PURPOSE

This manual change revises Exhibits 8-EX-25 and 8-EX-35. Both exhibits have been entirely reformatted and rewritten with new titles. The new titles are:

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Exhibit 8-EX-25 also contains a checklist as guidance for review and instructions.

Exhibit 8-EX-36 and Subsections 8.09.09.00, 8.09.09.01, and 8.50.04.00 were updated to reflect the new titles.

EFFECTIVE DATE

Immediately.

MANUAL IMPACT

- Remove the superseded pages and insert the attached pages in the Manual.
- Record the action on the Revision Record.

REVISION SUMMARY

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ACQUISITION

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12.00  Liaison Procedures with Railroad Companies
13.00  Steps in a Railroad Involvement
14.00  Property Classifications
14.01  Operating Property - Definition
14.02  Nonoperating Property - Definition
14.03  Operating Property - Degree of Title
14.04  Nonoperating Property - Degree of Title
15.00  Acquisition Procedures
15.01  R/W Maps and Legal Descriptions
15.02  Contract and Offer
15.03  Mile Post
15.04  Railroad Contacts
15.05  Title Reports for Exchanges
16.00  Railroad Payments
16.01  Minimum Payment of $1,000
16.02  Right of Entry - Interest Payment
16.03  Railroad’s Lessees
16.04  Purchase of Track
16.05  Transverse Crossings
17.00  R/W Agreements and Contract Clauses with Railroads
18.00  Deed Clauses with Railroads
19.00  Railroad Indentures (Easement)
19.01  Standards of Acceptability
19.02  Easements for Highway Widening
19.03  Drainage Easements
19.04  Easements in Limited Vertical Dimension (Aerial Easements)
19.05  Standard Indentures
19.06  License for Minor Installations on Right of Way

(REV 9/2011)
8.69.00.00 RAILROADS (Continued)

20.00 Drilling Permits
21.00 Acquisition of Railroad Access Rights
22.00 Replacement of Railroad Buildings
22.01 Determination of Use - Replacement
22.02 Buildings - Betterment and Credits
23.00 Railroad Rights of Entry
23.01 Types
23.02 Standards of Acceptability
23.03 Processing
24.00 Summary of Railroad Transactions
24.01 Standard Memorandum of Settlement
24.02 Short Form Railroad Memorandum of Settlement

(REV 9/2011)
8.09.00.00 - RENTAL AND POSSESSION PROVISIONS

8.09.01.00 Clauses for Grace Period, Early Vacation and Rent Confirmation

A. Contracts with owner-occupants of residential units who wish to remain in occupancy after close of escrow will contain fair market rental provisions and shall have the following clauses included in the Contract:

“It is agreed that the grantor(s) shall have a 15-day grace period commencing on the day following the date of recordation of the deed conveying title to the State. It is agreed that commencing on the day following the expiration of the grace period and thereafter, the State will rent the property to the grantor using the State’s standard form of Rental Agreement.”

If desirable, the rental rate may be included in the Contract by adding the following:

“The rental rate shall be $____ per month subject to all the terms and conditions as contained in said rental agreement, including the right of either party to cancel and terminate such rental agreement upon written notice as specified in said rental agreement. Said rental rate shall remain in effect for a period of at least one year, if the property is available for occupancy for that period, and subject to the right of the State to establish a new rental rate after one year if the property remains available for rent.”

B. If early vacation of an owner-occupied residential unit is necessary, use the following:

“It is agreed that grantor(s) shall, on the day following the expiration of the fifteen day grace period, vacate and deliver the above-described premises vacant to the State and in good order and condition, without further notice, and immediately thereafter deliver the keys thereto to the Department of Transportation (address) and also pay all closing utility bills up to and including the date of vacation.

In the event, however, grantor(s) does (do) not vacate the premises, grantor(s) agree(s) to pay the State at the rate of $____ per day for use and occupancy of said premises beginning the day following the recordation of the deed conveying title to the State; and the acceptance of such payment by the State shall in no way create a new tenancy between the parties.

In the event grantor vacates the premises prior to the recordation of the deed conveying title to the State, the State is hereby granted possession to use, occupy, or rent the property as it sees fit.”

C. If the grantor insists on written confirmation of the rental rate to be charged for continued occupancy after State takes title to the property, the following clause will be included in the Right of Way Contract:

“If it is agreed State will rent the property to grantor, using State’s standard form (Rental or Lease Agreement) commencing the day following the close of escrow. The (Rental-Lease) rate shall be $____ per month subject to all the terms and conditions in said (Rental-Lease) agreement, including the right of either party to cancel and terminate said agreement upon written notice as specified in said (Rental-Lease) Agreement. Said (Rental-Lease) rate shall remain in effect for a period of at least one year, if the property is available for occupancy for that period. State has the right to establish a new (Rental-Lease) rate after one year if the property remains available for occupancy.”
8.09.02.00   Delivery of Property Vacant at Close of Escrow

If early vacation of owner-occupied, nonresidential property is necessary, the following clause will apply:

“It is agreed grantor(s), on the day following the date title vests in State, will vacate and deliver the above-described property to State in good order and condition without further notice and immediately thereafter deliver the keys thereto to the Department of Transportation, (address), and also pay all closing utility bills up to and including the date of vacation.”

8.09.03.00   Delivery of Property Vacant After Close of Escrow

Where the owner desires to retain possession of the property beyond the date of close of escrow, the following clause will be included in the Contract. [The Memorandum of Settlement (MOS) must indicate the consideration the State is receiving for granting such occupancy.]

“It is agreed that grantors shall deliver the above-described premises vacant to State on or before _____ days after the date of recording of the deed conveying title to State, in good order and condition, without further notice, and immediately thereafter deliver the keys thereto to the Department of Transportation (address) and also pay all closing utility bills up to and including the date of vacation.”

8.09.04.00   90-Day Notice of Intention to Take Possession

It is Department policy to schedule construction projects so that no persons lawfully occupying real property required for highway or related purposes shall be required to move from their home, farm or business location without at least 90 days’ prior written notice from the State or other political subdivision having the responsibility for such acquisition. (Refer to the RAP Chapter for details.) See the Condemnation Chapter for a discussion on Orders for Possession.

8.09.05.00   Eviction by State

The State must either own the property or have legal possession under an Order for Possession (OP) before eviction proceedings can begin. Acquisition must work closely with Relocation to assure that State and Federal procedures are fully complied with. Property Management should be consulted with on how to proceed with evictions since procedures can vary by local jurisdiction.

