of the real estate aspects of the Federal-aid highway program. The regulations are arranged to follow the same sequence as the development and implementation of a Federal-aid project to assist the public and State transportation department (STD) in locating regulations applicable to a specific point of interest. This proposal is intended to clarify the State-Federal partnership.

DATES: Comments in response to this NPRM must be received on or before March 24, 1999.

ADDRESSES: Submit written, signed comments to the docket number appearing at the top of this document. You must submit your comments to the Docket Clerk, U.S. DOT Dockets, Room PL-401, 400 Seventh Street, SW., Washington, DC 20590-0001. All comments will be available for examination at the above address between 10 a.m. and 5 p.m., e.t., Monday through Friday, except Federal holidays. To receive notification of receipt of comments you must include a pre-addressed, stamped envelope or postcard.

FOR FURTHER INFORMATION CONTACT: Mr. James E. Ware, (202) 366-2019, Office of Real Estate Services, HRE-20, or Mr. Reid Alsop, Office of Chief Counsel, HCC-31, (202) 366-1371. Office hours are from 7:45 a.m. to 4:15 p.m., e.t., Monday through Friday, except Federal holidays.

SUPPLEMENTARY INFORMATION:**Electronic Access**

Internet users can access all comments received by the U.S. DOT Dockets, Room PL-401, by using the universal resource locator (URL): <http://dms.dot.gov>. It is available 24 hours each day, 365 days each year. Please

follow the instructions online for more information and help.

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Background

The FHWA provides funds to the States and other organizations to reimburse them for the cost they have incurred in completing highways and other transportation related projects. Regulations dealing with reimbursement and management of right-of-way are contained in 23 CFR parts 710 through 713. The FHWA acknowledged that the regulations were outdated and in need of updating by publishing an advance notice of proposed rulemaking on November 6, 1995, at 60 FR 56004 under Docket No. 95-18 (transferred to

U.S. DOT Docket Facility and scanned as FHWA Docket No. FHWA-97-2266).

Twenty comments were received: 2 from individuals, 2 from private groups or organizations, and 16 from State transportation agencies.

Based on the responses received, the FHWA concluded the right-of-way (ROW) regulations needed a comprehensive revision. During an initial review, the FHWA identified several parts of the regulations that were no longer needed.

As a first step in the comprehensive revision, the FHWA removed the obsolete and redundant parts by publishing an interim final rule on April 25, 1996, 61 FR 18246. This action removed from 23 CFR all of parts 720 and 740, and portions of parts 710 and 712.

This NPRM begins the second and final stage of the updating process. It seeks to further clarify and reduce Federal regulatory requirements and to place primary responsibility for a number of approval actions at the State level. If these regulatory changes are

adopted, other parts of 23 CFR will be affected, and in developing the final rule, attention will be provided to conforming revisions as necessary. Such parts include: 23 CFR part 130, subpart D, Advance right-of-way revolving funds; 23 CFR part 480, Use and disposition of property previously acquired by States for withdrawn Interstate segments; and 23 CFR part 620, subpart B, Relinquishment of highway facilities.

This proposed rule substantially revises the order of regulatory materials and completes the process of removing redundant, outdated, and unnecessary content from the existing rule. A unified purpose and applicability statement along with definitions is included in Subpart A of the proposed rule. This consolidates material now found in several locations of the existing regulations.

The following table highlights the reordering of content and intended action for each subpart of the existing regulation:

Old section	New section
710 Subpart B, <i>State Highway Department Responsibilities</i>	710.201—State responsibilities.
710 Subpart C, <i>Reimbursement Provisions</i>	710.203—Funding and reimbursement.
712 Subpart B, <i>General Provisions and Project Procedures</i>	710 Subpart C, <i>Project Development</i> (See also Subpart E, <i>Property Acquisition Alternatives</i>)
712 Subpart D, <i>Administrative Settlements, Legal Settlements, and Court Awards</i>	Definitions retained in 710.105, Eligibility for reimbursement in 710.203. See also 49 CFR part 24.
712 Subpart E, <i>Federal Land Transfers and Direct Federal Acquisition</i>	710.601—Federal land transfer, and 710.602—Direct Federal acquisition.
712 Subpart F, <i>Functional Replacement of Real Property in Public Ownership</i>	710.509—Functional replacement.
712 Subpart G, <i>Right-of-way Revolving Fund</i>	Removed.
713 Subpart A, <i>Property Management</i>	710 Subpart D, <i>Real Property Management</i> .
713 Subpart B, <i>Management of Airspace</i>	710.405—Air rights.
713 Subpart C, <i>Disposal of Right-of-way</i>	710.407—Disposals.

Alternative methods to achieve program objectives have been explored in developing this NPRM. Specifically, efforts were made to reduce the level of Federal oversight, required recordkeeping, and mandated reporting. However, no change is made to the longstanding statutory requirement that States be suitably staffed and equipped to perform surface transportation functions as a prerequisite for Federal financial assistance. Nor have we changed the requirement for States to maintain State right-of-way operating manuals.

Many of the existing provisions were designed to provide project level oversight through a series of Federal monitoring steps and Federal approval actions. This NPRM would eliminate or reduce the level of Federal approval actions and would rely on State ROW operating manuals to guide the

implementation of appropriate practices. The proposed regulation contains a provision for States to certify that their ROW manuals are current and conform to Federal requirements. Alternatives to this procedure were considered. One option would be to retain the current FHWA approval process. We solicit comments on these and other alternative approaches that would assure current and accurate ROW operating manuals.

State ROW manuals are considered to be a sound basis for implementing appropriate procedures at the State and local level. It is a State responsibility to maintain the manual and complete the various right-of-way phases in a manner which assures compliance with Federal law and regulations. The manual provides a documented reference for use by State ROW personnel, local public

agencies, affected individuals, and the FHWA.

The FHWA believes that the need for project level surveillance has diminished since the era of the Interstate program when Federal funding was allocated on the basis of the cost to complete the system. Now States receive a fixed allocation of Federal funds based largely on formula. Hence, it is clearly in the States' best interest to use their Federal-aid funds prudently in all areas, including the acquisition, management, and disposition of real property. Since 1991, States have been accorded a wide array of eligible activities for Federal-aid, as well as greatly expanded discretion in the use of Federal-aid funds. This NPPM echoes the policy changes that have occurred throughout the rest of the Federal-aid program for surface transportation.

A major objective of the NPRM is to reorder the regulation so that it follows the same sequence as the development and implementation of a Federal-aid project. This rearrangement in chronological order should aid the public and State transportation departments in locating the parts of the regulation needed to answer their questions.

