Appendix C

Summary of Transportation Departments’ Responses to the Survey

The state transportation departments identified in Appendix A responded to a survey conducted for the digest. As used in the survey, the term public-use property means property either that is already used for a public purpose or that is set aside for a specific public purpose with the intent that the property will be used for the designated purpose within a reasonable time. Although not all publicly owned property may be devoted to a public-use, the United States and state and local governments and their agencies or departments own public-use property, as do utilities and common carriers, such as pipelines and railroads. Public-use property also may be owned by an individual, a trust, a corporation, or other business entity. Public buildings, schools, parks, recreational areas, and wildlife refuges and conservation areas are examples of public-use property.

The summary restates the questions and thereafter summarizes the DOTs responses to the survey.

1. Does your state have a constitutional provision that authorizes your department to use eminent domain to take public-use property for a highway project?

A majority of the DOTs answered that in their state there is no constitutional provision that authorizes their department to use eminent domain to take public-use property for a highway project.1

Two departments stated that the constitutional authority in their state is not specific or explicit regarding the authority of their department to take public-use property for a highway purpose. PennDOT stated that its authority was not specific but that “Article I, Section 10, of the Pennsylvania Constitution provides the general power of eminent domain.” SDDOT advised that there is no “explicit authorization in the South Dakota Constitution” but that “South Dakota has a provision that prohibits taking private property without just compensation. S.D. Const. art. VI § 13.”

2. Does your state have a statute that authorizes your department to use eminent domain to take public-use property for a highway project?

With two exceptions, the DOTs responding to the survey stated that their state has a statute that authorizes the department to use eminent domain to take public-use property for a highway project.2

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1 Yes (ArDOT, DDOT, MoDOT, NHDOT, UDOT, and WVDOT); No (KDOT, MDT, PennDOT, SDDOT, TDOT, and TxDOT). Some transportation departments that responded to the survey did not answer all questions.

2 Yes (ArDOT, IDOT, KDOT, MDT, MoDOT, NHDOT, PennDOT, TxDOT, UDOT, and WVDOT); No (SDDOT and TDOT).
PennDOT reported that “Pennsylvania statutory law applicable to PennDOT provides broad authority to the Secretary of Transportation to use the power of condemnation for all transportation purposes. 71 P.S. § 513(e)(1).” PennDOT also stated that Pennsylvania has an express mitigation statute enabling PennDOT to acquire property—that would otherwise not be impacted by the transportation project—for the purpose of mitigating adverse effects on other land adversely affected by its proximity to such highway or other transportation facility. 71 P.S. § 513(e)(2)(ii). The other land adversely affected contemplated by this law may be public property put to public use, and PennDOT has the legal authority to acquire property for and on behalf of these public agencies (confirmatory deeds can then be provided to public agencies following certain types of mitigation acquisitions).

Furthermore, in Pennsylvania, state law applicable to transportation planning requires PennDOT, for environmental assessment or environmental impact statement projects, to conduct public meetings and consider all impacts of its projects to certain land types and uses in conjunction with, or addition to, regular environmental permitting and study requirements. 71 P.S. § 512(b)(1)-(23). PennDOT is further required by law to coordinate its transportation projects with those of other public agencies and authorities, 71 P.S. § 512(a)(6), and must consult specifically with state agencies and commissions regarding impacts to public land uses for recreation; wildlife; waterfowl refuge; historic sites; State forest land; State game land; wilderness area; and public parks. 71 P.S. § 512(a)(15).³

PennDOT also stated that “the Secretary is authorized to enter into contracts and agreements with proper agencies of any government, Federal, State or local political subdivision (or any private agency) in order to obtain any benefits or funding for any purpose connected in any way to PennDOT or the Commonwealth. 71 P.S. § 511.1.”⁴

PennDOT’s response concluded that “[t]aken in totality, and in combination with the general acquisition authority already found in Pennsylvania’s Eminent Domain Code, 26 Pa. C.S. § 101, et seq., agency experience has been that sufficient constitutional and statutory authority exists in Pennsylvania for PennDOT to complete its mission of providing safe, efficient transportation.”

