



6.3 RIGHT OF WAY USE AGREEMENTS

A right of way use agreement is a term established by the Federal Highway Administration (FHWA) that refers to any non-highway alternative use of real property interests of highways as defined in 23 U.S.C. 101(a) that received Title 23, United States Code, financial assistance in any way.

WisDOT must ensure that all real property interests within the approved R/W` limits or other project limits of a facility that has been funded under Title 23 are devoted exclusively to the purposes of that facility and the facility is preserved free of all other public or private alternative uses, unless such non-highway alternative uses are permitted by federal law (including regulations) or the FHWA. An alternative use, whether temporary under 710.405 or permanent as provided in 710.409, must be in the public interest, consistent with the continued operation, maintenance, and safety of the facility, and such use must not impair the highway or interfere with the free and safe flow of traffic. Park and Ride lots are exempted from these provisions (Park and Ride lot requirements are found in 23 USC 137 and 23 CFR 810.106).

A R/W use agreement for the non-highway use of real property interests may be executed with either a public entity or private party in accordance with 710.405 and this section. Any non-highway alternative use of real property interests requires approval by WisDOT, and FHWA, including a determination by FHWA that such occupancy, use, or reservation is in the public interest; is consistent with the continued use, operations, maintenance, and safety of the facility; and such use does not impair the highway or interfere with the free and safe flow of traffic described in §710.405(b). However, in Wisconsin, FHWA has given WisDOT the authority to approve R/W use agreements except in cases where interstate highways are affected.

R/W use agreements are not needed in the following situations:

- Bikeways and pedestrian walkways as covered in 23 CFR part 652.
- Park and ride lots as covered in 23 USC 137 and 23 CFR 810.106.
- Uses by railroads and public utilities which cross or otherwise occupy Federal-aid highway R/W and that are governed by other sections of this title.

6.3.1 Proposing and Executing an Agreement

6.3.1.1 Proposing a Right of Way Use Agreement

A right of way use agreement may be executed with either a public or private party. A proposal for a specific right of way use agreement must be submitted by the proposed user to the DTSD Technical Services Chief in the WisDOT regional office. The proposal must contain the following (per federal regulation):

- Adequately detailed three-dimensional presentation of the space to be used and the facility to be constructed if required by FHWA or the grantor. Maps and plans may not be required if the available real property interest is to be used for leisure activities (such as walking or biking), beautification, parking of motor vehicles, public mass transit facilities, and similar uses. In such cases, an acceptable metes and bounds description of the surface area, and

appropriate plans or cross sections clearly defining the vertical use limits, may be furnished in lieu of a three-dimensional description, at the grantee's discretion.

- Description of other general provisions such as the term of use, insurance requirements, design limitations, safety mandates, accessibility, and maintenance as outlined further in this section.
- Description of why the proposed use would be in the public interest.
- General statement of the proposed use.
- Identification of the party responsible for developing and operating the proposed use.
- Info demonstrating the proposed use would not impair the highway or interfere with the free and safe flow of traffic.
- Maps, plans, or sketches to adequately demonstrate the relationship of the proposed project to the highway facility.
- Proposed design for the use of the space, including any facilities to be constructed.
- Provision for vertical and horizontal access for maintenance purposes.

6.3.1.2 Reviews and Approvals

The proposal must be considered first by the regional office and after analysis and examination shall be forwarded to the BTS-RE property management coordinator for review, and subsequent forwarding to the FHWA. When the region forwards the proposal, they must include the recommendation of the region, which shall represent input from Real Estate, Design, Maintenance, Planning and other sections as appropriate, and must be approved by the regional director.

The lessee and WisDOT shall be the signatory parties. Since approval of the FHWA is required if the right of way use is located on an interstate highway system, the FHWA will also be a signatory in those cases.

6.3.1.3 Contents

Right of way use agreements must contain provisions that address the following items:

- Define the term of the agreements.
- Ensure the safety and integrity of the federally assisted facility.
- Establish terms for revocation of the R/W use agreement and removal of improvements at no cost to the FHWA.
- Grant access to the non-highway use by WisDOT and FHWA for inspection, maintenance, and activities needed for reconstruction of the highway facility.
- Identify the design and location of the non-highway use.
- Provide adequate insurance to hold WisDOT and the FHWA harmless.
- Require compliance with nondiscrimination requirements.
- Require grantee and FHWA approval, if on Interstate Right of Way, and WisDOT approval if the agreement affects a Federal-aid highway and the WisDOT is not the grantee, for any significant revision in the design, construction, or operation of the non-highway use.

