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Frequently Asked Questions (FAQs)

Right-of-Way (ROW)

23 CFR Parts 635, 710 and 810

(as amended August 23, 2016 (81 FR 57716))

This document contains frequently asked questions (FAQ) that users may have about the 23 CFR 710 final rule regarding right-of-way and real estate issues which was published in the Federal Register on August 23, 2016:

[FHWA Final Rule, 23 CFR Parts 635, 710 and 810.](#)

The FAQ's have been developed as a resource and guidance which is organized to provide users a convenient method of finding answers to questions that we have received about the requirements of this final rule.

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§ 635

Subpart C – Authorization

1. **Q: § 635.309. Can FHWA approve advertisement for bids if all the ROW is not acquired?**

A: Yes. The FHWA can approve a conditional ROW certification in accordance with 23 CFR 635.309(c)(3). The grantee must have acquired all but a few of the necessary properties, and must have made adequate housing available to all occupants of the residences on the parcels not yet acquired, in accordance with 49 CFR 24.204. If all applicable requirements of section 635.309(c)(3) are satisfied, FHWA will approve requests to advertise for bids unless FHWA determines that it is not in the public interest.

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2. **Q: § 635.309(c)(3)(ii). Can FHWA approve a request to proceed with construction if all necessary ROW has not been secured?**

A: It depends. The FHWA will approve the request only in exceptional circumstances showing that proceeding with construction is in the public interest. In most cases, approval to proceed with construction should occur only when all necessary ROW has been secured.

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3. **Q: § 635.309(c)(3)(iv). Is there a specific form the SDOT must use to provide FHWA an updated notification of locations if right of occupancy and use has not been obtained?**

A: No. There is not a specific form required by the Federal regulations. Updating the Conditional ROW Certificate may be sufficient if such an update meets the requirements of 23 CFR 635.309(c)(iv). Each SDOT should work with their FHWA Division office to determine the type of form to be used to document the updated notification. The procedure must be documented in the State ROW manual (23 CFR 710.201(c)).

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§ 710

Subpart A – General:

4. Q. § 710.105(b). Are agreements that result from mediation or stipulated settlements permitted?

A: Yes. Mediation and stipulated settlements are permitted on Federal-aid projects and are included under the definition of legal settlements.

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5. Q. § 710.105(b). Do legal settlements that result from mediation or stipulated settlements require an attorney?

A: No. These legal settlements do not require an attorney; only that a responsible official of the acquiring agency must have the legal power vested in him/her by State law to settle such claims after a condemnation action has been filed.

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Subpart B – Program Administration

6. Q: § 710.201. Are there specific qualifications or standards that State employees or consultants must have to perform ROW work?

A: It depends. There are no specific Federal requirements; however, each State should develop qualifications for their employees and consultants to ensure they are competent, adequately trained, and organized to discharge its real property related responsibilities (23 CFR 710.201(b)). Each State should detail these qualifications in the federally-approved State ROW manual. (23 CFR 710.201(c))

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7. Q: § 710.201(d)(3). Who may use a Real Estate Acquisition Management Plan (RAMP) in lieu of a ROW manual, and when is it appropriate?

A: 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 use of a RAMP is appropriate if the program or project is non-controversial, and the project is not complex. The authority to allow the use of a RAMP and the responsibility for review, approval, and monitoring of a RAMP's use lies with the Agency (e.g., SDOT or FHWA) who directly provided funds to the subgrantee (see 23 CFR 710.201(c)(1)).

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8. Q: § 710.201(d)(3). Is there a list of items a RAMP must include, and has FHWA provided samples of an acceptable RAMP?

A: No. There is not a list of required items for a RAMP, and FHWA has not made sample RAMPs available. An approved RAMP 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. The FHWA may develop a research project to determine what should be included in a RAMP, and may later publish samples of acceptable RAMPs.

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9. Q: § 710.201(h). May the SDOT assume responsibilities under part 710 not specifically delegated in the Stewardship & Oversight agreement?

A: No. The FHWA must authorize any assignment of FHWA approvals, including those in 23 CFR part 710, to the SDOT in the Stewardship and Oversight agreement. If a part 710 responsibility is not addressed in the Stewardship & Oversight agreement, the responsibility remains with FHWA.

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10. Q: § 710.203(a)(3). Is Federal-aid participation permitted for the costs to perform preliminary relocation-planning activities prior to the completion of NEPA?

A: Yes. Preliminary relocation activities, which are limited to searching for comparable properties, identifying replacement neighborhoods and identifying available public services, may be acceptable preliminary engineering expenses. However, any personal contact with affected property owners for purposes of negotiation and relocation assistance must normally be deferred until after NEPA approval except as provided in 23 CFR 710.501, for early acquisition; and in 23 CFR 710.503 for protective buying and hardship acquisition (23 CFR 710.203(a)(3)); and in 49 CFR 24.102(c)(1) for contact necessary for owner or owner's designated representative to accompany the appraiser during the appraiser's inspection of the property.

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11. Q: § 710.203(a)(3). Is Federal-aid participation permitted for appraisal preparation costs incurred prior to the project's NEPA decision?

A: Yes. The preparation of appraisals and appraisal waiver valuations performed prior to the NEPA decision on the project are eligible preliminary engineering expenses. However, any personal contact with affected property owners for purposes of negotiation and relocation assistance must normally be deferred until after NEPA approval except as provided in 23 CFR 710.501, early acquisition; and in 23 CFR 710.503 for protective buying and hardship acquisition (23 CFR 710.203(a)(3)).

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12. Q: § 710.203(b) and (d). What is a direct cost vs. an indirect cost?

A: For a cost to be eligible for Federal-aid participation, it must fit within one of two categories—direct cost or indirect cost.

Direct costs are those costs that can be identified specifically with a particular final cost objective such as a Federal award or that can be directly assigned to such activities relatively easily with a high degree of accuracy. 2 CFR 200.413 Authorized project-level acquisition activities may include the costs of acquiring the real property incorporated into the final project and the associated costs of acquisition. See 23 CFR 710.203(b) for a list of authorized costs.

