

Chapter 13 **Right of Way****Content**

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## Exhibits

Unless stated otherwise, exhibits applicable to this chapter can be found at:

<http://www.dot.ca.gov/hq/LocalPrograms/lam/forms/lapmforms.htm>.

- Exhibit 13-A Short Form Right of Way Certification Local Assistance Project
- Exhibit 13-B Right of Way Certification Local Assistance Project
- Exhibit 13-C Consultant Selection Criteria and Guide
- Exhibit 13-D Uniform Relocation Act Benefits Summary

## Chapter 13 Right of Way

### 13.1 GENERAL

The intent of this chapter is to provide local agencies with the basic understanding of Right of Way (R/W) procedures for locally sponsored federal-aid transportation projects. Local agencies, which will be actively involved in R/W acquisition and relocation, must comply with the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970 as amended in 1987 (the Uniform Act). This law can be found in Chapter 10 of the Caltrans Right of Way Manual, the FHWA Project Development Guide (See Appendices A and B) and 49 of the Code of Federal Regulations (CFR), Part 24.

**NOTE:** The Uniform Act must be followed on all local agency projects even if no federal funds are used for the acquisition of R/W for the project. Although substantial responsibility for the administration of local agency projects has been delegated to Caltrans (See “Caltrans Role” below), FHWA has retained the overall responsibility for compliance with the Uniform Act. Towards this end, FHWA periodically performs Process Reviews of local agency projects to ensure that the Uniform Act requirements are being met.

In addition, local agencies must also comply with all requirements of Title VI of the 1964 Civil Rights Act on federal-aid projects. This is to ensure that all services and/or benefits derived from any R/W activity will be administered without regard to race, color, gender, or national origin (See FHWA Project Development Guide, Appendix C-12). “Right of Way” refers to the real property rights, which local agencies must possess to construct local assistance transportation projects utilizing federal funds. The provisions of this chapter apply to all local assistance projects involving federal funds off the State Highway System (SHS), whether or not these funds are expended for purchase of real property rights. When local agency projects are performed on the SHS or any portion thereof, the local public agency must follow the Caltrans manuals that apply to the work being done, among them, is the Caltrans Right of Way Manual and Cooperative Agreement Manual.

The Caltrans *Right of Way Manual* is used for projects on the SHS, either conventional highways or expressways and freeways. The manual has approximately 575 forms and exhibits that are extremely useful and necessary to perform all of the various R/W functions. These forms and exhibits, as well as 17 chapters of R/W processes and procedures are available to all local public agencies for use in performing their R/W work. Caltrans projects may generally be larger than many local agency projects, but the R/W processes and procedures are the same as those performed by local agencies for their projects.

Local public agencies are encouraged to access the Caltrans Right of Way Manual at:  
<http://www.dot.ca.gov/hq/row/>.

The US Constitution and the Bill of Rights provide authority to acquire property by eminent domain for a public project. The Uniform Relocation Assistance and Real Property Acquisitions Policies Act of 1970, as amended (42 U.S.C. 4601 et seq.), provides the rules and processes to exercise this authority whenever a project benefits from federal funds. Affected property owners and those displaced by the project are entitled to fair, equitable and consistent treatment

and due process of law to determine compensation. These laws and regulations are also intended as a safeguard to ensure that federal funds are not unnecessarily or inappropriately expended.

The information in this section has been compiled from many sources, but the underlying federal and state laws remain unchanged. This chapter should not be used as a substitute for these laws, statutes, regulations, policies, and/or procedures when conducting R/W activities using federal funds.

**NOTE:** *All documents and papers related to a project must carry the federal-aid project number for identification.*

## 13.2 FEDERAL-AID AND THE FEDERAL/STATE/LOCAL AGENCY RELATIONSHIP

The Federal Highway Administration (FHWA) is the federal agency most typically involved in transportation projects undertaken with federal funding for the programs discussed in this LAPM. It has the authority and responsibility for implementing and monitoring federal laws, regulations, and executive orders affecting these programs. When a project utilizes federal funding, the FHWA is involved pursuant to these responsibilities and the delegations described below.

Caltrans is granted major delegations of authority from FHWA under 23 USC 106(c) and the FHWA/Caltrans Joint Stewardship and Oversight Agreement. Further, Caltrans has passed on these delegations to local agency partners to the greatest extent possible. With each delegation goes the responsibility for initiating and completing each project phase in accordance with the appropriate state and federal laws and regulations without extensive FHWA or state oversight.

### FHWA Role

FHWA is responsible for the following project activities, for all federal-aid projects:

- Obligation of federal funds
- Approval of E-76 for R/W activities and utilities under the Alternate Procedure
- Approval of Early Acquisition, Protective Buying or Hardship Acquisition
- Approval of High Profile Projects
- Execution of Project Agreements
- Acceptance of R/W Certification for projects on the National Highway System where total project costs exceed \$1 million
- Approval of Level 3 and 3W R/W Certifications

For additional details on the FHWA/Caltrans relationship, refer to Chapter 2, "Roles and Responsibilities," of the LAPM.

### Caltrans Role

When federal funding is used in any phase of a local assistance project, the FHWA places overall responsibility for the acquisition of R/W and the relocation of individuals, businesses, and utilities with Caltrans. Caltrans in turn has delegated substantial authority to local

agencies. On these federal-aid projects, all R/W activities must be conducted in accordance with the Caltrans Right of Way Manual.

When the project requires the relocation of utility facilities, Caltrans is responsible for approval of the FHWA Specific Authorization to Relocate Utilities and the FHWA Approval of Utility Agreement (Exhibit 14-C). More information is available in Chapter 14, Utility Relocation, of the LAPM. These agreement forms are both part of form RW 13-15, found in Chapter 13, Utility Relocation, of the Caltrans Right of Way Manual.

Caltrans is responsible for fully informing local agencies of their responsibilities accompanying federal-aid transportation projects by ensuring that every local agency receives all current regulations and procedural instructions affecting R/W activity, and on request will provide training, guidance and advice on R/W matters. Further information is provided in the Caltrans Right of Way Manual. FHWA's Project Development Guide and Caltrans Right of Way Manual are available to each local agency. Refer to Figure 13-1, Right of Way Procedures Flowchart, in this chapter which gives an excellent overview of the R/W process.

### **Caltrans District Roles**

When questions arise in the development of a federal-aid project, or if it is determined that property rights will be required on the project, the Caltrans District Local Assistance Engineer (DLAE) should be promptly notified. The DLAE has the overall responsibility as liaison with each local agency in that district. In addition, each district has an R/W Local Programs Coordinator who is responsible for working with each local agency whose projects involve federal funds.

As part of the overall responsibility assigned to Caltrans by FHWA, Caltrans R/W is required to monitor local agency's procedures for R/W appraisal, acquisition, relocation assistance, property management, and utility relocations on all local assistance projects for compliance with applicable state and federal laws and regulations.

### **The Monitoring Process**

The District R/W Local Programs Coordinator will monitor R/W activities at any time during the project. Normally, however, most monitoring is performed on a post-audit, spot-check basis to ensure that such activities are performed in compliance with state and federal laws and regulations. Acquisition and relocation activities must be in conformance with the Uniform Act, Federal Stewardship requirements, the FHWA Project Development Guide, and the Caltrans Right of Way Manual. All R/W functional areas are subject to review. Spot-check monitoring will normally be limited to no more than 25% of the total work performed. Additional reviews shall be made only when violations are discovered and then only to determine if the violations are prevalent or one-time occurrences (See "Monitoring Findings" below).

The reviewer shall bring all violations discovered to the attention of the local agency. It is the local agency's responsibility to ensure correction. The selection of projects that will be monitored shall be at the discretion of the district based on staff availability, familiarity with the local agency, the project, and consultants which may be used, as well as the complexity of the R/W issues.

Monitoring will usually use checklists or outlines to guide the review. Both entry and exit conferences will be conducted to advise local agency staff of the scope and findings of the monitoring visit. A written report will usually be provided to the local agency, though not necessarily at the time of the exit conference.

### **Monitoring Findings**

Ideally, the monitoring review will discover compliance with all applicable laws and regulations. Occasionally however, there may be other results with findings having different levels of seriousness.

### **Violations of What Caltrans Considers to Be Good Business Practice**

These are practices of the local agency which could be improved with the result being a more efficient or effective operation and/or reduced chance that more serious violations will occur subsequently. Local agencies will be advised of these observations, but there is no penalty associated with noncompliance. Local agencies are free to adopt suggested changes or not as their management judgment indicates.

### **Violations of Practices Where Correction is Mandatory**

Local agencies will be expected to change their practices to conform to Caltrans requirements. For qualified agencies, failure to do so may jeopardize their qualification status for future projects. In addition, serious violations of this nature must be corrected, particularly when it appears that a violation of property owner's rights is involved. Local agencies will be advised in writing of such violations and of the corrective actions to be taken. During the time the local agency is taking the corrective actions, federal reimbursement may be withheld. Failure to complete the corrective actions within reasonable time periods may result in withdrawal of federal funding for the project.

For additional details, refer to Chapter 20, "Deficiencies and Sanctions," of the LAPM.

### **Qualifying Local Agencies**

Caltrans qualifies local agencies to perform their own R/W functions (See "Qualification of Local Agencies" below). Caltrans also provides training and guidance to local agencies seeking assistance on federal-aid projects.

### **Local Agency Role**

#### **Certification of Projects**

The local agency will certify that all Uniform Act requirements have been met on federal-aid projects.

#### **Qualification of Local Agencies**

Caltrans has an agreement with FHWA that allows local agencies to be certified in advance to perform all or some R/W activities based on the local agency's qualifications, the size of their staff and their ability to perform the technical work and subsequent reviews. Caltrans District R/W staff conducts a qualification review to determine if the local agency is adequately staffed, organized and has the necessary expertise to perform R/W work properly and timely. The

agency must agree to conform to Caltrans policies and procedures in order to meet state and federal requirements. The review is necessary before the local agency can begin R/W work on a federal-aid project.

To become qualified, the local agency must first contact the District Right of Way Local Programs Coordinator, requesting approval of qualification status. The Coordinator will then meet with the local agency's Right of Way/Real Property Department to explain state and federal requirements and what must be done to become qualified. The Coordinator will request copies of organizational charts, staff resumes and duty statements, and will see that the agency has all needed material: the Caltrans Right of Way Manual, any necessary policy and procedure memos, and current copies of Titles 23 and 49 of the CFRs. The manuals shall be in sufficient detail to adequately describe operational procedures for the functional areas to be certified so as to provide adequate instructions to Right of Way/Real Property employees on how to perform their assigned duties.

### **Qualification Levels**

The local agency may have experienced staff but not in sufficient number to be qualified for every R/W function. The following levels of qualification can be obtained with prior Caltrans Region/District approval:

**LEVEL 1:** Staff is qualified to do technical work in one or more specific functional areas. These areas will be shown in the qualification approval. As an example, some smaller rural agencies have sought approval to perform only appraisal or acquisition functions.

**LEVEL 2:** Staff is qualified to do technical work in more than one functional area, but not in all. There is sufficient staff available to perform these functions on more than one project at a time.

**LEVEL 3:** Staff is large enough and qualified to do technical work in all functional areas.

### **Qualification Term**

Level 1, 2 and 3 approvals are good for three years and require a review at the end of that time.

See Chapter 17, "Local Programs," of the Caltrans Right of Way Manual for additional information on Local Agency Qualifications.

### **Withdrawal of Qualification**

It is important to note that the qualification status can be withdrawn if deficiencies are found and not corrected, or if the staffing and experience levels change so that the local agency can no longer meet the minimum requirements. At the time each agency is notified of its qualification level, the agency is told to inform Caltrans if there are any major personnel changes which would impact its ability to perform the respective R/W functions.

### **Appraisal Review Qualification**

On federal-aid projects, a formal review of the appraisal is necessary in order to establish the Fair Market Value for the property (See 49 CFR 24.104 Review of Appraisals). A consultant review appraiser must have a valid general license issued by the state Office of Real Estate Appraisers (OREA). The review appraiser must determine that the appraisal meets applicable

appraisal requirements and shall, prior to acceptance, seek necessary corrections or revisions. If the review appraiser is unable to approve or recommend approval of the appraisal, the reviewer may develop additional documentation in accordance with Section 24.103 to support an approved or recommended value. The reviewer must state the basis for the value conclusion.

