STATE OF CALIFORNIA • DEPARTMENT OF TRANSPORTATION

MANUAL CHANGE TRANSMITTAL

RW 0001 (REV. 10/93)

XX	R/W MANUAL CHANGE (1993 Edition)	RWMC– **69**
	PROCEDURAL HANDBOOK (1984 Edition)	RWPH-___-___-___ TRANSMITTAL#___

TITLE	APPROVED BY	DATE ISSUED
ACQUISITION	MICHAEL E. LAHODNY	July 8, 1999 Page 1 of 1
SUBJECT AREA Chapter 8, "Acquisition"	ISSUING UNIT Acquisition	

SUMMARY OF CHANGES

Section 8.50.03.00

PURPOSE

8.50.03.00 Reinstates the explicit responsibility of the Acquisition Agent to complete RW 12-1 (improvements) and RW 16-1 (excess land) when preparing the MOS.

EFFECTIVE DATE

Immediate.

REVISION SUMMARY

Chapter	Remove Old Page	Insert New/Revised Page	Replace Interim Change
8 Sections	8.50-1 through 8.50-6 (Rev. 7/98)	8.50-1 through 8.50-6 (Rev. 6/99)	N/A

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 R/W 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 pre-coded 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-04), Agreement for Possession and Use, 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 for the physical entering of the costs into the accounting system. Directions on the Memorandum provide that Accounting is not to change any entry without prior 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. When the signed copy of the Federal Participation Memorandum is returned from Accounting to Right of Way, it must have a completed TRAMS Multipurpose Posting Tag or equivalent attached.

The Acquisition Branch Chief must review the signed copy from Accounting to determine its correctness. This is a vital step in the closing-of-the loop process. As evidence of this review, the Acquisition reviewer shall date and initial both documents.

On an Order for Possession, a Request for Transfer of Funds" (see Condemnation Chapter), 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 TRAMS Multipurpose Posting Tag, or equivalent. This will indicate if the deposit has been coded 6090 or 7090. The signed and dated TRAMS Multipurpose Posting Tag attached to either the Federal Participation Memorandum or the Request for Transfer of Funds will be Accounting's verification the coding of the transaction is identical with the information provided by Right of Way.

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 lower portion of the Federal Participation Memorandum.

8.50.04.01 Federal Reimbursement Provisions

These are in 23 CFR 710.301 et seq. 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 making the first written offer. If prior authorization is not obtained, all acquisition costs on that parcel are ineligible for reimbursement.

B. The cost of acquiring excess land and major improvements located thereon are eligible for reimbursement unless it is only for the convenience of the owner.

There may be exceptions to noneligibility for convenience to the owner, in which Federal funds may be charged. A case may be made for the situation in which, under most circumstances, the acquisition would normally be proposed as a convenience to the owner, but an administrative decision to acquire all of the property is related to hardship-type reasons such as documented medical problems affecting the owner. Careful thought shall be given to consider this as an uneconomic remnant to the owner rather than a mere convenience. If in doubt, it is advisable to secure concurrence of the FHWA prior to converting a convenience to the owner to an uneconomic remnant on medical grounds.

The Acquisition File shall contain a fully signed RW 8-16, and a TRAMS tag reflecting RW 8-16 entries indicating the

charging of Federal funds for excess land. The Acquisition Branch Chief is to place a memorandum in the Acquisition File indicating the reason for acquisition of the excess. In some situations the decision may be controversial, so supporting documentation is required.

Buildings straddling the right-of-way line and improvements on excess but associated with the major improvements within or straddling the right of way, e.g., garage, landscaping, swimming pool, etc., are also eligible. This itemization will normally coincide with the segregation of values on the Appraisal Page. If a settlement is different from the appraisal, 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 Accounting.

C. Cost to acquire personal property is normally ineligible for Federal reimbursement. An exception is, if a landlord owns the personalty, 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 personalty. 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 personalty 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 Appraisal Chapter.

D. Damages to remainders are eligible for Federal reimbursement unless otherwise noted. Damages, either to real estate or to a business, which are ineligible include the following:

1. **Loss of Goodwill** - Settlement, which includes a specific amount for such loss is ineligible for Federal reimbursement. Narrative discussion of any potential loss of goodwill as an item of exposure but without itemization may not necessarily render it ineligible since it may have been considered only as one of many potentialities which, cumulatively, amount to exposure. If District Right of Way, in consultation with the attorney assigned to the case, and with HQ R/W concurrence arrive at a settlement in which ineligible items are discussed, the total settlement may still be eligible for reimbursement provided the settlement would represent reasonable payment for real estate acquired. However, if an unitemized settlement cannot be justified on the basis of reasonable payment for the real estate, then ineligible items should be estimated and not claimed for Federal participation. Any cost associated with the loss of goodwill, e.g., interest computed on the loss or cost of securing an independent appraisal is not eligible.

2. **Klopping** - Damages which result from a public entity either unreasonably

delaying eminent domain action following an announcement of intent to condemn or by other conduct prior to condemnation, the result of which is the property suffers diminution in market value. These damages, described as precondemnation damages, shall be segregated from the total award and not claimed for reimbursement.

