



# RIGHT-OF-WAY OPERATIONS MANUAL

## Chapter Four Acquisition

July 8, 2024

Version 4.1 – January 2, 2025

Version 4.2 – March 3, 2025

Version 4.3 – September 4, 2025

Version 4.4 – November 13, 2025

Version 4-5 – December 1, 2025

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# Chapter Four

## Acquisition

### 4-1 GENERAL REQUIREMENTS

#### 4-1.1 Introduction to Acquisition

The acquisition function encompasses the process of buying private property, public lands, or Native American lands. This chapter covers the steps in the acquisition process, as well as procedures for special acquisitions, condemnations, title clearance and project closures.

#### 4-1.2 Principal State and Federal Statutes

The following state and federal constitutional and statutory provisions control the acquisition function:

##### 1. State Law

The following state laws are applicable to the acquisition function:

- a. ***Constitution of the State of Montana.*** Article II, *Sections 17 and 29*, address due process of law and eminent domain.
- b. ***Montana Code Annotated (MCA).*** Title 60, Chapter 4, governs the Montana Department of Transportation's (MDT's) acquisition and disposition of property; Title 70, Chapters 30 and 31, address the eminent domain code, relocation assistance and fair treatment of condemnees.

##### 2. Federal Law

The following federal laws are applicable to the acquisition function:

- a. ***United States Constitution.*** The Fifth and Fourteenth Amendments address due process and the taking of private property for public use.
- b. ***US Code Annotated.*** To ensure eligibility for federal funding participation (federal aid) in any phase of a transportation project, property acquisition activities must comply with the ***Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970 (Uniform Act)*** (49 *United States Code* Part 24), as amended. The ***Act*** requires:
  - a reasonable effort to expeditiously acquire property.
  - an appraisal prior to acquisition, giving owners an opportunity to accompany the appraiser on inspection of the property.

- a written offer to the owner, with a summary of the basis of the determination of just compensation.
- payment or deposit of just compensation prior to possession.
- 90 days written notice of dislocation.
- limitation of any rental payment (rent back from owner or tenant) to an amount not exceeding fair rental value.
- no coercive action to compel an agreement on price.
- no action to intentionally make it necessary for an owner to institute a legal action for compensation (inverse condemnation).
- an offer to acquire uneconomic remnants; and
- no duplication of payments.

Details about each requirement, including procedures, are contained in Title 23, Part 710 and in Title 49, Part 24 of the ***Code of Federal Regulations (CFR)***.

#### **4-1.3 Other Acquisition Standards, Rules and Policies**

In addition to the requirements in *Section 4-1.2*, several other laws, regulations, policies, and procedures apply to acquisition activities. The following policies and procedures will be followed regardless of whether federal funding is being used on the project:

1. **Negotiated Purchase**  
MDT must make every reasonable effort to acquire real property by negotiation.
2. **Just Compensation**  
Prior to initiation of negotiations, MDT establishes an amount that it believes to be just compensation. In no event will this amount be less than the approved appraisal or waiver valuation. In determining just compensation, any decrease or increase in the market value caused by the public improvement or the likelihood that the property would be acquired for improvement, other than physical deterioration within the reasonable control of the owner, is disregarded.
3. **Written Offer and Summary Statement (MDT-ROW-201) or Right-of-Way Agreement clause 301.32**  
Upon initiation of negotiations, the property owner is provided with a written offer of the just compensation being offered, and a statement and summary of the basis for the amount of just compensation. The statement also includes a description of the property and the rights and interests to be acquired. Refer to *Section 4-6.2 (Offer to Purchase and Summary Statement of Just Compensation)*.

4. Occupancy

No legal occupant will be required to surrender occupancy of real property before the agreed-to purchase price has been paid or MDT's offered amount has been deposited with the court.

5. Coercion

In no event will MDT advance or defer the time of condemnation, defer negotiations, or take any other coercive action to compel agreement on the price to be paid for the property.

6. Uneconomic Remnant

If the acquisition of only part of the property would leave the owner with an uneconomic remnant or uneconomic remnants, as defined in **49 CFR 24.2** and determined by an MDT Review Appraiser or the Acquisition Manager, MDT must offer to buy the uneconomic remnants. Payment for the remnants must be based on the value of the property before the project.

7. Payments to Tenants

No payment is made to a tenant for any improvements unless:

- The tenant, in consideration of the payment, assigns, transfers and releases to MDT all the tenant's rights, title and interest in the improvements.
- The owner of the real property disclaims all interest in the improvement.
- The payment does not double any compensation, otherwise authorized by law.

8. Alternative Compensation for Tenant Improvements

The special conditions stated above will not be construed to deprive the tenant of any right to reject the offered payment and to obtain payment for the property interests in accordance with other applicable law.

9. Special Improvement District Assessments

A Special Improvement District (SID) is an area of land within which property owners pay an additional tax or fee designated for specific services or improvements within the district's boundaries. The value added by the special improvement must be reflected in the appraisal and in the compensation offered. For total acquisitions, the assessment tax, fee or lien must either be paid by the property owner or be deducted from and paid out of the compensation to be paid. On partial acquisitions, the assessment tax, fee or lien generally will be set over and attached to the remaining property.

10. General Real Estate Taxes

MDT does not pay general real estate taxes on lands acquired for transportation purposes.

11. Unpaid Taxes

Unpaid taxes and penalties for previous years must be assigned to the county treasurer from total compensation to be paid for the property when there is a total acquisition.

12. Partial Acquisition

For partial acquisitions, the owner needs to have the county appraisal/assessment office compute the owner's pro rata share of the taxes.

13. Tax Reimbursement

The property owner is entitled to a reimbursement of general real estate taxes already paid. The reimbursement is proportionate to the property acquired by MDT and allocable to the time that title vests in the State, or the effective date of possession, whichever is earlier. MDT will provide the reimbursement application form to the property owner.

14. Incidental Expense Reimbursement

The property owner is reimbursed for reasonable expenses incurred for the following:

- Recording fees, transfer taxes, excise taxes if applicable, title evidence, and similar expenses incidental to conveying the property to MDT (however, MDT will not pay costs solely required to perfect the owner's title to the real property).
- Penalty costs and other charges for prepayment or the release or partial release of any preexisting recorded mortgage or deed of trust entered into good faith.

Whenever feasible, MDT pays these costs directly so the owner will not have to pay them and then seek reimbursement.

15. Donations

Nothing will prevent a person, after being informed of the right to receive compensation based on an appraisal of the real property, from making a gift or donation of the property to the State.

16. Civil Rights

The right-of-way acquisition function will be conducted in a manner that will ensure that no person will be subjected to discrimination and that no person will, because of race, religion, age, disability, color, sex or national origin, be denied the benefits to which the person is entitled.

17. Conflict of Interest

The acquisition agent may not accept the assignment of a parcel under the following terms:

- if personally acquainted with or related to the property owner, where such acquaintance or relationship might tend to influence or prevent the agent from acting in an unbiased and professional manner; and/or
- if in violation of any departmental directive on conflict of interest and employment.

18. Relocation Assistance

Where a federally funded acquisition of property requires the displacement of any occupant, farm, business, nonprofit organization or the personal property of one of these, that person or organization may be entitled to payments separate and distinct from the acquisition compensation to alleviate the costs of moving and any additional costs for replacement housing, as described in Chapter 5.

19. Direct Federal Program or Project

Per 49 CFR 24.101 any project or program receiving direct federal funding must comply with the requirements of this section.

## **4-2 ADMINISTRATION AND AUTHORIZATION**

### **4-2.1 Assigned Responsibilities and Objectives**

The Acquisition Section of the Right-of-Way Bureau is responsible for monitoring, developing, and maintaining policies and procedures related to right-of-way acquisition, relocation, damage claims, pre-condemnation activities, and other department programs, and to ensure that all necessary actions to enable the Department to certify that it has title and legal possession, or a permissive right to enter upon property, prior to the letting of a construction contract have taken place.

In addition, the Acquisition Section, through Special Programs, performs acquisition services for federal lands, state lands and acquisitions of regular owner parcels as required by the districts as well as administers the Outdoor Advertising Control Program.

When the Special Programs Supervisor or staff are requested to perform acquisition services on a project for the District, the Special Programs Supervisor may act in the capacity of the District Right-of-Way Supervisor with all applicable authorities.

An important component of maintaining policies is to ensure the Acquisition Chapter of this manual is current, which is the responsibility of the Acquisition Manager. Chapter updates will be done as necessary to capture Bureau/Departmental policy changes, or when law changes, etc.

Any procedures not specifically covered in this chapter will be addressed and authorized by the Acquisition Manager or Bureau Chief on a case-by-case basis. To ensure statewide policy and procedure changes are communicated, documented, and implemented consistently, email guidance is sent to all right-of-way staff outlining the changes and communicated through regular district and headquarter meetings.

#### **4-2.2        Authorization and Assignments**

After project plans are completed and funding has been approved, the project is authorized, and appraisal and acquisition activities may proceed. Federal funds will only participate in the costs of construction features shown on approved construction and/or right-of-way plans. Any substantial change in project design and plans after the authorization must be approved before acquisition can proceed.

Acquisition authorizations and assignments are as follows:

**1. Authorization and Approval Authority**

Written authorization to proceed with acquisition of each parcel is issued by the R/W Design Supervisor prior to the start of project appraisals. Written authorization for each parcel is documented either on the initial Project Authorization Memo or on a Right-of-Way Plan Revision Memo when the 'new' parcel is added.

**2. Assignments**

Upon completion, or near completion, of the appraisal review, the District Right-of-Way Supervisor makes the acquisition assignments. The following factors are considered when the supervisor is making assignments: common ownership, common use, location of owners, lessees, correspondence, complexity, etc. A meeting between the supervisor, the project appraisers, and the acquisition agents to discuss any unusual or unique situations may be helpful. On complex acquisitions, a field review with appraisal personnel may be appropriate.

The District Right-of-Way Supervisor provides or makes available the following to the assigned acquisition agent:

- National Environmental Policy Act (NEPA) document.
- title commitments (if applicable).

- the approved appraisal and review.
- right-of-way, construction, cross sections, and detail plans.
- deeds and exhibits.
- right-of-way and Relocation brochures; and
- any other pertinent data, reports, background information and documents.

An acquisition agent will not be assigned to any parcel that the agent appraised or for which the agent reviewed the appraisal, except as provided for in Section 3-2.21 (Single Agent Valuations and Acquisitions) and *Section 4-3.3 (Acquisition Using Administrative Waiver Valuation)*

The District Right-of-Way Supervisor and the acquisition agent review each assignment and establish a target date for completion of the work.

A reassignment should be made if an employee of the Department or a close relative of a department employee becomes involved in right-of-way transactions as a landowner or has a monetary interest in a property. In these cases, a special assignment is made. Upon becoming aware of employee involvement, the District Right-of-Way Supervisor should coordinate the assignment through the Acquisition Manager and with the approval of the Right-of-Way Bureau Chief.

### 3. Special Assignments

Circumstances requiring the special assignment of acquisition responsibilities include employee-owned lands, potential conflicts of interest by an acquisition agent or close relative of the agent, landowner damage claims, permission to enter for survey, outdoor advertising, junkyard control, sidewalk and approach construction agreement letters, report writing, public involvement notifications and other assignments. Acquisition conducted through attorneys or third parties also may require special handling.

Other situations requiring special assignment, due to the procedural requirements of the agencies or companies involved, include the following:

- a. US Forest Services, Bureau of Land Management (BLM), Department of Natural Resources and Conservation (DNRC), and Montana Fish, Wildlife and Parks (FWP). Although the District may initiate any necessary valuations and negotiations with agency lessees, the Special Programs Section handles acquisition of these properties.
- b. Railroad Lands. Except for appraisals and lessee negotiations, the acquisition of operating railroad lands is the responsibility of the Utility Section.

- c. City and county-owned lands and School-, Water-, and Irrigation-District lands are acquired by District Right-of-Way Agents.
- d. Leases on Public and Railroad Lands. Leasehold interests on public lands and on operating or non-operating railroad land are acquired by District Right-of-Way Agents.

4. Due Dates and Extensions

The District Right-of-Way Supervisor and the acquisition agent establish a due date for each assignment. The due date should be realistic and should provide adequate lead time for condemnations before the proposed ready dates. Potential condemnations should be submitted as soon as practical to the Acquisition Manager.

Extensions of due dates are granted when circumstances beyond the control of the assigned acquisition agent and the District Right-of-Way Supervisor result in an unavoidable delay in completing the assignment on time. All extensions of this type are made by the District Right-of-Way Supervisor.

5. Premature or Unauthorized Commitments

Acquisition agents and other MDT staff are cautioned not to make commitments to landowners on behalf of the Department without proper authorization.

**4-2.3        Emergency or District Authorization to Acquire**

In emergency situations such as landslides or other natural disasters, the District Administrator and/or Preconstruction Engineer works with key staff at Headquarters, including the Lands Section Manager, to get a project authorized for appraisal and acquisition. The District Administrator and/or Preconstruction Engineer requests acquisition through the Right-of-Way Bureau and concurrently furnishes information regarding the emergency to all key personnel involved with getting the emergency resolved. Headquarters and/or District Right-of-Way personnel immediately initiate acquisition once there is an environmental document. District personnel may have to obtain title information and contact the landowners immediately, without having an appraisal or other data. In these cases, land values will not be discussed. Every effort should be made to follow established acquisition procedures. The District Administrator and Preconstruction Engineer should be kept informed of progress being made and the completion of the acquisition.

Document requirements and property rights to be acquired will vary with each occurrence. Coordination between Right-of-Way Design and Acquisition is vital to successfully resolving emergency situations.

#### **4-2.4        Landowner Damage Claims**

Occasionally, MDT receives serious complaints alleging that construction or maintenance activities by the Department are causing damage to private property. When a complaint is received, the District Right-of-Way Supervisor promptly investigates and reports on the claim. The field report includes a description of the damages, the location, the action that caused the damage, photos, sketches, and any other data pertinent to the claim.

District Right-of-Way Supervisor activities usually include determining land values, obtaining estimates on property damages, pursuing cures through landowner discussions, and obtaining agreements and releases.

District Administrators are authorized to approve and settle landowner damage claims up to \$50,000 (some have delegated this authority to the District Preconstruction Engineer). However, supporting documentation is required and is transmitted to the Right-of-Way Bureau for processing and recording. All damage claims greater than \$50,000 must be approved by the Acquisition Manager prior to any offer being made to the landowner. The Acquisition Manager will obtain any technical or legal advice needed prior to approving or denying a claim.

Landowner damage claims require close coordination with Right-of-Way Bureau and some damage claims are handled by the Department of Administration – Tort Claims Division. Refer questions and problems to the Acquisition Manager.

#### **4-2.5        Advanced or Early Acquisitions**

The Department may initiate acquisition of real property interests for a proposed transportation project at any time it has legal authority to do so. MDT may elect to pursue either an Advanced Acquisition or an Early Acquisition, based on project needs and/or landowner requests. Advanced Acquisitions may be undertaken prior to final environmental approval and Early Acquisitions may be undertaken before the completion of the environmental review process for the proposed transportation corridor preservation, access management, or other purposes, with approval from the Right-of-Way Bureau Chief and FHWA.

##### **4-2.5-1 Advanced Acquisitions**

**23 CFR Part 710.503** allows for Advanced Acquisitions with FHWA reimbursement in the following situations:

- Protective Buying

Protecting the availability of properties has a high probability of development. MDT must clearly demonstrate that development of the property is imminent and such development would limit future transportation choices. A significant increase in costs may be considered as an element in justifying a protective purchase.

Protective purchases require FHWA approval prior to the purchase and federal reimbursement is obtained shortly after the purchase is completed. Protective buying usually occurs during the project's NEPA phase. However, prior to approving protective buying, NEPA and section 4(f) clearance is necessary for the parcel. This requires the parcel to be carved out separate from the overall project to do NEPA and 4(f) review on those parcels. The NEPA class of action is typically a Categorical Exclusion (CE).

These parcels still will be included in the NEPA and section 4(f) evaluations for the entire project.

- Hardship Acquisition

A property owner may request an advanced acquisition because delay imposes a hardship on the owner. MDT must receive and concur with a request for a hardship acquisition based on a property owner's written submission that:

1. Supports the hardship acquisition by providing justification, on-the-basis of health, safety, or financial reasons, that remaining in the property poses an undue hardship compared to others.
2. Documents are an inability to sell the property at fair market value because of the impending project, within a time that is typical for properties not impacted by the impending project.

Hardship acquisitions require FHWA approval prior to the purchase so the Department can obtain federal reimbursement immediately upon completion of the purchase. Hardship acquisition usually occurs during the project's NEPA phase. However, prior to approving protective buying, NEPA and section 4(f) clearance is necessary for the parcel. This requires the parcel to be carved out separate from the overall project to do NEPA and 4(f) review on those parcels. The NEPA class of action is typically a Categorical Exclusion (CE). These parcels still will be included in the NEPA and section 4(f) evaluations for the entire project.

#### **4-2.5-2 Early Acquisitions**

**23 CFR Part 710.501** allows for Early Acquisitions under four scenarios:

1. State-funded early acquisition without federal credit or reimbursement.
2. State-funded early acquisition eligible for future credit toward the non-federal share of the total project costs.
3. State-funded early acquisition eligible for future reimbursement.
4. Federally funded early acquisition (stand-alone project).

The Department may determine that an early acquisition is in the public's best interest and may authorize the use of state funds for the acquisition without future credit or reimbursement. Use of state funds for an early acquisition requires approval from the Highways and Engineering Administrator.

If the Department determines that seeking future federal aid reimbursement is in its best interest, then it may seek reimbursement through future credit, future reimbursement or through initial federal funds authorization.

To obtain federal aid assistance, MDT must certify and FHWA must concur that all the conditions contained in **23 CFR Part 710.501(b), (c), (d) and (e)** have been met.

An example of an early acquisition is the purchase of parcels along a potential corridor for future infrastructure expansion.

#### **4.2.5-3 Advanced or Early Acquisition Procedures**

If an advanced or early acquisition is considered, the following are required to proceed:

1. A written request from the District Administrator recommending early or advanced acquisition.
2. A cost estimate from the district for programming purposes, which includes costs for acquiring land, improvements, relocation benefits, and any property management issues such as demolition costs.
3. A plan sheet designating the acquisition with calculated areas and a parcel number or a certificate of survey (COS).
4. Estimated ROW authorization date (note – FHWA will not consider a request that is within 3 months of ROW authorization).
5. Approval from the Right-of-Way Bureau Chief to proceed.
6. A Right-of-Way Authorization Memo issued by a Right-of-Way Design Supervisor.

7. A parcel specific environmental document\* which specifically addresses the early or advanced acquisition.
8. FHWA approval.

\*This is usually a Categorical Exclusion and must be completed and approved prior to the completed project's Environmental Document being approved. Right-of-Way Design will submit the request for an environmental document appropriate for the acquisition once background information is received from the district

On the non-federal aid participating examples above, the Department may use the value of the acquisition as part of its state-share match requirement once the project is authorized by FHWA as long as all other federal aid requirements were followed during the acquisition of the property.

If an amicable settlement cannot be reached on an advanced acquisition, the Department will not file condemnation action prior to regular project scheduling.

#### **4.2.6            Non-ROW Acquisition Sidewalk & Approach Construction Agreement**

When the construction/reconstruction of new curb ramps, sidewalks, and/or approaches are part of an MDT project that does not have a right-of-way phase, the PE Project Manager will notify the District Right-of-Way Supervisor. District Right-of-Way staff will identify the impacted landowners/addresses where the sidewalk facility or approach is to be constructed and will be responsible for initiating discussions and notification of the upcoming project with the landowners. To the extent possible, these improvements must be reasonably located within the existing footprint of the existing ramps, sidewalks, and/or approaches.

1. Prior to this work being performed, District Right-of-Way staff will distribute a Sidewalk & Approach Construction Agreement (MDT-ROW-240) to all impacted landowners to request signatures consenting to the proposed work. This activity should be performed 6 to 12 months prior to the project ready date. The District Right- of-Way Supervisor will be responsible for tracking the status of this activity.
2. Once signatures are fully obtained, District Right-of-Way staff will compile the signed letters, along with mapping, ownership summary, and the original survey request into one PDF report.
3. The District Right-of-Way Supervisor will close out the EPS 809 (Sidewalk & Approach Construction Agreements) activity.
4. The District Right-of-Way Supervisor will send an email to the Right-of-Way Records Management Specialist and the appropriate project design team members with a hyperlink to the compiled report in the sidewalk agreement folder.

The Records Management Specialist will upload the agreements into the Project Content Management System (PCMS). The naming convention for these agreements will follow PCMS document naming standards, document class will be SAC (Sidewalk & Approach Construction Agreements).

5. District Right-of-Way staff will charge their time spent obtaining these agreements to the applicable project and PE phase along with EPS activity code 809 (Sidewalk & Approach Construction Agreements).
6. If the improvements are outside the footprint of the existing curbs, sidewalks, and/or approaches, District Right-of-Way Design staff will need to request a right-of-way phase to be authorized for funding. Impacted property outside the existing footprint must be surveyed and acquired through the right-of-way acquisition process.
7. If any impacted property is outside the existing footprint, all properties will be handled through the right-of-way acquisition process. If all improvements are within the entire existing footprint, a sidewalk & approach construction agreement can be utilized.
8. Projects should utilize either the right-of-way acquisition process or the sidewalk & approach construction agreement, but not both methods in tandem.
9. District Right-of-Way Supervisors will notify the Acquisition Manager, Project Manager, and Preconstruction Engineer if a landowner is not willing to sign the Sidewalk & Approach Construction Agreement to determine the next course of action.
10. The Acquisition Manager will then notify MDT Legal Services of the situation and discuss the appropriate course of action. If Legal Services is unsuccessful in obtaining landowner consent, the option to design around that segment or to request a survey will be determined on a case-by-case basis.
11. If a certificate of survey verifies MDT ownership within the existing footprint, MDT may decide to move forward with the improvements without signature.
12. The District Right-of-Way staff will be responsible for documenting the timeline of correspondence and communication with the landowner as well as any decisions made by Legal Services. This history will be provided to the District Right-of-Way Designer to upload as a PDF into PCMS. The naming convention should include Sidewalk Agreement History, UPN number, street address and last name.
13. When a landowner expresses concern regarding MDT impeding access to the impacted property (ingress/egress) or potential liability, the District Right-of-Way Supervisor will contact the Acquisition Manager who will coordinate with MDT Legal.

MDT Legal will determine if an additional clause to the agreement is necessary and will provide the appropriate language to insert into the agreement.

Sidewalk & Approach Construction Agreements can be found within the Intranet RESOURCES tab under Forms and Templates.

#### **4-2.6-1 Non-Row Land Acquisition – District Responsibilities**

A District Representative (District Administrator, Maintenance Chief, Motor Carrier Services (MCS) Officer, etc.) or designee will prepare a statement of need detailing the current situation and benefits of acquiring a new site or expansion of a current site.

District operations personnel will work with District Right-of-Way personnel to help locate, identify, and obtain necessary documentation of the proposed site(s):

1. Estimated number of acres required (i.e., approximately 5.7 acres).
2. Maps showing the location of the proposed purchase:
  - a. An overview map large enough to show the section, township, and range or a county plat map, subdivision plat map, city maps or certificates of surveys to identify the site.
  - b. A second map large enough to show the site in more detail and scaled, if possible, to easily identify the location of the site within a section, lot, or other identifier. Highlight the area within a section or lot(s) proposed for purchase.
  - c. Description of the proposed parcel. District Right-of-Way staff would be able to assist in providing a description that would provide sufficient information for an appraiser to locate the site.
  - d. The basic layout of the parcel should be agreed to with the landowner. (i.e., starting at a point 4,000 feet from the west junction of route X and Y then 500 feet north, 500 feet west, 500 feet south, and 500 feet east to the starting point. May use a painted fence post, pin, etc., to identify the starting point.)
3. Name, phone number, and address of the landowner, if known. Include a general overview of any discussion with the landowner or his/her representative noting any special concerns or comments.
4. Copy of the last deed of record, surveys, or plat maps obtained from the appropriate county courthouse.

5. An estimate of cost per acre and estimated total costs to acquire the site.
6. Any other information that would be pertinent to the acquisition. (i.e., location of utilities, water or other services, covenants, locations of watercourses, flood plains, or any environmental issues such as wetlands, hazardous waste, etc.)
7. The appropriate approved environmental document or checklist pertaining to the land acquisition.
8. The district representative will then submit the statement of need and supporting documentation to the appropriate Division Administrator or designee in Helena. If approved, the Division Administrator or designee will submit a notification to proceed with the memo to the Right-of-Way Bureau Chief.

#### **4-2.6-2 Non-Row Land Acquisition – Bureau Responsibilities**

1. When the Right-of-Way Bureau Chief receives the appropriate notification memo, he/she will send a copy to the Right-of-Way Design Supervisor with instructions to authorize acquisition of the land.
2. The Right-of-Way Design Supervisor will coordinate with the District Right-of-Way Design to determine who will issue a Right-of-Way Authorization to Acquire memo.
3. The authorization memo will be sent to the District Right-of-Way Supervisor, and he/she will assign an acquisition agent to negotiate with the landowner. The agent should complete the MDT-ROW-229 Agreement to Sell and Purchase Real Estate form. If the landowner demands a purchase price that is higher than the estimated value, the Acquisition Manager must approve the purchase price before the Agreement can be executed.
4. Once MDT-ROW-229 is executed, the District Right-of-Way Supervisor will assign an acquisition agent to complete the appraisal, and the District Right-of-Way Supervisor will make the necessary arrangements to have the Environmental Section and Survey Section complete any work necessary to address the survey and environmental contingencies identified in the Agreement to Sell and Purchase.
5. The District Right-of-Way Supervisor will then monitor the appraisal, environmental report, and survey work to ensure they are completed on time.

- Surveys: All required surveys will be conducted according to MDT survey policy. The Agreement to Sell and Purchase will identify whose responsibility it is to conduct the survey and who will bear the associated costs for the same (landowner and/or MDT).
- If the survey is done by MDT or its consultant, the District Survey Manager should be consulted to ensure any proposed survey committed to in the Agreement to Sell and Purchase has a realistic completion date. A copy of the agreement should accompany the request for the survey so that all parties to the survey are aware of the transaction closing date (date which the survey will have to be completed and recorded).

6. The appropriate division will provide justification for the Acquisition Manager for any expenditure on the appraised value needed to acquire the site desired.
7. The Agreement to Sell and Purchase form MDT-ROW-229 will indicate the closing of the land purchase from this point forward.
8. The Acquisition Manager will provide a monthly status of the progress to the appropriate Division Administrator.

## **4-3 ACQUISITION PREPARATION**

### **4-3.1 General Preparation**

The acquisition agent collects information, organizes materials, and plans the acquisitions.

The agent then can respond to questions, solve problems, react to situations in a positive and assertive manner, create understanding and confidence and develop rapport with the owner. The agent will perform the following tasks:

Gather Information. Obtain plans, appraisals, evaluation reports, forms, documents, title commitments, NEPA document, drawings, manuals, and visual aids. The acquisition agent must know proposed letting dates, traffic volumes, funding, material sources and special procedures.

Where historic sites, wetlands, park lands, cemeteries, etc., are involved, the acquisition agent should be aware of laws protecting the environment and cultural resources and be responsive to landowners' questions. Where there is relocation involved in a project, the acquisition agent works closely with the Relocation Specialist.

## 1. Presentation

Organize documents to present accurate information in a logical and understandable manner. Acquisition agents organize documents to be used in the presentation and backup material that is available if needed.

## 2. Planning

Conduct proper planning. Planning varies with each assignment and what is known about owners, neighborhoods, communities, and special problems. Through planning, the agent determines how to proceed in proper sequence with sellers, buyers, lessees, third parties, etc.

### **4-3.2 Appraisals, Project Reports and Reviewer's Determinations**

Typically, the District Right-of-Way Supervisor makes acquisition assignments after the appraisals, project reports and the reviewer's determination of just compensation are completed. The acquisition agent must understand the appraisal and should discuss any questions regarding the appraisal with the appraiser or the reviewer before beginning acquisition.

### **4-3.3 Acquisition Using Administrative Waiver Valuation**

**49 CFR 24.102(c)(2)** states that:

"[a]n appraisal is not required... [when] the agency determines that an appraisal is unnecessary because the valuation problem is uncomplicated and anticipated value of the proposed acquisition is estimated at \$15,000 or less, based on a review of available data."

Pursuant to **49 CFR 24.7**, the FHWA has authorized MDT to use a limit of \$35,000 or less for its administrative waiver valuations, so long as landowner approval has been obtained. See further discussion in Section 4-3.4 (Valuation Process) below.

It is MDT policy, approved by the FHWA, that an appraisal will not be required if it is determined by the Right-of-Way Bureau that a valuation problem is uncomplicated, and the anticipated value is estimated to be \$15,000 or less (\$35,000 or less with landowner written approval on form MDT-ROW-414). Less complicated acquisitions are defined as acquisitions of fee interests, easements or temporary interests in land and/or minor improvements including minor cost-to-cures.

The purpose of this flexibility is to streamline acquisition procedures. The person performing the appraisal waiver valuation must have sufficient understanding of the local real estate market to be qualified to prepare the waiver valuation, but since the waiver valuation isn't an appraisal as defined in the **Uniform Act**, the detail required in appraisals isn't warranted. In addition, it is not necessary for the property owner to accompany the preparer during the inspection of the property.