The proposed revisions clarify the State-Federal partnership and are not considered a major or significant change.

Provisions relating to the real estate issues contained in the Transportation Equity Act for the 21st Century (TEA-21) Pub.L. 105-178, 112 Stat. 107, have been incorporated in these proposed regulations, notably: (1) Allowing credit to the non-Federal share when a State or local government contributes land to a project; (2) allowing States to retain income from sale or lease of real property, as long as the income is used for title 23, U.S.C., purposes; and (3) eliminating the ROW revolving fund.

Current procedures require States to submit a right-of-way certification and availability statement as part of construction PS&E approval. The NPRM accommodates TEA-21 oversight standards by incorporating the need for submission and review of these documents into the oversight agreement required by revised 23 U.S.C. 106.

The NPRM would expand Federal reimbursement for right-of-way acquisition costs, beyond the current limit of "generally compensable" costs. Under current regulations, States and the Federal government must ascertain which types of acquisition costs are generally compensable across the nation and limit Federal reimbursement to those activities. This limits State flexibility, imposes a "one size fits all" philosophy, and creates administrative burdens for both States and the FHWA. State and Federal staff time devoted to isolating and extracting these costs does not add value to the overall transportation program accomplishments. Moreover, States should have greater discretion in determining the best use of formula-allocated Federal funds for acquisition purposes, as they now have in virtually every other aspect of projects funded with Federal-aid. This proposed rule provides that FHWA will reimburse the costs of acquisition and damages in accordance with State law.

Three variations of this reimbursement policy were considered in developing the NPRM. First, the present regulation could be retained as it currently exists. This would require that the FHWA and the States continue

to exclude from Federal reimbursement elements of damage not generally compensable in eminent domain, such as circuity of travel, loss of business or goodwill, and those State required acquisition costs now specifically excluded, such as property owner attorney or appraisal fees. A second alternative could be to allow all valid property damage claims but to retain the limitation on reimbursement of cost elements related to the property acquisition as required by State law, such as property owner appraisal and attorney fees. Under this second alternative, State law, both statute and common, regarding compensability would be relied upon to determine if loss of business or goodwill, diversion of traffic, or other such value related damages are eligible for reimbursement. A third approach would retain the generally compensable standard relating to eligible property damage claims, but permit reimbursement of all usual costs and disbursements associated with property acquisition as required by State law. Comments are solicited on these alternatives or other alternatives to establish the appropriate scope of Federal-aid participation in acquisition costs.

The NPRM includes a TEA-21 provision that the Federal share of proceeds from the sale or lease of real estate originally acquired as part of a Federal-aid project (not limited to airspace) could be retained by the State, if used for projects that would be eligible for funding under title 23, U.S.C. The NPRM would require, with certain exceptions, that the State charge fair market value for the sale or lease of real property if the property was acquired with Federal assistance made available from the highway trust fund. This reflects the provisions of 23 U.S.C. 156 as amended by section 1303 of TEA-21. This revision would reduce administrative burdens on States and the FHWA and give States and local governments greater flexibility in use of funds, while also protecting Federal interests by ensuring funds are used on purposes permitted under title 23, U.S.C. This procedure applies to all disposals, including surplus property from withdrawn Interstate projects, processed subsequent to June 9, 1998, the effective date of TEA-21. Under the rule as proposed, income from all property uses and dispositions would be treated in a uniform manner.

The NPRM also includes a TEA-21 provision that the value of property acquired by States or local governments before project agreement could be credited toward the State share of project cost, as long as certain

conditions, including those relating to the Environmental process, have been met. Prior to TEA-21, private property donated to a Federal project could be credited to the non-Federal share, but no such credit was permitted for publicly owned property. The proposed regulation fulfills TEA-21 statutory provisions by allowing the State credit toward the non-Federal share of the cost of a project, and mandating the credit in the case of locally-owned property. The conditions which must be met to allow the credit would include careful observance of the environmental assessment process.

The NPRM contains separate sections for property donations by private parties and contributions by State or local government to clearly distinguish between these distinct actions, both of which can generate credit for the State or local matching share of a project.

The NPRM continues to specify procedures the States would be required to follow in use of airspace on the Interstate and other National Highway System (NHS) facilities which have received funding under title 23, U.S.C., in any way. However, these airspace requirements would no longer be mandated for non-NHS highways.

The NPRM relocates a significant amount of detail relating to the management of airspace. The detailed provisions for airspace, particularly the detailed geometric requirements for the use of property over or under a highway, would be developed and updated through an official technical advisory, which would be referenced in the final rule. Your comments are solicited regarding the possible use of a technical advisory for these requirements rather than the detailed provisions included in current regulations. An advantage of a technical advisory is that it would be easier to update. Your comments are also solicited regarding additional elements which should be included in either an advisory or in a modified regulation.

The NPRM eliminates the future use of the right-of-way revolving fund. The revolving fund was a pool of money that could be used by States to acquire right-of-way in advance of the time that State funding was available. The revolving fund was eliminated by TEA-21. The only remaining provisions needed for closing out this fund would deal with repayments which will be based on the transition provisions included in sec. 1211(e)(2) of TEA-21.

The NPRM provides that property disposals or any other use of right-of-way along the Interstate requires the State to obtain FHWA concurrence, but this would no longer be required for

non-Interstate highways. Instead, the State ROW manual would specify procedures for the leasing, maintenance and disposal of property rights, including access control.

The NPRM clarifies that where property is to be used for environmental mitigation or environmental banking the provisions of the Uniform Relocation Assistance and Real Property Acquisition Policies Act (Pub.L. 91-646, 84 Stat. 1894, as amended) apply in the acquisition of the property.

Rulemaking Analyses and Notices

All comments received before the close of business on the comment closing date indicated above will be considered and will be available for examination using the docket number appearing at the top of this document in the docket room at the above address or via the electronic addresses provided above. The FHWA will file comments received after the comment closing date in the docket and will consider late comments to the extent practicable. The FHWA may, however, issue a final rule at any time after the close of the comment period. In addition to late comments, the FHWA will also continue to file in the docket relevant information becoming available after the comment closing date, and interested persons should continue to examine the docket for new material.

Executive Order 12866 (Regulatory Planning and Review) and DOT Regulatory Policies and Procedures

The FHWA has determined that this proposed action would not constitute a significant regulatory action within the meaning of Executive Order 12866, nor would it be a significant regulatory action within the Department of Transportation's regulatory policies and procedures. It is anticipated that the economic impact of this rulemaking will be minimal; therefore, a full regulatory evaluation is not required. The FHWA does not consider this proposed action to be significant because these regulations would simplify, clarify, and reorganize existing requirements. The proposed procedures would simply implement current law and eliminate constraints on FHWA reimbursement for certain right-of-way expenditures when those expenditures are made under provisions within State law. Neither the individual nor the cumulative impact of this action would be significant because this action would not alter the funding levels available to the States for Federal or federally assisted programs covered by TEA-21.

