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# CHAPTER 12

## RIGHT OF WAY AND UTILITIES

### 12.1 GENERAL

This chapter provides the policies, standard practices and guidelines for obtaining and documenting the right-of-way and utility coordination requirements related to highway construction. Refer to [Section 1.1.1](#) for definitions of policy, standards, and guidance. Statements of FLH Policy are shown in **bold type**. Statements regarding FLH Standard Practice are so indicated.

The land that a highway occupies is the right-of-way. It consists of the land owned by the operating agency or land that the operating agency has a right to use for roadway purposes. The rights required to support a roadway must include sufficient interest to provide for both the construction and continued maintenance of the facility. FLH has a stewardship role to assure that lands acquired or incorporated within one of its projects, or work required to accommodate railroad or utility interests within project right-of-way complies with prevailing Federal and State laws and regulations.

This chapter outlines the legal foundation necessary to define and acquire those real property interests identified as needed to build, reconstruct and maintain roads and highways. The chapter focuses on right of way issues and activities from the perspective of FLH programs. Content covers right-of-way discipline contributions to normal project development activities, including defining property rights needed for the highway, identifying how utilities and railroads are affected, preparing right-of-way and utility plans, and coordinating acquisition and utility adjustments through agreements and other means to obtain the property rights required to advance a highway project to construction.

Federal Lands Highway Division offices work with many different roadway owners and operating agencies, therefore only general guidelines are provided. It is not practical to prescribe detailed procedures and methods applicable to all situations relating to right-of-way, utilities and railroads. Information on how to perform basic procedures and fundamental steps for performing general right of way and utilities work are typically incorporated by references to other documents.

The following sections describe the legal provisions applying to the acquisition of land for public purposes. The relationships between Federal and State law regarding how real property is defined and acquired in support of highway development are identified. Statutes and regulations, in addition to those included in [Section 1.2](#) related to right-of-way and utilities are referenced, and general guidance material identified. Links relevant to specific right-of-way activities are contained in the topical sections of the chapter that follow this introductory section.

## 12.1.1 REAL PROPERTY UNDER FEDERAL, STATE AND TRIBAL LAW

Property rights law and the issues surrounding public use of private property flow from Amendments 5 and 14 of the U.S. Constitution. The Fifth Amendment provides in part that "...nor shall private property be taken for public use, without just compensation." The Fourteenth Amendment contains the due process clause that requires that when a state or local governmental body, or a private body exercising delegated power, takes private property it must provide just compensation and take only for a public purpose.

The law relating to eminent domain is derived from these two Constitutional Amendments. Eminent domain is an inherent right of organized government to take or appropriate property for a public use, provided just compensation is paid. The power of the government to take property is only exercised through legislation or through legislative delegation. The Fourteenth Amendment applies this delegation and control to the states. Within each state, the power can be delegated to local jurisdictions. Eminent domain can also be delegated through legislation to private corporations such as public utilities, railroad and bridge companies when they are promoting a valid public purpose.

The use of eminent domain requires payment of just compensation and that the taking of private property is for a public use. Federal, State, County and Municipal governments usually have established procedures in place to negotiate the purchase of private lands without having to resort to using their eminent domain authority. Each jurisdiction's eminent domain authority applies only to the lands within its boundaries.

At the Federal level, the policy and procedures related to acquisition of property are contained in the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, as amended (Uniform Act). Each State has legislation that implements and in some cases expands on the minimum requirements established within the Federal legislation. The Federal legislation and regulations, and the related State laws will be discussed in more detail in the following sub-sections.

Tribal governments have their own sovereignty and operate under their own laws with land ownership maintained in trust through the Bureau of Indian Affairs. Unique situation when dealing with Indian tribes is discussed in [Section 12.7](#).

### 12.1.1.1 Federal Laws and Regulations

The following Federal laws and regulations may apply when real property interests are required for highway right of way or related activities. Their application depends on the type of property required and how they may be affected by the proposed project.

Laws enacted by Congress are contained in the *United States Code* (USC). Listed Key code references relevant to land acquisition and utilities are itemized below, but are not comprehensive.

1. **42 USC 61 – Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970** (The [Uniform Act](#)). The primary legislation related to Federal and federally

funded land acquisition programs. The Act and implementing regulations in [49 CFR 24](#) provide the basic requirements for projects using Federal funding. This Act is not an addition to eminent domain law but a policy standard providing a set of required actions and benefits that pertain to acquisitions and displacements from a residence, farm or business where federal funds are used in any part of the project. The law is broken down into three sub-chapters. The first sub- chapter contains the broad requirements of the law, definitions, State certification requirements and designation of the Department of Transportation as the lead agency for the Act. (DOT has delegated the lead agency function to FHWA.) The second sub- chapter contains the relocation provisions outlining the benefits that are to be made available to persons displaced by federally funded projects and identifies the duties of the lead agency. The third sub-chapter contains the policy statement for uniform real property acquisition.

The Act also provides that relocation assistance and payment benefits are required to assist persons displaced by the acquisition of their property. The Act also consolidates a set of procedures agencies have to use when acquiring property. Both the acquisition and relocation provisions of the law are required if Federal funds are to be applied to any part of the project. The intent of the acquisition policies is to achieve the following objectives:

- Encourage and expedite the acquisition of real property by agreements with owners;
- Avoid litigation and relieve congestion in the courts;
- Assure consistent treatment for owners in the many Federal programs, and
- Promote public confidence in Federal land acquisition practices.

2. **[23 USC 317 – Highways on Federal Lands](#)**. This section contains the legislative authority for DOT to assist in transferring necessary interests in land needed for right-of-way across federally owned lands for federally assisted projects. Procedures related to obtaining right of way over federal land are addressed in [Section 12.6](#).
3. **[23 USC 323 – Donations and credits](#)**. This section covers provisions relating to land donations in support of federally assisted projects and provide criteria allowing credits toward the State or local share for donated property.

The *Code of Federal Regulations* (CFR) documents regulations issued by federal agencies to implement the laws passed by Congress. Actions by federal agencies to modify or update CFR materials are published for comment in the [Federal Register](#) (FR).

1. **[49 CFR 24 – Uniform Relocation Assistance and Real Property Acquisition for Federal and Federally-Assisted Programs](#)**. Contains the implementing regulations for the Uniform Act. The regulation including the Appendix contains the Federal acquisition and relocation standards. The provisions in this rule and the Uniform Act apply to any project where privately owned real property is acquired. A summary of the acquisition and relocation requirements is included in [Section 12.9](#).
2. **[23 CFR 710 – Regulations for Right-Of-Way and Real Estate](#)**. This part contains Implementing regulations governing program administration, project development,

acquisition and management applicable to real property required for highway projects. See [Section 12.8](#) for details.

3. **[23 CFR 635 – Construction and Maintenance.](#)** Regulations governing project construction activities including the status requirements regarding right of way and utilities prior to advertising and awarding construction contracts. See [Section 12.9](#) for details.
4. **[25 CFR 169 – Rights-of-way over Indian Lands.](#)** The Bureau of Indian Affairs (BIA) regulations for obtaining easements over Indian lands covering the procedures, terms and conditions under which rights-of-way over and across tribal land, individually owned land and Government owned land may be granted. A general discussion on the subject is provided in [Section 12.7](#).

The above referenced federal laws and regulations provide the basic requirements for State and local land acquisition practice. [FHWA Realty](#) contains federal guidance and interpretation of how such laws are applied, including the following primary references:

1. **[Real Estate Acquisition Guide.](#)** This guide provides a comprehensive discussion of the various Federal requirements related to implementing the Uniform Act and project development and administration contained in [23 CFR 710](#) related to right-of-way concerns. It was developed specifically to assist local governments cooperating in developing a federally funded project.
2. **[Right-of-Way Project Development Guide \(PDG\).](#)** This guide provides practical approaches to developing a right-of-way project. It concentrates on providing accepted approaches to deal with developing a right-of-way project including mini-case studies to demonstrate how States have handled a variety of right-of-way problems. This guide utilizes a simple narrative approach instead of using the regulatory language and CFR references to explain activities related to right of way acquisition programs. The guide covers valuation, negotiation and relocation procedures, plus contracting for right of way services and other administrative issues that are related to highway acquisition.

### 12.1.1.2 Statutory Interpretations and Precedents

The FHWA Office of the Chief Counsel has had occasions to interpret some of the provisions in [23 CFR 710\(d\)](#) which pertains only to the Interstate System; and [23 USC 317](#) which pertains to all Federal-aid Systems and FLH projects covered under Chapter 2 of Title 23. In some instances, representatives of other Federal agencies have been conferred with to determine an agreeable application of the statute. A number of these interpretations have been referenced earlier in this chapter, and some others are as follows:

1. In [23 USC 317\(a\)](#), the phrase “lands or interests in lands owned by the United States” includes any interest in land owned by the United States, which interest is appurtenant to privately owned property. Examples include a leasehold interest, a reversionary interest, a mineral interest, an easement right in, on, and below the surface and a right to control or restrict the use of land. These interests may be relinquished or terminated under the cited statutory authority, for highway purposes.
2. The clause “for the right-of-way of any highway” in [23 USC 317\(a\)](#) is interpreted to mean “with respect to,” or “in connection with,” or “with regard to” a highway. Accordingly, lands

required as a maintenance site, stockpile site, or for scenic purposes, or for other construction projects and highway maintenance after the completion of the project, although not contiguous to the project, may be transferred under Section 317(a).

3. The phrase “such highway adjacent to such lands or interests in land”, appearing in the same section, is construed to mean “in the vicinity of” or “in the general area” of such land. Thus, land required as a source of borrow materials need not be contiguous to or actually about the highway project. The land parcels may be, and very often are, located a considerable distance away from the project. This interpretation is supported by a decision of the Court of Appeals for the Ninth Circuit. The Court said that “adjacent to such land” must be given a broad interpretation and that eight to ten miles from the construction would be adjacent to, as contemplated in any reasonable interpretation of the statute. (*Southern Idaho Conference Assoc. of Seventh Day Adventists. v. United States*, 418 F.2d 411, 416 (9th Cir. 1968))
4. The words “as a source of materials” includes either transfer of land outright for continuous and unlimited withdrawal of borrow material or the transfer of the right to enter upon the land for the purpose of extracting a specific quantity of materials during a period of time. However, in the case of BLM lands, the quantity of material needed should be specified so that BLM may plan other uses of the site.
5. In [23 USC 317\(b\)](#), the words, “under conditions” appearing in the clause “shall have agreed to the appropriation and transfer under conditions” do not include a condition whereby payment of a monetary consideration is required for the lands to be transferred. The following phrase “adequate protection and utilization of the reserve” can reasonably be interpreted to mean “adequate protection and utilization of the remainder lands”. Under this interpretation a monetary consideration may be required where a portion of a housing project is being transferred, and such transfer will adversely affect the agency's investment in the remainder property. The transferor agency should not be deterred in its mission or suffer a harm, without compensation, because of the transfer. However, it may receive a benefit from the road project to compensate for its loss of land.
6. The phrase “such land and materials may be appropriated and transferred” includes the conveyance of a determinable fee interest in the land, or such lesser interest as may be required by the SHA. This would include a highway easement for highway purposes.
7. The phrase “or its nominee,” appearing at the end of [23 USC 317\(b\)](#), where lands may be transferred to the SHA, is interpreted to mean an official authorized by State law, another State agency, a city, town, county, or other political subdivision of the State.
8. [23 USC 317\(c\)](#) says that if at any time the need for such lands or materials no longer exists, notice shall be given by the SHA to the FHWA. Further, there shall be an immediate and automatic reversion to the transferor agency. A recorded quitclaim deed or notice, suitable for recording, shall state that the need for the lands or materials no longer exists. The FHWA Chief Counsel's position is that such reversion is immediate and effective when the land is no longer used for highway purposes, even though the State fails or refuses to give notice of that fact. Notwithstanding Section 317(c), GSA may require compliance with their [Federal Management Regulation 102-75](#), as noted in Subpart 1.8(d), *supra*. (23 CFR 710.601; Federal Aid Policy Guide) But see Southern Idaho Conference of Seventh

Day Adventists v. United States, *supra*, where land reserved for a material site under 23 USC 317, remains a material site until it is specifically canceled by the Secretary.

9. With respect to the possibility of a reversion, a clause which may be used in an instrument of transfer and which is required in General Service Administration conveyances is as follows:

"In the event of a reversion, the acquiring agency shall be responsible for the protection and maintenance of the subject Premises from the date of notice of intent to revert title until such time as a quitclaim deed revesting title in the United States of America is recorded."

10. [23 USC 317](#) authorizes the transfer of any lands or "interests in lands" owned by the United States. Since the term "interest in lands" includes the control of access from adjoining lands, a transfer effected under Section 317 may properly include control of access to, from and between the land transferred and the remainder lands of the United States.
11. [23 USC 317](#) provides that the lands and materials transfer shall immediately revert to the grantor agency if at any time need for such property no longer exists. Since [23 USC 317\(d\)](#) has no such requirement, lands transferred may possibly be given the State outright, although this has not been done. Since Section 107(d) states that "the Secretary may make such arrangements with the agency having jurisdiction over such lands as may be necessary", it is the policy of the FHWA to include standard reversionary provision in all Section 107(d) transfers. This policy fosters a consistent and amicable relationship with transferor agencies, whether effected under Section 317 or Section 107(d).
12. The provisions of [23 USC 317](#) authorize the transfer of borrow material sites required for the construction or maintenance of projects on a Federal-aid system. [23 USC 107\(d\)](#), applicable only to projects on the Interstate System, does not specifically authorize the transfer of borrow materials sites. However, since the provisions of Section 317 are also applicable to Interstate highway projects, the authority contained in both sections of the statute may be relied upon in effecting the transfer of borrow material sites required for such projects.
13. It is the FHWA position that [23 USC 107\(d\)](#) and [23 USC 317](#) were specifically enacted for highway purposes. Thus, these statutes take precedence over more general statutes, which may be considered inconsistent.

#### **12.1.1.3 State Laws and Regulations**

The above Federal references are the foundations for [State laws and regulations](#) that apply to land acquisition within their borders. While the federal laws and regulations provide the broad framework regarding property acquisition, the particulars lie in the laws, regulations or codes of the State where the project is located. State laws generally also govern the procedural policies of their county or municipal governments. For relocating or accommodating utilities or acquiring private land and relocating persons or property from proposed right of way, usually the State laws and regulations will apply. All States have parallel legislation to implement eminent domain

provisions and address the policies and benefits required by the Uniform Act. Some provide benefits that exceed the federal minimums. For projects within their jurisdiction, the State procedures apply since all have already certified to FHWA that they have laws and benefits consistent with federal requirements. County and municipal governments must generally follow their respective State DOT approved procedures.

State law and regulation provide the framework for any required acquisition of privately owned lands identified as needed for a proposed project. See [Section 12.8](#) for more detail on the steps required for setting up the agreements and providing for land acquisition and if needed, relocations, prior to advancing a project to construction. State policies and regulations will also guide the relocation or accommodation of utilities affected by a proposed project and [Section 12.4](#) includes necessary guidance materials. [Section 12.5](#) contains similar information on the procedures required to work with railroads that may be affected by a project.

Acquisition of private property is based on the laws and procedures employed within each State. State Departments of Transportation (SDOT) have manuals and guidance materials, addressing the standards and procedures necessary to acquire property in compliance with the federal policy requirements of the Uniform Act. In addition, almost all States have programs and guidance material to assist local agencies in acquiring property for federally or state funded projects. A limited number of States prefer to acquire lands needed for local projects themselves when federal funds are involved in a project and in such cases it may be best to have the SDOT serve as the cooperating agency to handle right-of-way acquisition.

State and local custom regarding land titles, property records, right-of-way plans and other records need to be identified and matched with project development procedures.

Under provisions in [23 CFR 710](#), all States must maintain an up-to-date right-of-way operations manual that presents their existing practices and procedures for ensuring compliance with Federal and State real estate laws and regulations. Since all States have provided FHWA with assurances that they have laws and procedures enabling them to fully comply with the Uniform Act, project activity conforming to State standards and procedures can generally be accepted as complying with the provisions of the Uniform Act. State manuals are revised periodically, and procedures and guidance relating to right of way acquisition and utilities may be available on-line. The FHWA Office of Real Estate Services maintains a listing of [State Right-of-Way Resources](#). Some states maintain similar referral information. ~~For example, the Iowa DOT maintains links to other States' Right of Way materials.~~ The [AASHTO Right-of-Way and Utilities Subcommittee](#) provides information on current topics and research.