Indirect costs are those costs incurred for a common or joint purpose benefitting more than one cost objective, and not readily assignable to the cost objectives specifically benefitted, without effort disproportionate to the results achieved. 2 CFR 200.56. Indirect costs are program-level activities, and an indirect cost allocation plan must be prepared in accordance with 2 CFR 200.416 and approved by FHWA (and in some cases a SDOT). Indirect cost may include costs of providing program-level guidance, consultation, and oversight to other acquiring agencies and contractors where ROW activities on title 23 funded projects are performed by non-SDOT personnel. 23 CFR 710.203(d)

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13. Q: § 710.203(b)(1)(vi). Is Federal-aid participation permitted for closing costs?

A: Yes. Closing costs and costs of finalizing the acquisition are eligible for participation if the costs are ordinary and reasonable costs associated with those activities. 49 CFR 24.401(e) provides a list of incidental expenses incurred by a displaced person incident to the purchase of a replacement dwelling and customarily paid by the buyer.

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14. Q: § 710.203(b)(4). Is Federal-aid participation permitted for property management costs?

A: Yes. Under 23 CFR 710.203(b)(4), property management costs are eligible for reimbursement as a direct cost if they are incurred prior to and during construction until final project acceptance, and are adequately documented as required under 2 CFR 200.403(g).

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15. Q: § 710.203(b)(5). Is Federal-aid participation permitted for employee salary and related costs for work performed on a highway project?

A: Yes. Salary costs and related expenses for employee work directly attributable to the Federal-aid project are eligible costs provided such costs are not otherwise included in an indirect cost rate and must be consistent with and adequately documented in accordance with 2 CFR 200.430 and 23 CFR 710 subpart B.

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16. Q: § 710.203(d). Is Federal-aid participation permitted for the SDOT cost for a consultant to provide ROW program-level services including oversight, guidance, or consultation?

A: Yes. The SDOT cost for a consultant to provide ROW program-level guidance, consultation, and oversight to other acquiring agencies and contractors is an eligible indirect cost and may be included as part of the State's indirect cost rate in accordance with 2 CFR 200 Subpart E and is subject to 23 CFR 172.7(b)(5). When consultants provide program or project level oversight, the SDOT must maintain overall responsibility for the acquisition, management and disposal of real property interests on its Federal-aid programs and projects (23 CFR 710.201(a)).

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17. Q: § 710.203(d). Is Federal-aid participation permitted for the cost of a consultant to prepare the ROW manual and training in its use?

A: Yes. The cost of a consultant to prepare the ROW manual and training in its use is an eligible *indirect cost* that may be included as part of the State's indirect cost rate in accordance with 2 CFR 200 Subpart E.

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Subpart D – Real Property Management

18. Q: § 710.403(b). Is a ROW use agreement under part 710, subpart D required for a park-and-ride lot?

A: No. A ROW use agreement is not required for a park-and-ride lot because fringe and corridor parking facilities, including park-and-ride lots, are governed by 23 U.S.C. 137 and 23 CFR 810.106 and are exempt from 23 CFR part 710, subpart D (23 CFR 710.403(b)). Note: 23 CFR 810.106 includes requirements for FHWA approvals and for an agreement covering the financing, maintenance, and operations of the parking facility. In addition, 2 CFR 200.311 may apply.

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19. Q: § 710.403(b). May the SDOT convey temporary real property interests within the ROW limits for fair market value for a non-highway use without a public interest determination?

A: No. A public interest determination, pursuant to 23 CFR 710.405, is necessary since the real property interests lie within the ROW limits.

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20. Q: § 710.403(c). Are there specific State organizational units that must be coordinated with when deciding that the property rights are excess to the State's needs?

A: No. Each State differs in its own internal structure and processes, and the SDOTs are best qualified to determine the appropriate internal coordination required to decide if the property is excess to the State's needs. The process and organizational units used for internal coordination are to be documented in the State ROW manual that FHWA approves.

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21. Q: § 710.403(e). Does a State law requiring the State DOT to sell or lease property at less than the current fair market value take precedence over the Federal law requiring fair market value for real property interests previously obtained with title 23 funds?

A: No. The State law does not take precedence. Federal law governs the sale or lease of real property that was obtained as a part of a Federal-aid project. If Federal funds are used to purchase any real property interests, or if Federal credit is received for real property used in a federally-funded project, the sale, use or lease of such property rights are subject to the fair-market-value requirements in Federal law.

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22. Q: § 710.403(e)(1). Are there specific Federal criteria for evaluating disposals for less than fair market value to justify that it is in the public interest, based on social, environmental, or economic benefits?

A: No. Each SDOT or other grantee must have a section of its ROW manual which describes the criteria for evaluating requests for less-than-fair-market-value disposals on social, environmental, or economic grounds under 23 CFR 710.403(e)(1), and a method for ensuring the public will receive the benefit(s) used to justify the proposed disposal. A written justification must clearly document the specific positive benefits that the public will be receiving because of the proposed disposal.

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23. Q: § 710.403(e). Does the FHWA Division Office have the authority to approve the sale of excess ROW at less than the fair market value?

A: Yes. FHWA has delegated authority to the Division office to approve less than fair market value transactions. (FHWA Order M1100.1A, FHWA Delegations and Organizational Manual (as of date of this guidance.))

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24. Q: § 710.403(f). Is the State required to apply the Federal share of net income received from the sale or lease of real property acquired with Federal funds to a project of like nature, or may the funds be used on any title 23 eligible project?

A: No. The State is not required to use the Federal share of net income on projects of like nature. Those funds can be used on any project eligible under title 23 and must be in accordance with 23 CFR 710.403(f).

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25. Q: § 710.403(f). Is there a certain type of State account that must be used to deposit the Federal share of the net income?

A: No. There is not a certain type of State account that must be used to deposit the Federal net income. However, consistent with 2 CFR 200.302, the funds need to be held in an identified account which ensures the Agency can document and track the source of the funds, the amount of funds deposited, and the ultimate use of the funds for title 23 eligible activities.

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26. Q: § 710.403(f). May the State deduct the expenses associated with the sale or lease of Federal-aid property from the gross proceeds to arrive at net income?

A: Yes. The State may deduct the costs directly attributable to the property for actual and reasonable selling and fixing-up expenses that are incurred *after* acceptance of a project, from the gross proceeds to arrive at net income (2 CFR 200.311(c)(2)).

Costs incurred *before* acceptance of a project (e.g. maintenance, protection, clearance, and improvement disposition) are eligible for Federal participation until final project acceptance. See previous question # 17 on § 710.203(b)(4).