Those primarily impacted by the proposed changes have received

briefings of the revisions to be proposed at the last two annual Right-of-Way National Conferences sponsored by the American Association of State Highway Transportation Officials (AASHTO). During the most recent conference in April 1998, the FHWA briefed State right-of-way staffs on the changes being contemplated and asked them to comment when the NPRM is issued.

Regulatory Flexibility Act

In compliance with the Regulatory Flexibility Act (Pub. L. 96-354, 5 U.S.C. 601-612), the agency has evaluated the effects of this proposed rule on small entities and anticipates that this action would not have a significant economic impact on a substantial number of small entities. This proposed action would merely update and clarify existing procedures. The NPRM would also reduce Federal regulatory requirements and allow State procedures to be utilized. Local entities could also adopt State procedures for advancing Federal-aid projects under the State transportation plan. We specifically invite comments on the projected economic impact of this proposal, and will actively consider such information before completing our Regulatory Flexibility Act analysis when adopting final rules.

Environmental Impacts

The FHWA has also analyzed this proposed action for the purpose of the National Environmental Policy Act (42 U.S.C. 4321 *et seq.*), and anticipates that this action would not have any effect on the quality of the human and natural environment.

Executive Order 12612 (Federalism Assessment)

This proposed action has been analyzed in accordance with the principles and criteria contained in Executive Order 12612, and it has been determined that this action would not have sufficient Federalism implications to warrant the preparation of a Federalism assessment. This rule would reduce the level of Federal approval actions by placing greater responsibility at the State or local level. Throughout the proposed regulation there is an effort to keep administrative burdens to a minimum.

Executive Order 12372 (Intergovernmental Review)

Catalog of Federal Domestic Assistance Program Number 20.205 Highway planning and construction. The regulations implementing Executive Order 12372 regarding intergovernmental consultation on

Federal programs and activities apply to this program.

Unfunded Mandates Reform Act

Under Section 202 of the Unfunded Mandates Reform Act of 1995 (Pub. L. 104-4, 109 Stat. 48), the FHWA must prepare a budgetary impact statement on any proposal or final rule that includes a Federal mandate that may result in estimated annual costs to State, local, or tribal government of \$100 million or more. The FHWA has determined that the proposed revisions contained in this NPRM would not result in estimated costs of \$100 million or more to State, local, or tribal governments. This proposed action would simplify and reduce existing requirements. Accordingly no additional costs to State, local, or tribal governments are anticipated as a result of the proposed action.

Paperwork Reduction Act

This proposal contains no new collection of information requirements for purposes of the Paperwork Reduction Act of 1995, 44 U.S.C. 3501-3520. This NPRM would reduce the level of recordkeeping for the disposal of properties and would permit States to retain income for use and disposals of property thereby eliminating the administrative burden of crediting funds to Federal projects.

Regulation Identification Number

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

List of Subjects

23 CFR Part 710

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

23 CFR Parts 712 and 713

Grant programs—transportation, Highways and roads, Reporting and recordkeeping requirements, Rights-of-way.

In consideration of the foregoing, and under the authority of 23 U.S.C. 315, the FHWA proposes to amend title 23, Code of Federal Regulations, chapter I, as set forth below.

1. Part 710 is revised to read as follows:

PART 710—RIGHT-OF-WAY AND REAL ESTATE**Subpart A—General**

Sec.

- 710.101 Purpose.
710.103 Applicability.
710.105 Definitions.

Subpart B—Program Administration

- 710.201 State responsibilities.
710.203 Funding and reimbursement.

Subpart C—Project Development

- 710.301 General.
710.303 Planning.
710.305 Environmental analysis.
710.307 Project agreement.
710.309 Acquisition.
710.311 Construction advertising.

Subpart D—Real Property Management

- 710.401 General.
710.403 Management.
710.405 Air rights on the NHS.
710.407 Leasing.
710.409 Disposals.

Subpart E—Property Acquisition Alternatives

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

Subpart F—Federal Assistance Programs

- 710.601 Federal land transfer.
710.603 Direct Federal acquisition.

Authority: 23 U.S.C. 101(a), 107, 108, 111, 114, 133, 142(f), 145, 156, 204, 210, 308, 315, 317, and 323; 42 U.S.C. 2000d *et seq.*, 4633, 4651–4655; 49 CFR 1.48(b) and (c), 18.31, and parts 21 and 24; 23 CFR 1.32.

Subpart A—General**§ 710.101 Purpose.**

The primary purpose of these requirements is to ensure the prudent use of Federal funds under title 23, U.S.C., in the acquisition, management, and disposal of real property. In addition to the requirements of this part, other real property related provisions apply and are found at 49 CFR part 24.

§ 710.103 Applicability.

This part applies whenever Federal assistance under title 23, U.S.C., is used to acquire real property, unless stated otherwise.

§ 710.105 Definitions.

(a) Terms defined in 49 CFR part 24 and 23 CFR part 1 have the same meaning when used in this part, unless otherwise defined in paragraph (b) of this section.

(b) The following terms when used in this part have the following meaning:
Access rights. The right of ingress and egress from a property that abuts a street or highway.

Acquiring agency. A State agency, other entity, or person acquiring real property for title 23, U.S.C., purposes.

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

Air rights. Real property interests defined by agreement, and conveyed by deed, lease, or permit for the use of airspace.

Airspace. That space located above and/or below a highway or other transportation facility's established grade line, lying within the horizontal limits of the approved right-of-way boundaries.

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

Disposal. The sale of real property or rights therein, including access or air rights, when no longer needed for highway right-of-way or other uses eligible for funding under title 23, U.S.C.

Donation. The voluntary transfer of privately owned real property for the benefit of a public transportation project without compensation or with compensation at less than fair market value.

Early acquisition. Acquisition of real property by State or local governments in advance of Federal authorization or agreement.

Easement. An interest in real property that conveys a right to use a portion of an owner's property or a portion of an owner's rights in the property.

NHS. The National Highway System as defined in 23 U.S.C. 103(b).

Oversight agreement. The project approval and oversight agreement required by 23 U.S.C. 106(c)(3).

Real property. Land and any improvements thereto, including but not limited to, fee interests, easements, air or access rights, and the rights to control use, leasehold, and leased fee interests.

Relinquishment. The conveyance of a portion of a highway right-of-way or facility by a State highway department to another government agency for continued transportation use. (See 23 CFR part 620, subpart B.)

