



U.S. Department  
of Transportation

**Federal Highway  
Administration**

Washington  
Division

# Program Review

## Evaluation of WSDOT's Right of Way Certification Program

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**FINAL REPORT**

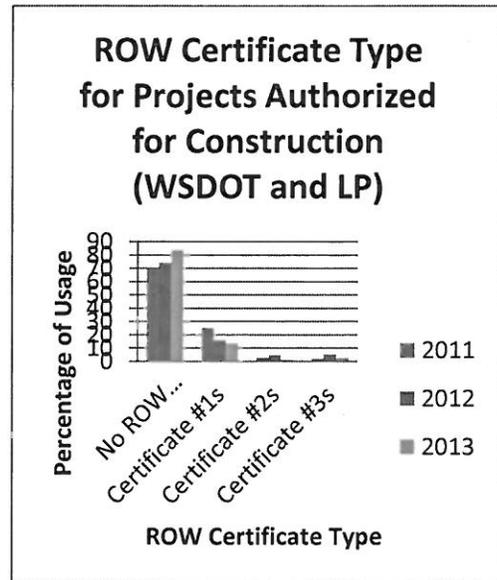




**Objective 2: Analyze WSDOT’s process used to determine when a project does not require right of way.**

The No ROW objective looked at both WSDOT and local agency projects. The data sample showed that the majority of projects advertised for construction were authorized with a statement that no ROW was required. A No ROW Required statement in a Project Agreement is equivalent to a ROW Certificate to show that the project proponent has sufficient property rights to construct, operate, and maintain the project.

The team decided to use surveys for multiple WSDOT positions to learn more about WSDOT’s process for both Local Agency projects and WSDOT projects. The team did not perform any file reviews of individual projects.



***Local Public Agency (LPA) Projects***

Observation 2: WSDOT’s Local Programs Office does not have a standardized process to verify that a Local Agency’s No Right of Way Required statement for local agency projects is accurate

Surveys were sent to Local Agency Coordinators, Region Local Programs Engineers, Headquarters Local Program Engineers, and Program Management. Program Management uses information from the Project Prospectus to determine ROW needs for the Project Agreement, and only one out of the six regions PS&E review specifically has a question on their review checklist to verify ROW needs.

Recommendation #2a: WSDOT needs to create a ROW verification process to confirm LPA information when WSDOT uses the State Remarks field in FMIS as their ROW Statement

Recommendation #2b: Improve FHWA/WSDOT/LPA/Consultant knowledge of when projects have ROW needs

***WSDOT Projects***

Observation 3: WSDOT does not have a standardized process to verify that the No Right of Way Required statements on WSDOT projects are accurate

Surveys were sent to Region Real Estate Services Managers (RESMs), Project Engineers, Project Development Engineers, Region Plans Engineers, the Region Program Management Services Manager, and Headquarters Program Management.



There isn't a standardized process for regions to follow to determine if projects require ROW. The level of involvement of the RESMs in determining ROW needs varies between regions, with some being involved throughout project development and others that are not involved at all. If the RESMs are involved, it is generally early in project development, with 50% of them generally involved in the early project development ROW decisions. Plans Engineers typically will consider ROW when reviewing PS&Es, but they do not always consider temporary construction easements, permits, and rights-of-entry (except those for design purposes) to be ROW that needs a ROW Certificate.

Recommendation #3a: WSDOT needs to create a ROW verification process to confirm information when WSDOT uses the State Remarks field in FMIS as their ROW Statement

Recommendation #3b: Improve FHWA and WSDOT staff knowledge of ROW Certification Requirements

## **Conclusion**

### Cert 3 Usage

The team determined that WSDOT's regular use of Cert 3s did not result from insufficient time allotted for ROW activities in the project development schedule for ROW acquisition. The two most common reasons for WSDOT's Cert 3 usage are because many projects had mandated construction ad dates, and because most of the projects had ROW Plan Revisions. The team determined that ROW Manual updates and training is needed. As part of the ROW Manual update, the policy should explain that Excepted Parcel Cert 3s should only be used in unusual circumstances, and Time Based Cert 3s can be used as a project streamlining tool.

### No ROW Required Statements

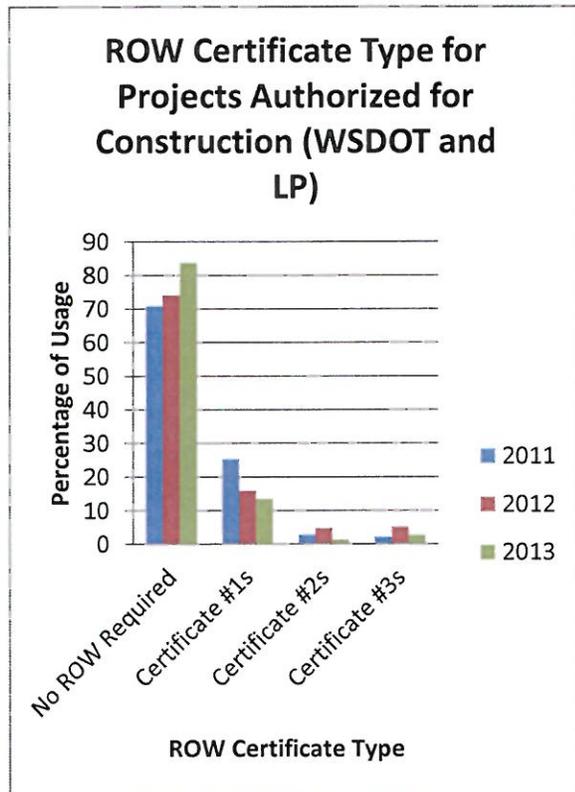
For both Local Programs and WSDOT projects, the team determined that neither group had a standardized process to verify that No Right of Way Required statements on projects are accurate. Without an appropriate WSDOT process to verify sufficient property rights to construct, operate, and maintain their projects, WSDOT is not fulfilling the regulatory requirement 23 CFR 635.309(b) for WSDOT to submit a statement that either all right-of-way clearance work has been completed or that all necessary arrangements have been made for it to be undertaken and completed as required for property coordination with the physical construction schedules. Verification processes for both groups need to be developed to ensure regulatory compliance.