In South Dakota, “[t]here is no explicit authorization through the statutory language permitting eminent domain does not contain a limitation to private property.”⁵

³ Response of PennDOT.
⁴ Id.
⁵ Response of SDDOT.
3. In your department’s experience, have there been occasions when your department has been unable to use eminent domain to take public-use property for a highway project because of the lack of state constitutional and/or statutory authority for taking one or more kinds of public-use property?

All except three of the transportation departments responding to the survey reported that there had been no occasion when their department has been unable to use eminent domain to take public-use property for a highway project because of the lack of state constitutional and/or statutory authority for taking one or more kinds of public-use property.⁶

If your answer to question 3 is “Yes,” please provide information on one or more examples of public-use property for which your department lacked state constitutional and/or statutory authority to take the property by eminent domain.

In Arkansas, “[r]ailroad defendants in condemnation cases have used 49 U.S.C. 10501 (b) to remove state condemnation actions against a railroad defendant to federal court [which then dismissed] on the basis that the state condemnation action is preempted by federal law.”⁷

ArDOT reported further that a railroad generally contend[s] that the Interstate [Commerce] Commission Termination Act vests the Surface Transportation Board with exclusive jurisdiction over certain forms of regulation or actions related to railroads, and, therefore, preempts certain state, local, and federal laws and judicial actions. The railroads have argued that a condemnation action is facially and categorically preempted or that the state law condemnation action is preempted under an “as applied preemption,” meaning that under the particular facts of the case the “remedy” sought “would impede rail operations or pose undue safety risks.” The railroads have used the standard for the “as applied preemption” found in the Surface Transportation Board case, *Maumee & W.R.R.,* [No. 34354] 2004 STB LEXIS 140 [March 2, 2004], which was adopted by the 8th Circuit Court of Appeals in the case of *City of Ozark v. Union Pac. R.R. Co.*, 843 F.3d 1167 (8th Cir. 2016).

IDOT is unable “to condemn property needed for its highway projects for land owned by Forest Preserve Districts, Metro, or the Water Reclamation District, etc.”⁸

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⁶ Yes (ArDOT, IDOT, PennDOT); No (DDOT, KDOT, MDT, MoDOT, NHDOT, SDDOT, TDOT, TxDOT, UDOT, and WVDOT).

⁷ Response of ArDOT.

⁸ Response of IDOT.
As for PennDOT, notwithstanding its affirmative answer to the question, “two examples of protected public use lands are property developed under the Keystone Recreation, Park and Conservation Fund Act, 32 P.S. § 2011 et seq., known as Act 50 land, and public parkland acquired with funding pursuant to the Project 70 Land Acquisition and Borrowing Act, 72 Pa. C.S. § 3946.1 et seq., known as Project 70 land.”

Both types of lands “become deed-restricted and the public entities owning them are entrusted with preservation and oversight responsibilities to ensure they are put [to] the intended public use. Even though the full legal authority for PennDOT to file a declaration of taking impacting these types of lands has never been tested, it is not the policy or intent of PennDOT to ever do so.”

However, “[a]micable agreements have been reached regarding Act 50 lands resulting in deed-restricted permanent interests in land for transportation purposes, along with temporary construction easements. Rather than acquisitions in fee simple title, PennDOT has agreed to easements for highway purposes with agreed-upon restrictions placed in the deeds.”

As for Project 70 lands, “environmental agencies with jurisdiction over these lands have agreed in principle that PennDOT acquisitions for highway purposes—where the road improvements would benefit the public use—are actually for recreational purposes within the intent of the use restrictions. Such transfers are thus not seen as sales of restricted land but, instead, the transfer of jurisdiction over land owned by the Commonwealth from one state agency to another.” PennDOT explained that “[t]his is the fundamental principal behind the Memorandum of Understanding (MOU) process used often between state agencies. The conversion of Project 70 lands require[s] special legislation [that grants] authority to transfer the property to PennDOT and in-kind mitigation for replacement lands, which PennDOT has the legal authority to do.” Furthermore, “[m]itigation requirements are worked out in advance, and included within the law, to ensure the legislation is universally supported.”

Although it responded “No” to the question, SDDOT’s response stated that, to the department’s knowledge, “this has never been attempted.”