Right-of-way. Real property and rights therein used for the construction, operation, or maintenance of a transportation or related facility funded under title 23, U.S.C.

Settlement. The result of negotiations based on fair market value in which the

amount of just compensation is agreed upon for the purchase of real property or an interest therein.

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

(2) A *legal settlement* is a settlement reached by a responsible State legal representative after filing a condemnation proceeding, including stipulated settlements approved by the court in which the condemnation action had been filed.

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

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

State transportation department (STD). The State highway department, transportation department, or other State transportation agency or commission to which title 23, U.S.C., funds are apportioned.

Uneconomic Remnant. A remainder property which the acquiring agency has determined has little or no utility or value to the owner.

Uniform Act. The Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, as amended (42 U.S.C. 4601 *et seq.*), and the implementing regulations at 49 CFR part 24.

Subpart B—Program Administration**§ 710.201 State responsibilities.**

(a) *Organization.* Each STD shall be adequately staffed, equipped, and organized to discharge its real property-related responsibilities.

(b) *Program oversight.* The STD shall have overall responsibility for the acquisition, management, and disposal of real property on Federal-aid projects. This responsibility shall include assuring that acquisitions and disposals by a State agency are made in compliance with legal requirements of State and Federal laws and regulations.

(c) *Right-of-Way (ROW) Operations Manual.* Each STD shall maintain a manual describing its right-of-way organization, policies, and procedures.

The manual shall describe functions and procedures for all phases of the real estate program, including appraisal and appraisal review, negotiation and eminent domain, property management, and relocation assistance. The manual shall also specify procedures to prevent conflict of interest and avoid fraud, waste, and abuse. The manual shall be in sufficient detail and depth to guide State employees and others involved in acquiring and managing real property.

(1) The STD shall prepare and make available to FHWA an up-to-date Right-of-Way Operations Manual by no later than September 30, 2000.

(2) In October 2000, and every three years thereafter, the chief administrative officer of the STD shall certify to the FHWA that the current ROW operations manual conforms to existing practices and contains necessary procedures to ensure compliance with Federal and State real estate law and regulation.

(3) The STD shall update the manual periodically to reflect changes in operations and make the updated materials available to the FHWA.

(d) *Compliance responsibility.* The STD is responsible for complying with current FHWA requirements whether or not its manual reflects those requirements.

(e) *Adequacy of real property interest.* The real property interest acquired for all Federal-aid projects funded pursuant to title 23, U.S.C., shall be adequate for the construction, operation, and maintenance of the resulting facility and for the protection of both the facility and the traveling public.

(f) *Recordkeeping.* The acquiring agency shall maintain adequate records of its acquisition and property management activities.

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

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

(ii) The date a credit toward the Federal share of a project is approved based on early acquisition activities of the State.

(2) Property management records shall include inventories of real property considered excess to project needs, all authorized uses of airspace, and other leases or agreements for use of real property managed by the STD.

(g) *Procurement.* Contracting for all activities required in support of State right-of-way programs through use of private consultants and other services shall conform to 49 CFR 18.36.

(h) *Use of other public land acquisition organizations or private consultants.* The STD may enter into written agreements with other State, county, municipal, or local public land acquisition organizations or with private consultants to carry out its authorities under paragraph (b) of this section. Such organizations, firms, or individuals must comply with the policies and practices of the STD. The STD shall monitor any such real property acquisition activities to assure compliance with State and Federal law and requirements and is responsible for informing such organizations of all such requirements and for imposing sanctions in cases of material non-compliance.

(i) *Approval actions.* Except for the Interstate system, the STD and the FHWA will agree on the scope of property related oversight and approval actions that the FHWA will be responsible for under this part. The content of the most recent Oversight Agreement shall be reflected in the State Right-of-Way Operations Manual. The Oversight Agreement, and thus the Manual, will indicate for which non-Interstate Federal-aid project submission of materials for review and approval are required.

(j) *Approval of just compensation.* The amount determined to be just compensation shall be approved by a responsible official of the acquiring agency.

(k) *Description of acquisition process.* The STD shall provide persons affected by projects or acquisitions advanced under title 23, U.S.C., with a written description of its real property acquisition process under State law and of the owner's rights, privileges, and obligations. The description shall be written in clear, non-technical language and, where appropriate, be available in languages other than English.

§ 710.203 Funding and reimbursement.

(a) *General conditions.* The following conditions are a prerequisite to Federal participation in the costs of acquiring real property:

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

(2) The State has executed a project agreement;

(3) Preliminary acquisition activities, including a title search and preliminary property map preparation necessary for

the completion of the environmental process, can be advanced under preliminary engineering prior to National Environmental Policy Act (NEPA) clearance, while other work involving contact with affected property owners must be deferred until after NEPA approval, except as provided in § 710.503 for protective buying and hardship acquisition; and

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

(b) *Eligible costs.* Federal participation in real property costs is limited to the costs of property incorporated into the final project, unless provided otherwise. Participation is provided for:

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

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

(ii) The cost of pre-acquisition activities such as appraisal, appraisal review, cost estimates, relocation planning, right-of-way plan preparation, title work, and similar necessary right-of-way related work.

(iii) The cost to acquire real property, including incidental expenses.

(iv) The cost of administrative settlements in accordance with 49 CFR 24.102(i), legal settlements, court awards, and costs incidental to the condemnation process.

(2) *Relocation assistance and payments.* Payments made incidental to and associated with the displacement from acquired property under 49 CFR part 24.

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

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

(5) *Payroll-related expenses and technical guidance.* Salary and related expenses of employees of an acquiring agency are eligible costs in accordance with OMB Circular A-87.¹ This includes State costs incurred for managing or providing technical

¹ OMB circulars may be obtained from the EOP Publications Office, 725 17th Street, NW., Room 2200, Washington, DC 20503 and at OMB's Internet home page at <http://www.whitehouse.gov/WH/EOP/omb>.

guidance, consultation or oversight on projects where right-of-way services are performed by a political subdivision or others.

(6) *Property not incorporated into a transportation project.* The cost of property not incorporated into a transportation project may be eligible for reimbursement in the following circumstances:

(i) *General.* Costs for construction material sites, property acquisitions to a logical boundary, or for eligible transportation enhancement, environmental mitigation, or environmental banking activities.

(ii) *Easements not incorporated into the right-of-way.* The cost of acquiring easements outside the right-of-way for permanent or temporary use.

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

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

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

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

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

Subpart C—Project Development

§ 710.301 General.

The project development process typically follows a sequence of actions and approvals in order to qualify for funding. The key steps in this process are provided in this subpart.

