LEGISLATION, REGULATIONS, GUIDANCE, AND POLICIES

23 CFR & NON-REGULATORY SUPPLEMENTS

23 CFR PART 710
QUESTIONS AND ANSWERS

General

Q: Is there any significance in the change from using the term "right-of-way" to "real property?"

Yes. There is legal significance to changing the term "right-of-way" to "real property." The term "real property" generally refers to any interest in land. The term "right-of-way," on the other hand, generally refers to a longitudinal strip of land used for transportation purposes. For example, 23 U.S.C. 156 permits States to retain the Federal share of net income from the sale or lease of *real property* acquired with Federal assistance from the Highway Trust Fund. In this instance, the term "real property" provides for States to retain the Federal share of net income from the sale or lease real property located both within

and outside of the right-of-way. In 23 U.S.C. 108 (a), the use of the term "real property" takes into account that not all acquired real property will ultimately be incorporated into Federally funded projects. The term also encompasses property that may be required for transportation enhancements, environmental mitigation, or CMAQ projects.

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Q: Since the new regulation has eliminated the "generally compensable" provision, who decides if property damage payments are necessitated by state law?

A: This is normally decided in consultation with the Attorney General's Office in each state.

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Q: Are there any qualification standards for state employees or consultants performing R\W work?

A: Qualifications for state employees and consultants, including any training necessary to insure competency, should be included in the state's manual.

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Q: Is it the intent of the new regulation that states must comply with air rights rules on other than Interstate highways?

A: We expect states to comply with the air space guidelines, to be issued as supplemental guidance, on any project. However, FHWA approval is only necessary on Interstate projects.

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Q: Is there any guidance that relates to income received as a result of the value created byTransportation Enhancement projects?

A: Yes, the project agreement should specify that a portion of the income generated by the project be utilized for maintenance of the facility and as reserve for replacements. Additional guidance on TE projects may be found in the recently published "Final Guidance, Transportation Enhancement Activities" at: http://www.fhwa.dot.gov/environment/te_final.htm

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Q: Does the Division Office have the authority to approve the sale of surplus right-of-way at less than the fair market value?

A: Yes, so long as the state provides documentation acceptable to the Division Office.

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State ROW Manuals

Q: Is the cost of a consultant to prepare the R\W manual, and training in its use, an eligible Federal-aid cost?

A: Yes, as part of the state's indirect cost rate in accordance with the Office of Management and Budget (OMB) Circular A-87. If a consultant is utilized, a separate Federal-aid project may be established.

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Q: Is the due date in January 2001 for the manual negotiable?

A: Since right-of-way manuals and updates have previously been a requirement for the states, we anticipate that the states will be able to complete their manual in the time frame.

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Q: Who will review the R\W manual in offices that do not have a R\W officer?

A: The Division has the responsibility for approving the manual and will make appropriate arrangements for a proper review.

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Q: Can the state implement 23 CFR provisions prior to completing the appropriate manual provision?

A: The effective date of the new regulation was January 20, 2000 and the provisions are in full effect at that time regardless of the status of the manual.

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Q: Must the state manuals be presented in paper format or may they be transmitted electronically? If submitted in paper format, how many copies? Where do we send electronic versions of the manual?

A: We prefer the manual to be submitted electronically, but manuals will be accepted either way. The manuals should be submitted to the Division Office. Since the manual will need to be revised on a regular basis, HQ does not require a copy.

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Early Acquisition, Credits and Donations

- Is it appropriate to develop a Categorical Exclusion so that property can be acquired in advance of full environmental evaluation of the project?
- Under the old regulation, the state DOT must have given official notice of the preferred alignment or afforded the opportunity for a public hearing prior to initiating a hardship acquisition or protective buying. Is the intent of the new regulation to eliminate the opportunity for a public hearing and provide for public involvement during the planning and environmental process?
- Is there any difference in a credit or a donation?
- Are there any conditions as to when a property can be donated?
- Can a contribution of real property by a unit of local government be applied as a credit if ownership of the real property will remain with the unit of local government after completion of the project?
- Can the cost of determining the fair market value of real property applied as a contribution for credit by a unit of local government be applied to the credit?
- Will a credit for early acquisitions before the passage of TEA-21 be allowed?
- Do early acquisitions by local governments or private parties for Federally funded projects need to conform to the Uniform Act requirements?
- Will the allowable credit for early acquisitions be the historic cost incurred or the current fair market value of the acquired property?
- States are to select a method, either historical costs or current fair market value, in order to determine the allowable credit. Does this set the standard for local governments? Are they restricted to fair market value?
- Can the credit for early acquired lands include all costs associated with the early acquisition such as relocation expenses, property management costs, and costs incidental to the purchase, e.g., appraisal fees, recording costs, etc.?
- If an agency decides to acquire all of the project right-of-way with its own funds and apply the value of the property incorporated into the project toward its share of the cost of construction, what will the acquiring agency be required to provide to the Federal funding agency to support the amount of the desired credit?
- When a project advances to the construction authorization stage, the final cost of the acquired right-of-way is frequently unknown due to outstanding condemnation cases. Assuming the agency has acquired the required property with its own funds and desires a