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27. Q: § 710.403(f). What will FHWA consider as an acceptable method of State certification regarding the Federal share of net income that has been deposited in a transportation fund and the amount that was expended on title 23 eligible projects during the fiscal year?

A: 23 U.S.C. 156 does not require State certification regarding the amount of the Federal share of net income deposited in a transportation fund and subsequently expended on title 23 eligible projects. However, the FHWA Division office will perform oversight compliance reviews to obtain reasonable assurance that the State is meeting the requirements imposed under 23 CFR 710.403(f). States should have procedures in place to document: (1) the amount of the Federal share of net income from the use or disposal of real property deposited in a State transportation fund during the fiscal year; (2) the amount of the Federal share of net income expended on title 23 eligible projects during the fiscal year, and (3) the list and description of title 23 eligible projects the funds were expended on during the fiscal year.

[Top of Section](#)**28. Q: § 710.403(f). May States retain the net income from dispositions of withdrawn Interstate segments, or would a credit to Federal funds be required?**

A: States may retain the net income from dispositions of withdrawn Interstate segments if the Federal share of net income is used on title 23 eligible projects.

[Top of Section](#)**29. Q: § 710.405. Do ROW Use agreement provisions apply to mineral sales and royalties from Federal-aid purchased property?**

A: Yes. Oil, gas, and other mineral interests are real property interests within the definition in 23 CFR 710.105.

[Top of Section](#)**30. Q: § 710.405(a). Are air rights or air space considered real property interests?**

A: Yes. Air rights are less-than-fee interests within the definition in 23 CFR 710.105. Time-limited use of space above the right-of-way may be permitted by a ROW use agreement subject to the conditions in the regulation.

[Top of Section](#)**31. Q: § 710.405(a)(2). Should a ROW use agreement be used instead of a utility highway occupancy permit to accommodate Utilities in the ROW?**

A: No. As per § 710.405(a)(2), utilities are listed as an exception to the ROW use agreement provisions. Utilities use and occupancy agreements (permits) must meet the requirements of 23 CFR 645.213.

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A: The real property cannot be used for non-highway purposes if the real property is necessary, either currently or in the foreseeable future, for safe and secure operation and maintenance of the highway facility. If such conflicts exist, the real property would be considered unavailable. The only exception may be for interim uses, which are terminated when the real property is needed for highway purposes.

The proposed non-highway use must meet the conditions in 23 CFR 710.405(a), including preservation of safety of the facility and its users. The FHWA views the manufacture or storage of flammable, explosive, or hazardous material on the ROW as presumptively a safety hazard. This presumption does not preclude the transverse or longitudinal installation of such items as petroleum pipelines that have been approved in accordance with the regulations.

Similarly, within the scope of the proposed non-highway use of the facility, there is a presumption that any structures, buildings, or facilities which utilize combustible materials (such as wood, wood fiber, plastic etc.) that may be fire hazards do not satisfy 23 CFR 710.405(a). Such non-highway uses cannot be allowed under or adjacent to overpasses and bridges, absent a showing that such uses would provide for the safe and secure operation and maintenance of the highway facility.

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33. Q: § 710.405. May highway real property interests be leased for public purposes without creating a use protected by Section 4(f) (23 U.S.C. 138)?

A: Yes. Available real property interests may be leased to a public agency for interim uses such as green space for small parks, play areas, parking, or public or quasi-public use which would integrate the highway into the local environment and enhance other publicly supported programs (without creating a Section 4(f) use, per 23 CFR 774.11(h)). Normally, the SDOT should retain supervision and jurisdiction over these interim land uses, but could enter into ROW use agreements with local political subdivisions. For authorized *temporary occupancy* of transportation right-of-way for park or recreation purposes, it must be clear in a limited occupancy ROW use agreement, with a reversionary clause, that no long-term right is created and the park or recreational activity is a temporary one that will cease either once completion of the highway or transportation project resumes or if the property is needed for future transportation use.

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34. Q: § 710.405. What are the primary terms and conditions for a ROW use agreement with structural improvements?

A: The ROW use agreement must contain provisions that address the items at 23 CFR 710.405(b).

- Ensure the safety and integrity of the federally assisted facility;
- Define the term of the agreement;
- Identify the design and location of the non-highway use;
- Establish terms for revocation of the ROW use agreement and removal of improvements at no cost to the FHWA;
- Provide for adequate insurance to hold the grantee and FHWA harmless;
- Require compliance with nondiscrimination requirements;
- Require grantee and FHWA approval, if not assigned to SDOT, and SDOT approval if the agreement affects a Federal-aid highway and the SDOT is not the grantee, for any significant revision in the design, construction, or operation of the non-highway use; and
- Grant access to the non-highway use by the grantee and FHWA, and the SDOT if the agreement affects a Federal-aid highway and the SDOT is not the grantee, for inspection, maintenance, and for activities needed for reconstruction of the highway facility.

In addition, the following terms, conditions and provisions may be included as appropriate.

- Identification of the party responsible for developing and operating the proposed use.
- A general statement of the proposed use.
- The proposed design for the use of the space, including any facilities to be constructed.
- Maps, plans, or sketches to adequately demonstrate the relationship of the proposed project to the highway facility.
- Provision for vertical and horizontal access for maintenance purposes.
- Other general requirements as term of use, insurance requirements, design limitations, safety mandates, accessibility, and maintenance as outlined further in this guidance.
- Provision to prohibit the transfer, assignment, or conveyance of the proposed non-highway use to another party without prior SDOT approval with FHWA concurrence on Interstates.
- Provision to revoke the agreement if the proposed non-highway use ceases to be used or is abandoned, or becomes necessary for highway purposes.
- Provision to revoke the agreement if the terms of the lease are breached and such breach is not corrected within a reasonable length of time after written notice of noncompliance has been given. In the event the agreement is revoked, the SDOT may request the removal of the facility occupying the airspace. The removal should be accomplished by the responsible party in a manner prescribed by the SDOT at no cost to the FHWA. An exception to facility removal is permitted when the improvements revert to the State upon termination of the agreement and the SDOT chooses to accept them.
- Provision to allow SDOT and authorized FHWA representatives to enter the non-highway use facility for inspection, maintenance, or reconstruction of the non-highway facility when necessary. The manner of when and how these inspections are to be made should be specified in the ROW use agreement.
- Provision that the non-highway use facility to occupy the airspace will be maintained to assure that the structures and the area within the highway right-of-way boundaries will protect the highway's safety and appearance, and that such maintenance will cause no unreasonable interference with highway use.
- Provisions assuring that the airspace user will be responsible for any resulting hazardous waste contamination without liability to the SDOT and FHWA.
- Provisions to assure full understanding that the airspace user will not qualify for relocation benefits under the Uniform Act.