## Background

### Right of Way Certification Requirements for Construction Authorization

FHWA regulatory requirements for right-of-way certifications are found in 23 CFR 635.309. The requirements are: Prior to authorization for the physical construction of a project, 23 CFR 635.309(b) requires that the State submit a statement that either all right-of-way clearance has been completed or that all necessary arrangements have been made for it to be undertaken and completed as required for property coordination with the physical construction schedules. Where it is determined that the completion of such work in advance of the highway construction is not feasible or practical due to economy, special operational problems and the like, there shall be appropriate notifications provided in the bid proposals identifying the right-of-way clearance, utility, and railroad work which is to be underway concurrently with the highway construction.



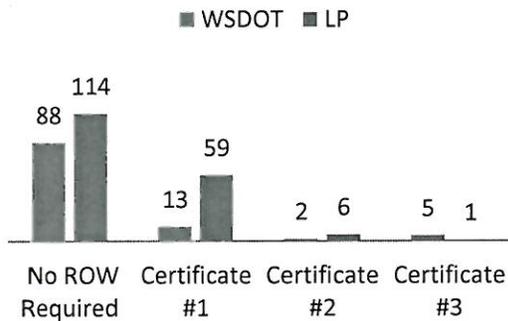
The Federal regulation describes three types of right of way certificates. Paragraphs 23 CFR 635(c)(1) and (2) cover two situations where the State has legal right of entry to all right-of-way, occupants of all lands and improvements have vacated, and the State has physical possession of and the right to demolish all improvements. We typically call these two situations Cert 1s and Cert 2s.

A Certificate #3 (typically shortened to Cert 3's) means that the acquisition or right of occupancy and use of a few remaining parcels is not complete, but all occupants of the residences on such parcels have had decent, safe and sanitary replacement housing made available to them in accordance with 49 CFR 24.204. Cert 3s are the third situation where the State has legal right for advertisement. Per 23CFR 635.309(c)(3), Cert 3s are to be used only in very unusual circumstances and the exception must never become the rule.

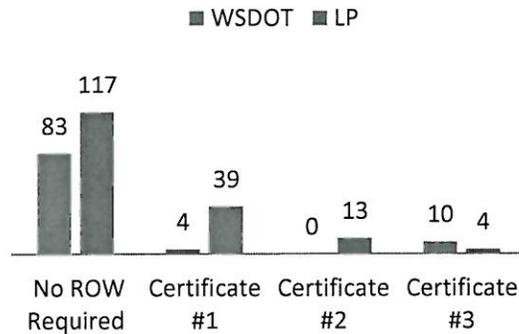




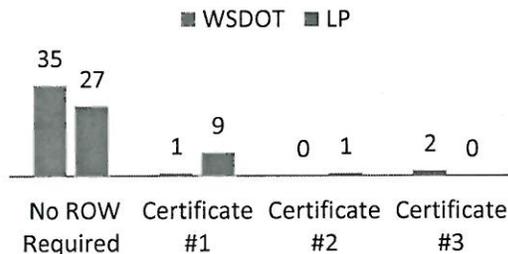
### ROW Certificate Types for Projects Authorized for Construction in 2011



### ROW Certificate Types for Projects Authorized for Construction in 2012



### ROW Certificate Types for Projects Authorized for Construction in 2013 (Through 3/31/13)



The charts in this section show the various right of way (ROW) statement types used by WSDOT for construction authorization requests from January 1, 2011 through March 31, 2013. The data used to create the charts came from FHWA’s Financial Management Information Systems (FMIS)<sup>1</sup>.

For projects where it has been determined that no ROW is needed, FHWA has accepted a statement in the Project Agreement, in the State Remarks section of the FMIS construction authorization, to meet the requirement for a statement.

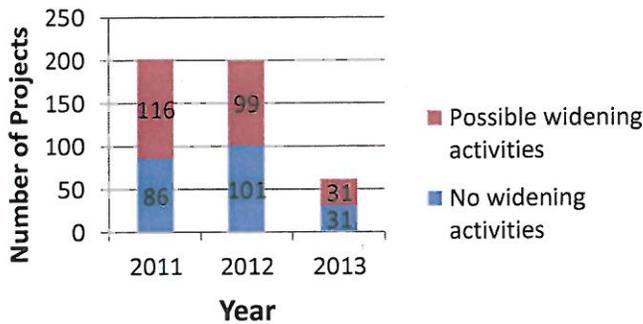
Data from January 1, 2011 through March 31, 2013 shows the majority of projects authorized for construction are done with a statement in the project agreement stating “No ROW required” or “No ROW Certification required”. Given the large number of projects authorized using the State Remarks field in FHWA’s FMIS as the ROW Summary Statement, this topic warranted further analysis.

<sup>1</sup> Since some projects have multiple construction authorizations handled as a project modification, FHWA’s data may not match WSDOT’s data that looked at all ROW Certificates.





### Projects Authorized for Construction Using No ROW Required Statement



The project titles and the project descriptions in the State Remarks field in the Project Agreements were reviewed to gauge the level of risk of projects being authorized for construction under the No ROW Required statement.

Most of the projects authorized for construction using the No ROW Required statement complied with the National Environmental Policy Act under our Programmatic Categorical Exclusion Agreement. As a result of this, the only information available to FHWA to determine if a project meets all regulatory requirements and is

ready for construction authorization is the information within the Project Agreement.

Project Agreement information was reviewed, and it was determined there were many projects with widening activities (roundabouts, new trails, new roadway on new alignment, new turning lanes) that were authorized for construction with a WSDOT statement that no right of way was required. There were also projects where there wasn't enough information in the project description to make an informed conclusion as to whether the project would widen infrastructure. Actual project files were not reviewed.

Since there were many projects where the Project Agreement information was not sufficient for FHWA to verify the No ROW Required statement, FHWA needed to determine that WSDOT has a sufficient ROW verification process to ensure projects comply with 23 CFR 635.309.

The team acknowledges that there may be projects with widening activities that fit within the Agency's existing ROW.



## Purpose and Objective

The purpose of the review is to evaluate the effectiveness of WSDOT management of the Right of Way Certification process.

There are two objectives of the review, as shown below:

Objective 1: Analyze Certificate #3s to determine when and why they are being used.

Objective 2: Analyze WSDOT's process used to determine when a project does not require right of way.