If the local agency receives a qualification status Level 1 or 2 without having the staff or means to perform the appraisal review function, the local agency shall hire either a qualified licensed consultant (See Local Agency Selection of Consultants below), or another local agency qualified to perform the appraisal review function.

**NOTE:** Only the local agency can determine the just compensation to be paid. Another agency or consultant cannot do so.

### **Non-Qualified Local Agencies – Options**

Local agencies that are not qualified to perform any or all of the respective R/W functions necessary for the project must either hire another local agency qualified to perform those functions, or directly hire a consultant who meets the consultant selection criteria discussed below.

Non-qualified local agencies have the following choices in hiring consultants:

- Contract with a qualified local agency.
- Contract with a private consultant(s) to perform one or more R/W specialties: Appraisals, Appraisal Review Acquisitions, or Relocation Assistance.
- Contract with an R/W Project Management consultant.
- Utilize a mixture of local agency staff and the resources available as mentioned in the first two items above.
- Contract with a Turnkey consultant who can perform all R/W functions.

**NOTE:** It is the local agency's responsibility to verify that the consultants have the necessary certificates/licenses to perform the R/W functions needed for the local agency's project.

### **Selection of Consultants**

The authority for selection of private sector consultants to perform R/W functions on federal-aid projects has been delegated to the local agencies. The selection process will be administered by the local agency in accordance with Chapter 10, "Consultant Selection," of the LAPM, using criteria from Exhibit 13-C, Consultant Selection Criteria and Guide, prepared by Caltrans to establish recommended minimum experience levels and to evaluate the qualifications of prospective consultant firms. When substantially different R/W services are needed, it is incumbent on the local agency to repeat the consultant selection process in choosing a consultant for those different services. The District Right of Way Local Programs Coordinator can provide additional assistance if needed.

The local agency should be advised that caution must always be exercised in the choice of a consultant, particularly with regard to the firm's experience on past projects and the firm's

references. Each project and each agency have unique demands and just because a prospective consultant may meet the broad qualifications contained in the Consultant Selection Criteria, it does not also mean that the consultant meets the local agency's requirements.

The local agency is responsible for maintaining written documentation concerning the consultant selection process to ensure that the procedures comply with the Consultant Selection Criteria and Guide (Exhibit 13-C). This information should be made available to Caltrans as part of the Caltrans monitoring process.

Local agencies are responsible and accountable for the actions of their consultants in properly executing their duties and activities in accordance with the Uniform Act. The local agency retains the ultimate responsibility for signing the R/W Certifications.

Also, local agencies receiving federal funds must take affirmative steps to assure that Disadvantaged Business Enterprise (DBE) consultants have ample opportunity to compete for consultant work. Such steps include soliciting DBE firms, and when feasible, organizing the project schedule and task requirements to encourage participation by DBE firms.

### **Consultant Contracts**

Competitive bidding is one of the cornerstones of a financially successful project. The competitive bid process is required for new contracts and/or replacing an expired contract. Local agencies shall not enter into a contract or renew an expired contract without completing the competitive bid process. Seeking bids from qualified firms will ensure that the local agency is getting the most reasonable price. Prior to soliciting bids, careful consideration should be given to defining the scope of the consultant's work, estimating the cost of the consultant's work, determining the type of contract needed, and deciding whether to seek bids on a project-by-project or time-base method.

The project-by-project method is appropriate for use when a local agency has only one project or has an extensive project expected to last more than 36 months. Under this method the consultant performs the tasks exclusively on the designated project until completion. All four commonly used contracts are suitable for use with the project-by-project method and include: (a) Actual Cost plus Fixed Fee, (b) Cost per Unit of Work, (c) Specific Rates of Comparison, and (d) Lump Sum.

The time-base method is appropriate for local agencies with multiple projects occurring simultaneously. This method is more cost effective as the agency is not required to complete the competitive bid process for each individual project. Under this approach the same consultant can perform R/W tasks on different projects during the contract term. The maximum contract length is 36 months. If the contract needs to be extended due to unforeseen circumstances, the local agency must complete Exhibit 12-F, Request of Approval of Cost-Effectiveness/Public Interest Finding and submit it to the DLAE along with a written justification. The contract may be extended once with a maximum length of 12 months. Of the four types of contracts noted above, it is not appropriate to use the Lump Sum contract with the time-base method.

The local agency which enters into a contract with a consultant for the performance of R/W work retains ultimate responsibility for the actions of the consultant. Caltrans has established broad criteria for use in evaluating the qualifications in the respective R/W functions, but

Caltrans is in no way liable either for devising such criteria or for the performance of consultants chosen by the local agency. In the event the actions or performance of the consultant result in a loss of federal funds for the project, it is the sole responsibility of the local agency to repay these funds.

Consultants must perform R/W functions to the same standards, practices, rules, and regulations as the local agency. The District R/W Local Programs/Assistance staff will monitor the work products of the consultants using the guidelines discussed under "The Monitoring Process" in section 13.2.

The local agency responsibilities also include the following in connection with project completion:

- A formal review of the appraisal (noted above) is required when federal funds are used for any portion of the project.
- An establishment of just compensation is necessary. The local agency must approve the fair market value appraisal and determine what compensation is to be paid in projects involving the acquisition of real property. **This is a federal requirement and cannot be delegated to the consultant.**
- The assignment of a Contract Manager who is knowledgeable in all aspects of the project is needed to serve as the contact person during the course of the project. (See "Contract Administration" below.)
- If the local agency has any questions or concerns regarding the hiring of R/W Consultants, they are encouraged to contact the nearest District Right of Way Office for assistance or guidance.

### Contract Administration

The local agency shall designate a Contract Manager to act as the official representative of the agency with full authority and responsibility to manage the contract. In addition to the duties listed in Chapter 10, "Consultant Selection," of the LAPM for the Contract Manager, R/W projects also require the following:

- Performing a functional review for each R/W activity.
- Approving and coordinating all consultant activities.
- Approving requests for payment (after completion of the work).
- Preparing interim/final contract completion reports and performance evaluations.

## 13.3 MASTER AGREEMENT

A master agreement is required with a local agency whenever federal funds are to be used on a local transportation project.

In the master agreement, a local agency agrees to comply with all federal and state laws, regulations, policies and procedures relative to the design, R/W acquisition, construction and maintenance of the completed facility. It is normally processed once with the agency when it

begins its first federal-aid funded project. The Local Agency-State Master Agreements are occasionally updated and re-executed to account for changes in laws and policies.

### **Program Supplement Agreement**

The Program Supplement Agreement (PSA) supplements the Master Agreement and formalizes the financial responsibilities and provisions for each specific federal-aid funded project. The PSA identifies the reimbursable phase(s) of work in addition to the types and amounts of federal and local funds used to finance the locally sponsored project. It is the contractual basis for the state to reimburse the local agency for work done.

Special covenants or clauses in the supplement agreement define the agency's specific responsibilities in implementing and maintaining the project. Others define state or local responsibilities for providing project funds.

## **13.4 RIGHT OF WAY AUTHORIZATION**

When federal funds are to be used for R/W costs, the Field Review Form (Exhibit 7-B) and the R/W estimate must be completed, and National Environmental Policy Act (NEPA) approval obtained before requesting authorization. If federal-aid is sought for any phase of the project, all R/W activities must conform to federal requirements. Failure to conform to these requirements will jeopardize federal funding.

**NOTE:** If any R/W activities are performed prior to authorization, those activities are normally ineligible for reimbursement later. Requests for authorization should be submitted to the DLAE. If the request is complete, the DLAE will initiate the authorization process.

### **Project Programming**

The initial step in obtaining federal-aid on a local assistance project involves selecting and programming the project into a federally approved Transportation Improvement Program. This will require careful estimates of the costs involved for all phases of the project including preliminary and construction engineering, utility relocation, R/W (if additional property interests are required), and construction.

Real property rights that are acquired for a local agency project must be sufficient for all activities necessary for the construction of the project and for the ongoing operation and maintenance of the facility when completed. It is the responsibility of the local agency to determine the property rights that will be necessary for each project and that these rights are sufficient for the project.

Procedures to program projects can be found in Chapter 1, "Introduction/Overview," and Chapter 2, "Financing the Federal-aid Highway Program," of the Local Assistance Program Guidelines (LAPG). Questions concerning project programming should be referred to the DLAE.

### **Request for Authorization to Proceed with Right of Way**

After a project is selected and programmed in a Federal Approved State Transportation Improvement Program (FSTIP), the local agency should then contact the DLAE to obtain authorization to receive federal funds. The authorization must precede any activities for which

reimbursement will be requested. When the project requires the relocation of utility facilities, the request must include a listing of each affected utility company together with an estimate of the cost of relocation for each company and a request for approval of the use of the Alternate Procedure. The local agency is responsible for initiating the Request for Authorization to Proceed with Preliminary Engineering (Exhibit 3-A) through Caltrans to FHWA. For additional details, please refer to Chapter 3, "Project Authorization," of the LAPM.

The project authorization obligates FHWA to reimburse allowable project costs and confirms that federal funds are available in the amount requested for that project. However, this is subject to the condition that acquisition of R/W may only commence after the necessary requirements have been met, including NEPA compliance. The local agency must prepare a Request for Authorization package (See Chapter 3, Exhibit 3-A, Request for Authorization to Proceed with Preliminary Engineering, Exhibit 3-B, Request for Authorization to Proceed with Right of Way, Exhibit 3-C, Request for Authorization to Proceed with Construction, and Exhibit 3-D, Federal Transit Administration Transfer, of the LAPM) and certify to the accuracy of all the data on the forms. Separate work authorizations and fund obligations are normally made for preliminary engineering, R/W, and construction, if federal funds are to be used for these phases of the project. The authorization to proceed must be obtained prior to starting an item of work for which the agency will seek reimbursement.

When the DLAE determines that the project has been authorized and obligated, an Authorization to Proceed is printed which shows the authorization and obligation dates. This form is then sent to the local agency as verification that they may begin with that phase of the project and subsequently be eligible for reimbursement. If the project cannot be authorized, the local agency is informed and advised what corrective actions are necessary.

### **Authorization to Begin Right of Way Work (E-76)**

Each phase (capital/support) or function (appraisal, acquisition, or utility relocation) of R/W claimed for reimbursement must be programmed and authorized by an E-76 prior to beginning that phase or function. Any work done prior to authorization will be ineligible. An E-76 may program multiple phases.

Local agencies may not proceed with final design or request for authorization to proceed with R/W or construction until full compliance with the provisions of NEPA have been documented and approved by Caltrans. Failure to follow this requirement will make the project ineligible for FHWA reimbursement. Upon final environmental approval, it is incumbent upon the DLAE to provide the local agency with immediate notification and a copy of the signed Categorical Exemption/Categorical Exclusion Determination Form or approved environmental document (Finding of No Significant Impact [FONSI] or Record of Decision [ROD]), so the local agency can commence with final design and/or request authorization to proceed with R/W activities.

Preliminary acquisition activities, including a title search and preliminary property map preparation, necessary for the completion of the environmental process can be advanced under preliminary engineering prior to NEPA compliance while other work involving contact with affected property owners must normally be deferred until NEPA approval, except as provided in 23 CFR 710.503, for protective buying and hardship acquisition, and in 23 CFR 710.501, early acquisition.

Only under these exceptional circumstances will the agency be allowed to acquire property prior to environmental approval. For example, the agency may acquire property in advance of the normal schedule if the owner claims hardship, or the property must be protected from future development. Appropriate documentation must accompany the request to FHWA for approval of Hardship and Protection acquisitions. When making these advanced acquisitions, ensure that the intent of the Uniform Act and the NEPA are not circumvented. For additional information, please refer to Chapter 5, "Hardship and Protection," of the Right of Way Manual, or contact Caltrans Right of Way Local Programs Coordinator in your area.

## 13.5 PRELIMINARY RIGHT OF WAY ACTIVITIES

### Request Authorization to Proceed with Preliminary Engineering

Separate work authorizations and fund obligations are normally made for Preliminary Engineering (PE), R/W (including appraisal, acquisition, relocation assistance, and utility relocation) and Construction phases, if federal funds are to be used in each of these phases.