4. **Are there constitutional provisions or statutes in your state that authorize your department and/or municipalities, counties, or local public entities or agencies to take state-owned public-use property?**

A majority of the DOTs responding to the question said that there are constitutional provisions or statutes in their state that authorize their department and/or municipalities, counties, or local public entities or agencies to take state-owned public-use property.9

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9 **Yes** (ArDOT, IDOT, MDT, PennDOT, TxDOT, UDOT, and WVDOT); **No** (DDOT, KDOT, NHDOT, and TDOT). SDDOT referred to its answer to question number 2 (i.e., to the department’s knowledge, “this has never been attempted.”).
In Arkansas, Ark. Code Ann. § 27-67-301(a), regarding authority to acquire property, states that “[t]he State Highway Commission is authorized to acquire real or personal property, or any interest therein, deemed to be necessary or desirable for state highway purposes, by gift, devise, purchase, exchange, condemnation, or otherwise.”

The state of Illinois has a “constitutional provision regarding takings, but the constitution does not give IDOT the power to condemn.” The department “does not have power of eminent domain over public entities. However, the Illinois Tollway pursuant to its Toll Highway Act has authority. Additionally, the City of Chicago has very robust power of eminent domain via its O’Hare Modernization Act.”

PennDOT’s response noted that “the Pa. Eminent Domain Code, 26 Pa. C.S. § 101, et seq., … contains no special protection or exemption for most types of public use property.”

5. Are there some kinds of public-use property in your state for which your department must obtain prior approval from the legislature or from a state or local agency or regulatory authority before taking the property, or an interest therein, by eminent domain for a highway project?

A majority of the DOTs responding to the survey stated that there were some kinds of public-use property in their state for which their department had to obtain prior approval from the legislature, or from a state or local agency or regulatory authority, before taking the property, or an interest therein, by eminent domain for a highway project.

If your answer to question 5 is “Yes,” please provide information on one or more examples of your department’s takings of public-use property for which prior approval was required.

In Arkansas, there is property in which the Arkansas Natural Heritage Commission has title or in which it has an interest “for the purpose of [the] preservation of natural areas and those lands or interests are deemed a state system of natural areas, referred to as the ‘system.’” The ArDOT explained that “[l]ands that are dedicated or become a part of the ‘system’ can only be acquired by another entity … after an administrative hearing in which the Arkansas Natural Heritage Commission finds an imperative public necessity and no feasible and prudent alternative.” Moreover, “[t]he findings by the Heritage Commission are subject to judicial review

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10 Response of ArDOT.

11 Response of IDOT.

12 Id.

13 Yes (ArDOT, IDOT, PennDOT, MoDOT, NHDOT, and TDOT); No (DDOT, KDOT, MDT, SDDOT, TxDOT, UDOT, and WVDOT).

14 Response of ArDOT.
under the Arkansas Administrative Act.”  

Finally, “[n]o alteration, change or modification to the ‘system’ will become effective until the next regular session of the Legislature after expiration of the administrative review process. Ark. Code. Ann. 15-20-314.”

Ark. Code Ann. § 15-20-316 provides “that the acquisition of land or the construction of structures on the lands required for the operation of railroad facilities are exempted from the above procedure” and also includes “an exemption for the construction of public utility structures or facilities permitted by order of the Arkansas Public Service Commission. However, no such exemption exists for the Arkansas State Highway Commission.”

DDOT stated that whenever the department “needs to acquire land from a federal agency such as the National Park Service approvals for the transfer of jurisdiction must be obtained from the National Capital Planning Commission and the DC City Council.”

If MoDOT needs “state park property, [it] must get a deed from the state of Missouri, which is facilitated by the legislative process.”

In New Hampshire, “[s]tate law requires that a quasi-judicial body appointed by the governor and executive council make a finding of necessity for the highway layout in order for the department to use eminent domain.”

PennDOT stated that for Project 70 land, identified in PennDOT’s answer to question 3, special legislation is needed; for highway/railroad crossings, an Application of Appropriation must be filed with the Pennsylvania Public Utilities Commission (PUC); and for railroad takings for other than operating highway right-of-way (non-grade crossing), the consent of the railroad is required.