This flexibility will allow agents and/or fee appraisers that specialize in appraisals to focus on addressing more complicated valuation assignments.

Initiation and use of this procedure are left to the discretion of the Appraisal Section Supervisor and District Right-of-Way Supervisor. Acquisition may be accomplished by personal contact or correspondence.

It is mandatory that MDT, when using this procedure, meet minimum acquisition requirements, maintain equitable treatment of landowners and be especially aware of project impacts.

**49 CFR 24.102(n)(2)** states that:

“No person shall attempt to unduly influence or coerce an appraiser, review appraiser, or waiver valuation preparer regarding any valuation or other aspect of an appraisal, review or waiver valuation.

Persons functioning as negotiators may not supervise or formally evaluate the performance of any appraiser or review appraiser performing appraisal or appraisal review work, except that, for a program or project receiving Federal financial assistance, the Federal funding Agency may waive this requirement if it determines it would create a hardship for the Agency.”

The FHWA has authorized MDT to utilize review appraisers to approve appraisals (of any dollar amount) and waiver valuations (greater than \$15,000 but less than or equal to \$35,000) when the appraisal or waiver valuation is prepared by a staff or fee appraiser who is under the direct supervision of the individual intending to negotiate the acquisition.

For waiver valuations of \$15,000 or less, a District Right-of-Way Supervisor may perform the negotiation functions even if he/she approves the waiver valuation that was prepared by his/her subordinate (staff or fee appraiser) as this is within the authority of the single agent acquisition process.

#### **4-3.4            Valuation Process**

Valuation process requirements for right-of-way acquisition under the administrative waiver valuation procedure are met by taking the following steps:

#### **4-3.5            Waiver Valuation**

The use of a Waiver Valuation (MDT-ROW-470) is acceptable when factors, including the following, are present:

- a. highest and best use of property is not controversial.
- b. zoning of the property is not in question.
- c. Property improvements are consistent with highest and best use.
- d. value conclusions are based upon readily available market data.
- e. there are no depreciation and/or benefits to the remainder.
- f. no portion of the estimated compensation is compensable depreciation that is not obviously less than depreciation to the remainder uncured; and
- g. The property is not contaminated.

Use of the waiver valuation form is straightforward and basic to the procedure. The land value analysis, which appears as Item 4 on the MDT-ROW-470 form, may consist of the following:

- a. Where the value is \$15,000 or less, the acquisition agent inquiries into recent sales of similar properties in the area to provide a reasonable foundation of land values.

This can be done by reviewing other recent appraisals on the project, project reports, sales catalogs, or talking to realtors or others who have knowledge of current sales. An explanation of the land valuation analysis including the data source(s) is required to provide a reasonable justification of the estimated conclusion of value.

- b. Where the value is over \$15,000, the acquisition agent is required to include at least three confirmed sales along with applicable analysis within the waiver valuation. If a catalog of sales has been prepared, proper reference to the catalog and specific sales, along with an analysis of the value estimation, will suffice.

#### **4-3.6 Cost-to-Cure**

Depreciation in the current fair market value of the remainder, which appears in Item 6 of the form, may be measured by a cost-to-cure. A cost-to-cure can be used only when it is obvious that the cost-to-cure would be less costly than the depreciation to the remainder if uncured. In cases that are questionable, the acquisition agent will briefly explain the situation.

Examples of the use of cost-to-cure are shown below:

- a. Four sprinkler heads are in the acquisition area. The acquisition agent obtains a bid from ABC Lawn Services to revamp the system and attaches the bid to the form. The cost-to-cure is \$800.

- b. There are 45 linear feet of 3-rail, 36-inch-high fence in the acquisition area. The fence is two years old and in good condition. Marshall Valuation Service shows a cost of \$5.85 per linear foot. The cost-to-cure is \$263.25.
- c. There are a yard light and pole in the acquisition area. The agent, called Ed Smith of D & B Electric, states that it would cost \$150.00 to move and reset the yard light.

Minor cost-to-cure estimates that don't exceed \$1,500 require no written bid.

#### **4-3.7            Unit Values**

To the greatest extent possible, on projects where there are both appraisals and Waiver Valuations, the acquisition agent should consult with the appraiser(s) to maintain consistent unit values. It is the responsibility of the District Right-of-Way Supervisor to maintain consistency in unit values. On larger projects, the preparation of project reports is recommended to ensure this desired consistency. See *Section 3-3.3* (Project Report) of Chapter 3, Appraisal, of the Right-of-Way Operations Manual.

##### **1. Single Agent Acquisitions**

Waiver Valuations will be assigned and authorized by the District Right-of-Way Supervisors or the Acquisition Manager. The assignment may allow for single-agent acquisition, under which the same agent conducts both the valuation function and the acquisition function.

Use of single-agent acquisitions is encouraged whenever deemed appropriate for circumstances when value is \$15,000 or less.

##### **2. Any acquisition over \$15,000 but less than or equal to \$35,000**

Requires the performance of the Waiver Valuation and negotiation functions by separate individuals and requires written approval from the landowner(s) using Form MDT-ROW-414. As mentioned in *Section 4-3.3*, when a Right-of-Way Supervisor intends to negotiate a waiver valuation greater than \$15,000 but less than or equal to \$35,000 and the waiver valuation preparer is under his/her supervision, the waiver valuation must be approved by a Review Appraiser or other District Right-of-Way or Special Programs Supervisor.

Acquisitions estimated to be greater than \$15,000 but less than \$35,000 require an appraisal and review of the appraisal if the valuation preparer is also acting as the negotiator.

### **3. Minimum Payments**

Minimum payments apply in certain circumstances:

- a. For construction permits, construction easements, temporary easements, or other temporary interests such as haul roads, etc., when the actual total compensation is less than \$300, the minimum payment is \$300.
- b. For permanent easements, fee takings, or other permanent property interests, when the actual total compensation is less than \$500, the minimum payment is \$500.

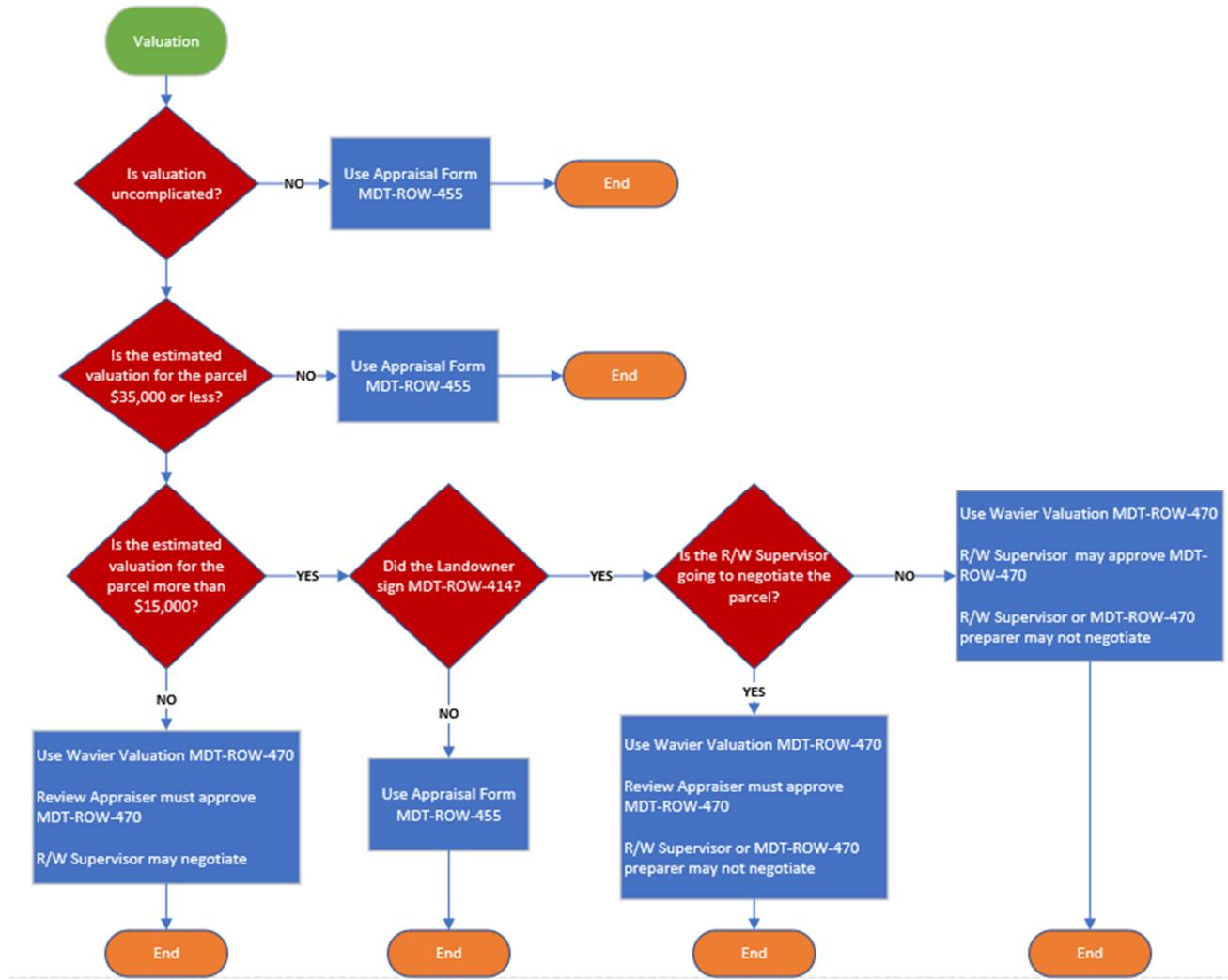
### **4. Limitations**

- a. Total compensation under the single agent procedure cannot exceed \$15,000 per parcel or per agreement where several parcels sharing a unity of use and ownership are included in the same agreement. The sum of the land value, minor improvements, permits, and minor cost-to-cure cannot exceed \$15,000. This limitation will not be waived.
- b. Total compensation under the Waiver Valuation procedure cannot exceed \$35,000 per parcel or per agreement where several parcels sharing a unity of use and ownership are included in the same agreement. The sum of the land value, minor improvements, permits, and minor cost-to-cures cannot exceed \$35,000. This limitation will not be waived.  
All acquisitions over \$35,000 (or over \$15,000 if written landowner approval is not obtained) will require an appraisal per Chapter 3 of the Right-of-Way Operations Manual.

### **5. Correspondence**

The District Right-of-Way Supervisor may elect to handle waiver valuation acquisitions by mail. Correspondence should afford the landowners the opportunity for personal contact to inspect the property and explain or discuss any questions they may have.

#### 4-3.8 Waiver Valuation/Appraisal Flowchart



#### 4-3.9 Minimum Requirements

Compliance with Title III of the ***Uniform Real Property Acquisition Act*** is required whenever MDT uses a Waiver Valuation. The Act requires MDT to offer the “owner” the full amount of the determined value, or the appropriate minimum payment, in writing. MDT must provide the owner with a summary statement. A copy of the Right-of-Way Agreement can serve as a written offer and summary statement if the acquisition agent includes standard clause 301.32 in the agreement.

The acquisition agent should consult the Act for other applicable policies in the Act. Compliance with applicable policies is mandatory.

#### **4-3.10 Plans and Special Construction Features**

The District Right-of-Way Supervisor provides the acquisition agent with right-of-way plans, construction plans and cross sections. Detailed drawings and layouts, utility and signing plans, and special provisions also should be available. The acquisition agent must be able to explain the effect of the acquisition and construction to a property owner. This will include the following:

**1. Acquisition**

Explaining the nature, size, and extent of the proposed acquisition.

**2. Changes**

Explaining proposed changes in the roadway grade adjacent to the property and the probable effect.

**3. Proximity**

Identifying the proximity of the right-of-way line and of the construction to existing improvements.

**4. Drainage, Irrigation**

Explaining the relocation or changes in drainage, irrigation, and other watercourses.

**5. Site Improvements**

Identifying the removal of trees, shrubs, bushes, and other natural objects.

Explaining the effect on land surface improvements (e.g., fences, access roads, sidewalks, approaches, driveways, utilities).

**6. Access**

Discussing access provisions of new projects, including the impact of limiting access.

**7. Construction**

Identifying construction features (e.g., cut and fill slopes, roadway width, typical sections).

#### **4-3.11 Project Familiarization and Parcel Inspection**

Acquisition agents must be familiar with the project, the project area, local government operations, zoning, major business activities, neighborhood services and area activities.

The acquisition agent must read the preliminary engineering reports, make a field inspection, and study the appraisal and supporting data prior to meeting with the property owners. Any appraisal questions, including possible errors or omissions, must be brought to the attention of the District Right-of-Way Supervisor, and must be resolved.

#### **4-3.12 Courthouse Records Check**

The acquisition agent must check courthouse records for any changes or encumbrances on the title before the acquisition and again prior to entering into an agreement.

The courthouse check includes a search for any new deeds, Notice of Purchaser's Interest, contracts for sale, leases, mortgages, liens, easements, judgments, decrees, probates, bankruptcies, injunctions, trusts, etc., that may have occurred since the date of the title commitment. An updated title commitment is not ordered by the Right-of-Way Design Section unless the commitment is older than two years. A new commitment should be obtained if the current one is older than two years or if there is perceived risk with the acquisition.

Since title commitments will not necessarily be current, the acquisition agent should be diligent about their courthouse record checks.

The title check must include the following:

**1. County Clerk and Recorder's Office**

Review the Index of Deeds, Mortgages and Liens. Check for ownership changes or newly filed documents for the property from the date of the most recent title commitment. Smaller courthouses may use a Miscellaneous Index to record unusual documents. Larger counties microfilm or digitize documents, and the method of indexing and recall may vary.

**2. Clerk of the District Court**

Acquisition agents may have to ask for assistance in obtaining information on judgments, decrees, injunctions, guardianships, pending probate proceedings, bankruptcies, etc.

**3. County Appraisal/Assessment Office**

Changes in title, or impending changes, addresses and assessments can be found in the appraisal/assessment records. The assessed value and ownership of land and improvements are shown on these records. In addition, the agent may find information on structures, land classification, and sometimes plats of subdivisions and ownership.

4. Review Schedule A of the title commitment for required supporting documentation. If title changes are encountered, the agent must obtain copies of documents for review, verification and file documentation, and email these documents to the Right-of-Way Design Section.

#### **4-3.13 Planning the Interview**

Appraisers and their appraisal histories are good sources of landowner information. Potential conflicts can be evaluated prior to any personal contact.

The acquisition agent must determine how to present and use the available information to complete the acquisition. The acquisition agent must anticipate problems that are likely to arise and be prepared to deal with them.

#### **4-3.14 Parcel File and Document Preparation**

The acquisition agent prepares a package containing all the documents and forms required to complete the purchase. All documents and forms must be complete and ready for signature. Typically, a package will include the following documents and forms for execution by the landowners, as well as copies of each document for the landowners' records:

- Deeds, easements, or other appropriate instruments of conveyance
- Right-of-Way Agreements
- tax reimbursement application
- Realty Transfer Certificate (RTC)
- W-9 Request for Taxpayer Identification Number & Certification
- A DOA form 204 from the landowner is required for all direct deposit payments.

Other documents that might be required include:

- Agreement and Grant of Possession
- Releases
- Material Site Agreements
- Haul Road Easement
- Partial Release of Mortgage and/or Partial Reconveyance of Trust Indenture
- Irrigation Agreements

Refer to *Section 4-6.14 (Typical Right-of-Way Packages)* for a list of documents in typical acquisition packages. The acquisition package also includes the brochure "Right-of-Way Q & A", the Non-Discrimination & Accessibility brochure, all written offers and summary statements, plats, plans and copies of all documents requiring signature for the landowner's file.

In addition to the documents requiring the property owners' signatures, the acquisition agent's file will contain an appraisal or waiver valuation, a Review Appraiser's determination if applicable, title commitments, a salvage appraisal, acquisition history, earlier correspondence, and other material pertinent to the acquisition.

When a person, business, or personal property is displaced due to a project, the Acquisition Agent shall coordinate with the Relocation Specialist in the Acquisition Section and provide the landowner with the Montana Relocation Assistance Program booklet and form MDT-ROW-381 general notice letter. Refer to Chapter 5, Relocation Assistance, of the Right-of-Way Operations Manual for document and file requirements.

#### **4-3.15        Errors and Corrections on Plans or in Appraisals**

If discrepancies, errors, or misunderstandings become apparent, they must be resolved with the District Right-of-Way Supervisor. The District Right-of-Way Supervisor may be able to resolve the problem or instruct the acquisition agent to seek corrections as follows:

##### **1. Right-of-Way Plans**

Appraisals and acquisitions are predicated on what is shown on the right-of-way plan. Any discrepancies, errors, omissions, or changes must be resolved and processed through the Right-of-Way Design Section.

##### **2. Reviewer's Determination of Value**

If the District Right-of-Way Supervisor agrees that there are valid concerns about the appraisal, the supervisor resolves the problems with the Review Appraiser. Problems with the reviewer's determination must be resolved in writing through the Appraisal Supervisor.

The acquisition agent need not be in full agreement with the opinion of the appraiser but must be able to explain the appraisal to the property owners.

## **4-4 ACQUISITION PROCEDURES**

### **4-4.1 General**

The acquisition process involves preparing documents, making all reasonable efforts to contact the owner or the owner's representative, making appointments, initiating correspondence, updating title information, meeting with owners, closing the transaction and clearing any outstanding interests.

### **4-4.2 Contacts, Appointments, and Interviews**

Initial contacts can be made by telephone, mail, email, or a personal appearance etc... at the owner's residence. Appointments should be at the convenience of property owners, preferably occurring with all persons having an interest in the property.

Information on where to contact the owners may be found in appraisals, title commitments, county courthouses, online sources or from adjoining owners. On Indian reservations, current addresses can be obtained from the local Bureau of Indian Affairs Office, Realty Department. To identify and locate responsible officials of oil companies, major industries, railroads, institutions and other enterprises, inquiries can be made through local offices and businesses.

If non-English speaking or elderly owners or lessees are encountered, the acquisition agent must arrange to have an interpreter or relative present during the discussions or have the owner provide an interpreter.

In the case of corporations, contact the appropriate officers, agents, or attorneys. Where all reasonable efforts to make personal contacts have failed, use certified or registered mail

Correspondence must include a copy of the Right-of-Way Q & A brochure, Civil Rights Discrimination Complaint Form, a written offer with summary statement, tax reimbursement instructions and forms (if applicable), a copy of the right-of-way plans, and copies of all documents requiring signatures for the landowner's file.

Acquisition histories must include the dates, contents, and purpose of correspondence and sufficient detail on all contacts between the agent and the property owner. Copies of all correspondence must be kept with the acquisition histories.

#### **4-4.3            Initial Meeting**

The acquisition agent should establish a goal and follow-up plan for each contact with the owner. The acquisition agent acts as a facilitator in reaching a fair and equitable settlement. During the initial meeting, the following should be accomplished or discussed:

##### **1. Title Verification**

The acquisition agent verifies the title information and other data contained in the appraisal and title commitment. Note any errors or deficiencies in correction.

##### **2. Construction**

The acquisition agent describes construction features of the proposed transportation project. This includes the type and width of the roadway surface, width of driving and parking lanes, mailbox(s), curbs and gutters, drainage features (including any changes of existing drains and natural water courses in the vicinity of the property), alterations of existing roads or streets and grade elevations with respect to the existing ground elevations.

##### **3. Right-of-Way**

The acquisition agent should inform the landowner of how and when the proposed right-of-way acquisition and construction will affect the property. The following items are of importance:

- The width of the proposed right-of-way.
- The amount and type of land to be acquired.
- Buildings or other improvements to be acquired.
- Distances between the right-of-way line and remaining improvements.
- Changes in the grades will affect the remaining property.
- Severance of the property.
- Alteration of irrigation and drainage ditches or other water courses.
- Limitations, restrictions, or control of access.
- Other changes or impacts.

#### **4-4.4            Landowner/Acquisition Follow-up**

Any applicable information received from landowners that may influence value, or any counter offers made by landowners will be documented and brought to the District Right-of-Way Supervisor's attention.

Follow-up discussions may occur with engineering, design, and/or appropriate Helena Right-of-Way staff. Some landowner concerns which may impact value are as follows:

- Need for design changes.

- New comparable sales provided by the landowner.
- Overlooked improvements with possible subsequent cost-to-cures.
- Undiscovered or very recent ownership changes.

Note additional pertinent information offered by the landowner including any discussion on valuation concerns. All discussions and correspondence, including e-mail, will be made a part of Parcel Negotiation History.

Landowners should be updated every two weeks, so they are kept apprised of progress or pertinent/applicable issues that were brought to MDT's attention by them, unless otherwise documented in the acquisition agent's history.

#### **4-4.5        Acquisition by Correspondence**

Acquisition by mail or email correspondence may be used on projects in remote areas where travel distances are significant, on projects that require only nominal amounts of additional right-of-way and have little or no effect on the remaining properties, or when personnel are not immediately available for field assignments. Any contact made electronically (e-mail or texts) must be documented and a copy of the electronic document must be placed in the permanent file. Texts can be summarized or print-screened into the history.

Acquisition by correspondence must comply with federal and state requirements. Landowners must clearly understand the extent and nature of the taking and be provided with information on the project and acquisition procedures. All acquisitions by correspondence must meet the following requirements:

##### **1. Right-of-Way Brochure**

The acquisition agent gives owners a brochure entitled, "Right-of-Way Q & A." This document advises property owners of the procedures used to acquire property and of the options if they reject the State's offer. Acquisition agents must give the brochure to owners even though the owners may have received one previously.

To create a record that this requirement has been met, the acquisition agent notes in the acquisition history the date the brochure was given to the property owner. Acquisition agents must be prepared to discuss the rights of property owners during any contact.

##### **2. Written Offer and Summary Statement**

This information may be presented in MDT-ROW-201 or in clause 301.32 in the Right-of-Way Agreement provided it meets the requirements of *Section 4-6.2* (Offer to Purchase and Summary Statement of Just Compensation).

3. Plats or Plans

The plans or plats should show the taking and allow the landowner to determine the extent of the acquisition.

4. Offer of Personal (Face-to-Face) Contact

Include an offer to accompany resident and nonresident property owners, their agent, or assignees, on a site visit to the property.

5. Appropriate Forms for Conveyance

This includes deeds, agreements, tax reimbursement claims, etc.

Copies of all correspondence become part of the acquisition histories and must be submitted with the documents when a parcel is closed or condemned. Prior to condemnation, personal contact should be made to clarify any possible misunderstandings.

**4-4.6 Relocation Assistance**

The following define the relocation assistance responsibilities:

1. Departmental Responsibilities

Relocation assistance is a process requiring special training in governing law (including the *Uniform Act*) and regulations. The District Right-of-Way Supervisor is the lead with respect to initial planning and providing information to the public concerning Relocation Assistance.

2. Relocation Specialist Responsibilities

The Relocation Specialist in the Acquisition Section is responsible for providing guidance to Right-of-Way Agents and for providing relocation assistance to individuals and businesses that are displaced by the project.

3. Acquisition Agent's Responsibilities

Acquisition agents should know the basic principles of the Relocation Assistance Program and will provide relocation assistance in those cases where only personal property is being relocated.

The Relocation Specialist will be providing relocation assistance to individuals or businesses displaced by the project; the Acquisition agent should give the Relocation Specialist at least 10 days advance notice of the appointments where the agent will be making the written offers to the occupants.

The Relocation Specialist should be present when the offer is made to the owner-occupant so he/she can explain the relocation services and other benefits available to the occupant.

4. **Training in Governing Regulations**

The Department will provide or make available to its employees specialized training in governing relocation, laws, regulations, and procedures.

**4-4.7        Option to Purchase**

The Department occasionally uses options to purchase (Form MDT-ROW-228) to assist with planning, to protect an impending acquisition or to relieve landowner hardships. An option is a contract by which a landowner grants the State the privilege, if it chooses, of buying real estate at an initial price within a specified time. The grant of an option is a contract that must be supported by monetary or other form of consideration.

Until consideration is paid, an option is merely an offer that may be withdrawn at any time. Once consideration is paid and the option is executed, the seller cannot withdraw the option. The consideration for an option generally is not deducted from the purchase price of the land.

Some landowners may think that an option establishes the minimum value of the property. Landowners must be informed that the acquisition will be based on appraised value, which may be higher or lower than the option amount.

**4-4.8        Acquisition by Donation**

Right-of-way donations can be accepted only after property owners have been informed in writing of their rights and potential benefits under the ***Uniform Act***, including their right to have an appraisal made and to receive just compensation. If owners choose to donate their property, appraisal is not necessary. The owners need to sign a Waiver of Compensation (Form MDT-ROW-211) in addition to the right-of-way deed and agreements. The State must comply with all other applicable acquisition and relocation assistance requirements.

The Waiver of Compensation is distributed as follows:

1. The signed original is forwarded to the Right-of-Way Bureau in Helena with the parcel acquisition package submittal.
2. A copy is retained by the acquiring organization, if other than MDT (e.g., county, city).
3. Another copy is retained by the property owner.

Where donations are obtained by cities or counties, as in the case of off-system roads and some urban or secondary highway projects, forward the waiver forms for all parcels on the project to the Acquisition Section after all parcels on the project have been acquired.

Although federal regulations don't require appraisal, it is MDT policy to complete an appraisal or waiver valuation in order to establish the value of the land, easements, and improvements for addition of those items onto MDT's asset management system and to enable MDT to use the value of the donated property for the State's share of the funding of the project.

#### **4-4.9            Grant of Possession (GOP)**

A Grant of Possession is an option when there is an impasse in negotiations or for emergency projects. A Grant of Possession provides MDT with legal possession; using a Grant of Possession in no way affects or jeopardizes any right or rights that either party may have under the statutes and the laws of Montana.

The process can be used after approval by the Acquisition Manager or Right of Way Bureau Chief. The form (MDT-ROW-212) is completed by the District Supervisor/Agent and takes the place of the right of way agreement until the right of agreement can be completed. The District Supervisor enters in the ROWA steps should include a Process = Acquisition, Step = Field Closed >Type =Field Grant of Possession. If payment is involved the form is sent to Compliance for processing with a link to the form in the Project Z-folder. The Parcel status remains active in ROWA as the right of way negotiations are continuing

#### **4-4.10           Administrative Settlements**

When agreement with a landowner cannot be achieved through negotiations, it may become necessary for MDT to consider an administrative settlement. This includes situations where it may be in the best interests of the State of Montana to seriously consider expediency of the project and/or cost savings as justification for an acquisition. Administrative settlements should be based on consideration of the factors preventing agreement.

Any settlement authorized by management that exceeds the appraised value or grants landowners any concessions is an administrative settlement. District Administrators and the Right-of-Way Bureau Chief are authorized to make administrative settlements when it is found to be in the best interest of the Department and the public to do so. District Administrators are authorized to approve administrative settlements up to \$50,000 and the District Administrator may delegate this authority to the District Right-of-Way Supervisor by completing MDT-ROW-245 and submitting it to the Right-of-Way Bureau Chief.

At the discretion of the District Administrator and District Right-of-Way Supervisors, acquisition agents may be given authority to enter administrative settlements not to exceed \$2,500 by completing MDT-ROW-246 and submitting it to the Right-of-Way Bureau Chief. Unusual, controversial, or exceptionally large administrative settlements must be brought to the attention of the Right-of-Way Bureau Chief.

The Right-of-Way Bureau Chief is authorized to approve any proposed settlement up to \$200,000. Administrative settlements of more than \$200,000 must be approved by the Preconstruction Engineer and/or Chief Engineer. The Right-of-Way Bureau Chief may delegate this authority to the Acquisition Manager by completing MDT-ROW-244.

At the discretion of the Right-of-Way Bureau Chief and the Acquisition Manager, the Special Programs Supervisor may be given authority to enter administrative settlements not to exceed \$50,000 by completing MDT-ROW-243 and submitting it to the Right-of-Way Bureau Chief.

A written justification using MDT-ROW-299 shall be prepared, and made a part of the permanent file, which states what available information, including trial risks, supports such a settlement. The scope and level of the written documentation is a subjective statement of the facts as determined by the appropriate approving level and needs to be commensurate with the situation, conditions, and the dollar amount involved.

The items to discuss at **the very least** in MDT-ROW-299 are:

1. Explain what the landowner is asking for.
2. Be able to state that the landowner refused to sign without receiving the settlement amount.
3. Be able to state that the settlement is in the best interest of the Department.
4. An example of why a settlement is in the best interest of the Department is when the settlement is less costly to the taxpayers than the cost of the condemnation process. Condemnation costs that should be taken into consideration include costs of obtaining new appraisals, appraiser preparation, expert and witness testimony, value commission/trial expenses, depositions, engineering studies, and attorney fees.
5. Another example is when the costs of delaying the project will exceed the amount of the settlement. When using this rationale, specific areas of cost increase must be provided and discussed. For example, if the price of oil is rising quickly, a delay in letting the project could result in the cost of asphalt having a higher cost so you could have an engineer calculate what the estimated cost increase would be.

6. Overall, the amount of information provided should correspond with the amount of the settlement. For example, if the administrative settlement amount is below \$10,000, then it may be acceptable to say the settlement is less costly than the condemnation process without providing detailed cost data.
7. However, if the settlement is over \$10,000, provide specific cost estimates such as the cost to obtain a new appraisal, the cost of having witnesses testify, the costs if the condemnation is lost, the higher costs that would occur as a result of construction being delayed, the potential cost of attorney fees, etc. Obtain the cost estimates from other MDT staff such as the Appraisal Supervisor, Staff Attorneys, and Engineers.