### Preliminary Studies

At this early stage in the development process, it is crucial to correctly evaluate the project requirements: namely, the limits, location (including existing utilities), scope, costs, and whether any additional R/W will be required. Each agency should establish a process for accumulating this data, which will play an integral part in successfully completing the Field Review, the Preliminary Environmental Study (PES) Form and the Plans, Specifications & Estimate (PS&E) for the project.

### Field Reviews

Formal Field Reviews, which may include FHWA and Caltrans representatives are not required on local agency transportation projects off of the National Highway System (NHS). (For additional details, see Chapter 7, "Field Review," of the LAPM.) However, Field Reviews are suggested practice for all complex projects. A representative from FHWA should be consulted on all FHWA High Profile projects. All requests for FHWA participation should be coordinated through the DLAE.

Local agencies should complete the PES Form and the first two pages of the Field Review Form prior to requesting a Field Review. If it appears that additional R/W will be required, one of the intended results of the Field Review is to provide sufficient data to complete the R/W estimate (See "R/W Estimate," in this chapter). The information contained in these two documents is crucial in obtaining FHWA authorization to proceed further with the next stage of the project (See "Request for Authorization to Proceed Right of Way," in this chapter).

The Field Review process brings together all interested parties in order to reach an agreement on the important aspects of the project, including such items as the design features, alternative proposals for building the project, respective responsibilities of the various agencies involved, level of documentation required in the NEPA process, and whether a public hearing will be necessary. For R/W objectives, the Field Review may confirm the need to acquire R/W and relocate the occupants, or relocate utilities and/or railroad facilities, which can significantly affect the project development, in particular, the costs and scheduling. The review also

facilitates the identification of compensable property interests plus uncovering project requirements such as the need for temporary construction easements, or permits to enter. Therefore, it is strongly encouraged that the Caltrans Right of Way Coordinators be invited to participate in the Field Reviews, as their assistance could be extremely helpful.

When the preliminary review is completed, the local agency is responsible for completing the Field Review Form. If there are R/W requirements for the project, the Division of Local Assistance Area Engineer (DLAE) should forward a copy of this form to the Right of Way Local Programs Coordinator. For NHS projects, all appropriate forms and attachments must be completed. For non-NHS projects, the two-page Field Review Summary must be completed at a minimum. Items 7 and 9 apply to R/W issues.

### **13.6 NATIONAL ENVIRONMENTAL POLICY ACT**

All local agency federal-aid transportation projects off the SHS must comply with the provisions of the National Environmental Policy Act (NEPA) and the implementing of regulations (23 CFR 771). Local agencies may not proceed with final design, R/W acquisition, or project construction until full compliance with the NEPA has been documented and approved by Caltrans.

The level of documentation required in the NEPA process will vary depending upon the NEPA Class of Action. A proposed major highway or a new highway on a different alignment, for example, will normally require an extensive study, an Environmental Impact Statement (EIS), while minor improvements to existing highways such as a roadway intersection signal installation may require only a short analysis, a Categorical Exclusion (CE).

All local agency projects must demonstrate compliance with NEPA and other federal environmental laws before proceeding with R/W work or the final design of a project.

#### **Preliminary Environmental Review**

The Preliminary Environmental Study (PES) form (Exhibit 6-A) of the LAPM is designed to identify such items as the existing conditions in the project area, environmental issues that may require further study, and the need for public hearing, or resource, or regulatory agency permit. Question No. 24 in Exhibit 6-A and Exhibit 6-B, Instructions for Completing the PES Form, specifically relate to R/W impacts and a "YES" answer would indicate that further action is necessary.

#### **Public Hearings**

In general, public hearings should be held for a project if there is substantial environmental controversy, if there is widespread interest in holding the hearing, or if an agency with jurisdiction over the project requests one. The procedures for holding hearings, including the requirements for notifying the public, the contents of the notification, scheduling, and the hearing process are all discussed in Chapter 8, "Public Hearings," of the LAPM.

Federal regulations require public hearings under certain circumstances. For example, projects being processed with an Environmental Assessment (EA) require a public hearing when significant amounts of R/W will be required for the project. Public hearings are also required during the circulation period of all draft EISs.

Public involvement is advantageous because it can broaden the agency's knowledge of the project area. If a public hearing is to be held and additional R/W or property rights will be required for the project, R/W personnel should be involved as early as possible. A public forum offers an excellent opportunity to discuss the acquisition and relocation impacts with the affected persons. The importance of explaining these projects within the context of a public hearing cannot be overstated. One of the most difficult aspects of any project is the displacement of people and/or personal property. Project construction activities can have very serious economic and social impacts on the affected region, including adverse impacts in the traffic patterns, business operations and the lives of its denizens. Those who are displaced must relocate and reestablish their residence or business in a new area. As a result, those most directly affected are often emotionally impacted, apprehensive of the changes due to the project, and need detailed information on the R/W procedures and their rights. The public hearing is often their first real opportunity for information and contact with project representatives. One of the keys to a successful project may be the cooperation engendered at the first public hearing. As the project progresses, there may be a need for additional hearings devoted solely to R/W issues and impacts.

### **The Environmental Document**

Depending upon the potential for impact, there are three NEPA Classes of Action under which a federal-aid project may be processed. These include: Categorical Exclusion (CE) determination, an Environmental Assessment (EA), or Environmental Impact Statement (EIS) document. The purpose of the environmental determination or document is to disclose to the public and decision makers the proposed action, potential environmental impacts, and propose avoidance, minimization, and mitigation measures to offset adverse impacts. R/W acquisition and activities associated with the action must be considered as part of the scope of the action. The environmental investigation and environmental determination or document must also address impacts associated with R/W activities. Guidance on analyzing impacts associated with R/W acquisition and use is provided in the *Standard Environmental Reference (SER)* at: <http://www.dot.ca.gov/ser/vol1/vol1.htm>.

## **13.7 PROJECTS REQUIRING RIGHT OF WAY/PROPERTY RIGHTS**

Local federally funded projects involving the acquisition of R/W should be discussed with the District R/W Local Programs Coordinator as early as possible in the project development stage. There are several reasons for this. As noted above, while some PE activities (i.e., ordering title reports, preparing base maps and appraisal maps, conducting project-wide comparable sales searches, gathering cost estimates and completion of the appraisal) may be conducted and subsequently reimbursed by FHWA prior to NEPA compliance, the majority of R/W activities (such as, initiation of negotiations with property owners, relocating displaced persons, and utility relocations) may not be performed on federal-aid projects prior to NEPA compliance. This restriction minimizes the potential for predetermined project site or alignment selection.

While Draft and Final EAs and EISs may identify the preferred alternative, the selected alternative shall not be announced until the FONSI and ROD has been completed. More detailed discussion of the pre-requisites for R/W activities are provided in Caltrans *Right of Way Manual* Chapters 3.08.00.00, and 7.01.06.00.

## The Right of Way Estimate

If property rights are necessary, the next phase in the project development is the completion of the R/W Estimate. The estimate is of primary importance in the cost-efficient delivery of the project. This process and subsequent document provide a detailed analysis of the following:

- Type of properties to be acquired.
- The size and number of the parcels.
- If displacement is to occur, what is the nature (e.g., residential or commercial), how many are affected and what is the projected timing.
- How much time and what personnel are needed to appraise and acquire the R/W and perform any necessary relocation work, including utilities.

The estimate for any liability for utility relocations should include:

- The estimated fair market value of the properties to be acquired.
- The anticipated relocation assistance payments.
- The portion of the local agency's liability to relocate utility facilities outside of the R/W.

An accurate estimate of R/W costs based on current market data is essential for forecasting capital expenditures and future staffing needs. For example, overestimating may result in deferring, down-scoping, or eliminating a project; underestimating could affect the financial ability to build the project or inadequate staffing needs. The District R/W staff may assist the local agency in preparing and reviewing the estimate documents.

Rough estimates are often prepared during the preliminary phase of a project. However, these estimates should be updated prior to use in a budgeting or programming document. Maps should be available once the project scope is defined. Detailed maps are critical in preparing good R/W estimates.

## Advance Acquisition/Hardship/Protection

Hardship acquisitions are situations where unusual circumstances have befallen the owner(s) of the property and are aggravated or perpetuated because of the proposed project and cannot be solved by the owner without acquisition by the local agency.

“Protection” acquisitions occur when property is purchased in advance of normal acquisition to prevent development on a proposed alignment. If the purchase were deferred, the result would be higher acquisition, relocation and/or construction costs.

Local agencies may acquire hardship and protection properties with their own funds prior to NEPA compliance without jeopardizing federal participation in future programmed project costs. These advance acquisitions require prior FHWA approval, and any such acquisition must comply with the Uniform Act if the local agency anticipates seeking reimbursement for the acquisition costs when the project is approved for federal-aid. The local agency should immediately contact the District Right of Way Local Programs Coordinator regarding FHWA approval before proceeding with any acquisition. See Chapter 5 for process and procedures of the Caltrans *Right of Way Manual*.

## Relocation Planning

When projects involve displacement, the successful resolution of the needs of those displaced requires careful planning. Housing resources must meet the needs of the displaced in terms of size, price, location and timely availability. Advisory services and various notices to vacate, some with specific timing requirements, must be provided. Businesses must be given assistance in relocating with minimal disruption during the move. Payments must be made to displaced persons at the time they are needed during the move to the new location. These things do not happen automatically, they require planning.

FHWA has long stressed the need for relocation planning. Congress gave new emphasis to the need for consideration of the impacts of displacement in the 1987 Amendment to the Uniform Act. 49 CFR 24.205(a), states that planning may involve a relocation survey or study which may include the following: (1) An estimate of the number of households to be displaced including information such as owner/tenant status, estimated value and rental rates of properties to be acquired, family characteristics, and special consideration of the impacts on minorities, the elderly, large families, and the handicapped when applicable, (2) An estimate of the number of comparable replacement dwellings in the area (including price ranges and rental rates) that are expected to be available to fulfill the needs of those households displaced. When an adequate supply of comparable housing is not expected to be available, consideration of housing of last resort actions should be instituted, (3) An estimate of the number, type and size of the businesses, farms, and nonprofit organizations to be displaced and the approximate number of employees that may be affected, and (4) Consideration of any special relocation advisory services that may be necessary from the displacing agency and other cooperating agencies.

## Railroad Operating Facilities

Railroad companies determine which of their facilities are “operating” or “non-operating.” The operating facilities can be “affected” by a construction project in several ways, each of which requires different processing. Because of the time required to reach agreement with the respective railroad companies and because of the complexities involved with these agreements, special care should be given to any project where railroad involvement is possible. For additional information, refer to Chapter 8, “Acquisitions,” (Railroad) of the Caltrans *Right of Way Manual*.

## 13.8 APPRAISALS

The Uniform Act contains basic requirements for the appraisal of real property acquired for public purposes. These basic requirements apply to all federal-aid projects. For additional details, refer to 49 CFR 24.102, 103 and 104, and Chapter 7, “Appraisals” of the Caltrans *Right of Way Manual*.

### Prepare Final Right of Way Requirements/Appraisal Maps

Before commencing appraisal activities, the final R/W or appraisal maps must be completed. The appraisal report, when completed, should contain additional diagrams, sketches or maps as necessary to understand the property valuation. Significant topography maps should be included for partial acquisitions. The appraiser is responsible for the completeness of the maps

and for requesting delineation of pertinent data including, in particular, the area of the taking, and any remainder parcels.

### **Appraise Right of Way, Determine Fair Market Value**

Prior to commencing appraisal work on parcels required for the project, the appraiser must advise the property owner of the decision to appraise the property. The notice must be in writing and covers the following:

- A specific area being considered for a particular public use, i.e., the project.
- The fact that the owner's property lies within the project area.
- All or a portion of the owner's property (which should be generally described) may be acquired for public use.

The letter must offer the owner (or the owner's representative) the opportunity to accompany the appraiser on an inspection of the property. It will give reasonable advance notice. There is no mandatory format for the notice; however, see Chapter 7, Exhibit 7-EX-17 Notice of Decision to Appraise, of the Caltrans Right of Way Manual for a suggested format. The owner will also be given a written explanation of the agency's land acquisition procedures. FHWA publishes a booklet entitled *Your Property, Your Transportation Project*, which will satisfy this requirement. Title VI brochures should also be sent to the property owners.