In Tennessee, “[i]f the property is publicly held, there must be a specific authorization from the legislature to condemn publicly held property.”

6. If your department has authority to take public-use property by eminent domain owned by the state, a state agency, or department, is your department required by

15 Id.
16 Id.
17 Id.
18 Response of MoDOT.
19 Response of NHDOT.
20 Response of PennDOT.
21 Response of TDOT.
law (or by judicial precedent) to pay compensation to the state, state agency, or department for its public-use property?

A majority of the DOTs responding to the survey stated that when their department takes public-use property by eminent domain owned by the state, a state agency, or department, their department is required by law (or by judicial precedent) to pay compensation for the public-use property that is taken.22

If your answer to question 6 is “Yes,” please explain whether your department is required by law (or by judicial precedent) to pay “compensation” or “just compensation” to the state, state agency, or department for its public-use property.

In Arkansas, “[i]t has been the practice of the Arkansas State Highway Commission to pay any state agency or public entity department for its property[;] however, generally, the Commission does not pay compensation for public property that is a dedicated right of way.”23

In Illinois, the Illinois Constitution, Article 1, Section 15 states that “[p]rivate property shall not be taken or damaged for public use without just compensation as provided by law. Such compensation shall be determined by a jury as provided by law.”24 Although the Illinois Constitution authorizes takings, the power to condemn or file eminent domain actions is authorized by statute for the respective agencies, such as the DOT. IDOT’s eminent domain authority is based on the Highway Code, 605 ILCS 5/4-501.25

Furthermore, IDOT reported that it “is required to pay just compensation” in accordance with the Illinois Constitution and the Highway Code,” but the department “does not have rights to condemn public lands.” The DOT stated that “605 ILCS 5/4-509 gives authority to IDOT but only to the extent [an] agreement is reached.”


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22 Yes (DDOT, IDOT, NHDOT (stating that “[u]nder the federal and state constitutions due process is required in order to take property. Just compensation is an element of due process”), MDT (“by statute”), PennDOT, SDDOT, TDOT (stating that “[g]enerally speaking, the Constitution and statutes require payment of just compensation to all condemnees), TxDOT, UDOT (stating that the payment of just compensation is required by the Utah law (Utah Constitution, Utah Code, and judicial precedent), and WVDOT(stating that West Virginia Code § 17-2A-17 “is the governing statute [that] provides authority to condemn public or private property, whether realty or personality, or any interest therein”); No (ArDOT, KDOT, and MoDOT).

23 Response of ArDOT.

24 Response of IDOT.

25 Id.
PennDOT stated, however, that when “the required areas are under the jurisdiction of a state agency or state commission, [a] MOU or [an] Interagency Agreement (IA) process, as the case may be, will be pursued and, oftentimes, monetary compensation is waived.”

SDDOT stated that the answer to the question is “unknown” and that, to the respondent’s knowledge, this has never been attempted.

TxDOT “is not required by law or judicial precedent to pay compensation for utilizing city street or county road right of way for highway purposes. Public use property other than municipal and county right of way is compensated for.”

7. Are there constitutional provisions or statutes in your state that authorize municipalities, counties, or other local public entities or agencies to take public-use property from another municipality, county, and/or other local public entity or agency by eminent domain for a highway project?

A majority of the transportation departments that responded to the question stated that in their state there are no constitutional provisions or statutes that authorize municipalities, counties, or other local public entities or agencies to take public-use property from another municipality, county, and/or other local public entity or agency by eminent domain for a highway project.

If your answer to question 7 is “Yes,” please explain whether a municipality, county, or other local public entity or agency is required by law (or by judicial precedent) to pay “compensation” or “just compensation” to another municipality, county, or other local public entity or agency for its public-use property.

PennDOT stated that its Eminent Domain Code, 26 Pa. C.S. § 101, et seq., “contains no special protection or exemption for most types of public use property.”

A local government sponsor (grantee) of a transportation project involving federal funding would be subject to the federal Uniform Act and Pub. 740 (PennDOT’s project delivery guide for local governments), as well as the provisions of the Eminent Domain Code, 26 Pa. C.S. § 101 et seq. Where federal funds are not involved, only the just compensation provisions of the Code would apply.