## Scope and Methodology

### Scope

The scope of the data collection for the review is based on projects authorized for construction for the two review objectives ranging from January 1, 2011 through September 6, 2013.

### Methodology

#### *Right of Way Certificate #3s*

The Certificate #3 objective focused on WSDOT projects, and data from 22 projects was analyzed. The team decided to limit the sample to the federally-funded projects with project certifications from July 1, 2011 to September 6, 2013. Major Design Build projects were excluded from this data. The team also used surveys as a second data source. The surveys were sent out to various staff positions to gain an understanding of project development circumstances for the 22 projects. For each project, surveys were sent to the following positions:

- Region Real Estate Services Manager
- Project Engineer
- Project Development Engineer
- Region Program Management Services Manager

There was 89% survey response rate.

#### *No Right of Way*

The No ROW objective looked at both WSDOT and local agency projects. The team used project data from January 1, 2011 through March 31, 2013 to show that the majority of projects advertised for construction in the timeframe were authorized with a statement that no ROW was required. The focus of the review was on WSDOT process for both Local Agency projects and WSDOT projects. The team did not perform any file reviews of individual projects.

For Local Public Agency (LPA) projects, 14 surveys were sent to the following positions:

- Local Agency Coordinators
- Region Local Programs Engineers
- Local Programs Engineering Services Manager
- Local Programs Manager of Program Management

There was a 100% response rate.

For WSDOT projects, 27 surveys were sent to the following positions:

- Region Real Estate Services Manager
- Project Engineer





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- Project Development Engineer
- Region Plans Engineer
- Region Program Management Services Manager
- Capital Program Development & Management Office

There was an 89% survey response rate.



## **Team Members**

Elizabeth Healy, FHWA Washington Division, Right of Way Program Manager, Team Leader

Megan Hall, FHWA Washington Division, Local Programs Engineer, Team Member

Dave Leighow, FHWA Headquarters, Realty Specialist, Team Member

Michele Palicka/Marshall Wainwright, FHWA Resource Center, Realty Specialist, Team Member

Kyle McKeon, WSDOT Headquarters Local Programs, Engineering Services Manager, Team Member

Dianna Nausley, WSDOT Headquarters Real Estate Services, Local Agency Program Manager, Team Member

Jim Salter, WSDOT Headquarters Real Estate Services, Acquisition and Title Program Manager, Team Member

Mark Ellis, WSDOT Olympic Region Real Estate Services Manager, Team Member

JoAnn Schueler, WSDOT Olympic Region Project Development Engineer, Team Member

Mike Frucci, WSDOT Eastern Region Assistant Regional Administrator for Project Development, Team Member



## Observations and Recommendations

**Observation 1: ROW Certificate #3 Usage Clarifications for Project Streamlining**  
WSDOT has increased their usage of Right of Way Certificate # 3s (Cert 3s) in the past few years. Per 23CFR 635.309(c)(3), Cert 3s are to be used only in very unusual circumstances and the exception must never become the rule. In 2011, FHWA issued six ROW flexibilities as part of the Every Day Counts (EDC) initiative. One of these flexibilities was to consider the use of Cert 3s as a way to shorten project delivery timeframes.

As shown in the data below, WSDOT has been using Cert 3s regularly since July 1, 2011.

Year	Total Number of WSDOT Projects with ROW Certificates		Total Number of Certificate #3s		Number of Certificates #3 Design, Bid, Build Projects		Total Number of Parcels: Design, Bid, Build Projects	Total Number of Parcels Not Complete: Design, Bid, Build Projects
	S & F Funds	F Funds	S & F Funds	F Funds	S & F Funds	F Funds		
2011	9	9	4	4	3	3	3	3
2012	36	29	21	17	19	15	268	104
2013	18	15	7	6	7	6	33	20
Total	63	53	32	27	28	23	304	127

Project certifications from July 1, 2011 to September 6, 2013. Major Design Build projects were excluded from this data.

S & F means State and Federal funded projects. F Funds column excludes state-only funded projects

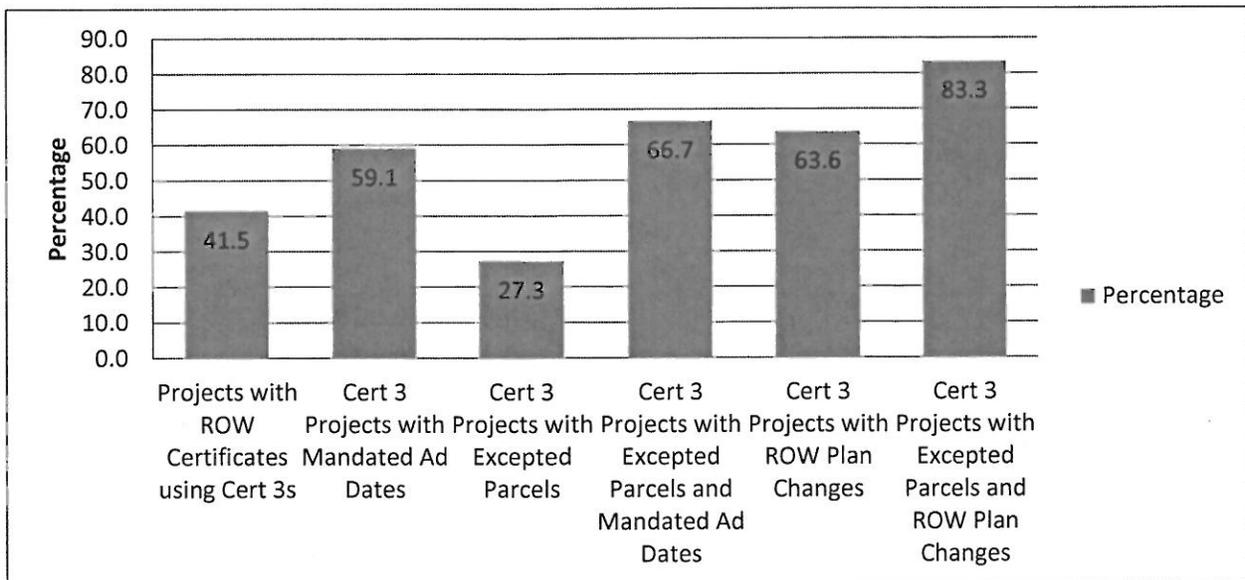
One of the goals of this review was to determine the reason for the increased usage of Cert 3s. The team wanted to understand if the increased usage of Cert 3s was due to initial project scheduling assumptions, or if there were other causes that led to the increased Cert 3 usage.