Provide enough evidence and data to convince the reader the settlement was justified. If there are appraisal issues that could be difficult to defend that could factor into a jury or judge ruling in the landowner's favor, they should be discussed as well.

The appropriate staff member will prepare the written justification in the form MDT-ROW-299 citing the applicable considerations and any pertinent details of conversations with the landowner, Legal Services, or other MDT staff that may be germane to the settlement; and the proper authority must sign and date the form. The form's content should be accurate, clear, concise, and in compliance with **49 CFR-24.102(i)**.

Often land values the Department offers on a project become an issue with several landowners early in the acquisition process. It may become obvious that for one reason or another, MDT has a strong difference of opinion as to what market value for a land use or type is. In these cases, MDT has two options.

One is to reinvestigate the market to ensure its appraised values are appropriate; or two, look at the benefits of administratively increasing MDT's offer for a land classification or classifications to ensure uniformity of value within the project limits.

To reinvestigate the market speaks for itself. If the Department finds that its values are not reflective of the most recent sales, MDT will adjust the appraisals in the appropriate manner and proceed. If the Department finds, however, that its offers are based on the most accurate and current market values, MDT may still want to consider raising the amount it is willing to offer per square foot or per acre on a project administratively to promote fairness and consistency in dealing with landowners. When the District Administrator and/or the District Right-of-Way Supervisor feels this is warranted, the proposal will be made to the Right-of-Way Bureau with supporting information in the form of a written request.

A decision will be reached through discussion with the Appraisal Supervisor, Acquisition Manager, District staff and, if needed, Legal Services. If the decision is made to uniformly adjust the Department's offer, appropriate justification will be documented using form MDT-ROW-299 and made a part of the permanent file.

Approved administrative settlements are documented on the Right-of-Way Agreement (form MDT-ROW-200) by placing a strike through the original total compensation amount and adding the phrase "lump sum" along with the approved settlement amount. Do not document any additional details regarding the settlement. The original amounts in sections 2 and 3 shall remain unchanged and are necessary for payment processing. Any of these revisions made in the field will require the initials of the landowner and the agent.

#### **4-4.11 Counter Offers and Documentation**

All counter offers over the acquisition agent's settlement authority of \$2,500, if so delegated, shall go through District Right-of-Way Supervisors.

These counter-offers will be assessed and evaluated, and the landowner will be notified every two weeks as to the status of their counteroffer.

If the District Right-of-Way Supervisor agrees with the counteroffer and it is within his/her authority, the parcel should be settled. If the counteroffer exceeds the settlement authority of the District Right-of-Way Supervisor or District Administrator, it will be brought to the attention of the Acquisition Manager. It will be at the discretion of the Acquisition Manager to include the Right-of-Way Bureau Chief or Legal Services, if appropriate, in further deliberation of the proposed settlement.

Any settlement that is unusually high in terms of dollars, of a controversial nature, or where justification is marginal, will be brought to the attention of the Bureau Chief by the Acquisition Manager prior to approval. Construction features will require approval of the appropriate engineering or design personnel prior to inclusion in any settlement.

It is not acceptable to delay or postpone action on any counter offers. If a landowner opts not to negotiate any further, it is advisable, with consultation from the District Right-of-Way Supervisor and appropriate Helena Right-of-Way staff, to prepare the package for submittal to Helena for a pre-legal review.

Acquisition agents are responsible for documenting any discussions in which they were involved regarding counter offers in their acquisition parcel histories on form MDT-ROW-208. Any discussions with Helena Right-of-Way staff or Legal Services regarding counter offers or settlements will be documented by both Helena and the District staff and made a part of the permanent file.

#### **4-4.12        Closures and Clearing Outstanding Interests**

Completion of the acquisition involves closing the transaction with the property owners and ensuring that the title acquired is free and clear of liens and encumbrances that could adversely affect the State.

#### **4-4.13        Document Execution by Owners**

After the owners have been properly informed about the acquisition, have accepted the offer, and are prepared to close the transaction, the acquisition agent must have the documents ready for signature. The acquisition agent explains the purpose of each document and how the documents are to be signed.

Signatures and names must be in identical form wherever they appear on plans, reports, legal and/or conveyance documents. Copies of all signed documents are to be left with the signers.

#### **4-4.14        Releases of Mortgages, Leases and Trusts**

Lenders, lessees, trustees, heirs, etc., may not be willing to release their interest in property until their underlying interests have been satisfied. These other interests also must be pursued, and signatures must be obtained before the acquisition package is submitted to Helena for acceptance and payment.

#### **4-4-15        Functional Replacement**

The functional replacement option was developed by the Federal Highway Administration (FHWA) to provide an alternative method of acquiring real property for any highway or highway related project in which federal funds will be utilized in any part of the right of way costs of the project and to compensate for publicly owned property providing essential public services. Regulation reference **23 CFR Part 710.509** (Functional Replacement of Real Property in Public Ownership). Examples are schools, police and fire stations, local parks, fishing access sites, government owned buildings, etc. The provisions of functional replacement do not apply to real property owned by utilities and railroads.

When FHWA concurs, it is in the public interest, the functional replacement of a public facility may be provided instead of a traditional acquisition. The use of functional replacement is at the discretion of the Right-of-Way Bureau Chief, subject to FHWA approval.

Traditional methods of paying for real estate require a deduction for the depreciation of the existing facility that is being acquired for a public project. Functional replacement represents a departure from this tradition. It provides a method of paying the cost necessary to replace the facility being acquired with a similar needed facility that offers the same utility, including betterments and enlargements required by present-day local laws, codes, and reasonable prevailing standards in the area for similar facilities.

#### **4-4-15.1 Requirements for Functional Replacement**

Federal-aid funds may participate in functional replacement costs only if:

- Functional replacement is permitted under state law and MDT elects to provide it.
- The property to be functionally replaced is under public ownership and use.
- The replacement facility will be under public ownership and will continue the public use function of the acquired facility.
- MDT has informed the agency owning the property, in writing, of its right to an estimate of just compensation based on an appraisal of fair market value and of the option to choose either just compensation or functional replacement.
- FHWA concurs that functional replacement is in the public interest.
- The real property is not owned by a utility or railroad.

Federal-aid participation in the costs of functional replacement is limited to costs which are actually incurred in the replacement of the acquired land and/or facility and are:

- Costs for facilities which do not represent increases in capacity or betterments, except for those necessary to replace utilities, to meet legal, regulatory, or similar requirements, or to meet reasonable prevailing standards.
- Costs for land to provide a site for the replacement facility.

#### **4-4-15.2 Functional Replacement Procedures**

If functional replacement is to be considered, the acquisition agent will first meet with the owning agency to discuss the effect of a possible acquisition and potential use of functional replacement. If functional replacement is to be an option for acquisition, MDT will coordinate an appraisal of the property at the earliest practical time and establish an amount it believes to be just compensation and shall advise the owning agency of the amount established.

Subject to the requirements of this directive, the owning agency has the option of accepting the amount of compensation established by the appraisal process or requesting functional replacement.

- The acquisition agent will explain to the owning agency that functional replacement results in MDT taking full ownership of the entire impacted property (total take). MDT will acquire the replacement property in the name of the public entity. Any resulting uneconomic remnants owned by MDT will be considered excess land and available for future disposal.

- The acquisition agent will email the Real Estate Section Supervisor notifying him/her of the excess land parcel as soon as it is identified. If the owning agency desires functional replacement, it will be responsible for initiating and sending a formal written request to the acquisition agent.
- The acquisition agent will present this request to his/her District Right-of-Way Supervisor.
- The District Right-of-Way Supervisor will then send an email request to the Bureau Chief requesting the approval of functional replacement along with a detailed explanation of the transaction, the appraised value of the publicly owned parcel, and the proposed replacement parcel.

If the Right-of-Way Bureau Chief agrees that functional replacement is acceptable and in public interest, he/she will submit a specific written request (form MDT-ROW-324) for FHWA concurrence. Once FHWA has provided concurrence to the Bureau Chief that functional replacement is approved, the Bureau Chief will notify the District Right-of-Way Supervisor to proceed with the acquisition of the substitute site.

## **4-5 ACQUISITION SPECIFIC TYPES OF PROPERTY INTEREST & IMPROVEMENTS**

### **4-5.1 Disposal (Salvage) of Improvements**

Structural and site improvements located in the proposed right-of-way may or may not be salvageable or have salvage value.

The acquisition agent may, at the Department's discretion, grant the landowner the opportunity to retain the improvement(s). If the owner does not retain the improvements, they become the property of the State of Montana and upon notification will be placed under the management of the Real Estate Services Section. The following will also apply:

#### **1. Owner-Retained Improvements**

If the owner retains the improvements, a definite date for their removal must be agreed to. It is the owner's responsibility to police and protect the property until the improvements are made and to leave the site in a safe and appropriate condition. The landowner must notify the Department in writing when removal and site restoration are complete and must request any payment withheld pending removal of the improvement and inspection thereof by the respective district.

**2. Improvements Not Retained**

Improvements not retained by the landowner are administered and managed by the Real Estate Services Section until the Department disposes of them. An inventory of all fixtures and equipment must be included in the acquisition packet.

**3. If Possession is not Immediate**

A date of possession must be established and included in the agreement. The right to enter the remainder of the property and to remove the improvement must be obtained if the improvement sits partially on the landowner's remaining property.

**4-5.2 An Entire Landowner Property (ATotal Take)**

Occasionally, acquisition of an entire property may be appropriate if it is fair to the property owner and mutually beneficial. A total take may relieve the Department of construction obligations including fencing, access, drainage, and other facilities. A total take acquisition is pursued when all the following conditions are met:

1. There is extensive damage to the remaining property.
2. There are justifiable savings in construction costs.
3. The landowner is agreeable.
4. Approval is obtained from the Right-of-Way Bureau Chief.

If relocation benefits provide a replacement dwelling the preferred method for closing both the acquisition and relocation properties should be coordinated by the Relocation Agent.

The Real Estate Services Section (RESS) is responsible for managing a total take after conveyance. The property which is to be categorized as an excess land property. When completing Form MDT-ROW-210, please check "yes" after the question "Does the Parcel involve RESS? and select total take". If the excess land includes improvement(s), the RW Bureau Chief and RESS may consider the need for a home inspection to be completed. The inspection is to assess the current condition of the improvement(s) before determining what property management direction is best for the Department.

The District RW Agent assigned to the total take would work with the landowner and RESS on filling out a questionnaire about the transfer details of the property with improvement(s), (ex. keys, utility services, septic tank, well, appliances, etc.).

Acquisition of a total take is like other acquisitions, but the processes and procedures are simplified. The property's legal description is taken from the owner's last recorded deed of record (i.e., lot, block, or subdivision). The "before value" is sufficient for the acquisition and becomes the offer of just compensation. In addition to a deed and right-of-way agreement, the acquisition agent must withhold a part of the compensation to satisfy outstanding taxes and mortgages.

The withholding(s) should be prorated to satisfy the outstanding taxes and mortgages at the time the Department makes payment, which is usually within 60 days.

When Closing with a Title Company the following procedure steps will take place.

1. Relocation and RESS services should be notified and provided with a copy of the appraisal. (If its Vacant land and there is no personal property, Relocation does not need to be involved).
2. The first appointment with a landowner should have the relocation agent present if residential or commercial improvements are present.
3. If relocation benefits provide a replacement dwelling the preferred method for closing both the acquisition and relocation properties should be coordinated by the Relocation Agent.
4. Upon completion of negotiations, signed R/W Agreement – MDT-ROW-200 or MDT-ROW-229 Buy/Sell Agreement should be provided to the title company. MDT pays closing costs.
5. Set a closing date with Title Company and request a Title Policy and a Settlement Statement. Settlement Statement needs to be received a minimum of 14-working days prior to closing. The title company will prorate taxes accordingly.
6. Title policy is reviewed by District R/W Supervisor and/or Relocation Agent. The Settlement Statement is reviewed by District R/W Supervisor or Relocation Agent if applicable.
7. Set-up form DOA-204-EFT with title company for electronic funds transfer or plan for check payment to be sent to title company.
8. Submit Agreement and Settlement statement to compliance for payment at least 10-days in advance of closing to ensure payment can be processed by closing date. EFT requires DOA review and verification.

#### **4-5.3 Uneconomic Remnants and Excess Land**

An uneconomic remnant is "the remaining part of a larger tract of land that may have little utility or value to the owner" after the right-of-way acquisition. When an appraiser is determining the value of property that will be left with an uneconomic remnant, the Department must offer to purchase the remnant at its before value.

Prior to an offer to the landowner, the acquisition agent will request that Right-of-Way Design prepare the deed. If the owner accepts the offer, the acquisition agent will present the deed to the owner to prevent a delay in a settlement.

Remainders that are not concluded to be uneconomic by the review appraiser may still have little utility or value to the landowner if the landowner can't use the property in the same manner that they used it for prior to the acquisition. These remnants can be acquired administratively upon request by the landowner and approval of the Acquisition Manager.

Uneconomic remnants and remainders are not included in condemnations.

#### **4-5.4 Leasehold Interests**

MDT must acquire from leaseholders any leasehold interest in property required for right-of-way. For purposes of this section, leasehold interest is defined as any person(s) or entity having a written lease with the fee owner. However, if, during negotiations, the fee owner reveals that a verbal lease exists, and requests further negotiations involve their lessee, the acquisition agent shall recognize verbal lessee as having a leasehold interest and obtain acquisition documents as outlined below.

##### **1. Leases with No Compensable Interest**

If the approved valuation document concludes that the lessee has no compensable leasehold interest in the property, the acquisition agent obtains the lessee's signature on a Right-of-way Agreement to demonstrate the lessee's acknowledgment of the land being conveyed to MDT and to acknowledge any construction features affecting the leased property.

A Grant of Possession of Leasehold Interest (form MDT-ROW-237) signed by the Lessee is required when the acquisition is from a DNRC parcel. Prior concurrence of the Utility Section should be obtained before the Acquisition Agent attempts to secure a Right-of-Way Agreement from a lessee on Railroad right-of-way.

##### **2. Leases with Compensable Interests**

If the approved valuation document concludes that the lessee has a compensable interest in the property (e.g., lessee-owned improvements, a below-market lease agreement, etc.), the acquisition agent must address that in the Right-of-Way Agreement and written offer provided to the owner and the lessee.

The acquisition agent must obtain the lessee's signature on the Right-of-Way Agreement and on a Grant-of-Possession of Leasehold Interest.

If the original lease is recorded, the Grant of Possession of Leasehold Interest must be signed and acknowledged by a notary so that it can be recorded.

Regardless of whether the valuation document indicates that the lessee has a compensable interest, the total compensation paid for all property interests cannot exceed the total compensation shown in the valuation document.

If a compensable leasehold interest is indicated by the valuation document, the acquisition agent should attempt to settle the parcel by paying each party in accordance with the distribution of compensation shown on the valuation document.

If the distribution of compensation cannot be agreed upon by the parties, request the party's set up a joint escrow account with the title company. MDT does not have the ability to issue a single warrant (physical or electronic) to more than one payee. The Right-of-Way Agreement needs to indicate a single payment made payable to the title company (escrow account).

The parties involved can determine the allocation of payment outside of MDT negotiations. This can be used in cases where multiple parties cannot agree to the allocated payment terms.

MDT will pay for the title company's fees to establish an escrow account in this situation. The Right-of-Way Agreement will have to be signed by all party's privy to the transaction. Use payment clause 301.03.

Prior concurrence of the Utility Section should be obtained before the acquisition agent attempts to secure a Right-of-Way Agreement or a Grant of Possession of Leasehold Interest from a lessee on Railroad right-of-way.

An additional payment may be made to the lessee of agricultural land for the costs incurred in preparing the soil and planting a crop, if maintained to harvest but prevented from harvesting, or the resulting crop loss.

### 3. Leases on State Lands

Leases of state-owned land normally do not create compensable leasehold interests. An exception may occur when a lessee has incurred costs to make land improvements, and the Department of Natural Resources and Conservation (DNRC) agrees that the lessee should be compensated for improvements.

A lessee of state land also is entitled to compensation for field preparation and crop seedling or, if maintained to harvest but prevented from harvesting, the resulting crop loss. A District acquisition agent must obtain a Right-of-Way Agreement, and a Grant of Possession of Leasehold Interest signed by the lessee. The district acquisition agent shall place these completed documents in the Working Project Parcel Acquisition folder and notify the Special Programs Supervisor with an email these documents are ready to be included for submission to the DNRC with MDT's right-of-way application.

#### **4-5.5 Tenant-Owned Improvements**

Where lessees, licensees, permittees or others on private or public lands have lawfully erected improvements that are permanently affixed to the land, they are considered “tenant-owned” improvements and must be acquired if they are situated on the proposed right-of-way.

A determination whether the improvements or fixtures are real or personal property is made in the appraisal. MDT acquires the rights from the proper owner. MDT commonly encounters tenant-owned improvements on railroad lands, trailer courts and commercial properties. The following applies to tenant-owned improvements:

- 1. Mobile Homes**

Mobile homes and their appurtenances may be considered realty when they are permanently affixed or established on a site.

The acquisition agent obtains title to the trailer unit when concluding an agreement for its purchase unless the owner elects to repurchase it at salvage. An adequate description (e.g., color, size, style) of the unit is included in the agreement if a title is not available. The acquisition agent works out arrangements with the owner for the termination of services (e.g., electricity, water, sewer, garbage) to the property.

- 2. Trade Fixtures.**

Occasionally, questions arise over the status of “trade fixtures” as realty (real property) or personally (personal property). The acquisition agent should refer these questions to the District Right-of-Way Supervisor or to the Acquisition Manager for review.

MDT must reach agreements with the tenant and property owner about which improvements are tenant-owned improvements or fixtures. The acquisition agent prepares an itemized list describing the acquired items and those items to be retained by the tenant-owner. The acquired items must be included in the Right-of-Way Agreement form MDT-ROW-200.

Acquisition agents should discuss and describe what was acquired and the date of possession with their supervisors. District supervisors then arrange for the security of all property acquired through the Real Estate Services Section.

To eliminate any questionable interest in real or personal property, the acquisition agent obtains a quitclaim deed or grant of possession from the tenant.

The acquisition agent also obtains a disclaimer form MDT-ROW-219 Disclaimer of Interest in Tenant-Owned Improvements from the realty owner disclaiming any interest in the tenant's property described. Tenant owners, like realty owners, have the right to reject payment and proceed under law.

#### **4-5.6 Mining Claims**

Federal law permits a valid mining claim to be patented. When a patent is obtained, the owner has full property rights. **MCA 82-2-101 and 102** prescribe the manner of locating claims, the requirements for recording a certificate of location, the requirements of performing annual work, the access rights of owners of mines and the proceedings to obtain a right-of-way across adjacent claims.

##### **4-5.6.1 Patented Mining Claims**

Acquisition of right-of-way on or through a patented mining claim is like the acquisition of other properties. The patent holder has an interest fee and can exercise all property rights inherent with ownership. Patented claims are subject to property taxes. Relocation services are available and applicable to possessors of patent claims.

Title information including the name of the claim, name of the locator(s), date of location, description and type (lode, placer) can be obtained at the appropriate county courthouse, the Bureau of Land Management (BLM) office or the Department of Natural Resources and Conservation (DNRC). Procedural information on locating a claim, improvement work, etc., can be obtained from BLM.

##### **4-5.6.2 Unpatented (Valid) Mining Claims**

By the laws of Montana and the United States, the owner of a valid mining claim has the right to exclusive possession of a claim for mining (lode or placer) purposes. To be valid, a claim must fulfill all the requirements of the law.

Legislation restricts the surface rights of the claim's owner to the amount necessary for mining operations. A claim owner cannot use the surface for any purpose except those related to mining operations.

Title information and location data on valid claims should be on record in the county courthouse. Occasionally, claims may not be recorded and are not discovered until surveyors, appraisers, acquisition agents or contractors are on the site. If a claim is substantially in compliance with applicable laws, it may be valid. The Right-of-Way Bureau Headquarters should be notified and furnished with any information that is available on unrecorded claims. After the validity and rights of claim owners are examined, the Right-of-Way Bureau Chief decides on how to proceed.

Appraisal and acquisition over or through an unpatented mining claim differs from patented claims in that the claim owner only has a right to use the surface for mining purposes. The land still belongs to the government, but payment may be justified for improvements, costs-to-cure, or other damages.

Quitclaim deeds normally replace the standard bargain and sale deed for the acquisition across unpatented claims. Relocation services are available and applicable to possessors of valid claims.

#### **4-5.7 Railroad Lands**

The Utility Section acquires all railroad property needed for transportation projects directly with the appropriate railroad officials. Detailed information on railroad acquisitions is contained in the ***Right-of-Way Utilities Manual***.

##### **4-5.7-1 Non-Operating Railroad Lands**

“Non-operating” railroad right-of-way generally consists of abandoned railroad lines. Non-operating railroad lands may be under lease. If this is the case, the leased areas of the railroad property should be parcelized on the right-of-way plans.

##### **4-5.7-2 Operating Railroad Lands**

Operating railroad right-of-way usually includes the “strip of land” the tracks are located on, freight and switching yards, depots and shops, sidings, spurs, turnarounds, and other facilities.

It is common that lands adjacent to operating railroads contain buildings, parking lots, or other improvements that are leased. If this is the case, the leased areas of the railroad property should be parcelized on the right-of-way plans.

The Right-of-Way Designer or District Right-of-Way staff obtain lease information from the Utility Section. The designer then parcelizes the leasehold interests using the railroad parcel number and the letter L1. Assuming the railroad parcel number is 1, each subsequent leasehold interest parcel is labeled numerically, e.g., 1L2, 1L3, 1L4, etc.

The acquisition of railroad lands is similar to acquisitions from private corporations. District Right-of-Way Agents appraise the land in accordance with *Section 3-2.11 (Railroad Properties)*. If the land value is greater than \$15,000 and less than \$35,000, the acquisition agent will request that the Utility Agent obtain form MDT-ROW-414 (Waiver Valuation - Landowner Approval Letter) from the railroad company. If the land value is greater than \$35,000, the Review Appraiser will provide the Utility Agent and District Right-of-Way Supervisor with a link to the approved MDT-ROW-455 (Appraisal Report) and MDT-ROW-409 (Determination of Just Compensation).

If there are lessees, MDT district acquisition agents must contact leaseholders to obtain agreements and, if there is a compensable interest, grants of possession prior to the Utility Agent acquiring the fee interest. The District Right-of-Way Supervisor will ensure that the Utility Agent is emailed a link to the Z-FINALIZED\_PROJECT-DOCS folder which includes the lessee Right-of-Way Agreement, waiver valuation or appraisal, and negotiation history.

Utilities Agents prepare the legal description for all railroad easements and agreement for review by the Lands Section. The Utility Agent prepares easements and agreements. Construction and Maintenance Agreements address the treatment of crossings, structures, signals, drainage, access, lateral encroachment, fencing and other features that may affect the operation of the railroad. The Utility Section also handles any flagging and signing agreements.

Jones Lang Laselle (JLL) is a real estate agent representing BNSF in all land transactions. JLL charges a minimum flat fee of \$2,500 for each land transaction to cover the administration costs. This fee is negotiated between the MDT Utilities Manager and JLL.

#### **4-5.8 (6)f LWCF**

Acquisition of Right-of-Way -Land and Water Conservation Fund (6)f Conversions Land and Water Conservation Fund Act (LWCF), 6(f) properties are those that were obtained or improved through the LWCF grants to develop public recreational sites. These properties are under the jurisdiction of Montana Fish Wildlife and Parks (MTFWP).

When the department is acquiring land for a highway project and the land is LWCF 6(f) the land is converted from 6(f) to right-of-way. For these transactions, replacement property of equal size, value and usefulness may be required. Special Programs must be involved with these acquisitions. MDT Right-of-Way provides valuations of the acquired land and the replacement property.

The compensation for the acquired 6(f) land is used towards the purchase of the replacement property. If the cost of the replacement property value exceeds the acquisition value, MDT may provide additional funds and will receive credit for the difference in value.

This credit is tracked through MDT Accounting who records the transaction on MDT financial statements as an outstanding accounts-receivable and unique open item key FWP6f. Often, the 6(f) acquisition is minor and the ability to find replacement property of an equal size is prohibitive.

When this occurs, MDT with concurrence from MTFWP will utilize the current available balance of 6(f) credits and adjust the outstanding accounts-receivable balance. Cost to Cure compensation is not part of the 6(f) accounts-receivable process and will be paid directly to MTFWP.

- A cover letter explaining the conversion specifics with credit balance status is sent to MTFWP along with the Right-of-Way Agreement that contains a clause with the conversion specifics. The MTFWP Director signs the Right-of-Way Agreement and conveyance deed. MTFWP, having jurisdiction over the lands, will be responsible for submitting the conversion application request to the National Park Service.
- When these adjustments to the accounts-receivable balance occur, the Special Programs Supervisor will send an email to the Accounting System Operations Section Supervisor, Accounting Treatment Section Supervisor, copying the Right-of-Way Bureau Chief requesting an adjustment to the current accounts-receivable account balance. The accounts-receivable account code is 1203 and uses open item key FWP6f.
- The email request should contain the following information/documentation: a pdf version of the applicable letters sent to MTFWP, and the 6(f)-tracking spreadsheet maintained by Right-of-Way staff.

#### **4-5.9    Underground Missile Cable System**

Underground missile cables are installed throughout the following counties in Montana: Cascade, Fergus, Judith Basin, Wheatland, Lewis & Clark, Pondera, Toole, Chouteau, and Teton.

Orange-topped poles set from 3,000 ft. to 6,000 ft. apart along the various routes identify the buried cable lines. The U.S. Air Force (USAF) recommends that the following procedures be used for the crossing and/or relocation of underground missile cable systems:

1. MDT will need to send email request to relocate or cross USAF missile cable facilities at least 120 days prior to the start of any construction activities that could affect the missile underground cable system either by encasement, relocation, lowering or any combination of the three. Contact the Cable Affairs Office ([cableaff@us.af.mil](mailto:cableaff@us.af.mil)), 341<sup>st</sup> Missile Maintenance, Malmstrom Air Force Base, Montana, for information concerning geographic locations of any underground cables and/or detailed construction specifications.

This is a coordinated effort between the District Right-of-Way Supervisor and Right-of-Way Acquisition Manager.

2. Email the Cable Affairs Office detailed plans (right-of-way, road plan & profile sheets and cross-sections) with a legend on the maps showing the location of the potential conflict of the highway with the missile cable. The missile cable must have at least 3 feet of cover, otherwise, MDT will possibly have to secure additional crossing easement and will be required to install a conduit for the USAF to relocate the cable. Provide the original highway plan and easement so the Air Force can determine whether it has superior easement rights. If the missile cable is disturbed, request the Air Force to submit a cost estimate for the relocation of the missile cables if their rights are superior to the highway. This is a coordinated effort between the District Right-of-Way Supervisor and Right-of-Way Acquisition Manager.
3. Email the Cable Affairs Office, a Right-of-Way Agreement between the Department of the Air Force and MDT. If the cable is clear of any disturbance with the project, the agreement will generally contain the provisions in Items 4 – 6 below. If the cable is disturbed, MDT will request that the USAF provide its consent to cross in the Right-of-Way Agreement or documentation deemed necessary by their real estate section. This is a coordinated effort between the District Right-of-Way Supervisor and Right-of-Way Acquisition Manager.

After the agreement has been executed and consent to cross cable right-of-way is received from the Air Force, the Cable Affairs Office must be notified a minimum of 72 hours in advance of any construction in the vicinity of missile cables. This is a District Construction function.

The 72-hour advance notice is mandatory so that the Air Force can arrange to have a representative on site during any construction.

Costs for all labor, vehicles and materials used in connection with cable adjustments, and for providing communications personnel on site during excavation in the Air Force cable right-of-way, are the responsibility of the party not having superior easement rights.

Under no circumstance will anyone other than Air Force personnel be permitted to relocate the Air Force cable. Severing or damaging the cable due to negligence will result in the Air Force billing the company involved for the cost of repairs.

#### **4-5.10 Fencing**

All Federal-aid highway projects are fenced along the right-of-way line unless a determination has been made in the Scope of Work report that continuous fencing is unnecessary.

- Where fencing exists, MDT will install similar replacement fencing along the new right-of-way line unless otherwise agreed upon with the landowner. Where existing fencing isn't impacted, but is in poor shape, it may be replaced at the discretion of the Right-of-Way Supervisor. In any case, replacement fencing must be a type that is in the MDT Detailed Drawings, Section 607 and is not considered a construction feature, therefore an "NSOP" designation is not required on the ROW Agreement.
- The Project Manager will determine whether existing serviceable cattleguards will be relocated. Gates will be installed at all other approaches as specified in the Right-of-Way Agreement. Farm entrance gate standards for wood, wire and metal gate design are shown in the MDT Detailed Drawing No. 607-02
- The District Right-of-Way Supervisor makes recommendations for fencing solutions at intersecting county and Forest Service roads. This work is coordinated through the Road Design Section.

#### **4-5.10-1 Fencing Procedure**

During the pre-acquisition phase, the need and extent of fencing is determined and documented in the Scope of Work Report.

- During the negotiation phase, the right-of-way acquisition agent explains MDT's fencing plans. Fence construction is done by state contract unless the property owner insists on constructing the fence.

The new fence is the same type as the existing fence, unless otherwise negotiated and agreed upon.