§ 710.303 Planning.

State and local governments conduct metropolitan and statewide planning to

develop coordinated, financially constrained system plans to meet transportation needs for local and statewide systems, under provisions contained in 23 CFR part 450. Projects must be included in an approved State Transportation Improvement Program (STIP) in order to be eligible for Federal-aid funding.

§ 710.305 Environmental analysis.

The NEPA process as described in 23 CFR part 771 normally must be conducted and concluded with a record of decision (ROD), FONSI, or CE determination before Federal funds can be placed under agreement for acquisition of right-of-way. Where applicable, a State also must complete Clean Air Act project level conformity analysis. At the time of processing an environmental document, a State may request reimbursement of costs incurred for early acquisition, provided conditions prescribed in 23 U.S.C. 108(c) and § 710.501, are satisfied.

§ 710.307 Project agreement.

As a condition of Federal-aid, the STD shall obtain FHWA authorization in writing or electronically before proceeding with any real property acquisitions, including hardship acquisition and protective buying (see § 710.503). The STD must prepare a project agreement in accordance with 23 CFR part 630, subpart C. The agreement shall be based on an acceptable estimate for the cost of acquisition. On projects where the initial project agreement was executed after June 9, 1998, a State may request credit toward the non-Federal share, for early acquisitions, donations, or other contributions applied to the project provided conditions in 23 U.S.C. 323 and § 710.501 are satisfied.

§ 710.309 Acquisition.

The process of acquiring real property includes appraisal, appraisal review, establishing just compensation, negotiations, administrative and legal settlements, and condemnation. The State shall conduct acquisition and related relocation activities in accordance with 49 CFR Part 24.

§ 710.311 Construction advertising.

The State must manage real property acquired for a project until it is required for construction. Clearance of improvements can be scheduled during the acquisition phase of the project using sale/removal agreements, separate demolition contracts, or be included as a work item in the construction contract. On Interstate projects, prior to advertising for construction, the State shall develop ROW availability

statements and certifications related to project acquisitions as required by 23 CFR 635.309. For non-Interstate projects, the Oversight Agreement must specify responsibility for the review and approval of the ROW availability statements and certifications. Generally, for non-NHS projects, the State has full responsibility for determining that right-of-way is available for construction.

Subpart D—Real Property Management

§ 710.401 General.

This subpart describes the acquiring agency's responsibilities to control the use of real property required for a project in which Federal funds participated in any phase of the project. Prior to allowing any change in access control or other use or occupancy of acquired property along the Interstate, the STD shall secure an approval from the FHWA for such change or use. The STD shall specify in the State's ROW Operations Manual, procedures for the rental, leasing, maintenance, and disposal of real property acquired with title 23, U.S.C., funds. The State shall assure that local agencies follow the State's approved procedures, or the local agencies own procedures if approved for use by the STD.

§ 710.403 Management.

(a) The STD must assure that all real property within the boundaries of a federally-aided facility is devoted exclusively to the purposes of that facility and is preserved free of all other public or private alternative uses, unless such additional uses are permitted by Federal regulation or the FHWA. An alternative use must be consistent with the continued operation, maintenance, and safety of the facility, and such use shall not result in the exposure of the facility's users or others to hazards.

(b) The STD shall specify procedures in the State manual for determining when a real property interest is no longer needed. These procedures must provide for coordination among relevant STD organizational units, including maintenance, safety, design, planning, right-of-way, environment, access management, and traffic operations.

(c) The STD shall evaluate the environmental effects of disposal and leasing actions requiring FHWA approval as provided in 23 CFR part 771.

(d) Acquiring agencies shall charge current fair market value or rent for the use or disposal of real property interests, including access control, if those real property interests were obtained with title 23, U.S.C., funding. Exceptions to the requirement for

charging fair market value may be approved in the following situations:

(1) With FHWA approval, when the STD clearly shows that an exception is in the public interest, for: social, environmental, or economic purposes; non-proprietary governmental use; or uses under 23 U.S.C. 142(f), Public Transportation. The STD shall submit requests for such exceptions to the FHWA in writing.

(2) Use by public utilities is covered under separate regulations (23 CFR part 645).

(3) Railroads may be accommodated in accordance with 23 CFR part 646.

(4) Bikeways and pedestrian walkways may be accommodated in accordance with 23 CFR part 652.

(e) The Federal share of net income from the sale or lease of excess real property shall be used by the STD for activities eligible for funding under title 23, U.S.C.

§ 710.405 Air rights on the NHS.

(a) The FHWA policies relating to management of airspace on the NHS for non-highway purposes are included in this section. This subpart applies to the Interstate and to other National Highway System (NHS) facilities which receive title 23, U.S.C., assistance in any way. This section does not apply to non-NHS highways; to railroads and public utilities which cross or otherwise occupy Federal-aid highway rights-of-way, nor to relocations of railroads or utilities for which reimbursement is claimed under subpart H and E of 23 CFR part 140; and bikeways and pedestrian walkways as covered in 23 CFR part 652.

(b) A STD may grant rights for temporary or permanent occupancy or use of NHS airspace if the STD has acquired sufficient legal right, title, and interest in the right-of-way of a federally assisted highway to permit the use of certain airspace for non-highway purposes; and where such airspace is not required presently or in the foreseeable future for the safe and proper operation and maintenance of the highway facility. The STD must obtain prior FHWA approval, except for paragraph (c) of this section.

(c) A State Agency may make lands and rights-of-way available without charge to a publicly owned mass transit authority for public transit purposes whenever the public interest will be served, and where this can be accomplished without impairing automotive safety or future highway improvements.

(d) An individual, company, organization, or public agency desiring to use NHS airspace shall submit a

written request to the STD. If the STD recommends approval it shall forward an application together with its recommendation and any necessary supplemental information including the proposed airspace agreement to the FHWA. The submission shall affirmatively provide for adherence to all policy requirements contained in this subpart and conform to the provisions in the FHWA's Technical Advisory on Airspace Utilization.²

§ 710.407 Leasing.

(a) Leasing of real property acquired with title 23, U.S.C., funds shall be covered by an agreement between the STD and lessee which contains provisions to insure the safety and integrity of the federally funded facility. It shall also include provisions governing lease revocation, removal of improvements at no cost to the FHWA, adequate insurance to hold the State and the FHWA harmless, nondiscrimination, access by the STD and the FHWA for inspection, maintenance, and reconstruction of the facility.

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

(c) Proposed uses of real property shall conform to the current design standards and safety criteria of the Federal Highway Administration for the functional classification of the highway facility in which the property is located.

§ 710.409 Disposals.