Q: Is it appropriate to develop a Categorical Exclusion so that property can be acquired in advance of full environmental evaluation of the project?

A: It may be appropriate, on a limited number of properties, for hardship acquisition or protective buying. (23CFR771.117(d)(12))

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Q: Under the old regulation, the state DOT must have given official notice of the preferred alignment or afforded the opportunity for a public hearing prior to initiating a hardship acquisition or protective buying. Is the intent of the new regulation to eliminate the opportunity for a public hearing and provide for public involvement during the planning and environmental process?

A: No. One aspect of the new regulation is to remove redundant material and the public involvement process is clearly discussed in 23 CFR 450 and 771. The process should start early in project development with the goal of keeping the public informed which may alleviate the need for a public hearing. Hardships and protective buying may be processed as a Categorical Exclusion for a parcel, or a limited number of parcels, as long as the purchase does not limit the evaluation of alternatives. Currently, efforts are underway to streamline the environmental process. A "Notice of Proposed Rulemaking" is to be issued soon.

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Q: Is there any difference in a credit or a donation?

A: A gift of land, goods or services from private individuals is considered a donation. A donation is eligible for use as a credit towards the states share of the project.

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Q: Are there any conditions as to when a property can be donated?

A: A state can accept a donation at any time.

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Q: Can a contribution of real property by a unit of local government be applied as a credit if ownership of the real property will remain with the unit of local government after completion of the project?

A: Yes. For example, transportation enhancement projects can involve real property owned by units of local government and private entities. To be eligible for a credit, the real property *may not* be part of a current transportation facility. The fair market value of the real property will be credited against the non-Federal share of the project.

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Q: Can the cost of determining the fair market value of real property applied as a contribution for credit by a unit of local government be applied to the credit?

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

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Q: Will a credit for early acquisitions before the passage of TEA-21 be allowed?

A: Yes, provided the relevant project agreement is executed on or after June 9, 1998.

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Q: Do early acquisitions by local governments or private parties for Federally funded projects need to conform to the Uniform Act requirements?

A: Yes. To be eligible for reimbursement, 23 U.S.C. 108 (c)(2)(A) requires that any land acquired, and relocation assistance provided, comply with the requirements of the Uniform Act. To be eligible for credit, 23 U.S.C. 323 (b)(1)(A) requires that the acquired land was "lawfully obtained." In such instances, if the property was acquired for a transportation purpose under the threat of eminent domain (subsequent to the Uniform Act), the requirements of the Uniform Act would apply. If the property was acquired by other means (e.g., local government acquisition via tax delinquency or exaction), it must have been acquired in accordance with the laws of the jurisdiction in which the property is located.

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Q: Will the allowable credit for early acquisitions be the historic cost incurred or the current fair market value of the acquired property?

A: The allowable credit for early acquired lands may be based on either the current fair market value or historic acquisition cost of such lands. The method selected (i.e., current fair market value or historic acquisition cost) by the State must be used on a consistent basis and specified in the State's Right-of-Way Manual. The Manual may also specify certain criteria which would allow for use of the alternate method. For example, a State's Manual may require that historic acquisition costs be used as the primary basis for credit

purposes *and* that current fair market value would be used in those instances where: (1) there has been a significant lapse in time since the property was acquired, or (2) there has been a significant change in market conditions (not caused by the project) since the property was acquired.

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Q: States are to select a method, either historical costs or current fair market value, in order to determine the allowable credit. Does this set the standard for local governments? Are they restricted to fair market value?

A: States and local units of government are treated differently in both the law and in the implementing regulations. 23 USC 323(e) states that a contribution of real property, funds or materials by a unit of local government *shall* be credited at the fair market value.