8.09.06.00   Lease Warranty Provision

Where the owner claims that tenants occupy the property being acquired on a month-to-month tenancy, the following clause will be included in the Contract:

“Grantor warrants that there are no oral or written leases on all or any portion of the property exceeding a period of one month, and the grantor agrees to hold State harmless and reimburse State for any and all of its losses and expenses occasioned by reason of any lease of said property held by any tenant of grantor for a period exceeding one month.”
Rent Proration and Security Money Collection for Other Than Owner-Occupied Single Family Residential Properties

The following clause will be included in the Contract where property is tenant occupied:

“The grantor(s) shall retain possession of the property conveyed up to and including the date of recording of the deed conveying title to State upon compliance by the grantor(s) with the conditions of this contract. All rents and all security money collected by grantor(s) applicable to any period thereafter shall be paid to the State. Either party hereto collecting rents or security money to which the other party is entitled shall forthwith pay such amount to the other as is necessary to comply with the provisions of this clause.”

Rent Proration by Escrow Agent

If the District desires that rent be prorated by the escrow agent through use of separate Rental-Escrow Instructions made a part of the Right of Way Contract, use the following clause:

“The grantor(s) shall retain possession of the property conveyed up to and including the date of recording of the deed conveying title to State upon compliance by the grantor(s) with the conditions of this contract. All rents and all security money collected by grantor(s) applicable to any period thereafter shall be paid to the State in accordance with the terms and conditions of the Rental-Escrow Instructions attached hereto and made a part hereof. Either party hereto collecting rents or security money to which the other party is entitled shall, in the final settlement of this contract, pay such an amount to the other as is necessary to comply with the provisions of this clause.”

Definite Rent Proration Date Established

If grantor insists on a definite date for proration of rents, the following clause may be used:

“All rents shall be prorated as of (date). All rents derived from said property up to and including said date shall be paid to the grantor(s), and all rents derived thereafter shall be paid to the State of California. If any rentals on said property have been or are collected by the undersigned grantor(s) for any period beyond said date, the undersigned grantor(s) shall immediately refund such rentals to the State.

All security money collected by the undersigned grantor(s) shall be paid to the State of California.”

Grantor Retaining Temporary Possession

The following clauses may be used where it is advantageous to allow the grantor to retain possession and use of the property, e.g., avoidance of crop damage payment, control of noxious weeds, agricultural land without an independent water supply or property not capable of independent use. Prior approval of the DDC-R/W must be secured before either of these clauses are included in any Contract.

It is essential in the use of either of these clauses that complete justification be included in the Memorandum of Settlement (MOS). Without justification, it is tantamount to a gift of State property.

“Until such time as the State elects to take possession of any or all of the property acquired herein, the grantor shall have the use and enjoyment of its surface in the same manner as now used, except that in no event shall any advertising sign of any nature whatsoever be placed upon or allowed to remain on the property. Grantor agrees to keep the premises in a neat and clean condition.

The grantor agrees that no improvements other than those already on the property, shall be placed thereof; and the planting of any crops, trees, or shrubs, or alterations, repairs, or additions to existing improvements which may hereafter be placed thereon are at grantor’s risk and without expectation of payment if removed by the State.”
Where temporary possession is being allowed and the land is improved with an orchard, or similar enterprise, the District should use the following clause which provides for good husbandry practices, including pest control.

“It is agreed that the undersigned grantor(s) shall harvest the existing _____ crop on that portion of grantor’s property being acquired by the State. It is further understood that said crop shall be harvested on or before _____ and, if not harvested by said date, shall become the property of the State to dispose of as it may see fit. The undersigned grantor(s) agree(s) to cultivate and maintain the existing crop in conformance with the practices of good husbandry, including pest control, up to and including date grantor(s) harvest(s) said crop.

It is further understood that this property shall be used only for the purpose of maintaining and harvesting the crop on the subject property.

Upon the failure of the grantor(s) to comply with any condition or provision of this agreement, the authorization to harvest said crop by the grantor(s) shall immediately cease and possession shall be taken by the State.”

8.09.09.00 Right of Entry-Waiver Clause

After an appraisal has been approved and an offer made, authority to solicit a Right of Entry from the owner may be granted by the DDC-R/W. When deemed absolutely necessary to solicit a Right of Entry from an owner before initiation of negotiations, approval of the DDC-R/W must first be obtained. Complete documentation for such action must be in the acquisition file.

Authorization to solicit Rights of Entry prior to the appraisal process and initiation of negotiations shall be restricted to circumstances which are exceptional or emergency in nature. Ordinarily, the Right of Entry will not dislocate people or impact improvements of a significant nature. Typically, Rights of Entry prior to initiation of negotiations involve emergency projects or situations which constitute a hazard to the traveling public, or additional areas required during construction of the transportation facility and are not in conflict with the environmental document related to the project. The normal appraisal and acquisition process must not be unduly delayed after the securing of a Right of Entry prior to the initiation of negotiations.

Whenever the content of a Right of Entry is revised or modified from the standard form, approval of Legal must be obtained prior to submitting the Right of Entry to the owner for execution.

The Right of Entry - Long Form (Exhibit 8-EX-23) and Possession and Use Agreement (Exhibit 8-EX-25) contain a standard clause waiving the owner’s right to appear before the California Transportation Commission.

This clause must be included since omission of the clause would provide the owner with the right to question the validity of a project which may be under construction or completed at a time when a Resolution of Necessity may be sought. In limited instances, the Right of Entry - Short Form (Exhibit 8-EX-24), which does not include the waiver clause, may be used. There may be circumstances in which the Right of Entry will not be used. This could occur in emergency situations where there is an immediate danger to life, property, or the highway facility. Under such circumstances, the Department may rely on its Police Power.

The use of a Right of Entry is only appropriate in those situations where the State would ultimately acquire the needed interest by eminent domain proceedings. Whenever it becomes necessary to institute such proceedings on parcels under the State’s possession by Right of Entry or Possession and Use Agreement, there is no need to mail the Notice of Intent.
In exchange for the Department’s early possession and use of a property, in those infrequent occasions where settlement has not been reached or condemnation does not appear to be the appropriate course of action, a non-“large organization” property owner will be given the option of receiving compensation based on the State’s estimate of just compensation or payment of interest on the settlement amount. The parcel diary will reflect that such property owners were given this option and their preferred course of action.