MDT-funded research has shown scientifically that making rights-of-way more permeable allows wildlife such as deer, elk, and antelope to pass through them (over or under) more effectively and quickly, without becoming entangled or trapped within the right of way; while not sacrificing the protection and safety of travelers, and the protection of personal property, i.e., livestock. MDT has adopted the use of a modified farm fence design to promote habitat connectivity. This fence type reduces the chance of entanglement and other impediments to wildlife movement, by making highway rights-of-way more permeable to wildlife moving across the landscape.

MDT modified farm fence is MDT's preferred fence option for new and replacement right-of-way fencing. MDT's standard modified farm fence design (Detailed Drawing 607-01) Type 1 consists of 4 strands of wire with the top and bottom strands being a smooth wire.

The bottom wire is smooth and 18" above the ground surface, the two middle strands are barbed wire, and the top wire is a strand of smooth wire no higher than 42" above the ground surface.

Although Type 1 is preferred, Detailed Drawing 607-01 also provides several alternative 42" modified fence designs which include a bottom wire at 16" above the ground surface and several combinations of smooth and barbed wire. If one of the modified farm fence alternatives are desired over the livestock fencing types in Detailed Drawing 607-00, it is ultimately the landowner's decision to determine the fencing type as he/she will be responsible for maintaining it unless it is interstate fencing.

The acquisition agent should encourage the landowner to consider the modified farm fence options. If the landowner suggests an alternative that will create a more permeable highway right-of-way, the agent should consult their respective District Biologist before agreeing to a design that deviates from one of the alternatives provided in Detailed Drawing 607-01.

In some specific cases, strategically placed segments of a modified farm fence, when constructed or erected directly opposite from one another along the highway right-of-way (rather than along the entire length of the property), may also meet the goal of a more permeable right-of-way. In this instance, MDT District Right-of-Way personnel are encouraged to seek specific guidance from the MDT District Biologist to properly select the site for this alternative. If additional questions or concerns arise before or during acquisition, the MDT District Biologist can provide guidance and additional talking points that can be used during negotiations.

In exceptional circumstances, some MDT projects may include Wildlife Fencing as provided in Detailed Drawing 607-50. Wildlife Fencing provides a barrier designed to prevent wildlife from crossing the highway except at designated crossing locations. Wildlife fencing is typically made of woven wire, is 8 feet tall, and installed inside MDTs right-of-way.

This fencing alternative is also designed with wildlife crossing structures, jump-outs, or at-grade crossings. This type of fencing is considered part of the project.

#### **4-5.10-2 Fencing Rights for High-Hazard Open Range**

The Department provides continuous fencing along sections of primary highway through "high hazard areas" (open range) except where there are natural barriers that prevent livestock from entering onto the highway. The Right-of-Way Bureau may be asked to identify and appraise abutting properties that will be affected by the fences.

The District Right-of-Way Section contacts abutting property owners and obtains easements and/or other recordable agreements that give the State sufficient rights to construct the fence.

Agreements specify the compensation to be paid, the type of fence to be built (based on the type of livestock being raised on the property) and the location of cattleguards, gates, stock passes and other land service facilities to be constructed by the State. The agreement provides that the property owner will maintain the fence and will release the State from any future liability or claims for damages to the abutting property resulting from the construction or maintenance of the proposed fence.

This type of acquisition is unusual. Problems or questions should be referred to the Acquisition Manager.

#### **4-5.11 Irrigation Canals, Private Ditch Co. and Dual/Multiple Owned Facilities**

Water rights are a valuable property asset, and delivery systems must be protected, replaced, or adequately compensated for whenever they are disturbed. Early coordination between canal company officials and department engineers is necessary to ensure adequate and acceptable replacement of facilities when a project involves a major canal. Changes in minor ditches and facilities are coordinated with owners along with the project.

If the irrigation facility owner determines that an irrigation crossing is not needed, they may be offered a minimum payment of \$500 for each removal for incidental costs incurred for execution of documents, correspondence, etc.

For larger settlements, a documented justification of cost is required and must be submitted to the Acquisition Manager and/or Bureau Chief for approval prior to agreement. A release (Form MDT-ROW-262) should be signed by the property owner and submitted with the acquisition documents.

#### **4-5.12 Irrigation Districts/Major Canal Companies**

When a project reaches the acquisition stage, major design and engineering decisions and problems usually have been resolved with canal companies. District Right-of-Way Sections prepare Irrigation Agreements (Form MDT-ROW-273) containing the principal elements of design, construction, coordination, and property right transfers. The exhibit for the agreement should contain the following items stamped "Exhibit A": title sheet, ownership sheet and plan sheets that show the irrigation parcel; all pertinent construction plan and cross section plan sheets that identify the parcel's irrigation features.

#### **4-5.13 Private Ditches and Dual or Multiple Owned Ditches**

Provisions for altering private irrigation systems can be included in the right-of-way agreements (Form MDT-ROW-200) with on-project owners. Separate irrigation agreements (Form MDT-ROW-273) should be obtained on multi-owned irrigation facilities and executed by all users/owners. If changes are significant, it may be necessary to add additional protective clauses to the agreement, ensuring landowners that water will be available during the irrigation season.

#### **4-5.14 Water Resources Division (DNRC) Facilities**

The Water Resources Division has requested that all contacts regarding their irrigation facilities be conducted and concluded with and through their Helena office. The Right-of-Way Bureau enters into acceptable agreements with the Water Resources Board covering approved construction features and a release of easements.

#### **4-5.15 Access Control**

Access control is implemented through a recorded access control resolution that is approved by the Highway Commission and regulated through MDT's Traffic Operations and Analysis Unit (Access Management Specialist). Access Control is considered a governmental police power; therefore, it is not considered a "taking" or a property owner right that requires just compensation to the landowner.

If access control is identified on the right-of-way plan title sheet, the first right-of-way acquisition activity is to mail form MDT-ROW-235 to each parcel as a courtesy notification to the landowner. The Right-of-Way Agent will perform this activity. Right-of-Way Agents will complete form MDT-ROW-295- verifying access control letters were sent to each landowner. This form will be saved electronically in the project Z-folder of the Helena share drive.

During right-of-way negotiations, any new or modified approach requests will need to be reviewed and approved using the existing approach permit application process.

#### **4-5.16 Signs, Sign Sites, and Illegal Signs**

Lawfully erected advertising signs within a proposed right-of-way are handled in the same manner as any other improvement in real estate. They are acquired based on their appraised value or relocated with a cost to cure. Right-of-Way Agreements involving impacted signs should include the standard clause 301.45.

**On-Premise Signs:** Compensation for purchasing or relocating on-premise signs should be included in the land appraisal and negotiated along with the property owner's land acquisition.

**Off-Premise Signs:** Off-Premise Permitted Signs should be parcelized on the right-of-way plans and negotiated for acquisition or relocation based on whether they are conforming, or non-conforming as determined in the sign valuation.

If an off-premise sign cannot be relocated, it must be purchased at its fair market value, and the sign owner should be offered the option of retaining the sign for its salvage value. Sign valuations will be calculated using the MDT-ROW-481 Off Premise Sign – Valuation Report. District Right-of-Way Supervisors will review and approve form MDT-ROW-481 when the value is less than \$15,000. When the value exceeds \$15,000, a Review Appraiser must review and approve it.

**Off-Premise Sign Sites:** If a legally permitted off-premise sign cannot be relocated and the property owner is going to lose the sign site because of MDT acquisition of the sign and sign site, the property owner must be compensated for the sign site. To determine compensation for the sign site, the appraiser should use the form MDT-ROW-480 Sign – Site Valuation. Compensation for the sign site must be addressed within the property owner's land appraisal.

The form MDT-ROW-210 requires notification from the Special Program Supervisor for all off-premise permitted sign relocations or removals. **Illegal Signs and Signs encroaching on MDT Right-of-Way:** Illegal signs are signs that were erected in violation of rules or regulations in-place at the time the sign was erected.

Non-conforming signs that were lawfully erected or altered, but no longer conform to the current regulations, are not illegal signs.

Illegal signs within the proposed new right-of-way limits and signs encroaching on MDT's existing right-of-way should not be purchased or relocated by MDT. However, these signs should be parcelized on the right-of-way plans.

The purpose of parcelizing is to ensure that the sign owner is notified that the sign must be removed prior to project construction. The acquisition agent will notify the sign owner that the sign must be removed at the sign owner's expense prior to construction and, if it is not removed, MDT and/or its contractors will dispose of the sign as MDT sees fit.

Chapter 8 of the Operations Manual contains details on Outdoor Advertising Control.

#### **4-5.17 Timber**

Often, there is timber on the land that is acquired for transportation purposes. Timber purchase and disposal decisions usually are made on a case-by-case basis. The appraiser determines if the timber contributes to the value of the property, based on the highest and best use of the property and on the comparable sales used to determine land values. It may be necessary to retain the services of an Independent Fee Timber Cruiser.

Marginal or non-marketable quantities and types of timber are cleared from the right-of-way by the Department's contractor or are removed by the landowner. Marketable timber acquired by the Department is harvested as part of the prime contract and normally is handled during project construction.

Lumber companies (as owners of affected property) may ask that the timber be cut and decked on their adjoining property for their disposal.

#### **4-5.18 Underground Vaults, Tanks and Passageways**

Known private underground facilities (e.g., vaults, tanks, passageways) are shown on right-of-way plans and arrangements are made to preserve or to remove them.

Underground facilities discovered during acquisition should be brought to the attention of the District Right-of-Way Supervisor.

Underground facilities are addressed in the appraisal and acquisition process by purchase, relocation, or replacement. Encroaching facilities are the responsibility of the owners, but previous owners may have abandoned the facility.

Therefore, Department action often is required to prevent delay and undue hardship. MDT obtains agreements to allow the Department to fill the cavities and provide support (e.g., walls, cribbing) for the roadway.

#### **4-5.19 Underground Storage Tanks in the Proposed Right-of-Way**

Underground Storage Tanks (UST's) in the proposed acquisition area are probably the most common hazardous materials situation that MDT will encounter. Standard clauses 301.53 and 301.54 contain language that should typically be used in the right-of-way agreement to address USTs located within the proposed new right-of-way. However, each situation is unique, and the clauses may need to be revised on a case-by-case basis.

When in doubt about the language that should be used, the acquisition agent should consult Environmental Services, Legal Services, and the Acquisition Manager. The following are some facts that should be known prior to preparing the Right-of-Way Agreement:

- 1) Is the UST system active or inactive?
- 2) Is the current owner currently operating the system or did they operate the system in the past?
- 3) Is the system in compliance with applicable rules and statutes? The acquisition agent or a representative from the Remediation and Assessment Section should consult DEQ to determine this.

#### **4-5.20 Water Wells and Springs**

Water wells or springs may be damaged and are addressed in the appraisal. Other wells or springs on remainder parcels may be adversely affected by construction. The owner then may file a damage claim, alleging that the project impaired the quantity and/or quality of the water.

If a landowner refuses to settle an acquisition until assurances are offered that MDT will safeguard a well or spring, it is necessary to have data on the quality and quantity of water prior to any construction. The agent should add a clause to the Right-of-Way Agreement to provide MDT and/or its contractors with permission to enter their property to test the wells before, during and after construction. In these cases, the agent should have the District Right-of-Way Supervisor submit a request to the Project Manager to include special revisions in the contract for water well system protection and testing or vibration monitoring prior to, during and after construction, as appropriate.

#### **4-5.21 Encroachments**

Acquisition agents should be aware that illegal encroachments are not compensable and do not appear as “pay items” in appraisals.

Landowners must remove non-permitted encroachments prior to construction, or they may be cleared, or destroyed, as part of the project clearing. A more detailed discussion on encroachments appears in Chapter 7.

#### **4-5.22 Land Exchanges**

Landowners occasionally request that the Department convey excess or unneeded MDT property to them in exchange for the property MDT needs from them.

The acquisition agent must obtain permission from the District Right-of-Way Supervisor, Real Estate Section Supervisor, and Acquisition Manager prior to entering into an exchange agreement. The agent prepares the agreement using standard clause

301.51. The Real Estate Section Supervisor must approve the exchange language prior to presenting it to the landowner. Exchanges are governed by **MCA 60-4-201** which requires notification of all landowners whose property is adjacent to the land proposed for exchange, reference form MDT-ROW-153.

Once the exchange is agreed upon by the landowner and approved by the District Right-of-Way Supervisor and/or Acquisition Manager, the Real Estate Services Section Supervisor shall be responsible for completing the exchange and ensuring that all the terms of the agreement are followed. The exchange will not be completed until after the project has been constructed.

#### **4-5.23 Discharge of Easements**

Landowners occasionally request that the Department discharge excess or unneeded highway easement as part of their negotiations. MDT cannot discharge a highway easement to an individual or entity. When MDT discharges a highway easement, it abandons its interest in the land. Caution should be taken as the adjacent landowner requesting the discharge may not be the underlying fee owner of the easement area. Reference form MDT-ROW-186. The acquisition agent must implement standard clause 301.52 in all agreements involving a discharge. The Real Estate Services Section Supervisor must approve any deviation from this discharge language.

Once the agreement is signed by the landowner and approved by the District Right-of-Way Supervisor and/or Acquisition Manager, the Real Estate Services Section Supervisor shall be responsible for completing the discharge of easement. The discharge will not be completed until the project has been constructed.

#### **4-5.24 Sites Containing Hazardous Materials**

Hazardous material is a substance that poses a threat to human health or the environment. Typical hazardous materials are substances that are toxic, corrosive, ignitable, explosive, or chemically reactive.

Occasionally the Department needs to acquire property that contains or may contain hazardous materials. There are several types of businesses that use hazardous materials. They include, but are not limited to, the following: service stations, gas stations, oil refineries, automotive repair shops, dry cleaners, railroad fueling facilities, post and pole yards, junk or salvage yards, chemical manufacturers, landfills, mines, farms, etc.

Generally, hazardous materials should be dealt with at the earliest possible stage of the project. When the acquisition agent becomes aware that an acquisition may affect a property containing hazardous materials, the agent should proceed as follows:

- 1) Review the environmental document to determine if it addressed the situation.
- 2) Review the appraisal to determine if it addressed the situation.
- 3) Notify the appropriate Right-of-Way Supervisor of the situation.
- 4) Notify the Remediation and Assessment Section of the Environmental Services Bureau of the situation. Upon being notified, Environmental Services may visit the site, collect soil, and water samples, etc.
- 5) Prepare the Right-of-Way Agreement with the appropriate language.
- 6) Have Legal Services and the Remediation and Assessment Section review the agreement prior to presenting it to the landowner.

The acquisition agent is responsible for preparing the Right-of-Way Agreement to appropriately address how the hazardous materials will be handled. The following guidelines should be followed when preparing the Right-of-Way Agreement.

- 1) Whenever possible, MDT should acquire the property in fee.
- 2) MDT should not pay for the cleanup of hazardous materials. The party responsible should be required to clean up the property prior to MDT taking possession. Exceptions to this requirement shall only be made after the approval of the Acquisitions Section Manager.
- 3) If a fee interest that is free of hazardous materials cannot be obtained, other options such as only acquiring an easement or revising the plans to avoid the contaminated property should be researched.

#### **4-5.25 Re-Establishment of Property Monuments**

State statute requires MDT to restore or replace all monuments disturbed or destroyed because of MDT activities. MDT Survey staff are responsible for locating and filing existing monumentation. MDT's construction phase is responsible for ensuring each disturbed or destroyed monument is restored or replaced. This coordination will be the responsibility of the project manager(s).

Establishing monuments at the property corner along the new right of way boundary is not required by law, however, upon a landowner's request the cost to survey and establish these new monuments can be negotiated as an administrative settlement. This is only applicable to new monumentation along the new right of way boundary.

The preferred method to compensate landowners for new monumentation is through a reasonable contractor estimate paid directly to the landowner via a ROW Agreement. Alternatively (not recommended), MDT can agree to reimburse the landowners directly upon receipt of an invoice from the surveyor (must be a PLS or under the direct supervision of a PLS).

The landowner shall have this survey completed and is responsible for submitting a bill (or paid invoice) within six months of the Grantor's signature on this Right-of-Way Agreement, whichever comes first. Landowners can receive an additional administration and oversight fee to compensate them for the time and work needed to hire a surveyor and oversee the work. The ROW Agent should add a 5% administration and oversight fee payment (or \$50 minimum, \$1,000 maximum) to the invoice or estimate total.

The District ROW Supervisor is responsible for adding a "Note" to ROWA to track all outstanding monumentation obligations. The ROW phase should not be final vouchered until all outstanding payments are processed, or the time requirements have expired, whichever comes first.

See *Mont. Code Ann. § 70-22-115, § 70-22-105, § 76-3-403 and ARM 24.183.1104.*

#### **4-5.26 Negotiations Only Parcels**

Some parcels do not require acquisition but have construction items or features such as approaches and fencing that need to be agreed to. These parcels will be labeled "For Negotiations Only" on the right-of-way plans. Obtaining a Right-of-Way Agreement signed by the landowners and lessees is the preferred method for closing these parcels. Consult with the Acquisition Manager prior to deviating from the preferred method.

#### **4-5.27 Owner Notification Only Parcels (ONO)**

Some parcels that do not require acquisition and do not need construction items or features addressed, may be shown on the plans to ensure that the landowner is notified about the project or a specific issue relating to the landowner's property.

These parcels will be labeled "Owner Notification Only-ONO's" on the Right-of-Way plans and do not require any further action. Occasionally, the acquisition agent may need to send a letter to adequately inform the owners of the project or the specific issue.

When a parcel transitions from an acquisition or negotiation only parcel to an ONO, the ROWA parcel information must be updated with a status note, change the acquisition type, and field close the parcel. Any documentation that supports the revision to ONO and any communication with the landowner should be transmitted to Helena through the normal 210 submittal processes for the documentation to be stored for the long-term retention.

#### **4-5-28 Acquisition of Conservation Easements**

A conservation easement is an interest in real property established by agreement between a landowner and a land trust or unit of government to achieve certain conservation purposes which run with the land.

The landowner voluntarily accepts use and development restrictions in exchange for state and federal tax advantages or other compensation. The landowner continues to own and operate the land consistently with the easement objectives and the easement holder has a responsibility to ensure compliance with the terms of the easement and to enforce the correction of any violations.

The easement holder may be entitled to receive a percentage of the acquisition compensation based upon the appraisal, financial arrangements or agreement between the parties.

The conservation easement document, which often does not include financial interest allocation, should be included in the title commitment or available from the Clerk & Recorder's Office.

The property burdened by the conservation easement will be parcelized normally and the easement holder interest parcel will be the same number as the suffix "CE". Once the waiver valuation or appraisal is approved, the Right-of-Way Agent will begin negotiations with both the fee interest landowner and the conservation easement holder.

If the valuation report does not contain the allocation distribution between the parties, the agent should obtain the allocation percentages from the easement holder in writing so it can be applied as an allocation of the compensation between the parties. In the event the easement document is not available, or the easement holder is not willing to release the easement document or allocation distribution, consult with the Acquisition Manager.

The best practice is to prepare a single Right-of-Way Agreement containing parcel and ownership information for both the landowner and the conservation easement holder.

The agreement will show total compensation, and the payment clause will split the payment based upon the percentage either outlined in the conservation easement or provided by the conservation easement holder. Both parties sign the same agreement even if they do not sign on the same signature page.

There may be times when the landowner and/or the easement holder do not want to share a single Right-of-Way Agreement to keep their negotiations and potential settlement figures confidential. In this circumstance, two separate agreements may be necessary. If two separate agreements are required, payment for both parcels shall be submitted to the Compliance Specialist for payment concurrently utilizing one submittal process to help ensure consistent documentation for payment processing and deed recordation.

An administrative settlement for each party may be considered in the event the landowner and/or the easement holder do not agree with the compensation and negotiations have been exhausted.

Easement holders, such as the Montana Land Reliance, may require additional language in the Right-of-Way Agreement. This language must be submitted to Legal Services for review and approval. To transfer ownership to MDT, the landowner should execute a Bargain and Sale Deed, and the easement holder must execute a Quit Claim Deed, Subordination of Deed of Conservation Easement, or other applicable conveyance documents. All original documents should be submitted together for recording—do not send them separately or in multiple envelopes to MDT Headquarters.

If the documents cannot be submitted together for recording, please email the Records Mgmt. Supervisor and Technician. The submission must also include the Real Estate Transfer Certificates (RTC) along with the relevant conveyance documents.

## **4-6 ACQUISITION DOCUMENTATION**

### **4-6.1 Acquisition Documents and Records**

Documents commonly used in the acquisition of right-of-way parcels include:

- Written Offer to Purchase with Summary Statement of Just Compensation (MDT-ROW-201).
- Right-of-Way Agreements (MDT-ROW-200).
- deeds and easements.
- Tax Reimbursement Notice and Instructions (MDT-ROW-203); and
- Parcel Acquisition History (ACQ MDT-ROW-208)

### **4-6.2 Offer to Purchase and Summary Statement of Just Compensation**

Federal regulations require that the State provide the owner and tenants of real property with a written statement and summary at the time MDT makes the offer to purchase.

The statement must include:

- the amounts established as just compensation for the land and improvements and the basis for that amount.
- a separate statement of the damages to the remainder, if any; and

- the estate, or interest, being acquired.

For parcels less than \$15,000 (and for parcels between \$15,000 and \$35,000 where the landowner waiver form MDT-ROW-414 has been completed) these requirements are met by including standard clause 301.32 in the Right-of-Way Agreement. For other transactions, the following procedures apply:

1. Amount Established as Just Compensation

The written offers to purchase (Form MDT-ROW-201) state that just compensation is based on fair market value of the property, disregarding any decrease or increase in the fair market value caused by the project. In the case of separately held interests, the offer includes an apportionment of the total just compensation for tenant-owned improvements and for real property.

2. Identification of Real Property

The real property to be acquired is identified by the owner by providing a copy of the deed and deed exhibit. A printed right-of-way plan should also be provided to the owner.

3. Identification of Improvements

The agreement will identify buildings, structures and other improvements including fixtures, movable building equipment and any "trade" fixtures that are to be considered part of the real property or tenancy for which the offer of compensation is made. Identify buildings by size, type of building (e.g., house, shed, barn) and type of construction (e.g., frame, brick, stucco).

4. Identification of Estate (or Interest)

Identify the owner's and tenant's interests in the agreement. An area being acquired by fee will be shown as "in Fee" and easement areas will be identified as "in Easement". Other real-property interests being acquired also should be identified in the agreement.

5. Identification of Damages

Show the amount of damages or depreciation to the remaining property or tenancy separately on the agreement. Show and identify cost-to-cure items separately.

#### **4-6.3 Right-of-Way Agreements (MDT-ROW-200)**

Right-of-Way Agreements are contracts that bind the State and landowner to certain conditions and terms. They identify the project, property involved, owners, compensation, and any special considerations. Agreements must be accurate, clear, complete and in writing, and must include all the obligations of the State. No verbal "understandings" or commitments can be accepted. Right-of-Way Agreements are MDT's preferred document for acquiring right-of-way, including construction permits, wetlands, etc. When making field edits to Right-of-Way Agreements, Right-of-Way Agents must obtain landowner initials and provide their own initials next to each revision. Be sure handwriting is legible. Landowner correspondence (email) accepting the changes is acceptable if it is difficult to obtain initials. The use of any other form must be approved by the Acquisition Manager prior to its use. Agreements will conform to the requirements described below:

**1. Project, Designation, Property Identification**

Show data identifying the project, federal-aid number, if applicable, and the property and parcel at the top of the Right-of-Way Agreement.

**2. Names and Addresses of Necessary Parties-in-Interest**

Include names and addresses of grantors, contract purchasers, contract sellers, lessees, or other parties to the agreement. Show names on all documents as they appear on the title commitment or latest conveyance document.

If plans, appraisals, or other documents show different spelling or ownership, verify the information. If necessary, a request for changes must be sent to the Right-of-Way Design Section to ensure acquisition from the legal owner(s).

**3. Compensation for Land, Improvements and Damages**

Compensation for land, improvements and damage is broken down and shown in the appropriate place. This information is available from the appraisal and the reviewer's determination.

This breakdown is required so the landowner can determine what part of the payment may be taxable income. Generally, damages are not taxable or can be deferred. The acquisition agent should recommend that owners seek appropriate tax advice.

The Accounting Services Bureau requires that rounding and minimum payments be called out separately under Item 3 of our Right-of-Way Agreements.

Below are two examples of how these items should be shown:

## EXAMPLE 1

Appraisal concludes with land for \$1,203.00, Improvements for \$609.00, and a construction permit for \$345.00. Total Compensation is \$2,157.00, rounded to \$2,200.00.

Items 2, 3 and 4 on the R/W Agreement should be as follows:

COMPENSATION FOR LAND AND IMPROVEMENTS (List acreage and improvements to be acquired.)

XX's acres of land in fee by Deed	\$1,203.00
Improvements	\$609.00
<b><i>Other Compensation</i></b>	
XX's acres temporary construction permit	\$345.00
Rounding	<u>\$43.00</u>
Total Compensation (includes all damages to the remainder)	\$2,200.00

## EXAMPLE 2

Appraisal concludes to land for \$133.00 and a construction permit for \$62.00, Total Compensation is \$195.00, Minimum Payment is \$500.00.

Items 2, 3 and 4 on the R/W Agreement should be as follows:

COMPENSATION FOR LAND AND IMPROVEMENTS (List acreage and improvements to be acquired.)

XX's acres of land in fee by Deed	\$133.00
<b><i>Other Compensation</i></b>	
XX's acres temporary construction permit	\$62.00
Minimum Payment	<u>\$305.00</u>
Total Compensation (includes all damages to the remainder)	\$500.00

### 4. Disbursement of Payment

The agreement must clearly show to whom the payment is to be made, where it should be sent and when it is to be made.

Most agreements only involve a single property owner, and payment can be mailed to the owner. However, properties under contract for deed or other sale arrangements may require a split of the compensation. *Refer to standard clauses 301.01 through 301.09 for specific payment options.*

Identify all amounts withheld for taxes, mortgages, etc., as well as deferred payments. The agreement must show how any refunds are to be disbursed. Correct mailing addresses are important, and acquisition agents should avoid using "in care of" or "city only" addresses.

When making payments to Cities and/or Counties, the warrants must be made payable to and mailed to the City or County Treasurer. If a rural fire department or similar entity has a FEIN separate from their city or County, the payment can be made to the specific entity. Otherwise, the payment must be made to the respective Treasurer. Since School Districts usually have their own federal employer identification number (FEIN), we can make payments to them in the same way they took title to the property.

## **5) Special Considerations**

Agreements may include special provisions relating to road approaches, fencing, irrigation pipe, stock passes, conduits, driveways, private utilities, placement of topsoil, obliteration, disposition of improvements and other items peculiar to the acquisition. Some examples of these special terms can be found in the MDT-ROW-200 Clauses & Index (labeled Form MDT-ROW-200). Acquisition agents and grantors both must initial any handwritten changes or additions to the agreement.

The Right-of-Way Agreement identifies what is considered realty and which personal property items are being acquired. The document must clearly show what agreement has been reached on disputed realty, including permanently attached versus temporarily attached fixtures. To facilitate removal and resale, MDT obtains titles to mobile homes or similar items acquired as part of the realty.

Cases may arise where a "Bill of Sale" may suffice to transfer title and will facilitate the acquisition. In these cases, the agreement must give the State the right to enter the remaining property to remove the improvements.

## **6) Signatures**

All copies of the Right-of-Way Agreement must be properly signed and dated. The signature lines for grantors must identify the individual's signing capacity if signing for a limited liability company, trust, partnership, corporation, etc.

The agreements become binding upon the State when they are executed by the Acquisition Section Manager or a designated representative such as the District Right-of-Way Supervisor when compensation is under the \$15,000 threshold and the Acquisition Manager/Bureau Chief when compensation is over the \$15,000 threshold.

#### **4-6.4 Not Shown On Plans (NSOP'S)**

“NSOP” is a designation meaning “not shown on plans,” either right-of-way or construction plans. It is a designation found on a Right-of-Way Agreement following the call out for a construction feature that is not currently found on the plans, or a revision to a construction feature found on the plans but is a condition of agreement by the landowner.

As it is a condition of agreement, it is important that any construction feature or revision to a construction feature not called out on the plans be noted in the Right-of-Way Agreement.

Therefore, the following will be the procedure of the Right-of-Way Bureau for using the NSOP designation:

1. All construction features agreed to through the negotiation process, if not currently on the plans, will be designated as “NSOP.” Construction features do not include standard fencing.
2. Any revision to a planned construction feature through the negotiation process not currently on the plans will be followed by “NSOP.” The words “eliminate” or “delete” should follow any construction features shown on the plans that are to be eliminated.
3. All NSOP items contained in the Right-of-Way Agreement will be reviewed by the authorized District Administrator, District Preconstruction Engineer or designee who will sign the appropriate signature block on the agreement certifying the changes as being approved and constructible.
4. The feature or revision to a feature should have prior concurrence by the authorized district person or Project Manager prior to inclusion in the Right-of-Way Agreement.
5. If prior authorization or concurrence is not obtained for the NSOP item, the acquisition agent shall also include standard clause 301.37 referring to the NSOP item/items.
6. The road designer will make the NSOP changes to the plans prior to bid letting.

On consultant design projects the authorized district person or Project Manager should document the consultant's concurrence with the NSOP prior to his or her approval.

#### **4-6.5 Supplemental Agreements**

Occasionally, there is a need to alter a Right-of-Way Agreement that already has been processed, approved, and paid. It is more desirable to initiate a supplemental agreement than to attempt to correct the prior agreement.