(a) Real property interests determined to be excess to transportation needs may be sold or conveyed to a public entity or to a private party in accordance with § 710.403(d).

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

(c) Real property interests may be retained to restore, preserve, or improve the scenic beauty and environmental quality adjacent to the transportation facility.

²This FHWA directive is available for public inspection and copying as prescribed at 49 CFR part 7.

(d) Where the transfer of properties to other agencies at less than fair market value for continued public use is clearly justified as in the public interest and approved by FHWA, the deed shall provide for reversion of the property for failure to continue public ownership and use. Disposal actions which do not generate fair market value require a public interest determination and FHWA approval, consistent with 23 CFR 710.403(c).

Subpart E—Property Acquisition Alternatives

§ 710.501 Early acquisition.

(a) *Real property acquisition.* The State may initiate acquisition of real property at any time it has the legal authority to do so based on program or project considerations. The State may undertake early acquisition for corridor preservation, access management, or other purposes.

(b) *Eligible costs.* Acquisition costs incurred by a State agency prior to executing a project agreement with FHWA are not eligible for Federal-aid reimbursement. However, such costs may become eligible for reimbursement or use as a credit towards the State's share of a Federal-aid project if the following conditions are met:

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

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

(3) The property was acquired in accordance with the provisions of 49 CFR part 24;

(4) The requirements of title VI of the Civil Rights Act of 1964 (42 U.S.C. 2000d *et seq.*) had been complied with;

(5) The State determined and the FHWA concurs that the action taken did not influence the environmental assessment for the project, including:

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

(ii) The consideration of alternatives; and

(iii) The selection of the design or location; and

(6) The property will be incorporated into a Federal-aid project.

(c) *Reimbursement.* In addition to meeting all provisions in paragraph (b) of this section, the FHWA approval for reimbursement for early acquisition costs, including costs associated with displacement of owners or tenants, requires the STD to demonstrate that:

(1) Prior to acquisition, the STD made the certifications and determinations required by 23 U.S.C. 108(c)(2)(C) and (D); and

(2) The STD obtained concurrence from the Environmental Protection

Agency in the findings made under paragraph (b)(5) of this section regarding the NEPA process.

(d) *Credit*. In addition to meeting all provisions in paragraph (b) of this section, for original project agreements executed on or after June 9, 1998, the State can apply for a credit toward the State's non-Federal share of project costs for real property required by the project.

§ 710.503 Protective buying and hardship acquisition.

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

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

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

(3) A section 4(f) determination has been completed for any property subject to the provisions of 49 U.S.C. 303, and 23 U.S.C. 138;

(4) Procedures of the Advisory Council on Historic Preservation are completed for properties subject to 16 U.S.C. 470(f) (historic properties).

(b) *Protective buying*. The STD must clearly demonstrate that development of the property is imminent and such development would create extreme adverse impacts on future transportation use. The FHWA will not approve advance acquisition proposed solely for reducing project cost.

(c) *Hardship acquisitions*. The STD must accept and concur in a request for a hardship acquisition based on a property owners' written submission that contains:

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

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

(d) *Environmental decisions*. Acquisition of property under this section shall not influence the environmental assessment of a project,

including the decision relative to the need to construct the project or the selection of a specific location.

§ 710.505 Real property donations.

(a) *Donations of property being acquired*. A non-governmental owner whose real property is required for a Federal-aid project may donate the property to the acquiring agency. Prior to accepting the property, the owner must be informed by the agency of his/her right to receive just compensation for the property. The owner shall also be informed of his/her right to an appraisal of the property by a qualified appraiser, unless the Agency determines that an appraisal is unnecessary because the valuation problem is uncomplicated and the fair market value is estimated at no more than \$2500 or the State appraisal waiver limit approved by the FHWA, whichever is greater. All donations of property received prior to the approval of the NEPA document must meet environmental requirements as specified in 23 U.S.C. 323(d).

(b) *Credit for donations*. Donations of real property may be credited to the State's matching share of the project. Credit to the State's matching share for donated property shall be based on fair market value established on the earlier of the date on which the donation becomes effective or the date on which equitable title to the property vests in the State. The fair market value shall not include increases or decreases in value caused by the project. Donations may be made at anytime during the development of a project. The STD shall develop sufficient documentation to indicate compliance with paragraph (a) of this section and to support the amount of credit applied. The total credit cannot exceed the State's pro-rata share under the project agreement to which it is applied.

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

§ 710.507 State and local contributions.

(a) *General*. Real property owned by State and local governments incorporated within a federally funded project can be used as a credit toward the State matching share of total project cost. A credit cannot exceed the State's

matching share required by the project agreement.

(b) *Effective date*. Credits can be applied to projects where the initial project agreement is executed after June 9, 1998.

(c) *Exemptions*. Credits are not available for lands acquired with any form of Federal financial assistance, or for lands already incorporated and used for transportation purposes.

(d) *State contributions*. Real property acquired with State funds and required for federally-assisted projects may support a credit toward the non-Federal share of project costs. The STD must prepare documentation supporting all credits including:

(1) A certification it met the requirements in § 710.501; and

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

(e) *Credit for local government contributions*. A contribution by a unit of local government of real property in connection with a project eligible for assistance under this title shall be credited against the State share of the project at fair market value of the real property. The STD shall assure that provisions in § 710.401 have been complied with, and that documentation justifies the amount of the credit.

§ 710.509 Functional replacement of real property in public ownership.

(a) *General*. When publicly owned real property, including land and/or facilities, is to be acquired for a Federal-aid highway project, in lieu of paying the fair market value for the real property, the State may provide compensation by functionally replacing the publicly owned real property with another facility which will provide equivalent utility.

(b) *Federal participation*. Federal-aid funds may participate in functional replacement costs only if:

(1) Functional replacement is permitted under State law and the STD elects to provide it.

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

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

(4) The State has informed the agency owning the property of its estimate of just compensation based on an appraisal of fair market value and of the option to choose either just compensation or functional replacement.

(5) The FHWA concurs in the STD determination that functional replacement is in the public interest.

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

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

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

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

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

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

§ 710.511 Transportation enhancements.

(a) *General.* Section 133(b)(8) of title 23, U.S.C., authorizes the expenditure of surface transportation funds for transportation enhancement activities (TEA). Transportation enhancement activities which involve the acquisition, management, and disposition of real property, and the relocation of families, individuals, and businesses, are governed by the general requirements of the Federal-aid program found in titles 23 and 49 of the Code of Federal Regulations (CFR), except as specified in paragraph (b)(3) of this section.

(b) *Requirements.* (1) Acquisitions and displacements for TEA are subject to the Uniform Act.