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26 Response of PennDOT.

27 Id.

28 Response of TxDOT.

29 Yes (IDOT (citing O’Hare Modernization Act), MDT, NHDOT (referring to its answer to question 6), PennDOT, TDOT (referring to its answer to question 6), UDOT (reiterating that the payment of just compensation is required by the Utah law (Utah Constitution, Utah Code, and judicial precedent)), and WVDOT (citing Article III, § 9, West Virginia Constitution)); No (ArDOT, DDOT, KDOT, MoDOT, and TxDOT). SDDOT did not answer the question yes or no but commented as set forth in the summary.

30 Response of PennDOT.
In South Dakota, to the respondent’s knowledge, “there is no explicit authorization, but the language of the statute permitting eminent domain is broad and does not contain an explicit prohibition.”

8. Has your department has used eminent domain to take public-use property or an interest therein (e.g., a permanent easement or a temporary construction or other easement) for a highway project?

With two exceptions, the DOTs responding to the question reported that their department has used eminent domain to take public-use property or an interest therein (e.g., a permanent easement or a temporary construction or other easement) for a highway project.

If your answer to question 8 is “Yes,” please provide information on one or more of your department’s takings of such an interest in public-use property for a highway project, including the identity of the owner of the property.

In Arkansas, “the Arkansas State Highway Commission has used the power of eminent domain on rare occasions regarding public-use property.” Examples include property owned by school districts. One property owned by a school district “was subject to a reversionary interest” that the Commission had to condemn “to extinguish….” The Commission has “condemned school district property when there are issues concerning the cost to cure and land values….” Because the decisions relating to school district property involve school board meetings and approvals, “it may be necessary to condemn the property due to time constraints and issues that cannot resolved.”

KDOT identified in its response a matter involving a small parcel of property used by a city that was needed for a highway project. Title research revealed “that there was possibly an underlying fee owner and that the City did not own the property in fee. KDOT used condemnation to acquire any and all outstanding ownership interests, as the City would not have been able to convey clean title to the property.”

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31 Response of SDDOT.

32 Yes (ArDOT, KDOT (identifying the railroad BNSF), MDT (identifying county, city, and Federal Forest Service property and trial land), NHDOT, PennDOT, SDDOT (also identifying the railroad BNSF), TDOT, TxDOT, UDOT, and WVDOT); No (DDOT, MoDOT).

33 Response of ArDOT.

34 Id.

35 Id.

36 Id.
PennDOT’s response reported on a leading case in Pennsylvania in which the DOT acquired use-restricted parkland owned by a local government, then argued in a just compensation proceeding that its value should be as restricted. The Commonwealth Court conducted a survey of other jurisdictions and, in this case of first impression, held that the land must be valued to its highest and best use in the market without regard to the use restriction for public purposes. *In Re Legislative Route 1094*, 352 A.2d 244 (Pa. Cmwlth. 1976). On appeal to the Supreme Court, the Court affirmed but sought to limit the case to its facts; to wit, takings of use restricted, public lands. *Appeal of Commonwealth, Department of Highways*, 383 A.2d 525 (Pa. 1978).

As for other responses, TxDOT “routinely acquires non-public road right of way public use properties from cities and counties, occasionally through eminent domain.” UDOT has “acquired portions of utility interests and relocated [their] use.” WVDOT’s highway division “has taken property owned by public school boards, utility boards, and various municipalities throughout West Virginia in connection with road construction projects.”

9. **Please provide information on one or more of your department’s takings of public-use property that your department regards as having been particularly difficult for legal or other reasons:**

(a) when the state, a state agency, or department owned the property;  

In Arkansas, “[l]ands owned by the Arkansas Natural Heritage Commission require State Legislative action for release. This process generally adds time to the project development and land acquisition process.”

In Missouri, “from time to time,” there are environmental issues when the transportation department needs “property owned by the state parks commission or department of natural resources.”

PennDOT’s response reported on constructing

I-99 through a large portion of Department of Corrections property used for the Rockview State Prison in Centre County, Pennsylvania. The highway was located

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37 Response of TxDOT.