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35. Q: § 710.405. How specific must the maps or plans be?

A: The party wishing to use the real property interest must submit maps, plans, or sketches adequately showing the relationship between the proposed project and the highway facility (23 CFR 710.405(e)(6)). An adequately detailed three-dimensional presentation of the space to be used and the facility to be constructed must be submitted if required by FHWA or the SDOT. However, maps and plans may not be required if the available real property is to be used for leisure activities (such as walking or biking), beautification, parking of motor vehicles, public mass transit facilities, and similar uses. In such cases, an acceptable metes and bounds description of the surface area, and appropriate plans or cross sections clearly defining the vertical use limits may be furnished in lieu of a three-dimensional description, at the discretion of the party requesting the use agreement (23 CFR 710.405(e)(9)).

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36. Q: § 710.405(b)(5). What are the insurance requirements?

A: The use agreement must require adequate insurance that holds the grantee, as defined in 23 CFR 710.105, and FHWA harmless (23 CFR 710.405(b)(5)). The insurance policy will name the grantee and FHWA as insured parties, and provide coverage for all loss and damage arising out of or relating to the third party's possession or use of the property (and should include attorney's fees). The coverage should start as of the execution of the use agreement and terminate when the use agreement terminates, but should include coverage for any claims made after termination based on events that occurred prior to termination. Typically, the agreements require the party receiving approval for the non-highway use to pay for the insurance.

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37. Q: § 710.405(b)(7). What if revisions need to be made to the original ROW use agreement?

A: Any significant revision in the design, construction, or operation of the non-highway use requires prior approval by the grantee and FHWA (if the approval has not been assigned to the SDOT) and the SDOT (if not the grantee and the use is on a Federal-aid highway). When the revision impacts an Interstate highway facility, the FHWA approval cannot be assigned to the SDOT (see 23 CFR 710.405(a)).

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38. Q: § 710.405(b)(8). Does a ROW use agreement need to have clauses or conditions addressing FHWA and SDOT access to the ROW and transportation facility?

A: Yes. The ROW use agreement must provide for FHWA and SDOT access to the non-highway use for inspection, maintenance, and for activities connected with reconstruction of the highway facility. In the event the responsible party fails in its maintenance obligations, there should be provisions allowing the SDOT to enter the premises to perform such work.

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39. Q: § 710.405(c). Can a lease of real property interests require or cause the re-alignment or other changes to a highway?

A: Yes. The change must be approved by the SDOT and FHWA under 23 CFR 710.405(a) and (c). The FHWA encourages SDOTs to avoid proposed uses that would involve any temporary or permanent change in alignment or profile of an existing highway except where the change would improve existing highway operation and maintenance.

The cost of any approved highway changes cannot be paid from Federal funds unless the SDOT and FHWA agree to the use of such funds (23 CFR 710.405(c)). Such agreements should be made only in exceptional situations where there is a demonstrable benefit to the SDOT and the Federal-aid Highway Program, such as when the lease improvements of a proposed facility or other interim uses are for public or quasi-public purposes and would assist in integrating the highway into the local environment and enhance other publicly supported programs. The cost provision in 23 CFR 710.405(c) does not alter existing limitations upon expenditures of Federal-aid funds.

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40. Q: § 710.405(d). Are there design requirements for leasing of ROW for non-highway use?

A: Yes. Proposed uses must conform to applicable design standards and safety criteria for the functional classification of the highway facility in which the property is located (23 CFR 710.405(d)). Design requirements are generally in the SDOT's manuals, and FHWA regulations 23 CFR part 625, et. seq. Additionally, standards can be found from organizations such as American Association of State Highway and Transportation Officials (AASHTO). For guidance and interpretation on specific proposals, contact your SDOT and FHWA Division Office.

See [FHWA Bridge and Structure Security](#).

The following are major design criteria that should be covered in a proposed ROW use agreement:

- The use of real property located beneath the established highway grade-line should provide sufficient vertical and horizontal clearances for the construction, operation, maintenance, ventilation and safety of the highway facility.
- The use of real property located above the established highway grade-line, should not at any location between two points established 2 feet beyond the two outer edges of the shoulder, extend below a horizontal plane which is at least 16 feet 6 inches above the highway grade-line, or the minimum vertical clearance plus 6 inches as approved by the State, except as necessary for columns, foundations or other support structures.
- Where control and directional signs needed for the highway are to be installed beneath an overhead structure, vertical clearance should be at least 20 feet from the highway grade-line to the lowest point of the soffit of the overhead structure. Exceptions to the lateral limits set forth above, when justified by the SDOT, may be considered on an individual basis by FHWA as appropriate.

- Piers, columns, or any other portion of a non-highway structure should not be erected in a location which will interfere with visibility or reduce sight distance or in any other way interfere materially with the safety and free flow of traffic on the highway facility.
- The structural supports for the non-highway facility should be located to clear all horizontal and vertical dimensions established by the SDOT. Supports should be clear of the shoulder or safety walks of the outer roadway. However, supports may be in the median or outer separation when the SDOT determines and the FHWA concurs that such medians and outer separations are of sufficient width.
- All supports are to be behind or flush with the face of any wall at the same location. Supports should be adequately protected by means acceptable to the SDOT and the FHWA. No supports should be in the ramp gores, or in a position that interferes with the signing necessary for the proper use of the ramp.
- To the extent possible and within the scope of the proposed use of the non-highway facility, vehicular access should be designed and managed to restrict vehicles capable of carrying explosives or of a type that might be used for terrorist activities. For example, barriers may be installed to limit the width of vehicles accessing the site. In situations where the use of the facility is for purposes other than vehicular access (such as a bike path or dog-walk for adjacent property owners), the design should use fencing, barriers, and/or other appropriate methods to restrict vehicular access.
- Proposals may involve coordination with multiple offices within the SDOT such as Planning, Environment, Traffic, Operations, and Maintenance. Details of required approvals should be incorporated into the ROW use agreement as appropriate.

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41. Q: § 710.405(d). What are the safety requirements for a lease of real property interests?