*Data Findings:*

- During the timeframe analyzed for our sample, there were 53 projects that had Right of way Certificates.



- 27 Cert 3s were issued. There were three projects with multiple Cert 3s (one with four, two with two), resulting in a total of 22 projects with Cert 3s.
- The statistics below are based on individual issues looked at separately and do add up to 100%.
  - 10 out of the 27 Cert 3s (six out of 22 projects) included excepted parcels equating to 37% of the total Cert 3s or 27.3% of the projects. The remainder of the Cert 3s were time-based, where WSDOT recertified the project using a Cert 1 or Cert 2 prior to bid opening.
  - 22 out of the 53 projects (41.5%) were advertised for construction using a Cert 3.
  - 13 out of the 22 projects (59.1%) reviewed had mandated advertisement (ad) dates.<sup>2</sup>
  - Four of the six projects (66.7%) with excepted parcels had Nickel/TPA funds.
  - 14 out of the 22 projects (63.6%) had ROW Plan changes.
  - Five out of the six projects (83.3%) with excepted parcels had ROW Plan changes
  - Multiple people in several Regions stated they could not start ROW acquisition until after the environmental decision (NEPA) has been made. This shows that not everyone is aware that early acquisition can be used as a tool to streamline project delivery.



<sup>2</sup> There were two separate state laws that increased state gas taxes, referred to as Nickel and TPA funds. Both state laws had project lists with specific ad dates. One of the projects received TIGER funding, and the TIGER Agreement had a specific ad date.



During the data analysis process, the team discovered some data previously collected by WSDOT's Southwest Region that analyzed the causes of right of way acquisition delays. Southwest Region reviewed 11 projects that had 41 change management transmittal requests covering 103 total plan sheet changes to the ROW Plans. The reasons for the ROW Plan changes are as follows:

- Design change (38%)
- Calculation/boundary/easement error (15%) (Design issue)
- Request by Real Estate Services (23%)
- Policy change during project development (11%)
- Headquarters error (7%)
- Incorrect approach (5%)

Southwest Region's analysis showed that 53% of the ROW Plan changes were a result of design issues (top two bullets above).

#### *Conclusions:*

##### WSDOT's Usage of Cert 3s

The team determined that WSDOT's Cert 3 usage was not due to initial project scheduling allowing insufficient time for ROW activities during project development. WSDOT is electing to do more design and ROW acquisition activities concurrently as a way to streamline project delivery timeframes. WSDOT assumes some risks by starting ROW activities when design activities are less complete.

There were several factors contributing to WSDOT's regular usage of Cert 3s. The two most common reasons include:

- Projects with mandated construction ad dates
- Projects had ROW Plan Revisions

##### *Mandated Ad Dates*

Nine out of the 22 projects in the sample had mandated ad dates. Of the nine projects, four of them went on ad with excepted parcels.

Since there were a large number of projects with mandated ad dates, WSDOT did not have the ability to deliver projects based on project development progress. WSDOT had less flexibility in managing staff and/or resources, which also likely impacted delivery of other planned projects that did not have mandated ad dates, which may have also led to an overall increase in Cert 3 usage. WSDOT has also been in a period where they have been delivering their largest program of projects, which likely contributed to staffing and/or resource issues.





### *ROW Plan Revisions*

Changes to approved ROW Plans were made to 14 out of the 22 projects in the sample. Eight out of the 22 projects extended the ROW schedule. For one project, the ROW Plan revision was approved with six weeks remaining in the nine month schedule, and this was after the ad date had already been delayed. For another project, the ROW Plan revision was approved with six months remaining out of a 14 month schedule. For both projects, the Project Engineers reported the amount of time given for ROW acquisition was what was in the original schedule and did not reflect the actual amount of time available for acquisition activities after the last ROW Plan revision and the ad date.

There were a variety of reasons behind the need to change the acquisition areas. It is unlikely that WSDOT can significantly reduce the need to make ROW Plan changes as long as WSDOT concurrently finishes design while acquiring ROW.

Changes to ROW Plans require that acquisition activities often have to start over by reappraising property, issuing a new offer to the property owner, continuing negotiations, and relocation activities. Changing ROW Plans can result in significantly less time available for acquisition activities than what is reported in the project schedule if the Project Office is unwilling or unable to extend the ad date.

In order to try and streamline overall project delivery by having design and ROW acquisition activities run concurrently, WSDOT has accepted the associated risk that there will be ROW Plan Changes.

Two topics to consider when proceeding with concurrent design and ROW acquisition activities are:

- The right of way phase of a project should not begin unless the design plans are developed sufficiently to determine all project impacts to the abutting property's use and value. Just determining the amount of right of way needed for the project may not be enough to value all the elements of the taking.
- The pre-NEPA early acquisition process may not be utilized on some projects due to the provision that eminent domain will not be used to acquire the property. Not having the ability to use condemnation to acquire the right of way increases the risk of not meeting the project schedule. If a property owner is unwilling to sell under this provision, WSDOT would need to wait to acquire until NEPA has been approved.

If WSDOT does not allow for sufficient time in the project development schedule for ROW acquisition and relocation activities, there is a higher risk that WSDOT may not be able to comply with Uniform Act requirements. If the acquisition schedule is compressed too much, two of the more possible non-compliance risks could be: insufficient time





provided in the schedule to meet mandated time frames (49 CFR 24.102(f) and 24.203), or WSDOT could be at a higher risk of unintended coercive activities in order to get property owners to sign agreements (49 CFR 24.102(h)). Non-compliance events could lead to WSDOT's inability to issue a ROW Certificate, and the project would be ineligible for federal funds.