All real property shall be appraised before the initiation of negotiations with the owner, and the acquiring agency shall establish an amount it believes to be just compensation. Although Fair Market Value sets the basis for just compensation," the two amounts may differ because of unusual circumstances. The Code of Civil Procedure defines Market Value as: "(a) The fair market value of the property taken is the highest price on the date of valuation that would be agreed to by a seller, being willing to sell but under no particular or urgent necessity for doing so, or obliged to sell, and a buyer being ready, willing and able to buy but under no particular necessity for so doing, each dealing with the other with full knowledge of all the uses and purposes for which the property is reasonably adaptable and available," and "(b) The fair market value of property taken for which there is no relevant comparable market is its value on the date of valuation as determined by any method of valuation that is just and equitable."

### **Appraisal Review**

As noted above, on federal-aid projects, a formal review of the appraisal is necessary (See 49 CFR 24.104). If the local agency is using a private sector review appraiser, the review appraiser must have a valid California license issued by the state Office of Real Estate Appraisers (OREA). If the project sponsor is a qualified agency and performing its own appraisal work, the California Department of Real Estate (DRE) has held that, as employees of a public agency, neither the appraiser, nor the review appraiser needs such a license. The review appraiser must determine whether the appraisal meets applicable requirements and make any necessary corrections or revisions.

If the review appraiser is unable to approve or recommend approval of the appraisal, the reviewer may develop additional documentation to support what is felt to be an approved or recommended value. The reviewer must state the basis for the value conclusion. The Uniform Act makes it clear that the local agency must establish an amount believed to be just

compensation. Therefore, if another agency or a consultant does an appraisal review, the acquiring agency must retain the responsibility for establishing an estimate of just compensation. Another agency or a consultant cannot do so.

### **Appraisal Waiver Valuation**

When the local agency determines that the valuation problem is uncomplicated and the market value is estimated at \$10,000 or less based on a review of available data, the appraisal can be waived. In this case, the local agency will prepare a Waiver Valuation. The \$10,000 amount includes any damages to the remainder property but excludes any non-substantial construction contract work. This information is consistent with 49 CFR 24.102(c)(2).

### **Separation of Appraisal and Acquisition Functions**

Local agencies should maintain a separation of the appraisal and acquisition functions, except that the same person can appraise and acquire a parcel if the total valuation excluding non-substantial construction contract work is \$10,000 or less. This dollar limit also applies to appraisal revisions where the appraiser was previously assigned to negotiate the parcel. The valuation document can be either an appraisal or Waiver Valuation.

When the same person prepares the appraisal and does the acquisition, the appraisal should contain a statement substantially as follows: "I understand that I may be assigned as the Acquisition Agent for one or more parcels contained in this report, but this has not affected my professional judgment or influenced my opinion of value."

All railroad properties should be valued in the full, narrative format. The Non-complex Valuation of \$10,000 or less and the Determination of Just Compensation (waiver of appraisal) formats shall not be used. Railroad parcels are not eligible for the one-agent appraise/acquire process. This also includes the appraisal and acquisition of a temporary construction easement from the railroad.

For additional details, refer to Section 7, "Appraisals," of the Caltrans *Right of Way Manual*.

### **Dual Appraisal Report**

Caltrans policy no longer requires dual appraisal reports. Local agencies may determine that a dual report is needed to ensure the owner receives a fair market value offer. Dual appraisal reports should be considered for unusually large or complicated parcels or parcels exceeding \$500,000 in value. This amount includes improvements pertaining to realty, severance damages, and construction contract work.

Consider the following when determining which parcels require dual appraisal reports:

- There is a serious question as to highest and best use.
- Market data is inconclusive because of its scarcity and/or absence of established patterns and value conclusions must, therefore be based primarily on opinion.
- There are substantial improvements not compatible with the highest and best use of the land. In other words, there is a high degree of economic obsolescence.
- A significant portion of the appraised value is severance damages or there is a substantial question regarding damages or benefits.

- The value of the land is primarily on a development-analysis approach, or there is reliance on a specific plan of proposed development.

Dual appraisals shall be separate and fully independent in calculations, analysis, and conclusions. This will give a better basis for determining market value and help ensure a sound offer. The appraisers and the local agency management are responsible for maintaining the fact, spirit, and appearance of this independence.

### 13.9 RIGHT OF WAY ACQUISITION

The Uniform Act contains basic requirements for the acquisition of real property, which apply to all projects. For additional details, refer to 49 CFR 24 and to the Chapter 8, "Acquisition," of the Caltrans *Right of Way Manual*.

Prior to initiating negotiations for the acquisition of real property, the agency must establish an amount it believes to be just compensation and must make a written offer to the owner(s) to acquire the property for the full amount so established. All local agencies are encouraged to establish a Nominal (minimal) dollar amount of "Just Compensation" for any private property right needed to complete a project. Thus, estimated or appraised property rights acquired, rented or used for a project would be consistent from project to project. In no event, shall such amount be less than the agency's approved appraisal of the fair market value of the property. The agency should make every effort to acquire the property by negotiation. Any increase or decrease in the value of the property to be acquired prior to the date of valuation caused by the transportation project shall be disregarded in determining the compensation for the property. The agency shall provide the owner(s) with a written statement explaining the basis for the amount it established as just compensation or a copy of the completed appraisal.

The acquisition agent is responsible for securing all property rights necessary to certify the project (See "Right of Way Certifications" below).

**NOTE:** If a private sector consultant is used in the acquisition phase, the consultant must have a valid California Real Estate Broker's license, or Salesperson's license if supervised by a licensed Real Estate Broker. All R/W Contracts must be approved for content and signed or initialed by the Real Estate Broker or Principal of the Company.

By signing the R/W Contract, the Broker or Principal of the Company acknowledges responsibility for a complete file. (See Exhibit 13-C, Consultant Selection Criteria and Guide, in this chapter.)

The general Uniform Act requirements are as follows:

- A written appraisal establishing just compensation must be approved prior to the initiation of negotiations.
- The written offer must be made promptly in the full amount of the appraisal and contain a summary for its basis.
- At least a 90-day written notice must be given to all lawful occupants.
- The owner's incidental escrow cost must be paid.
- A written (parcel) diary must be maintained.

## Condemnation/Eminent Domain

Eminent Domain is the inherent power of government to acquire property for public use. The Fifth and Fourteenth Amendments to the U.S. Constitution and Article I of the California Constitution provide that such private property shall not be taken without just compensation. Condemnation is the legal proceeding by which the power of eminent domain is exercised.

Public agencies may condemn private property provided that the governing body of the condemning agency (e.g., the Board of Supervisors or City Council) adopts a Resolution of Necessity at a public hearing. The owner(s) must be provided advance notice of the hearing. If the owner(s) believe that their property should not be required, they have the right to appear at the hearing and contest the adoption of the Resolution of Necessity.

Great care must be taken in the exercise of the power of eminent domain. The process is discussed in detail in Chapter 9, of the Caltrans *Right of Way Manual*.

## Relocation Assistance

The Uniform Act also contains basic requirements when displacement occurs as a result of the transportation project. These requirements are found at 49 CFR 24 Subparts C, D and E. The relocation procedures are also discussed in detail in Chapter 10, "Relocation Assistance," of the Caltrans *Right of Way Manual*.

The purpose of the Uniform Act 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 understand that successful relocation is essential not only to those displaced but also to the progress of the entire highway project.

While the local agency needs information about any displacement, which will occur because of the project, the displaced persons have an equal or greater need for information about the benefits, the eligibility requirements to obtain these benefits, and the appeal process in the events these benefits are denied. FHWA has prepared a broadly written brochure entitled *Your Rights and Benefits as a Displaced Person*. The brochure explains these matters and is intended to be used by relocation agents and at public hearings. Copies are available from the District R/W Local Programs Coordinator. In addition, FHWA has also prepared a more specific explanation of these benefits and the requirements to obtain them. This summary should minimize any disruption caused by the move and maximize the likelihood of a successful relocation. A copy of this summary is provided as Exhibit 13-D, Uniform Relocation Act Benefits Summary, in this chapter.

## General Requirements

The relocation agents and any private sector consultants should meet the selection criteria found in Exhibit 13-C, Consultant Selection Criteria, in this chapter.

The relocation activities should be coordinated with both the appraisal and acquisition functions.

It is crucial to ensure that:

- Timely calls are made.
- Proper entitlements and advisory services are provided.

- Relocation Assistance Program (RAP) payments are timely and properly calculated.
- The appeal process is communicated to the displaced.
- Diaries are maintained.
- All notices (Eligibility, Vacate, or Entitlement) are timely.

### Property Management

Property management includes the administration of property acquired for transportation projects. FHWA regulations for the property management function are found in 23 CFR 710. These policies and procedures apply to all real property acquired by local agencies in connection with projects where federal funds participate in any of the R/W costs for the project. Federal funds may be used to cover the net costs incurred in leasing, rental, maintenance, disposal of improvements, and the clearance of the property. For additional details, refer to Chapter 11, "Property Management," of the Caltrans *Right of Way Manual*.

The management and administration of acquired property includes:

- An inventory of all improvements acquired as part of the R/W.
- An accounting of the property management expenses and the rental payments received.
- An accounting of the disposition of improvements and the salvage payments received.

### Special Requirements

**If a private consultant provides property management services, the firm must have a valid California Real Estate Broker's license and a minimum of two (2) years' experience at the working level in management of rental properties.**

See Chapter 17, Exhibit 17- EX 13, Consultant Selection Criteria and Guide, of the Caltrans Right of Way Manual for more information.

Former owners and tenants subject to termination by the local agency on short notice will not be charged more than fair market rents.

### Excess Lands (Acquisition and Disposal)

The regulations covering acquisition and disposal of Excess Lands are found in 23 CFR, 710 and 771. FHWA no longer requires reimbursement of the federal share of proceeds from the sale of excess real property. Local agencies shall use these funds for subsequent Title 23 (US Code) eligible projects. Local agencies may consider creating a dedicated Title 23 (highway) account where proceeds from the sale of excess will be deposited and only used for Title 23 projects. See 23 CFR 710.403(e).

## 13.10 RIGHT OF WAY CERTIFICATION

When a local agency performs R/W activities on a federally assisted local project, the local agency prepares the R/W Certification. The R/W Certification is necessary before a project can proceed to construction. The purpose of the R/W Certification is to document that any interests necessary for the project have been, or are being secured, and physical obstructions including

buildings, utilities and railroads have been, or will be removed, relocated or protected as required for construction, operation and maintenance of the proposed project. The R/W Certification also documents that R/W activities including the relocation of any displaced persons conducted in accordance with applicable state and federal laws and regulations.

**NOTE:** For projects requiring CTC allocation approval, see Chapter 23 of the LAPG.

### **Certification Forms**

A separate R/W Certification must be completed by local agencies for each local assistance project even if no R/W is required for the project. All Certifications can be prepared using forms specified by Caltrans (See Exhibits 13-A and 13-B, in this chapter).

On the R/W Certification form, the local agency should use only the portions applicable to the project being certified.

**NOTE:** Exhibit 13-A is intended for projects that do NOT require R/W acquisition, relocation assistance, have NO railroad involvement, and the ONLY utility relocation involvement is limited to utility cover adjustments.

### **Utility Relocation**

Local agency transportation projects often involve utility relocation. For utility relocation details refer to Chapter 14, "Utility Relocation," of the LAPM.

### **Project Certification – Right of Way Required**

When additional property rights are required for a local federal-aid project, it is necessary for the agency to certify that these rights were acquired in conformance with the Uniform Act.

All local agencies will certify their own projects, but it is of crucial importance to adhere to the CFRs and the Caltrans *Right of Way Manual* that incorporate these federal regulations so that any state or federal funds to be used for the project are not jeopardized. This emphasizes the gravity for non-qualified local agencies in the selection of qualified consultants or in contracting with a qualified local agency to perform the respective R/W functions for them.

### **Levels of Certification**

There are four levels of R/W Certification, which are discussed below.