### **12.1.2 RIGHT OF WAY AND UTILITIES PROCESS OVERVIEW**

Right of way and utility related issues should be identified, considered and resolved as early as possible in the project development process. Right of way and utility input at an early project stage can facilitate the design and NEPA processes by providing specialized information and expertise to the project team. For purposes of planning the Right of Way and Utilities process for a project, consider the following project development milestones with related key points.

Although the primary right of way and utility support (ROWUS) activities are concentrated in Stage 3 and 4, there are tasks or coordination activities in which they should be involved in all stages. For each of the stages the following brief outline identifies some key work areas where depending on project conditions ROWUS involvement might be appropriate.

The general right of way acquisition process is depicted in [Exhibit 12.1-A](#), and the utility relocation process is depicted in [Exhibit 12.4-A](#).

### **12.1.2.1 Initial Right of Way Planning**

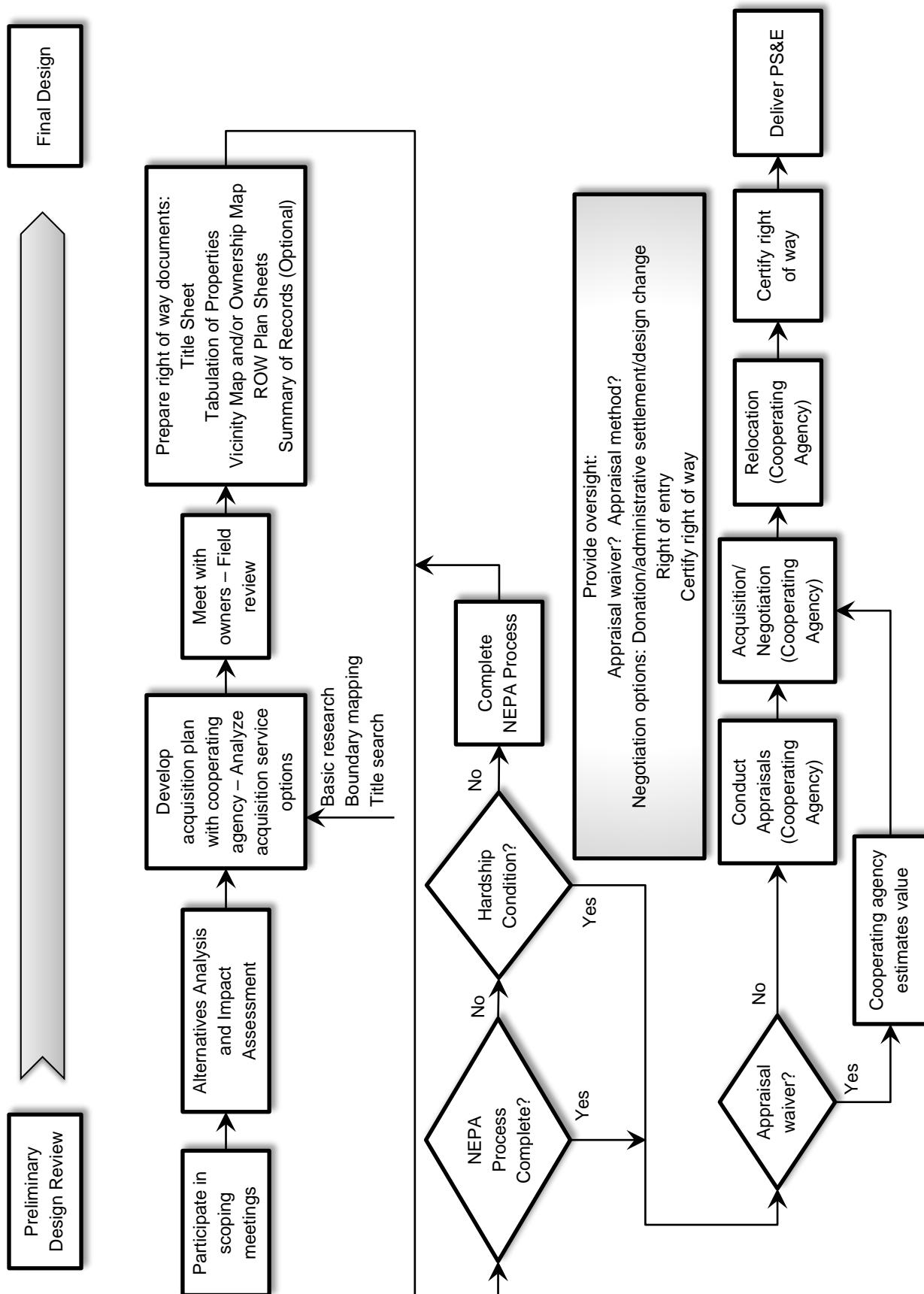
Right-of-Way activities can require an extended time commitment and affect project delivery schedules. It is essential that right-of-way considerations and issues be identified early in the project development process (refer to [Chapter 3](#)). The initial stage revolves around activities to set up the project and identify both the scope and stakeholders in the project. Identify the type and extent of right of way needed for the project and assess the capabilities of the cooperating agency that will be responsible for right of way and utility work. Any training or support services needed by the cooperating agency to acquire or work with affected utilities should be identified at this stage of the project. The following activities should be performed for this stage:

- Identify known utilities
- Develop contact list of utility interests
- Develop project agreement addressing utility issues

### **12.1.2.2 Preliminary Right of Way Activities**

This stage includes the support for the development of alternatives and the NEPA process during which a range of effects on both the natural and human environment are evaluated. Provide support in developing surveys and ownership information, which can often identify critical locations where property interests may influence the selection of the preferred alternative. Communicate any feedback received from owners to the design unit, which may also influence preliminary design considerations. Input from the right-of-way specialist during the preliminary design process can be influential in determining the optimum alignment. Human impact on the environment can often be minimized and the time required for purchasing or obtaining the easements, deeds, permits or agreements shortened by identifying the local land holdings and the potential effects on property rights. The following activities should be performed for this stage:

- Facilitate the design and NEPA processes
- Preliminary right of way studies
- Identifying existing ownerships, existing rights and existing access
- Identify existing utility facilities
- Field investigations and surveys
- Locate and map all utilities within extent of project
- Secure title work
- Right of way impact and cost analysis relative to design alternatives
- Public Hearing involvement to provide right of way and utility information

**Exhibit 12.1-A      RIGHT-OF-WAY ACQUISITION PROCESS FLOW CHART**


### 12.1.2.3 Right of Way and Utilities Development and Engineering

This includes defining the specific properties and utilities affected by the preferred alignment. During this stage right of way plans are completed and the utility coordination work started. Coordinate the plan preparation process and develop maps and descriptions necessary to support project needs. Checklists covering Preliminary Research, Boundary Compilation and Documents detail the work done during this stage. Work activities during this stage are described in Sections [5.4.5](#), [9.5.9](#) and [12.2](#). Identify the type of ownership interests that might be affected by the project. For railroads and utilities, early coordination is essential since they need sufficient time to plan for and complete work necessary to fit final project design and construction needs. The review and approval process can take time even in situations when coordination is required to assure that no additional right-of-way is required.

Define the ownership of any additional right-of-way. Sections [12.6](#), [12.7](#) and [12.8](#) address in more detail the activities that will be required to obtain right-of-way when Federal, Tribal or privately owned property is involved in a project. The time required to obtain additional right-of-way can be directly linked to the number of ownerships affected, the cooperating agency involved and the complexity of the property interests affected.

The following activities should be performed for this stage:

- Property boundary ownership map/compilation
- Project proposed right of way takings
- Produce right of way documents
- Design accommodations for utilities
- Identify utility conflicts

### 12.1.2.4 Right of Way Acquisition

During this stage final right of way plans will be issued identifying the individual parcels and utility work related to the project. For Federal land parcels prepare a land transfer request on behalf of the cooperating agency. Where private land, or non-federal lands, and utilities work is required the cooperating agency will acquire the required property rights and coordinate the accommodation of affected utilities and railroads. Provide support services to the acquiring agency, as needed. Permits required by the project are also requested during this stage. Work activities during this stage are discussed beginning in [Section 12.4](#).

The following activities should be performed for this stage:

- Evaluate acquisition capabilities of cooperating agency
- Develop acquisition service contract
- Oversight and stewardship
- Develop utility conflict resolution or utility accommodation plan
- Develop right of way agreements
- Develop utility agreements

### **12.1.2.5 PS&E Development and Finalization**

At the PS&E development stage final design details are developed and compared with mitigation and property acquisition commitments, and then consolidated into the construction proposal. Assure that Right-of-Way Certifications from the acquiring agency are accurate, and that the status of required utility adjustments is accurately reflected in the availability statement included in the contract proposal.

Ideally all property required for construction is available, and all utility relocations are completed prior to contract advertisement. When that is not the case, the proposal must provide the contractor detailed information regarding when parcels will be available and when and where utilities work will have to be coordinated with project construction.

The following activities should be performed for this stage:

- Develop special contract requirements
- Process right of way and utility certifications
- Finalize utility related documents
- Utility facility specifications, SCRs, detail sheets, etc.
- Utility certification according to [23.CFR.635.309\(b\)](#)
- Assure right of way and utility commitments are included in PS&E

### **12.1.2.6 Construction**

During project construction there may be disputes with property owners or utilities that arise out of issues related to negotiated settlements, letter of consent or permit conditions, utility relocation agreements or any other property rights issue. When applicable, coordinate the dispute resolution involving land based issues.

Prior to construction provide notification to utility companies to participate in pre-construction conferences, and continue coordination throughout construction.

### **12.1.2.7 Recording**

After the project construction is complete assure that 'as built' right of way plans are recorded when required and that any agreed final survey and monument placement be completed before finalizing project activity.

## 12.2 GUIDANCE AND REFERENCES

The references shown in this section provide additional information and guidance relevant to Right of Way and Utilities.

### 12.2.1 LAWS AND REGULATIONS

1. Uniform Act Title 42 USC, Chapter 61, [Uniform Relocation Assistance and Real Property Acquisition Policies for Federal and Federally Assisted Programs](#)
2. 23 USC 107(d) Title 23 USC, Chapter 1, Section 107, [Acquisition of rights-of-way – Interstate System](#)
3. 23 USC 138 Title 23 USC, Chapter 1, Section 138, [Preservation of Parklands](#)
4. 23 USC 317 Title 23 USC, Chapter 3, Section 317, [Highways on Federal Lands](#)
5. 23 CFR 635 Title 23 CFR Part 635, [Construction and Maintenance](#)
6. 23 CFR 645 Title 23 CFR Part 645, [Utilities](#)
7. 23 CFR 710 Title 23 CFR Part 710, [Regulations for Right-Of-Way and Real Estate](#)
8. 25 CFR 162 Title 25 CFR Part 162, [Leases and Permits](#)
9. 25 CFR 169 Title 25 CFR Part 169, [Rights-of-way over Indian Lands](#)
10. 49 CFR 24 Title 49 CFR, Part 24, [Uniform Relocation Assistance and Real Property Acquisition for Federal and Federally-Assisted Programs](#)

### 12.2.2 GUIDANCE

1. FHWA Realty FHWA [Real Estate Information](#)
2. Real Estate Acquisition Guide FHWA [Real Estate Acquisition Guide For Local Public Agencies](#)
3. PDG [Project Development Guide \(PDG\)](#), FHWA Office of Real Estate Services

4. Program Guide *[Utility Relocation and Accommodation on Federal-Aid Highway Projects](#)*, FHWA Office of Program Administration, Sixth Edition, January 2003
5. Federal Acquisition Brochure *[Acquiring Real Property for Federal and Federal-aid Programs and Projects](#)*, Publication No. FHWA-HEP-05-030, 2005

## 12.3 RIGHT OF WAY COORDINATION

It is essential when additional property rights are required to build a proposed project that the ownership and jurisdiction be identified and coordinated so that, as necessary, responsibilities can be assigned and included in an interagency agreement to advance project activity. The ownership and jurisdiction, along with the property interests needed for the project are also key components to developing a realistic delivery schedule.

The FHWA documents referenced in [Section 12.2.2](#) provide guidance on implementation strategies to advance both property acquisition and utility relocation or accommodation. The general work flow of the right of way acquisition process is depicted in [Exhibit 12.1-A](#).

### 12.3.1 INTERNAL COORDINATION

As applicable, perform the following internal coordination activities during Project Development:

1. **Coordination with Planning and Programming.** At the early stage of project planning and scoping identify potential impacts to existing facilities or features that could have a significant effect upon the design, right of way and utilities, and the cost of developing the project.
2. **Coordinate with Surveying and Mapping.** Determine field evidence for boundaries and utility locations. Utility locate service. Provide monument records, plats and other documents to field surveyors with exhibits to determine what evidence is required.
3. **Coordination with Preliminary Design.** It is important for the right-of-way specialist to be involved and participate in the early field reviews when it is expected the scope of the project may involve acquisition of additional right-of-way, relocation of utilities, irrigation facilities or railroads. The early involvement by the right of way specialist can add value to the design process by contributing perspective to the analysis and selection of route and design alternatives. Having a knowledgeable representative from the cooperating agency participate in early project activity is recommended. This individual may provide insight into the land holdings and uses that may be affected by project development. The preliminary engineering investigation and preparation of the Project Scoping Report are described in [Section 3.3.1](#). Identifying potential right-of-way acquisition needs and determining if utilities, railroads or other public entities might be impacted by a project is a key component in assuring that sufficient time is available to meet project schedules.
4. **Coordination with Environment.** Throughout the planning, conceptual studies and preliminary design phases coordinate with the Environment unit to identify and evaluate right of way and utilities impacts and issues for inclusion in the environmental process. Refer to [Section 4.2](#).
5. **Coordination with Design.** Throughout the development of the design and PS&E it is important for the right-of-way specialist to be involved and participate in the determination of additional right-of-way, relocation of utilities, irrigation facilities or railroads. The continuous involvement by the right of way specialist during design can add value to the

design process by identifying opportunities to minimize the amount of additional right of way acquisition and utilities adjustments, and related costs and schedule impacts.

6. **Coordination with Construction.** Prior to and during construction, coordinate the right of way and utility issues closely with the Construction unit, including follow-up on right of way and utility commitments, and subsequent acquisitions or utility adjustments related to construction activities, if necessary.

### 12.3.2 EXTERNAL COORDINATION

As applicable, perform the following external coordination activities during project development:

1. Coordination with land owners
2. Coordination with tribal authorities
3. Coordination with acquiring/maintaining agency, including assurance of:
  - Legal sufficiency of right of way acquisition documents;
  - Recordability. Each state and local jurisdiction has its own unique recording requirements, which must be identified and incorporated into the development of right of way documents; and
  - Expertise and resources for right of way acquisition.
4. Coordination with utilities, railroads, irrigation companies
5. Coordination with State Agencies including State DOTs. It is important to identify the laws of the state within which a project is located since their standards of practice will control the form and process used for right-of-way acquisition and provide the policy related to utility accommodation and relocation when affected by a transportation project. Right-of-way and utility operations are for the most part dependent on states laws and policies relating to real property and utility accommodation. Title and land transfer requirements enacted through State legislation dictates how official records are maintained. Although federal acquisition and relocation policies apply to any property acquisitions required by a federally funded project, all States have provided assurances that their laws and practices comply with the minimum federal requirements. Many states have programs that provide benefits exceeding the Federal minimums and therefore project activities, especially when dealing with private land acquisition need to match state standards.
6. Coordination with the Federal Land Management Agency (FLMA) requirements
7. Coordination with State and local public agencies. Coordinate special permitting requirements for highway occupancy, encroachments and special uses.

### 12.3.3 ENVIRONMENTAL CONSIDERATIONS

Consider the following environmental-related constraints in developing the Right of Way for the project:

- NEPA and Right of Way Acquisition;
- 23 CFR 771;
- Context Sensitive Solutions (CSS). The CSS approach will sometimes utilize nontraditional solutions involving real estate and may influence the designation of right-of-way. See [Archive 4.6.1](#) and the [CSS information](#) provided by FHWA;
- Mitigation areas; and
- Hazardous materials, including
  - ◊ Due diligence requirements. Property acquired for right-of-way must be free of any hazardous material or contamination. Liability for any subsequent clean up or remediation will be at the expense of the right-of-way interest holder. In order to assure sufficient time is available for such actions it is imperative that the initial property scoping activities identify potential underground storage tanks and contaminated sites.
  - ◊ Certification on re-acquired land.

Right-of-Way acquisition cannot begin until after completion of the environmental document and approval of NEPA clearance, except under certain hardship and protective buying conditions as described in [23.CFR.710.503](#). Coordinate the right-of-way and utility activities with the environmental processes as described in [Section 4.2](#).

