

**APPENDIX B
RIGHT OF WAY CERTIFICATION
DESIGN-BID-BUILD PROJECT DEVELOPMENT FORMAT**

Introduction

The intent of Appendix B is to provide added detail and discussion on the material provided in 3.680 – 3.685 of the Right of Way Manual. The correct Certification of a right of way project is an essential step in project delivery and one that, at times, can be a source of controversy and contention. Incorrect Certification, whether due to an incomplete understanding of the process and requirements or to project scheduling pressures, can have serious consequences for the project and for the department. For these reasons, it is important that Region Right of Way staff, Project Delivery Team Leaders, and other project development personnel be knowledgeable of Certification requirements and the criteria for correct application of the process.

1. Right of Way Certification is a requirement on all STIP projects including local public agency STIP projects, regardless of funding. **On local projects and consultant projects the Region Right of Way Manager * is required to co-sign the Certification. This means that Right of Way staff must do adequate monitoring of the project to enable the Manager to co-sign. The one exception to this requirement for co-signing is when the local public agency is handling all phases of a state-funded project including letting the construction contract without any involvement from ODOT.**

Timing of Certificate Writing

Advertisement dates precede contract bid letting dates by 3 to 6 weeks. The great majority of project advertisements run for 3 weeks. Longer advertisements are used selectively for larger and/or complex projects. Contact the Specifications Unit and/or the Project Team Leader for the planned ad length on a specific project.

Right of Way Certifications are one part of the final PS&E (Plans, Specifications & Estimate) package submitted to the ODOT Office of Pre-Letting (OPL) by the Project Development Team Leader (PDTL). This final PS&E package is required to be submitted to the OPL 24 days prior to the beginning of the project advertisement.

On federal-aid projects with full federal oversight, an additional three weeks of lead time is necessary. On these projects, the Highway Finance Office Program and Funding Services (PF&S) Unit must make a formal request to FHWA for review and approval of the PS&E package, including the right of way Certification.

The following table shows the right of way Certification due date in relation to the planned bid letting date for different ad lengths. The Certification is due at the Right of Way Project Administration Unit, and, as part of the PS&E package, at the OPL Unit.

Advertisement Length	PS&E Due at OPL & Right of Way Project Administration Project Type	
	State Administered	Full Federal Oversight
2 weeks	+38 days	+59 days
3 weeks	+45 days	+66 days
4 weeks	+52 days	+73 days
5 weeks	+59 days	+80 days
6 weeks	+66 days	+87 days

Length 9/23/2005 9/23/2005

To avoid confusion regarding the Certification due date, the Region Right of Way Manager or Right of Way Project Manager should work with the PDDL to clarify the due date early on in the project.

Writing the Certificate

The Certification reflects the status of the right of way acquisition and relocation work as of the Certification date. There are some types of properties for which the department either does not have condemnation authority or will not proceed to a condemnation action. These include:

- Property belonging to other state and local governmental agencies;
- Railroad properties;
- Tribal lands;
- Forest Service and BLM lands
- Other federal agencies

If property possession has not been obtained on these types of properties, the right of way Certification should not be done unless a valid Permit of Entry has been obtained in compliance with 5.315(a) of the Right of Way Manual.

Property acquisition and relocation activity that is incomplete as of the date of the Certification but which will be complete by the contract bid letting date (Box 3 of the Certification) is not considered a Certification Exception, or holdout, and will not be identified as a holdout on the contractor plans and specifications. The Region Right of Way Manager* must take care that these acquisitions and relocation activities will be complete by the bid letting date. Otherwise, these should either be identified as Exceptions (Box 4) or the right of way should not be certified.

Right of Way Certification Exceptions (Holdouts)

Certifying a right of way project with holdouts is a major decision that carries the potential for serious consequences to the department if misused or incorrectly done. These consequences could include:

- Disruption in the construction schedule with resulting increased costs and/or time delays;
- Loss of federal participation in one or more phases of a federal-aid project;
- Jeopardizing future federalization of a state-funded project;
- Increased legislative and/or media involvement resulting from complaints by property owners and displaced occupants

Criteria for Certification Exceptions

- A decision to hold out property at Certification increases the risk of not having the proper right of way for use by the contractor and should, therefore, be made infrequently and with caution. The need for Exceptions should be minimized or eliminated during the establishment of the project development schedule and during project development team discussions. The Region Right of Way Manager should review the schedule and potential for holdouts at the Design Acceptance milestone in project development. In the event that the potential for holdouts is high, the Region Right of Way Manager

should discuss the need for a change in schedule with the Project Team Leader and the Area Manager. Any change in the project schedule should be communicated by a Project Development Change Request as per the Highway Division Project Delivery Leadership Team Operation Notice 02 (PD02) (*see the next section for a link to the PD02 Notice on the project delivery website.*)