### Time Based Cert 3s

The EDC initiative provided certain flexibilities, within the context of the existing regulations, to consider the use of Cert 3s as a way to shorten project delivery timeframes. The 23 CFR 635.309 regulation states Cert 3s should only be used in very unusual circumstances and should never become the rule. Prior to the EDC initiative implementation, FHWA allowed WSDOT to use Cert 3s in unusual circumstances. In 2011, the FHWA Washington Division worked with WSDOT to allow for additional use of Time Based Cert 3s, and worked with WSDOT to agree to have an unwritten policy to allow WSDOT to use time-based Cert 3s without questioning the numbers or the reasons. Approximately 73% of the Cert 3s in the data sample were Time Based Cert 3s. Based on this information, WSDOT has successfully utilized Cert 3s to shorten project delivery timeframes.

The team considered how the time-based Cert 3s are working, and agreed that the process is working smoothly. However, as a way to reduce the number of Excepted Parcel Cert 3s by increasing the amount of time allowed for a Time Based Cert 3, the team discussed changing the time frame from bid opening to either before contract award or giving the Contractor a notice to proceed with construction to gain more time to complete the ROW activities. While changing the timeframe would provide a small amount of additional time, it has the potential to cause some potentially significant issues. First, WSDOT would assume the risk of incurring delay claim costs. Second, once WSDOT opens bids, they have set an expectation for award unless there are bid irregularities. Even though WSDOT does not have to award a contract, opening bids creates issues for contractors because the bids become public and contractors that may have worked out low prices may now lose that competitive advantage in a re-bid situation. The team decided the benefit of this additional time does not outweigh the issues created by changing to the award date or notice to proceed date. The team determined the process is working pretty well now with allowing the extra time between the project advertisement date and the bid opening date. The team determined that no change will be made to the Time Based Cert 3 process.

### **Recommendation 1a: Update WSDOT's ROW Manual Chapter 17, Project Certification**

The update should address the following items:



1. Articulate the unwritten policy regarding the difference between asking for a Cert 3 that will be updated to a #1 or #2 prior to bid opening and a Cert 3 asking to except out parcels.
2. Include a questionnaire or ROW Certificate template for projects requesting to except out parcels. This template will include specific questions for Real Estate Services and others for the project office. Some topics to consider are: information explaining the need for a Cert 3; justification to support a public interest finding; project schedule information, such as if there were ROW plan revisions, and if sufficient time for ROW acquisition was provided.

Compliance Issue (if any): No

Resolution (This is to be Completed when Action Item is Resolved):

WSDOT will work with FHWA to update the ROW Manual Chapter 17.

FHWA Responsible Person

Elizabeth Healy

Due Date

To be determined as part of the Action Plan development.

### **Recommendation 1b: Improve WSDOT staff knowledge of Acquisition**

#### **Requirements**

There are two main focus areas to improve staff knowledge:

- Improve the WSDOT engineering staff's understanding of the acquisition process. Inform staff of the consequences of changing ROW Plans and how changes affect acquisition activities, which can impact the overall project schedule. Improved staff knowledge is needed to mitigate the risk that WSDOT is assuming by having the design and ROW activities run concurrently. Staff in the Project Office need a basic knowledge of ROW activities to ensure they allow enough time in the ROW schedule to meet Uniform Act requirements.
- Improve the WSDOT staff knowledge of early acquisition and the ability to use it as a project development streamlining tool. WSDOT may want to implement procedures to reduce risks.

Improving staff knowledge could be done through a variety of forums:

- Write articles explaining acquisition processes
- Provide training (PDE conference call, Region Design/Construction Meetings, webinar, etc.) to engineering staff
- Update the Early Acquisition section in the ROW Manual Chapter 6

Compliance Issue (if any): No



Resolution (This is to be Completed when Action Item is Resolved):  
WSDOT will improve staff knowledge of acquisition requirements.

FHWA Responsible Person  
Elizabeth Healy

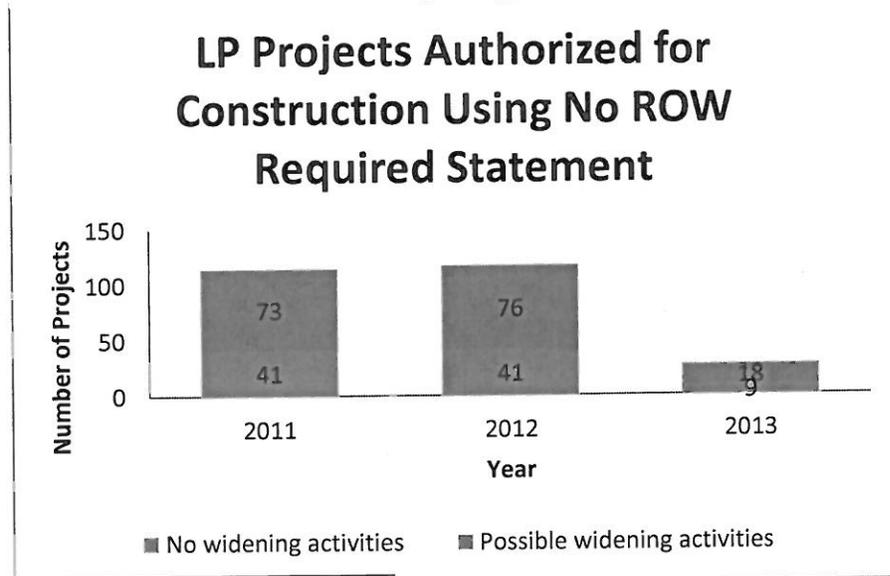
Due Date  
To be determined as part of the Action Plan development.

**Observation 2: WSDOT’s Local Programs Office does not have a standardized process to verify that a Local Agency’s No Right of Way Required statement for local agency projects is accurate.**

Prior to authorization for the physical construction of a project, 23 CFR 635.309(b) requires that WSDOT submit a statement that either all right-of-way clearance work has been completed or that all necessary arrangements have been made for it to be undertaken and completed as required for property coordination with the physical construction schedules. WSDOT cannot delegate this requirement to local public agencies (LPA).

The project titles and the project descriptions in the State Remarks field in the Project Agreements were reviewed to gauge the level of risk of projects being authorized for construction under the No ROW Required statement.

**Chart demonstrates program risk**



<sup>3</sup> Most of the projects authorized for construction using the No ROW Required statement complied with the National Environmental Policy Act under our Programmatic Categorical Exclusion Agreement. As a result of this, the only information available to

<sup>3</sup> There were projects that clearly had no widening activities. The red projects in the chart were grouped into one category that covered projects with insufficient information to tell if there were widening activities, projects with possible widening activities, and projects with definitive widening activities.