38 Response of UDOT.

39 Responses of DDOT, KDOT, and NHDOT stated “N/A.”

40 Response of ArDOT.

41 Response of MoDOT.
on a portion of the property used by inmates for agricultural operations. Highway construction and the configuration of two small bridge structures raised security concerns that had to be addressed in the MOU and in highway design.

Although TxDOT said that it had not had any takings as described in question 9(a), “Texas statutes contemplate such acquisitions [by] other state agencies and provide a non-judicial determination of compensation by the Texas General Land Office.” For example, the department “acquired property from the Dept. of Public Safety which was a commercial driver’s license driver testing facility.”

UDOT advised that the situation described in question 9(a) “[h]as not happened in the last couple decades.” Likewise, WVDOT’s response stated that “[n]o significant project [could] be recalled.”

(b) when a municipality, county, or other local public entity or agency owned the property;

ArDOT referred to its previous answer that involved school districts. KDOT “typically enters into City/State Agreements requiring the municipality to donate right of way.” MoDOT stated that the department usually does not “have any problems” with local public agencies.

PennDOT reported that in Montgomery County, Pennsylvania, a township filed preliminary objections to a formal declaration of taking for a small strip of land for a bridge replacement. The parcel was wetland and open space. The township asserted in negotiations that PennDOT should include a walking trail within its design and assist the township in obtaining environmental approvals. The area for the proposed walking trail was outside the scope of the project. Eventually, PennDOT paid for new landscaping to be placed in proximity to the new bridge; the objections were withdrawn; and the matter settled.

TxDOT’s response identified the “[a]cquisition and functional replacement of [the] Dallas County jail[] under what is called the substitute facilities doctrine under Texas law.”

Other transportation departments responding to question 9(b) could not identify any takings responsive to question 9(b).

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42 Response of TxDOT.

43 Response of KDOT.

44 DDOT and NHDOT answered “N/A.” The UDOT stated that the situation described in question 9(b) “[h]as not happened in the last couple decades.” WVDOT stated that “[n]o significant project can be recalled.”
(c) when a utility or common carrier, such as a pipeline or railroad, owned the property.  

In Arkansas, with respect to utilities, a utility ordinarily will have an easement. If the Highway Commission condemns an “area encompassed by a utility easement[,]” then the Commission may have to pay relocation benefits to relocate the utility and for a replacement easement.  

When a utility is located in or on “the Highway Commission’s right of way by permit and must be moved as a result of a project, then the utility generally must move at its own expense[,]” however, often companies on Highway Commission right of way by permit are defunct or have no funds to be moved and this poses a problem and delay for highway projects.

KDOT “does not condemn railroads. Generally, [the department] enter[s] into relocation agreements with utilities and other common carriers.”

MoDOT reported that railroads charge the department “to review our deeds and cause delays,” but the department has “only attempted to condemn a [railroad] once in 25 years. We have authority to condemn them but prefer to negotiate.”

PennDOT’s response discussed two situations and how the department resolved or attempted to resolve them. The first situation involved Amtrak that operates the Keystone Corridor in Pennsylvania and is presently under a federal consent decree to bring several station stops into full compliance with the Americans with Disabilities Act (ADA). PennDOT has agreed to construct in-line ADA-compliant platform stations at several of these stops, but Amtrak initially refused to provide a sufficient real property interest to construct, operate and maintain the improvements within its railroad right-of-way. Eventually, the parties negotiated specialized in-track, long-term leases for the improvements that provided sufficient irrevocable property rights to support the transportation investment.

Second, PennDOT described a local government project involving federal funds for which improvements were required for stormwater management to support not only the highway but stormwater at and around an existing commuter rail line operated by

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45 DDOT and NHDOT answered “N/A.” SDDOT identified one railroad as “difficult to reach and often non-responsive.” WVDOT identified the “Madison Bridge Project – CSX Railroad in Boone County, West Virginia STP-1711 (001).”

46 Response of ArDOT.

47 Regarding railroads, the ArDOT’s response referred to the examples it provided in response to question 3 concerning a railroad’s removal of a state court action and the dismissal of the action by the federal court.