- The Region Right of Way Manager must be able to set a firm target date for possession of a held-out property with a high degree of confidence in meeting that date. If not, the right of way should not be certified.
- The property owners and occupants received written offers in accordance with ORS 35 and have had an adequate length of time to consider the offer and to work with the department's Right of Way Agent or consultant to address all the pertinent acquisition and relocation questions and issues.
 - *The 40 day time period stated in ORS 35.346(1) is a minimum time allowed property owners for consideration of the written offer before commencement of Condemnation. It is not to be used as a default negotiation timeframe for determining a possession date for a Certification holdout. The negotiation timeframe must be commensurate with the magnitude of the impact on each individual property.*
- The Right of Way Operations Manager must be included in any Exception decision involving unconcluded relocation of displaced occupants.
- To avoid potential problems gaining approval of the PS&E, it is advisable to involve FHWA as early as possible when considering Certification Exceptions on full federal oversight projects.
- Residential displacees still occupying the held-out property at the time of Certification must have had replacement housing made available to them according to the CFR and 6.340 of the Right of Way Manual. The Manual states: "A comparable replacement dwelling will be considered to have been made available to a person if:
 1. the person is informed of its location; and
 2. the person has sufficient time to negotiate and enter into a purchase agreement or lease for the property; and
 3. subject to reasonable safeguards, the person is assured of receiving the relocation assistance and acquisition payment to which the person is entitled in sufficient time to complete the purchase or lease of the property."
- Property owners and remaining occupants of property that will be held-out of the Certification must not be put at risk, significantly inconvenienced, or subjected to coercion or the appearance of coercion by the department when moving forward with the contract and the start of construction. Once the commitment is made to let the contract and proceed with construction, the pressure on both the department and the property owners and occupants will likely be elevated. The department wants to make certain that the construction progresses smoothly without unplanned interruptions or elevated costs. Property owners and occupants are concerned about whether their rights will be violated or they will be put at risk by the construction activities. This lays the groundwork for misunderstandings leading to claims and allegations.
- Since holding out a property invariably increases risk, there must be an offsetting benefit to the public by moving the project forward. Whenever holdouts are identified, the Region must complete a written public interest finding and include it in the PS&E package.

PD 02 Exception Letter

Project Delivery Operational Notice 02 requires "the approval of the Highway Division Deputy Director in consultation with the affected Region Manager and the Chief Engineer "when there are exceptions to the normal project development process. The use of "exception" in this context is not the same as a right of way Certification "Exception" or holdout. Certifying the right of way with holdouts, when appropriately used, is one variation of the normal project development process. It does not require approval of the Highway Division Deputy Director by means of a PD 02 Exception Letter. That approval would be required when the Region Right of Way Manager cannot certify the right of way and the Region wishes to move forward with the contract

and construction. The PD 02 Operational Notice can be accessed on the ODOT internet. (<http://www.oregon.gov/ODOT/HWY/OPD/docs/OPnotices/PDLTNotice02.pdf>)

Not Certifying the Right of Way

The final responsibility and authority in deciding whether or not to certify a right of way project rests with the Region Right of Way Manager. When the necessary criteria for Certification have not been met as discussed in 3.680 – 3.685 and elaborated above, the right of way should not be certified. Notwithstanding pressures arising from inflexible schedule timelines or other project concerns, misuse or misapplication of the Certification process raises the likelihood of serious departmental consequences which outweigh the pressures to move forward. The rights of property owners and displaced occupants must never be violated. A contract letting date can be changed despite the importance of adhering to a schedule. In a majority of cases it is less problematic and costly for a letting date to be delayed than for construction activities to be halted due to the unavailability of needed right of way. If there is enough reason for the bid letting to move forward despite the right of way not being certified, the Project Team Leader can request a PD 02 Exception.

Public Interest Statement Guidelines

When one or more properties will be held-out of an intended Right of Way Certification, a public interest statement must address why it is in the public's best interest for the department to move ahead with letting the construction contract rather than delaying the letting until all right of way has been acquired. The statement should address why the benefits in moving ahead with the contract letting outweigh the inherent risk that goes along with that decision: unanticipated problems occur which prevent the department from getting legal and physical possession by the target date, thereby interfering with the contractor and possibly forcing a halt in construction. The potential fiscal impact to the department from delaying ongoing construction can be far more expensive than delaying the contract letting.

In no instance can property owners or persons being displaced by the right of way acquisition be significantly inconvenienced or have their rights jeopardized or violated by a decision to move ahead with the letting of the construction contract prior to completion of the right of way acquisition and relocation work. The public interest statement should provide assurances to that end.

Following are a few examples of situations where it could be in the public's best interest to proceed with letting the construction contract while holding out properties from the Right of Way Certification:

- Project mitigates serious safety and traffic issues requiring correction ASAP;
- Limited construction window;
- Delays in starting the project threaten efforts to minimize traffic disruption to the community;
- Project is to be built concurrent with a local project that has a set schedule;
- Project completion needed prior to a significant community event;
- Delay in starting the construction will have serious economic impact on the community or state;
- Favorable contract bidding climate for the department and construction would not be hindered by the hold-outs;
- Quick resolution needed for an emergency situation

* For projects managed by the Oregon Bridge Delivery Partners, ODOT's Bridge Delivery Unit Technical Center Manager has delegated authority from the Statewide Right of Way Manager for all the responsibilities and accountabilities of the Region Right of Way Manager that are contained in Section 3.680 and Appendix B. This delegated authority is based on OBDP having an experienced employee that meets the minimum qualifications for a Region Right of Way Manager and is experienced with the Uniform Act and all applicable state and federal laws, ODOT's Right of Way Manual, and internal policies and procedures, who reviews all documents and gives assurance that they are ready for approval.