FHWA to determine if a project meets all regulatory requirements and is ready for construction authorization is the information within the Project Agreement. For most projects, since FHWA is relying on the Project Agreement to determine projects are ready for construction authorization, the graphic highlights the risk to FHWA in accepting the No ROW Statement since so many projects have widening activities.

For 2011, 71% of both WSDOT and LPA projects were authorized for construction with a No ROW Required statement. For 2012, it was 74% of the projects, and for the first quarter of 2013, 84% of the projects were authorized for construction with a No ROW Required statement.

For 2011, 36% (41 out of 114) of the LPA projects advertised for construction using a No ROW Required statement had no widening activities. For 2012, 35% (41 out of 117) of the LPA projects had no widening activities. For the first quarter of 2013, 33% (9 out of 27) of the LPA projects had no widening activities. This data is based on the project titles and project descriptions in the Project Agreement only. No project files were reviewed.

The team chose to focus on WSDOT's process rather than individual projects to determine how WSDOT is providing oversight.

WSDOT uses the No ROW Required statement in the Project Agreement to fulfill the construction authorization requirement. The No ROW Required statement in the Project Agreement is equivalent to a ROW Certificate to show that the Agency has sufficient property rights to construct, operate, and maintain their project.

For many projects, WSDOT Local Programs Program Management's initial project authorization uses information from the Statewide Transportation Improvement Program (STIP), the project prospectus, and the roadway section to describe a project's ROW needs. If the information from the STIP, project prospectus, and/or roadway is in conflict, WSDOT Local Programs HQ will contact the Region Local Programs Engineer for clarification. This documentation is prepared at the start of the project, prior to in-depth analysis and environmental approval, and may change during life of the project. If it is discovered that the ROW information is incorrect, usually at the next phase authorization, WSDOT will modify the statement about ROW needs accordingly. The Program Management process does not verify the ROW statement put into the Project Agreement is accurate. No other Local Programs staff consistently verifies the statement either. Only one region asks a question about ROW during PS&E review, and PS&E reviews are not done on all projects.

Data and information gathered through the surveys show that there are multiple reasons why the current process used to develop the statement that ROW is not required in the Project Agreement does not completely fulfill WSDOT's responsibility to ensure all



projects authorized for construction have sufficient property rights to construct, operate, and maintain projects:

- The LPA makes the ROW determination as part of project programming, early in project development. Several regions noted that design changes and/or design refinements can change the ROW needs for a project, but it was not clear how Regions or LPAs reevaluate ROW needs if design changes or design refinements are made.
- WSDOT Region Local Program staff perform PS&E reviews. Only one out of the six regions PS&E review specifically has a question on their review checklist to verify ROW needs. Also, WSDOT Regions do not review all local agency project PS&Es. Typically, for non-Certification Acceptance (CA) Agencies, WSDOT will review all PS&Es, but they only review some of the CA Agency PS&Es. Therefore, even if there is a ROW question on the PS&E checklist, WSDOT is not verifying ROW needs on all projects per the current process.
- Per the surveys, not all Regions staff believed temporary construction easements (TCEs), permits, and rights-of-entry (ROEs) (except those for design purposes) should be or are being considered as ROW.
- Two team members gave LPAs training during April and May of 2014, and LPAs and consultants had lots of questions and comments about when TCEs, permits, and ROEs trigger the need for a ROW Certificate.
- Most of the WSDOT region staff stated there still may be situations where LPAs do not realize that the ROW that they acquired early for the project will require a ROW Certificate.
- Some of the Region staff believes that any mistakes in reporting on whether ROW is required is the LPA's risk only, and if they get involved in making ROW determinations, WSDOT will take on the LPA's liability.

Due to the timing of when the LPA makes the determination "No ROW Needed/Required", as well as on-going LPA/consultant confusion about when temporary rights and early acquisition parcels need to be considered ROW, there is a chance that projects have been authorized for construction with a No ROW statement when there was ROW that needed a ROW Certificate.

Without a WSDOT process to verify LPAs have sufficient property rights to construct, operate, and maintain their projects, FHWA would need to request additional information on projects that are not easily determined to have no widening activities. This request for additional information could delay construction authorization approvals, and in extreme cases, could prevent construction authorization approval.

**Recommendation #2a: WSDOT needs to create a ROW verification process to confirm LPA information when WSDOT uses the State Remarks field in FMIS as their ROW Statement**





A standardized process should be developed to insure that WSDOT verifies the ROW needs for all federal-aid projects.

Compliance Issue (if any): Yes, for WSDOT Local Programs process

The team did not review specific projects, so there we could not find any projects out of compliance with 23 CFR 635.309(b).

23 CFR 635.309(b) requires that WSDOT submit a statement that either all right-of-way clearance has been completed or that all necessary arrangements have been made for it to be undertaken and completed as required for property coordination with the physical construction schedules. WSDOT cannot delegate this statement to LPAs,

WSDOT does not currently have a standardized process to confirm the Local Agency's statement that No ROW is required for their projects at the time of construction authorization.

Resolution (This is to be Completed when Action Item is Resolved):

The specifics of the resolution will be determined as part of the Action Plan.

FHWA Responsible Person

Elizabeth Healy

Due Date

To be determined as part of the Action Plan development.

**Recommendation #2b: Improve FHWA/WSDOT/LPA/Consultant knowledge of when projects have ROW needs**

Improving staff knowledge could be done through a variety of forums:

- Provide training, either in person or through webinars. Training should target both ROW and engineering disciplines.
- Write articles for the LTAP newsletter
- Provide clarification describing the process to determine when a ROW Certificate is needed and what property rights are needed for a project in the LAG Manual. Consider using a flow chart and narrative of the process.

Compliance Issue (if any): No

Resolution (This is to be Completed when Action Item is Resolved):

The specifics of the resolution will be determined as part of the Action Plan.