Clearly identify any supplemental agreements as such. Supplemental agreements must show what the supplemental agreement is for and how it affects the earlier agreement. All supplemental agreements must be approved by the Acquisition Manager.

#### **4-6.6 Contingent Agreements**

Occasionally, it may be expedient to pursue the acquisition by tentatively agreeing to include items in an agreement that may or may not be acceptable to the Department. The acquisition agent should tell the property owner, or others, that if MDT does not accept the proposal, all signed documents will be returned to them.

Include standard clause 301.37 in the agreement, emphasizing that the contract is contingent on final approval by the Acquisition Manager. Acquisition agents should avoid making contingent agreements except in unusual cases.

#### **4-6.7 Deeds and Easements**

Acquisitions are completed when the title to property transfers from private ownership to the State by deed or easement and when payment is made. The following types of deeds are used for acquisitions:

1. Quitclaim Deed

A quitclaim deed conveys all interest that the grantor may have. It is a release of the grantor's rights but does not guarantee that the grantee will receive any property interest at all.

2. Bargain and Sale Deed

In Montana, the word "grant" in any conveyance implies only that the grantor and his or her heirs warrant that:

- The Bargain and Sale Deed transfer the grantor's fee interest.
- The grantor has not previously conveyed the same estate or any right, title, or interest to any other person.
- At the time of the conveyance, the estate is free from any encumbrances made or suffered by the grantor.

These are implied by statutes and may result in litigation upon breach. If there are terms added to the deed that are contrary to the implications, then the added terms control. Because of the implied warranties, a bargain and sale deed are superior to a quitclaim deed. This may be the best type of deed the grantor can or will give.

3. Warranty Deed

This is the highest order of deed. The grantor warrants that the title is clear except for any expressed limitations or exceptions. The grantor guarantees the title and right of possession and guarantees the title against attack from any source.

4. Easement

An easement is a non-possessory interest in the real property of another and gives the holder the right to use another's land for a specific purpose. Utility and irrigation companies have easements for the construction and maintenance of their facilities. If their easements are dated prior to the highway taking, the acquisition agent must secure a release from the owner as well as the person or persons holding the easement. This can be done with a quitclaim deed.

#### **4-6.7-1 Examples of Wording for Conveyance Documents**

The following are examples that may be used as a guide when completing acquisition deeds or easements, obtaining signatures and notarization.

<b>GRANTOR(S)</b>	<b>FACE OF DEED: "...WITNESSETH THAT,"</b>	<b>NOTARY: "...ACKNOWLEDGED BEFORE ME ON [date] BY</b>
INDIVIDUALS	John L. Doe PO Box 00, Helena MT 59620	John L. Doe
INDIVIDUAL WITH NON-OWNER SPOUSE, SPOUSE TO SIGN DEED	John L. Doe and Jane M. Smith PO Box 00, Helena MT 59620	John L. Doe and Jane M. Smith, Husband and Wife
ALSO KNOWN AS (or AKA)	John Doe, also known as Jonathon Doe, also known as John L. Doe	John Doe, also known as Jonathon Doe, also known as John L. Doe
Doing Business As (or DBA)	John Doe doing Business as Empire Building	John Doe doing Business as Empire Building
(Merger or Marriage) Formerly Known as (or FKA)	Empire Building LLC, formerly known as Johnson Brothers LLC, and by merger  Jane Doe, formerly known as Jane Smith	Empire Building LLC, formerly known as Johnson Brothers LLC, and by merger  Jane Doe, formerly known as Jane Smith
JOINT TENANTS AND TENANTS IN COMMON	John Q. Public and Jane Q. Public, as joint tenants with right of survivorship and not as tenants in common. If tenants in common, leave blank no language. PO Box 00, Helena MT 59620	John Q. Public and Jane Q. Public

<b>CORPORATIONS</b>	Empire Building, Inc., an (insert name of state the company is registered in) corporation. PO Box 00, Helena MT 59620	John L. Doe as President of Empire Building, Inc. a (insert name of state the company is registered in) corporation.
<b>GENERAL PARTNERSHIPS</b>	Empire Building General Partnership, a (insert name of state the company is registered in) partnerships. PO Box 00, Helena MT 59620	John L. Doe as General Partner of Empire Building General Partnership, a (insert name of state the company is registered in) limited partnership.
<b>LIMITED PARTNERSHIPS</b>	Empire Building, LLP, a (insert name of state the company is registered in) limited liability company. PO Box 00, Helena MT 59620	John L. Doe, as Managing Partner of Empire Building, LLP, a (insert name of state the company is registered in) limited partnership
<b>LIMITED LIABILITY COMPANIES</b>	Empire Building, LLC, a (insert name of state the company is registered in) limited liability company. PO Box 00, Helena MT 59620	John L. Doe, as Managing Member of Empire Building, LLC, a (insert name of state the company is registered in) limited liability company.
<b>LLC's and LLPs without a Managing Partner or Member</b>	Empire Building, LLC, a (insert name of state the company is registered in) limited liability company/partnership. PO Box 00, Helena MT 59620	John L. Doe, Member of Empire Building, LLC (All Members must sign)
<b>TRUSTS</b>	Doe Family Trust PO Box 00, Helena MT 59620	John L. Doe, Trustee of the Doe Family Trust make sure we add the date of the trust, ex The Doe Family Trust dated March 15, 2011
<b>ATTORNEYS IN FACT</b> aka Power of Attorney or POA, however these words are never used on the deed, Ref: <b>MCA 70-20-108</b>	John L. Doe PO Box 00, Helena MT 59620	Jane M. Doe, Attorney in Fact for John L. Doe. NOTE: She needs to sign and subscribe exactly as follows: "John L. Doe by Jane M. Doe, his Attorney-in-Fact" even if it is typed below the signature line.
<b>ESTATES (By a Personal Representative)</b>	Jane M. Smith, Personal Representative of the Estate of John L. Doe, Deceased PO Box 00, Helena MT 59620	Jane M. Smith, Personal Representative of the Estate of John L. Doe, Deceased
<b>ESTATES (By a Personal Representative and as an individual)</b>	Jane M. Smith, Individually, and as a Personal Representative of the Estate of John L. Doe, Deceased PO Box 00, Helena MT 59620	Jane M. Smith, individually and as Personal Representative of the Estate of John L. Doe, Deceased
<b>GUARDIAN</b>	John L. Doe, Legal Guardian of Junior Doe, a minor PO Box 00, Helena MT 59620	John L. Doe, as Legal Guardian of Junior Doe, a minor
<b>GUARDIAN AND AS AN INDIVIDUAL</b>	John L. Doe, personally and as Legal Guardian of Junior Doe, a minor PO Box 00, Helena MT 59620	John L. Doe, personally and as Legal Guardian of Junior Doe, a minor
<b>CONSERVATOR</b>	Jane M. Smith, Conservator of John L. Doe, an incapacitated person PO Box 00, Helena MT 59620	Jane M. Smith, as Conservator of John L. Doe, an incapacitated person
<b>COUNTIES**</b>	Lewis & Clark County PO Box 00, Helena MT 59620	Name(s) and title(s) of authorized county official(s)
<b>SIGNATURE BY MARK</b>	John L. Doe PO Box 00, Helena MT 59620	John L. Doe, known to me to be the person whose name is subscribed to the within instrument by his mark
<b>CITIES**</b>	City of Helena, Montana, it is a good practice to add "a municipality" after the name of the city. * See below comment PO Box 00, Helena MT 59620	Name(s) and title(s) of authorized city official(s)
<b>SCHOOL DISTRICTS</b>	School District #2, Lake County, Montana PO Box 00, Polson MT	[Names of Trustees], Trustees of School District #2

\*When a party enters into an agreement with or receives from a municipality, it is presumed to have knowledge of the regulations of the municipality's powers and procedures. If the city isn't a municipality the power comes from the county government.

\*\*When making payments to Cities and/or Counties, the warrants must be made payable to and mailed to the City or County Treasurer.

#### **4-6.8 Special Improvement District Assessments**

MDT does not pay special improvement district assessments on lands taken for highway right-of-way. The Review Appraiser's determination of compensation is based on the fair market value of the property as improved at the date of taking, free of all encumbrances.

The compensation reflects any value added to the property by the special improvement regardless of the status of any outstanding special improvement liens. Where the acquisition is a partial taking, a set-over letter signed by the property owner and accepted by the lien holder will transfer the lien to the remaining property. If the acquisition is a total taking, the lien must be satisfied prior to closing the parcel. Because the value of the special improvement has been included in the approved compensation, the outstanding lien must be paid from this amount. This can be done by:

- The landowner makes payment voluntarily before the parcel is closed.
- The amounts of the outstanding lien are deducted from the total compensation to be paid by the property owner. The amount deducted should be pro-rated based on a date far enough in advance to pay any accruing interest or penalties due at time of payment/closing.

#### **4-6.9 Real Estate Taxes**

##### **4-6.9-1 Reimbursements for Taxes Paid**

MDT does not pay general real estate taxes on lands taken for highway rights-of-way.

The property owner is entitled to reimbursement from the State for general real estate taxes paid by the landowner that are proportionate to the property acquired by the State and are allocable to the time after title to the property vests in the State, or the effective date of possession of the property, whichever is earlier.

This applies regardless of whether acquisition is a partial or a total taking of the property. The acquisition agent provides the owner with the appropriate tax reimbursement forms (MDT-ROW-203).

The acreage listed on the form must include the gross right-of-way area, which includes the new fee taking area and the existing right-of-way easement area being converted to fee.

#### **4-6.9-2 Unpaid Taxes on Total Takings**

The full amount of unpaid taxes for previous years, including delinquent taxes with penalties and interest, must be assigned to the county treasurer from the total compensation to be paid for the property.

The acquisition agent must obtain the appropriate payoff amount from the County Treasurer. Taxes for the current year must be paid by assignment to the county treasurer.

Then, If the amount of taxes for the current year is unknown at the time of settlement, an amount equaling the total amount of taxes for the preceding year must be withheld from the compensation due.

When the amount of the current taxes becomes known, the property owner should submit the bill to the State and request the State to pay the entire tax bill using the withheld amount to pay their proportionate share. The State will then refund the remaining withheld amount to the landowner.

#### **4-6.9-3 Delinquent Taxes on Partial Takings**

The property owner is responsible for all taxes, including penalties and interest that are delinquent at the time the State takes ownership or possession of the property.

#### **4-6.10        Claims and Assignments**

If a property owner or other claimant wishes to direct any part of the compensation to a specific person or business, the owner may do so by assignment. The assignment must indicate to whom payment is to be made and the amount of the payment. This is commonly done with mortgages, liens, contracts, taxes and for other purposes.

The payment clauses of the Right-of-Way Agreement (MDT-ROW-200) allow for the disbursement of part or all a property owner's compensation. On tax and mortgage assignments, the amount of payment may be indeterminate at the time and may have to be calculated later. A W-9 is required for all persons or entities receiving payments by assignments. A DOA form 204 from the landowner is required for all direct deposit payments. A blank check is not necessary.

#### **4-6.11        Acquisition Histories**

An acquisition history (MDT-ROW-208) documents all acquisition activities and enables another agent to carry on negotiations if there is a change in assignments. It shows that MDT made a good faith effort to purchase, and it assists and informs district and headquarters personnel when condemnation proceedings are necessary.

Each parcel should have a separate history. Combined histories are acceptable on parcels where title interests are identical, as with "combination parcels."

The acquisition agent sorts out significant items that should become part of the Right-of-Way Agreement. Merely mentioning something in history does not constitute an agreement. Any commitment between MDT and the owner must be part of the Right-of-Way Agreement.

Acquisition histories are discoverable and should reflect professionalism. The Acquisition Section periodically audits parcel files to ensure that acquisition histories are being transmitted and that histories are complete and up to date. Incomplete histories may be returned for further information.

Applicable acquisition history requirements are listed below:

1. Documentation Included

Acquisition histories are initiated when a parcel is assigned. The history should start with the date assigned and should indicate the due date.

The first entries describe preliminary work including reviewing plans, reviewing appraisals, field reviews, checking courthouse records, etc. Identify all the people who were contacted and the date, place of contact, time of contact, who was present, phone numbers and addresses.

2. Level of Detail and Agent Verification

History must be complete and specific. Include the dates and locations of all meetings, people contacted and content of the discussions. How much was offered, in what manner, why was it refused or accepted. Any counteroffers made are stated in history.

Upon completion of negotiations, the agents sign a statement on the bottom of the history form certifying the way negotiations were conducted. The acquisition agent maintains the history until the parcel is submitted to Headquarters, either closed or for condemnation.

3. Additional Requirements for Acquisition by Written Correspondence.

When acquisitions also include written correspondence, note the dates of all letters received. Save copies of all letters and emails to the electronic Z-Compliance working folder in the submittal for payment.

4. **Subsequent History**

If a property owner or other interested party contacts MDT personnel with a significant issue, the Agent should prepare an addendum history for the file, even after the acquisition package has been sent to Headquarters. The addendum history added to Records Management to save Parcel history in Project1.

**4-6.12        Realty Transfer Certificate (RTC)**

To record a deed or Statement of Acknowledgement (MDT-ROW-254) in any county courthouse in Montana, a completed Realty Transfer Certificate (RTC)- page 3 must accompany the deed. Page 3 of the RTC should not be saved electronically to MDT's share drive, it should only accompany the deed as a hard copy because it contains personal identifiable information (PII).

It is the acquisition agent's responsibility to complete the RTC and to have the grantor complete and sign the section pertaining to water rights. This may involve researching the DNRC Water Rights Query System website as well as discussions with the landowner.

In accordance with ***MCA 15-1-201(b)***, the Department of Revenue requires the last 4-digits of the social security number(s) or FEIN(s) for all grantors listed on the deed, as referenced in Page 3 of the RTC. When completing Part 3 of the RTC, it is imperative that the legal description references the deed exhibit and that the exhibit is attached to the RTC.

In Part 7, the RTC requires that the grantor indicate whether the property being conveyed is served by a public water supply. If it is not, then the grantor will need to indicate whether the property being conveyed has water right on record with DNRC.

If the property being conveyed does have a water right on record with DNRC, the grantor will need to indicate whether said water right is being conveyed with the land (such as in total acquisitions) or whether the grantor is reserving the water right. The grantor/seller's signature is required no matter which box is checked.

In the event the landowner does have a water right on record with DNRC that is attributable to the land being acquired by MDT and wishes to reserve and reallocate said water right for future use on their remainder, the acquisition agent and landowner must mark the appropriate box under Part 7 and complete page 5 of the RTC (Certification of Water Right Ownership Update) and sign where indicated.

The acquisition agent must also complete DNRC form 642 (DNRC Ownership Update, Split and Sever of a Water Right) and have the landowner sign as indicated.

The Compliance Specialist will then process the form's \$150 filing fee and send said form to DNRC as required.

**MCA 85-2-424(7)** mandates that standard clause 301.55 be included in all buy-sell or Right-of-Way Agreements where either: (1) water rights are being conveyed with the property –such as total acquisitions; or (2) water rights are being severed or reserved from the property being conveyed.

#### **4-6.13 Signature Authority-Closings Held By Title Companies**

Either the District Right-of-Way Supervisor or the Acquisition Manager should attend all closings and said a person must review and sign the closing or settlement statement on behalf of the Department. This includes closings arranged by consultant acquisition firms.

In situations where it is inconvenient or impossible for the District Right-of-Way Supervisor or Acquisition Manager to personally attend the closing, he/she should still review and sign the closing or settlement statement prior to the closing. As an alternative, an MDT Right-of-Way Agent may be designated to sign for closing.

#### **4-6.14 Typical Right-of-Way Packages**

The following are lists of documents required for the given type of acquisition package. Remember, every DEED included in a package must be accompanied by a Realty Transfer Certificate (RTC).

##### **Parcels greater than \$15,000 with an appraisal (MDT-ROW-452/455)**

- Right-of-Way Agreement (MDT-ROW-200).
- Bargain & Sale Deed with exhibit.
- Realty Transfer Certificate(s).
- Written Offer and Summary Statement (MDT-ROW-201).
- Tax Re-imbursement Forms (MDT-ROW-203).
- History (MDT-ROW-208) and correspondence.
- Partial Release of Mortgage or Partial Reconveyance of Trust Indenture (MDT-ROW-222 or MDT-ROW-223, MDT-ROW-224) only applies if the compensation excluding cost to cure damage is greater than \$35,000.

##### **Parcel is less than \$35,000.00 with a completed waiver valuation (MDT-ROW-470)**

- Right-of-Way Agreement (MDT-ROW-200 with clause 301.32).
- Bargain & Sale Deed with exhibit.
- Realty Transfer Certificate(s).
- Tax Re-imbursement Forms (MDT-ROW-203).
- History (MDT-ROW-208) and correspondence.

- Waiver Valuation, if applicable (MDT-ROW-470).
- If over \$15,000 and less than \$35,000 waiver valuation-landowner approval letter (MDT-ROW-414).

### **Lessee's Interest**

- Right-of-Way Agreement (MDT-ROW-200 for Leasehold Interest Only).
- Grant of Possession of Leasehold Interest (MDT-ROW-237), if there is a compensable interest or if acquisition is from a DNRC parcel.
- Bargain & Sale Deed or Quitclaim Deed and exhibit, if applicable.
- Realty Transfer Certificate(s), if applicable.
- Disclaimer of Interest in Tenant-owned Improvements, if applicable (MDT-ROW-219).
- History (MDT-ROW-208) and correspondence.
- Waiver Valuation, if applicable (MDT-ROW-470).

### **Construction Permit only Parcel**

- Right-of-Way Agreement (MDT-ROW-200).
- History (MDT-ROW-208) and correspondence.
- Waiver Valuation, if applicable (MDT-APP-470).

### **Indian Trust Lands**

- Right-of-Way Agreement (MDT-ROW-200).
- BIA Consent of Owners to Grant Right-of-Way (MDT-ROW-326).
- Written Offer and Summary Statement (MDT-ROW-201).
- History (MDT-ROW-208) and correspondence.
- Waiver Valuation, if applicable (MDT-ROW-470).

Consult with the Acquisition Manager on the current Bureau of Indian Affairs (BIA) process.

### **Stock Underpass – Release**

- Right-of-Way Agreement (MDT-ROW-200).
- Release (MDT-ROW-262).
- History (MDT-ROW-208) and correspondence.
- Waiver Valuation, if applicable (MDT-ROW-470).

### **Maintenance Sites**

- Right-of-Way Agreement (MDT-ROW-200).
- Title commitment and eventual title policy, if applicable.
- Settlement Statement if closing through a title company.
- Recorded copy of Certificate of Survey, if applicable.
- Copy of Conditions of Plat Approval, if applicable.

- Bargain & Sale Deed or Warranty Deed if closing through a title company.
- Realty Transfer Certificate(s).
- Written Offer and Summary Statement, if applicable (MDT-ROW-201).
- Tax Re-imbursement Forms, if applicable (MDT-ROW-203).
- History (MDT-ROW-208) and correspondence.
- Partial Release of Mortgage or Partial Reconveyance of Trust Indenture, if applicable (MDT-ROW-222 or MDT-ROW-223, MDT-ROW-224).
- Waiver Valuation, if applicable (MDT-ROW-470).

## **4-7 ACQUISITIONS BY LOCAL PUBLIC AGENCIES**

The use of Local Public Agencies (LPA's) and/or their consultants to acquire right-of-way MDT projects must be approved by the Right-of-Way Bureau Chief prior to entering into agreements with those entities.

The Right-of-Way Bureau Chief is responsible for ensuring that the LPA and/or their consultant have sufficient staff with the necessary experience and qualifications needed to acquire the right-of-way. The District Right-of-Way Supervisor is responsible for providing guidance and support to the LPA's and/or their consultants acquiring right-of-way projects located in his/her respective District. The District Right-of-Way Supervisor is also responsible for ensuring that LPA's and/or their consultants follow all MDT acquisition processes and procedures as outlined in the MDT Right-of-Way manuals.

All acquisition packages must be reviewed by the District Right-of-Way Supervisor for accuracy and completeness, completion of ROWA entries, and submission to Helena Acquisition Compliance.

Upon request from the District Right-of-Way Supervisor and upon the concurrence of the Acquisition Manager, the Special Programs Section may oversee and coordinate the activities of LPA's and/or their consultants.

## **4-8 ACQUISITION BY CONSULTANTS**

### **4-8.1 Acquisitions By Consultants Through Consultant Design Bureau**

The use of Acquisitions consultants to acquire right-of-way for MDT projects is selected and approved by the Consultant and Design Bureau.

The Consultant Design Bureau is responsible for ensuring that the consultant has sufficient staff with the necessary experience and qualifications needed to acquire the right-of-way.

The District Right-of-Way Supervisor is responsible for providing guidance and support to the consultants acquiring right-of-way on projects located in his/her respective District. The District Right-of-Way Supervisor is also responsible for ensuring that the consultants follow all MDT acquisition processes and procedures as outlined in the MDT Right-of-Way manuals.

All acquisition packages must be reviewed by the District Right-of-Way Supervisor for accuracy and completeness, completion of ROWA entries, and submission to Helena Acquisition Compliance. Upon request from the District Right-of-Way Supervisor and upon the concurrence of the Acquisition Manager, the Special Programs Section may oversee and coordinate the activities of consultants.

#### **4-8.2 Acquisitions by Term Consultants**

The use of acquisition term consultants to acquire right-of-way for MDT projects is selected through a competitive process and then approved by the Acquisition Manager. The term consultants are managed and selected through a Request for Proposal (RFP) process.

The Acquisition Manager is responsible for ensuring that the term consultant has sufficient staff with the necessary experience and qualifications needed to acquire the right-of-way.

The District Right-of-Way Supervisor, Special Programs Supervisor, or their designee is responsible for providing guidance and support to the term consultants acquiring right-of-way on projects located in his/her respective District.

The District Right-of-Way Supervisor is also responsible for ensuring that the term consultants follow all MDT acquisition processes and procedures as outlined in the MDT Right-of-Way manuals.

All acquisition packages must be reviewed by the District Right-of-Way Supervisor for accuracy and completeness, completion of ROWA entries, and submission to Helena Acquisition Compliance. Upon request from the District Right-of-Way Supervisor and upon the concurrence of the Acquisition Manager, the Special Programs Section may oversee and coordinate the activities of consultants.

## **4-9 ACQUISITION OF PROPERTY RIGHTS FOR SPECIAL PURPOSES**

### **4-9.1 Properties Needed by the Department**

Acquisitions of properties for purposes other than use as part of the right-of-way usually are initiated by special request from other administrative offices to the Right-of-Way Bureau. Modified acquisition procedures can be used when no federal funds are involved.

### **4-9.2 Types of Special Purpose Parcels Acquired**

The principal types of special-purpose acquisitions are those needed for operational and administrative purposes and non-right-of-way properties needed in conjunction with a transportation project. Typical types of operational and administrative properties are:

- Administrative and maintenance section sites.
- Maintenance stockpile and supply sites.
- Communication facilities sites.
- Motor Carrier Services (MCS) weigh stations.
- Gross vehicle weight (GVW) scale locations.
- Travelers' rest areas.
- Wetland mitigation sites.

A mitigation parcel is an example of a type of property needed in conjunction with transportation projects. When existing wetlands or public parks and recreation sites are destroyed or affected by a transportation construction project, the Department will acquire wetland mitigation sites and 4(f) replacement lands. The acquisition is like that for maintenance sites but requires an approved environmental document and is coordinated closely with Environmental Services.

### **4-9.3 Acquisition Procedures**

The request and authorization for the acquisition should include coding for funds and plats of the property. Surveys and plats may be needed if a legal description for the tract otherwise cannot be drafted. Securing an agreement to sell and buy from the landowner may be advisable before surveys are contracted.

Appraisals then should be prepared, the title verified, and agreements and appropriate instruments of conveyance executed and submitted to Headquarters. Reproducible copies of any surveys also should be obtained for permanent filing. design and is not a fencing option for landowners to choose.

#### **4-9.4        Property Rights Needed by Other Agencies**

Under cooperative agreements with other state departments and with federal agencies, MDT may obtain options to purchase for those other agencies to acquire suitable remainder parcels. Under its agreement with the Montana Department of Fish, Wildlife and Parks, when requested, MDT tries to obtain an option for remainder parcels during the right-of-way acquisition. Where the State acquires a remainder, MDT and the Department of Fish, Wildlife and Parks may develop the parcel jointly. The Acquisition Section notifies the Right-of-Way Design/Plans Section of any necessary plan corrections.

Similarly, options may be secured for federal agencies if cooperative agreements are entered into between MDT and the agencies.

### **4-10 ACQUISITION OF FEDERAL PUBLIC LANDS**

#### **4-10.1       General Procedures**

The requirements of various federal agencies differ as to the form and content of applications and plan requirements. There also are differences based on whether MDT is acquiring the property for right-of-way or for use as a material or maintenance site. The applicable requirements for the major agencies are discussed in the following section.

#### **4-10.2       Bureau of Land Management (BLM)**

After the Right-of-Way Design Section authorizes the right-of-way phase for a project, the District Right-of-Way Agent reviews the plans and parcel ownership sheet to determine which public agency is affected. No waivers or appraisals are prepared. The application to the Bureau of Land Management (BLM) is initiated in the district; however, the Special Programs Section finalizes the conveyance documents.

- District Supervisor enters the “Assigns” agent in ROWA.

##### **4-10.2-1 Preliminary Preparation Completed by District R/W Staff**

The district agent verifies ownership of public lands with the BLM Montana/Dakotas State office in Billings and checks the plans for the following information:

- Delineated control of access, if applicable.
- Tract or parcel number.
- Area of the taking.
- Name of county where the land is located.
- Right-of-way limits.
- Citation to federal-aid project number.

- Section lines, section numbers and subdivision of the sections, townships, and ranges.
- The acquired area on the exhibit is shaded (Right-of-Way plans are not shaded).

If the information is not shown, the District Right of Way Design Section needs to correct the plans.

If the plans show the above information, the acquisition agent secures two complete sets of plans (one for FHWA and one for BLM) showing the public lands to be acquired for the project, the cross sections and construction plan of the affected area only.

The acquisition agent obtains all environmental documentation, including the Cultural Resources Study if available.

#### **4-10.2-2 Application and Transmittal**

In accordance with **23 CFR 710.601(d)**, applications for transfer of public domain must include or be accompanied by the following information:

- Purpose for which the land is to be used.
- Estate or interest in the land required.
- Federal-aid project number.
- Name of agency exercising jurisdiction over the land and identity of the installation or activity in possession of the land.
- Commitment that the lands will be used within 10 years.
- Map showing the lands to be acquired.
- Legal description of the lands desired.
- Statement of compliance with the **National Environmental Policy Act of 1969** (**42 USC. 4321**, et seq.) and any other applicable Federal environmental laws, including the **National Historic Preservation Act (54 USC. 306108)**, and **Preservation of Parklands (23 USC. 138)**.

The district acquisition agent prepares an application for the area to be transferred, by using the following form:

1. Form MDT-ROW-304 is used when making application for right-of-way for the National Highway System (NHS) and Surface Transportation Program (STP) projects.

This form certifies the right-of-way is subject to the terms and conditions of the granting agency, cites the statutory authority under which the federal property interests can be conveyed (**23 USC 317**) and directs the federal agency to cooperate in granting rights-of-way and control of access (**23 USC 107(d)**). Applications for Interstate projects must contain an access control clause.

2. The agent transmits the applications, with the designated enclosures, as follows:  
FHWA (Helena) Material submitted to FHWA includes:
  - Form MDT-ROW-319 letter of transmittal, identifying the easement or temporary construction easement (construction permit), or both.
  - The original application (Form MDT-ROW-304).
  - A copy of the right-of-way plans, construction plans, and cross sections of the affected area only.
  - The Categorical Exclusion, the Finding of No Significant Impact (FONSI) or the Record of Decision (ROD) under the ***National Environmental Policy Act of 1969***.
3. BLM Field Office  
Material submitted to BLM includes:
  - The letter of transmittal (MDT-ROW-318 or MDT-ROW-320, indicates that the application has been mailed to the FHWA.
  - A copy of the application (MDT-ROW-304).
  - Right-of-way plans, plans and profile sheets from road plans, and cross sections for the affected area only.
  - The Categorical Exclusion with MDT's PFR or SOW Report, or the Environmental Assessment with the FONSI attached, or Environmental Impact Statement with Record of Decision (ROD) attached, and the Cultural Resource Study.

#### **4-10.2-3 Transferring Agency Approval**

If the proposed transfer is acceptable, the BLM will issue a Letter of Consent. The BLM may have the district agent coordinates with the permittee (or lessee) of the acquisition property concerning fencing and approaches. Approved exhibits will accompany the letter of consent from the BLM.

The Letter of Consent may include special conditions that will be included in the easement prepared by Special Programs. If there are any special conditions, the district agent performs the following tasks:

1. Distributes the Letter of Consent to the following individuals for approval of the conditions:
  - District Administrator.
  - District Preconstruction Engineer.
  - District Construction Engineer.
  - District Right-of-Way Supervisor.

2. When approval has been received from all the above, the district agent prepares a Right-of-Way Agreement with a Letter of Consent attached and emails the District Right-of-Way Supervisor with a hyperlink to the project Z-folder. Containing the agreement, forms, parcel history and correspondence along with any additional conveyance documents if applicable.
3. The District Right-of-Way Supervisor reviews the documents and emails the hyperlink to the Special Programs Supervisor.