#### **Certification No. 1**

This level of certification documents the following:

- All the work is within existing R/W acquired for a previous construction project and all new work will be within that existing R/W.

OR

- Acquisitions are complete (escrow's closed and/or Final Orders of Condemnation recorded).

AND/OR

- There are effective Orders for Possession on all remaining un-acquired parcels.

AND

- All occupants have vacated the lands and improvements.
- Relocation Assistance and payment requirements have been met.
- All necessary material and/or disposal sites have been secured.
- All encroachment and/or construction permits have been obtained.

AND

- All Rights of Way clearance, utility, and railroad work has been completed, or all necessary arrangements have been made (Utility Notices issued, demolition contracts awarded, railroad contracts executed) for the work to be undertaken and completed as required for proper coordination with the physical construction schedules.

**Certification No. 2**

This level of certification documents the following:

All the requirements for R/W Certification No. 2 are the same as for Certification No. 1, except that one or more parcels are in the agency's possession by virtue of effective Rights of Entry or an Agreement for Possession and Use. Similar documents, such as a permit, license, or an approved R/W Contract with an effective right of possession date, also require the use of a Certification No. 2. (See limitations on use of "Rights of Entry" contained in Section 13.12 in this chapter.)

**Certification No. 3**

This level of certification documents the following:

All requirements are the same as for Certification No. 1, except legal possession or right of occupancy and use of a few remaining parcels are not complete. A Certification No. 3 may only be used in an exceptional circumstance, on a very limited basis, and must be accompanied by a full written justification. At a minimum, the justification must include the following:

1. An outline of the very unusual circumstances that require early advertisement.
2. A statement how and/or why it is believed to be in the public's interest.
3. A statement that a Resolution of Necessity has been approved on all parcels yet to be acquired.
4. The reason why a Certification No. 1 or No. 2 is not possible.
5. Anticipated actual dates when legal possession and physical occupancy and use will be obtained and substantiation that such dates can be met (a copy of the executed Order of Possession or Right of Entry can be attached to satisfy this requirement).
6. A statement that all remaining residential occupants have had replacement housing made available to them. (For additional information, see Chapter 10, "Relocation Assistance," of the Caltrans *Right of Way Manual*.)

7. A statement assuring that occupants of residences, businesses, farms, or nonprofit organizations who have not yet moved from the R/W are protected against unnecessary inconvenience and disproportionate injury, or any action coercive in nature.
8. Identification of each parcel on which legal possession and/or right of occupancy and use has not been obtained.
9. Bids cannot be opened until the Certification 3 is upgraded to a Certification 2.

#### **Certification No. 3 with a Work-Around (3W)**

This special R/W Certification 3W may be used only in the most extraordinary circumstances. The local agency must show that there is a critical need to advertise and award the project and describe in detail the extraordinary circumstances. If federal funds are involved in any portion of the project, including construction, approval of the work-around must be obtained from FHWA in advance of certifying the project for advertising. This certification will allow physical construction of a project to commence while occupants of businesses, farms, or nonprofit organizations remain within the R/W. All occupants of residences must have had replacement housing made available to them in accordance with the Uniform Act. The certification must be completed in a timely manner, with proper and complete documentation and justification. Should the local agency anticipate a need to certify the R/W for a project under this type of certification, the District R/W Coordinator should be contacted as soon as the circumstances are confirmed during the PS&E stage.

#### **Time Requirements for Right of Way Certifications**

Under ideal conditions, a Certification No.1 would be completed for each project at the PS&E stage. Because this is not always possible, the lower levels of certification allow projects to proceed within limitations while the remaining necessary rights are acquired.

The local agency must transmit all certifications to the DLAE for all federal-aid projects along with the Request for Authorization. Certification No's. 1 and 2 are approved at the district level. Certification No's. 3 and 3W require headquarters concurrence and FHWA approval. FHWA also retains approval of all certifications for High Profile projects.

In those cases when a project advances to advertising on a Certification No. 3, an upgraded Certification No. 1 or No. 2 must be received by the DLAE prior to the bid opening date. In rare cases where a Certification No. 3W is used, an "Updated" Special Certification No. 3W must be provided when the local agency has legal and physical possession of the property that is being worked around. This dated and signed "Updated" Special Certification No. 3W must be provided to the DLAE no later than 15 working days prior to bid opening. For a full discussion on R/W Certification and their usage, see Chapter 14, "Project Certification" and 17.08.06.00 of the Caltrans *Right of Way Manual*.

### **13.11 EMERGENCY RELIEF PROJECT CERTIFICATION**

#### **Emergency Opening Phase**

Emergencies require rapid response. An R/W Certification for Emergency Opening (EO) work is not required until after the roadway is opened. Upon FHWA approval of the Damage Assessment Form (DAF), actions to advertise, award and administer Emergency Relief (ER)

projects may proceed without going through the usual R/W steps. (See Chapter 11, "Disaster Assistance," of the LAPG for further discussion)

After the facility has been reopened, the emergency actions must be reviewed for R/W implications. If either persons or properties were affected during the emergency repair phase, even temporarily, appropriate steps must be taken to ensure compliance with the Uniform Act. This may include appraisal and purchase of the real property rights, or relocation assistance, required to perform the ER construction activities.

Following the review, and any required subsequent actions necessary to comply with the Uniform Act have been completed, an R/W Certification meeting the Level 1 requirements detailing the R/W activities required must be prepared for each project that has been completed using a PS&E (generally a non-force account project) and submitted to the DLAE or District R/W Local Programs Coordinator. (See Chapter 11, "Disaster Assistance," of the LAPG for further discussion)

All Permanent Restoration (PR) work follows the standard federal-aid process and therefore requires complete R/W certification prior to processing the construction E-76.

### **Permanent Restoration Phase**

Once the facility has been reopened and the emergency is over, any further work to restore or improve the facility is no longer exempted from the requirements for certification prior to advertising, or obtaining bids. Restoration projects shall follow the procedures outlined in this chapter. (See Chapter 11, "Disaster Assistance," of the LAPG for further discussion)

## **13.12 RIGHT OF WAY CERTIFICATION FORM - DISCUSSION**

In order to assist the local agency in completing the certification form, the following explanations are provided for each of the items, which appear on the certification.

For additional information, see Chapter 14, "Project Certification," of the Caltrans *Right of Way Manual*.

### **Status of Required Right of Way**

All new property rights required for a project must be included in the R/W Certification. This includes any interests in real property that lie outside of the existing R/W boundary lines, as well as regular parcels acquired by deed, Final Orders of Condemnation, and Orders for Possession. It also includes temporary interests such as Rights of Entry (See "Rights of Entry" below), construction or access easements, permits to enter during construction (including any Caltrans encroachment permits), or licenses. It is important to include the expiration date of any temporary rights in the certification, so that they may be evaluated in terms of the construction schedule.

### **Rights of Entry**

The use of Rights of Entry are limited to only emergency and exceptional situations and require pre-approval from Caltrans Division of Right of Way and Land Surveys (Headquarters) and the Federal Highway Administration.

In accordance with Caltrans policy and 49 CFR 24.102(j), funds must be made available to the property owner for their withdrawal and use prior to the owner surrendering possession of their property. Owners must acknowledge they have been advised of their right to receive immediate compensation and have waived that right, agreeing to be compensated at a later date with interest. Local agencies must also deposit funds into escrow prior to obtaining possession.

A Right of Entry allows an agency representative to enter someone's property for a specific purpose at a specified time. Obtaining a Right of Entry can require that the agency pay just compensation at the time agency takes possession. A Right of Entry does not replace the R/W Contract and shall not be used to certify control of the R/W for the project. The local agency must first have an appraisal of the property rights prepared and present an offer of settlement to the owner. The Right of Entry will not be utilized if the project will displace people or impact improvements of a significant nature. A Right of Entry is appropriate only when the local agency would normally acquire the needed interest, but the owner cannot or will not provide an executed R/W contract, and eminent domain proceedings are not the practical approach. It is used only in extraordinary circumstances and can never be used for the sole reason of meeting the scheduled certification date.

**NOTE:** The form that is acceptable is the state's Agreement for Possession and Use, Exhibit 8-EX 25, of the Caltrans *Right of Way Manual*. This form should not replace the use of an R/W Contract.

### **Status of Access Control**

Access to the project must be adequate to meet the needs during construction. At the same time, access rights for persons whose property abuts on the project boundaries cannot be denied or unreasonably restricted, unless other access is available or provided to the owner during construction. If no access can be provided, the owner is entitled to compensation during the course of construction.

### **Status of Affected Railroad Operating Facilities**

The local public agency must confirm that all arrangements have been made with the railroad. If railroad-operating R/W is not within the project limits or ends two feet of the rail crossing, then "NONE" would be noted on the certification form. Railroads are considered clear for advertising when all arrangements have been made with the railroad for entry on to their property and/or for working on or near the tracks. Types of agreements that may be required include acquisition contracts for fee, easement (permanent or temporary) or Right of Entry, construction and maintenance agreements, or service contracts. Contact the railroad for specific requirements.

### **Railroad Involvement and Project Deliverables**

Clearance of construction projects that involve railroads consists of the following three distinct and mandatory project deliverables:

1. CPUC Application Approval of Project Railroad Plans for final project PS&E;
2. Identification and acquisition of railroad real property rights; and
3. Obtaining an agreement with the railroad for physical construction of the project.

**California Public Utilities Commission Application Approval Required for PS&E**

Pursuant to Public Utilities Code sections 1201-1220, the California Public Utilities Commission (CPUC) has jurisdictional authority over all railroad crossings, including the exclusive power to “determine and prescribe the manner, including the particular point of crossing, and the terms of installation, operation, maintenance, use and protection of each crossing of one railroad by another railroad, ...of each crossing of a public or publicly used road or highway by a railroad or street railroad, of a street by a railroad or of a railroad by a street.”

CPUC Rule 3.9 requires submittal of an application to construct a railroad across a public road, highway or street (<http://www.cpuc.ca.gov/PUC/documents/codelawspolicies.htm>).

**Acquisition of Railroad Real Property Rights**

Real property rights consist of any additional area from the railroads whether above, at, or below-grade and/or subsurface, whether temporary, permanent or otherwise, in fee, easement, or temporary construction easement. These are R/W acquisition items separate and distinct from the agreement for physical project construction requiring compliance.

**Agreement with Railroad for Physical Project Construction**

Railroad owners typically require the railroad construction activities be performed by their own forces at project cost. Therefore an agreement to memorialize the performance of work, liability, cost, and future maintenance with the completed highway facility (such as a Construction and Maintenance Agreement) must be fully executed prior to commencement of construction.

Railroad companies determine which of their facilities are “operating” or “non-operating.” The operating facilities can be “affected” by a construction project in several ways, each requiring different processes. Because of the time required to reach an agreement with the respective railroad companies, and because of the complexities involved with these agreements, special care should be given to any project where railroad involvement is possible. Early discussions should take place with the District Right of Way Local Programs Coordinator on the specific project requirements necessary to successfully process a R/W Certification.

Please refer to Chapter 8, Section 8.69.00, of the Caltrans *Right of Way Manual* (Acquisitions – Railroads) for a detailed discussion on this topic.

**Material and Disposal Sites**

When projects involve the excavation or importation of soils and other materials to or from a material and/or disposal site, separate agreements providing for the use of the sites, the owner’s name, and the duration of the agreement must be listed.

**NOTE:** Typically, on local public agency projects, there is excess material, which the contractor disposes of as part of the contract. The disposal site is not a project need. Under these circumstances, in completing the R/W Certification, “NO” should be the response. Only when a separate disposal site is necessary as a part of the project should the “YES” answer be given.

### **Utility Relocation**

It is the local agency's responsibility to provide for the relocation, protection or removal of all private and public utility facilities which conflict with the construction of the proposed project. It is necessary to reach agreement concerning: (1) the date by which the relocation will be completed, (2) the financial liability for the relocation costs with each of the utility companies having facilities within the project area or that are affected in some way by the project, and (3) who will perform the utility relocation work.

**NOTE:** 23 CFR 635.309(b) requires utility arrangements to be completed prior to project construction except where it is determined such work is not feasible or practical. Federal participation in the utility relocation costs is a R/W issue and not a construction matter, even if the relocation will occur during construction. A separate Authorization Approval must be received prior to any utility relocation. LAPM Chapter 14, "Utility Relocation," provides a detailed discussion of the specific authorization requirements and approval process.