Involvement by Realty staff or representatives from the cooperating agency is recommended in the environmental analysis process. Local knowledge and their active participation can identify environmental issues caused by, social or economic impacts, or other human factors that will be affected by the project. Additionally right of way involvement may contribute to environmental mitigation efforts.

### 12.3.4 RIGHT-OF-WAY SERVICES

Right of Way services includes the following activities:

- Right of way engineering
- Right of way acquisition
- Interagency agreements

Refer to [Section 2.5](#) for a description and samples of interagency agreements FLH uses to advance a highway project. On projects needing new right-of-way, or affecting utilities or railroad interests, the agency having responsibility for acquisition needs to be identified at an early stage of project development. The cooperative agreement developed for the project needs to spell out the property acquisition and relocation responsibilities attendant to advancing the project.

When projects are developed in counties without staff familiar with right-of-way practices, the need may exist to contract for some or all of the right-of-way function. Contracting for such consultants, whether they deal with appraisal, acquisition, or relocation, must follow approved State or local (with State approval) procurement procedures. Cooperating agencies are encouraged to work with their state transportation agency to determine specific requirements.

FLH is responsible for assessing the capability of the right-of-way acquisition agency and fulfilling the stewardship role to assure acquisitions and relocations if required are conducted in compliance with federal and state standards. This will require pre-screening activities and consultation with the acquiring agency to develop an appropriate acquisition plan. Coordination between the local government and the State DOT may be necessary when local conditions warrant.

### **12.3.5 ESTABLISHING PROPOSED RIGHT-OF-WAY LIMITS**

Sufficient right of way must be acquired to construct, operate and maintain the roadway and the appurtenant features. Right of way should provide for access for maintenance, utility accommodation, possible future widening, drainage structures, and in some circumstances control of access. It may be necessary to acquire temporary right of way for construction activities. Establish the following right-of-way limits and descriptions for development of the project:

- Existing right of way. Property records research and cadastral surveys should be developed following the guidance in [Section 5.4.5](#).
- Width of new right of way. Consider state, county, and other cooperating agency right of way standard widths for roads and highways when establishing proposed right of way limits. A number of State roadway design manuals can be found online. Consult the appropriate state roadway Design Manuals for design information.

Establishing proposed right-of-way widths can usually begin as soon as the earthwork design is substantially completed. This must include alignment, grade, drainage structures, driveways and approach roads and any other structure associated with the roadway. The right-of-way line must encompass the cut and fill catches as well as clearing limits and slope rounding (construction limits). It is recommended that additional right-of-way area be included to accommodate minor changes in construction and to allow access for typical maintenance operations.

As practical, apply the following recommended criteria for projecting right of way lines:

- Maintain a uniform right-of-way width through each ownership parcel for ease in locating fences and describing right-of-way.
- Keep changes of right-of-way width to a minimum. Consider keeping the minimum length of constant width along centerline to 200 ft. [60 m]. Change widths when the right-of-way width needs changes by more than 15 ft. [5 m] over a length of 200 ft. [60 m].
- Limit changes in right-of-way widths to property lines, which will simplify the legal description of the right-of-way.

- Change right-of-way widths at even stations or at curve points. To make a symmetrical fence line, it may be necessary to change widths at 50 or 100 ft. [20 m] points or other odd stationing.
- Changes in width should taper from point-to-point except at property lines. Use a minimum of 50 ft. [15 m], preferably 100 ft. [30 m], along the centerline to avoid abrupt angles in the right-of-way line. This makes it easier to build and maintain right-of-way fences and to mow and care for right-of-way plantings.
- Provide sufficient right-of-way width to accommodate stopping sight distances at intersecting road approaches and provide right-of-way to maintain these sight distances. This is mandatory at all grade crossings of railroads.

Sometimes there is a need to have drainage control structures, channel changes, riprap, stilling pools, etc., constructed above or below the roadway. It is desirable to have these structures within the right-of-way so there is no question of the right to maintain or rebuild them. The right-of-way should extend at least 10 ft. [3 m] beyond these facilities. It is preferable to obtain right-of-way to cover these installations but in some cases a construction easement may suffice. Determine the required nature of these type right of way interests, such as the following:

- Fee
- Easement
- License or permit

### **12.3.6 RIGHT-OF-WAY PLANS**

Refer to the [PDG](#) Section 5.3 Right-of-Way Plans and Section, [23 CFR 710.203\(b\)\(1\)\(ii\)](#) and Division Supplements.

For Forest Lands Access Program (FLAP) projects, typically the county, as cooperating agency and maintainer of the roadway acquires right of way. Right of way document format must be adequate to meet the acquisition needs of the different acquisition agencies. The right-of-way staff should meet with the acquisition agency early in the design process to determine the format and style acceptable to all parties.

The following general topics also merit discussion and resolution during the preparation of the right-of-way plans:

- What are the document formatting and recordation requirements?
- How should property lines and ownerships be shown on the plan sheets?
- Can construction plans and right-of-way plans be combined?
  - ◊ For separate right-of-way plans, is it necessary to have profile grade plan sheets?
  - ◊ Are Federal-aid Plan and Profile Sheets adequate or are separate sheets necessary?
- What is the right-of-way fencing policy? How should fencing be depicted on the plan?

- When the agency acquiring the right-of-way is also responsible for utility relocation agreements, what additional requirements are necessary to complete the plans?
- What is the process for modifying right-of-way plans after the acquisition agency has given final approval to the plans?

The cooperating agency may request that FHWA furnish descriptions of the proposed right-of-way. Provide a metes and bounds description, if requested.

In some instances, the cooperators prefer to prepare their own right-of-way plans and only require a completed detail map with slope limits and all known property ties. In other areas, Federal Lands Highway Division offices are responsible for the acquisition of right-of-way. The following discussion provides the guidelines and recommendations that cover the preparation of plans.

Before developing the right-of-way plans, obtain title reports, copies of deeds and any other documents about existing right-of-way. In some cases, the acquisition agency will perform this function.

Examine the documents for easements or other encumbrances to reveal the existence and location of waterlines, conduits, drainage or irrigation lines or other features affecting construction.

Although not typical on FLH projects, a relocation plan may have been prepared during the conceptual stage of the project and is available to the right-of-way designer for information related to improved properties affected by the project. If the plan is outdated or significant changes have occurred within the project corridor, it may be necessary to request a supplemental relocation study. The study should show how occupancy needs are correlated with specific available and suitable housing. Typically, the right-of-way designer can request this information from the State or cooperator by working through the appropriate FHWA Federal- aid division office.

Resolving the right-of-way plan format and obtaining current title reports and other documentation opens the way to preparation of the actual right-of-way plans. Completed right- of-way plans generally consist of four elements:

- Title Sheet.
- Tabulation of Properties.
- Vicinity Map and/or Ownership Map.
- Right-of-Way Plan Sheets.
- Summary of Records (optional)

The basic information required on all right-of-way plans is found in [FAPG NS 23 CFR 630B](#). The Division Supplements provide sample plans and activity checklists to assist in the development and review of right of way plans.

A standard construction type of title sheet, modified to reflect right-of-way criteria, may be used provided it is acceptable to the acquisition agency. All the information that normally shows on a construction title sheet can appear on the right-of-way Title Sheet.

Most projects require a vicinity map or total ownership parcel map. The map scale used should be suitable to show the entire project on one plan sheet. It should also show general information

to depict the project in relation to surrounding communities, public and private road systems and other local features.

Many States use the vicinity map to show ownerships and parcel numbers. This is often shown in tabular form with column headings as follows:

- Parcel numbers.
- Recorded owner.
- Total assessed ownership.
- Right-of-way required.
- Existing right-of-way.
- Remainder (left and right).
- Easements (permanent and temporary).

Minor variations of this tabular format will occur depending on the acquisition agency's practices. It is usually permissible to place the parcel tabulation on a separate plan sheet if the vicinity map becomes too detailed. Some agencies show the parcel tabulation on the individual plan sheets rather than the vicinity map. Best practice for vicinity maps is to follow the format of the applicable agency manual for projects located on a county road or State system.

In addition to the requirements of the vicinity map and other right-of-way documents, show the following data on the right-of-way plan sheets:

1. **Alignment.** Show the base line that legally describes the right-of-way as a continuous solid line for the full length of the project including alignment data. Existing or additional centerlines show as dashed lines with or without alignment data as appropriate. Tie the existing stationing to the new centerline by station and/or bearing equations.
2. **Control Features.** In addition to the culture tie requirements of [Chapter 5](#), identify on the plans all Government subdivisions, platted subdivisions, donation land claims, National Park or Forest boundaries, Indian reservations or farm units.

Show a minimum of one tie from the new highway centerline to an existing and recorded monument or Government subdivision, particularly the monument from which the title report originates. Compute the tie to a centerline intersection along the section subdivision line with a station, bearing and distance to the monument.

Frequently, it is necessary to resolve the issue of appropriate evidence of property lines for purposes of right-of-way activities. The property line could be a fence, ditch, partial section boundary (1/16) or the line described in the property deed. Locate, reference and show on the plans all topographic features (e.g., fences, ditches, roads) relating to property usage and boundaries. These topographic features are shown on the plans as they actually exist in the field. The property line is determined and designated from this data for right-of-way requirements.

3. **Right-of-Way Details.** Right-of-way lines are continuous. These lines cross city streets, county roads, rivers, railroads, etc., and must match adjoining projects.

Show enough detail to describe the right-of-way for its entire length from a centerline or from a metes and bounds description. Tie any existing right-of-way retained for the new

project and describe it from the new centerline or by metes and bounds description. Ties to a previous centerline are not acceptable.

Right-of-way may be established by deed, dedication or statute. The project scoping report should identify how the existing right-of-way was obtained, the owner, and the type of interest held.

Right-of-way by usage or prescription may or not be legally supportable in a court of law, depending on the evidence and other factors. When a recorded (deeded) right-of-way does not exist, tie any physical evidence of the existing roadway and the maintained right-of-way, and the centerline of the existing road, to the new road alignment and/or the new right-of-way.

Right-of-way widths and centerline stationing must be shown at the beginning and ending of each plan sheet and at all points of change in right-of-way width. Any easements required outside the right-of-way must show permit descriptions. These easements will accommodate intersecting roads and streets, land service, access and temporary roads, drainage areas, material storage areas, slope widening, utilities, railroads and other special uses.

Show centerline stationing at the beginning and end of each easement. Mark each easement as temporary (T) or permanent (P). If the easement is irregular in shape, include distance and bearings for writing a description.

Temporary construction easements give permission to use the land for a brief time (e.g., during construction). Determine a period of effective use or termination date of the temporary easement. Use permanent easements where parties other than the owner need to maintain a right to the land (e.g., a pipeline, an access road).

Assign a parcel number to each recorded ownership for properties involved on each project. This includes all units of Government. As a rule, number parcels starting with the first tract crossed by the project and then continue in sequence through to the end of the project.

4. **Access Control.** FLH projects usually do not include access control which in most states is a compensable land right that must be specifically purchased and can create damages to the non-needed portion of a property. The highway-operating agency regulates control of access between a highway facility and all other property. In instances where access rights are acquired, access control lines and all approved points of entry or exit from the traffic lanes must be shown on the plans. An access control line may or may not be coincident with the right-of-way line. Several types of access control, ranging from minimal to full control, may exist within the project limits.

When the access control agency permits individual road approach entries from adjacent properties, identify them on the plans by symbol or type including stationing, width and grade.

Refer to [\[EFLHD – CFLHD – WFLHD\]](#) Division Supplements for more information.

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### **12.3.7 PLANS FOR NATIONAL FOREST LANDS AND FEDERAL AGENCIES**

When the acquisition agency and the Forest Service request that FHWA prepare right-of-way plans over National Forest Lands, the above plan preparation instructions apply. When the cooperator is a State highway agency, the right-of-way plans should comply with the Memorandum of Understanding (MOU) between the State and the Forest Service. When the acquisition agency is a county or other local Government entity, the State highway agency may assist the county in obtaining the appropriate easement deeds for the highway construction. The process will be expedited and function quite smoothly if the designer coordinates the procedures through the appropriate FHWA Federal-aid division right-of-way office.

Guidance in the [PDG](#) and in [23.CFR.710.601](#) provides information on the content requirements of the application, and the deed for conveying the lands or interests required. Other details concerning land transfers can be found in the [Manual for Federal Land Transfers for Federal-Aid Projects](#) and 1998 [MOU between FHWA and the USFS](#) and the 1982 [Interagency agreement between the FHWA and the BLM](#).

## 12.4 UTILITIES

The term utility means all privately, publicly or cooperatively owned lines, facilities and systems for producing, transmitting or distributing communications, power, heat, petroleum products, water, steam, waste and storm water not connected with highway drainage. Other services that directly or indirectly serve the public and are also considered utilities include cable television, fire and police signal systems and street lighting systems. It also means the utility company is inclusive of any wholly owned or controlled subsidiary.

Irrigation districts or companies performing work at Federal expense should be treated as utilities.

### 12.4.1 REGULATIONS AND GUIDANCE

**It is FHWA policy that utilities can occupy the right-of-way if they do not conflict with the integrity, operational safety or functional and aesthetic quality of the highway facility.**

Two sections of Federal highway law in Title 23 of the United States Code (cited 23 USC) specifically address utilities:

- [23 USC 109\(l\)](#) addresses the accommodation of utilities on the right of way of Federal-aid highways.
- [23 USC 123](#) addresses reimbursement for the relocation of utility facilities necessitated by construction on any Federal-aid or Federal Lands Highway project.

[23 CFR 645](#) and the [Non-regulatory Supplement to 23 CFR 645A](#) provide policy and guidelines on adjustments to utilities. The highway operating agencies have various degrees of authority to designate and to control the use of right-of-way acquired for public highway purposes. Their authorities depend upon State laws or regulations. Utilities also have various degrees of authority to install their lines and facilities on the right of way.

More information on utilities related relevant laws and regulations can be found at FHWA [Utilities Program](#).

### 12.4.2 ACCOMMODATION OF UTILITIES

It is in the public interest to permit utility facilities within the right of way of public roads and streets when such use does not interfere with primary highway purposes. The opportunity for such joint use avoids the additional cost of acquiring separate right of way for the exclusive accommodation of utilities. As a result, the right of way of highways, particularly local roads and streets, is used to provide public services to abutting residents as well as to serve conventional highway needs.

It is not mandatory to provide right of way for new utilities. However, existing rights must be recognized. Impacts to utility facilities or interests may be compensable under the Uniform Act in accordance with [23 CFR 645.107\(j\)](#).

It is FLH Standard Practice to accommodate existing facilities when they do not conflict with the primary function of the roadway. The roadway project can cause the relocation of utilities that are in conflict with either design or construction. It is required that the relocation be accommodated within the new right of way or the utility company be made whole for their relocation.

The FHWA's authority for allowing utility use and occupancy of the right of way of Federal-aid and direct Federal highway projects is contained in [23 CFR 1.23](#). The right of way must be devoted exclusively to public highway purposes. However, § 1.23(c) permits certain non- highway uses of the right of way which are found to be in the public interest provided such uses do not impair the highway or interfere with the free and safe flow of traffic thereon. As previously discussed above in "Public Interest Finding," such a public interest finding has been made for utilities.

Refer to Chapter 2 of the [Program Guide](#) for additional details. See also AASHTO's *A Guide for Accommodating Utilities within Highway Rights-of-Way*, 4th Edition, 2005, and AASHTO's *A Policy on the Accommodation of Utilities within Freeway Right-of-Way*, 5th Edition, 2005, for more guidance.