A: Safety is a key concern in evaluating any proposed use of the ROW. Full safety requirements are generally found in the SDOT's manuals, FHWA regulations, and in national professional organization standards. For specific guidance and interpretation, contact your SDOT and FHWA Division Office.

The SDOT should consider the following safety precautions.

- The design, occupancy, and use of any structure over or under a highway facility should not interfere with the use, safety, appearance, or the enjoyment of the facility nor produce fumes, vapors, odors, drippings, droppings, or discharges of any kind.
- The ROW use agreement should not result in either highway or non-highway users being unduly exposed to hazardous or unsafe conditions because of highway location, design, maintenance, and operation features.
- Appropriate safety precautions and features should be incorporated in the design to minimize the possibility of injury to users of either the highway facility or real property/ROW use area due to highway or non-highway incidents.

- Highway ROW use facilities should not be approved unless the plans contain adequate provisions, acceptable to the SDOT and the FHWA, for evacuation of the structures or facilities in case of a major incident endangering the occupants of such structures or facilities.
- Any ROW use facility should provide adequate fire and life safety provisions in accordance with applicable local codes or national standards found acceptable by the SDOT and the FHWA, such as NFPA 502.
- Adequate security measures should be in place to ensure that the facility is safe from both natural disasters and human actions (whether accidental or intentional). Examples of such measures include the use of barriers to restrict vehicular traffic to the site and pier protection devices.

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42. Q: § 710.405(d). Is it necessary to provide light and ventilation?

A: For detailed design standards for specific proposals, refer to SDOT manuals or FHWA regulations in 23 CFR part 625, and then direct specific inquiries to the SDOT's specialists. Guidance on tunnel lighting is provided by Illuminating Engineering Society (IES) RP22. The National Fire Protection Association (NFPA) 502 provides fire protection and fire life safety standards for limited access highways, road tunnels, bridges, elevated highways, depressed highways, and roadways that are located beneath air-right structures. Generally, however,

- unless mechanical tunnel ventilation is provided, non-highway structures over highways should be designed and constructed to establish natural ventilation of the highway, and
- the underside and any supports for such structures should have smooth and easily cleanable surfaces. Supports for such structures should leave as much open space on the sides of the highway as feasible. Such space should be appropriately graded.

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43. Q: § 710.405. May a ROW use agreement be used to allow parking for motor vehicles?

A: Yes. Assuming the proposal is not subject to 23 U.S.C. 137 or 23 CFR part 810, the parking of motor vehicles may be allowed in limited instances and with proper precaution. To the extent possible and within the scope of the proposed non-highway use of the facility, vehicular access should be designed and managed to restrict vehicles capable of carrying explosives or of a type that might be used for terrorist activities. For example, barriers may be installed to limit the width of vehicles accessing the site. Tanker trucks or vehicles carrying flammable, explosive, or hazardous material are presumed by FHWA to be unsafe and should be prohibited from parking in the ROW use areas to ensure the full use and safety of the highway is not impaired. (23 U.S.C. 111, 23 CFR 710.405(a))

In addition to the security considerations noted above, approval for the use and occupancy of highway ROW for the parking of motor vehicles should not be granted unless proper consideration has been given to the need for the following:

- Parking design or arrangement to assure orderly and functional parking.
- Plantings or screening measures to improve the aesthetics and appearance of the area.
- Surfacing, lighting, fencing, striping, curbs, wheel stops, pier protection devices, etc.
- Access for fire protection and fire-fighting equipment.

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44. Q: § 710.405. What other laws, regulations, and polices should be considered when developing a ROW use agreement?

A: There are other legal requirements that must be considered when developing a proposed ROW use agreement. The SDOT is the best source for requirements under State law, and other applicable requirements. Some examples of Federal requirements include:

- Appropriate provisions with respect to title VI of the Civil Rights Act of 1964 and 49 CFR part 21.
- Conformity with the Americans with Disabilities Act (ADA).
- Conformity with the governing provisions of the Federal Aviation Administration, Federal Rail Administration, Federal Transit Administration, and other Federal agencies whose approvals may be required.
- Applicable environmental review and approval requirements, including the National Environmental Policy Act (NEPA).
- To the extent appropriate, as determined by the SDOT and/or FHWA, coordination with the U.S. Department of Homeland Security (DHS) to ensure adequate security of the facility may be necessary. Prior to any contact with DHS, the FHWA Division Office will coordinate with the Program Manager for Transportation Security, Office of the Administrator, FHWA Headquarters.

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45. Q: 710.405. What are the SDOT obligations for management of the non-highway use of the ROW?

A: SDOTs are responsible to control the use of the real property acquired for a project in which Federal funds participated in any phase of the project. (23 CFR 710.401, 710.403(b)) To assist the SDOT with the management of property leased for non-highway use, an inventory should be maintained of all authorized uses of highway real property. This inventory should include at least the following items for each authorized use of real property:

- Location by project, survey station, or other appropriate method.
- Identification of the authorized user of the real property.
- A three-dimensional description or a metes and bounds description.
- As-built construction plans of the highway facility at the location where the use of real property was authorized.

- Pertinent construction plans of the facility authorized to occupy the real property.
- A copy of the executed ROW use agreement.
- Documentation of the periodic inspections of the non-highway facilities to ensure that the safety and security requirements specified in the ROW use agreement are being properly maintained, and
- Documentation of the compliance monitoring to ensure other terms and conditions in the ROW use agreement are being met.

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Subpart E – Property Acquisition Alternatives

State-funded Early Acquisition

46. Q: § 710.501(a). Do State-funded, early acquisitions for federally funded projects need to conform to the Uniform Act requirements?

A: Yes. Even if the State does not intend to seek reimbursement or credit for the early acquisitions, the State-funded early acquisitions shall comply with all real property acquisition requirements for federally assisted transportation projects (23 CFR 710.501(a)-(b)). Real property acquisition provisions under the Uniform Act apply to any real property acquisitions for programs and projects where there is Federal financial assistance in any part of project costs. (49 CFR 24.101(b)).

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47. Q: § 710.501. Do properties that are acquired early by means of exaction, at tax sale, or other similar types of sales and are later used for federally funded projects, need to conform to Uniform Act requirements?