3. **Cozza** - Damages based on perceived increased costs due to circuity of travel. These damages, while not expressly overruled by another decision, People v. Lundy, are rarely, if ever made part of our appraisals. In the rare instance in which they might be included, they are to be coded ineligible unless a legal opinion with FHWA concurrence provides they are eligible. Difficulty may be encountered distinguishing circuity of travel from impairment of access. Assistance of the Legal Service Center may be necessary.

E. Interest computed on the value of eligible items, is not participating unless it meets specific criteria, e.g., an owner, because of court procedures, cannot withdraw the deposit or when the settlement exceeds the amount on deposit, then interest on the eligible portion of the overage is participating. If a deposit is made and settlement exceeds the deposit, interest computed on the eligible portion of the difference between deposit and settlement is eligible for participation for the full period of possession or period covered by the interest calculation. Interest up to a maximum of 45 days may be participating in those rare situations in which the owner due to court procedures was unable to withdraw the deposit. If excess is acquired, any participating interest is to be prorated between right of way and excess with any interest attributed to excess being ineligible. Interest payable resulting from the taking of a Right of Entry is not eligible except interest computed on eligible amounts between the approved appraised value at the time the Right of Entry is secured and the settlement amount is eligible.

F. 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.

G. 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 710.304(b)(3). 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.

H. As noted in the second paragraph of this section, the Federal Participating Memo is to be attached to and become a part of every MOS. When a property or an interest therein is acquired, the schedule package submitted to HQ R/W must include a completed copy of Federal Participating Memo and the Request for Deposit shall be in the acquisition file.

I. 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 Participating Memo. This procedure will be of significant assistance to the Accounting Service Center.

J. 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 having the withheld fund entry checked in the "yes" column and the amount(s) withheld coded and entered in the space(s) provided. In the situation where funds are being withheld, items I through VII of the Federal Participation Memorandum shall reflect the total settlement without any offset or subtraction of the withheld funds. It is anticipated that Accounting will not charge Federal funds on any eligible amounts withheld until such funds have in fact been paid to the grantor.

When the condition which required the withholding of funds has been eliminated or complied with, Accounting shall be notified that Federal funds may be charged and the withheld amount scheduled for payment. Notification must be in writing and a supplemental Federal Participation Memorandum is the desirable method to advise Accounting to charge Federal Funds, as appropriate, when the withheld amount is scheduled for payment. Care should be exercised to ensure that the supplemental memorandum does not create a "double billing" situation.

K. Parcels acquired on either a hardship or protection basis, under a Federal Aid Stage 1 Authorization, have specific eligibility requirements for Federal participation. Stage 1 Authorizations occur only after a route adoption. If a public meeting is held in which neither the preferred alternate is discussed nor a reporter's transcript made, such a meeting is classified as informational and cannot qualify as a public hearing.

In the Stage 1 Authorization a FNM-76 will have been prepared in the District, processed through the Federal Resources Office of the Budget Division in Sacramento and submitted to and approved by the FHWA. At that stage the FNM-76 will show "zero" dollars for Federal participation.

When parcels are acquired under a Stage 1 Authorization, the Federal Participation Memorandum shall be coded to provide that items which normally are coded "6" shall be coded "8". Coding in this manner will suspend their eligibility until a public

hearing is held and a revised FNM-76 approved.

A public hearing has been held when the preferred alternate is discussed and reporter's transcript made. NEPA requirements are met when the entire record of the public hearing is included in the Draft Environmental document.

Subsequent to the public hearing, a revised FNM-76 is prepared in the District and again routed through the Federal Resources Office and approved by the FHWA. After FHWA approval of the revised FNM-76, the Department and the FHWA enter into an agreement (PR-2) which in essence authorizes the Department to activate the suspended costs and process claims for Federal reimbursement. The PR-2 is the document by which the FHWA agrees to reimburse the State for eligible costs. Eligible costs are limited by the dollar amount in the PR-2.

In order to claim Federal participation for the suspended costs, a revised Federal Participation Memorandum, together with a copy of the revised FNM-76, are submitted to the District Accounting Officer. The revision to the Federal Participation Memorandum will be to change items previously coded with a prefix "8" to a prefix "6". A notation shall be included that the parcel was acquired under a Stage 1 Authorization.

District Right of Way must ensure that Accounting is promptly advised when previously suspended costs become eligible. These costs, incurred under a Stage 1 Authorization must not be claimed prematurely and must not be overlooked when they, in fact, become eligible. A signed copy of the revised Federal Participation Memorandum is to be returned by Accounting with a TRAMS Multipurpose Posting Tag attached for review by the Acquisition supervisor prior to filing in the Acquisition file.

L. If a construction 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 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 obligation, but not both. The Federal Participation Memorandum will be limited to payments. The Agent must ensure that whenever any construction 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 obligation without an offset or credit to Federal funds.

M. 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.

N. 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.