If the owner elects to receive payment of interest on the settlement amount and defer immediate compensation, the Region/District will pursue execution of a Right of Entry document.

If the owner elects to receive immediate compensation, the Region/District will pursue execution of a Possession and Use Agreement.

8.09.09.01 Possession and Use Agreement

The Possession and Use Agreement provides the legal right for the State to possess and use the owner’s property prior to the execution of a Right of Way Contract, and, at the same time, allows the owner to receive just compensation for the State’s possession and use of the parcel. When an owner elects not to receive immediate compensation, the Right of Entry document can be used.

Use Exhibit 8-EX-25 for the Possession and Use Agreement. The Possession and Use Agreement requires that the State record a Memorandum of the Agreement (Exhibit 8-EX-35) and deposit funds into an escrow account to allow the owner to withdraw funds. Refer to Sections 8.60.00.00 through 8.68.00.00, and Exhibit 8-EX-36 for more detailed instructions. The process should include proper notification of the owner on the withdrawal of funds. It is critical that lien holders be notified that an escrow and sale are pending to ensure the owner does not withdraw funds that will be needed to satisfy any liens against the property.

8.09.10.00 Construction Permits and Permits to Enter and Construct

When temporary rights are needed to perform work for grantor’s benefit, a Permit to Enter and Construct or Construction Permit may be used. These documents provide no permanent right to the State and may be used when the State would not condemn the rights secured. See Exhibits 8-EX-26 and 8-EX-27.

8.09.11.00 Temporary Easements

Where State must enter adjoining property for temporary use during construction, the appropriate right is a Temporary Easement. This is also the right to be acquired through eminent domain when negotiations fail.

8.09.12.00 Indemnification by State

Where rights of a temporary nature (material agreements, detour easements, drilling permits, etc.) are required, and the property owner or other party to the agreement requests to be indemnified by the State for any damage caused by reason of the uses authorized by such agreement, the following clause may be used:

“State agrees to indemnify and hold harmless (name of other party to agreement) from any liability arising out of State’s operations under this agreement. State further agrees to assume responsibility for any damages proximately caused by reason of State’s operations under this agreement and State will, at its option, either repair or pay for such damage.”

Easements for slope purposes, whether temporary or permanent, are not considered as being “temporary” for the purposes of this section.
**8.09.13.00 Right of Possession**

Where early possession is required and no Order for Possession has been obtained, add the following clause to the Contract:

“It is agreed and confirmed by the parties hereto that notwithstanding other provisions in this contract, the right of possession and use of the subject property by the State, including the right to remove and dispose of improvements, shall commence on _____ or the close of escrow controlling this transaction, whichever occurs first, and that the amount shown in Clause 2(A) herein includes, but is not limited to, full payment for such possession and use, including damages, if any, from said date.”

**8.09.14.00 Confirming Date of Possession**

Whenever State has secured an Order for Possession or a Right of Entry and settlement is by Contract, the contract shall include the following clause:

“It is agreed and confirmed by the parties hereto that notwithstanding other provisions in this contract, the right of possession and use of the subject property by the State, including the right to remove and dispose of improvements, commenced (effective date of Order for Possession or Right of Entry) and that the amount shown in Clause 2(A) herein includes, but is not limited to, full payment for such possession and use, including damages, if any, and interest from said date.”

See the R/W Engineering Chapter for deed clause where an Order for Possession or Right of Entry has been obtained.

**8.09.15.00 Confirming Vacation in Hardship Acquisitions**

The following clause is only to be used in hardship acquisitions. Although it should be adequate to accomplish the stated objective, the District should use extreme care in implementing it. Under Government Code Section 87261(b)(3), the District must be able to assure the grantor (who, upon acquisition, becomes eligible for benefits under the Relocation Assistance Act) that within a reasonable period of time prior to displacement, comparable replacement housing will be available. Further, Section 6042 of the Department of Housing and Community Development (HCD) Guidelines requires that the displacee be actually offered replacement housing before forced to vacate the property. For this reason and because eviction can only be used as a last resort, the 90-day notice should be served on the grantor only after having been given a reasonable number of offers of a replacement dwelling [HCD Guidelines SS6042(d), 6058].

“It is understood and agreed between the parties hereto that the sole reason for the State’s purchase of the subject property at this time is to alleviate a hardship condition presently suffered by the grantor(s) and that said hardship can only be cured by the grantor(s) selling and vacating the premises. It is, therefore, confirmed by the parties hereto that the grantor(s) has (have) received notice of the State’s intent to serve a 30-day Notice to Vacate and that said Notice to Vacate will be served either (1) after the close of escrow or (2) after 90 days from the date of said notice of intent to serve the 30-day eviction notice. Grantor(s) will deliver the premises vacant to the State in good order and condition without further notice and will immediately thereafter deliver the keys to the premises to the Department (District Office address) and also pay all closing utility bills up to and including the date of vacation.”
8.50.00.00 - MEMORANDUM OF SETTLEMENT

8.50.01.00 General

All transactions concluded by Contract, stipulated, contested or default judgment, Transfer of Control and Possession, or other special agreements must include a Memorandum of Settlement (MOS) Form RW 8-12. A short form MOS (Form RW 8-13) may be used provided the following conditions are unequivocally met: The cash settlement figure, including construction obligations, must be in accordance with the approved staff appraisal, no dollar limitation; the Deed and Contract must not contain any special clauses and title must not be taken subject to any encumbrance which would result in diminution of value of the property being acquired. The MOS shall be signed by the Acquisition Agent. Such signing will constitute the agent’s assurance that the related transaction meets State and Federal requirements. The Senior Agent, Acquisition Branch, shall also sign the MOS. For those parcels with a value less than $10,000, the Acquisition agent’s supervisor, regardless of regular branch assignment, is authorized to approve a Memorandum of Settlement. Individual districts may find it internally desirable for others, i.e., Supervising R/W Agent, Acquisition Branch; District Directors, etc., to sign; however, as a minimum the memorandum shall be signed by the Acquisition Agent and the Senior Agent, Acquisition Branch, for parcels in excess of $10,000. Scheduling procedures should be initiated as soon as the Contract, Amendment or other Agreement has been executed.