(2) Except as provided in paragraphs (b)(3) and (b)(4) of this section, entities acquiring real property for TEA who lack the power of eminent domain may comply with the Uniform Act by meeting the limited requirements under 49 CFR 24.101(a)(2).

(3) The requirements of the Uniform Act do not apply when real property acquired for a TEA was purchased from a third party by a qualified conservation organization, and—

(i) The conservation organization is not acting on behalf of the agency receiving TEA or other Federal-aid funds; and

(ii) There was no Federal approval of property acquisition prior to the

involvement of the conservation organization. ("Federal approval of property acquisition" means the date of the approval of the environmental document or project authorization/agreement, whichever is earlier.

"Involvement of the conservation organization" means the date the organization makes a legally binding offer to acquire a real property interest (including an option to purchase) in the property.)

(4) When a qualified conservation organization acquires real property for a project receiving Federal-aid highway funds on behalf of an agency with eminent domain authority, the requirements of the Uniform Act apply as if the agency had acquired the property itself.

(5) When, subsequent to Federal approval of property acquisition, a qualified conservation organization acquires real property for a project receiving Federal-aid highway funds, and there will be no use or recourse to the power of eminent domain, the limited requirements of 49 CFR 24.101(a)(2) apply.

(c) *Property management.* Real property acquired with TEA funds shall be managed in accordance with the property management requirements provided in subpart D of this part. Any use of the property for purposes other than that for which the TEA funds were provided must be consistent with the continuation of the original use. When the original use of the real property is converted by sale or lease to another use inconsistent with the original use the STD shall assure that the fair market value or rent is charged and the proceeds reapplied to title 23 purposes.

§ 710.513 Environmental mitigation.

(a) The acquisition and maintenance of land for wetlands mitigation, wetlands banking, natural habitat, or other appropriate environmental mitigation is an eligible cost under the Federal-aid program. FHWA participation in wetland mitigation sites and other mitigation banks is governed by 23 U.S.C. 103(b)(6)(M), 133(b)(11), and 23 CFR part 777.

(b) Environmental acquisitions or displacements by both public agencies and private parties are covered by the Uniform Act when they are for or related to (or the result of) a program or project undertaken by a Federal agency or one that receives Federal financial assistance. This includes real property acquired for a wetland bank, or other environmentally related purpose, for a Federal or Federal-aid project. Where private entities develop private wetland banks unrelated to Federal or Federal-

aid projects there would be no applicability of Uniform Act provisions.

Subpart F—Federal Assistance Programs

§ 710.601 Federal land transfer.

(a) The provisions of this subpart apply to any project undertaken with funds for the National Highway System. If the FHWA determines that a Federal transportation interest exists, these provisions apply to projects constructed on a Federal-aid system or that are under provisions in chapter 2 of title 23, U.S.C.

(b) Sections 107(d) and 317 of title 23, U.S.C., provide for the transfer of lands or interests in lands owned by the United States to a STD or its nominee for highway purposes.

(c) The STD may file an application with the FHWA, or can make application directly to the land-owning agency if the land-owning agency has its own authority for granting interests in land.

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

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

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

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

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

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

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

(7) A statement of compliance with the National Environmental Policy Act of 1969 (42 U.S.C. 4332, *et seq.*) and any other applicable Federal environmental laws, including the National Historic Preservation Act (16 U.S.C. 470(f)), 49 U.S.C. 303, and 23 U.S.C. 138.

(e) If FHWA concurs in the need for the transfer, the land-owning agency will be notified and a right-of-entry requested. The land-owning 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. FHWA may extend the four-month reply period at the timely request of the land-owning agency for good cause.

(f) Deeds for conveyance of lands or interests in lands owned by the United States shall be prepared by the STD and

certified by an attorney licensed within the State as being legally sufficient. Such deeds shall contain the clauses required by the FHWA and 49 CFR 21.7(a)(2). After the STD prepares the deed, it will submit the proposed deed with the certification to the FHWA for review and execution.

(g) Following execution, the STD shall record the deed in the appropriate land record office and so advise the FHWA and the concerned agency.

(h) When the need for the interest acquired under this subpart no longer exists, the STD must restore the land to the condition which existed prior to the transfer and must give notice to the FHWA and to the concerned Federal agency that such interest will immediately revert to the control of the Federal agency from which it was appropriated or to its assigns.

§ 710.603 Direct Federal acquisition.

(a) The provisions of this section apply to projects on the Interstate System, defense access roads, public lands highways, park roads, parkways, Indian reservation roads, and projects performed by the FHWA in cooperation with Federal and State agencies. For projects on the Interstate System and defense access roads, the provisions of this part are applicable only where the State is unable to acquire the required right-of-way or is unable to obtain possession with sufficient promptness.

(b) To enable the FHWA to make the necessary finding to proceed with the acquisition of the rights-of-way, the STD's written application for Federal acquisition shall include:

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

(2) The date the FHWA authorized the STD to commence right-of-way acquisition, the date of the project agreement and a statement that the agreement contains the provisions required by 25 U.S.C. 111;

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

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

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

(6) A statement on compliance with the provisions of 23 CFR part 771;

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

(8) An outline of the negotiations which have been conducted by the STD with landowners;

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

(10) A statement that assures compliance with the applicable provisions of the Uniform Act. (42 U.S.C. 4601, *et seq.*)

(c) If the landowner tenders a right-of-entry at any time before the FHWA makes a determination that the STD is unable to acquire the rights-of-way with sufficient promptness, the STD is legally obligated to accept such tender and the FHWA may not proceed with Federal acquisition.

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

(e) When the United States obtains a court order granting possession of the real property, the FHWA shall authorize the STD to take over supervision of the property. The authorization shall include, but need not be limited to, the following:

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

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

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

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

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

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

(7) The requirement for appropriate credits to the United States for any net

salvage or net rentals obtained by the State, as in the case of right-of-way acquired by the State for Federal-aid projects; and

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

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

(g) As soon as practicable after the date of payment of the purchase price or the date of deposit in court of funds to satisfy the award of the compensation in a Federal condemnation, the FHWA shall reimburse the owner to the extent deemed fair and reasonable, the following costs:

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

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

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

(h) The lands or interests in lands, acquired under these provisions, will be conveyed to the State or the appropriate political subdivision thereof, upon agreement by the STD, or said subdivision to:

(1) Maintain control of access where applicable;

(2) Accept title thereto;

(3) Maintain the project constructed thereon;

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

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

(i) The deed from the United States to the State, or to the appropriate political subdivision thereof, shall include the conditions required by 49 CFR part 21.