**Note** ~ The District Agent does not complete a form MDT-ROW-210. Form MDT-ROW-310 is completed by the Special Programs Agent.

#### **4-10.2-4 Transfer Documents - Highway Easements**

Once the Right-of-Way Agreement with the Letter of Consent is received from the District Right-of-Way Supervisor, a Special Programs agent prepares a pseudo form MDT-ROW-200 with a letter of consent attached. The Special Programs Supervisor and Special Programs Agent both sign the pseudo-Right-of-Way agreement. The Special Programs Agent then prepares the Highway Easement through US Lands (Form MDT-ROW-306 include **Title 23, USC Section 107(d)**). The Special Programs agent transmits the following items to the FHWA Office in Helena:

- 1, Special Programs Supervisor enters the “Assigns” agent in ROWA.
- 2, Letter to FHWA – With Easement (MDT-ROW-317), indicating that the conditions in the BLM Letter of Consent are acceptable.
- 3, The original Highway Easement, for MDT-ROW-306 is signed by the Special Programs Supervisor and notarized (the easement must recite the authority under which the transfer is authorized).
- 4, The highway easement and exhibits are then sent to FHWA for their concurrence and signature.

After the highway easement is executed by FHWA Regional Administrator and sent to the Special Programs Section. The Special Programs Agent will save all finalized documents; MDT-ROW-208, 310, a copy of the executed highway easement Z-folder and a hyperlink to the project Z-folder emailed to Compliance with the form MDT-ROW-310.

#### **4-10.2-5 Transfer Documents - Temporary Construction Easements**

Temporary Construction Easements (MDT-ROW-315) are used for construction outside of the proposed acquisition limits of the project.

Once the Letter of Consent is received, the Special Programs Agent prepares a Temporary Construction Easement (MDT-ROW-315 including Title 23, **USC, Section 107(d)**) for submission to the FHWA for all temporary construction permits on BLM properties. The Special Programs agent transmits the following documents to the FHWA:

1. The original letter of transmittal indicates that the conditions in the BLM Letter of Consent are acceptable.
2. The original Temporary Construction Easement, signed by the Special Programs Supervisor and notarized (the easement must recite the authority under which the transfer is authorized).
3. The Temporary Construction Easement with exhibits for concurrence and signature.
4. Upon receipt of the Temporary Construction Easement executed by the FHWA Regional Administrator, the Special Programs Agent transmits the Temporary Construction Easement through Compliance.
5. **The Temporary Construction Easement is not recorded.**
6. All final documents are saved to the Z-folder of the project and a hyperlink emailed to Compliance with the form MDT-ROW-310.
7. Special Programs Supervisor enters the “Field Closed” step in ROWA.

#### **4-10.3 U.S. Forest Service (USFS)**

##### **4-10.3-1 Acquisition of Right-of-Way by Special Programs**

After Right of Way authorization of the project, the Special Programs agent reviews the plans and parcel ownership sheet to determine which federal agency has jurisdiction over the public domain involved. No waivers or appraisals are prepared. The Special Programs Section handles the transaction from start to finish.

- Special Programs Supervisor enters the “Assigns” agent in ROWA.

#### **4-10.3-2 Preliminary Preparation**

The Special Programs agent verifies which National Forest Service has jurisdiction on the lands to be acquired and checks the plans and exhibits for the following information:

- Control of access delineation, if applicable.
- Bar scale on pages.
- North arrow, meridian, township and range.
- Bearing basis (e.g., solar, reference line, geodetic).
- Centerline data (e.g., curve elements, bearing, length of tangent).
- Surveyed, calculated, or scaled ties to centerline at each Forest Service property boundary.
- Right-of-way limits.
- Section lines, section numbers and subdivision of sections (e.g., 40 acre or lots).
- Shaded area of easement acquisition on the exhibit.
- Existing easement recording information is shown on the right-of-way plan sheets.
- Forest Service authorized Officer Signature block on the first page of the exhibit.

#### **4-10.3-3 Application and Transmittal**

The Special Programs agent prepares an application and letter (form MDT-ROW-304) (form MDT-ROW-313) for mailing to the FHWA along with the MDT-ROW-310 form and saves the documents to the project working folder. Applications must contain or be accompanied by the following information:

- Purpose for which the land is to be used.
- Estate or interest in the land required.
- Federal-aid project number.
- The name of the agency is exercising jurisdiction over the lands and identity of the installation or activity in possession of the land.
- Commitment to use the land within 20 years.
- Right of Way plan sheet, showing lands to be acquired.
- A legal description of the lands desired; and
- Request for timber cruise appraisal summary from the Forest Service.

The Special Programs agent mails the application to the FHWA (Helena) with the following enclosures:

- The completed application letter (MDT-ROW-313).
- Easement application (MDT-ROW-304).
- Right-of-way plans with easement and construction permit areas highlighted.
- Environmental documents.
- Set of exhibits.

In addition, the Special Programs agent sends a copy of the application package to the Regional Forester, Forest Supervisor and District Ranger, of the applicable national forest, which includes:

- A copy of the cover letter that was sent to FHWA (Form MDT-ROW-313).
- A copy of the easement application (MDT-ROW-304).
- Right-of-way plans with easement and construction permit areas highlighted.
- Environmental documents.
- Set of exhibits.

The Special Programs Agent saves the application documents to the parcel Z-folder:

- Receipt of Letter of Consent from District Supervisor or FHWA.
- The exhibit must be signed by the Forest Service Authorized Officer.
- Special Programs Supervisor enters the “field close” step in ROWA.
- Special Programs agent prepares the highway easement (form MDT-ROW-307).
- Special Programs Supervisor signs the highway easement and notarizes.
- Special Programs agent prepare form MDT-ROW-314 (execution letter).
- Special Programs Supervisor signs form MDT-ROW-314.
- Special Programs agent submits the letter and highway easement to FHWA for concurrence and signature.
- Special Programs agent receives executed highway easement, and the following steps are performed:
  1. The agent finalizes the form MDT-ROW-310.
  2. The agent prepares, form MDT-ROW-208 (history).
  3. Saves the executed highway easement in the project Z-folder.
  4. Saves the MDT-ROW-208 form in the project Z-folder.
  5. Saves all emails in the project Z-folder.
  6. Saves the form MDT-ROW-310 to the parcel Z-folder.
  7. Submits an email to the Compliance with a hyperlink to the parcel Z-folder to Finalize the parcel.
  8. The original highway easement and exhibit with the 1<sup>st</sup> page of the MDT-ROW-310 are given to Records Management Specialist.
  9. Special Programs Supervisor enters the “Approve/Sent” step in ROWA.

#### **4-10.4        Timber Cruise**

The application letter form MDT-ROW-313 requests that the Forest Service furnish MDT with a timber cruise of the merchantable timber to be removed from within the right-of-way limits and an appraisal summary of the merchantable timber.

The Forest Service provides the timber cruise and appraisal summary to MDT along with two copies of the Timber Removal Contract.

The Special Programs agent submits the timber contract to the District Administrator, District Construction Supervisor, District Preconstruction Engineer and District Right-of-Way Supervisor for their review and approval.

Upon their approval, the Special Programs Supervisor signs the contract and returns it to the Forest Service. The Forest Service will fully execute the contract and return one original to MDT. The timber payment is made with state funds. Upon completion of the project the Forest Service will issue a determination of the final timber value which may result in either credit or debit balance due.

Any credit balance is applied to state funds and MDT apply to FHWA for timber value reimbursement. Engineering Fiscal is notified of the finalized timber cruise value; a journal is completed to convert state funds to federal funds to initiate federal billing and reimbursement to MDT from FHWA.

After receiving the executed timber contract from Forest Service, the Special Programs agent emails a copy to the Project Manager including the Letter of Consent.

#### **4-10.4-1 Transferring Agency Approval**

Upon receipt of the Forest Service's Letter of Consent (LOC) with its stipulations, the Special Programs agent completes the following:

- Distributes the Letter of Consent to the District Supervisor for concurrence from the Pre-Construction Engineer and Construction Engineer.
- When approval has been received from each of the above, the District Supervisor emails the Special Programs Supervisor with the district's concurrence.
- Special Programs prepares a pseudo-Right-of-Way Agreement with Letter of Consent attached, has it signed by the Special Programs Supervisor, saves these documents to the project Z-folder.

#### **4-10.4-2 Transfer Documents - Highway Easement**

Upon receipt of the Letter of Consent from Forest Service, the Special Programs agent prepares the Highway Easement form MDT-ROW-307 and mails to FHWA. The package to FHWA (Helena) contains the following:

1. Form MDT-ROW-314 indicates that the Forest Service stipulations are acceptable.

2. Highway Easement form MDT-ROW-307, signed by the Special Programs Supervisor and notarized. The easement must recite the authority under which the transfer is authorized:
  - a. Title 23, **USC**, Section 107d for right-of-way for Interstate projects with access control, or
  - b. Title 23, **USC**, Section 317 for right-of-way for NHS and STPP projects, material sites, maintenance sites or roadside development; and
3. Easement exhibits as approved by the Forest Service.

Upon receipt of the Highway Easement executed by the FHWA Administrator, the Special Programs agent hand delivers the easement with exhibit and the 1<sup>st</sup> page of the MDT-ROW-310 to Records Management Specialist for recordation.

The Records Management Specialist will give a copy of the recorded easement to the Special Programs Agent. The Special Programs Agent emails a copy of the recorded Highway Easement to the Regional Forester in Missoula and FHWA.

#### **4-10.5        United States Bureau Of Reclamation (USBR)**

##### **4-10.5-1 Preliminary Preparation**

Seldom does MDT acquire land for highway purposes from the United States Bureau of Reclamation (USBR). If the acquisition of land is necessary, the District Right-of-Way Section will work with the USBR Realty Section in Billings to ascertain the requirements and obligations of each agency. The acquisition of land requires a valuation or appraisal.

Generally, the highway crosses that agency's irrigation facilities and requires reconstruction of the facilities, but no actual acquisition of land. An agreement is necessary to enter the Bureau of Reclamation lands and to construct a highway over their land and facilities. In these cases, after the Right-of-Way Design Section authorizes acquisition, the district acquisition agent performs the following tasks:

1. Checks with the Hydraulics Unit to determine whether the Bureau of Reclamation has approved the relocation or reconstruction engineering details.
2. Checks with the USBR Realty Section in Billings to determine whether an application will be necessary for the USBR to issue a Special Use Permit or Acknowledgement of Easement Crossing.
3. Prepares an Irrigation Agreement.

#### **4-10.5-2 Application and Transmittal**

After the Bureau of Reclamation approves all phases of the engineering details for the irrigation facilities, the Hydraulics Unit notifies the acquisition agent, who then prepares the following application package:

Letter of Application and completes any of the following necessary forms.

1. Statutory authority under **43 CFR 429** is cited.
2. List public lands or irrigation features affected (e.g., subdivision, section, township, range).
3. Specify the purpose of the project and for which the land is to be used.
4. A Special Use Permit or Acknowledgement of Easement Crossing is requested.
5. Whether or not MDT has completed an Environmental Impact Study on the subject project and whether it does, or does not, involve any 4(f) property is mentioned.
6. Plans or plats. The plans will show the following:
  - o Structures or canal crossings highlighted.
  - o Special considerations (e.g., road approaches, inlet ditches, pipes) clearly marked.
7. The transmittal package for the application is emailed or mailed to the Bureau of Reclamation in Billings, Montana. The package consists of the following:
  - The letter or email of application.
  - Any necessary application.
  - Irrigation Agreement, if applicable.
  - Pertinent right-of-way, construction, and cross section plans.

The acquisition agent saves a copy of the application and supports documentation to the project folder.

#### **4-10.5-3 Transferring Agency Approval**

Upon receipt of a from the Bureau of Reclamation, the Acquisition agent sends copies of the Special Use Permit, Acknowledgement of Easement Crossing or other license for approval to the following MDT offices:

- District Administrator
- District Preconstruction Engineer
- District Construction Engineer
- District Right-of-Way Supervisor
- Acquisition Manager

After approval, the Acquisition Manager executes the license.

The Acquisition agent emails the copies of the license to the Bureau of Reclamation for execution. The agent saves a copy of the license package on the project Z-folder. When transmitting the license to the Bureau of Reclamation, the District agent requests the return of a fully executed copy of the license.

Once received, the District Acquisition agent emails the executed license to the following MDT offices:

- District Preconstruction Engineer
- District Construction Engineer
- District Right-of-Way Supervisor

#### **4-10.5-4 Closing Out the Parcel**

The acquisition agent completes a pseudo–Right-of-Way Agreement (Form MDT-ROW-200) with the license or approval attached and emails the District Right-of-Way Supervisor a hyperlink to the Z folder containing the agreement, forms, parcel history and correspondence. The district supervisor reviews and signs the right-of-way agreement and emails the hyperlink to parcel Z-folder including the form MDT-ROW-210 to Records Management Specialist.

If acquisition of land or construction permits is necessary, the district staff will need to coordinate the requirements of the USBR with Helena staff to obtain the necessary right-of-way.

### **4-11 ACQUISITION OF STATE AND LOCAL AGENCY PUBLIC LANDS**

#### **4-11.1 Department of Natural Resources and Conservation (DNRC)**

After Right of Way authorization, the District Agent prepares the waiver valuation or appraisal and discusses the project impacts with the lessee(s), if any. The Special Programs concludes negotiations with the DNRC.

##### **4-11.1-1 Tasks Completed by the District**

1. Prepares waiver valuation or appraisal of all DNRC parcels. DNRC has authorized the use of the MDT-ROW-470 form for all parcels for which the acquisition area is valued between \$15,000 and \$35,000. No form MDT-ROW-414 is required.
2. The district agent should obtain information about the leases and licenses from the regional DNRC Land Offices, not the DNRC Helena Headquarters.

If DNRC property is leased, the district agent obtains a Grant of Possession (of Leasehold Interest), and Right-of-Way Agreement signed by each lessee. Occasionally, the DNRC will have issued a license to a user rather than a lease. The District Agent may need to revise the Grant of Possession of Leasehold Interest form to a Grant of Possession of License Interest and revise the Right-of-Way Agreement accordingly.

2. The district agent places scanned copies of the Right-of-Way Agreement, Grant of Possession, waiver valuation or appraisal, negotiation history and correspondence in the project Z-folder and emails the hyperlink to the District Right-of-Way Supervisor for review and approval.

**Note** ~ The District Agent does not complete a form MDT-ROW-210. Form MDT-ROW-310 is completed by the Special Programs Agent at the final closing of the parcel.

4. The District Right-of-Way Supervisor reviews the documents and forwards the hyperlink to the Special Programs Supervisor and Records Management Specialist to request the signed Right-of-Way agreement to be uploaded to PCMS system.

#### **4-11.1-2 Tasks Completed by Special Programs**

When authorization to acquire is received, the Special Programs Section will take the following actions:

1. Review plans to determine which parcels are owned by the State of Montana.
2. Review right-of-way plans to ensure that the following information is shown:
  - A breakdown showing the gross area, present travel way (PTW) and net acres being acquired.
  - The number of acres remaining left and right of the roadway for each 40-acre tract or Government Lot.
3. Obtain all approved appraisals or waiver valuations and lessee documents from the project Compliance Z-folder for all DNRC parcels.
4. If the lessee is to receive payments, the Special Programs Section will process the payment. It should be noted that the Land Board may approve our application for right-of-way without Lessee consent, but DNRC will not release an easement.

5. Secure a copy of each sheet of right-of-way plans showing DNRC parcels. Outline in red the proposed acquisition. All road approaches, construction permits, channel changes, etc. are outlined in green. For bridges, the agent secures a copy of bridge plans to forward with the application. Secure a copy of applicable pages of construction and x-section plans.
6. The Special Programs Agent will initiate the form MDT-ROW-310.

#### **4-11.1-3 Application and Transmittal**

Upon receipt of the Lessee documents and Grant of Possession and valuation, The Special Programs Agent must submit the application within a 2-week period and not exceed 4-weeks.

The Special Programs acquisition agent prepares the application package to mail hardcopies to DNRC-Helena and a copy (send to DNRC area manager) of the Application for Right-of-Way Easement on State Lands (Form MDT-ROW-302). The application must identify the acquisition areas for each Quarter-Quarter section or Government Lot.

A separate application (Form MDT-ROW-302) must be prepared for the Land Use License (construction permits). The application must identify the construction permit areas for each Quarter-Quarter section or Government Lot. The Special Programs Supervisor signs the Land Use License application documents. The Land Use License application will only be submitted to the DNRC Area Manager.

The Special Programs agent transmits the easement application package to the Helena Office of the Department of Natural Resources and Conservation and copies to the Area Manager of the Department of Natural Resources and Conservation with the following attachments, if applicable:

- The original of the application (Form MDT-ROW-302) with cover letter (Form MDT-ROW-323).
- A copy of the right of way plan sheets with appropriate color coding described in Section 4-11.1.2 number 5.
- A copy of applicable pages of construction and cross section plans.
- A copy of environmental document.
- An original copy of the lessee's Grant of Possession and lessee's Right-of-Way Agreement. (If these are not available at the time the application is made, forward these documents directly to the Helena Office of the Department of Natural Resources and Conservation as soon as they are turned in by the District Right-of-Way Section.

- An original copy of the waiver valuation or appraisal (with reviewer's determinations).
- A copy of narrative legal description.
- A copy of the exhibit with the Engineer's signature, per *MCA 77-2-102*.

#### **4-11.1-4 Compensation**

MDT pays the Department of Natural Resources and Conservation for rights-of-way, Land Use Licenses (temporary construction permits) and other rights. The Special Programs agent reviews all computations for compensation, ensuring that all the areas on the plans, descriptions and appraisals agree.

When the application is ready for submission to the Department of Natural Resources and Conservation, MDT pays all application fees by no-warrant transfer to the Helena Department of Natural Resources and Conservation Office.

In the transmittal letter and on the application, the agent notes that MDT is paying the application fees by no-warrant transfer directly to the Helena office of Department of Natural Resources and Conservation. The Special Programs agent processes the payment as follows:

- Saves a copy of the signed transmittal letter project Z-folder.
- Emails Compliance with the signed application letter for payment of the application fees.
- MDT compensates the Department of Natural Resources and Conservation as follows:
  1. Land Only. Acquisition is by easement application and MDT pay the appraised market value, or a minimum of \$500, for the property. It is MDT policy to pay 100% of the fee value for highway easements over DNRC parcels. An application fee of \$50 is paid to the DNRC for preparing the easement.
  2. Land Use Licenses (Temporary Construction Permits - Form MDT-ROW-302). These are acquired by application for a temporary license. Payment is based on the appraised market value of the Temporary Construction Permit, but not less than \$300. There also is a \$50 application fee for the Land Use License.
  3. Bridges (Navigable Rivers). Compensation is based on land values of adjacent banks considering each quadrant of the bridge and compensating 50% of the fee. A \$500 minimum applies. See **3-2.13.2 (Navigable & Non-Navigable Streams)**.

4. Riprap Projects. Calculations of payments for riprap projects are based on the area of the easement. The appraiser calculates this in the same manner as for bridge crossings.

**Note:** Unlike most valuations completed by MDT, compensation totals on State-Owned parcels should not be rounded to the nearest \$50. Totals should only be rounded up to the nearest \$1.

#### **4-11.1-5 Transferring Agency Approval**

Once the DNRC's Area Office reviews and approves the application, the Helena Office of the DNRC submits it to the Land Board for approval. Once the Land Board approves the application, the Department of Natural Resources and Conservation advises MDT of the acceptance of the offer and approval of the application. The DNRC also submits the easement and billing invoice to MDT for signature by the Special Programs Supervisor.

The DNRC area office will mail or email MDT with two copies of the Land Use License once the application is approved. The two copies are signed by the Special Programs Supervisor.

#### **4-11.1-6 Processing the Easement**

Once the Special Programs Section receives the notice of approval and easement from the DNRC, the Special Programs agent does the following:

1. Submits the easement to the District Supervisor for the District's concurrence of the conditions stated in the easement.
2. Prepares an R/W Agreement (Form MDT-ROW-200) with easement and/or land use license attached. The Special Programs Supervisor signs the Right-of-Way Agreement, and the easement.
3. If the District concurs with the conditions, the Special Programs agent saves a copy of the billing invoice and Right-of-Way to the project Z-folder. The Special Program Agent sends email to Compliance for payment of the billing invoice by no warrant transfer.

The DNRC will not prepare and execute the easement until payment is received.

4. The Special Programs agent returns the easement to DNRC so that the Governor and Secretary of State can execute it. Once the fully executed easement is received back from DNRC, the acquisition agent forwards it on to Records Management for recordation.

- 5, The Records Management Specialist will stamp MDT return address to the original easement before recording.

#### **4-11.2 Acquisition From Other Agencies**

When acquiring rights of way from any other state agencies such as FWP, Department of Corrections, DEQ, etc., or other local agencies, the acquisition is handled like private ownership with a Right-of-Way Agreement and a Quitclaim Deed being obtained.

Typically, the Director of the grantor state agency is the signer. The district may request assistance from Special Programs to facilitate and assist with the acquisition.

### **4-12 ACQUISITION OF NATIVE AMERICAN LANDS**

#### **4-12.1 Introduction**

There are seven Indian Reservations located in the State of Montana that serve the Flathead, Blackfeet, Rocky Boy, Fort Belknap, Fort Peck, Northern Cheyenne, and Crow Tribes.

Each reservation falls under the jurisdiction of the US Department of the Interior and has a local Bureau of Indian Affairs office (BIA) and a Superintendent that is responsible for administration and management of surface acres and subsurface mineral estates held in trust by the United States for American Indian and Indian tribes. The regional BIA office that regulates the local reservation BIA offices is in Billings.—The Flathead is regulated by the regional BIA office in Portland, Oregon.

Each reservation also has a local tribal governing body which runs the day-to-day operations of each reservation. Those local governing bodies are as follows: Confederated Salish & Kootenai Tribes of the Flathead Reservation (CSKT), Blackfeet Tribe of the Blackfeet Reservation, Chippewa Cree Tribe of the Rocky Boy's Reservation, Crow Tribe of the Crow Reservation, Fort Belknap Tribes of the Fort Belknap Reservation, Fort Peck Tribes of the Fort Peck Reservation, and the Northern Cheyenne Tribe of the Northern Cheyenne Reservation.

There are a few basics of Native American trust land that are true for all tribal lands held in trust. One aspect to understand is that trust land falls under tribal government authority and is not subject to state law. This allows tribes to form their own governments, make and enforce laws, tax citizens, and to determine membership, who to include and exclude.

Even though the tribes are allowed to make their own governments, there is a limitation to how they can use the land and require federal approval when it comes to most actions, including taking out mortgages for home, building on the land, and renovating existing buildings.

There are two ways to hold title on Native American trust lands. The first is holding an allotment, which is when a tribal member holds title to an allotted plot of land which the tribe has no interest in (referred to as Allotted Trust Land).

The tribe members can mortgage, gift, or sell the property as they see fit with the approval of the BIA. The tribe can be an individual allotment owner. The second way of holding a title on trust land is the tribe itself having control over all or a portion of trust land on the reservation (referred to as Tribal Trust Land). The tribe can then assign any member the right to use the land for a variety of reasons.

Acquisitions of Trust Lands on the Flathead Reservation are conducted in a slightly different manner than the other reservations as CSKT is compacted. In the early 1970s, Congress passed the Indian Self Determination and Education Assistance Act that allowed Native American tribes and tribal organizations to acquire increased control over the management of federal programs that impact their members, resources, and governments.

These agreements are referred to as “638 compacts and contracts.” As CSKT is compacted, the BIA has transferred authority for administration and management of surface acres and subsurface mineral estates to CSKT.

Ownership of individual allotments may be fractionalized with several individuals holding a small percentage of ownership due to inheritance of the property from the original creation of the allotment. When individual allotment owners die, their property goes through the probate department (BIA or CSKT).

The probate process determines if their heirs will inherit the land in trust or in fee. If the land is inherited in fee the heir is given a patent interest for their percentage ownership of the property, and they may/may not choose to record the patent with the clerk and recorder for the affected county. Once the probate is completed the fee interest is no longer tracked by the local governing authority.

#### **4-12.2        Acquisition of Native American Lands Requirements**

Acquisition of Native American lands on most reservations requires preparation of specific BIA forms and direct contact with individual allotment and tribal allotment owners to obtain consent. On the Flathead reservation, the BIA forms are prepared for the CSKT Tribal Lands office, and they contact the individual allotment and tribal allotment owners to obtain consent.

For all reservations, other than CSKT, the acquisition agent prepares transaction documents for individual allotment and tribal allotment lands as follows:

1. Right-of-Way Agreement (Form MDT-ROW-200). Prepare the form for signature. More than one (1) allotment owner may be included in a single agreement. In the case of leaseholds, the lessee signs the agreements.
2. Consent of Ownership to Grant Right-of-Way (Form MDT-ROW-326). Prepare form for signature with exhibits attached. It is up to the individual reservation whether the temporary construction permits (TCP's) are included on the consent form or on the Revocable Use Permit (Form MDT-ROW-329). Allottees must consent to the TCPs.

To ensure signatures are obtained from the most current owners, the acquisition agent completes the BIA request form and sends it to the Realty Department at BIA requesting updated Title Status Reports (TSR's).

The TSR's list ownership in each allotment and will include fractionalized ownerships for Tribal Trust, Allotted Trust and Fee as well as leasehold information. Additional leasehold information may need to be obtained to be sure the lease covers the area in which the r/w acquisition will take place.

The acquisition agent will directly negotiate with all owners, including Trust and Fee. Since the fee interest is not tracked after the initial inheritance determination, the TSR usually is not a current reflection of the fractionalized fee interest. The acquisition agent will need to determine if the fractionalized fee interest is recorded in the courthouse or has been probated through the local county jurisdiction.

The acquisition agent will attempt to clear all interests in the parcel which may include fractionalized interests in fee. Parcel payment to each owner will be divided by fractionalized percentage ownership. If the fractionalized interest cannot be cleared up, the agent will need to contact the Acquisition Manager for further directions.

Acquisitions over Trust Lands are accomplished by easement only, but it is MDT policy to pay 100% of the fee value for these easements.

#### **4-12.3 Conveyance of Native American Lands**

The conveyance of Native American Lands is accomplished by obtaining consent from the necessary percentage of ownership as determined by the local BIA office.

For some jurisdictions obtaining 51% of the ownership of a trust interest in the parcel (not 51% of the owners) is sufficient regardless of the number of owners. The acquisition agent is required to contact all allotment owners to ask for consent.

Initial contacts for allotments with numerous owners can be accomplished by certified mail with a request for receipt of delivery.

The superintendent of the BIA has the authority to sign the consent form on behalf of those allotment owners whose estate is in probate. The superintendent may also provide consent if the ownership of the allotted trustworthy is too numerous (50 or more owners) upon the following additional conditions:

- 1) No substantial injury to the land or landowner.
- 2) All landowners are compensated.
- 3) The BIA provides notice of intent to grant at least 60 days prior and provides owners with 30 days to object.

To complete acquisition of the parcel, the acquisition agent is required to attempt to clear the interest of fractionalized fee interest owners as well. The fee interest may be recorded and therefore listed on the title commitment or unrecorded. If unrecorded, the agent will attempt to contact the current owner or their heirs to obtain a signature. Acquisition documents and procedures for the fee interest are the same as they would be off the reservation.

#### **4-12.4 Application and Transmittal**

All reservations except Flathead -Once all the necessary signatures have been obtained, the acquisition agent prepares the paperwork necessary for submittal to the BIA to obtain the conveyance (easement). The application package that is submitted to the BIA should include the following:

1. Right-of-Way Documents. The original copy of each Right-of-Way Agreement (Form MDT-ROW-200) and Consent of Owners to Grant Right-of-Way Easement and/or Temporary Construction Permit (Form MDT-ROW-326) with exhibit attached.
2. Payment and acreage purchased summary. A spreadsheet showing a summary of each parcel including the fractionalized interest in each and payment. The total of all parcel payments will be used by the BIA to invoice MDT.

3. Application for Right-of-Way Form (Form MDT-ROW-325). The application must contain all the information requested on the form. The description is by legal subdivision, section, township, and range, and does not require a centerline description. The acquisition supervisor signs the application.
4. Plans. Set of right-of-way plans.
5. Appraisal. Original copy of each parcel appraisal.
6. Environmental Document. Copy of the environmental and cultural document for the project.

The spreadsheet, plans, appraisal, and environmental documents may be copied to a thumb drive for transmittal to the BIA. Providing the BIA with an electronic version of these documents assists them in their processing as they can then upload them directly to their system. All other submitted documents require original signatures.

#### **4-12.4-1 Flathead Reservation**

The acquisition agent prepares the paperwork necessary for submittal to the CSKT Lands Office. The application package includes the following:

1. RW Documents. Two original copies of each right-of-way agreement (Form MDT-ROW-200) and consent of owners to grant right-of-way (Form 326) with exhibit attached.
2. Application for Right-of-Way (Form MDT-ROW-325). The application must contain all the information requested on the form.
3. The description is by legal subdivision, section, township, and range, and does not require a centerline description. The acquisition supervisor signs the application.
4. Right-of-Way Easement (Form MDT-ROW-525).
5. Revocable Use Permit (Form MDT-ROW-329) This form is used for temporary construction permits.