FHWA Responsible Person  
Elizabeth Healy

Due Date

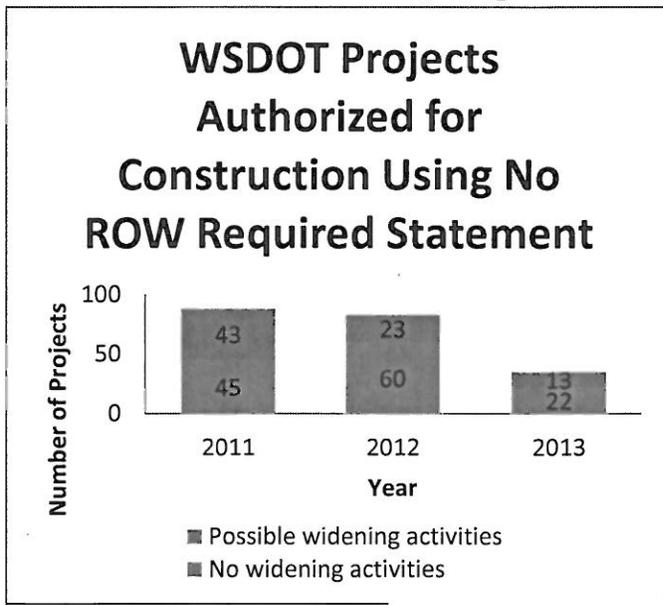
To be determined as part of the Action Plan development.

**Observation 3: WSDOT does not have a standardized process to verify that No Right of Way Required statements on WSDOT projects are accurate.**

Prior to authorization for the physical construction of a project, 23 CFR 635.309(b) requires that WSDOT submit a statement that either all right-of-way clearance has been completed or that all necessary arrangements have been made for it to be undertaken and completed as required for property coordination with the physical construction schedules. WSDOT uses the No ROW Required statement in the Project Agreement to fulfill this requirement. The No ROW Required statement in the Project Agreement is equivalent to a ROW Certificate to show that WSDOT has sufficient property rights to construct, operate, and maintain the project.

The project titles and the project descriptions in the State Remarks field in the Project Agreements were reviewed to gauge the level of risk of projects being authorized for construction under the No ROW required statement.

**Chart demonstrates program risk**



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Most of the projects authorized for construction using the No ROW Required statement complied with the National Environmental Policy Act under our Programmatic Categorical Exclusion Agreement. As a result of this, the only information available to FHWA to determine if a project meets all regulatory requirements and is ready for construction authorization is the information within the Project Agreement. For most projects, since

<sup>4</sup> There were projects that clearly had no widening activities. The red projects in the chart were grouped into one category that covered projects with insufficient information to tell if there were widening activities, projects with possible widening activities, and projects with definitive widening activities. Culvert and bridge replacements were included in the red group since they frequently require TCEs.



FHWA is relying on the Project Agreement to determine projects are ready for construction authorization, the graphic highlights FHWA's risk in accepting the No ROW Statement since so many projects have widening activities.

For 2011, 71% of both WSDOT and LPA projects were authorized for construction with a No ROW Required statement. For 2012, it was 74% of the projects, and for the first quarter of 2013, 84% of the projects were authorized for construction with a No ROW Required statement.

For 2011, 51% (45 out of 88) of the WSDOT projects advertised for construction using a No ROW Required statement had no widening activities. For 2012, 72% (60 out of 83) of the WSDOT projects had no widening activities. For the first quarter of 2013, 63% (22 out of 35) of the WSDOT projects had no widening activities. This data is based on the project titles and project descriptions in the Project Agreement only. No project files were reviewed.

The team chose to focus on WSDOT's process rather than individual projects to understand how WSDOT is determining whether they have sufficient property rights to construct, maintain and operate their projects.

Data and information gathered through the surveys show that there are multiple reasons why the current process used to develop the statement that ROW is not required in the Project Agreement does not completely fulfill WSDOT's responsibility to ensure all projects authorized for construction have sufficient property rights to construct, operate, and maintain projects:

- Project Engineers are typically the responsible official for determining if property rights are needed for projects. PEs and other Region staff often do not differentiate between temporary construction easements (TCEs), permits, and rights-of-entry (ROEs) (except those for design purposes) when determining if a project needs a ROW Certificate.
- There isn't a standardized process for regions to follow to determine if projects require ROW. The level of involvement of the RESMs in determining ROW needs varies between regions, with some being involved throughout project development and others that are not involved at all. If the RESMs are involved, it is generally early in project development, with 50% of them generally involved in the early project development ROW decisions. Plans Engineers typically will consider ROW when reviewing PS&Es, but they do not always consider temporary rights, such as TCEs, permits, and ROEs (except those for design purposes), when determining if a project that needs a ROW Certificate.
- For construction authorizations, Program Management's normal process is to use the statement No ROW Required in the State field of FMIS for projects that do not have a ROW phase. They have done this when there is no separate ROW





work order that is required to be set up for Real Estate staff to charge to for acquisition of a real property interest, such as when a permit is needed from a local agency for work done on the local agency's property to tie in to their roadway.

Due to confusion about whether TCEs, permits, and ROEs need to be considered ROW, there is a chance that projects have been authorized for construction with a No ROW statement when there was ROW that needed a ROW Certificate.

Without an appropriate WSDOT process to verify sufficient property rights to construct, operate, and maintain their projects, FHWA would need to request additional information on projects that are not easily determined to have no widening activities. This request for additional information could delay construction authorization approvals, and in extreme cases, could prevent construction authorization approval.

**Recommendation #3a: WSDOT needs to create a ROW verification process to confirm ROW information when WSDOT uses the State Remarks field in FMIS as their ROW Statement**

A standardized process should be developed to insure that WSDOT verifies the ROW needs for all federal-aid projects.

**Compliance Issue (if any): Yes, for WSDOT process**

23 CFR 635.309(b) requires that the DOT submit a statement that either all right-of-way clearance has been completed or that all necessary arrangements have been made for it to be undertaken and completed as required for property coordination with the physical construction schedules.

WSDOT does not currently have a standardized process to confirm the statement that No ROW is required for projects at the time of construction authorization.

The team did not find any projects to be out of compliance with 23 CFR 635.309(b).

**Resolution (This is to be Completed when Action Item is Resolved):**

The specifics of the resolution will be determined as part of the Action Plan.

**FHWA Responsible Person**

Elizabeth Healy

**Due Date**

To be determined as part of the Action Plan development.