48 Response of KDOT.
SEPTA. Traditional drainage easement rights were needed to place three cross-pipes underneath the track—which was elevated on ballast that operated as an impediment to proper drainage and flood control. SEPTA refused to convey the drainage easements but, instead, insisted upon a strictly-defined easement limited essentially to the areas actually occupied by the subsurface cross pipes.

In Texas, there has been “substantial difficulty with [the] acquisition of real property for highway right of way from railroads due to STB’s exclusive jurisdiction over rail operations and the expense, delay and difficulty involved in obtaining a no impact determination from STB.”49 The department advised that it “typically pays a premium for these kinds of acquisitions.”50

UDOT reported that it has had no difficulties; for example, the DOT relocates utility facilities.

10. In your department’s experience, has the National Gas Act (NGA) and/or the Federal Energy Regulatory Commission’s (FERC) authority affected or precluded your department’s ability to take or acquire public-use property owned by a pipeline for a highway project?

Only one DOT stated, in its department’s experience, that the NGA and/or FERC’s authority had affected or precluded its department from taking or acquiring public-use property owned by a pipeline for a highway project.51 The other DOTs said that neither the NGA nor FERC had affected or precluded their department’s ability to take or acquire public-use property owned by a pipeline for a highway project.52

If your answer to question 10 is “Yes,” please provide information on how the NGA or FERC affected or precluded your department’s takings or acquisitions of property owned by pipelines.

Only WVDOT’s response stated that the NGA or FERC had affected or precluded its department’s takings or acquisitions of property owned by pipelines, because “[p]ipeline location is a material consideration in the development and construction of roadway projects and is a routine issue in many of the agency’s condemnation activities.”

11. In your department’s experience, has the Land and Water Conservation Fund Act (LWCFA) affected or precluded your department’s ability to take or acquire public-use property owned by a park or recreation area subject to the LWCFA for a highway project?

49 Response of TxDOT.

50 Id.

51 Yes (WVDOT).

52 No (ArDOT, DDOT, KDOT, MoDOT, NHDOT, PennDOT, SDDOT, TxDOT, and UDOT).
All departments, except one, responding to the survey reported that in their department’s experience the LWCFA had not affected or precluded their department’s ability to take or acquire public-use property owned by a park or recreation area subject to the LWCFA for a highway project.\footnote{Yes (TxDOT); No (DDOT, KDOT, MoDOT, NHDOT, PennDOT, SDDOT). SDDOT said that it had been affected “somewhat.” WVDOT’s answer to the question was “unknown.”}

If your answer to question 11 is “Yes,” please provide information on how the LWCFA has affected or precluded your department’s takings or acquisitions of public-use property subject to the LWCFA.

ArDOT has been affected “somewhat,” because the “LWCFA generally adds time to the project development and land acquisition process.”\footnote{Response of ArDOT.}

TxDOT stated that “[i]n designing highway projects, if land protected under Section 6(f) of the LWCFA is identified in the area, [the department seeks] to avoid impacting the 6(f) property[] and would only propose conversion of the 6(f) property if necessary to meet the project’s purpose and need.” However, the DOT did advise that “[c]onversion of 6(f) property for highway purposes is very rare.”

PennDOT stated that “[t]he LWCFA has affected, but not precluded, PennDOT’s ability to take property for a project.” PennDOT reported that

\[\text{[o]ver the past few years, PennDOT has faced three primary issues with LWCFA requirements: (1) … temporary construction impacts are limited to 180 or fewer days, after which the [National Park Service (NPS)] considers the impact permanent and requires PennDOT to acquire and then donate replacement land equal in area to the temporary construction easement; (2) the NPS has traditionally been very resistant to alternative or innovative ways to mitigate for impacts to recreation areas that have received LWCF grants; and (3) the NPS has been very slow to review PennDOT submissions. At the extreme, the NPS has still not approved a temporary non-conforming use that PennDOT submitted at the beginning of 2017.}

PennDOT said that, as to the first issue noted above it its response,

\[\text{[t]he Section 6f policy issued … in 2008 address[ed] the LWCFA program (Section 6f) identifying any temporary use over 6 months as a conversion requiring replacement land has significantly affected the project schedule and the project costs on numerous project[s] in PA.” [See link to the manual at http://www.nps.gov/lwcf/manual/lwcf.pdf , last accessed March 25, 2019] In chapter 8, subsections E (page 8-3) and I (page 813), conversions of use are addressed. Subsection I addresses temporary uses of Section 6f property. This}
section does provide that continued use beyond 6 months will not be considered temporary and will require replacement property.

