



Oregon

Kate Brown, Governor

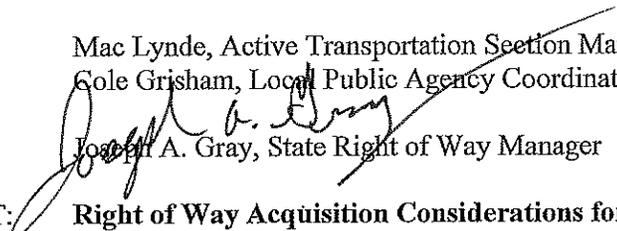
Department of Transportation

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Memorandum

DATE: May 12, 2016

TO: Mac Lynde, Active Transportation Section Manager
Cole Grisham, Local Public Agency Coordinator

FROM:  Joseph A. Gray, State Right of Way Manager

SUBJECT: **Right of Way Acquisition Considerations for Efficient Use of Federal Funds**

The Intermodal Leadership Team is working on an initiative to improve the efficiency of project delivery with federal funds. One of the new actions being initiated is to increase the use of state-only funding for local public agency (LPA) projects, in order to simplify and expedite project delivery for these agencies. State monies for certain projects will be distributed directly to the LPAs, eliminating the need to submit documentation to Right of Way Headquarters (HQ) and obtain authorization to proceed with acquisition of right of way. The purpose of this memo is to provide information and a recommendation related to the ODOT requirements of acquiring and/or accepting property on an LPA project funded with state dollars.

Overview:

Numerous laws and regulations apply to the acquisition of right of way in the State of Oregon. Prior to this initiative, almost all LPA projects were federally funded. In order to comply with the Federal Highway Administration (FHWA) requirements and guidelines, including 23 CFR 710 (Right of Way and Real Estate) and 49 CFR Part 24 (Uniform Act), National Environmental Policy Act of 1969 (NEPA), the regions work with the LPAs to provide legal descriptions, maps, detailed cost estimates, environmental documents and agreements to Right of Way HQ. This information is then submitted to FHWA and Active Transportation Office (ATO) for approval and the obligation of funds. It takes an average of three to five weeks to receive approval, plus additional time for ATO to collect a deposit from the LPA to cover ODOT's oversight work.

Throughout the right of way acquisition, ODOT is required to provide oversight to ensure that all laws and regulations are being followed by the LPA or consultant. When the acquisition is complete, ODOT and the LPA co-sign the Right of Way Certification, attesting that the right of way was acquired in accordance with 23 CFR 635.309.

State funded projects, although not under the nexus of Federal laws, have their own governing laws and regulations, which the LPA is expected to follow when utilizing state funds. The Oregon Revised Statutes (ORS) are the codified body of statutory law governing the State of Oregon and are subordinate to the Oregon Constitution. ORS' that provide guidance for Right of Way Acquisition can be found in the ODOT Right of Way Manual. ODOT also follows the CFRs for all projects, regardless of funding source.

Occasionally, a project involves property acquired by the LPA which will be transferred to ODOT at the end of the project (i.e., intersections of city streets/state highways, where ODOT takes jurisdiction of signal maintenance, sidewalks, etc., or if a city street and a state highway are layered together and the properties fall within ODOT's jurisdiction, etc.) An agreement between ODOT and the LPA specifying the details of the property transfer is always required.

Analysis:

Implementing the use of state funds by LPAs would speed up the project delivery timeline by eliminating the submission of paperwork, the weeks spent waiting for projects to go through the approval and obligation process by both FHWA and ATO, and the added time of waiting for the deposits to be made by the LPAs and processed by ATO. It would also lighten the workload of Right of Way staff, who would not be required to perform oversight duties on these local projects.

With this new initiative, the loss of oversight and involvement in the submittal and authorization of the right of way opens vulnerabilities to ODOT.

There are instances where federal funding may be incorporated into the project later (by means of a federal grant or other federal dollars). If the property was not lawfully acquired, the the federal funds could be withdrawn and the project could be at risk.

In addition, if the LPA transfers any property to ODOT at the end of the project, the State Right of Way Manager is ultimately responsible for formally accepting it. Under the current process, the State Right of Way Manager accepts the property with the assurance that through oversight, documentation and co-certification, it was acquired in conformance with all state laws and regulations. Without involvement of ODOT's Right of Way personnel in the acquisition, that assurance is lost.

If the property is accepted by the State Right of Way Manager on ODOT's behalf, and subsequently, there is a discrepancy or claim by a property owner about the acquisition process, ODOT could be named in a lawsuit/inverse condemnation.

Recommendation:

ODOT operates on the basic principle of reasonable expectation that the LPA will acquire the right of way in accordance with state laws and guidelines. Because ODOT will have no oversight or authorization for the right of way acquisition, it is important that the State Right of Way Manager have documentation regarding the property acquisition before he accepts any transfer.

When a project agreement specifies the LPA will be transferring property to ODOT, the LPA should be aware that detailed documentation regarding the right of way acquisition will be required and must be provided to the State Right of Way Manager before the property transfer will be accepted.

It is also recommended that LPAs access the following resources if they have any questions or need clarification on ORS, right of way acquisition, appraisal, condemnation or relocation. The complete ORS citation can be accessed electronically at the following website: <http://www.oregonlaws.org>.

The ODOT Right of Way Manual also provides guidance and clarification on many right of way, appraisal, condemnation and relocation processes, and references many of the ORS. It can be accessed electronically at the following link:

http://www.oregon.gov/ODOT/HWY/ROW/Pages/row_manual_info.aspx.

Additionally, the LPAs may contact their Region Right of Way office at any time for assistance.