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Q: Can the credit for early acquired lands include all costs associated with the early acquisition such as relocation expenses, property management costs, and costs incidental to the purchase, e.g., appraisal fees, recording costs, etc.?

A: No. The allowable credit for early acquired lands is limited to the current fair market value or historic acquisition costs of such lands (see above). Federal reimbursement of other costs associated with the acquisition are subject to the requirements of 23 U.S.C. 108 (c) or at the states indirect cost rate as described in OMB Circular A-87.

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Q: If an agency decides to acquire all of the project right-of-way with its own funds and apply the value of the property incorporated into the project toward its share of the cost of construction, what will the acquiring agency be required to provide to the Federal funding agency to support the amount of the desired credit?

A: The agency must provide documentation supporting the amount of credit sought for the acquired lands. The documentation must include: (1) a certification by the agency that the requirements for acquired lands specified in 23 U.S.C. 323 (b)(1) were satisfied, and (2) evidence supporting either the current fair market value (e.g., copies of the certificates of value or review appraiser statements) or historic acquisition costs (e.g., closing statements, etc.) of the acquired lands.

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

A: In such cases, while the initial allowable credit would be limited to the current fair market value of the acquired lands as of the date of the project agreement, the allowable credit may be adjusted upon resolution of the outstanding condemnation case(s).

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Q: Is park land the land described in section 138 of Title 23? Can public park land incorporated into a project which furthers the park use qualify for credit? Can public owned right-of-way incorporated into a project qualify for credit?

A: 23 U.S.C. 138, 49 U.S.C. 303, and 23 CFR 771.135 describe the national policy regarding the preservation of 4(f) lands (i.e., publicly owned park and recreation lands, wildlife and waterfowl refuges, and historic sites). Federally funded projects requiring the use of such lands will not be approved unless: (1) there is no feasible and prudent alternative to the use of such land, and (2) the action includes all possible planning to minimize harm to such park, recreational area, wildlife and waterfowl refuge, or historic site resulting from such use. 23 U.S.C. 323 (b)(1)(C) prohibits non-Federal share credits for the incorporation of lands described in 23 U.S.C. 138 into Federally funded projects. Based on current Office of Real Estate Services (ORES) policy, non-Federal share credits are not available for: (1) lands acquired with *any* form of Federal financial assistance, and (2) lands currently incorporated within the operating right-of-way limits of a transportation facility.

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Q: Can lands acquired as part of a project funded by the right-of-way revolving fund, where the right-of-way project has been converted to a regular Federal-aid project, be credited toward the non-Federal share of the project? What about federally owned property such as properties available from base closures?

A: No. A credit toward the non-Federal share of the project would not be allowed since the lands were acquired with some form of Federal assistance.

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Q: How will the credit be applied to innovative projects such as State Infrastructure Bank (SIB) loans? Should the credit be taken from the amount the State or local government has pledged to repay the loan?

A: While there is a possibility that credit for land acquisition may be used in SIB-assisted projects, the main application of the changes in 23 U.S.C. 323 applies to standard Federal-aid project activities. The SIB is a State-backed entity that is capitalized with Federal funds and matched with non-Federal funds, at the State's traditional matching ratio. According to the SIB Guidance, SIB capitalization grants must be matched with *liquid funds*. So, at the time of capitalization, donated land, etc., would not count toward the State match. However, the non-Federal match is not required at the project-by-project loan level. The board of the SIB establishes its own requirements for repayments. It would be up to each SIB whether it found sufficient value in donated land, etc., to give up the liquid repayment funds available to lend to subsequent projects. Lands already used for transportation purposes, such as existing right-of way being required for a new or upgraded facility, will not be eligible for receipt of a credit.

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Q: How is the donation credit actually calculated and applied to a federal-aid project?

A: Credits are considered a project cost and applied to the total cost of the project before calculating the federal/state share. (see attached memo and sample calculation)

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Q: If there is excess donation credit, is it permissible to change the project limits in the project agreement so that no credit is lost?

A:Yes, the project agreement can be modified to allow the state to utilize the full credit.

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Proceeds from the Sale or Lease of Right-of-Way

- Will it be necessary for State agencies to credit federal-aid projects which have had disposition costs billed to them prior to depositing a net proceed amount into a state road fund?

- If we continue to handle property management costs as in the past, must the state deduct these costs from the sales income received on the property to arrive at "net income" to be deposited in their State Road Fund or can the total gross amount of sale income be deposited for use on Title 23 projects?

Q: Does the net income received from the sale or lease of real property acquired with Federal funds have to be applied to a project of like nature, or can the funds be used on any kind of Title 23 eligible project?