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### **Recommendation #3b: Improve FHWA and WSDOT staff knowledge of ROW Certification Requirements**

Improving staff knowledge could be done through a variety of forums:

- Provide training, either in person or through webinars. Training should target both ROW and engineering disciplines.
- Provide clarification describing the process to determine when a ROW Certificate is needed and what property rights are needed for a project in the ROW Manual. Consider using a flow chart and narrative of the process.

Compliance Issue (if any): No

Resolution (This is to be Completed when Action Item is Resolved):

The specifics of the resolution will be determined as part of the Action Plan.

FHWA Responsible Person

Elizabeth Healy

Due Date

To be determined as part of the Action Plan development.



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## Successful Practices

Some notable current activities done by WSDOT staff include:

- Northwest Region Local Programs includes a question about ROW needs in their PS&E checklist.
- The Plans Preparation Manual states ROW includes easements, permits, and other documentation maybe a ROW Cert.
- WSDOT's Northwest Region RES completes a "No Right of Way Certification" on projects. This shows how they have considered ROW needs, and it documents that No ROW is needed for a project.



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## Conclusion

### Cert 3 Usage

The team determined that WSDOT's regular use of Cert 3s did not result from insufficient time allotted for ROW activities in the project development schedule for ROW acquisition. The two most common reasons for WSDOT's Cert 3 usage are because of many projects had mandated construction ad dates, and because most of the projects had ROW Plan Revisions. The team determined that ROW Manual updates and training is needed. As part of the ROW Manual update, the policy should explain that Excepted Parcel Cert 3s should only be used in unusual circumstances, and Time Based Cert 3s can be used as a project streamlining tool.

### No ROW Required Statements

For both Local Programs and WSDOT projects, the team determined that neither group had a standardized process to verify that No Right of Way Required statements on projects are accurate. Without an appropriate WSDOT process to verify sufficient property rights to construct, operate, and maintain their projects, WSDOT is not fulfilling the regulatory requirement 23 CFR 635.309(b) for WSDOT to submit a statement that either all right-of-way clearance work has been completed or that all necessary arrangements have been made for it to be undertaken and completed as required for property coordination with the physical construction schedules. Verification processes for both groups need to be developed to ensure regulatory compliance.



## **Action Plan**

WSDOT is working on developing the Action Plan. For Recommendations 1a, 1b, 3a, and 3b, Real Estate Services is taking the lead. For Recommendations 2a and 2b, Local Programs is taking the lead. WSDOT will submit the Action Plan by January 30, 2015.



## Appendices

### Glossary

#### **Early Acquisition**

ROW acquisition activities start prior to the completion of the project's NEPA document. It is usually not done under the threat of condemnation. Agency or federal funds can be used for the acquisitions, but there are more requirements/restrictions if federal funds are used.

#### **Excepted Parcels**

A parcel where either the acquisition activities and/or relocation activities are not complete at the time WSDOT prepares the ROW Statement

#### **Excepted-Parcel Cert 3**

WSDOT's ROW Statement when they request to start construction with acquisition and/or relocation activities still pending.

#### **NEPA**

The **National Environmental Policy Act (NEPA)** is a United States environmental law that established a U.S. national policy promoting the enhancement of the environment and also established the President's Council on Environmental Quality (CEQ). NEPA requires the federal government to prepare documents assessing the environmental impacts federal actions, which are triggered by project funding or approval requirements.

The NEPA process consists of an evaluation of the environmental effects of a federal undertaking including its alternatives. There are three levels of analysis: categorical exclusion determination; preparation of an environmental assessment/finding of no significant impact (EA/FONSI); and preparation of an environmental impact statement (EIS).

The public has an important role in the NEPA process, particularly during scoping, in providing input on what issues should be addressed in an EIS and in commenting on the findings in an agency's NEPA documents. The public can participate in the NEPA process by attending NEPA-related hearings or public meetings and by submitting comments directly to the lead agency. The lead agency must take into consideration all comments received from the public and other parties on NEPA documents during the comment period.



### **Project Prospectus**

The Project Prospectus is the description of the proposed improvement which serves as the support document for Federal Highway Administration (FHWA) authorization of federal funds. The prospectus also provides a schedule which tells when the local agency anticipates obligating federal funds.

### **Right of Way Cert 3s**

The acquisition or right of occupancy and use of a few remaining parcels is not complete, but all occupants of the residences on such parcels have had replacement housing made available to them in accordance with 49 CFR 24.204. The State may request authorization on this basis only in very unusual circumstances. This exception must never become the rule. Under these circumstances, advertisement for bids or force-account work may be authorized if FHWA finds that it will be in the public interest. The physical construction may then also proceed, but the State shall ensure that occupants of residences, businesses, farms, or non-profit organizations who have not yet moved from the right-of-way are protected against unnecessary inconvenience and disproportionate injury or any action coercive in nature. When the State requests authorization to advertise for bids and to proceed with physical construction where acquisition or right of occupancy and use of a few parcels has not been obtained, full explanation and reasons therefor including identification of each such parcel will be set forth in the State's request along with a realistic date when physical occupancy and use is anticipated as well as substantiation that such date is realistic. Appropriate notification shall be provided in the bid proposals identifying all locations where right of occupancy and use has not been obtained.

### **Right of Way Statement**

A statement is received from the State, either separately or combined with the information required by § 635.309(c), that either all right-of-way clearance, utility, and railroad<sup>5</sup> work has been completed or that all necessary arrangements have been made for it to be undertaken and completed as required for proper coordination with the physical construction schedules. WSDOT prepares ROW Certificates when a project requires new ROW (including temporary rights needed just for construction). WSDOT includes a no ROW needed/required statement in the Project Agreement (in FMIS) when a project can be built entirely within existing ROW.

### **Time-Based Cert 3**

WSDOT's ROW Statement when they request to allow a project to be advertised for construction that will be recertified to a Certificate #1 or #2 prior to bid opening.

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<sup>5</sup> WSDOT has chosen to have separate statements Right of Way and Utility/Railroads and they are in the process of updating their procedures. This process review is only focusing on the ROW component.

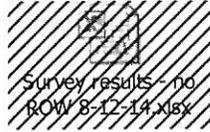


## Survey Results

Compilation of Survey information is available upon request.



Cert 3 Survey  
Results.xlsx



Survey results - no  
ROW 8-12-14.xlsx



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