A letter of transmittal is prepared to the Tribal Lands Specialist of the CSKT to go along with the above reference documents. The Tribal Lands Specialist is the acquisition agent and obtains consent from the individual and tribal trust owners. During that consent process, the Tribal Lands Specialist usually schedules a negotiation settlement meeting. Once compensation is agreed upon MDT signs the right-of-way agreements and the Tribal Lands Specialist obtains all necessary approval signatures from Tribal Legal, the Tribal Chairman, and ultimately the BIA. Once all signatures are obtained, the final documents are sent to Tribal Title Plant for recording.

#### **4-12.4-2 Processing and Closing Out the Parcel**

For all reservations except Flathead, upon receipt and approval of all the necessary paperwork the BIA will send an invoice to the district for payment. The invoice covers the total landowner payments for all trust payments on the project.

Since the BIA frequently changes where the payments are to be mailed, the invoice will also include payment submittal information.

Upon receipt of the BIA invoice and easement, the acquisition agent will submit all parcel paperwork through the 210-submittal process to the Compliance Specialist in Helena for payment which will include an original copy of all right-of-way agreements (Form MDT-ROW-200), consent of owners to grant right-of-way (Form MDT-ROW-326) and a history (Form MDT-ROW-208) for all landowner contacts.

The Compliance specialist will then submit payment to the BIA via the terms specified in the invoice. The local BIA office then sends the final easement document to the Regional BIA office in Billings for recording.

### **4-13 ALTERNATIVE CONTRACTING**

#### **4-13.1 Design Build (DB)**

A Design-Build highway project is contracted in a single phase that includes design and construction authorized under **23 CFR Part 636**.

Typically, a project is less than 20 percent designed, with a well-defined scope and knowledge of project risks at the point proposals and bids are requested via best value procurement. Right-of-way acquisition may be included in Design-Build contracts of a project under a single contract.

Such a contract will normally have the right-of-way functions, including acquisitions, performed by a qualified subcontractor reporting to the prime Design-Build contractor. This arrangement must incorporate a process that complies with **Section 4-1.2 (Principal State and Federal Statutes)** of this manual, and implements the following regulations:

- a. **23 C.F.R.** Part 710 in general and subsection 309 that contains specific requirements related to projects where the right-of-way acquisition is included in the design build contract.

The purpose of special right-of-way provisions under the Design-Build set forth below are to enable the benefits of the Design-Build concept to be realized while assuring that property owners and occupants have quality services, and the same benefits and protections as would be provided if the right-of-way were administered under the traditional contract process. Some DB contracts may purposefully omit right-of-way acquisition activities when it is known these functions will be performed by the District Right-of-Way staff.

#### **4-13.2 Contract Provisions**

Include the following in the request for proposals and/or the contract when right-of-way is included under a design-build contract:

1. The prime Design-Build contractor will be responsible for delivering the right-of-way acquired and cleared in full compliance with **Section 4-1.2 (Principal State and Federal Statutes)** of this manual. Conflicts must be brought to the attention of the District Right-of-Way Supervisor if noted by the Design-Build firm between written authorities such as what is stated in the request for proposal (RFP) and the Right-of-Way Operations Manual or other implementing regulations.
2. People and companies performing valuation, acquisition, and relocation will be considered qualified if they are on MDT's current list of term contract holders for the functions they will perform. A firm from this list may request authorization to use additional agents who have not been prequalified as part of their original term contract. Each agent not listed in the current term contract that the firm intends to use must meet the requirements established by MDT under the most recent RFP/RFQ for Right of Way Term Contracts.
3. The Contractor will submit a Right-of-Way Schedule to the MDT Project Manager and the District Right-of-Way Supervisor for review and before initiation of right-of-way authorization. The District Right-of-Way Supervisor will be responsible for sharing this information with all necessary MDT staff, such as the Appraisal Supervisor. This will include:
  - a. The anticipated date of Right-of-Way Authorization.
  - b. A proposed schedule for completed appraisals to be submitted for review by an MDT Review Appraiser.
  - c. A proposed schedule for completing the acquisition of parcels includes the strategy for getting all parcels closed within the time identified in the Design-Build contract.

- d. If Relocation Services are included in the Design-Build Contract, a relocation plan be submitted that includes time estimates for relocation based on individual displacee needs, housing availability, and regulatory notice to move requirements.
- 4. MDT Right-of-Way Staff will approve appraised values, just compensation amounts, contracts, administrative settlement amounts, relocation benefit amounts, and proposed use of Last Resort Housing for displacees. In addition, MDT District or Helena Right-of-Way Supervisors or Managers will review and approve acquisition packets for under normal submittal procedures. Contact the Acquisition Manager and District Supervisor if a Grant of Possession needs to be considered (MDT-ROW-215).
- 5. The Contractor will develop a right-of-way tracking system to provide ongoing project status of appraisal, acquisition, and relocation.
- 6. The Contractor will develop a quality control system to assess the performance of services and monitor progress in relation to the project schedule.
- 7. Proposed settlements above the established just compensation amounts and relocation program appeals will be referred to MDT Right-of-Way Staff for decision or resolution.
- 8. The Contractor will refer unsettled cases for condemnation through the District Right-of-Way Supervisor based on criteria MDT establishes for the project and the process described in Chapter 4 of this Manual.

#### **4-13.3        Design Bid Build (DBB)**

A Design Bid Build (DBB) is the traditional project delivery method. MDT contracts separately for design, if not designed internally, and construction services. The bid is based on complete plans and specifications. Design and construction occur sequentially. The award of the project is granted to the lowest responsible bidder. Right-of-way activities are programmed into the schedule.

#### **4-13.4        Progressive Design Build (PDB)**

A Progressive Design Build (PDB) is a project delivery method in which a solicitation is generally done prior to full scope definition and knowledge of project risks.

A contractor, design team and risks are identified early in the design phase. Early designer and contractor collaboration promotes innovation and reduces cost through early risk mitigation. Upon completion of the design, or individual design packages, the contractor and agency negotiate a price which is corroborated by an Independent Cost Estimator. This method is less suitable for projects where right-of-way acquisition, and its associated risks, may be necessary.

#### **4-13.5 Construction Manager General Contractor (CM/GC)**

A CM/GC project is one to be delivered using a two-phase contract with a CM/GC contractor for services during the preconstruction and, if there is an agreed price, construction phases of a project.

The construction services phase may occur under one contract or under multiple contracts covering portions of the project, including early work packages.

MDT provides professional services of a construction manager on a qualifications or best-value basis. Design services are contracted separately from the construction manager. The designer collaborates with the construction manager to implement innovative solutions to mitigate risk. Upon completion of the design or individual design packages, the contractor and agency negotiate a price which is corroborated by an Independent Cost Estimator.

This method is less suitable for projects where right-of-way acquisition, and its associated risks, may be necessary.

### **4-14 RIGHT-OF-WAY CERTIFICATION**

An alternative contracting (Design-Build, Progressive Design Build, or Construction Manager/General Contractor (CM/GC)) project may be authorized for construction in buildable segments as right-of-way for each segment is available and approved MDT must have legal possession of all property on the segment and occupants must have vacated with full relocation benefits paid for full certification.

There are three types of certifications allowed by FHWA for alternative contracting.

#### **Certificate 1 – No Right of Way Required**

- No certification is necessary on projects that do not require the acquisition of new or additional right-of-way.
- Can advertise and award then begin construction once notice to proceed document is issued.

- No FHWA approval is needed considering MDT verified there is no ROW needed.

### **Certificate 2 – Full Right of Way Acquired**

- The Right-of-Way Bureau will provide a full right-of-way certification once all parcels on a project are acquired. MDT must have legal and physical possession of the necessary right-of-way. Payment must be made for possession to occur.
- A Grant of Possession is acceptable to issue a full right of way certification as all necessary arrangements have been made to provide the legal right of entry onto the property to begin physical construction. Legal proceedings, court ruling, or negotiations can be pending if MDT has obtained a signed Grant of Possession from the landowner(s).
- All impacted landowners that are required to be moved because of being displaced due to a total take must be relocated to decent, safe, and sanitary housing.
- Can advertise and award then begin construction once notice to proceed is issued.
- FHWA approval authority is delegated to MDT for all full right-of-way certifications per the Stewardship & Oversight Agreement.

### **Certificate 3 – Contingent Right of Way**

- MDT can certify right of way prior to having legal and physical possession of all right-of-way parcels.
- MDT is “in the process of making necessary arrangements to gain possession of all rights-of-way”.
- Construction cannot proceed until a full right-of-way cert is issued and MDT has legal and physical possession of all parcels.
- Can advertise and award prior to full right-of-way cert. Once all parcels are acquired, MDT will issue a full right-of-way cert along with a notice to proceed with construction activities.
  - a. The certification will be initiated by the Design-Build Contractor for the Right-of-Way Subcontractor and will be submitted to the Project Manager.

- b. The Project Manager will submit the request to the Right-of-Way Bureau Chief and the Compliance Specialist.
- c. The Compliance Specialist will prepare an MDT Right-of-Way Certification memo and send it to the Right-of-Way Bureau Chief for review and approval.

MDT does not delegate official right-of-way certification authority to consultants. Consultants performing right-of-way functions must be verified to ensure they are on the approved list of fee appraisers or term assignments for acquisition services. Contact the Right-of-Way Bureau for the current list of fee appraisers and term assignments.

## **4-15 ACQUISITION BY CONDEMNATION**

### **4-15.1 Authority and Applicability**

The ***United States Constitution***, the ***Montana Constitution***, and the laws of eminent domain grant public bodies and quasi-public bodies (e.g., utilities, pipelines) the conditional right to take private property for public use by condemnation. Condemnation is the legal procedure where; after demonstrating a greater public need, private property can be acquired under adverse circumstances provided just compensation has been paid and the taking results in the least private harm to the owner.

The provisions of Title 60, Chapter 4, and Title 70, Chapter 30, of the ***Montana Code Annotated*** establish the procedures for MDT acquisition of property by eminent domain.

It should be noted that MDT cannot condemn temporary construction permits. They must be converted into temporary construction easements. Use form MDT-ROW-153, Release of Temporary Easement to discharge outstanding temporary easements if necessary.

### **4-15.2 Conditions and Necessary Prior Actions**

State and Federal laws have been enacted to ensure that all citizens and property owners are treated fairly by agencies acquiring land with Federal funds for public use. Acquisition agents, and those who preceded the agents, must ensure that MDT is substantially in compliance with the following acquisition requirements before a parcel is considered for condemnation:

1. A reasonable effort has been made to acquire expeditiously through negotiations.
2. An appraisal or waiver valuation was prepared prior to acquisition, and the owner was given an opportunity to accompany the appraiser on an inspection of the property if an appraisal was prepared.

3. A written offer and summary of the basis for establishing just compensation was furnished to the owner.
4. Payment or deposit of just compensation was made prior to taking possession.
5. A written 90-day relocation notice was provided.
6. Any rental payment agreement does not exceed the fair rental value.
7. No coercive action was taken to compel an agreement or price.
8. MDT does not intentionally make it necessary for an owner to institute legal action (inverse condemnation).
9. MDT has offered to acquire uneconomic remnants.

Other requirements that come under the purview of Headquarters and the Legal Services Division personnel are not included in the above list.

#### **4-15.3        Impasse in Negotiation**

When reasonable efforts to acquire a parcel have been pursued and prove unsuccessful, the acquisition agent and District Right-of-Way Supervisor will consult with the Right-of-Way Bureau. The District, Right-of-Way Bureau and Legal Services will work cooperatively to settle the parcel without formal condemnation proceedings.

The following outlines the progressive steps that will be followed to ultimately determine if condemnation proceedings are necessary:

#### **4-15.4        ROW Negotiations**

District Administrators have \$50,000 settlement authority (some have delegated this authority to the District Right-of-Way Supervisors). The Right-of-Way Bureau Chief has \$200,000 settlement authority (this authority can be delegated to the Acquisition Manager). Legal is not involved at this stage.

Primary acquisition responsibility remains at the district level. The District Right-of-Way Supervisors, Bureau Chief and Acquisition Manager work cooperatively to try and reach agreement with the landowner within the \$200,000 settlement authority. Once the agreement is reached, Form MDT-ROW-299 will be prepared for the settlement justification, and it will be approved by the appropriate individual(s) per the settlement authority as outlined in **4-4.9 (Administrative Settlements)**.

#### **4-15.5 Legal Planning Discussions**

The Acquisition Manager communicates with the Chief Legal Designee to identify and assess projects for inclusion in the Pre-Legal Process.

Upon request, Legal Services can help with settlement justifications, prepare settlement justifications, or help present recommendations to the Preconstruction Engineer with Chief Engineer who have final settlement approval if the proposed amount exceeds the Bureau Chief's \$200,000 settlement authority.

The Chief Legal Designee will assign a Staff Attorney to work directly with the Right-of-Way District Supervisor (in coordination with the Acquisition Manager) to advise on negotiations (e.g., values to determine if additional payments beyond appraisal are justified, etc.). The district will maintain responsibility for in-person landowner negotiations and documentation; however, District staff may ask for direct in-person assistance from the assigned Attorney at any point to assist in in-person landowner negotiations. The Staff Attorney and District Right-of-Way Supervisor will determine if that is necessary.

The goal is to have Legal Services aware of and participating in "high risk" parcels as soon as possible to allow for quicker resolution with these parcels. The Staff Attorney and Acquisition Manager agree when the parcel is transferred to the Legal Service's responsibility.

#### **4-15.6 Pre-Condemnation**

Once the parcel is transferred to the Legal Services' responsibility, the Staff Attorney will have lead responsibility for further negotiations. The district will be responsible for all right-of-way paperwork. The district will also provide full support for negotiations and other assistance as requested by the assigned Staff Attorney.

Any recommendation to pursue condemnation is made between the Preconstruction Engineer and the Chief Legal Designee. If consensus cannot be reached, the recommendation will be forwarded to the Chief Engineer and Chief Legal Counsel for a final decision.

#### **4-15.7 Initiating Condemnation**

When the Department decides to proceed with formal condemnation, Legal Services will have the lead responsibility and Right-of-Way will assist with processes as requested by the Staff Attorney. Once a resolution has been taken – either by settlement or court order – Legal Services will provide court-related documents.

#### **4-15.8 Field Preparation**

Once formal condemnation proceedings have been authorized, the District Right-of-Way Supervisor will work with the Acquisition Manager to ensure the Staff Attorney receives all final right-of-way acquisition documents.

#### **4-15.9 Condemnation Packet Submittal**

All condemnation materials will be electronically saved by the Acquisition Agent and put in the following order:

- Preliminary Condemnation Report
- Parcel Acquisition Histories, in chronological order with most recent on top
- All general correspondence
- Offer(s) to Purchase Right-of-Way
- Tax Reimbursement Form(s), if applicable
- Release of Mortgage(s) or Deed(s) of Trust, if applicable
- Bargain and Sale Deeds or other conveyance documents
- Summary Statement - Amount Established as Just Compensation
- Salvage Appraisal
- Appraisal with the finalized Appraisal Reviewer's Report, or determination of value
- Deed or Easement Exhibits
- Title Reports and updates
- Right-of-Way Agreement

Several of these documents may not be applicable.

#### **4-15.10 Plan Revisions after Submittal for Condemnation**

Condemnations are conducted and predicted with the Department's intent to construct what is shown in the plans.

Right-of-Way Bureau Review and Coordination: Prior to submitting a parcel to Legal Services, the Right-of-Way Bureau will conduct the following:

1. Review documents, plans and histories.
2. Initiate a concurrent check of the legal description and/or Supplemental Title Report by the Right-of-Way Plans/Design Section.
3. Prepare a summary and a Condemnation Order for the MDT Project Development and Delivery Division Administrator, or designee, and.
4. Transmit the completed packet to the Legal Services Division.

#### **4-15.11 Legal Services Proceedings**

Once the Right-of-Way Bureau submits a parcel to Legal Services, acquisition becomes the Legal Service's responsibility, and all contacts or correspondence should be referred to that office.

The condemnation process carried out by Legal Services involves the following steps:

1. Filing of Complaint. This is the filing of a complaint in the District Court.
2. Summons. This is an issuance of summons by the District Court.
3. Necessity Hearing. If the necessity of a project is challenged, a hearing and ruling must resolve this issue. The property owner may agree to or stipulate necessity. In this event, there will not be a necessity hearing, and the condemnation moves to a commission hearing or a jury trial.
4. Commission Hearing. A three-party commission is convened to hear value testimony and determine value. The commission's finding may be accepted, or either party may appeal it. This step may be waived by mutual consent of both parties.
5. Jury Trial. A jury trial is conducted, valued testimony is presented, and a determination of value is made. The jury award is final unless there is trial error. If there is trial error, the case may be appealed to the Supreme Court.
6. Supreme Court. Issues of law are resolved, with a possible referral back to the District Court for retrial.
7. Final Order of Condemnation. The District Court issues an order putting the State in possession of the property.

A legal settlement may be arranged and consummated at any stage in this process. MDT Attorneys may request Right-of-Way Bureau or District assistance during condemnation or with legal settlements.

### **4-16 TITLE CLEARING REQUIREMENTS**

#### **4-16.1 General**

This section describes property interests and estates that commonly are encountered in real property acquisition.

It provides guidance in acquiring and clearing title to property. Acquisition agents should be aware that there might be a need to acquire types of interests that are not included or identified in this text. Questions about proper handling of any property interest should be discussed with the District Right-of-Way Supervisor and, if necessary, the Acquisition Manager.

#### **4-16.2 Title Evidence, Recorded and Unrecorded**

The acquisition agent receives a copy of the title commitment/preliminary title report and supporting documentation for each parcel to be acquired from the Title/Land Services Company. The document shows the ownership of the property and any encumbrances of record as of the date of the report. It also indicates which estates and encumbrances must be acquired to give the State a clear title to the rights needed.

The report enables the acquisition agent to proceed, but it must be checked for changes and information that are not of public record, as described below:

1. Recorded Title Information. Before contacting the property owners, the acquisition agent must check courthouse records for title changes that have occurred since the date of the report.
2. Unrecorded Title Information. The acquisition agent must be alert for any unrecorded title information and should ask if the property owners about the following:
  - a) Leases. Leases are seldom recorded but may be discovered and shown in the appraisal report. Other owners on a project may know if there are leased parcels.
  - b) Mortgages or Deeds of Trust. There may be a new mortgage or deed of trust on the property, a recent satisfaction of an older mortgage, or re-conveyance of a deed of trust that has not been recorded.
  - c) Ownership Changes or Liens. The owner may have entered into a buy-sell agreement or Notice of Purchaser's Interest (NPI) which will require negotiations with both parties. If there is a tax or other lien on the property, the compensation may need to be directed to another party.

### **4-17 TYPICAL PROPERTY INTERESTS**

#### **4-17.1 Commonly Encountered Property Interests**

One or more individuals, corporations, partnerships, nonprofit organizations, trusteeships, or other entities may hold title to property. The type of property interest held also varies. These may include the following:

1. Fee Title/Fee Estate. “Fee ownership,” “fee interest,” “fee title” and “fee estate” refers to the principal ownership of property.

The fee owner may hold title to the property in fee simple or absolute fee, meaning the property owner has not sold, leased, rented, mortgaged, or encumbered any of the rights of ownership of the property. Landowners may encumber property by granting easements or renting, leasing, mortgaging, or assigning property rights to others. The owner then holds something less than fee simple title to the property.

The remaining estate or property interests may be referred to as the “underlying fee” or “encumbered fee” estate.

The fee interest must be acquired regardless of whether it is held in fee simple, absolute or as an encumbered fee estate.

All interests or estates must be acquired and any encumbrances affecting the area being acquired must be released, extinguished, or made subordinate to the property interests being acquired by the State.

2. Easements. An easement is a non-possessory interest in the property of another. An appurtenant easement is for the benefit of a specific parcel; an easement in gross is for the benefit of a network, such as for utilities and pipelines.
3. Licenses and Permits. Licenses and permits are permission for a person or groups of persons to do something on a property. The acquisition agent must address these rights.
4. Life Estates. Title to property may be conveyed subject to reservation of a life estate, where the grantor retains the right of occupancy, or the right to all or part of the income of the property, for the rest of the grantor’s life or that of another designated person. The holder of the life estate must join the holder of the fee estate in conveying the property to the State.
5. Reversionary Interests. There are times when grantors convey property subject to a right of reversion.

The document stipulates that when the property is no longer used for a specified purpose or when a specific event occurs, title to the estate created by the conveyance will revert to the grantor and the grantor’s heirs or assignees. When this is encountered, the grantor, or the grantor’s heirs and assignees, must be found and must join the present owner in the conveyance to the State.

#### **4-17.2 Marital Status**

The acquisition agent confirms the marital status of the record owner regardless of what the title commitment shows. An owner shown as unmarried may have married since the title information was obtained, in which case the spouse should join in conveying the property. Death or divorce also may have altered the marital status that was previously reported.

It is important for the acquisition agent to be aware of the various rights of single and married individuals. Under certain conditions, a spouse should join in conveyance of the property even though the spouse may not be named as an owner of record. The following applies to marital status:

1. Common Law. A man and woman who have not obtained a marriage license and who have not been married in a church or civil ceremony, but who are living together as a married couple and claim to be married, are legally considered husband and wife. In this case, both "common law" spouses should join in conveying the property.
2. Divorce. The distribution of property under the terms of a decree of divorce must be investigated. If it is not addressed in the Title Commitment, the acquisition agent must check the courthouse record, both the Clerk of Court's office and the Clerk and Recorder's office, for this information.

The acquisition agent must take every precaution to ensure that the State is getting all the property interests involved.

Occasionally, when dealing with a divorced person, each may claim that the other has no interest in the property. These statements cannot be taken at face value but must be confirmed with appropriate documentation. Otherwise, valid property interests may be overlooked, and the State may have to perfect its title later. These cases can result in a duplication of payment.

3. Separation. Separation means merely that the husband and wife are not living together. However, they still are legally married, and both parties have the same property rights as if they were living together.
4. Property Owned Solely by a Married Person. Under the Uniform Probate Code, neither a married woman nor a married man has an interest in property owned by the other spouse, and each may deal with his or her own property as though the individual was unmarried. The code contains other legal ramifications pertaining to estate inheritance, however, that could result in future problems if the non-owner spouse does not join in a property conveyance.

Therefore, although it is technically only necessary to secure the record owner's signature on a deed, it is the Department's policy to make every reasonable effort to secure the signature of both spouses.

The preferred mechanism to clear any interest a non-owner spouse may have been a Quitclaim Deed, which the Right-of-Way Plan Section will prepare upon request by the District Right-of-Way Supervisor.

However, if the acquisition agent is unaware of the non-owner spouse until the time of their meeting, the agent may have the non-owner spouse sign the applicable Bargain & Sale Deed or Easement by including the capacity in which he/she is signing. Example: John Doe, husband of Jane Doe. In this case, Jane Doe is the vesting owner, and her name should appear on the face of the deed/easement.

It is not necessary to include the name of the non-owner spouse on the face of the deed/easement when both spouses are signing the same document.

The District Right-of-Way Supervisor is authorized to determine when a reasonable effort has been made and that a conveyance will be accepted without the signature of a non-owner spouse. When this determination is made, it is clearly stated and explained in the form MDT-ROW-210 transmitting the closed parcel.

## **4-18 TENANCIES AND RIGHTS OF SURVIVORSHIP**

### **4-18.1 Joint Tenancies with a Right of Survivorship**

When two or more individual's own property as joint tenants with the right of survivorship, they are co-owners. Each has an interest in the property in proportion to their agreement or investment. Upon the death of one of the co-owners, his or her interest immediately and automatically vests in the survivor or survivors until there is only one left.

The heirs of the deceased co-owner get no interest in the property (other than the heirs of the final survivor(s)).

Technically, the interest of the deceased joint tenant passes immediately and automatically to the surviving joint tenant; however, it is necessary that other steps be taken to terminate the joint tenancy of the decedent.

To acquire clear title from the surviving tenant(s) with regards to the tenancy on a parcel involving a non-probate interest, the joint tenancy must be terminated to the last deed of record as it pertains to the acquisition area. This can be accomplished by receiving a completed Termination of Joint Tenancy form (Statement of Acknowledgement) with a notarized signature of the person(s) with an interest in real property.

Termination of Joint Tenancy Form may be prepared with assistance from the acquisition agent and should only relate to the last deed of record that pertains to the acquisition area. The acquisition agent will attach the last deed of record and death certificate with the Termination of Joint Tenancy Form. The acquisition agent also needs to prepare a Realty Transfer Certificate (RTC) to accompany Termination of Joint Tenancy form. The Termination of Joint Tenancy form and the RTC will then be recorded by Records Management prior to the acquisition deed being recorded.

The acquisition deed should only show the name of the surviving tenant(s) on the face of the deed.

#### **4-18.2        Tenants in Common**

For MDT's purposes, the main difference between holding land as joint tenants with right of survivorship and tenants in common is the disposal of the land upon the death of one of the owners. Unlike joint tenancy with the right of survivorship, the interest of a deceased tenant in common does not pass automatically to the other tenant in common.

Upon the death of one of the tenants under a tenancy in common, the interest of the deceased descends to the deceased's heirs or goes to the legatees of the will of the deceased. No additional rights vest in the other tenant(s) because of the death.

#### **4-18.3        Estates and Conveyances by Heirs of Deceased Owners**

Except for property owned by two or more individuals as joint tenants with rights of survivorship, the real property of a deceased individual becomes part of the deceased's estate and is subject to legal probate requirements. If the estate has not been distributed and closed, arrangements must be made with the duly appointed legal representative of the estate (the personal representative).

In as much as an estate is not a legal entity and cannot convey property, the deed and other documents should name the conveying party and specify the party's capacity, for example: "John Smith as Personal Representative of the estate of Richard Doe, deceased."

The negotiation history should contain a statement indicating that the acquisition agent has confirmed the legal authority of the party conveying the real estate by obtaining copies of the letters of appointment.

#### **4-18.4 Probate Estate Distributed to Heirs**

If probate proceedings have progressed to the point that the property has been distributed to the heirs, but the estate has not been closed, a conveyance may be taken from the heirs. The granting clause in the deed conveying the property to the State will specify the parties and their status as heirs and will take the following form: "John Smith and Minnie Smith, husband and wife; Nellie Smith, an unmarried woman; Edward Smith, an unmarried man, being all of the heirs of Thomas Smith, deceased."

The acquisition agent must obtain a copy of the will or an order from the Probate Court determining that these are indeed the heirs of the estate. In every case, the negotiation history must contain specific reference to the court in which the estate was probated and the date and document numbers of the court orders.

#### **4-18.5 Estate Not Probated**

If the probate of the estate has not been started, there may be no one in power to convey the property to the State. Under these circumstances, little can be done until the estate is under probate, and a Personal Representative is appointed and given an order to sell. This can be handled in two different ways:

1. Initiate a condemnation action to clear title.
2. Find out from the heirs which local attorney they intend to use for the estate and arrange for that attorney to proceed with the necessary formalities. In this case, prior approval will have to be secured from the Acquisition Manager.

#### **4-18.6 Estate with Small Amount of Acquisition Compensation**

If the heirs of the estate can be determined readily and the taking is very small in terms of compensation, it may be permissible to obtain a quitclaim deed from the heirs and their spouses without going through the usual formality of requiring a Personal Representative. In these cases, prior approval must be obtained from the Acquisition Manager to handle the acquisition in this way. The procedure is as follows:

The agent secures from one of the heirs a statement or letter listing the names of all heirs to the estate and their wives, together with an affirmation that these are all the heirs of the deceased person.

1. If the acquisition agent is able to secure the signatures of all the heirs and their wives on one deed, the granting clause should follow this pattern: "John Smith and Minnie Smith, husband and wife; Nellie Smith, a woman; Edward Smith, an unmarried man, (etc.) being all of the heirs of Thomas Smith, deceased."
2. Where the heirs are scattered and more than one deed is needed, the granting clause will show the name and marital status of the persons signing each deed, followed by the phrase "heir of (name of the deceased)."

#### **4-18.7 Conveyances by Guardians of Minors and Incompetents**

When title or a portion of the title to the property is in the name of a minor or an incompetent person, conveyance of the property to the State must be handled through guardianship.

A parent cannot convey the property of a minor child unless the parent has been legally appointed the guardian of the child and has the legal authority to sell the property. The biological mother and father are the guardians of minor children except where the children have been given up or have been taken involuntarily from them by the court.

If a guardian has been appointed, the acquisition agent should examine the document establishing the guardianship to determine whether court permission is required before the guardian can sell the property. Ordinarily, court permission will be required. If this is the case, an attorney undoubtedly will represent the guardian. The attorney will handle the transaction, and the State probably will pay the attorney's fee. The acquisition agent should find out the amount of the fee and get prior approval from the Acquisition Manager before authorizing the attorney to proceed with the required action.

If a guardian has not been appointed, or if the acquisition agent encounters an incompetent owner who has not been declared legally incompetent, the Acquisition Manager is to be contacted for specific instructions.

#### **4-18.8 Contract for Deed**

Contracts for deeds are commonly encountered in right-of-way acquisition. In these cases, the property title documents are held in escrow at a bank or lending company. When a property is sold on a contract for deed, the contract purchaser holds "equitable title" and is usually the one with whom the acquisition agent must negotiate.

Both the contract purchaser and the contract seller, who holds "legal title," must join in conveying the property to the State because title to the property does not pass to the purchaser until the contract has been completed.

The tax assessment list in the County Assessor's office and the tax statement in the County Treasurer's office may provide evidence or indicate the existence of an unrecorded contract. The assessment list and tax statement always show the record owner's name, but if they show that the tax statement is to be sent to the owner in the care of another party, it may indicate that the property is being sold under a contract. Agents should ask owners if they have entered a contract to sell the property.