#### **12.4.3 UTILITY COORDINATION**

Coordinate utility issues early in the project development process, with all affected entities, including:

- Utility companies
- Cooperating agencies
- FLMAs
- State DOT or local agency for encroachment permits

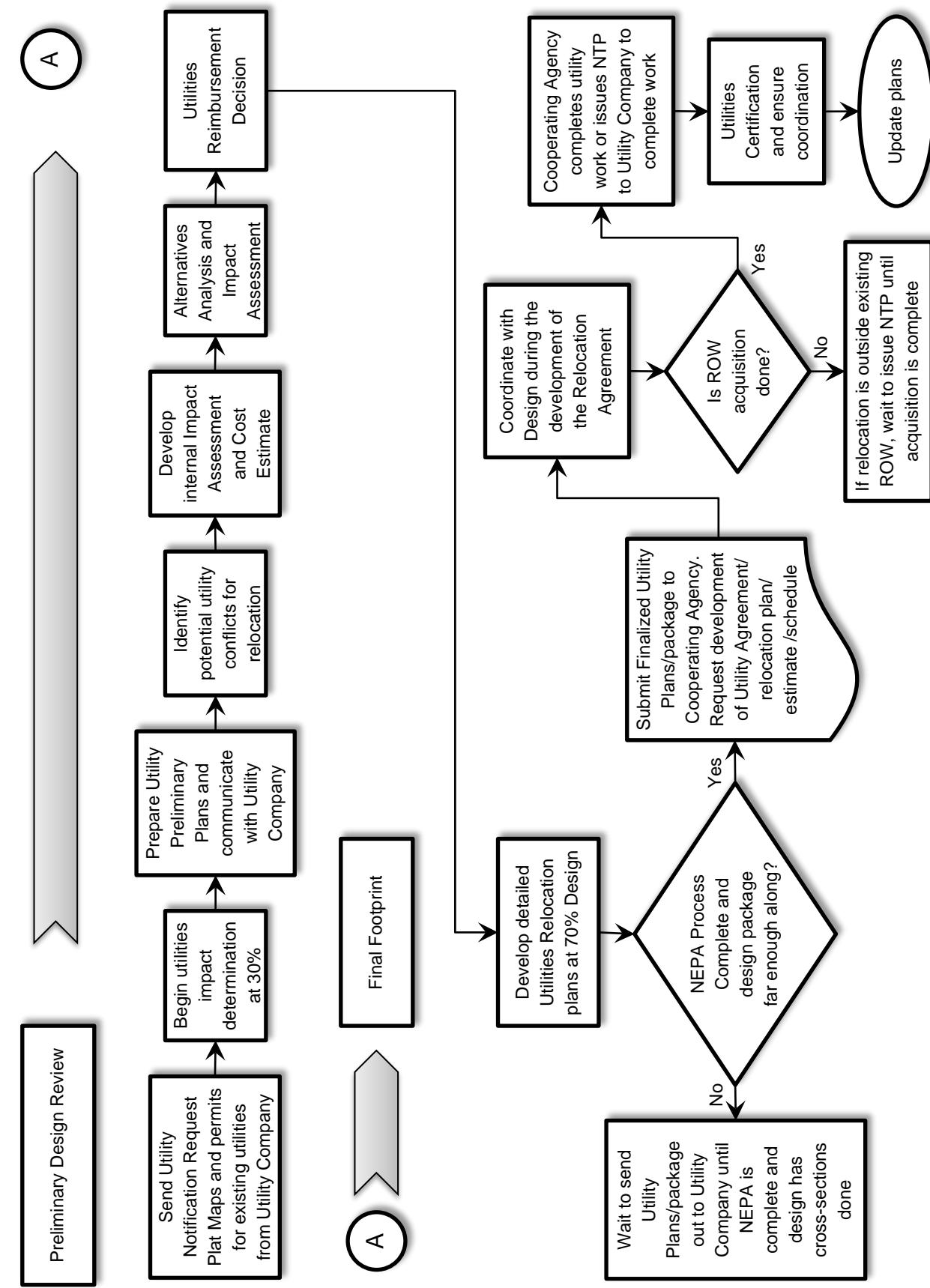
The cooperating agency is typically responsible to work with the utilities located within the right of way and arrange to either accommodate them within the new right of way or relocate them to a location outside the new right of way. FLH will typically provide the initial maps and plans to assist the cooperating agency working with the affected utilities. The general flow of work is indicated in [Exhibit 12.4-A](#).

Identify all existing utility facilities (overhead, surface and subsurface) in accordance with the American Society of Civil Engineers (ASCE) National Consensus Standard titled ASCE C-I 38-02, Standard Guidelines for the Collection and Depiction of Existing Subsurface Utility Data. Conduct required field survey for Quality Levels C, B and A of the standards to locates and map utilities within extent of project. At a minimum, call the State Utility Locate One Call Center (i.e. 811, Miss Utility One Call) to schedule a locating and marking of underground facilities prior to conducting preliminary survey.

Obtain a list of utility facility owners from State or County Utility Coordinators, One Call Centers or SUE (Subsurface Utility Engineering) firms.

Exhibit 12.4-A

## UTILITY RELOCATION PROCESS FLOW CHART



Contact and coordinate with all utility companies shortly after the preliminary design work begins. Outline the proposed construction project, its length, termini and other pertinent information that could affect the utility company (e.g., a tentative construction schedule).

During the preliminary or final design identify any utility conflicts, and provide the information to the utility company. The earlier an alert of potential conflicts can be identified the better for providing time to prepare for the accommodation or relocation necessary to complement project construction activity.

#### **12.4.4 UTILITY AGREEMENTS AND RESPONSIBILITY FOR UTILITY RELOCATION**

Early in the project development process, identify the roles and responsibilities of all parties regarding utility issues, and develop utility agreements which include the:

- Purpose of agreement,
- Parties to agreement,
- Terms of the agreement, and
- Financial liability and schedule.

After the preliminary design is established, identify the utilities that may require relocation or adjustment. Once the utilities have been identified, form a utility agreement with the utility company indicating scope of work and financial responsibilities. The utility agreements indicate responsibility for the utility adjustments.

This could be an agreement with a government, utility or a combination. When determining the responsibility for utility adjustments, identify each utility conflict on the preliminary plans. Color-coding and/or symbols can be helpful in making proper identifications. A tabulation sheet showing conflicts by utility companies is recommended.

Refer to the utility agreements to determine financial responsibility. If no utility agreement exists, use the following general guidance:

- When the utility occupies the existing highway right-of-way, applicable State law determines the portion of the utility relocation cost that is the responsibility of the Government.
- When the utility occupies Government land (e.g., land administered by the Forest Service, National Parks, Bureau of Land Management), relocation cost is usually borne by the utility. There are cases when the utility has occupancy rights that require the Government to share in the cost of adjustment, so check with the land management agency.
- When the utility facility is owned as part of the Federal property infrastructure, as in National Park areas, cost for relocation will be part of the project.
- Determine responsibility for design, ownership and future liability of the facility.

After establishing financial responsibility, show on preliminary utility plans the method used to make the required utility adjustment. One way to accomplish this is to identify and show the following information on the plans at each location where conflict exists:

- Who is to move the facility (i.e., utility company, FHWA, State).
- Existing and proposed locations (i.e., stationing, left or right of centerline).
- Who will pay for the relocation (i.e., utility company, FHWA, State).

A system of symbols can show the same information. In addition, some method of noting joint use of utilities (i.e., power and telephone lines on the same poles) is desirable for use on the plans.

There will also be cases where the utility move will be a combination of utility and Government expense. This covers instances where the utility is on existing right-of-way and would only need to move a short distance for construction purposes. However, FHWA wants them to move a greater distance for other purposes (e.g., aesthetics, clear zone requirements). In all cases, the utility owner has to be "made whole" or compensated for impacts to the facility.

Send a letter and plans to the utility companies inviting them to a field inspection. Provide the utility companies with a copy of [23 CFR 645](#) and [Non-regulatory Supplement Attachment for 23 CFR 645A](#) along with the preliminary plans, if applicable. This is particularly applicable if the utility is a local entity and not familiar with their rights and obligations under FHWA policy and procedure. As applicable, include a statement that the company's preliminary engineering costs for plan preparation and estimating costs of the utilities to be removed, adjusted or relocated at FHWA expense are eligible for reimbursement after date of the letter.

At the field review with the utility company's representative, discuss areas of mutual interest and resolve any conflicts to the extent possible.

Document oral agreements made at the field review. The report should note the name and organization of those in attendance, the names of contacts during development of the utility plan and any problems pertaining to facility relocations. The utility should receive a copy of the plan and any problems pertaining to facility relocations. The utility should receive a copy of the report.

Invite the highway agency responsible for permitting the utility to use a portion of the right-of-way to all field reviews and keep them informed of all developments. When the utility is on Government land, involve the administering agency in the utility relocation.

Following the field review, work with the utility's representative to determine the adequacy, practicality and economic reasonableness of the portion of the relocation eligible for reimbursement by FHWA. This involves checking the utilities' relocation plans and reviewing their work estimate for accuracy and cost effectiveness.

The evidence of the right-of-occupancy submitted by the utility requires a check to determine its validity. The evidence may be a letter giving the numbers and/or identifying the use permit or a statement that the utilities are on private right-of-way or easements. If there is any question, check the permits through the applicable agency. The utility right-of-way easement over private property can be checked through the county records of deeds or assessments.

On approval of the utility relocation plan, show the information on plan sheets and provide copies for the utility agreement, if applicable.

The Government requires a utility agreement when any portion of the relocation costs is eligible for reimbursement. When the relocation costs are borne by the utility, the utility staff will furnish plans, coordinate activities and review the utility's proposal for compatibility with construction and safety requirements. A non-reimbursable utility agreement may still be required to commit utility companies to meet relocation schedule.

Send a copy of the utility package (include occupancy permits when applicable) to the cooperating agency with responsibility for its use. The responsible agency is usually the State highway organization of the county. When the relocated utilities fall within the Forest Service boundaries, send a copy to the Forest Supervisor's Office for review.

When all the review comments are resolved, complete the final agreement package. Distribute in accordance with Division procedures.

Prepare a utilities packet and provide the packet to the appropriate construction staff for forwarding to the project engineer. The Construction unit is responsible for verifying the utilities work.

#### **12.4.5 LOCATION OF UTILITIES**

It is recommended that utilities be placed within the right of way but beyond or outside the construction limits.

If possible, locate facilities to minimize the need for utility adjustment on future highway improvements. Avoid interference with highway maintenance and permit access to the facilities for their maintenance with minimum interference to highway traffic. Follow roadside safety and clear zone requirements when making utility adjustments; refer to [Chapter 8](#) for this guidance.

Locate facilities on uniform alignment as near as practical to the right-of-way line. Locate facilities providing access for maintenance of utility facilities. Where possible, co-locate facilities within the same general corridor or trench.

For facilities crossing the highway, locate them at approximately right angles to the highway alignment whenever possible and, preferably, under the highway. It is recommended that placement of utility conduit be considered in the design and construction of the roadway for future placement of utilities under the roadway. Benefits to the project include elimination of future pavement cuts, preserving the integrity of the roadway, avoiding expensive directional boring, etc. Avoid longitudinal placement of any facility within the roadway prism.

#### **12.4.6 RETENTION OF EXISTING FACILITIES**

Determine if existing utilities may remain in place during construction, and if so develop a utility accommodation plan including:

- Design accommodation requirements and specifications (e.g. clearance requirements, minimum depth of cover)
- Preserve in place protections and requirements, including:
  - ◊ Encasement protection
  - ◊ Effect of final grade on facility

Under certain conditions, AASHTO policy permits existing facilities encountered during highway construction to remain in place. Facilities deviating from this policy may remain on the highway right-of-way when it is in the public interest and will not adversely affect the highway or its users. This type of retention will be with the understanding that compliance is mandatory when the facility is reconstructed.

When crash history or safety studies show that existing facilities are hazardous, relocate or shield them regardless of prior agreements with the utility. Changes in operating conditions of existing facilities, other than for routine maintenance, require a new permit from the highway operating agency before initiating any work or change.

#### **12.4.7 AESTHETIC CONTROLS**

The design of facilities should minimize any adverse visual impact and should be planned to preserve attractive landscapes.

New utility installations, including those needed for highway purposes, are not permitted on highway right-of-way or other lands acquired by or improved with Federal funds within or adjacent to areas of scenic enhancement and natural beauty. These types of areas include public parks and recreational lands, wildlife and waterfowl refuges, historic sites as described in [23 USC 138](#), scenic strips, overlooks, rest areas and landscaped areas.

New underground utility installations must not cause the extensive removal or alteration of trees visible to the highway user or impair the visual quality of the area.

Avoid new aerial installations unless there is no feasible and prudent alternative to the use of these lands.

No service connections are permitted to cross freeways when a distribution line is available within a reasonable distance on the same side of the highway as the premises being served. Keep crossings of other highways and streets to a minimum.

Facilities to be located on or across highways having easements across federally owned land require the approval of the FLMA and the roadway maintaining agency.

State law may have requirements for placement of utilities along roadways.

#### **12.4.8 UTILITY INSTALLATIONS ON HIGHWAY STRUCTURES**

Accommodate utility attachments to bridge structures whenever possible. In those cases where alternate location is not practical, ensure that utility relocation needs are identified early in the roadway and bridge design process.

#### **12.4.9 OVERHEAD POWER AND COMMUNICATION LINES**

Above ground facilities must be located outside the clear zone. When circumstances warrant a lesser distance, facilities can be installed behind guard rail or other protective barrier or other design accommodations can be made. It is recommended to locate all facilities as near as possible to the right of way line.

Minimum vertical clearance for conductors must meet the requirements of the National Electrical Safety Code or applicable local codes. When codes conflict, use the code requiring the greater clearance.

#### **12.4.10 UNDERGROUND ELECTRIC POWER AND COMMUNICATION LINES**

It is recommended that installation be outside the construction limits and as near to the right-of-way line as practical while maintaining a uniform distance from the highway centerline.

Longitudinal installations located within the foreslope limits are acceptable if an installation outside the ditch line would be difficult or costly; or if the highway traverses a scenic area where an aerial installation would have negative esthetic impact.

Locate installations placed within the foreslope limits a uniform distance from the pavement edge and as near as practical to the inside edge of the ditch. Locate all crossings as normal to the highway alignment as practical. Avoid crossings in deep cuts, near footings of structures, at-grade intersections or ramp terminals, at cross drains and in wet rocky terrain.

#### **12.4.11 IRRIGATION AND DRAINAGE PIPES, DITCHES AND CANALS**

When crossing a roadway, water canals and irrigation ditches can pass through culverts or bridges. Bury irrigation line and pipe siphon crossings from right of way line to right of way line or from edge-of-clear zone to edge-of-clear zone.

Open channels or ditches should not be parallel to highways within the clear zone. It is preferable to locate these outside the right-of-way limits. Conversely, accommodate existing irrigation facilities through minor modification of design, thus eliminating them from being located within the right of way.

Maintain water flow to accommodate periods of mandatory operation. Provide temporary facilities as needed.

## 12.5 RAILROADS

Projects that cross or may affect land owned by a railroad require early action to start the process required to coordinate development of necessary agreements between the railroad, the cooperating agency and FLH. The following sections provide guidance on railroad-highway right of way issues.

### 12.5.1 REGULATIONS AND GUIDANCE

Most railroad impacts for projects involve grade crossings. When initiating a project to eliminate a grade crossing of a highway the rail traffic volume should be considered and for low volume lines a determination made whether abandonment of the railroad line is probable within a reasonable time. Such considerations can influence the scope of the crossing design.

Railroads and their rights of way are addressed in several sections of the USC: Title 16, Conservation; Title 25, Indians; Title 43, Public Lands; and Title 45, Railroads. Title 23, Highways also contains numerous references to railroads, notably [23 USC 130](#) dealing with railway-highway crossings.

The federal regulations related to railroads from the highway perspective can be found in [23 CFR 646](#). Other federal programs that may be considered when project development affects railroads include Safety's [Railway-Highways Crossing Program](#), [rails with trails](#), and rails to trail programs in states with rail banking programs. Refer to [Section 5.4.4.6](#) for survey guidelines for railroad-highway grade crossings.

Identifying rail ownership can be facilitated through State contacts. Both [The Association of American Railroads \(AAR\)](#) and [Freightworld](#) maintain member railroad information.

### 12.5.2 RAILROAD AGREEMENTS

The processing of railroad agreements and the preparation of plans for railroad encroachment projects are usually time-consuming operations. Therefore, as indicated the coordination activities with the railroad and cooperating agency need to be started as early as possible in the project development process.

Railroad agreements are multi party documents between the cooperating highway agency, the affected railroad companies and the Federal Lands Highway Division. The responsibilities and obligations of each party must be spelled out in detail in the jointly signed agreement. If there is anticipated to be an interruption of service during the construction process it must be noted in the agreement. There is no rigid format for preparation of the agreement, but items needed in every agreement are spelled out in [FAPG NS 23 CFR 646B](#). Each railroad may have its own internal requirements.

In general, right of way is not acquired in fee from a railroad company. Instead, the highway cooperating agency acquires either a right-of-entry permit, or a temporary or permanent easement to cover land interests needed for highway construction. All cost associated in the preparation and recording of right-of-entry permit, temporary or permanent easement(s) including services provided by the railroad company (PS&E reviews, inspections, protection of railroad traffic, preliminary and construction engineering) will be borne by the cooperating highway agency.

The cooperating highway agency or the affected railroad may prepare the actual agreement. However, it requires review and approval by all three parties. The agreement must be executed prior to project advertising so that all parties, including the eventual contractor are aware of the agreed upon provisions.