8.50.02.00 Preparation

The MOS must be prepared in sufficient detail so anyone reviewing the transaction will fully understand all phases of the acquisition and reasons for special clauses or other provisions included in the Contract. There should be no doubt that all the elements of the transaction were given consideration and the Contract and MOS totally reflect the agreement between the State and the grantor.

All applicable information must be inserted. Under the DOCUMENTS IN FILE portion, the appropriate boxes must be checked and those documents must be in the file. A complete description on how to prepare the MOS is included with the Form.

8.50.03.00 Disposal Records

The Acquisition Agent may need to complete two documents that provide information on property acquired.

The Inventory and Disposal Record (Form RW 12-1) is used for accountability of improvements and personal property purchased through Right of Way transactions, and to record the discharge of such accountability at the time of clearance. See Property Management Chapter (as written).

The Excess Land parcel Acquisition/Disposal Summary (Form RW 16-1) must be completed when real property is acquired in excess of the property needed for a project. Data in the acquisition appraisal is used to provide the inventory value and the acquisition file provides information for the remainder of the form. Parts I, II, and III of the form should be prepared at the time the MOS is prepared and is attached as one of the DOCUMENTS IN FILE. The document is attached to the MOS with a copy forwarded to the Excess Land Senior. The information is used to create the history of the parcel in the Excess Land Management System (ELMS).

The Agent will provide all the required information to complete these forms in the MOS. The Forms should be prepared at the time the MOS is prepared. The Registration Number must be shown on the first page of the MOS next to the “Inventory and Disposal Record” under the “DOCUMENTS IN FILE” section.

Improvements acquired through condemnation proceedings should be listed in the same manner as those acquired by negotiation. The form should be prepared when an Order for Possession or Right of Entry is secured. It shall be the responsibility of the Agent assigned to the case to provide the necessary information.
8.50.04.00 Segregation of Acquisition Costs for Federal Reimbursement

The Acquisition Branch must segregate acquisition costs into federally eligible and ineligible items through the use of a precoded Federal Participation Memorandum (Form RW 8-16). The source of this information is the settlement and the segregation of settlement amounts as set forth in the MOS. A Federal Participation Memorandum shall be completed on all transactions which create obligations of capital funds, e.g., Contract or other agreement.

The Federal Participation Memorandum is not an encumbering document. Capital funds are ordinarily encumbered by one or more of the following acquisition documents: Right of Way Contract, Amendment to Right of Way Contract, Judgment, Stipulation, Transfer of Control and Possession, Request for Transfer of Funds (to support an Order for Possession), Rental Agreement (Exhibit 8-EX-4), Possession and Use Agreement, or other agreement by which Right of Way agrees to pay monies to an owner or lessee.

Right of Way is responsible for accurate segregation of acquisition costs. The Federal Participation Memorandum is forwarded by Planning and Management to Accounting who records the costs into the accounting system (TRAMS). Accounting is not to change any entry without prior consultation and approval of Right of Way. Ultimately, therefore, Right of Way has the sole and final responsibility to ensure that the capital costs are accurately charged or not charged to Federal funds.

A fully signed copy of the Federal Participation Memorandum shall be attached to and become part of every MOS in the Acquisition file.

The Acquisition section must review the signed copy from Accounting to determine its correctness. This is a vital step in the closing-of-the-loop process.

On an Order for Possession (OP), a “Request for Transfer of Funds” (Form RW 9-19) provides for the segregation of values for Accounting to charge or not charge Federal funds. This “Request” shall also be forwarded to Accounting through Planning and Management. A copy of the “Request” must be included in the acquisition file with a copy of the Accounting Weekly Report or equivalent. This will indicate if the deposit has been coded 6090 or 7090.

When settlement occurs after the taking of an OP, Accounting must be advised if there was a withdrawal of the deposit by the owner or if there is a need to “reverse” a charge to Federal funds made when the transfer of funds occurred. Since there is a potential for double billing of Federal funds, caution should be exercised.

Proper entries must be made on the center portion of the Federal Participation Memorandum.

8.50.04.01 Federal Reimbursement Provisions

These are in 23 CFR 710.203 and 710.309. Items with the greatest potential for erroneous claims and requiring careful review include the following:

A. Federal authorization to proceed with right of way acquisition must be obtained prior to initiation of negotiations. If prior authorization is not obtained, all acquisition and related costs on that parcel are ineligible for federal reimbursement.

B. Although the cost of purchasing an excess, uneconomic remainder is eligible for Federal participation, the Department has decided to no longer seek Federal participation. The cost of purchasing an “excess acquisition” is not Federally Participating. The Department will seek Federal participation for any and all damages attributed to an acquired excess parcel. (RWMC 132, December 22, 2003.)
Buildings or other improvements straddling the right-of-way line, e.g., garage, landscaping, swimming pool, etc., are eligible. Itemization will normally coincide with the segregation of values on the Appraisal Page. A pro rata segregation between right of way and excess, as in the appraisal, or other applicable basis, shall be used. If design changes either reduce or increase the area of excess subsequent to appraisal, adjustments must be made at time of settlement. If changes in the area of excess occur subsequent to acquisition, the Right of Way Engineering Branch notifies Excess Lands Branch, by memorandum, of these changes. Changes in the area of excess, of necessity, require adjustment of the Excess Land Inventory. Accounting is expected to make any necessary coding adjustments on an as-learned basis.

District Planning and Management has the responsibility to coordinate these Right of Way activities with R/W Accounting.

C. Cost to acquire personal property is normally ineligible for Federal reimbursement. An exception is, if a landlord owns the personality, e.g., furnished apartment, and if the furnishings are not acquired, a consequential eviction of tenants could occur by removal of the furniture by the landlord. Trade fixtures, equipment, machinery and other items installed for use on a property and within the right of way will be eligible if determined to be improvements pertaining to realty. There may be certain unique situations in which failure to acquire personal property may result in either relocation assistance benefits. In these unique situations, the District is cautioned that the prior concurrence of the FHWA shall be secured to preserve eligibility which would otherwise be lost. Mobile homes may be considered as either realty or personality. If a mobile home cannot be relocated, i.e., not decent, safe, sanitary or not acceptable to another mobile home park, the only alternative is to offer to acquire and whether it is realty or personality is not relevant, either as to the acquisition process or Federal eligibility. The FHWA has allowed participation in the cost of acquiring mobile homes which are in the right of way. If the acquisition involves a mobile home park and mobile homes are acquired which are on excess land, the guidelines in Section 8.06.22.00 should be reviewed to determine Federal eligibility. (See Section 7.03.04.00.)