### **Right of Way Clearance**

The preliminary investigations included in the field review will reveal the presence of any improvements or physical obstructions that must be removed prior to construction. Care should be taken in arranging for the removal of these items in order to properly coordinate with the construction schedule.

### **Airspace Agreements**

Airspace leases are revenue-producing agreements for parcels within (above or below) the operating R/W. When subsequent projects are proposed, which affect the airspace leasehold areas or pose a problem for the lessee's use of the site, provision must be made in the contract to minimize this conflict. If airspace leasehold area is required for the project, the lease must be cancelled and arrangements for the lessee's relocation must be made prior to certifying the project.

### **Compliance with the Relocation Assistance Program**

The Uniform Act prescribes certain benefits and protections for persons displaced by local projects which are funded in whole or in part with federal money. Among the benefits the Uniform Act provides are relocation payments for residential displaced persons and for businesses, farms, and nonprofit organizations. The Uniform Act also provides certain protections, such as requiring the availability of replacement housing for residential displaced persons, minimum standards for such housing, and assurances that displaced persons have sufficient time in which to choose their replacement properties. Finally, the Uniform Act provides for certain "advisory services" for displaced persons. Each of these legal requirements must be satisfied and then addressed in the R/W Certification.

### **Cooperative Agreements**

Cooperative Agreements are defined as any formal agreement between Caltrans and a local agency for a project on the SHS wherein the parties share in the development activities. If there

are Cooperative Agreements covering responsibilities or obligations for the respective portions of the project, these agreements must be listed on the R/W Certification form.

### **Environmental Mitigation**

When an approved NEPA document includes mitigation commitments involving the acquisition of property, a list of those commitments along with the date each parcel is expected to be acquired, must be listed on the R/W Certification. While wetland and floodplain mitigation is mainly the responsibility of the project engineer and their environmental staff and/or consultant, the mitigation measures involving the acquisition of property to accommodate replacement wetlands is the responsibility of the District R/W staff. To ensure the most efficient and expeditious implementation of mitigation commitments, it is imperative that the local agency project engineer, District Right of Way Engineer and District Environmental staff collaborate closely on the acquisition of mitigation parcels and the subsequent implementation of mitigation measures.

### **Acceptance of Right of Way Certification**

When there are R/W issues involved, the local agency will certify that the issues have been resolved. Because local agencies are now certifying their own projects, it should be stressed that the authorized official or designated alternate executing the certification must be certain that the proper R/W procedures have been followed and that the requirements of the Uniform Act have been met.

All local agencies may certify their own projects but it is of crucial importance to adhere to state and federal standards, so that the federal funds for the project will not be jeopardized. This emphasizes the gravity for non-qualified agencies in the selection of qualified consultants or in contracting with a qualified agency to perform the various R/W functions. Upon receipt, the District Right of Way Local Programs Coordinator will review the certification to see that each item has been completed in compliance with federal and state laws and regulations and if applicable, the date by which the R/W will be cleared.

If all of the R/W issues have been dealt with in a satisfactory manner, both duplicate originals will be accepted and a signed original copy will be returned to the local agency.

If there are irregularities in the certification and it cannot be accepted as submitted, the Right of Way Local Programs Coordinator will return the certification to the local agency with an explanation as to why it cannot be accepted and the steps that are necessary for acceptance.

Certifications 1 and 2 will be accepted in the district. Certifications 3 and 3W will be forwarded to Caltrans headquarters for review and FHWA's approval.

## **13.13 REIMBURSEMENT/FISCAL POLICY**

### **Purpose**

This section contains critical requirements and basic principles relating to the eligibility of R/W transactions for federal reimbursement. From this overview, the local agency should be able to understand the overall federal and state requirements. Detailed procedures are found in Chapter 5, "Invoicing," of the LAPM.

## Reimbursement Process Overview – Caltrans

Caltrans receives federal funds on a reimbursement basis. This means Caltrans must first obtain an Authorization to Proceed (E-76), incur costs, and bill the FHWA for payment before receiving payment. Federal funds are received by Caltrans as reimbursement for federally eligible expenditures.

As noted above, the normal sequence of events to obtain prior Federal Authorization and reimbursement through Caltrans is:

- a) Obtain authorization to begin work. Federal authorization is gained by obtaining an E-76, "Approval to Proceed" which means funding is available. Only eligible expenditures incurred for work after the date FHWA approves the request are reimbursable.
- b) Reimbursement is limited to the amount shown on the E-76. However, the amount can be revised. If necessary, execute a revised E-76 with FHWA. The revised E-76 is used to increase or decrease the federal funding limit shown on previous agreements.
- c) Submit progress payment invoices during the course of the work and a final invoice upon completion, along with the other documents discussed below.
- d) Final Voucher Project with FHWA after work is completed. Caltrans may audit project charges to ensure that FHWA is billed for all federally eligible expenses. When Caltrans has billed FHWA for all expenses, it sends vouchering documents to FHWA and closes out the project.

Project costs incurred prior to approval of the E-76 are ineligible for federal reimbursement. Charges incurred for eligible costs after the E-76 is signed are federally reimbursable. Actual federal reimbursement is not made until an E-76 is approved and executed. If there is no Program Supplement or an award package for construction, no reimbursement will be given even if the E-76 is approved and executed. Progress payments can be made during the R/W phase. Upon completion of a project, Caltrans may audit the charges and close out the project.

If the local agency wants federal participation for a Hardship or Protection parcel, federal approval must be obtained in advance of the NEPA compliance. If approval is not obtained, the local agency should be aware that the acquisition must still comply with the Uniform Act in order to be eligible for federal reimbursement for other project costs.

## Reporting Costs

FHWA has approved the Caltrans Cost Accounting and Cost Coding Systems. FHWA has agreed as to which Caltrans activities and expenditures are eligible for reimbursement for each phase of work. These agreements are incorporated into the Caltrans accounting system, coding instructions, and manuals to serve as a model for local agencies.

The local agency must be able to separate all costs, and code them as eligible or ineligible. Caltrans will review this breakdown to ensure only eligible costs are reimbursed.

R/W costs are recorded in the Caltrans Accounting System in the following two categories:

- Capital Outlay

- Incidental (Support)

Capital Outlay consists of those R/W costs necessary to acquire and clear R/W for the construction of the project. All Capital Outlay costs must be charged to a specific project. In order to meet the FHWA requirements, Capital R/W costs must be documented in sufficient detail to determine eligibility. This includes transactions for land, improvements, damages, utility relocation, demolition and clearance, relocation assistance, condemnation deposits and income and expense relating to sale of improvements.

Incidental costs include personnel and operating expenses of the R/W functions, which produce the Capital Outlay payments. The term "Incidental Cost" is used by FHWA, and "Support Cost" is used by Caltrans.

A federal project number is assigned to each project and must be noted on all project documents.

### **Progress Payments**

Procedures for submitting invoices for payment are discussed at considerable length in Chapter 5, "Invoicing," of the LAPM. Reference should be made to that chapter for an explanation of these procedures and sample invoice forms.

### **Reimbursement of Local Agency's Expenditures**

Reimbursement of local agency's costs on federal-aid projects follows the same requirements as for Caltrans, State-funded projects. The major difference between State-funded and local assistance funded projects is that project expenditures for local projects are not entered initially into the Caltrans mainline accounting system. Local projects are accounted for and maintained within the local agency's project and fiscal system. The local agency is responsible for correctly identifying and segregating reimbursable costs as prescribed by federal and state requirements.

Local agencies submit individual project claims to Caltrans periodically. Caltrans is responsible for obtaining reimbursement from FHWA for the local agencies. This is accomplished through the Caltrans Current Billing and Reporting System (CBARS.) Project claims are entered into the Caltrans Accounting System and become part of the Current Bill submitted to FHWA. Caltrans makes payment of the funds to the local agency from the highway account, and Caltrans then receives reimbursement from FHWA through the Current Bill. Whenever possible, reimbursement for final R/W costs should be claimed at the time they are known rather than waiting for the final project costs.

### **Reimbursement Invoices/Progress Payment Request**

Procedures for submitting invoices for payment are discussed at considerable length in Chapter 5, "Invoicing," of the LAPM. Reference should be made to Chapter 5 for an explanation of these procedures and sample invoice forms.

### **Salaries and Wages**

Generally, salaries, wages and related costs, (e.g., travel and per diem) are eligible for federal reimbursement when incurred by employees who directly or indirectly are working on project related activities. Reimbursable activities for the acquisition of Rights of Way are:

- Preparation of R/W maps and deeds.
- Surveying pertaining to R/W engineering needs only.
- Making economic studies and other related preliminary work.
- Appraisal for parcel acquisition.
- Review of appraisals.
- Parcel negotiations.
- Preparation for the trial of condemnation cases.
- Management and disposition of properties acquired.
- Negotiations for utility relocation.
- Relocation advisory assistance activities.

### **Operating Expenses – Project Related**

Title and escrow costs are project-related capital expenses that are eligible for federal reimbursement. Direct payment to title and escrow companies should be recorded against capital outlay support EA (Phase 2). Escrow closing statements and title company billings should be retained in the project file to support costs claimed on a Progress Payment Request.

### **Cost Accumulation Centers**

Cost accumulation centers may be used to capture related types of costs for later distribution to all projects or other benefiting activities for which work was performed during the accounting period.

These are small items of costs that affect several projects and may be eligible for reimbursement, but will result in a disproportionate amount of time and number of documents for separate project accounting in relation to the amount of costs involved.

### **Costs of Management**

The costs of management, general supervision, and other administrative support activities above the first level are usually eligible for reimbursement as indirect costs.

### **Final Payment/Project Completion**

When the project is complete, the final request for payment shall be submitted to the DLAE as part of the Final Report of Expenditures. The procedures for submitting the final invoice and other supporting documents are discussed in detail in Chapter 17, "Project Completion," in the LAPM. Included in Chapter 17 are samples of each document. The final invoice will be reviewed in the district by the DLAE prior to payment. The final invoice for R/W costs should be submitted as soon as these costs are known in order to expedite the audit of the claim and reimbursement. The Final Report should contain final R/W maps for the project, a list of the parcels acquired for the project, and a breakdown of the R/W costs incurred.

After the final invoice is received, the Caltrans Audit Branch in Sacramento may perform an audit. An audit is done to verify that the expenses claimed for reimbursement were actually

incurred, were eligible, and sufficiently documented. If exceptions are found, the local agency will be asked to justify or support the costs. Any costs which cannot be justified or supported shall be declared ineligible for federal reimbursement and the local agency will be required to repay these funds.

## **Final Cost Adjustments**

### **Adjustment of Eligibility of Costs**

Generally, the R/W boundary lines determine the eligibility of R/W costs. Only those parcels within the R/W lines are eligible. This eligibility determination is made parcel by parcel at the time of acquisition and again when the "As Built" lines are known. Adjustment of eligibility of costs is necessary when the "As Built" lines are different from the lines at the time of acquisition. It is recommended that the local agency prepare a Parcel List (See discussion below and Exhibit 17-K, Attachment 1 - Sample Final Report) to be used as a control to assure that the accounting is complete and accurate as related to the final lines. The Parcel List will show which parcels need costs adjusted to the final R/W lines.

## **The Final Report of Right of Way Expenditures**

Procedures to be followed at the completion of the project are discussed in Chapter 17, "Project Completion," in the LAPM. The discussion includes sample documents and the supporting documents to be submitted when final payment is sought and a project is being closed out.

When the project is complete, a summary of the progress payments is submitted on a Final Report of Right of Way Expenditures, Form FM 1592A (See Chapter 17, Exhibit 17-K, Sample Report of Completion of Right of Way Expenditures, in the LAPM). This claim should be submitted when final R/W costs are known in order to expedite the audit of the claim and reimbursement. This report is due within six months of completion of acquisition. The final Report shall also include the following:

- Preparation of R/W maps and deeds
- Surveying pertaining to R/W engineering needs only
- Making economic studies and other related preliminary work
- Appraisal for parcel acquisition
- Review of appraisals
- Parcel negotiations
- Preparation for the trial of condemnation cases
- Management and disposition of properties acquired
- Negotiations for utility relocation
- Relocation advisory assistance activities

The total participating costs should equal the "Participating Costs to Date" as shown on the Final Progress Payment Request (Form FM 1592A).