A: No. There can be no connection between the acquisition and a transportation project. If the property was acquired by other means (e.g., local government acquisition via tax delinquency or exaction) it must have been acquired in accordance with the laws of the jurisdiction in which the property is located to be eligible for future credit (23 CFR 710.501(c)(1)). However, if at the time of acquisition, there is a nexus between the property and a transportation project and the intent was to acquire the property for a federally funded project, the Uniform Act requirements must be followed to maintain Federal eligibility. (49 CFR 24.101(b))

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48. Q: § 710.501(c) Can the credit for early acquired real property interests include all costs associated with the early acquisition such as relocation expenses, property management costs, and costs incidental to the purchase, e.g., appraisal fees, recording costs, etc.?

A: No. The allowable credit for an early acquired real property interest under 23 CFR 710.501(c) is based on the fair market value of such real property interests

established at acquisition (23 U.S.C. 323; 23 CFR 710.507). Federal reimbursement of other acquisition costs associated with the early acquisition is permitted under the early acquisition eligible for future reimbursement option as per 23 U.S.C. 108(c)(2)(A) and 23 CFR 710.501(d), and under Federally Funded Early Acquisition pursuant to 23 U.S.C. 108(d) and 23 CFR 710.501(e).

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49. Q: § 710.501(c). Is there a significant milestone/requirement that must be completed before requesting a State funded early acquisition credit?

A: Yes. There are 6 requirements per 23 CFR 710.501(c) which must be met to qualify for a credit. However, a request for credit cannot be approved until a NEPA determination is made for the transportation project.

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50. Q: § 710.501(d)(3). Is it possible to waive the State-funded early acquisition reimbursement requirement for a mandatory comprehensive and coordinated land use, environment, and transportation planning process and consistency certification by the Governor?

A: No. There is no authority for waiver of this statutory requirement. (23 U.S.C. 108(c)(3)(C)) However, the Governor may delegate authority to handle the required certification to another State official, such as the chief executive officer of the State DOT. The FHWA has completed a research report on these requirements. This [report](#) analyzes how States have interpreted and implemented 23 U.S.C. 108(c)(3)(C), and documents the challenges the State DOTs have faced, and opportunities to further clarify the requirements.

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Federally-funded Early Acquisition

51. Q: 710.501(e)(3). Does each Federally Funded Early Acquisition project need to be listed separately in the STIP/TIP?

A: Yes. Each Early Acquisition project must be listed individually in the STIP/TIP to ensure transparency and proper management of the project. As defined in regulation (23 CFR 710.105(b)), an Early Acquisition Project may consist of acquisition of real property interests in a specific parcel, a portion of a transportation corridor, or an entire transportation corridor. Accordingly, a single STIP/TIP entry may be used to list all acquisitions for a single transportation project or corridor. However, the regulation does not permit the use of a single STIP/TIP listing to cover acquisition activities on a statewide or “generic” basis.¹

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¹ The FHWA addressed this issue in the final rule preamble discussion of section 710.501(e)(3). See 81 FR 57716, 57724 (August 23, 2016).

52. Q: § 710.501(e). How does the State certify that the Federally Funded Early Acquisition project conditions have been met?

A: The State ROW manual required under 23 CFR 710.201(c) must thoroughly document the processes and procedures that the State will undertake to comply with all relevant requirements. Prior to FHWA authorizing title 23 funds for an Early Acquisition project, the Acquiring Agency must provide to FHWA a certification form affirming that the State has met all requirements in 23 U.S.C. 108(d) and 23 CFR 710.501(e). If FHWA concurs with the certification, FHWA will note this concurrence in the project agreement comment section so that Federal funds can be obligated. The FHWA Division Office will periodically conduct process reviews to ensure the State certification procedures and processes comply with 23 U.S.C. 108(d) and 23 CFR 710.501(e).

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53. Q: § 710.501(e). Is there a minimum and maximum negotiation period for Federally Funded Early Acquisition projects?

A: Yes. Early Acquisition projects are subject to Uniform Act requirements in 49 CFR part 24. Each Acquiring Agency must have a reasonable minimum negotiation period for the property owner to consider the offer and to present relevant material for modifying the terms and conditions of the purchase if necessary (49 CFR 24.102(f)). This minimum negotiation period should be documented in the State Right-of-Way Manual (See 49 CFR part 24, appendix A under § 24.102(f) for a discussion of a minimum negotiation period of 30 days as reasonable).

To avoid allowing the Early Acquisition negotiation to continue indefinitely, the completion of NEPA on the Transportation project should trigger a winding down process for Early Acquisition to avoid negotiations running in parallel on both projects. The Acquiring Agency should provide to the property owner a written notice of the date negotiations will end. The negotiation end date cannot be less than the minimum negotiation period. The State Right-of-Way Manual should identify the time period for terminating the Early Acquisition negotiations, and should explain how it arrived at that negotiation period for early acquisitions.

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54. Q: § 710.501(e). Can a property owner request that negotiations be terminated prior to the end of the minimum negotiation period?

A: Yes. The property owner may request an early end to negotiations, preferably in writing. The Acquiring Agency should follow-up with a negotiation termination letter documenting in the letter that negotiations were terminated at the request of the property owner. This letter should be placed in the file to officially close the Early Acquisition file. (23 CFR 710.201(e)(1))

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55. Q: § 710.501(e)(2)(vi). If all acquisitions must be voluntary negotiations with no threat of or use of condemnation, which Uniform Act requirements apply to a Federally Funded Early Acquisition project?

A: 1) These acquisitions are subject to all the requirements of 49 CFR part 24, subpart B of the Uniform Act regulations including notification, appraisal, and offer requirements.

2) All persons displaced by a Federally Funded Early Acquisition project are entitled to relocation assistance. However, relocation eligibility for these projects is not established at the initiation of negotiations; rather, eligibility is established when a person is required to move from the real property as a direct result of a binding written agreement for the purchase of the real property interest(s) between the Acquiring Agency and the property owner (23 CFR 710.501(h)).

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56. Q: § 710.501(e). Can an Administrative Settlement be used on a Federally Funded Early Acquisition project?

A: Yes. The Administrative Settlement must be justified in writing and the settlement must be approved by an authorized Acquiring Agency official, who determines that the administrative settlement is reasonable, prudent, and in the public interest (49 CFR 24.102(i)).

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57. Q: § 710.501. What are the advantages of using an Option for a Federally Funded Early Acquisition Project?