D. If legally compensable under State Law, Goodwill, interest and damages to remainders are eligible for Federal reimbursement unless otherwise noted.

E. Care must be exercised when segregating values into eligible and ineligible categories when an administrative settlement has been made. If ineligible items are monetarily identified, they are not to be claimed. If, with other items, they were considered as potential contributions to an adverse verdict, then they may still be eligible provided the settlement is reasonable for the real property acquired. Eligibility for reimbursement is achieved when no item adversely effects the amount of the settlement for eligible interests in real property, and in the judgment of the District, the payment for the real property acquired is reasonable. In a partial acquisition, an administrative settlement amount may be prorated between land, improvements and damages unless the file reflects the increase was limited to any one of these components. If a portion of the property acquired in a partial acquisition is excess, an ineligible proration must be made. In a total acquisition without excess, prorate the increase between the components individually as in the partial acquisition, discussed above. In a total acquisition, with excess, prorate the administrative settlement increase between right of way and excess unless there is a clear and positive indication the increase is related to an improvement within the right of way.
F. Certain costs encountered in the acquisition of a property are to be included as part of an administrative settlement. Specifically, these costs are: approved and authorized out-of-pocket expenses and rental payments as outlined in Section 8.01.30.00. These costs are eligible for Federal reimbursement and are to be listed as damages in a partial acquisition and included with the land payment in a total acquisition. If excess is acquired, prorate these costs between the right of way and the excess. State costs related to the trying of an eminent domain action, e.g., jury fees, reporter’s transcript, filing fees, etc., while eligible for reimbursement have previously been entered into the accounting system (TRAMS) and should not be listed in the Federal Participation Memorandum. Litigation fees, determined by the court, to be paid to defendant’s counsel are ineligible. Defendant’s costs in trying an eminent domain action are not eligible except as noted in 23 CFR 710.203(b)(1). Prior to settlement, funds may have been advanced to an owner/lessee in order to perform rehabilitative work when a partial acquisition is to be made. These costs, as well as those for architectural drawings, are eligible provided the costs are not in conflict with concepts in an approved or authorized appraisal.

G. The Appraisal Chapter provides guidelines for rounding of the appraised value of the required property. The practice is to round the total value of the required property.

In the settlement column of the MOS, the components (land, improvements, etc.) shall be rounded to the extent that their total will equal the rounded total of the appraisal or the settlement. As in any judgmental decision, reasonable care should be used, i.e., when excess is being acquired, the rounding should be reasonable so that Federal funds are not charged inappropriately.

The rounded components in the settlement column of the MOS shall be used in the preparation of the Federal Participation Memo. This procedure will be of significant assistance to R/W Accounting.

H. Care must be exercised to avoid charging Federal funds prematurely. A portion of a settlement, normally eligible, but not to be paid until a later time, is not to be charged to Federal funds until the payment is made. The typical example is when a portion of the payment is withheld until the grantor performs an act, e.g., removes an improvement, cuts and caps a waterline, etc. When funds are withheld, the Federal Participation Memorandum shall reflect this by inserting the withheld amount in the FAE 8 - Suspense column, and on the appropriate line, i.e., Improvements. The Withheld Funds box at the center of the form is marked “Yes” and the balance of the line completed. Coding of withheld transactions to FAE 8 – Eligibility Not Determined or Suspense will prevent charges to bill out for federal reimbursement.

When the condition that required the withholding of funds has been eliminated or complied with, Acquisition notifies R/W Accounting by submitting a supplemental Federal Participation Memorandum (RW 8-16) and a completed Acquisition Invoice (RW 8-17). The Federal Participation Memorandum must clearly indicate the adjustment to be made, (i.e., adjust the withheld amount from FAE 8 to charge either FAE 6 or FAE 7 depending on federal eligibility). Additionally, include a statement in the Explanation Section of the form that the terms of the contract have been complied with (e.g., premises have been inspected and work performed).

Care should be exercised to ensure proper scheduling and payment of the withheld amount, and appropriate charging of the expenditure to avoid a double billing situation. It is advised that the original RW 8-16 also be attached with the payment request package for the withheld amount.
I. Parcels acquired on either a hardship or protection basis, under a Federal-Aid Stage 1 Authorization, have specific eligibility requirements for Federal participation. See Section 3.05.05.02 Stage 1 Authorization - Hardship and Protection and Sections 5.03.00.00 – Hardship and 5.04.00.00 – Protection.

After the selection of a particular location, 23 CFR Section 630.106 (3) & (4) (d) allows authorization to proceed with R/W acquisition in hardship and protective buying situations. At the time of FHWA authorization, the Federal government does not provide federal funds for the hardship and protective acquisitions.

However, costs of approved hardship and/or protection parcels are eligible for future federal reimbursement. Therefore, R/W transactions for hardship and protection acquisitions must be coded as “eligible for federal aid,” that is with FAE Code 6. The Accounting System (TRAMS) must record these hardship and protection acquisition costs as federally eligible so that the Current Billing and Reporting System (CBARS) (with special tracking of these Stage 1 Authorized R/W projects) may bill FHWA for future federal reimbursement.

J. If a construction contract obligation has been included in either the construction plans or the appraisal, or both, and the grantor requests payment in lieu of the State’s contractor performing the work, as evidenced by a clause in the Contract, then such payment is to be listed under damages.

Conversely, a proposed damage payment may have been changed to a construction contract obligation. This change must also have been covered by a Contract clause, with appropriate explanation in the MOS and eliminating the applicable portion of the payment from the Federal Participation memorandum.

The Contract and MOS shall each reflect that the pertinent item is covered by either payment or construction contract obligation, but not both. The Federal Participation Memorandum will be limited to payments. The Agent must ensure that whenever any construction contract obligation is covered by payment, such obligation is eliminated as work to be performed by the contractor. If the acquisition is on a project which is federally participating but Right of Way costs are not, then any Right of Way obligation should not be made a construction contract obligation without an offset or credit to Federal funds.

K. If an exchange is involved, the gross cost to acquire the required property is to be reflected in the Federal Participation Memorandum, not as offset by the credit received for the exchanged property.