Each State usually has a procedure and guide to clear their projects through the appropriate railroad channels. State requirements must be reviewed for compliance. Contact the cooperating highway agency for additional guidance.

Refer to [Section 9.3.15](#) for highway design considerations and requirements, and for coordination of the highway plans preparation with the railroad agreement.

## 12.6 FEDERAL LANDS

Lands needed for road right of way or road related construction located on federally owned land is obtained by requesting a federal land transfer. Provisions in both 23 USC and 23 CFR provide the authority for a transfer of an easement interest between a Federal Land Management Agency (FLMA) and a non-federal roadway maintaining agency. Although these transactions are referred to as a land transfer, the conveyance does not involve a transfer of the fee simple interest to the property. Only specific property rights for permanent or temporary use are transferred by easement with the underlying fee ownership remaining with the FLMA. In some cases it may be more expedient to construct roadway under a special use permit issued by the FLMA.

Generally, compensation for land is not required, but some agencies may require fees based on a schedule to cover the cost of processing the transfer request. When initiating work with a FLMA the existing MOUs with that agency should be reviewed. The FLH request to the FLMA for their consent to transfer the easement should also request a waiver of all fees.

Land transfers require coordination and cooperation between multiple agencies. The coordination process is usually time-consuming, and proper recognition of that fact is very important for the successful completion of a project. If a project is expected to involve a land transfer, it is very important to identify and involve realty staff for all involved agencies early on in the project development process. Refer to the flow chart in [Exhibit 12.6-A](#) for the key steps in processing a land transfer.

### 12.6.1 REGULATIONS AND GUIDANCE

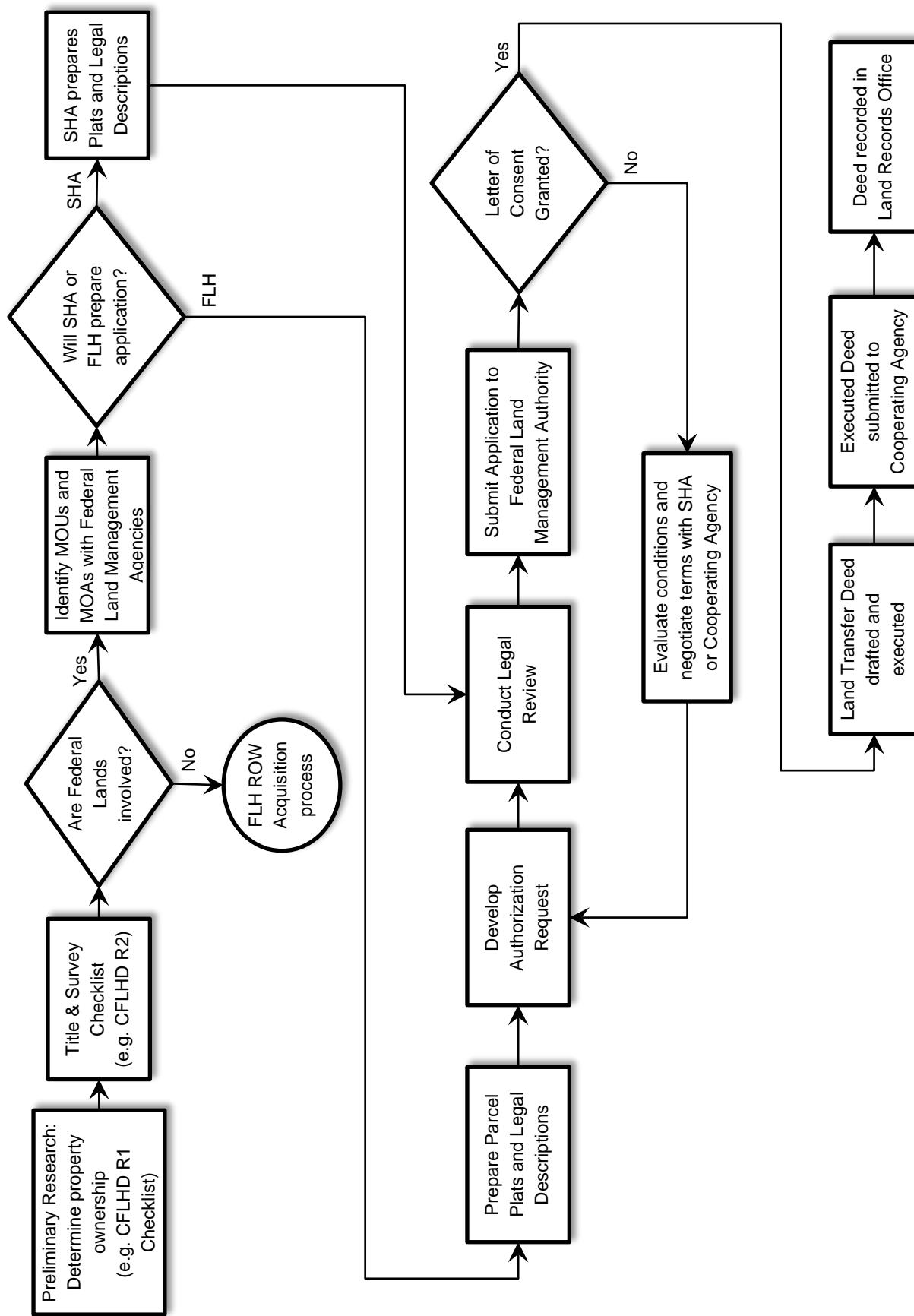
[23 USC 317](#) provides the authority for appropriation of lands or interests in lands owned by the United States, when identified as reasonably necessary for the right of way of any highway, or as a source of materials for the construction or maintenance of any such highway. The section provides for a filing and review process between the transportation agency and the land resource agency to identify any conditions that may apply to the land transfer. The section also provides that any transfer shall revert to the resource agency when the transportation need no longer exists.

[23 CFR 710.601](#) contains the regulations related to making an application for a Federal land transfer. For FLH projects, the application material is normally prepared on behalf of the cooperating agency, processed through the land-owning agency, and then approved by the FLH Division Engineer.

A [summary report](#) of findings related to improving interagency coordination required in securing public land transfers is available online at the FHWA Office of Real Estate Services.

Exhibit 12.6-A

## FEDERAL LANDS TRANSFERS FLOW CHART



## 12.6.2 FEDERAL LAND TRANSFER COORDINATION

During early project scoping, when project needs are identified and it is apparent that right of way or material sites will have to be obtained from a FLMA, steps need to be taken to alert the realty staff at the FLMA. Much of the environmental work is coordinated with the resource agency (see [Section 4.1](#) for process and MOU or MOA with Federal resource agencies), but often these preliminary activities are not processed through the realty office of the FLMA and specific attempts may be required to assure all parties essential for the review and approval of a transfer are alerted early in the process. Offices and contacts for the primary resource agencies involved with FLH projects can be found using the following links.

1. [U.S. Forest Service](#)
2. [National Park Service](#)
3. [U.S. Fish and Wildlife Service](#).

Early coordination regarding the potential land transfer is also needed with the state and the cooperating agency since deed form and filing documents must conform to any applicable State laws. In addition to the national MOUs and MOAs with the Federal resource agencies listed in [Section 2.5](#), regional and state based agreements may also be in place. Real Estate contacts in the State [FHWA Division Office](#) can identify those procedures and practices that apply.

The national MOUs and the State agreements provide the framework for land transfers. In locations where there are extensive public landholdings, more specific agency guidance manuals help provide more detailed information on document preparation and content requirements relating to the conveyance of property interests.

The preparation necessary to secure either a Letter of Consent or easement conveyance requires a commitment of resources for both the requesting agency and the FLMA. This preparation work includes preparation of surveys, land descriptions, and documents necessary to define the appropriate terms, stipulations, and conditions related to the Letter of Consent or easement conveyance.

### 12.6.2.1 Application to the Federal Agency

FLH projects affecting Federal resource agency land are developed in cooperation with the FLMA and developed in accordance with the environmental process outlined in [Chapter 4](#). A general understanding of the conditions and stipulation that may apply to a project should become known early on through the environmental process contacts with the agency. The agency staff that oversees the forest, park or refuge can also be particularly helpful in this respect. The work on the actual land transfer can begin once the alternate selection, preferred alignment survey, and mapping work are complete. The initial objective is to secure a letter of consent (similar to a right-of-entry) from the resource agency that will permit initiation of construction, with the easement deed conveyed based on “as built” conditions.

Unless otherwise determined by an agreement between the agencies, the following steps outline the process for obtaining a transfer or needed property rights for highway construction purposes.

1. Determine whether FLH or the SHA or Local Public Agency (LPA) will prepare an application setting forth the need for the lands in accordance with [23 CFR 710 Subpart F](#) (see also the Federal Aid Policy Guide).
2. Prepare the application. The application must address the requirements set forth in [23 CFR 710.601](#). The application must also cover any applicable provisions in the SHA Right of Way Manual as approved by FHWA at the time of the request, and meet the requirements of the cooperating agency. The FLH Division Engineer coordinates a review of the application and accompanying materials by the FLH Right-of-way utilities support (ROWUS) staff and the appropriate FHWA Counsel. The application must be based on the eligibility of the project for the proposed transfer, and a determination that the land is reasonably necessary for the project.

The application must include, at a minimum, the following information and certifications (See 23 CFR 710.601).

- The purpose for which the lands are to be used.
- The estate or interest in the land required for the project.
- The Federal-aid project number or other appropriate references.
- The name of the FLMA exercising jurisdiction over the land and identity of the installation or activity in possession of the land.
- The name of the cooperating agency that will have jurisdiction over the lands conveyed.
- A map showing the survey of the lands to be acquired.
- A legal description of the lands desired.
- A statement of compliance with the National Environmental Policy Act of 1969 ([42 USC 4332](#), et seq.) and any other applicable Federal environmental laws, including the National Historic Preservation Act ([54 USC Division A](#)), and Section 4(f) ([23 USC 138](#)).

3. The FLH Division Engineer requests authorization from the FLMA to allow the FHWA to effect the transfer of property under the FHWA statutory authority on behalf of the cooperating agency. To expedite the project, a Letter of Consent (interim right of entry) on behalf of the cooperating agency is routinely included in the request, since they are consenting to transfer the easement.
4. Upon receiving appropriate authorization from the FLMA, the FLH, cooperating agency, and possibly the SHA review the conditions and negotiate mutually acceptable conditions with the FLMA. The deed or appropriate instrument of transfer is then drafted by FHWA Counsel or the SHA. Deeds effecting the transfer shall contain certain clauses required by FHWA and [49 CFR 21.7\(a\)\(2\)](#), relating to nondiscrimination and the agreed upon conditions. All deeds shall be certified by an attorney licensed within the State as being legally sufficient, as required by [23 CFR 710.601\(f\)](#).
5. The proposed deed, along with any comments from the FLMA, conditions of transfer, and the recommendations of FLH will be coordinated with the cooperating agency. All

accompanying data shall be reviewed at this time. This includes the request for authorization to transfer, the responses of the FLMA, the conditions of transfer, the proposed deed with the legal property description, and findings that the land is reasonably necessary for the proposed highway project.

6. Coordinate the resolution of any remaining issues with the cooperating agency and the FLMA, and review the final documents. This review shall include a determination that the proposed deed and transfer conditions, easements, etc., are adequate and acceptable.
7. Upon a determination that the documents are adequate and acceptable, the FLH Division Engineer executes the deed and transmits it to the cooperating agency or the SHA for execution and recording. The FLH Division distributes executed copies of the deed to all interested parties and coordinates remaining administrative matters.
8. Upon notice by the SHA that the executed deed was delivered to, accepted in writing by the SHA, and recorded in the land records office, the Division posts the recordation data in a log or similar record. The Division then establishes follow-up procedures to assure that post construction activities related to the transfer are implemented.

#### **12.6.2.2 Plats and Legal Descriptions**

Plats and legal descriptions used in developing an application for a land transfer should conform to the following standards unless written agreement between the parties state otherwise.

1. Maps and plats should be printed on paper of a size for attachment to the deed. If the size exceeds 8½ x 11 inches [216 mm x 279 mm], they should be folded and mounted on 8½ x 11 inch [216 mm x 279 mm] paper. Very large or bulky maps may be cut in sections for mounting, or reduced, provided the reduction is clear and legible. Plats that are illegible, too small, or not properly mounted should be returned to the SHA for correction. The map or plat should show a survey of the requested land or should otherwise be sufficient to enable an engineer or surveyor to locate the land.
2. Maps, plats, and legal and narrative descriptions should be reviewed concurrently to determine that all courses, distances and reference points in the legal description are shown on the plat, so that the documents may be used independently. A metes and bounds description should be reviewed to make certain that the description yields an enclosed parcel.
3. Land descriptions may be by metes and bounds, a public land survey, or a legal subdivision description. The above types are preferred, but a centerline or other description is acceptable when allowed by the FLMA or by the provisions of (4) below. The description should also include the tract number and total acreage of each parcel.
4. A road or trail in place is a sufficient boundary or monument for a right of way when there is agreement among the parties involved and such property description is not in conflict with State law. The use of a United States Geological Survey Map or an aerial photo is acceptable instead of a centerline survey plat, for an existing road or trail. This procedure may be used for low risk boundary situations, not involving significant project expenditures, or when there is no dispute over ownership or land rights. The map or photo

should be attached to the deed and a "Certificate of Right-of-way Description Standard" (such as used by the Forest Service) may be included along with the title documents.

5. The plat or map shall, at a minimum, include the following information on all copies.
  - a. Control of access lines, if applicable, identified by appropriate symbol and map legend. Permitted access points should be located by survey between station numbers.
  - b. The area to be transferred outlined in red marker.
  - c. The acreage or square footage contained in each tract, if feasible. The area of very small parcels should be shown in square feet [meters].
  - d. Tract Number assigned to each parcel.
  - e. Section lines and section numbers, if applicable.
  - f. Name of State and County wherein land is located.
  - g. Citation to Federal-aid project number and project name.
  - h. Terminal and lateral limits of the project.
  - i. The map or plat should identify the location of appurtenances which are significant to the project or of noteworthy value, i.e., buildings, bridges or roads.
6. Land transfers for one project, under the jurisdiction of more than one agency, shall be separately described, but processed and coordinated so that the transfers coincide.

### **12.6.3 TRANSFER PROCEDURES OF OTHER AGENCIES**

In some situations the controlling agency may elect to utilize their own authority and procedures for effecting land transfers. These authorities are ancillary to or in lieu of the authority of Title 23, USC, and the procedures outlined above. When land transfers occur under the authority of the other Federal agency, the transfer is effected in a manner acceptable to the FHWA.

When authorities other than those under Title 23, USC, are used, the cooperating agency or FLH may receive a grant of a permit, license, and right of entry or similar document with conditions from the FLMA in lieu of a land transfer. This procedure is acceptable for temporary uses and for material or maintenance sites.

The land transfer procedures of various controlling agencies are discussed below, with additional information available in Chapters 14 and 16 of the [PDG](#).

#### **12.6.3.1 Department of Agriculture, Forest Service**

The Forest Service is responsible for protection and multiple use management of National Forest Lands and resources. Requests for transfer of property for which the Forest Service is the FLMA shall be consistent with the 1998 Memorandum of Understanding (MOU) between the Forest Service and the FHWA, as amended.

The Forest Director having jurisdiction over the needed land should be contacted early in the project development process to discuss the transfer. The land transfer request is submitted to the Regional Forester, or other designated representative of the Forest Service for approval. The application can include a request for an interim right of entry, pending execution of the instrument of transfer. If approved, the Regional Forester, or other designated representative of the Forest Service, will negotiate agreement on any required stipulations. The Forest Service shall then send a letter of consent to FLH and the cooperating agency agreeing to an imminent appropriation and transfer, and granting an interim right of entry.

These transfers of interests in Forest Service lands are by Highway Easement Deed and agreed upon stipulations, terms and conditions, some of which have been previously agreed upon; others are permissible if concurred in by the FHWA and Forest Service.

### **12.6.3.2 Department of the Interior**

#### **12.6.3.2.1 Bureau of Indian Affairs**

Applications for right of way or interests in land on Indian lands are submitted directly to the Bureau of Indian Affairs (BIA) by the SHA or LPA in accordance with [25 CFR 162](#) and [25 CFR 169](#). The transfer is effected by the BIA pursuant to its own statutory authority. For purposes other than those specified therein, transfers are made under the provisions of [23 USC 107\(d\)](#) and [23 USC 317](#). More detailed information on working with the BIA and Tribal governments is included in [Section 12.7](#).