## Final Vouchering

The last phase of a federal-aid participating project is the final vouchering and closing of the project. This step is very important. After the project has been completed, a final voucher must be prepared and submitted to the FHWA as an E-76 by the Division of Accounting. The final voucher is a segregated summary of the project's total costs and a determination of the final federal share. Caltrans Division of Accounting uses the local agency's Final Report as the basis for the final voucher. The Final Report of R/W Expenditures must follow the Detail Estimate submitted to the FHWA.

## Record Retention

Local Agency-State Agreements provide for retention of records. Ordinarily, this is a three-year period after FHWA payment of the final voucher or a four-year period from the date of the final payment under the contract, whichever is longer. Caltrans will notify the local agency of the beginning date for record retention.

**NOTE:** All documents and papers related to the project must carry the federal-aid project number for identification.

## Federal Policies Specifically Related to the Reimbursement of Right of Way Costs

The R/W lines determine the eligibility of R/W acquisition costs. Generally, costs for parcels inside the R/W lines are eligible; those outside are ineligible. However, there are some exceptions to the general rule that must be dealt with on an individual basis (e.g., an improvement which needs to be removed would be eligible for reimbursement).

The following are current federal policies that are to be used for claiming R/W costs for federal reimbursement.

### A. Acquisitions

Federal participation in R/W costs requires prior authorization from FHWA. In order to obtain this authorization, it is necessary to identify the costs, parcels to be acquired, and the phase for which authorization is being requested. Costs to be reimbursed with federal funds for eligible parcel acquisition reimbursement, initiation of acquisition (first written offer) cannot begin until the E-76 has been approved by FHWA. 23 CFR 710.203(a)(3) provides specific preliminary acquisition activities that can occur under the preliminary engineering phase.

The following describes the three basic parcel types as related to the proposed R/W line:

- A Core Parcel is one which is acquired in its entirety (full acquisition) whether or not the parcel lies entirely within the proposed R/W lines.
- An Excess Parcel is that portion of a property not within the R/W lines that is acquired, even though it is not needed for construction or maintenance of the highway facility. The acquisition costs for excess parcels are not eligible for reimbursement.
- A Non-Core Parcel is one which is not required in its entirety (partial acquisition) leaving the grantor with ownership of an adjacent remainder.

Federal-aid authorization/agreement is required for both “Full Acquisition” and “Partial Acquisition.”

#### **B. Acquisition of Uneconomic Remnants**

If prior FHWA approval has been secured, federal funds can participate in the acquisition costs of uneconomic remnants.

#### **C. Acquisition of Property Specifically for Exchange**

Acquisition of property specifically for exchange occurs where the agency agrees to obtain property for the grantor in exchange for the required R/W. This occurs primarily in connection with public utilities or other public agencies where substitute property is acquired by the local agency to replace property required for the project. Both properties must be appraised. The costs of such acquisition are chargeable directly to the R/W Capital Outlay EA. This type of acquisition is treated as acquisition of replacement property. Without prior federal approval, reimbursement cannot be obtained.

#### **D. Functional Replacement**

This involves the replacement of real property in public ownership, either lands or facilities, or both, acquired for a highway project with other lands or facilities which will provide equivalent utility. FHWA has specific procedures, which must be followed, and requirements, which must be met if the costs for a functional replacement property are to be reimbursed. These procedures are discussed in 23 CFR 710.509. For additional information, see Chapter 7, “Appraisals,” and Chapter 8, “Acquisitions,” of the Caltrans *Right of Way Manual*.

#### **E. Condemnation Deposits and Interest Thereon**

The amounts deposited in court in connection with the condemnation of a parcel are reimbursable. Subsequent progress billings must account for differences between the original amount deposited and the amount of the final settlement or award.

When settlements include interest, such interest payments can only be claimed for federal reimbursement in specified situations. Participation is available for a period not to exceed 45 days, if court procedures result in the owner not being able to withdraw a deposit made in support of an Order for Possession. If the deposit is available and the owner declines to withdraw it, any subsequent interest payment is ineligible for reimbursement.

Interest is reimbursable on the amount of an award in excess of the original deposit from the date of the original deposit until date of settlement or award. If court procedures prevent immediate delivery of the excess amount due following settlement or award, participation in interest on the excess amount for a period not to exceed 45 days is available. Participation may be allowed in the required interest payment on the excess until 45 days after final determination when the local agency has appealed an award.

Federal participation is not allowed in interest costs based on appraised fair market value of the property, when a Right of Entry has been secured except in cases of unusual circumstances and with prior approval of the FHWA.

Interest on amount of award over the deposit is an eligible expense with certain limits. Interest is not eligible for federal reimbursement for nonparticipating costs such as acquired excess land, goodwill awards, or awarded defendant court costs.

**F. Klopping**

Klopping Damages (frustrated development rights) are always ineligible costs. The only damages that are eligible are those created by the before and after values to the remaining property.

**G. Goodwill**

Awards or settlements involving loss of goodwill, interest on goodwill, and defendant's costs in a goodwill action are all now eligible for federal reimbursement. Costs to appraise goodwill and/or try a goodwill action are also eligible for reimbursement.

**H. Personal Property**

As a general rule, costs for the purchase of personal property are ineligible for federal reimbursement. An exception would be where it is necessary to acquire the furniture of a furnished apartment.

**I. Defendant's Costs in Connection with Condemnation Action**

Federal participation is not allowed when the local agency, found to be noncompliant, is ordered to pay for the costs of a property owner's attorney fees, appraiser fees, expert witness fees or similar costs which are incurred by the property owner in connection with acquisition of R/W, through condemnation proceedings or awarded as court costs in litigated cases.

**J. Utility Relocation**

The following must exist for reimbursement of utility relocation costs and/or to be eligible for reimbursement:

- An E-76 for "Preliminary Engineering - Utility" must be approved before any preliminary utility design work is commenced.
- An E-76 for "Utility Alternate Procedure" together with a list of every utility company's facility to be adjusted and the best available estimate of the cost involved must be approved before any relocation work can commence for any of the affected utility facilities. See 23 CFR, 645.119(e)(2).
- An FHWA Specific Authorization (form RW 13-15) must be approved by Caltrans for each utility relocation listed on the E-76 before any relocation construction work can commence. The Specific Authorization must be supported by a Report of Investigation, Utility Agreement, Notice to Owner (NTO) and other documentation as outlined in Chapter 13, "Utility Relocation," of the *Right of Way Manual* and Chapter 14, "Utility Relocation," of the LAPM.
- The FHWA Approval of Utility Agreement (also form RW 13-15) must be approved by Caltrans before reimbursement is requested from FHWA.
- Immediately after Caltrans approves the Utility Agreement, authorized expenditures by the utility company can be reimbursed. No audit is necessary and receipts for payments are not required by FHWA before progress payments are made.

- Final payments can be reimbursed only when costs for the utility work covered by the agreement are supported by evidence of payment by the local agency with fully itemized billings.
- Costs must be identified in each Utility Agreement.

#### **K. Demolition and Clearance**

The federal government will participate in demolition costs of improvements on or within the R/W lines, provided the improvements involved are demolished subsequent to the authorization date of the project. This can occur regardless of whether or not the federal government participated in the cost of acquisition of the improvements. If federal funds did not participate in acquisition, then demolition must be separately authorized. The federal government may also participate in clearance and demolition costs on improvements on a parcel outside the R/W lines as long as the parcel was acquired solely for an exchange and is eligible for federal participation.

When a demolition contract includes improvements not eligible for participation, a separate bid item should be established in the bid proposal for the ineligible improvements so that the costs may be segregated.

When improvements purchased with federal participation are sold for salvage, federal funds are to be credited with the proceeds of the sale.

It should be stressed that whenever possible, improvements should be sold with the excess land rather than demolished to provide an income rather than incur an expense.

#### **L. Relocation Assistance Program**

Federal and state laws require that relocation assistance be provided to any person, household, business, farm or nonprofit organization displaced because of the acquisition of real property by a public entity for public use. Basically, there are two programs:

- The Relocation Advisory Assistance Program, which aids in locating suitable replacement properties.
- The Relocation Payments Program, which provides payments for certain costs in relocating.

Local agencies must comply where federal funds are to be used for the acquisition or construction for the proposed project. The Relocation Assistance Program (RAP) is a complex program and will not be covered here. Chapter 10 of the Caltrans *Right of Way Manual* provides detailed instructions on eligibility.

#### **M. Disposition of Excess Lands**

For accounting purposes, excess land is defined as that portion of any acquisition of R/W that lies outside the established R/W line and is not needed for the construction or maintenance of the highway facility. The only exceptions are the acquisition of property for replacement housing purposes, and the acquisition of property specifically for the purpose of exchange with another governmental agency or utility company.

The disposition of excess land is accomplished in the following number of ways: competitive bid sales, fair market value exchanges, or inclusion into the R/W in a new project. (Federal funds cannot be used for the acquisition of excess lands.)

#### **N. Sales of Excess - Damages**

FHWA regulations set forth criteria concerning transactions involving the sale of excess property for more or less than the original cost.

Generally, local public agencies will not request federal moneys on the acquisition of excess parcels, but where federal participation is involved in excess acquisition, the subsequent sale or disposal of the parcel no longer requires the local agency to return a portion of the proceeds to FHWA. The proceeds of the sale must be used for subsequent Title 23 (US Code) eligible projects. The local agency's accounting procedures must be able to track these Title 23 funds.

On federal-aid R/W projects, damages may be claimed under the following conditions:

Excess must have been acquired in connection with the project and with federal participation in R/W costs authorized for the parcel.

Excess exchange or sale transaction must occur within two years after opening the highway to traffic, or within two years after submitting the final voucher to the FHWA (whichever is earlier).

Excess exchange or sale transaction must involve the complete disposal of the entire parcel. Interim transactions, such as sale or exchange of a portion of the parcel or sale of improvements should be noted for ultimate determination of total gain or loss.

Local agency receives less than the value of the excess when the excess is sold or exchanged. Damages may be claimed for reimbursement under the conditions detailed above.

#### **O. Exchange Transactions**

When local agency-owned land is exchanged for other land to be incorporated into the R/W of a federal-aid project, federal funds may participate in the current fair market value of the excess land being exchanged. However, federal participation will not exceed the fair market value of the land being acquired.

**NOTE:** FHWA is likely to be involved in two transactions; the initial acquisition and the subsequent exchange or disposal.

The accounting requirements to record the exchange transaction involve consideration of the following:

- The Phase 9 or R/W EA is charged for the market value of the R/W acquired.
- Damages on the exchange of the excess may be claimed if the local agency receives less than the exchanged land's fair market value.
- Federal reimbursement for the market value of exchanged, cash, and construction features may not exceed the total market value of the R/W parcel being purchased.

Excess Parcels need not have been acquired on a federal-aid project to allow reimbursement of market value, but for severance damages (including selling costs), the excess parcel must have been originally purchased on a project with federal participation.

**P. Right of Way Sales Credits**

Sales credits are due to FHWA when R/W bought with federal funds are sold, then subsequently declared to be excess because of an alignment change, modification or termination action. The following time limits apply:

If excess R/W results from an alignment change

- Excess should be disposed of before final vouchering of the project or no later than two years from the time the highway is opened to traffic, whichever is earlier.
- An extension of time limits can be granted by the FHWA.
- If property is not sold within the approved time limit, the cost of the excess acquisition must be credited to the project.

If excess results because the property is no longer needed for the purposes of the highway project

- If within ten years of the modification or termination action the resulting excess property is neither sold, nor reused on another federal project, then the FHWA must receive credit for the market value of the property at the end of ten years. If the parcel is on a terminated project, prior federal approval is required for disposal (23 CFR 480).
- When crediting federal funds is required, the cost of the disposition may be offset against the sales price.
- Except for parcels on the Interstate program, the disposal of excess resulting from a project's termination is treated the same as any other disposal. The parcel can then be used for another highway project without giving a credit to FHWA.

The net proceeds of the sales credit should be shown on the Progress Payment requests as credit to the project's capital costs. This procedure reduces acquisition costs and payment due to the local agency.