A: The net income received from the sale or lease of real property can be used on any Title 23 eligible project, including transit.

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Q: What should the State do with the net income received from the sale or lease of real property acquired with Federal funds if the funds can't be used right away?

A: The Federal share of net income should be held in an appropriate state account. It does not have to be a unique account, as long as records are adequate to document ultimate use of the funds. When the State is ready to use the funds, the total amount of such funds shall be used on Title 23 eligible projects.

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Q: Would a sale of excess real property initiated prior to June 9, 1998 and closed on or after that date require a credit to Federal funds as required by 49 CFR 18.31?

A: No, there would be no credit to Federal funds provided the sale closed on or after June 9, 1998.

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Q: Do the changes in the right-of-way sales and lease provisions apply to mineral sales and royalties from Federal-aid purchased property (i.e., can proceeds be used for Title 23 purposes and not credited back to the Federal funds)? Can these funds be used on Title 23 eligible projects that do not follow Federal requirements?

A: Oil, gas, and other mineral interests are real property interests. When States acquire real property with Federal assistance from the Highway Trust Fund, 23 U.S.C. 156 permits States to sell or lease such interests for fair market value and retain the Federal share of net income (gross proceeds less sale or lease costs) for use on Title 23 eligible projects. A credit to Federal funds is not required. With regard to the second Qhe project would only need to be a Title 23 eligible project. The State-retained Federal share of net income must be used on either a Federal-aid project or a State-funded project that is eligible for Title 23 funding.

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Q: Can expenses associated with the sale or lease of real property acquired with Federal funds be deducted from the gross proceeds for the purpose of calculating the proceeds subject to use on Title 23 projects?

A: Yes. The Federal share of net income, to be retained by the States and used for Title 23 eligible projects, is calculated by deducting the disposition or leasing costs from the gross proceeds from the sale or lease.

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Q: Can income from the sale or lease of real property acquired with Federal funds be credited to an account or project that would benefit transit?

A: The net income may be used for any project that is eligible for assistance under Title 23. This would include transit projects that are eligible for assistance under the surface transportation or CMAQ programs.

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Q: If the State chooses, can income from the sale or lease of real property acquired with Federal funds be credited to a past or future project instead of making a showing that the income was credited to their transportation program?

A: The net income should be deposited in a state transportation fund or credited to a current Title 23 eligible project.

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Q: What will FHWA consider to be an acceptable method of State certification regarding the Federal share of net income that has been deposited in the State Road Fund during the fiscal year and the amount of the Federal share of net income that was expended on Title 23 eligible projects during the fiscal year?

A: 23 U.S.C. 156 does not require State certification regarding the amount of the Federal share of net income deposited in a transportation fund and subsequently expended on Title 23 eligible projects. However, as a practical matter, States should have an accounting system in place which documents: (1) the amount of the Federal share of net income deposited in the a state transportation fund during the fiscal year, and (2) the amount of the Federal share of net income expended on Title 23 eligible projects during the fiscal year.

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Q: Can States retain the net income from dispositions of withdrawn Interstate segments or would a credit to Federal funds be required?

A: States may retain the net income for dispositions of withdrawn Interstate segments provided that: (1) such title transfers occur on or after June 9, 1998, and (2) the Federal share of net income is used on Title 23 eligible projects.

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Q: If a state law requires the state DOT to sell or lease property at less than the current fair market value, does the state law take precedence over federal law requiring fair market value for property or access control previously obtained with Title 23 funds?

A: No, the state law does not take precedence. Federal law governs the sale or lease of real property that was obtained as apart of a Federal-Aid project. If Federal funds are used to purchase real property, or if Federal credit is received for real property used in a federally funded project, the sale, use or lease of such property rights are subject to Federal law. State laws do not take precedence over Federal property disposition standards where Federal funds or credits were involved in the property acquisition.

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Q: Are property management disposition costs eligible for Federal participation and chargeable to Federal-aid projects?

A: On a project basis, real property disposition and leasing costs should be deducted from gross sales or lease proceeds to arrive at a net income amount that would be deposited in an appropriate state fund until used on Title 23 eligible projects. Net property management costs for maintenance, protection, clearance, and improvement disposition until final project acceptance are eligible for Federal participation.

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Q: Will property management costs now be considered eligible for federal participation and chargeable to federal-aid projects?