#### **12.6.3.2.2 Bureau of Land Management**

The Bureau of Land Management (BLM) has jurisdiction over certain Federal lands (e.g., non-military Federal lands that are not part of a National Park, Monument, Wildlife Refuge, Forest, or Western States water project). Applications can be submitted to BLM directly or via the FHWA Counsel. The transfer is effected pursuant to an Interagency Agreement between BLM and FHWA, and takes the form of a Highway Easement Deed between the cooperating agency and FHWA. This procedure may not be appropriate for temporary use of land controlled by BLM. Temporary uses such as the use of a site for construction equipment, maintenance, or for gathering barrow materials may be more conducive to a permitting process, rather than with a recorded deed and land transfer.

The BLM, as the steward of certain public lands, must have a request that identifies land parcels and their uses. It cannot grant an overall request to use BLM lands for borrow material without identifying the location and quantity of material to be used. Under [30 USC 601](#), BLM may, in its discretion, transfer material without charge.

#### **12.6.3.2.3 Bureau of Reclamation**

The Bureau of Reclamation (BOR) has jurisdiction over certain other Federal lands associated with water resource projects in seventeen western States. In transfers involving these lands, the request is submitted to the BOR, which, in some instances, coordinates the transfer decision with

the BLM. The BOR will effect the transfer unless it defers to BLM for a decision and subsequent transfer on behalf of BOR.

#### 12.6.3.2.4 National Park Service

Application for rights-of-way or interests in lands controlled by the National Park Service (NPS), submitted pursuant to [23 USC 107\(d\)](#) and [23 USC 317](#), are reviewed and processed in the normal manner as described above, except that the transfer is effected by the FHWA, and that the instrument of transfer document or deed must be approved and concurred in by the NPS Director, prior to issuance.

Submissions affecting NPS lands must be sent to the NPS Headquarters and conform to [36 CFR 14](#), including Subpart D, which addresses transfers under Title 23, United States Code. The NPS will determine if use of the lands for highway purposes is consistent with its management program and if the SHA or LPA agrees to measures necessary to maintain program values.

#### 12.6.3.2.5 Fish and Wildlife Service

Applications for rights-of-way or interests in lands under the control and supervision of Fish and Wildlife Service are submitted by FHWA Counsel to the appropriate Regional Director of the Fish and Wildlife in accordance with the procedures set out in [50 CFR 29](#), Subpart B, Land Use Management.

Part 29 provides that where the land administered by the Secretary of the Interior, through the Fish and Wildlife Service, is owned in fee by the United States and the requested right of way is compatible with the objectives of the area, a permit or easement may be granted by the Regional Director. Generally, an easement or permit will be issued for a term of 50 years or for as long as it is used for the purpose granted.

Also, transfer agreements should recognize that unless otherwise stated, no interest granted shall give the grantee any right to use or remove any material, earth, or stone for construction or other purposes. However, stone or earth removed from the right of way in the construction of a project may be used elsewhere along that right of way in the construction of the same project.

#### 12.6.3.3 Military Departments

The military departments have statutory authority for granting rights of way over lands under their jurisdiction ([10 USC 2668](#)). This law provides for the granting of easements instead of fee estates. These departments may prefer to transfer an easement under their own authority.

Applications for transfers affecting lands under the control of the Army or the Air Force are submitted directly to the installation commander and to the District Engineer - Corps of Engineers. For Navy lands, the application is sent to the Public Works Officer of the Naval District involved. Where a satisfactory approval from the Navy is not readily obtained, the application can be processed pursuant to [23 USC 107\(d\)](#) and [23 USC 317](#) described above.

#### **12.6.3.4 Veterans Administration**

Under [38 USC 8124](#), the Veterans Administration (VA) is authorized to grant to any State, or political subdivision thereof, easements in and rights of way over lands under the VA's supervision and control, with such terms and conditions as it deems advisable. The application is submitted directly to the VA when an easement is requested from the VA.

#### **12.6.3.5 General Services Administration**

Special conditions may apply as in [41 CFR 102-75](#), *Real Property Disposal*, in general, and specifically in Subpart B, *Utilization of Excess Real Property* and Subpart C, *Surplus Real Property Disposal*. The General Services Administration may require the FHWA and the granting agency to agree on certain transfer conditions, such as the following: "In the event of a reversion, the acquiring agency shall be responsible for the protection and maintenance of the subject premises from the date of notice of intent to revert title until such time as a quitclaim deed re-vesting title in the United States of America is recorded."

### **12.6.4 FORMS OF TRANSFER**

Transfers made under the provisions of [23 USC 107\(d\)](#) and [23 USC 317](#), with the exception of Forest Service and BLM lands, need not be in any particular form as long as they comply with statutory conditions. [23 USC 107\(d\)](#) provides for FHWA to make such arrangements as may be necessary "to give" the SHA or designee constructing the project adequate rights of way and control of access from adjoining lands. Section 317(b) is equally broad, although it does not provide for control of access. It recites that the land and materials "may be appropriated and transferred to the State highway department, or its nominee, for such purposes and subject to the conditions so specified."

The granting document must be certified by an attorney licensed within the State as being legally sufficient, as required by [23 CFR 710.601\(f\)](#). The granting document(s) shall include the following information.

1. The statutory authority under which the transfer is authorized.
2. The identity of the Federal-aid or Interstate highway project involved.
3. A determination that the lands or interests in lands described therein are reasonably necessary for the project.
4. A statement that the head of the agency having jurisdiction over the land has authorized the Department of Transportation and FHWA to transfer the lands or interests in lands to the SHA.
5. An appropriate granting clause.

Except for grants affecting lands of the Forest Service and the BLM, the conveying instrument is a highway easement deed (See example in [Exhibit 12.6-B](#)) wherein the United States of America, acting through the FHWA, appropriates, remises, releases, quitclaims and transfers to the SHA or LPA, the lands or interests in land described therein, subject to any specified conditions. The

deed concludes with an acceptance of the transfer and the SHA or LPA certifies that it accepts the right of way or other interest conveyed and agrees to abide by the conditions of the deed.

Generally, the legal description, Exhibit "A", and the map, Exhibit "B", will be attached to and made a part of the granting document. (See examples in [Exhibit 12.6-B](#)). In some jurisdictions, where the map is not required, the instrument is legally sufficient and entitled to be recorded as a land record of the State, if a metes and bounds description, or other acceptable form of legal description is used. In other jurisdictions, a map, citation to a recorded subdivision plat or other land map will suffice as the description, if the method used meets the requirements of State law.

#### **Exhibit 12.6-B      EASEMENT DEED**

*<< See each Divisions supplements >>*

**Refer to [EFLHD – CFLHD – WFLHD] Division Supplements for more information.**

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#### **12.6.5 CONDITIONS OF TRANSFER**

Under the provisions of [23 USC 317\(b\)](#), transfers of lands are subject to conditions which the Secretary of the Department having control of such lands "deems necessary for the adequate protection and utilization of the reserve."

The policy of the FHWA is to concur in all reasonable conditions of transfer. For example, a requirement that the State convey to the United States comparable lands might be deemed reasonable if the substitute lands are essential to enable the agency presently occupying the land to carry out its functions. If substitute lands are not required, but are requested solely as compensation, the condition is not considered reasonable. Other conditions, as further described below, may involve providing payment of compensation or functional replacement of improvements. In such events, it is suggested that, where appropriate, the interest in the property described in the transfer request be a fee simple.

FHWA's policy has been that transfers generally occur without the payment of compensation. This policy is supported by an opinion dated as far back as 1947, when the then Acting Attorney General stated: "I concur in the conclusion of the General Counsel of the War Assets Administration that transfer of the land without monetary consideration is authorized by Section 17 of the Federal Highway Act..."

Various Federal or quasi-Federal agencies, such as the Tennessee Valley or Bonneville Power Authorities, may be required to receive compensation because they have fiduciary responsibilities to bondholders or other creditors or because funding of operational costs may be dependent, in whole or in part, on revenues received from real estate assets. In these circumstances, compensation may be a proper condition of transfer, if no other arrangements or conditions can be negotiated.

A Federal agency is entitled to compensation for those appurtenances on its facilities that are to be removed or destroyed in connection with the transfer of its lands. Thus, a Federal agency could impose as a condition of transfer that the State provide substitute land and for the construction thereon, facilities comparable to those taken in conjunction with the transferred land.

However, the substitute land and facilities must be essential for the continued operation of the remaining lands according to the agency purpose. The FHWA can concur in such a condition, provided the substitute land and facilities do not include an enhancement of the existing facilities. The transferor agency is to assume the cost of any enhancements.

In calculating the value of facilities that must be replaced, there should be a deduction for the accrued depreciation of the old facility. When a satisfactory arrangement cannot be achieved with the transferor agency, the matter should be referred to FHWA Counsel. A military department may request that the SHA or LPA pay the entire cost of replacing a facility (without enhancement), since the service may not be able to use funds for construction without specific Congressional approval. In this situation, the terms of the project agreement must be referenced to determine who will agree to pay the replacement cost when there is a great need for the highway construction project at that location.

A condition requiring review from the US Property Review Board is not necessary. By letter of March 10, 1983, the Assistant to the President for Policy Development advised FHWA that highway conveyances under [23 USC 107\(d\)](#) and [23 USC 317](#) are exempt from review by the United States Property Review Board, and as such are not "public benefit discount conveyances" as described in Executive Order 12348 of February 25, 1982.

The Archaeological Resources Protection Act of 1979, [16 USC 470aa-mm](#), provides certain conditions and permits which may apply to projects when archaeological resources may exist in the project area.

## **12.6.6 SPECIAL USE PERMITS**

There are limited applications of special use permits, which may be used for temporary staging areas, temporary field offices and laboratory trailers, temporary storage areas, material sources and waste sites. These permits should be used restrictively, and coordinated early in the project development process such that all necessary environmental analysis, engineering and decision-making is included in the overall project development and design process.

Follow the affected land management agency requirements for processing special use permits.

## 12.7 TRIBAL TRUST LANDS

This section pertains to the acquisition process when Indian lands may be required for non-TTP (Tribal Transportation Program) road projects.

FLH provides transportation planning and engineering support in conjunction with the Bureau of Indian Affairs (BIA) in developing the TTP as indicated in [Section 2.3.1.3](#). The support services provided do not involve oversight of right-of-way acquisition, as the BIA is responsible for that function. Operations of the TTP can be found in [25 CFR 170](#).

The TTP is advanced under terms in the May 24, 1983 MOA with the BIA. For projects that are part of the TTP system, the BIA is responsible for right- of-way acquisition.

Indian lands include any tract of land where interest in the surface estate is owned by a tribe or individual Indian in trust or restricted status.

The procedures used are similar to those outlined in the preceding section for public land transfers. The BIA is the Federal Land Management Agency with fiduciary responsibility on behalf of the Indian landowners and is authorized by Federal law to grant easements across Indian land for right of way when the tribe and individual Indian owners consent.

The difference between a public land transfer and one dealing with lands administered by the BIA is that a tribal government, and in certain instances, individual owners must be contacted to obtain their consent before any transfer is approved. State governments may also have to be consulted to coordinate the future maintenance requirements for the proposed highway improvement.

### 12.7.1 REGULATIONS AND GUIDANCE

During project development, there are a number of Federal laws that may require consultation with Indian tribes or individuals. The Native American Graves Protection and Repatriation Act of 1990, P.L. 101-601; [25 USC 32](#) (NAGPRA) provides that Federal Agencies must consult with Indian tribes or individuals prior to authorizing the intentional removal of Native American human remains, funerary objects, sacred objects, and objects of cultural heritage. Federal agencies and the affected tribes or individuals must agree as to the handling and disposition of "cultural items" as defined by the act. NEPA and NHPA provisions may also come into play during project development and have an impact on right of way considerations with respect to the protection of Indian cultural and historic resources.

When right of way is required from Indian lands, the conveyance of property rights will be under provisions in [25 USC 8](#). Sections 323-328 of that chapter provide the statutory language, and the related regulations issued by the BIA are in [25 CFR 169](#). The regulations provide that right of way grants for easements across Indian lands must have the consent of the Indian owners, with consent potentially required from both individual and tribal owners. The legal title to trusts or restricted lands is held by the United States of America for the benefit of a tribe(s) or an individual

Indian(s). The BIA Land Titles and Records Office (LTRO) records the official documents with the legal description, owners, and existing encumbrances of Indian lands.

The [Tribal Leaders Directory](#) provides contact information for all federally recognized tribal government officials and the BIA Regional and Agency offices.

Tribes are sovereign governments under Federal law and regulations. They need to be recognized as such and included in all project activities that might affect their lands. Procedures used when dealing with local public agencies and the general public need to be carefully evaluated to see if they are appropriate for use with tribal governments and the residents of the reservation.

There are about 280 land areas currently administered as [Federal Indian reservations](#) in 33 States. Reservation lands are those held in trust by the Federal government for the common benefit of the tribe. Allotted lands are reservation “trust” lands conveyed by the government to individual Native Americans.

Many States and some State departments of transportation have established government-to-government agreements with the tribes that have land holdings located within their borders. A good example of State liaison efforts is the [Minnesota Tribes and Transportation E-Handbook](#) where agreements, policies, and programs affecting the tribes are enumerated. Washington DOT [Tribal Liaison](#) office is another State site that provides a comprehensive coverage of the efforts being made to establish effective government-to-government relationship with the tribes.

Federal agencies also have developed liaison efforts to engage tribal governments. The FHWA [Tribal Transportation Planning](#) site provides background information and links to information regarding developing transportation planning capabilities including the TTP. Other Federal agencies directly related to the FLH program, namely the [U.S. Forest Service](#), [US Fish and Wildlife Service](#), and the [National Park Service](#) have developed government-to-government programs for working with the tribes. All agencies under executive order must establish a government-to-government consultation process with the native tribes when implementing programs affecting tribal interests.

## **12.7.2 TRIBAL SOVEREIGNTY AND CONSULTATION**

Indian tribes are recognized as domestic dependent nations with sovereign powers, except as divested by the United States. Any action that will involve lands held in trust by the United States for the benefit of a tribe or a member of a tribe will require early and ongoing consultation with the tribe.

Executive Order 13175, entitled Consultation and Coordination with Indian Tribal Governments, establishes regular and meaningful consultation and collaboration with tribal officials in the development of Federal policies that have tribal implications. Indian tribes are recognized as domestic dependent nations with sovereign powers, except as divested by the United States.

The following four essential elements must be met in developing effective consultation with the tribes.

- Identifying appropriate tribal governing bodies and individuals from whom to seek input;
- Conferring with appropriate tribal officials and/or individuals to obtain their views regarding project activities, right of way requests, and how particular locations may affect traditional tribal activities, practices, or beliefs;
- Treating tribal information as a necessary factor in defining the alternatives for acceptable project locations and right of way requirements;
- Creating and maintaining a permanent record showing how tribal information was obtained and used during the project development and right of way application process.

Effective consultation demands more effort than routine public participation. Tribal consultation means a dialogue between FLH and a tribal government regarding proposed project activities, with the intention of securing meaningful tribal input and involvement in the decision making process. Since the first step to obtain any right of way across Indian lands is the consent of the tribe, the consultative process must be started early and be an ongoing part of project development. This will require visits with tribal councils and appropriate tribal leaders on a recurring basis. Such face-to-face meetings, without regard to specific issues or proposed actions, help in developing relationships that can reduce the time and effort spent in consultation devoted to obtaining approvals on individual projects or actions. These early meetings should be used to discuss how, when, and with whom follow-on consultation would occur with those affected tribes and/or their designated representatives. It is very important to remember that this is government-to-government consultation and should be treated with appropriate respect and dignity of position.

When publishing notices and/or open letters to the public, it is good practice to send individual letters to tribes requesting their input on actions being considered, with individualized follow up to assure that tribal officials understand the issue at hand and that the consultation is being made in good faith.

It is important to note that a lack of response might be related to the sensitivity of the information involved. The tribes may be reluctant to provide specific information particularly when places of religious importance are involved. This could be because of the fact that it is culturally impermissible to share such information outside the tribe, or because the relationship with the tribe has not been sufficiently developed.

Consultation requirements and procedures, including the identification of the appropriate consultation partner vary according to the legal basis for consultation and any MOU or MOA that may apply with the Tribe, the BIA, or the State. Specific consultation should focus on groups known to have concerns about the geographic area under consideration.

To identify contacts within tribes, the BIA publishes an annual list of federally recognized tribes in the *Federal Register*. This list is the best starting point for identifying recognized tribes with which the United States has a government-to-government relationship. This list is not exhaustive, however, and must be augmented by other sources such as the State Office of Indian Affairs.