L. Region/District Right of Way has the option to review how capital and support costs actually appear in the accounting system. The Right of Way History Report, FIS 867, will show the costs involved in acquiring a parcel and whether these costs have been coded participating or nonparticipating. In the event there might be some concern whether Federal funds have been charged, the history report will provide the answer.
# CHAPTER 8

## Acquisition

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POSSESSION AND USE AGREEMENT

DATE

CO  RTE  POST

PARCEL NO.  EXP AUTH  PROJECT ID NO.

APN

This Possession and Use Agreement ("Agreement") is made on _____________, 20____, by and between the State of California, acting by and through the Department of Transportation ("State"), and ____________________ ("Owner"), who shall be collectively referred to as the “Parties.”

RECITALS

A. State requires immediate possession and use of Owner’s real property to construct a State highway project. Owner’s property is located in ____________________ County, California, legally described in the attached Exhibit “A” and identified on the Right of Way map in the attached Exhibit “B.”

B. Property is designated by State as Parcel No[s]. ____________________ (the “Parcel”). The Parcel is required for the purpose of constructing a portion of State Highway Route _____ (the “Project”). The purpose of this Agreement is to allow the State to proceed with construction of the Project without delay.

C. The Parties acknowledge and agree that any delay in the start of construction of the Project is contrary to public interest. It is the intent of State to offer fair-market compensation to Owner for permission to enter the Parcel and to construct the Project, and as consideration for the rights set forth in the paragraph entitled “Possession,” below. State has made a firm written offer to pay the total sum of $_______________ to Owner and any other persons having an interest in the Parcel. This amount does not include compensation for any loss of business goodwill, pre-condemnation damages, loss of rent or any other claims for just compensation except for the State’s appraised fair market value of the Parcel (and, if applicable, severance damages). This amount does not include reimbursement for relocation benefits which will be handled pursuant to state and federal regulations and policies. The Owner has not accepted this offer.

OPERATIVE PROVISIONS

In consideration of the sum to be paid to Owner and in consideration of the foregoing recitals and the promises, covenants and any other conditions set forth in this Agreement, State and Owner agree as follows:

Possession

1. Owner grants to State and its contractors, agents, representatives, employees and all others deemed necessary by State, the irrevocable right to exclusive possession and use of the Parcel, including but not limited to, the right to remove and dispose of any and all improvements within and/or straddling the right of way. In consideration for this irrevocable grant of possession and use, State will tender into escrow the sum of $_______________. State shall have the right to possess the Parcel and begin construction of the Project on the date the sum is paid into escrow.
Just Compensation and Appraisal

2. Owner acknowledges that the sum referenced in paragraph 1 represents the full amount of the State-approved appraisal of what State believes is just compensation owed for the acquisition of the Parcel. Should the Parties fail to reach a settlement and it becomes necessary for State to file a condemnation action to acquire the Parcel, the Parties agree the amount deposited into escrow shall not be admissible as evidence of value in such condemnation proceeding. The Parties agree that the deposit and payment under this Agreement shall be equivalent to a deposit and payment under California Code of Civil Procedure section 1255.010 and that the basis for such deposit and payment, including but not limited to any appraisal, shall be governed by Code of Civil Procedure section 1255.060. Accordingly, the Parties agree that the amount deposited or withdrawn under this Agreement may not be given in evidence or referred to in any trial on the issue of compensation and further agree that any appraiser who prepared any report or statement concerning the deposit may not be called to testify at any such trial.

Escrow

3. This transaction will be handled through an escrow with ____________, Escrow No. ____________. State shall pay all escrow fees incurred in this transaction. Owner shall be entitled to interim disbursement of $_____________ from the sum referred to in paragraph 1, less any amounts payable to any other persons having an interest in the Parcel. Any unearned rents will be prorated in escrow and State shall be credited with any outstanding security deposits. Owner shall not be entitled to receive any proceeds until:

a. All holders of liens and encumbrances on the Parcel have received full payment for all principal and interest due to them and have executed a reconveyance of their interests in the Parcel; and

b. All other parties having interests in the Parcel have received payment or have consented to a payment to Owner; and

c. State has acknowledged in writing that it concurs that all other parties having interests in the Parcel have received full payment or have consented to Owner’s withdrawal.

** See Optional Paragraph Checklist.

4. This escrow shall remain open until either a final settlement, or until termination of this Agreement, or until a Final Order of Condemnation under section 1268.030 of the California Code of Civil Procedure is entered by the court and recorded by State. Any sum disbursed to Owner from this escrow shall be deducted from the ultimate amount received by Owner as a result of any settlement, award, or verdict of just compensation for the Parcel.

Effective Date

5. This Agreement is effective as of _______________ (the “Effective Date”). From and after the Effective Date, Owner shall not assign, sell, encumber or otherwise transfer all or any portion of their interest in the Parcel, or the property, without first obtaining State’s prior written consent.

Taxes

6. Owner agrees to submit payment, when due, to the County tax collector for all taxes and special assessments on the Parcel that are due during the period from the date of possession (as set forth in paragraph 1 of this Agreement) to the date title transfers to the State. Title transfers to the State on the date the Grant Deed or Final Order of Condemnation is recorded in the office of the County recorder. Owner shall not be required to pay taxes or special assessments on the Parcel on or after the date title transfers to the State. After the date title transfers to the State, the State will request that the County tax collector cancel taxes and/or special assessments for the period from the date of possession to the date title transferred to the State. After the tax cancellation request is made by the State, Owner may file a claim with the County tax collector for a refund of any tax overpayment. Notwithstanding any other provision of this Agreement, no cancellation shall be made of all or any portion of any taxes that were due prior to the date of possession but which were unpaid; escrow shall pay in a timely manner all delinquent property taxes due from the sums deposited into escrow. (California Revenue and Taxation Code section 5084.)
7. This Agreement is made with the understanding that State will continue to negotiate in good faith with Owner to acquire its interest in the Parcel by direct purchase. It is further understood that in the event an agreement for purchase is not reached within ____________________(**Insert: # of months) of the Effective Date of this Agreement, such failure will be an acknowledgement that the negotiations to acquire the Parcel have proved futile, and State shall have the right to file a complaint in eminent domain to acquire title to the Parcel. Such complaint shall be filed within a reasonable time after the time period provided in this paragraph has expired.

8. If State begins proceedings in eminent domain, it is understood and agreed that this Agreement shall continue in effect until either a settlement is reached or a Final Order of Condemnation under section 1268.030 of the California Code of Civil Procedure is entered by the court and recorded by the State.