A: An Option allows the Acquiring Agency to purchase a right to acquire real property within an agreed-to period of time for an agreed to amount thus allowing the Acquiring Agency to carry out limited acquisition activities to secure rights to a property should it be needed for a Transportation project, without acquiring full title to the property at that time. Options save time and money during the Transportation project's right-of-way acquisition phase.

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58. Q: § 710.501. Can an Option be used to acquire the right to purchase a Section 4(f) property?

A: No. 23 CFR 710.501(e)(2)(i) does not allow the acquisition of any real property interests including an Option on a 4(f) property (23 CFR 774.3).

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59. Q: § 710.501(e). When can an Acquiring Agency exercise a Federally Funded Early Acquisition Option?

A: The Acquiring Agency has flexibility to decide which project (Early Acquisition Project or Transportation project) to fund for exercising the Option. Prior to requesting

Federal funding, the Acquiring Agency will decide whether to acquire an Option and the length of the Option as the time period drives value; thereby, allowing the Acquiring Agency to determine when the Option will be exercised and into what project the funding for exercising the Option will be placed. The Option can only be exercised on the project that has specific funding for that activity (23 CFR 630.108(b)(3) and (4)).

For the Acquiring Agency to maintain adequate Early Acquisition records, if the Option is exercised under the Transportation project, the file should reference the Early Acquisition project under which the Option was negotiated and acquired (23 CFR 710.201(e)).

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60. Q: § 710.501(e). Once there is a NEPA decision for the Transportation project, must active negotiations on an Early Acquisition project be immediately terminated?

A: The FHWA encourages Acquiring Agencies to avoid allowing the negotiation process to continue indefinitely. The completion of NEPA on the Transportation project should trigger a winding down process for Early Acquisition negotiations to avoid two processes running in parallel. The Acquiring Agency should provide to the property owner a written notice of the date negotiations will end. This date will not be less than the minimum negotiation period. The Acquiring Agency should document the maximum length of negotiations in the Right-of-Way manual.

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61. Q: § 710.501(e). What items should be addressed in a Federally Funded Early Acquisition Intent to Acquire letter?

A: The Intent to Acquire letter required by 49 CFR 24.102(b) should inform the property owner of the following:

- The Acquiring Agency's interest in acquiring the property.
- The purpose of the Early Acquisition project.
- The owner's legal rights:
 - Real property interests must be acquired through negotiations without the threat or use of condemnation (23 U.S.C. 108(d)(3)(B)(vii); 23 CFR 710.501(e)(2)(vii)).
 - Relocation eligibility applies when there is a binding purchase and sales agreement, or an Option has been exercised that requires the Acquiring Agency to purchase the property 23 CFR 710.501(h)).
 - The Acquiring Agency must inform the property owner of the minimum negotiation period that it will allow for the owner to consider the offer and to present relevant material to modify the terms and conditions of the purchase, if necessary (See 49 CFR part 24, appendix A under § 24.102(f) for a discussion of a minimum negotiation period of 30 days as reasonable.)
 - If an agreement cannot be reached, negotiations will be terminated (23 CFR 710.501(e)(2)(vii)).
 - The Acquiring Agency will provide the property owner with a written description in clear, nontechnical language of its Early Acquisition process for

acquiring property and the property owner's rights under Federal and State law (23 CFR 710.305(d)).

- If a Transportation project has a NEPA decision on the corridor that will incorporate this parcel in the project, the Acquiring Agency should provide to the property owner a written notice of the date that negotiations will close. (not less than the minimum negotiation period).
- An Early Acquisition-specific brochure may be developed or the Acquisition Brochure and Relocation Brochure may be revised to include a section on Early Acquisition that reflects the property owner's legal rights that differ from a traditional acquisition and relocation (as mentioned above).
- The possibility that a termination of negotiations under the federally-funded early acquisition project does not preclude the future possibility of the Acquiring Agency authorizing the Transportation project to acquire the property. That subsequent acquisition process would be carried out under normal acquisition procedures.

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62. Q: § 710.501(e). If an Early Acquisition negotiation is unsuccessful and the property rights are needed for the Transportation project, is a new offer letter and a new appraisal required?

A: If the Early Acquisition negotiation is terminated and the Acquiring Agency initiates a new acquisition process to acquire the parcel for the Transportation project, then it must issue a new offer letter. The Transportation project is not a continuation of the Early Acquisition project. It is a separate project; as such, the Acquiring Agency must prepare a new offer letter (49 CFR 24.102(d)).

A new appraisal may be required. The Acquiring Agency shall establish an amount which it believes is just compensation for the real property (49 CFR 24.102(d)). The Acquiring Agency determines if the appraisal secured during the Early Acquisition project remains valid and in compliance with the Uniform Act and State laws. Considerations include market condition changes (if any) since the appraisal was completed, the amount of time that has elapsed since the current appraisal was completed, and if the current appraisal accurately reflects compensation for the rights to be acquired.

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63. Q: § 710.501(e). Can documents such as titles, appraisals, and relocation studies that were prepared for the Early Acquisition project be reused for the Transportation project?

A: Yes. However, the Acquiring Agency should verify that the documents are current, valid, and consistent with the Uniform Act and Federal and State laws, processes, and procedures. Also, the correct Federal and State project numbers must be used on all documents in order to maintain adequate acquisition records (23 CFR 710.201(e)).

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64. Q: § 710.501(e) and (f). Are development activities allowed on properties purchased on Federally Funded Early Acquisition projects?

A: Only in limited circumstances. These properties are acquired in anticipation of a proposed Transportation project, which has not completed the environmental review process. Real property interests acquired as a part of an Early Acquisition project may not be developed in anticipation of the Transportation project prior to completion of required environmental reviews (23 CFR 710.501(f)). This ensures that the evaluation of alternatives for the proposed Transportation project is not influenced by the early acquisition activities.

Development activities that are prohibited include:

- demolition,
- site preparation, including clearing and grubbing, and
- any construction activity that is not necessary to protect public health or safety.

In very limited instances, FHWA may approve development activities, such as limited clearing and demolition activity necessary to protect public health and safety.

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Protective Buying and Hardship Acquisition

65. Q: § 710.503. Are NEPA and 4(f) approvals required for Advance Acquisition (AA)—Protective Buying and Hardship Acquisition parcels?