The deed shall be recorded by the grantee in the appropriate land record office, and the FHWA shall be advised of the recording date.

PART 712—[REMOVED]

2. Part 712 is removed.

PART 713—[REMOVED]

3. Part 713 is removed.

Issued on: December 16, 1998.

Kenneth R. Wykle,

Federal Highway Administrator.

[FR Doc. 98-33994 Filed 12-23-98; 8:45 am]

BILLING CODE 4910-22-U

LIBRARY OF CONGRESS

Copyright Office

37 CFR Part 255

[Docket No. 96-4 CARP DPRA]

Mechanical and Digital Phonorecord Delivery Rate Adjustment Proceeding

AGENCY: Copyright Office, Library of Congress.

ACTION: Notice of proposed rulemaking.

SUMMARY: The Copyright Office of the Library of Congress is submitting for public comment proposed regulations which set the royalty rate for the delivery of digital phonorecords in general and defer until the next scheduled rate adjustment proceeding further consideration of the royalty rate for the delivery of a digital phonorecord where the reproduction or distribution is incidental to the transmission which constitutes a digital phonorecord delivery.

DATES: Comments are due by January 25, 1999.

ADDRESSES: If sent by mail, an original and five copies of comments, should be addressed to: Copyright Arbitration Royalty Panel ("CARP"), PO Box 70977, Southwest Station, Washington, DC 20024. If hand delivered, an original and five copies of comments, should be brought to: Office of the Copyright General Counsel, James Madison Memorial Building, Room LM-403, First and Independence Avenue, SE., Washington, DC 20559-6000.

FOR FURTHER INFORMATION CONTACT:

David O. Carson, General Counsel, or Tanya M. Sandros, Attorney Advisor, Copyright Arbitration Royalty Panel ("CARP"), PO Box 70977, Southwest Station, Washington, DC 20024. Telephone (202) 707-8380. Telefax: (202) 252-3423.

SUPPLEMENTARY INFORMATION: On November 1, 1995, Congress passed the

Digital Performance Right in Sound Recordings Act of 1995 ("Digital Performance Act"). Pub. L. 104-39, 109 Stat. 336. Among other things, it confirms and clarifies that the scope of the compulsory license to make and distribute phonorecords of nondramatic musical compositions includes the right to distribute or authorize distribution by means of a digital transmission which constitutes a "digital phonorecord delivery." 17 U.S.C. 115(c)(3)(A). A "digital phonorecord delivery" is defined as "each individual delivery of a phonorecord by digital transmission of a sound recording which results in a specifically identifiable reproduction by or for any transmission recipient of a phonorecord of that sound recording * * *." 17 U.S.C. 115(d).

The Digital Performance Act established that the rate for all digital phonorecord deliveries ("DPDs") made or authorized under a compulsory license on or before December 31, 1997, was the same rate in effect for the making and distribution of physical phonorecords. 17 U.S.C. 115(c)(3)(A)(i). For digital phonorecord deliveries made or authorized after December 31, 1997, the Digital Performance Act established a two-step process for determining the terms and rates. 17 U.S.C. 115(c)(3)(A)(ii). The first step in the process is a voluntary negotiation period initiated by the Librarian of Congress to enable copyright owners and users of the section 115 digital phonorecord delivery license to negotiate the terms and rates of the license. The Librarian initiated this period on July 17, 1996, and directed it to end on December 31, 1996. 61 FR 37213 (July 17, 1996).

The second step of the process is the convening of a Copyright Arbitration Royalty Panel ("CARP") to determine reasonable terms and rates for digital phonorecord deliveries for parties not subject to a negotiated agreement. In the July 17, 1996, **Federal Register** notice, the Library stated that CARP proceedings would begin, in accordance with the rules of 37 CFR part 251, on January 31, 1997. 61 FR 37214 (July 17, 1996). The Library also directed those parties not subject to a negotiated agreement to file their petitions to convene a CARP, as required by 17 U.S.C. 115(c)(3)(D), by January 10, 1997, and their Notices of Intent to Participate in CARP proceedings by January 17, 1997. 61 FR 37214-15 (July 17, 1996). In addition, the Library directed interested parties to comment by November 8, 1996, on the possibility of consolidating the CARP proceeding to determine terms and rates for digital phonorecord deliveries with the

proceeding to adjust the mechanical royalty rate for the making and distributing of physical phonorecords. 61 FR 37215 (July 17, 1996).

On November 8, 1996, the Library received a joint motion from the Recording Industry Association of America ("RIAA"), the National Music Publishers' Association, Inc. ("NMPA"), and The Harry Fox Agency, Inc. ("Harry Fox") to vacate the scheduled dates appearing in the July 17, 1996, **Federal Register** notice for convening a CARP. The Library vacated the schedule on December 11, 1996, and established a new precontroversy discovery schedule and date for the filing of Notices of Intent to Participate. 61 FR 65243 (December 11, 1996).

After publication of the new schedule, representatives of the RIAA, NMPA and Harry Fox informed the Library that terms and rates for digital phonorecord deliveries could be negotiated through voluntary agreement and requested that the Library vacate the new schedule to allow sufficient time for such negotiations. The Library vacated the new schedule on February 3, 1997. 62 FR 5057 (February 3, 1997). In time, the parties did reach a voluntary agreement and, pursuant to the rules, the Library published the proposed rates and terms for digital phonorecord deliveries for public comment. 62 FR 63506 (December 1, 1997). In that notice of proposed rulemaking, the Library specified that any party that objected to the proposed rates and terms was required to file a Notice of Intent to Participate and was expected to fully participate in a CARP proceeding. 62 FR 63507 (December 1, 1997).¹

Three parties filed comments to the proposed terms and rates, the United States Telephone Association ("USTA"), the Coalition of Internet Webcasters ("Webcasters"), and Broadcast Music, Inc. ("BMI"). USTA and the Webcasters also filed their Notices of Intent to Participate because they challenged directly the proposed rates and terms for the delivery of incidental digital phonorecord deliveries. BMI, on the other hand, did not file a Notice of Intent to Participate

¹ On July 1, 1998, the Copyright Office published a notice requesting that any other party with an interest in participating in a CARP proceeding to establish the rates and terms for digital phonorecord deliveries file a Notice of Intent to Participate. 63 FR 35984 (July 1, 1998). In response to this request, the Office received Notices of Intent to Participate from the RIAA, NMPA, Harry Fox, the Songwriters Guild of America ("SGA"), the American Federation of Television and Radio Artists ("AFTRA"), America Online, Inc. ("AOL"), Digital Cable Radio Associates ("DCR"), SESAC, Inc., and the American Society for Composers, Authors and Publishers ("ASCAP").