Tribes and groups with historic ties to the lands in question, including those that are no longer locally resident, should be given the same opportunity as resident tribes and groups to identify their selected contact persons, issues, and concerns regarding the proposed improvement.

Initial inquiries should be addressed to the presiding government official of the Indian tribe, e.g., the Tribal Chairman. Initial discussions should attempt to determine which individual(s) will be officially authorized to serve as the point of contact and representative/spokesperson for highway and right of way matters that may come up during project development.

In preparing for consultation, the first step is to identify a clear purpose for meeting with the tribe and to identify with whom the consultation should take place. The second step is to review past history and any known tribal concerns regarding State or Federal project actions that might remain unresolved. Recorded sources that could be reviewed include:

- Previous correspondence with tribes;
- Records of previous consultation;
- Public participation records for land use plans;
- Plan protest records;
- Transcripts of public hearings; and
- Minutes of public meetings.

After establishing the need and a purpose for consulting and determining with whom to consult, an initial contact should be made with the tribal appointee by letter and telephone, explaining the reason for the contact. During that contact, request their direct participation and input and ask them to identify any other tribal officials who they think should be contacted. Tribal government officials are the appropriate spokespersons where proposed actions might affect tribal issues and concerns. The tribal government officials are responsible for any tribal members that may have pertinent information concerning cultural and religious values/concerns.

Correspondence with the tribe can serve as notification or just be a written precursor or supplement to direct, person-to-person consultation. All correspondence including notification and consultation documents shall be retained as part of the project record. If a letter is returned as undeliverable, retain the canceled, unopened letter in the project file and, if appropriate, begin more direct (and documented) attempts to gather the needed input from the tribe. The project records must show that an effort was made in good faith to obtain and weigh tribal input in the decision making process. If a project decision does not conform to the tribe's requests, the ability to apply for and obtain necessary highway easements for the project may be jeopardized.

Just as for written communication with the tribe, document all attempts to establish telephone communication, including a record of all conversations conducted by telephone through a signed and dated note to the files. All the aforementioned information, as well as copies of any relevant emails needs to be included in the permanent project record.

The amount of consultation required to advance a project will be based on the involved tribes, scope of the project, and the following considerations.

- Potential harm or disruption that a proposed action could cause;
- Alternatives available to reduce or eliminate potential harm or disruption;

- Completeness and appropriateness of the list of Native American groups and individuals consulted;
- Nature of the issues raised;
- Intensity of concern expressed;
- Legal requirements posed by treaties (if any);
- Ability to resolve issues through further discussions;
- Need for further consultation.

It is important to keep in mind that many, perhaps most, specific issues of Native American concern will not be issues associated with cultural resources such as archaeological sites. Rather, Native American cultural concerns are likely to center on issues of access, collection and use of plants and animals, protection of religious places, and incompatible land and resource uses. Information that is related to cultural resources or areas identified as having ongoing traditional religious significance and use should be considered extremely sensitive. Any maps or other project information should be treated as confidential working files, and kept private unless specifically authorized for release by the tribe.

At the end of a consultation process, the preferred alternative and the right of way needs that were identified for the project must address the tribal concerns. Tribal consent to the project is the first step in the application process to the BIA for granting easements for project right of way as outlined below.

### **12.7.3 APPLICATION PROCEDURES**

Applications for right of way or interest in land that is on Native American lands are submitted directly to the BIA in accordance with [25.CFR.162](#) and [25.CFR.169](#). BIA conducts the transfer of land pursuant to its own statutory authority. For purposes other than those specified therein, transfers are made under the provisions of [23.USC.107\(d\)](#) and [23.USC.317](#).

[25.CFR.162.601](#) provides, in part, that the Secretary of the Interior may grant leases on government land and on individually owned Indian land when the Secretary has written authority to execute leases on the Indian's behalf; and on an Indian's land whose whereabouts are unknown. Applications for right of way across such lands should be submitted to the BIA for transfer. *BIA represents individuals on all land leases.*

[25.CFR.169](#) has procedures under which rights of way over government, tribal, and individually owned land may be granted. Consent of the tribe or individual Indian owner may be required and [43.CFR.7](#) (Protection of Archaeological Resources) may apply. If such resources are present, the BIA must issue a permit and obtain the consent of the Indian landholders.

When a Federal, State, or local agency is applying for a grant of an easement from Indian lands, the following general steps apply (except where State specific agreements are in place with the tribe or the BIA).

- Application for permission to survey.
- Consent of landowner.
- Title Status Report (TSR).
- Right of way application (in DUPLICATE).
- Survey plat (in DUPLICATE).
- Field notes.
- Applicant's certificate.
- Engineer's affidavit.
- Landowner's consent to grant ROW.
- Field inspection.
- Appraisal.
- NEPA document.
- Payment (Receipt).
- Grant of easement for right of way.

The process to obtain a grant of easement for right of way is initiated through the BIA Agency Office. The initial step is filing an Application for Permission to Survey for Right of Way. The application will initiate the BIA agency office to file a Request for Title Status Report (TSR) with the BIA Land Titles and Records Office (LTRO). The LTRO prepares the TSR, which provides the land ownership information along the proposed right of way necessary to complete the right of way/cadastral surveys activities outlined in [Section 5.4.5](#).

Based on the TSR information, the cooperating agency or the agency responsible for right of way acquisition will prepare appraisals and obtain consent forms from all Indian tribes or individuals holding an ownership interest in the property affected by the project.

For tribal lands, a tribal resolution passed by the tribe's federally recognized governing body and signed by duly authorized tribal officers is required. The resolution should include the following information:

- Name of tribe.
- A statement specifically addressing what the tribe is requesting the Secretary to approve.
- Land description.
- Tract (allotment) number, if applicable.
- Tribal organizational authority.
- Authority for the signatories.
- Date the resolution was signed.
- Date the tribe met on the resolution, if different from the date the resolution was signed.

When seeking a consent resolution from the tribal government, requesting both permission to conduct survey as well as to grant right of way can save time. If both consents are requested simultaneously, a minimum consideration must be specified, with the actual amount fully dependent on an appraisal.

For land that is held in trust on behalf of individual Indians, a consent form will have to be obtained from each owner or group of owners as part of the process for being granted an easement for right of way. Prior to seeking owners consent, the property must be appraised.

Property appraisals are usually prepared by the requesting agency. The appraiser must attach to his report a Certificate of Appraisal and the BIA Office of Appraisal Services must review all reports. A Review of Land Appraisals report will be issued to set the minimum consideration on all parcels for which a grant of easement is being requested.

Negotiating for consent based on approved appraisals for tracts held in trust by individual Indians can sometimes create problems since in many cases the TSR may indicate multiple ownership interests on a single tract. Prevailing statutory authority from the 1948 Indian Land Consolidation Act (ILCA) provides a general framework that requires obtaining consent from a simple majority of owners. Under terms of the American Indian Probate Reform Act of 2004, the minimum consent requirements for land transactions are indicated to be:

1. Ninety percent (90%) if five or fewer owners.
2. Eighty percent (80%) if between 6 and 10 owners.
3. Sixty percent (60%) if between 11 and 19 owners.
4. A simple majority, if more than 20 owners.

The process to track down and secure consent can involve a lot of effort and be a very lengthy process even with these stated percentages. The agency responsible for land acquisition should confirm the number of partial owner consent forms that will be acceptable in support of a grant of easement request through the BIA agency office. This confirmation should be obtained prior to seeking out consent from the list of owners reported in the TSR.

## 12.8 PRIVATE LAND ACQUISITION

This section outlines the key Federal acquisition policies and standards that are minimal requirements for acquiring privately owned property for federally funded projects, and indicates the extent of stewardship and quality control desirable to assure that the acquisition by the cooperating agency complies with Federal and State policies.

### 12.8.1 OVERVIEW OF THE PRIVATE LAND ACQUISITION PROCESS

The following sections summarize the overall process for acquiring privately owned property for federally funded projects.

#### 12.8.1.1 Project Scoping

Whenever project needs identify that acquisition from privately-owned property may be required, interagency agreements are used to establish the funding and acquisition responsibilities for needed right of way. Refer to [Section 2.5](#) for a description of interagency agreements. These agreements typically establish either a State or a County as the cooperating agency to assume responsibility for obtaining needed right of way, including utility relocation. Assess carefully the type of land acquisition required for each project and assess the cooperating agency's understanding of Federal acquisition processes and their ability to acquire the rights according to those processes. This is especially important for new location routes where displacements of residential or commercial properties may be required. In those situations, using the State DOT may be the more prudent choice because their staffing and experience with Federal and State acquisition and relocation policies.

The following activities should be performed for the project scoping stage:

- Identification of cooperating/acquiring agency
- Identification of potentially impacted property owners and complexities
- Analyze right of way impacts and provide input for NEPA process
- Participate in SEE team activities
- Participate in Public meetings and hearings
- Identify unique right of way acquisition issues and potential conflicts
- Meeting with cooperating agency to assess acquisition capability
- Develop cooperating agency acquisition plan

Coordinate the project scoping activities with the other interdisciplinary scoping activities performed during the preliminary engineering investigation and development of the Project Scoping Report. See [Section 3.3.1](#).

### 12.8.1.2 Preliminary Design

Develop the preliminary right of way information in conjunction with the preliminary design and alternatives analysis described in [Archive 4.7](#) and [Archive 4.8](#).

The following activities should be performed in conjunction with the preliminary design:

- Determine right of way impact assessment for various design options
- Prepare right of way cost estimate
- Perform Design/Right of way plan review
- Perform right of way field review with property owner meetings
- Coordinate design accommodations to reduce right of way
- Determine acquisition service options
  - ◊ In house or state certified cooperating agency
  - ◊ Contract with SDOT
  - ◊ Acquisition services contract
  - ◊ Design/Build options for right of way acquisition
- Assess advancing right of way acquisition options
  - ◊ Allowable acquisition activities prior to NEPA decision document
  - ◊ Hardship acquisition
  - ◊ Protective buying (corridor protection)

### 12.8.1.3 Final Design

Develop the final right of way information in close coordination with the development of the final design described in [Chapter 9](#).

The following activities should be performed in conjunction with the final design:

- Prepare right of way acquisition documents
- Right of Way acquisition process activities, including:
  - ◊ Acquisition of State owned land
  - ◊ Functional replacement
  - ◊ Appraisal waivers
  - ◊ Donations
  - ◊ Real estate appraisals/valuation
  - ◊ Appraisal review
  - ◊ Temporary easements
  - ◊ Closing and payment
  - ◊ Mortgage releases
  - ◊ Relocations
  - ◊ Environmental mitigation
  - ◊ Right of entry
  - ◊ Administrative settlements
  - ◊ Resolution of necessity
  - ◊ Order for possession

- ◊ Legal settlements
- ◊ Final order of Condemnation
- ◊ Project property management
- ◊ Disposal of excess right of way
- Initiate property negotiations
- Maintenance of acquiring agent parcel negotiation record
- Real estate oversight and guidance of acquisition process

#### **12.8.1.4 PS&E Development and Finalization**

Develop the final right of way information in coordination with the PS&E development described in [Chapter 9](#).

The following activities should be performed in conjunction with the PS&E development and finalization:

- Finalize right of way acquisition documents
- Tabulation of right of way acquisition commitments to PS&E package
- Quality Assurance Checklist, including
  - ◊ Utility certification in accordance with [23 CFR 635.309\(b\)](#)
  - ◊ Right of way certification in accordance with [23 CFR 635.309\(c\)\(1\), \(2\), or \(3\)](#)
  - ◊ Letter of Consent for federal land transfer

#### **12.8.1.5 Construction**

The following activities should be performed in conjunction with the project construction:

- Follow-up on right of way commitments, and
- Subsequent acquisitions related to construction activities, if necessary.

### **12.8.2 GUIDANCE AND REFERENCE MATERIAL**

The acquisition of private property for a public improvement is based on Federal and State eminent domain laws. The action of taking property under eminent domain law is normally termed condemnation, although some State laws may use other terms. Both Federal and State laws relating to eminent domain require payment of just compensation. Although eminent domain and condemnation of private property to advance public projects is well established, it is not used in all situations. Since the use of eminent domain requires court action, procedural policies have been enacted to promote amicable settlements with owners.

The following reference materials should be used, as applicable:

1. [Uniform Act](#)
2. FHWA Right-of-Way Project Development Guide ([PDG](#))
3. FHWA [Real Estate Acquisition Guide](#)
4. State Code or State DOT Right of Way Manuals

[FHWA Realty](#) also contains several helpful resources regarding Federal guidance and interpretation of how laws are applied.

### **12.8.3 STEWARDSHIP AND QUALITY CONTROL**

For FLH projects the cooperating agency is responsible for providing the right of way necessary for the project. In some instances, Federal funding may be available for use by the cooperating agency to acquire project right of way. The agreements required to make provisions for acquisition of right of way are discussed in [Section 2.5](#). At the time that project-specific agreements are being negotiated, especially if extensive right of way or relocations of families or businesses are possible, the familiarity with Federal and State right of way acquisition policies and the capabilities of the cooperating agencies staff need to be assessed.

Since project funding is dependent on having any needed property acquired in accordance with the provisions in the Uniform Act and related State law, the cooperating agency should be evaluated to assure they are sufficiently conversant with the Act and have procedures, either actual or contractual, that can accomplish the acquisitions anticipated to be needed for the project. Early coordination with the cooperating agency on right-of-way acquisition requirements should identify where supplemental assistance may be required, if necessary, to provide the proper level of project oversight.

Where the State DOT is designated as the cooperating agency, there is a high degree of assurance that it will comply with the provisions in the Uniform Act. In instances where local county and municipal governments will be the cooperating agency, the State DOT right-of-way staff responsible for advancing local projects is a primary source of information on the capabilities of such governments. Many states have some form of LPA program to advance their own stewardship responsibilities. The FHWA Division Office can assist in determining the appropriate contact and providing insight into how effective the State program may be in providing training and other support services to the local governments that may be involved in project related right-of-way acquisition.

The results of the early coordination efforts will provide an indicator of the scope and extent of oversight responsibilities. FLH is responsible for stewardship and oversight during the active acquisition period. Where a cooperating agency has limited or no State supported prior training regarding implementation of the Uniform Act, an intensive effort may be required. Developing an appropriate oversight plan for each project to ensure the right-of-way program is administered in an effective and efficient manner and in compliance with Federal and State laws and regulations is an essential component of project activity. Oversight may include: (1) all required review and approval actions, and (2) quality assurance reviews, process reviews, and project reviews necessary to validate compliance with the Uniform Act and State right-of-way procedures.

The importance of ongoing review and oversight is essential so that the certification process, outlined in [Section 12.9](#) can be accepted.

#### 12.8.4 ACQUISITION PROCESS

Each State DOT is required to have available a written description of their acquisition process. This document is primarily required as an informational document to provide to landowners whose land is needed for State projects. Many States use a modified version of the [Federal Acquisition Brochure](#). This brochure identifies the policies that are required by the Uniform Act when acquiring real property interests for a federally funded project. In general, the Uniform Act requires that the acquiring agency make a prompt written offer to the property owner. This offer should be based on the agency's current estimate of just compensation, including the amount and a summary of the basis for the offer.

The Uniform Act requires the following actions be taken when acquiring real property:

1. Appraise the property before initiating negotiations, and provide the owner or his designated representative an opportunity to accompany the appraiser during his inspection of the property.
2. Before initiating negotiations, establish an amount believed to represent just compensation. In no event shall such amount be less than the agency's approved appraisal of the fair market value of such property.
3. Make a prompt offer to acquire the property for the full amount established as just compensation. Provide the owner with a written statement of, and summary of the basis for the offer and where appropriate, a breakdown of the amount of the offer that applies to the real property acquired and any damages to the remaining real property.
4. Make every reasonable effort to acquire expeditiously the real property by negotiation.
5. Do not defer negotiations or advance the time of condemnation or delay the deposit of funds in court for the use of the owner, or take any other action coercive in nature, in order to compel an agreement on the price to be paid for the property.
6. Make no attempt to require an owner to surrender possession of real property before full payment of the agreed purchase price, or a full deposit is made with the court for the benefit of the owner. The agreed purchase price/full deposit should not be less than the agency's approved appraisal of the fair market value of such property, or the amount of the award of compensation in the condemnation process for such property.
7. If the acquisition of only a portion of a property would leave the owner with an uneconomic remnant, make an offer to acquire that remnant. The acquiring agency determines when the real property remaining with the owner after a partial acquisition creates an uneconomic remnant with little or no value or utility to the owner.

The State right-of-way manual will outline the procedures available within the State for meeting the acquisition requirements of the Uniform Act and will also provide the options and alternatives that the State has adopted for property acquisition.