A: Prudent property management and disposition costs will continue to be eligible for Federal participation until final project voucher. Subsequent to final voucher, sales expenses are deducted from the gross proceeds to arrive at net income to be deposited in an appropriate state fund. As for maintenance, protection and related costs, TEA-21 Subsection 1212 (a), removes the longstanding limitation on indirect costs. This means that most costs incurred by States are now eligible for federal-aid reimbursement as either a direct or indirect cost. States and local agencies may now claim reimbursement in accordance with OMB Circular A-87. Prior to claiming reimbursement, the state must have an approved cost allocation plan. States with previously approved rates may claim costs for any billings submitted after June 9, 1998.

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Q: Will it be necessary for State agencies to credit federal-aid projects which have had disposition costs billed to them prior to depositing a net proceed amount into a state road fund?

A: A credit to Federal funds is no longer required for disposals of real property which close on or after June 9, 1998, even though costs have been billed to a project. Since the expenses were charged to a project, the net proceeds from the sale would be deposited in an appropriate state fund. The states manual should clearly define procedures for the accounting of income, expenses and deposits into an appropriate state fund for use on Title 23 eligible projects.

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Q: If we continue to handle property management costs as in the past, must the state deduct these costs from the sales income received on the property to arrive at "net income" to be deposited in their State Road Fund or can the total gross amount of sale income be deposited for use on Title 23 projects?

A: Real property maintenance, protection, leasing and related costs are now eligible for federal reimbursement. Disposition costs should be deducted from gross sales proceeds to arrive at a net income amount that would be deposited in an appropriate state fund until used on Title 23 eligible projects.

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Federal Participation in State-Required Payments

Q: The Right-of-Way and Real Estate Regulation, 23 CFR 710.203(12/99) States that Federal funds may be used for any project related costs for acquisition which are required under State laws. A separate reference is made to payments associated with displacement from acquired property under the Uniform Act Regulation at 49 CFR Part 24. Does this mean that Federal funds can participate only in payments required under State law for acquisition, but not for relocation assistance? If so, why? Some States have laws that provide for relocation payments exceeding the benefits provided under the Uniform Act as well as laws that provide additional payments in acquisition. Is there any way that the States can streamline their accounting work efforts and be reimbursed for both acquisition and relocation costs required under State laws?

A: Yes, the Right-of-Way and Real Estate regulation allows participation in relocation payments required by State laws. The States accounting efforts can be streamlined. The issue in 23 CFR 710.203 is fiscal and related to participation in costs incurred as a result of project activities. It includes the costs of the many activities necessary to provide the real property necessary for a project. This fiscal participation is based on a broader concept than requirements of the Uniform Act. The programmatic requirements of the Uniform Act are for the provision of certain levels of payment to individuals affected by acquisition and relocation activities, but do not address the source of these payments. Every State must provide assurances of compliance with the Uniform Act. However, some States also have State laws providing for benefits in addition to those required under the Uniform Act.

Participation in the payment of both acquisition and relocation costs does not change the level of payments being made to property owners and displaced persons. As in the past, these persons will still receive the benefits available under the Uniform Act plus any additional benefits provided by State law. The sole change is in the billing for a parcel.

Instead of billing only the required costs under 49 CFR Part 24 to federal-aid funds and the State mandated additional costs to State only funds, all costs can be billed to federal-aid. It is a State's decision to use federal-aid in this manner. A change in billing activities does not increase the amount or availability of Federal funds. It only affects how a State elects to use the funds available from all its sources.

For these reasons, we consider the issue of FHWA reimbursement for States legally mandated costs for acquisition and relocation to be a Title 23 issue and not a Uniform Act issue. If a State must pay relocation benefits exceeding the limits in the Uniform Act, the cost is considered a legitimate project expense under Title 23 and is eligible for FHWA reimbursement. This position is in keeping with the TEA-21 provisions for increased participation in the costs incurred by State Transportation Departments in advancing highway projects.

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Q Are there any studies of the adequacy of relocation benefits under the Uniform Act that might result in a recommendation to increase benefit levels?

The Office of Real Estate Services currently is conducting a national research study of the adequacy of business relocation payments and services. This may lead to recommendations for an increase in the benefits provided under the Uniform Act.

The Uniform Act dates from 1970 and even though one major update was made in 1987, the relocation cost limits do not necessarily bear any relationship to the costs actually experienced by displaced businesses and others who relocate. Because of this, several State legislatures have either updated their relocation laws or enacted new laws to enhance the benefits provided to businesses. Other States are considering similar action.

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