If either the contract purchaser or the fee owner is unwilling to sell the property to the State, both parties must be named in the condemnation proceedings. If one of the two parties does not wish to be named in the condemnation proceeding and agrees to convey his or her interest to the State without compensation, it may be possible to take a deed clearing that interest and to proceed with condemnation of the other interest. The Acquisition Manager should be contacted for approval prior to closing out such a partial interest.

#### **4-18.9        Notice of Purchaser's Interest (NPI)**

An NPI is a recorded document that provides public notice that a property may be in transition (e.g., sale, trade). The existence of the notice requires an investigation and title clearance.

An NPI may occur where two parties prefer not to record a contract for deed or other contractual arrangements. Acquisition agents must check courthouse records for these documents. Subsequent interviews with the parties to the transaction will reveal the extent of the involvement if it is not available from the document.

#### **4-18.10      Disclaimer of Abandoned Personal Property and Improvements to Leased Property**

An acquisition agent occasionally may face acquisition of personal property that must be removed from the acquisition area but has little or no evidence showing who owns the property or with whom the agent should negotiate.

Examples are abandoned signs, cars, equipment, underground tanks, etc. The Right-of-Way Agreement for the affected parcel should contain documentation from the landowner disclaiming any interest in the personal property to be removed from the acquisition area.

It is not uncommon for lessees to construct buildings (e.g., houses, cabins, sheds, granaries, livestock facilities) on leased land. Normally, these appurtenances would be considered part of realty and have common ownership. When these conditions exist, the acquisition agent should have the landowner sign a disclaimer stating that he or she holds no interest in the improvement.

#### **4-18.11 Transferable Licenses and Permits**

Generally, the State does not acquire transferable licenses, permits, certifications, etc., through normal right-of-way acquisition procedures. Examples of these include liquor licenses and business licenses. Displaced persons and businesses may be compensated for renewals under the provisions of ***Chapter 5 Relocation Assistance***.

#### **4-18.12 Deeds of Trust and Trust Indentures**

A Trust Indenture (aka Deed of Trust) is a form of a mortgage by which the trustor (borrower or debtor) conveys title of property to a trustee (third party) who holds the title for the protection of the lender (beneficiary) as a pledge of security for the repayment of the loan or debt described in the instrument. A trust deed is a conveyance of the legal title by the borrower to the trustee.

The trustee can be an attorney, a bank, a trust company, a savings and loan association, or a title insurance or abstract company in Montana. The lender also may be the seller in each transaction.

Upon compliance with the provisions of the trust deed, the trustee reconveys the property back to the trustor/grantor, who is the buyer or borrower (comparable to the mortgagor in a mortgage transaction).

The procedure is for the beneficiary to execute a request for reconveyance and present it to the trustee, who upon payment of a fee reconveys the property to the trustor/grantor. The reconveyance is recorded in the office of the County Clerk and Recorder in the county in which the property is situated.

Upon defaulting on the provisions of the trust deed, according to the terms of such deed and as provided by law, the trustee is empowered to sell the property by public sale or to the beneficiary (lender) of the property. In Montana, the trustor (borrower or debtor) is without the right of redemption after sale of the trust deed and in these cases must surrender possession within 10 days after the sale. However, no deficiency judgment can be entered against the trustor if the sale does not bring sufficient proceeds to satisfy the obligation secured.

Lenders are only entitled to the proceeds for the land. They are not entitled to proceed for damages or settlements. For parcels in which a partial release is required, the agent should have a warrant clause for the land that is subject to the deed of trust and a separate warrant clause for the damage and settlement amounts payable directly to the landowner.

When acquiring only a portion of a property covered by a trust deed, the acquisition agent secures a "Partial Reconveyance of Trust Indenture" (Form MDT-ROW-224) from the trustee. This is done by obtaining an "Authorization to Sign Partial Reconveyance of Trust Indenture" (Form MDT-ROW-223) from the beneficiary (lender) and then submitting the authorization and a partial reconveyance form to the trustee.

MDT normally does not obtain partial reconveyances when the total compensation for the parcel (fee, easement, and improvements; all costs noted under section 2 of the Right of Way Agreement) is \$35,000 or less.

When a property is subject to a trust indenture, the acquisition agent follows a series of steps:

1. Investigation of Courthouse Records. The acquisition agent must check the courthouse records for any additional trust indentures or reconveyances that may have been filed since the date of the Title Commitment.
2. Beneficiary Commitment. Some beneficiaries may not require payment for a partial reconveyance of trust indenture; however, they are entitled to receive payment and may require that a portion or all the acquisition payment be applied to the loan as a condition of signing an "Authorization to Sign Partial Reconveyance of Trust Indenture" (Form MDT-ROW-223).
3. The amount required by the beneficiary, if any, usually depends on the status of the owner's loan payments and on how the property is being affected. The payment required by the beneficiary will have to be determined and this amount must be paid directly to the beneficiary and compensation is considered compensation to the property owner. The acquisition agent is responsible for advising the property owner that payment for the trust indenture will be paid directly to the beneficiary and any remaining balance will be paid directly to the property owner.
4. Once the beneficiary has signed the Authorization to Sign Partial Reconveyance, that form is provided to the Trustee and the Trustee then signs the Partial Reconveyance of Trust Indenture (Form MDT-ROW-224).
5. The district acquisition agent is responsible for securing partial reconveyances regarding whether the principal office is located within or outside of the State of Montana.
6. Administrative Fees for Partial Reconveyances. Some lending agencies require payment of an administrative fee to cover document preparation, etc. in connection with a reconveyance. This fee is paid by MDT directly to the Lender and is not deducted from the compensation paid to the property owner.

#### **4-18.13 Mortgages, Mortgage Payments, and Release of Mortgage**

A mortgage is a security pledge on a loan, guaranteeing the repayment of the loan or the performance of some other obligation. It is a lien against property, not a conveyance of property rights.

There are two types of interests involved when there is a mortgage. The mortgagor (borrower) grants the mortgage so that his or her interest in the property acts as security for his or her obligation to repay a loan or fulfill some obligation. The mortgagee (lender), to whom the mortgage is granted, holds rights in the property as security for the repayment of a loan or fulfillment of some obligation of the mortgagor.

When MDT is acquiring in fee and/or easement and there is a mortgage on the property, and the compensation is greater than \$35,000 (excluding any cost-to-cures damage payment), the portion of the property to be acquired by the State requires a partial release (Form MDT-ROW-222).

Partial Release of Mortgages are not required for total takings, properties involved in foreclosures or bankruptcy, or acquisitions where the value of the remaining property is insufficient to cover the mortgage balance.

Mortgage companies are only entitled to the proceeds for the land. They are not entitled to proceed for damages or settlements. For parcels in which a mortgage release is required, the agent should have a warrant clause for the land that is subject to the mortgage and a separate warrant clause for the damage and settlement amounts payable directly to the landowner.

When a property is subject to a mortgage, the acquisition agent follows a series of steps:

1. Investigation of Courthouse Records

The acquisition agent must check the courthouse records for any additional or recent mortgages or releases of mortgages that may have been filed since the date of the Title Commitment.

2. Mortgage Commitment

Some mortgagees may not require payment for a partial release of a mortgage. However, mortgagees are entitled to receive payment and may require that a portion or all the acquisition payment be applied to the loan as a condition of giving a partial release or subordination agreement.

The amount required by the mortgagee, if any, usually depends on the status of the owner's mortgage payments and on how the property is being affected. The payment required by the mortgagee will have to be determined and this amount must be paid directly to the mortgagee and compensation to the property owner is considered.

The acquisition agent is responsible for advising the property owner that payment for the release of mortgage will be paid directly to the mortgagee and any remaining balance will be paid directly to the property owner.

3. Release of Mortgage

The acquisition agent is responsible for securing partial releases of mortgages from any lending agency. One of the leading mortgagees of rural properties in the state is the USDA Farm Service Agency (formerly Farmer's Home Administration).

Partial releases of mortgages from this agency are coordinated through the USDA Farm Service Agency (FSA) county director in accordance with that agency's policies. The agent must provide the FSA office with the following: 1) a copy of the Right-of-way Agreement in which the warrant is to be issued as directed by the FSA; and 2) a copy of the signed Bargain & Sale Deed with exhibit. The owner must complete a county FSA office form FSA-2061, Application for Partial Release, or Consent.

The county FSA office will then complete their partial release form, after recordation, Right-of-Way will provide the county FSA office with a copy of the recorded Partial Release.

The acquisition agent will also be responsible for the partial releases of mortgages or subordination agreements from all out-of-state lending agencies, major insurance companies, the Department of Veteran's Affairs, the Federal Land Bank Association, etc. If the District Right-of-Way Supervisor determines there is a resource need to complete the out-of-state partial release, they will notify the Acquisition Manager to discuss alternative resources that may be available to complete these tasks.

It will be the acquisition agent's responsibility to supply the Acquisition Section with complete copies of all mortgage documents and addresses or phone numbers for all parties involved in the mortgage. This information must be submitted with the acquisition package when it is transmitted.

4. Administrative Fees for Release of Mortgage

Some lending agencies require payment of an administrative fee to cover document preparation, etc. in connection with the release of mortgage interest. This fee is paid by the State. It is not deducted from the compensation paid to the property owner.

## **4-19 CORPORATIONS, PARTNERSHIPS, LLC'S, TRUSTS**

To obtain adequate title insurance on acquisitions involving these types of entities, the following is required.

### **4-19.1 Corporations**

Signature by the President or Vice President should be obtained on the acquisition documents. No supporting documentation stating the President/VP has signature authority is necessary if the total compensation, less cost-to-cures, is \$15,000 or less.

However, if the total compensation, less cost-to-cures, is greater than \$15,000 and the title company requires it or if signatures can only be obtained from the Secretary/Treasurer of the Corporation, then additional documentation (through either the corporate by-laws or a corporate resolution) supporting his/her authority to sign is required.

In general, corporate resolutions approving the sale of right-of-way to MDT are not necessary. However, in cases where the acquisition area is considered a major asset of the corporation (such as a total acquisition parcel) or where the acquisition area is the corporation's last remaining asset, a corporate resolution (MDT-ROW-217) approving said disposal is required.

The acquisition agent is required to provide a copy of the Montana Secretary of State principal extract listing who the corporate officers are.

### **4-19.2 Partnerships – General And Limited Liability (LLP)**

The “General Partner” typically has authority to sign on behalf of General Partnerships and the “Managing Partner” typically has authority to sign on behalf of LLPs. As with any partnership, a copy of the “operating agreement” or “partnership agreement” stating who has authority to sign on behalf of the partnership should be obtained (best business practice) and this person signs all ROW documents on behalf of the LLP.

In the event an LLP partnership or operating agreement does not exist, there are two options available to proceed:

- 1.) ROW Agent obtains a copy of the Secretary of State Business Search printout which identifies all LLP members. All members sign form MDT-ROW-218 identifying the one person who has signing authority on behalf of the LLP. This person signs all ROW documents on behalf of LLP. The MDT-ROW-218, and Secretary of State printout must be attached as supporting documentation to the ROW Agreement.

- 2.) ROW Agent obtains a copy of the Secretary of State Business Search printout which identifies all LLP members. Each member of the LLP is required to sign all ROW documents. The Secretary of State printout must be attached as supporting documentation to the ROW Agreement. (Note, this option does NOT require form MDT-ROW-218).

Note: Not obtaining the partnership agreement may jeopardize MDT's ability to obtain title insurance for the parcel. Refer to **Section 4-19.6 (Title Policies)** for guidance on title policies.

#### **4-19.3 Limited Liability Company (LLC)**

Generally, the "Managing Member" has authority to sign on behalf of the LLC. A copy of the "operating agreement" stating who has authority to sign on behalf of the LLC should be obtained (best business practice) and this person signs all ROW documents on behalf of the LLC.

In the event an LLC operating agreement does not exist, there are two options available to proceed:

- 1.) ROW Agent obtains a copy of the Secretary of State Business Search printout which identifies all LLC members. All members sign form MDT-ROW-218 identifying the one person who has signing authority on behalf of the LLC. This person signs all ROW documents on behalf of LLC. The MDT-ROW-218, and Secretary of State printout must be attached as supporting documentation to the ROW Agreement.
- 2.) ROW Agent obtains a copy of the Secretary of State Business Search printout which identifies all LLC members. Each member of the LLC is required to sign all ROW documents. The Secretary of State printout must be attached as supporting documentation to the ROW Agreement. (Note, this option does NOT require form MDT-ROW-218).

Note: Not obtaining an operating partnership agreement may jeopardize MDT's ability to obtain title insurance for the parcel. Refer to **Section 4-19.6 (Title Policies)** for guidance on title policies.

#### **4-19.4 Trusts**

Generally, the "Trustee" has authority to sign on behalf of the Trust. A copy of the "trust agreement" stating who the Trustee is and stating the Trustee has authority to convey property on behalf of the Trust is required. In addition, Form MDT-ROW-218 (Affidavit of Trustee, Partnership or LLC Authority) is required also.

In the event a trust agreement does not exist, the landowner can obtain a signed letter from an attorney stating: 1) that said trust still exists, 2) who the Trustee is, and 3) that the Trustee has authority to convey real estate on behalf of the Trust to MDT.

Note: Not obtaining the trust agreement may jeopardize MDT's ability to obtain title insurance for the parcel. Refer to **Section 4-19.6 (Title Policies)** for guidance on title policies.

#### **4-19.5        Liens**

In addition to mortgages and trust indentures, a parcel may also be encumbered by other types of liens such as a Mechanic's Lien, Child Support Judgment, etc.

On acquisitions where the total compensation, less cost-to-cures, is greater than \$25,000, the portion of the property to be acquired by the State should be released from the lien or judgment. Important exceptions requiring releases are total takings, properties involved in foreclosures or bankruptcy or acquisitions where the value of the remaining property is insufficient to cover the lien.

#### **4-19.6        Title Policies**

MDT's preferred option is to obtain a title insurance policy on all parcels involving a fee or easement acquisition when a title commitment has been obtained for the parcel.

However, the acquisition agent might encounter issues with obtaining the necessary documents required by the title company to issue the title insurance to MDT. (For example, the acquisition agent may not be able to obtain trust documents, LLC Operating Agreements, Partnership Agreements, etc.)

When these situations arise, if the total compensation on the parcel is \$35,000 or less, the District Right-of-Way Supervisor will review the situation and decide whether to waive the title insurance policy. This must be communicated in the parcel submittal to Compliance. If the compensation is greater than \$35,000, the Acquisition Manager must approve waving the title insurance policy.

#### **4-19.7        Power of Attorney\Attorney-in-Fact**

Power of Attorney is defined as "An authority by which one person (Principal) enables another person (Attorney-in-Fact) to act for him\her."

When right-of-way needs to be acquired from an individual who has recorded a Power of Attorney in the county in which the property is located, **MCA 70-20-108** specifies how the attorney-in-fact must sign to execute documents.

**“MCA 70-20-108. Attorney-in-fact -- how to execute for principal.** When an attorney-in-fact executes an instrument transferring an estate in real property, the attorney-in-fact shall subscribe the name of the principal to it and the attorney-in-fact's own name as attorney-in-fact.”

For example, if the John L. Doe (principal), has given power of attorney to Jane M. Doe (attorney-in-fact), the front of the deed must contain principal's full name “John L. Doe”, which should match the ownership of the parcel, the title commitment and the right-of-way Plans. The attorney-in-fact must sign all acquisition documents as follows:

**“John L. Doe by Jane M. Doe, his Attorney-in-Fact”.** Please note that the principal must sign the entire phrase on the signature line even if the phrase is typed under the signature line.

If the principal is the trustee of a trust, a partner in a partnership, or a member of an LLC, the Power of Attorney must be read carefully to determine if the principal gave the attorney-in-fact the authority to act on behalf of the principal with respect to the principal's capacity as trustee, partner, or member. For example: **“John L. Doe by Jane M. Doe, his Attorney-in-Fact, as Trustee of the John L. Doe Trust”.**

In most cases, the Power of Attorney only applies to the principal as an individual.

When an attorney-in-fact signs a conveyance document, the notary acknowledgement must be completed as follows: **This deed was acknowledged before me on (date) by Jane M. Doe, Attorney-in-Fact for John L. Doe.**

If the Power of Attorney indicates that Jane M. Doe also has the authority to act as attorney-in-fact for John L. Doe in his role as trustee of the John L. Doe Trust, the notary acknowledgement must be completed as follows: **“Jane M. Doe, Attorney-in-Fact for John L. Doe as Trustee of the John L. Doe Trust”.**

Please note: the words “Power of Attorney” or “POA” are never used on the conveyance documents.

## **4-20 FINALIZING PARCELS THROUGH COMPLIANCE**

### **4-20.1 Landowner Payments-General**

Once the acquisition agent completes work on the parcel, the District Right-of-Way Supervisor or the Special Programs Supervisor reviews the acquisition package to ensure that the proper documents are included and that the engineering details of the Right-of-Way Agreement are accurate and sends the parcel hyperlink to Compliance.

A cursory review is performed by Compliance before landowners are paid, and Right-of-Way Agreements are accepted. Upon the completion of the review, Compliance will submit the parcel packet to Engineering Fiscal for payment processing. Generally, landowners will receive payment within 4 weeks after the parcel packet has been received in Headquarters. Any necessary corrective action may be required before payment can be made.

Form MDT-ROW-210 shall be completed and signed by both the acquisition agent and supervisor to ensure the package has been reviewed and approved. Form MDT-ROW-210 is required to be included in the documents submitted to the Right-of-Way Bureau as the District Right-of-Way Supervisors are responsible for package compliance. If the District Right-of-Way Supervisor or the Special Programs Supervisor acts as the agent, then they sign as agent, and the Acquisition Manager signs as the approver.

District Right-of-Way Supervisors are authorized to approve payments of \$15,000 or less. For these parcels, the District Right-of-Way Supervisor reviews the documents for compliance with Title III of the **Uniform Act** and for accuracy and completeness and signs the right-of-way agreement as approver.

The Acquisition Manager or Bureau Chief approves the payment and stamps and/or signs the Right-of-Way Agreement as approver.

There are times when payment requests have been submitted to pay multiple parties with the intent of requiring dual signatures to cash a single warrant. MDT does not have the ability to issue a single warrant (physical or electronic) to more than one payee. MDT's AP (accounts payable) module does not allow for more than one tax reporting identification number (FEIN or SSN) to be used when processing a single payment. Paying multiple parties also creates issues from a tax reporting (1099-S) perspective and could lead to over/under reporting to landowners.

Payment options for multiple payees:

1. Identify each individual payee within the Right-of-Way Agreement payment clause so there is no confusion about who each payee will be. This will require the agent to negotiate an agreed-upon allocation of just compensation to each party. If more than one party is to be paid, the Right-of-Way Agreement must indicate each payee and the allocated payment amount to each. A W-9 form must be obtained for each party receiving payment. A DOA form 204 from the landowner is required for all direct deposit payments. Clause 301.02 has been modified to allow for multiple payees/allocations.

2. Request that the parties set up a joint escrow account with a title company. The Right-of-Way Agreement needs to indicate a single payment made payable to the title company (escrow account). The parties involved can determine the allocation of payment outside of MDT negotiations. This can be used in cases where multiple parties cannot agree to the allocated payment terms. MDT will pay for the title company's fees to establish an escrow account in this situation. The Right-of-Way Agreement will have to be signed by all parties privy to the transaction. Use payment clause 301.03.
3. Draft a Right-of-Way Agreement that indicates payment will be made to one single landowner in full (primary payee), and all parties involved will negotiate the allocation separate from their agreement with MDT. The Right-of-Way Agreement will have to be signed by all parties privy to the transaction. Use payment clause 301.01.

#### **4-20.2        Certification – Design Bid Build projects**

The final step in the project development process is to certify the project as clear for construction. The Right-of-Way Certification (MDT-ROW-079) is a written statement that summarizes the status of all right-of-way related matters for a project, and it declares that the Department has complied with the requirements of ***Title 23, Part 635.309*** of the ***Code of Federal Regulations (CFR)***. This certification provides the following information and assurances:

1. Sufficient property rights to construct, operate, and maintain the facility, as shown in the plans, specifications, and estimate, have been acquired. This includes parcels needed for construction purposes.
2. The right-of-way is clear of encroachments. This includes the entire right-of-way, not just the area of the traveled way or project improvements. Any encroachment that will be allowed to remain in the right of way must be there legally, i.e., under a Right-of-Way Use Agreement through Real Estate Services or an Encroachment Permit through the Maintenance Section.
3. All right-of-way has been acquired in accordance with the Uniform Act requirements.
4. All relocation assistance has been completed in accordance with the ***Uniform Act*** and meets the requirements of ***Chapter 5 of the Right-of-Way Operations Manual***.

There are three types of certifications allowed by FHWA.

##### **Certificate 1 – No Right of Way Required**

- No certification is necessary on projects that do not require the acquisition of new or additional right-of-way.
- Can advertise and award, then begin construction once notice to proceed document is issued.
- No FHWA approval is needed considering MDT verified there is no ROW needed.

### **Certificate 2 – Full Right of Way Acquired**

- The Right-of-Way Bureau will provide a full right-of-way certification once all parcels on a project are acquired. MDT must have legal and physical possession of the necessary right-of-way. Payment must be made for possession to occur.
- A Grant of Possession is acceptable to issue a full right of way certification as all necessary arrangements have been made to provide the legal right of entry onto the property to begin physical construction. Legal proceedings, court ruling, or negotiations can be pending if MDT has obtained a signed Grant of Possession from the landowner(s).
- All impacted landowners that are required to be moved because of being displaced due to a total take must be relocated to decent, safe, and sanitary housing.
- Can advertise and award, then begin construction once notice to proceed is issued.
- FHWA approval authority is delegated to MDT for all full right-of-way certifications per the Stewardship & Oversight Agreement.

### **Certificate 3 – Conditional Right of Way**

- The Right-of-Way Bureau may provide a conditional right-of-way certification when acquisition or right of entry of a few remaining parcels is not complete, but all displaced landowners have been relocated. Conditional right-of-way certifications should be used as an exception in rare circumstances, issuing full right-of-way certifications is the normal business practice.

Can advertise, award, and begin construction with a conditional right-of-way certification. Contractors are not permitted to enter upon or begin construction on any outstanding acquisition parcel(s) where MDT does not have legal and physical possession.

- A risk assessment should be conducted to determine the level of risk and the probability of closing out the remaining right-of-way parcels. Advertising, awarding, and starting construction with a conditional ROW certification presents risk of non-participating federal aid costs based on potential construction delays due to acquisition delays. Conditional right-of-way certifications must be approved by the statewide Preconstruction Engineer and Right-of-Way Bureau Chief.
- Conditional right-of-way certifications must provide written justification and explanation of the outstanding right-of-way parcels along with a realistic date of when acquisition will be completed. MDT must demonstrate that proceeding with a conditional right-of-way certification is in the public's best interest. District Right-of-Way Supervisors must send written requests for conditional certifications to the Right-of-Way Bureau Chief and the Compliance Specialist providing a detailed summary outlining the remaining parcels to be acquired along with forecasted dates of completion.
- Appropriate notification must be provided in the request for bids, identifying all locations where right of entry and possession have not yet been obtained. Prior to issuing a notice to proceed with the contractor with an outstanding conditional right-of-way certification, MDT must provide an updated notification to FHWA outlining the remaining parcels and realistic acquisition timeframes.
- FHWA will provide written approval via email for conditional right-of-way certifications located on the interstate prior to the conditional certification being distributed. The FHWA approval/denial email will be attached to the right-of-way certification.
- FHWA approval authority is delegated to MDT for all non-interstate projects per the Stewardship & Oversight Agreement.
- Once all ROW parcels have been acquired and MDT has obtained legal and physical possession, the Compliance Specialist will prepare and distribute a full right-of-way certification to replace the conditional right-of-way certification. It is the responsibility of the District Right-of-Way Supervisor to notify the Bureau Chief and Compliance Specialist to request a full right-of-way certification.

The certification is prepared by the Compliance Specialist using form MDT-ROW-079. The Compliance Specialist monitors the monthly status review report to determine certification due dates based on each letting schedule.

Right-of-way certifications are due on the same date as the Plans, Specifications and Estimate (PS&E) submittals are due to the Engineering Construction Contracting Bureau (ECCB), also known as the ready. The right-of-way certification drop dead date is the same date estimates are due to the Federal Funds Management Section.

The Compliance Specialist will prepare a ROW certification as soon as possible once all ROW is acquired. If there is no ROW involvement on a project, the Compliance Specialist will prepare a ROW certification as soon as possible.

The purpose of preparing a ROW certification as soon as possible is to provide utility companies and surveyors with as much time as possible to complete their work before the construction notices to proceed (NTP) date. The Compliance Specialist confirms that all right-of-way parcels are acquired and closed in ROWA to certify.

The certification is then sent to the Right-of-Way Bureau Chief for approval. The certification is then sent to FHWA, the Construction Contracting Bureau Chief, Federal Funds Management Section Supervisor, District Utility Agent(s), and District Surveyor(s) so that the specific project may be advertised.

The Construction Contracting Bureau Chief will update the monthly status review spreadsheet to identify each project as certified or not. The status review spreadsheet will contain the following designations on a project-by-project basis: "C" means the project has no ROW involvement and is certified, "X-C" means the project has ROW involvement and is certified, "O" means the project has ROW involvement and is not certified, or "blank cell" means the project has no ROW involvement and is not certified.

These designations on the status review spreadsheet are reviewed and confirmed each month during the status review meeting.

#### **4-21 Annual Uniform Act Statistics Report**

MDT Right of Way Bureau uses the Right of Way Applications (ROWA) software to record detailed project and parcel level transactions related to acquisition and relocation activities. The Right of Way Business Analyst initiates a report in the ROWA system each year starting in October to populate the required reporting fields outlined in appendix A to section 24.9(c). The annual report populates all transactions recorded in the federal fiscal year (10/1 through 9/30). This report is analyzed for accuracy and tied to the MDT Cost Coding System (CARES) to ensure reliability of data. Once the data is verified, the report is then reviewed by the Right of Way Bureau Chief, the Acquisition Manager, and the Relocation Specialist for final approval. The Right of Way Bureau Chief sends an email to the FHWA Montana Division Transportation Specialist attaching the annual report prior to November 15<sup>th</sup> of each year for review and final approval.



## DEFINITIONS

1. **Acquisition**. The process by which the acquiring agency makes every reasonable effort to acquire real property through voluntary transfer of the property.
2. **Fair Acquisition**. All interested parties have been contacted to reach a settlement. A minimum of three contacts is considered “fair.”
3. **Relocation**. The displacement and re-establishment of individuals, businesses, farms, nonprofit organizations, personal property, etc. for which special financial assistance and/or advisory assistance is available.
4. **Certification of Right-of-Way**. An official confirmation that the Department has acquired all right-of-way necessary for the project, and it was acquired in accordance with ***Uniform Act*** procedures.
5. **Ready Date**. The target date for completion of right-of-way activities and for the project to be ready for letting.
6. **Waiver Valuation**. The term waiver valuation means the valuation process used, and the product produced when the Department determines that an appraisal is not required.

## REFERENCES

1. **Civil Rights Act of 1964**, 42 **United States Code**, 1971.
2. **Building a Good Road Takes Time under Publications, Overview -Brochures, Reports, and Studies under Transportation on the MDT internet**,
3. **Code of Federal Regulations**, 49 **CFR** Part 24.2, *Definitions* [Uneconomic Remnants].
4. **Code of Federal Regulations**, 23 **CFR** Part 710, *Right-of-Way and Real Estate*.
5. **Code of Federal Regulations**, 23 **CFR** Subpart B-Relinquishment of Highway Facilities 620.201-620.203.
6. **Code of Federal Regulations**, 43 **CFR** 2300.0-1 et seq., *Bureau of Land Management, US Department of Interior land withdrawal* [reference to Sections 1, 2, and 3 of the Act of February 28, 1958 (72 Stat. 27, Title 43, **USC**)].
7. **Constitution of the United States of America Amendment V**, *Grand jury, double jeopardy, self-incrimination, due process*, 1791.
8. **Constitution of the United States of America, Amendment XIV**, *Privileges and immunities, due process, equal protection, apportionment of representatives, civil war disqualification and debt*, 1868.
9. **Constitution of the State of Montana, Article II, Section 17**, *Due process of law*.
10. **Constitution of the State of Montana, Article II, Section 29**, *Eminent domain*.
11. **Farmers' Home Administration Instruction No. 465-1A**, *Coordination of partial releases of mortgages through the FMHA County Supervisor, USDA Rural Development*.
12. **Federal Highway Act of 1968**, Section 4(f), as amended and codified in 49 **USC** 303, *Policy on lands, wildlife and waterfowl refuges, and historic sites*.
13. **Free Use Application and Permit, Bureau of Land Management Form 5510-1**, *Material sites and haul roads on vacant public domain*, September 1977.
14. **Montana Code Annotated**, Title 60, Chapter 4, *Acquisition and disposition of property*.
15. **Montana Code Annotated**, 60-2-209, *Description and plan of new highway or reconstructed or controlled-access facility*.
16. **Montana Code Annotated**, Title 70, Chapter 30, *Eminent domain*.

17. **Montana Code Annotated**, Title 70, Chapter 31, *Relocation Assistance Fair Treatment of Condemnees*.
18. “**Right-of-Way Q & A**” Montana Department of Transportation, May 2023.