BTS-RE, along with representatives from the Operations, Maintenance and Development bureaus and other appropriate areas, shall review the proposal to determine if the right of way use identified is, from a statewide perspective, free from future construction needs and does not inhibit the safe operation and maintenance of the highway facility. BTS-RE will forward the proposed R/W use agreement to FHWA along with their recommendation for FHWA concurrence. If the proposed use is on interstate highway right of way, the Department's approval shall be subject to FHWA concurrence. BTS-RE will notify the region upon approval or

rejection. In the event the proposal is rejected, the region shall advise the prospective lessee. WisDOT retains the authority to approve R/W use agreement uses not along the federal interstate system.

6.3.1.4 Fair Market Rental

Right of way use agreements along the federal interstate system are required to generate fair market rent. Because of this requirement, real estate staff must establish a fair market rent for R/W use agreements. Fair market rental rates shall be determined by one of two methods: 1) public bidding for the right to use or operate the site; or, 2) a detailed appraisal prepared by an experienced and qualified appraiser that documents the market rent to be collected. If public bidding is chosen as the method to arrive at fair market rent, the request for FHWA and BTS-RE concurrence must include the documented estimate of the high bid.

Current fair market value must be charged for the use or disposal of all real estate property interests if those real property interests were obtained with Title 23, United States Code, funding, except as provided below:

When the grantee shows that an exception is in the overall public interest based on social, environmental, or economic benefits, or is for a nonproprietary governmental use. The grantee's R/W manual or RAMP must include criteria for evaluating disposals at less than fair market value, and a method for ensuring the public will receive the benefit used to justify the less than fair market value disposal.

1. Use by public utilities in accordance with 23 CFR part 645.
2. Use by railroads in accordance with 23 CFR part 646.
3. Use for bikeways and pedestrian walkways in accordance with 23 CFR part 642.
4. Uses under 23 U.S.C. §142(f), Public Transportation Lands and rights of ways of a highway constructed using Federal-aid highway funds may be made available without charge to a publicly owned mass transit authority for public transit purposes whenever the public interest will be served, and where this can be accomplished without impairing automotive safety or future highway improvements.

Requests for exceptions to the fair market value requirement must be submitted to BTS-RE. For R/W use agreements along the federal interstate system, the exception request must also be submitted to FHWA. Any income received by WisDOT from R/W use agreements is subject to financial procedures and reporting as designated by the WisDOT, Bureau of Financial Management.

Federal requirements regarding procedures for the negotiation and approval of right of way use agreements can be found in 23 CFR 710 Sub. D.

6.3.2 Right of Way Agreements in Milwaukee County

For right of way use agreements on property that is over, under, or abutting freeways in Milwaukee County, a document entitled "How Freeway Airspace is Leased in Milwaukee County" has been developed between Milwaukee County, WisDOT and FHWA. This document provides background on how to draft and develop right of way use agreements on property that is over, under or abutting freeways in Milwaukee County. Contact BTS-RE property management coordinator for a copy. Guidance from the BTS-RE property management coordinator and FHWA should be sought if you are new to preparing such agreements.

6.3.3. Maintaining Inventory of Leases

Each regional office will maintain an inventory of all existing right of way use agreements in READS. This inventory shall be available for review by appropriate federal and state agencies and will include, but not be limited to, the following items for each authorized use of airspace:

- A three-dimensional description or a metes and bounds description.
- As-built construction plans of the highway facility locating where right of way use is authorized.
- A copy of the executed right of way use agreement.
- Identification of the authorized right of way user.
- Location by project, survey station, or other appropriate method.
- Pertinent construction plans of any structure or facility authorized to occupy the right of way.

6.3.4 Maintaining Intended Use

Regional real estate or county staff will, through inspection and surveillance, assure that the user carries out the intent of the agreement for use of the right of way. In all cases, the applicable provisions of FHWA guidelines apply. In the event of breach of lease provisions and FHWA guidelines, lease termination and eviction shall occur.

6.3.5 Change in Proposed Use of Lease

The regional office shall advise BTS-RE of any proposed change in use of any right of way use agreement, and shall submit a revised right of way use agreement incorporating the proposed change in use.

6.3.6 Special Consideration to Institutions of Higher Learning

Wisconsin Statutes requires special consideration be given to institutions of higher learning concerning contracts. See [s. 118.09\(2\) Wis. Stats.](#) for more information.