**Q. Rental Income and Expense and Disposition of Improvements**

Vacated or improved land, acquired prior to actual need for highway construction must be available for rent. FHWA participates in rental income and property management expenses if the property was acquired with federal funds.

Rental account records must be maintained to record income and direct expenses identifiable to a parcel. Eligible property management costs include costs such as repairs to a rental unit, activities of a rental agent, or advertising. Any rental income or expense apportioned to a property's excess portion is ineligible for federal participation. The federal share of net rental income should be shown on the Progress Payment Requests as a credit to the project, or a deduction from any payment due to the local agency.

The local agency should separate costs incurred to collect rent on a parcel-by-parcel basis, and then offset the costs against the actual rent collected.

Accounting records must be maintained for the disposition of improvements. Net income from the sale of improvements, except those on excess land, is shown as a credit to the project. Cost of the sale of improvements within the R/W is considered an expense that is a debit item and

may be applied to gross sales proceeds. These credits must be given to the acquisition phase and not the rental phase.

### 13.14 DEFINITIONS

**Access Rights** – The right of ingress and/or egress to and from a property which abuts on an existing street or highway. Access rights cannot be denied or unreasonably be restricted, unless other access is available. If it is not, compensation is paid for this restriction of access.

**Advanced Acquisition** – The acquisition of property by the local agency temporarily using their own funds prior to NEPA approval of the environmental document. To be eligible for future federal reimbursement, R/W activities must have been performed in accordance with all federal/state guidelines and the property acquired must be included in the R/W for the project. The two types of Advance Acquisition are Hardship and Protection.

**Bundle of Rights** – Ownership of real property includes a many rights, such as the right of occupancy and use, the right to sell it in whole or in part, the right to bequeath, and the right of transfer by contract for a specific period of time. It is also referred to as the benefits to be derived by the occupancy and use of the real estate.

**Damages** – The loss in the value of the remainder in a partial acquisition of a property.

**Dedication** – Pursuant to the “police power” of government, this involves the setting aside of property for public use without compensation as a condition precedent to the granting of a permit, license, or zoning variance by a local governmental agency. The property owner must initiate contact with the local agency for a request to develop before the local agency can proceed with dedication requirements.

**Donation** – The voluntary conveyance of real property without compensation which may be utilized for an improvement project. Donations of future R/W can only be accepted if the offer to donate is done voluntarily by the property owner who is advised of the right to receive an appraisal but signs a written waiver of the right to be compensated. R/W that is donated for federal-aid transportation projects must also comply with the provisions of NEPA, even if no other R/W or rights in real property are required for the project.

**Easement** – The right or privilege to use real property (including access rights) is distinct from the ownership of real property.

**Eminent Domain** – The inherent power reserved by government to acquire private property rights by due process of law when the necessity arises. When exercising this right, two basic requirements must be met: the use must be public, and just compensation must be paid to the owner prior to taking possession of the property.

**Environmental Mitigation** – Measure necessary to mitigate adverse impacts resulting from a federal-aid transportation project. Mitigation must represent a reasonable public expenditure after considering the impacts of the action and the benefits of the proposed mitigation measures. Mitigation measures typically assist in compliance with federal statutes (example: Federal Endangered Species Act), Executive Orders (example: E.O. 11990 Protection of Wetlands, E.O. 11998 Protection of Floodplains) or Administrative regulation or policy. In some

instances mitigation will require the acquisition of alternate sites to replace wildlife habitat or wetlands, or by building sound walls for noise attenuation.

**Excess** – Property acquired for a project but which is in excess of the R/W requirements. Excess is created when there is a design change or when additional property was acquired to avoid an “uneconomic remnant.” Whenever there is federal participation in R/W acquisition, any subsequent decertification and ensuing disposal (sale or trade) of the newly created excess land requires FHWA’s prior approval.

**Fee Simple** – An absolute ownership without limitations or restrictions but subject to the inherent powers of government; namely, eminent domain, escheat, police power, and taxation.

**Hardship** – A situation where unusual personal circumstances not shared by others (example; financial, or health) accrue to an owner of property and are aggravated or perpetuated by the pending project and can only be resolved by early acquisition of the property by the agency.

**Protection** – A situation where substantial building activity or appreciation of vacant land value is likely to occur and early acquisition by the agency is needed to prevent development of the site and avoid higher acquisition, relocation or construction costs in the future.

**NOTE:** Hardship and Protection acquisitions must comply with the Uniform Act, Title VI of the Civil Rights Act, and 49 CFR 24. Local agencies must ensure all R/W activities comply with these criteria to avoid jeopardizing federal participation in subsequent project costs.

**Hazardous Materials/Waste** – A material is hazardous if it poses a threat to human health or the environment. The term “hazardous waste” is applicable to storage, deposit, or contamination, involving a hazardous material which has escaped or has been abandoned. It can be defined in general terms as any of the following:

- Flammable
- Reactive (subject to spontaneous explosion or fire) substances
- Corrosive/Toxic

Regulations require all toxic substances be removed in accordance with applicable environmental laws prior to a public project proceeding to construction.

**Highway Easement** – A right or rights granted or acquired for the construction, maintenance, and operation of a highway, which does not transfer fee title.

**Inverse Condemnation** – The legal process initiated by a property owner to claim compensation for the taking of, or damages to, his property as a result of a public project.

**Just Compensation** – The offer amount an Agency establishes prior to the initiation of negotiations. The amount shall not be less than the approved appraisal of the fair market value of the property, taking into account the value of allowable damages or benefits to any remaining property.

**Local Agency** – A unit of government (e.g., county, city, and municipality) authorized to undertake a project for which federal-aid is requested. This is sometimes referred to as local public agency.

**Market Value** – The California Code of Civil Procedure Section 1263.320 defines “Fair Market Value” of property acquired as:

- a) The highest price on the date of valuation that would be agreed to by a seller, being willing to sell but under no particular or urgent necessity for doing so, nor obliged to sell, and a buyer being ready, willing and able to buy but under no particular necessity for doing so, each dealing with the other with full knowledge of all the uses and purposes for which the property is adaptable and available.
- b) The fair market value for which there is no relevant comparable market is its value on the date of valuation as determined by any method of valuation that is just and equitable.

**Negotiation** – The process of communication whereby an agreement is arrived at for the voluntary transfer of ownership at terms mutually acceptable to all parties of interest.

**Partial Acquisition** – The taking of only a part of a property for public use under the power of eminent domain and for which just compensation must be paid, offsetting the damages and/or special benefits to the remaining property.

**Permit to Enter and Construct/Construction Permit** – Used when temporary rights are needed to perform work solely for the owner’s benefit. These documents provide no permanent rights to the local agency (and the rights would not be condemned). Permits to Enter would also be used to collect data for hazardous waste or soil analysis and for environmental analysis. It is possible to make payment for a Permit to Enter, when appropriate.

**Real Estate** – Refers to the physical land and appurtenances including structures affixed thereto.

**Relocation Assistance** – The process by which a government agency meets the legal requirements for providing relocation services, moving cost payments, increased costs to find and acquire replacement property for all eligible individuals, families, and business displaced by a project. (Not to be confused with relocation of utilities).

**Remainder** – Property remaining in possession of the owner after a partial acquisition.

**Required Right of Way** – Any interests in real property required for the project that lay outside the existing R/W line. Includes any requirements from state or local agency-owned excess land, land purchased for other projects, and land purchased by other agencies.

**Right of Entry** – A document used to obtain permission to enter and perform some activity prior to the effective date of an R/W Contract or an Order for Possession. It shall not be used to certify control of R/W for the project, except in emergency situations only. Solicitation of Rights of Entry prior to the appraisal process should be restricted to circumstances, which are exceptional or emergency in nature. Ordinarily, the Right of Entry will not dislocate people or impact improvements of a significant nature. In all instances when a Right of Entry is secured, the document must explain the provisions for use, disposal, amount, and the time period (See “Rights of Entry,” in Section 13.12). Rights of Entry should not be confused with Temporary (Construction) Easement.

**Right of Way Certification** – A written statement prepared by the local agency summarizing the status of all R/W related matters with respect to a proposed construction project. An authorized Caltrans R/W representative will accept the R/W Certification.

**Slope, Drainage or Utility Easements** – Easements for these purposes, covering areas which will either remain permanently under the acquiring agency control, or be relinquished, or conveyed to a utility owner by agreement.

**Temporary Easement** – A property right which is required for only a limited time period. On a specific date, all of the acquiring agency's interest in the area is terminated. An example is a Temporary (Construction) Easement that is used when the agency must enter a property for temporary use during construction of the project. There must be a specified time period for which the temporary right exists which is sufficient to allow for delays in advertisement of the project and for the anticipated construction order of work.

**Turnkey Consultant** – A consulting firm that would be considered a “Multifunctional Organization.” A firm that provides the expertise in all areas of R/W (Appraisal, Acquisition, Relocation Assistance, Utilities, Property Management, Excess Lands).

**Uneconomic Remnant** – A remainder of land so small or irregular that it has little or no value or utility to the owner.

## 13.15 References

- [23 Code of Federal Regulations, Part 710 and 771 \(23 CFR 710 and 771\)](https://www.fhwa.dot.gov/real_estate/uniform_act/program_administration/lpa_guide/ch20.cfm)  
[https://www.fhwa.dot.gov/real\\_estate/uniform\\_act/program\\_administration/lpa\\_guide/ch20.cfm](https://www.fhwa.dot.gov/real_estate/uniform_act/program_administration/lpa_guide/ch20.cfm)
- [49 Code of Federal Regulations, Part 24 \(49 CFR 24\)](http://www.ecfr.gov/cgi-bin/text-idx?c=ecfr&SID=ed0244e664c6a24e7f62848547de88f9&tpl=/ecfrbrowse/Title49/49cfr24_main_02.tpl)  
[http://www.ecfr.gov/cgi-bin/text-idx?c=ecfr&SID=ed0244e664c6a24e7f62848547de88f9&tpl=/ecfrbrowse/Title49/49cfr24\\_main\\_02.tpl](http://www.ecfr.gov/cgi-bin/text-idx?c=ecfr&SID=ed0244e664c6a24e7f62848547de88f9&tpl=/ecfrbrowse/Title49/49cfr24_main_02.tpl)
- [23 Code of Federal Regulations, 635.309\(b\) and \(c\)](http://www.ecfr.gov/cgi-bin/text-idx?c=ecfr&SID=ed0244e664c6a24e7f62848547de88f9&rgn=div8&view=text&node=23:1.0.1.7.23.3.1.5&idno=23)  
<http://www.ecfr.gov/cgi-bin/text-idx?c=ecfr&SID=ed0244e664c6a24e7f62848547de88f9&rgn=div8&view=text&node=23:1.0.1.7.23.3.1.5&idno=23>
- [Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970 as amended \(Uniform Act\)](http://www.fhwa.dot.gov/real_estate/publications/act.cfm)  
[http://www.fhwa.dot.gov/real\\_estate/publications/act.cfm](http://www.fhwa.dot.gov/real_estate/publications/act.cfm)
- [Title VI of the 1964 Civil Rights Act](https://www.justice.gov/crt/title-vi-civil-rights-act-1964-42-usc-2000d-et-seq)  
<https://www.justice.gov/crt/title-vi-civil-rights-act-1964-42-usc-2000d-et-seq>
- [Caltrans, Right of Way Manual](http://www.dot.ca.gov/hq/row/rowman/manual/ch17.pdf)  
<http://www.dot.ca.gov/hq/row/rowman/manual/ch17.pdf>
- [Local Assistance Procedures Manual \(LAPM\)](http://www.dot.ca.gov/hq/LocalPrograms/lam/lapm.htm)  
<http://www.dot.ca.gov/hq/LocalPrograms/lam/lapm.htm>
- [Local Assistance Program Guidelines \(LAPG\)](http://www.dot.ca.gov/hq/LocalPrograms/lam/lapg.htm)  
<http://www.dot.ca.gov/hq/LocalPrograms/lam/lapg.htm>
- [Standard Environmental Reference \(SER\)](http://www.dot.ca.gov/ser/)  
<http://www.dot.ca.gov/ser/>

Figure 13-1. Right of Way Procedures Flowchart