A: Yes. Protective Buying and Hardship Acquisitions usually occur during the Transportation project's NEPA phase. However, prior to approving this Advance Acquisition (AA) alternative, NEPA review and a section 4(f) determination, if applicable, must be completed for the proposed AA parcels (23 CFR 710.503(a)). The NEPA class of action is typically a CE (categorical exclusion) under 23 CFR 771.117(d)(12). The reviews and decisions are only for the advanced acquisition purpose. The NEPA review and section 4(f) evaluations for the Transportation project must include consideration of the impacts of acquiring and incorporating these properties on an alignment.

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66. Q: § 710.503. Can Federal reimbursement for Hardship Acquisition and/or Protective Buy be made before a NEPA decision for the Transportation Project?

A: Yes. Once the CE is completed for the Hardship Acquisition or the Protective Buy and the State provides justification for the Advance Acquisition, then FHWA may approve their request, thus giving the State authority to proceed with the Advance Acquisition and to request reimbursement. However, there is a risk that if the Hardship Acquisition and/or Protective Buy parcels are not incorporated into a surface transportation project within 20 years, they will be subject to the requirement to repay Federal funds. (23 U.S.C. 108(a)(2))

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67. Q: § 710.503. Is public involvement recommended for Protective Buying and Hardship Acquisition?

A: Yes. The public involvement process starts early in project development with the goal of providing the general public with reasonable opportunity to be informed of the project and that sufficient outreach activities have been conducted. The public involvement process is discussed in 23 CFR parts 450 and 771.

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Real Property Donations

68. Q: § 710.505. Is there any difference between a donation and a credit?

A: Yes. *Donation* is the voluntary transfer of privately owned real property (from a property owner who has been informed, in writing of their Uniform Act eligibilities and benefits) either without compensation or for less than fair market value (FMV) for a public transportation project (23 CFR 710.105(b) Donation definition).

The State may receive a *credit* for the donation, to be applied towards the State's share of the project cost if the requirements imposed at 23 CFR 710.505 are met. If the property interest was donated to the State as an Early Acquisition property, additional conditions apply under 23 U.S.C. 323 and 23 CFR 710.501(c)(1) – (6).

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69. Q: § 710.505. Are there any conditions as to when, in the project development process, a property can be donated for a project?

A: No. Grantees may accept a donation at any time subject to applicable State laws.

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70. Q: § 710.505(b). May the cost of determining the fair market value of real property be applied as a donation credit by a unit of local government? (23 U.S.C. 323(b))

A: No. A donation credit sought by a unit of local government is restricted to the fair market value of the real property, funds, or materials incorporated into the project.

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71. Q: § 710.505(b). How are donations considered when calculating Federal and State shares of total project costs?

A: The donation item must qualify as a participating cost. The value of the credits is added to the total project cost of the project prior to calculating the Federal/State share. These funds should be applied as a match when the State submits billings for progress payments. (See example 1 under Third party donations from [the FHWA Center for Innovative Finance Support, Federal-aid Matching Strategies](#)).

For further information see [memorandum dated May 15, 2019 for Federal-Aid Guidance Non-Federal Matching Requirements](#).

72. Q: § 710.505(b). If there is donation credit in excess, is it permissible to change the project limits in the project agreement so that no credit is lost?

A: No. The FHWA should not approve the change in project limits to increase donation credit. Project limits are established based on the project's purpose and need. Design, construction and environmental review decisions are reasons for changing project limits.

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73. Q: § 710.505(b). Is there a difference between local match funds and offset funds?

A: Yes. Local matching funds may be used as a credit towards the non-federal share of the cost of a project. An offset in this context means a reduction in the State's apportionment of title 23 funds. For example, an offset may occur when an acquired real property interest is not incorporated into an eligible project within the required time period under 23 U.S.C. 108(d)(7) and 23 CFR part 710.501(g).

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74. Q: § 710.505(b). What is the timeframe for determining fair market value of a real property donation?

A: It is the earlier of the following: the date when the real property donation becomes effective, or the date which equitable title to the property vests in the State.

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State/Local Contributions and Credits

75. Q: § 710.507. When the project advances to the construction authorization stage, the final cost of the acquired right-of-way is frequently unknown due to outstanding condemnation cases. Assuming the Agency has acquired the required real property with its own funds and desires a *credit* toward the cost of construction, will the allowed credit be limited to the acquisition costs incurred as of the date of the credit application?

A: No. In such cases, while the initial allowable credit would be limited to the amount thought to be the fair market value of the acquired real property interests as of the date of the acquisition (the date that equitable title to the property vested in the State), the allowable credit may be adjusted upon resolution of the outstanding condemnation case(s) if the case results in an increase in the FMV (e.g., from a different finding on the amount that constitutes just compensation).

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76. Q: § 710.507(a). What documentation is typically necessary for early acquisition credit requests?

A: The documentation must include a certification by the Agency that the early acquisition satisfied the conditions in 23 CFR 710.501(c)(1) - (6). (see 23 CFR 710.507(a)(1)).

In addition, the Agency must provide supporting documentation justifying the value of the credit sought for the early acquisition property. Supporting documents may include project valuation documents verifying FMV such as appraisals and/or waiver valuations. Also, prior incurred acquisition costs to acquire title can be used as justification for the value of the property (23 CFR 710.507(a)(2)).

If the property interest was donated to the Agency, additional conditions apply under 23 U.S.C. 323, 23 CFR 710.505, and 49 CFR 24.108.

For further information see [memorandum dated May 15, 2019 for Federal-Aid Guidance Non-Federal Matching Requirements](#).

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77. Q: § 710.507(b). May public parkland incorporated into a project, which furthers the park's use, qualify for credit?

A: No. 23 U.S.C. 323(b)(1)(C) prohibits non-Federal share credits for the incorporation of lands described in 23 U.S.C. 138 into federally funded projects. Non-Federal share credits are also not available for: (1) lands acquired with any form of Federal financial assistance, and (2) lands currently incorporated within the operating right-of-way limits of a transportation facility (23 CFR 710.505(b)).

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78. Q: § 710.507. May a local government contribute real property to a Federal-aid project and retain ownership? May the value of this real property be applied as a credit?

A: Yes to both questions. For example, transportation alternatives and recreational trail projects can involve real property owned by units of local government and private entities. To be eligible for a credit, the real property may not be part of a current transportation facility (23 CFR 710.507(b)). The fair market value of the real property at the time of acquisition will be credited against the non-Federal share of the project.

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