Waiver Notice Pursuant to Code of Civil Procedure Section 1245.235

9. Section 1245.235 of the California Code of Civil Procedure requires the State of California, Department of Transportation, to give each person whose property is to be acquired by eminent domain notice and a reasonable opportunity to appear before the California Transportation Commission and be heard on the matters referred to in section 1240.030 of the Code of Civil Procedure, which provides:

The power of eminent domain may be exercised to acquire property for a proposed project only if all of the following are established:

a. The public interest and necessity require the project.

b. The project is planned or located in the manner that will be most compatible with the greatest public good and the least private injury.

c. The property sought to be acquired is necessary for the project.

d. The offer required by section 7267.2 of the Government Code has been made to the Owner or others of record.

10. By granting this irrevocable right to possession and use of the Parcel to State, Owner agrees to the following:

a. Owner specifically waives the notice required by Code of Civil Procedure section 1245.235 of the hearing on the matters referred to in Code of Civil Procedure section 1240.030, and Owner shall not object to the adoption of the resolution of necessity by the California Transportation Commission authorizing the taking of the property described in Exhibit “A.”

b. Owner shall not object to the filing of an eminent domain proceeding to acquire the property described in Exhibit “A.”

c. In any eminent domain action filed by State to acquire the property described in Exhibit “A,” Owner shall not challenge State’s right to acquire such property, and the only issue shall be the amount of just compensation for the property.
Refund

11. Owner agrees that in the event the ultimate amount of any settlement, award, or verdict is less than the total of the sums paid to and withdrawn by Owner, the Owner shall refund the difference including interest at the apportionment rate of interest as provided in Code of Civil Procedure section 1268.350 to State.

Waiver

12. Owner waives any right to challenge State’s right to possess and use the Parcel in any subsequent eminent domain proceedings filed by State. Owner also waives all claims and defenses in its favor in any subsequent eminent domain proceeding, except a claim for greater compensation.

Date of Valuation

13. In the event proceedings in eminent domain are begun, the date of valuation for determining the amount of just compensation for the Parcel shall be [**Insert: the date State takes possession of the Parcel OR the date which State files the complaint in such proceedings.]

Interest

14. Compensation awarded in an eminent domain proceeding shall draw interest as prescribed by section 1268.350 of the California Code of Civil Procedure. Owner shall be entitled to receive interest on any sum received as compensation for its interest in the Parcel, whether pursuant to this Agreement, a subsequent settlement or court judgment, beginning on the date State takes possession of the Parcel pursuant to this Agreement and ending on the earliest of the dates as provided in Code of Civil Procedure section 1268.320.

Hazardous Materials

15. If any hazardous materials or waste (as defined by California Health and Safety Code section 25100, et. seq., and/or 42 U.S.C. §9601, et. seq.) are present on the Parcel on the date State takes possession of the Parcel, Owner shall be responsible for and bear the entire cost of all removal, disposal, cleanup and decontamination which may be required because of these hazardous materials.

Owner shall further hold State, its officers and employees harmless from all responsibility, liability and claims for damages to persons or property resulting from the existence or use of hazardous materials which are present on the Parcel on the date State takes possession under this Agreement.

Abandonment of Proceeding

16. Under section 1268.510 of the California Code of Civil Procedure, at any time after the commencement of proceedings in eminent domain, State reserves the right to abandon the proceeding in whole or in part.

** See Optional Paragraph Checklist re Ceasing Business Operations and Rental Units.

Authority to Execute and Bind

17. Each of the Parties represents and warrants that each of the persons executing this Agreement has full and complete legal authority to do so and thereby binds the party to this Agreement.
Entire Agreement

18. This Agreement reflects the entire agreement between the Parties and shall supersede all prior or contemporaneous oral or written understandings, statements, representations or promises between the Parties concerning the matters contained herein.

Governing Law

19. This Agreement is made and entered into in the State of California, and shall in all respects be interpreted, enforced and governed under the laws of said state. The language of all parts of this Agreement shall in all cases be construed as a whole, according to its fair meaning and not strictly for or against any of the Parties.

Successors in Interest

20. This Agreement shall be binding upon and inure to the benefit of the heirs, devisees, executors, administrators, legal representatives, successors and assigns of the Parties.

Understanding of Agreement

21. This Agreement has been negotiated in good faith and each party warrants and represents that in executing this Agreement, they are not relying upon any representation, promise, inducement or statement made in negotiation that has not been included in the terms of this Agreement.

Fees and Costs

22. Except as otherwise provided in this Agreement, each party shall bear all costs (including expert and appraisal fees) (excluding appraisal fees not to exceed $5,000 pursuant to section 1263.025 of the California Code of Civil Procedure) and attorneys’ fees individually incurred in connection with negotiating the matters described in this Agreement.

Severability

23. In case any part, term, portion or provision of this Agreement is determined to be illegal, invalid or unenforceable, the remaining parts, terms, portions and provisions shall remain valid, enforceable, and in full force and effect.

Amendment to Agreement

24. This Agreement may only be amended by written agreement, executed by all Parties.

Counterparts

25. This Agreement may be executed in one or more counterparts, each of which shall be deemed an original, but all of which together shall constitute one and the same instrument.
Memorandum of Agreement

26. State shall record a memorandum of this Agreement.

** See Optional Paragraph Checklist re Indemnification.

DATED: ____________________________  OWNER

RECOMMENDED FOR APPROVAL [per delegations]:

DATED: ____________________________  By: ____________________________
  [Name]
  Right of Way Agent

DATED: ____________________________  By: ____________________________
  [Name]
  Chief, Acquisition Branch

APPROVED BY:

DATED: ____________________________  STATE OF CALIFORNIA
  DEPARTMENT OF TRANSPORTATION

By: ____________________________
  [Name]
  Deputy District Director, Right of Way
POSSESSION AND USE AGREEMENT CHECKLIST

1. Fill in the “blanks” in the opening paragraph and in paragraphs A, B, C under “Recitals.”

2. Fill in the “blanks” with the appropriate information for each paragraph listed below:
   
   1 - Possession
   3 - Escrow
   5 - Effective Date
   7 - Eminent Domain Proceedings (INSERT: # of months State will have to file a complaint in eminent domain if an agreement cannot be reached. **IMPORTANT: DO NOT USE # OF DAYS. Use # of months (i.e., three months, six months, etc.). This will avoid confusion as to “working days” or “business days,” etc.
   13 - Date of Valuation (INSERT: ∈ the date State takes possession of the Parcel OR ∈ the date which State files the complaint in such proceedings.)
   22 - Fees and Costs.