For cooperating agencies that do not have staff sufficient to appraise, negotiate or provide relocation services, the use of State DOT personnel or consultants may be necessary. Guidance on right-of-way contracting is available in the [PDG](#), [Real Estate Acquisition Guide](#), and through consultation with SDOT staff.

#### **12.8.4.1 Donations**

Right of way acquisition is generally based on the owner being paid for the property needed for the project. There are situations however when an owner may desire to donate his property, in whole or in part. The Uniform Act acknowledges that a donation can be accepted. However, it requires that each owner must be fully informed of his right to receive just compensation for such property. Each owner must be provided an explanation of the acquisition process, including the right of having the property appraised and being made an offer of just compensation before the property owner waives his rights and the agency accepts the donation.

Sometimes an owner's offer to donate a whole or part of a property involves a request for construction features that will benefit the owners remaining property. Agreements to donate based on providing a new driveway, entrance, or other features in lieu of cash compensation are possible provided a comparison is made of the donated property's value and the cost of the additional construction features to ensure that the costs are equivalent.

As with any land purchase, the cooperating agency should be cautious and ensure that no environmental concerns such as the presence of hazardous waste are associated with the property being offered before accepting a donation.

#### **12.8.4.2 Valuation**

The Uniform Act and the implementing regulations require that the acquiring agency must estimate an amount believed to be just compensation except when the landowner proposes a donation. Under eminent domain law, this amount is usually equivalent to fair market value as determined by an appraisal.

An appraisal is an independent and impartial written statement prepared by a qualified appraiser setting forth an opinion of defined value of an adequately described property as of a specific date. This statement is supported by the presentation and analysis of relevant market information.

The method of valuation used on any particular property is dependent on the type of property, its expected value and the complexity of the appraisal problem. In addition, the Uniform Act regulations require each SDOT to have criteria for determining the minimum qualifications of appraisers, consistent with the complexity of the appraisal assignment. If a contract appraiser is used to do a detailed appraisal, the appraiser must be State-certified in accordance with [Title XI of the Financial Institutions Reform, Recovery, and Enforcement Act of 1989](#). Refer to the State Regulatory Board within each State for information on State-certified real estate appraisers.

#### **12.8.4.3 Appraisal Waiver Procedure**

In certain situations, when the property required for a project is determined to have a low value and the valuation process is complicated, the requirement for preparing an appraisal can be waived. A waiver valuation (See [49 CFR 24.102\(c\)](#)) is not an appraisal, so appraisal-related

requirements, such as owner accompaniment and appraisal review, are not Federal requirements when waiver procedures are used.

The State Right-of-Way Manual will indicate what is considered a low value acquisition and provide necessary guidance for determining the type of property acquisitions and whether local agencies may use the waiver valuation procedure.

The Federal rule provides agencies the authority to define the low value criteria used to determine when a waiver of appraisals can be used. The agency can select any amount up to \$10,000 as the value limit beyond which an appraisal would have to be prepared. Agencies can also request approval from the funding agency to use a higher amount up to \$25,000 for defining a low value acquisition. Whatever low value amount is in use and available to the cooperating agency, the property acquisition must also be uncomplicated in order to waive the appraisal requirements of the Uniform Act.

#### **12.8.4.4 Appraisal Standards**

The Department of Justice [Uniform Appraisal Standards for Federal Land Acquisitions](#) is the primary Federal guide dealing with appraisal standards and documentation standards for detailed reports. The Department of Justice Guide includes as Appendix A an Appraisal Report Documentation Checklist indicating the scope of reporting appropriate for a detailed appraisal.

Appraisal standards, forms and procedures that apply to acquisitions in each State are included in the State's Right-of-Way Manual or may be contained in a separate Appraisal Manual. The appraisal format(s) that may apply to any given project location and be appropriate for each property to be appraised will be determined by State DOT procedures and the appraisal standards adopted by the State Appraisal regulatory board.

All appraisals must include a certification by the appraiser based on the State requirements.

#### **12.8.4.5 Determining the Amount of the Initial Offer**

All appraisals must be reviewed by a qualified review appraiser. The review provides both a technical check regarding the data contained in each report and how it was analyzed to arrive at the fair market value conclusion. Depending on State procedures, the review appraiser can either establish the amount believed to be just compensation or provide a recommendation regarding the appraised values to the acquiring agency for use in establishing just compensation. Appendix A of [49 CFR 24](#), Section 24.104, *Review of appraisals*, contains a broad description of the role a qualified review appraiser has in providing quality control over the amount an agency establishes as just compensation.

#### **12.8.4.6 Making the Offer and Negotiating**

The full amount estimated to be just compensation must be offered to the owner in writing. The amount established as just compensation is date sensitive and therefore the offer must not be

delayed. While personal contact with the owner is preferred, offers can be made via the mail provided such a practice is provided for in State procedures.

Owners are to be afforded sufficient time to consider the offer and to assemble any information they deem necessary to judge its adequacy. The acquiring agency must record and maintain a written record of all contacts with the owner including offers made, counter offers received, and discussions relating to the purchase.

When justified through the negotiation process and the exchange of information with the owner, settlements above the original estimate of just compensation are acceptable. The negotiation record should support how the settlement amount and agreement were reached.

Any additional or revised construction features that are discussed during the negotiation process need to be carefully considered and approved before a settlement agreement is accepted. Construction features included in a settlement agreement need to be incorporated into the final design plans.

Other settlement considerations such as allowing existing buildings to remain in the designated right-of-way can also be considered during the negotiation process. Granting a permit for encroachments can be part of a settlement agreement when such an action will not pose any safety or maintenance problem.

When an agreed settlement is reached and immediate possession is needed to advance construction, the owner can be asked if he would grant an immediate right of entry prior to making full payment for the acquired property.

#### **12.8.4.7 Settlements and Payments**

Settlements reached through the negotiation process need to be processed and payment made to the owner using closing procedures established by the State. Closing procedures must provide for any applicable mortgage releases and address any other title issues before payment is made and the deed recorded to conclude the property purchase.

In addition, the agency should arrange to pay or reimburse the owner for any incidental costs associated with the property transfer. The property owner should be informed early in the acquisition process of the Agency's policies regarding incidental costs and identify those reasonable and necessary expenses that are covered.

#### **12.8.4.8 Requesting Condemnation**

When an agreed settlement is not achieved, or condemnation action is required to clear title issues, the practices of each State regarding the use of eminent domain and condemnation apply. Property that cannot be acquired through agreement must be turned over to the State office holding authority for filing condemnation actions either with the courts or intermediate boards that may be established by State law.

A deposit of the full amount of the last written offer to the owner must be made on the owners behalf. No order of possession by the court should be accepted unless the owner has access to the full amount of the deposit.

### **12.8.5 RELOCATION ISSUES**

The Uniform Act provides a number of benefits to reimburse out of pocket expenditures that owners and tenants face when displaced from property acquired for a public improvement. For the type of projects advanced under the FLH programs there are limited situations where occupied improvements are acquired and residential or business displacement occur. Because the relocation program has an array of benefits available to persons displaced from residential and non-residential properties, it is highly desirable that the State DOT be engaged to provide the notices, assistance and payment benefits that apply.

When dealing with relocation situations, the Uniform Act provides that no person lawfully occupying real property shall be required to move from a dwelling or to move a business or farm operation without at least a 90-day written notice. The full range of benefit options available to displaced persons under the Federal law are outlined in the FHWA [Relocation Brochure](#).

Although displacements from occupied residential or commercial buildings are rare on FLH projects, there are relocation benefits that apply to personal property that may be stored on acquired lands requiring an owner or tenant to incur an expense to move them off the acquired right of way. Refer to Chapter 10 of the [PDG](#) for eligible costs that may be reimbursed when personal property is required to be removed from acquired property

The provisions of the Uniform Act concerning relocation are found in Title II. As stated in the law, the purpose of Title II is to assure fair and equitable treatment of displaced persons so that such persons do not suffer disproportionate injury from projects designed to benefit the public as a whole. It is important to keep this purpose in mind, as it can serve as a valuable guide when making decisions on difficult questions.

For roads designed by FLH, the impact of the project on occupied improvements can often be adjusted to avoid the adverse impacts created on owners and tenants by being displaced from their residence, business or farm. Coordination with the acquisition agency and affected owners through the design process may avoid the costly relocation of wells or the demolition of improvements and resulting move of stored property.

### **12.8.6 STATE OWNED LANDS**

State land management agencies whose lands are needed for highway purposes may operate under State laws that include provisions similar to the ones found in the USC dealing with the transfer of federal lands. When State owned lands are needed for a FLH project, the State rules and regulations must be reviewed to determine the requirements of the State application and approval process.

For state lands compensation is usually required although transaction may be arranged using land swaps, or other types of negotiated solutions. Functional replacement of acquired property is often preferred.

## 12.9 RIGHT OF WAY AND UTILITY RECORDS

The acquisition of right of way, relocation and accommodation of utilities are expected to be complete with all agreements in place prior to completing the contract assembly or acquisition package discussed in [Chapter 9](#). This section discusses the documents that are required to be included in that package.

Acquisition records, plans and property plats related to project right-of-way need to be documented to conform to Federal and State laws and regulations. The general rule related to real estate transactions requires written documentation and full disclosure. This section addresses those project level and parcel level records that are essential to support right-of-way activities and funding.

### 12.9.1 RIGHT OF WAY CERTIFICATION

During the development of the final PS&E package as described in [Chapter 9](#), it is essential to confirm the acquisition status of required right of way before soliciting bids for project construction. The status of any utility or railroad work required by the project must also be confirmed.

For projects where all right-of-way is being obtained through a land transfer from another federal agency, the approved agreements and the right of entries for all needed property should be available.

For projects where right of way is being acquired from private parties, the acquiring agency must prepare a right-of-way certification and submit it to FLH. The certification is prepared to indicate that the property interests needed for construction have been fully acquired, and are available for construction. If any occupied structures were acquired, the certification must indicate that all persons have been relocated and that the benefits required were provided as required by the Uniform Act and in accordance with State law.

In certain situations, where all property interests are not yet acquired, the certification statement must include a detailed availability report on parcels or properties that are still to be acquired clearly indicating the dates such property will become available for project construction. This statement should also indicate any acquired and vacant improvements remaining in the right of way that are to be included as a demolition work item in the construction contract.

Where it is determined that the completion of such work in advance of the highway construction is not feasible or practical due to economy, special operational problems and the like, the acquisition package shall contain appropriate notification in the bid proposals identifying the right of way clearance, utility, and railroad work which will be underway concurrently with the highway construction.

Any incomplete acquisition or relocation situations or utility/railroad work that may impact a contractor in developing his work schedule needs to be clearly identified in the acquisition package. The regulations related to the necessary certification and availability statements can

be found in [23 CFR 635.309](#). The procedure, as applied to FLH projects, requires the cooperating agency to provide the right of way certification and availability statement to the FHWA FLH office coordinating the project. The form of the certification can follow that employed by the State for LPA projects, or a letterform similar to the example shown in [Exhibit 12.9-A](#).

**Exhibit 12.9-A****SAMPLE RIGHT-OF-WAY CERTIFICATION FORM****RIGHT-OF-WAY CERTIFICATION**

This is to certify that all necessary rights of way have been acquired, including legal and physical possession. Said rights of way have been acquired in accordance with Federal Highway Administration directives governing the acquisition of real property including CFR 49 Part 24.

This is to certify that there are no relocatees (families, businesses, or tenants) involved in this project.

All improvements (buildings, fences, signs, etc.) have been removed from the proposed right of way.

The status of utilities is as follows:

>> List each utility company and include status.

e.g., Power and Light Company – Adjustments to begin when contract is awarded and adjustments to be made concurrent with construction.

This is to certify that arrangements have been made as indicated above for the adjustment of all utility facilities as required for coordination with the physical construction schedules. As noted, the Contractor's operations should not be adversely affected.

Sincerely,

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Agency Head/Mayor/President of the Board

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Attorney for the Agency/City/County

The federal regulations allow three levels of certification. Each level relates to the degree of risk that exists for property being available to the contractor for use during construction. The levels are outlined in the regulation in sub section (c)(1) through (3). The level 1 certification is preferred as it provides that at the time of advertising full legal possession of all property rights necessary to construct the project have been secured. This means that payments have been made available to all owners. The level 2 certification is similar in that all properties are available for construction but some may be based on right of entry with payments or other actions still remaining to obtain full legal possession. The level 3 certification indicates that some properties are not available for use and must provide support for dates when physical occupancy will be provided to the contractor for construction activities. Examples of the wording for each level of available certification are indicated below.

1. **Certification Level 1.** I hereby certify the right of way on this project as conforming to [23 CFR 635.309\(c\)\(1\)](#). All necessary right of way has been acquired. Trial or appeal of cases may be pending in court, but legal possession has been obtained for each parcel.

There may be some improvements remaining on the right of way, but all occupants have vacated the lands and improvements. The County has physical possession of the right of way and has the right to remove, salvage, or demolish these improvements and enter on all land.

2. **Certification Level 2.** I hereby certify the right of way on this project as conforming to [23 CFR 635.309\(c\)\(2\)](#). All necessary right of way has NOT been fully acquired, but the right to occupy and to use all rights of way required for the proper execution of the project has been acquired. Trial or appeal of some parcels may be pending in court and on other parcels full legal possession has not been obtained but right of entry has been obtained. All occupants have vacated the lands and improvements. The County has the right to enter on all land and has physical possession of the right of way and the right to remove, salvage, or demolish these improvements.
3. **Certification Level 3.** I hereby certify the right of way on this project as conforming to [23 CFR 635.309\(c\)\(3\)](#). The acquisition or right of possession and use of a few remaining parcels is not complete, but physical construction may proceed. Occupants of residences, businesses, farms, or non-profit organizations have not yet moved from the right of way, but all occupants on such parcels have had replacement facilities or assistance made available to them. Physical occupancy and right to enter all parcels (Certification Level 1 or 2) is anticipated by \_\_\_\_\_ (enter date).

The FHWA has received appropriate notification identifying all locations where right of occupancy and use has not been obtained.

### **12.9.2 RIGHT-OF-WAY ACQUISITION RECORDS**

Real property acquisition procedures place an emphasis on fully documenting decisions related to title, valuation, negotiations, settlement agreements, and conveyance documents. Any agency acquiring right of way for a federally funded project is expected to maintain parcel files that document each required action under the Uniform Act, including the appraisal or waiver valuation, the offers made, and a written contact log of the negotiations with the property owner. When relocation activity is required on a parcel, a separate relocation record should be created and provide the same type of information to document the offers, assistance and payments provided to comply with the Uniform Act.

The parcel records developed by the acquiring agency as part of the acquisition process are required to be available for review by State and FLH personnel. If the acquisition is federally funded, the agency is required to retain the records and have them available for review for three years from the date of acceptance of the final voucher for the project. State practices may also include record keeping requirements for property acquisition even if Federal funding was not used for project acquisition.

### **12.9.3 ACQUISITION STATISTICS**

Acquisition activity subject to the provisions of the Uniform Act is subject to reporting requirements in §24.9(c) of [49 CFR 24](#). For FLH projects, the appropriate time to collect the required information is at the time the right of way certification is submitted. The reporting data to be obtained is summarized in Appendix B of [49 CFR 24](#). A project level report is prepared based on the right of way plans for the project and the above-mentioned certification.

### **12.9.4 RECORDING RIGHT-OF-WAY PROJECT RECORDS**

At the conclusion of the right of way acquisition process, a deed or easement is executed to complete the transfer of rights needed for the highway improvement.

Deeds and easements are the records of land ownership and transactions. Deeds are recorded in a central place, according to state law. The location differs from State to State. Some registries of deeds have posted information, indexes, and all or part of their holdings on-line. Acquisition agencies at the municipal, county or State level should have full knowledge of existing procedures covering their recording policies.

The executed documents are usually permanent in nature, although some easements could have a very limited duration, and apply only during project construction. For long-term transfers, the deed or easement should be recorded to protect the public investment in right of way and maintain the chain of title available in public records.

Property transfers between governmental agencies also need to be recorded in the registry of deeds of the municipality or county in which the property is located. This protects the investment made in the highway by serving a public notice regarding the location and rights and interests held by the agency responsible for maintaining the facility. Refer to the local register of deeds to determine how individual property plat and project right of way transactions should be placed in the public record.

Upon completion of construction in National Forests, set survey monuments based on "as built" right of way if requested, in conformance with the Memorandum of Understanding between the State and Forest Service. Setting survey monuments for all projects is good policy and may be required by State law. The "as built" right of way plans should be filed or recorded based on State practices to complete the public record.