3. Review the list of Optional Paragraphs and decide if any apply. Search for ** in the Agreement and insert the appropriate Optional Paragraph(s).

4. Search for and delete all ** and instructions with **.

5. Review Agreement to ensure all issues (blanks) have been addressed.

6. Renumber paragraphs if necessary.

7. Consult with the Legal Department if there are questions.

8. Insert names for signature blocks.

9. Prepare a Memorandum of Possession and Use Agreement; must be notarized and recorded immediately after execution.

OPTIONAL PARAGRAPHS

☐ Escrow

§ 3 To confirm there is no lease or tenancy INSERT:

d. Owner represents and warrants to State that neither the Parcel nor the property is subject to any lease or tenancy, and there is no party other than Owner who is entitled to any proceeds for the acquisition or damaging of the Parcel.
Ceasing Business Operations (Use this title.)
¶ # - If there is a business operating on the property, INSERT PARAGRAPH, PARAGRAPH # & FILL IN DATES & TIMES:

#. Owner shall cease all business operations and related activities on the Parcel no later than ________ a.m. / p.m. on ____________, 20____, and shall fully vacate and remove any and all fixtures, equipment and personal property from the Parcel no later than ________ a.m. / p.m. on ____________, 20____. If Owner has not fully vacated the Parcel by ________ a.m. / p.m. on ____________, 20____, State may obtain an immediate Writ of Possession pursuant to California Code of Civil Procedure sections 512.010 and 1230.050.

Rental Units (Use this title.)
¶ # - If there is a tenant on the parcel, INSERT PARAGRAPH, PARAGRAPH # & FILL IN appropriate information:

#.
State agrees to pay Owner lost rental for the tenancy from the date vacated until the date State acquires possession under this Agreement. The Parties agree that the monthly rental for tenancy is/are as follows:

[list rental]

The Parties further agree that payment to Owner of lost rental hereunder is in addition to and does not constitute just compensation, severance damages, or any other damages allowable under Part 3, Title 7 of the Code of Civil Procedure (the Eminent Domain Law). In addition, the Parties agree that payment for lost rental hereunder is made solely for purposes of leaving the tenancy vacant until the date of possession, at which time the leases/rental of such tenancy terminate by operation of law pursuant to Code of Civil Procedure section 1265.140. Owner shall not claim nor be entitled to any additional lost rental under this Agreement or in any eminent domain proceedings.

Indemnification (Use this title.)
¶ # - If Owner requests indemnification, INSERT:

#.
State agrees to indemnify, defend, and hold harmless ________________ [Owner] from any liability arising out of State’s operations under this Agreement. State further agrees to assume responsibility for any damages proximately caused by reason of State’s operations under this agreement and State will, at its option, either repair or pay for such damage.

o REVIEW AGREEMENT.
o HAVE ALL ISSUES BEEN ADDRESSED?
o IS ALL THE APPROPRIATE INFORMATION FILLED IN?
o ARE ALL PARAGRAPHS SEQUENTIALLY NUMBERED?
o HAVE PAGES FROM THE CHECKLIST BEEN REMOVED FROM THE AGREEMENT?
MEMORANDUM OF POSSESSION AND USE AGREEMENT

This Memorandum of Possession and Use Agreement is made on ________________, 20__, by and between the State of California, acting by and through the Department of Transportation (“State”), and ____________________ (“Owner”), who shall be collectively referred to as the “Parties.”

The Parties acknowledge and agree as follows:

1. **Premises:** Owner grants State the permission to enter and use Owner’s real property to construct a State Highway project. Owner’s property is located in ________________ County, California, legally described in the attached Exhibit “A” and identified on the Right of Way map in the attached Exhibit “B.” The property is designated by State as Parcel No[s]. ________________ (the “Parcel”).

2. **Term:** Owner grants to State and its contractors, agents, representatives, employees and all others deemed necessary by State, the irrevocable right to exclusive possession and use of the Parcel, including but not limited to, the right to remove and dispose of any and all improvements within and/or straddling the right of way. This Agreement shall be binding and inure to the benefit of the heirs, devisees, executors, administrators, legal representatives, successors and assigns of the Parties.

3. **Other Terms and Conditions:** The effective date of the Possession and Use Agreement is ________________. All covenants, promises and conditions set forth in the unrecorded Possession and Use Agreement are incorporated by reference into this Memorandum.

4. **Purpose of Memorandum of Possession and Use Agreement:** The purpose of this Memorandum is for recordation and it in no way modifies the terms and conditions of the Possession and Use Agreement.

DATED: ________________________ STATE OF CALIFORNIA, DEPARTMENT OF TRANSPORTATION

By: ____________________________
   [Name]
   Deputy District Director, Right of Way

DATED: ________________________ OWNER
ESCROW INSTRUCTIONS

MAIL TO: Title Company Date: __________________________
Dist/Co/Rte/PM: __________________________
EA: __________________________
Project ID No.: __________________________
Parcel: __________________________

Atttn: Your No.

We are enclosing an original and one copy of a Possession and Use Agreement for Parcel No. ____________________
from ________________________________________ (Owner).

Pursuant to General Instructions on the reverse side of this letter, you are authorized to disburse the sum of
$_______________ as follows:

Pay:
1. Any delinquent general and/or specific County taxes (or assessments) as specified in Item 8 of General
Instructions.

Balance to:

Address:

Possession to be taken subject only to current taxes as covered in Item 7 of General Instructions and those exceptions in
your report dated __________, and numbered as follows: __________, Title Report No. __________.

Special Instructions: This is a Possession and Use Agreement of (an improved) (an unimproved) (a commercial)
(a residential) property. The property address is _________________________________________. There are (no) trust
deeds on the property. When funds are received and ready for disbursement, please notify this office by Fax at
(619) 688-2570. Also, please notify ________________________________________, Owner. Owner’s telephone number
is __________.

NOTE: Owner may elect to leave funds in escrow pending acquisition of his property. Also, escrow instructions may be
amended within 120 days.

The State’s negotiator for this transaction is: _________________________________________.

___________________________________________________________