In PennDOT’s view, the “policy is unreasonable as applied to roadway projects for the following reasons.”

1. The roadways provide access to the recreation facilities/property purchased under the LWCFA program. If the public cannot safely access the recreational property, it cannot enjoy the recreational benefits of the property.

2. The roadway projects are funded with Federal and State taxpayer dollars – the taxpayers should not have to purchase replacement property if a roadway repair requires the use of 6f property for longer than 6 months.

3. The roadway projects also serve a public health, safety, and welfare role to the public including, but not limited to, replacing structurally deficient bridges, sight distance issues, access issues, and congestion issues. The public’s interest in safe roadways needs to be balanced with the public’s interest in recreational resources.

4. The requirement is merely policy and is not a statutory or regulatory requirement.

Furthermore,

[t]he requirement for replacement land for temporary uses over 6 months is not supported by any statutory or regulatory provision. Since there are no statutory or regulatory provisions supporting this policy, PennDOT would suggest that NPS include an exception for roadway projects based on the four reasons detailed above.55

Nevertheless, PennDOT also reported that

[w]ithin the past few months, issues seem to be improving on the 2nd and 3rd issues [identified above]. For nearly five years, PennDOT has worked very closely with the LWCFA state liaison office in PA, which is the [Department] of Conservation and Natural Resources (DCNR). DCNR has helped PennDOT coordinate with the NPS. As a result, recent NPS reviews have been a lot more timely; they have considered some temporary construction easements to be “conforming uses” rather than non-conforming uses; and they have been more open to innovative approaches to mitigation.

12. Has the Surface Transportation Act (STA) and the Surface Transportation Board (STB) affected or precluded your department’s ability to take or acquire public-use property, including an interest therein, owned by a railroad?

55 Response of PennDOT.
A majority of the responding transportation departments stated that the STA and the STB had not affected or precluded their department’s ability to take or acquire public-use property, including an interest therein, owned by a railroad.56

If your answer to question 12 is “Yes,” please provide information how the STA and/or STB has affected or precluded your department’s takings or acquisitions of public-use property owned by railroads.

DDOT reported that it was unable to acquire 6 miles of the corridor from “Shepherd Junction” to the end of the track at milepost BAZ 6.0. for which service was discontinued per an order by the STB on September 10, 2004. The STB took the position that the Federal preemption provision contained in 49 U.S.C. 10501(b), as broadened by the ICC Termination Act of 1995, Pub. L. No. 104-88, 109 Stat. 803 (1995), protects railroad operations that are subject to the STB’s jurisdiction from state or local laws or regulations that would prevent or unreasonably interfere with those operations and advised DDOT that they would intervene in any condemnation case opposing the Districts right to condemn.

KDOT commented that “[d]ecisions of STB influence [the] ability to condemn railroad right of way.” TxDOT also said that the “STB’s exclusive jurisdiction over [railroad] operations hampers TxDOT’s ability to acquire [railroad] property by eminent domain.” TxDOT said that typically the department “pays a premium, if not whatever it has to,” to acquire property from railroads that the department needs for highway right of way.

13. Have there been occasions when your department has requested the U.S. Department of Transportation (U.S. DOT) and/or the Federal Highway Administration (FHWA) to assist your department to acquire public-use property from the United States and/or a federal agency or department for one or more of your department’s highway projects?

A majority of the DOTs responding to the question stated that there have been occasions when their department has requested the U.S. DOT and/or the FHWA to assist their department to acquire public-use property from the United States and/or a federal agency or department for one or more of their department’s highway projects.57

56 Yes (ArDOT (referring to its prior answer to question 3 regarding railroads and preemption), DDOT, KDOT, and TxDOT); No (MoDOT, NHDOT, PennDOT, SDDOT, and UDOT. WVDOT’s answer to the question was “unknown.”

57 Yes (ArDOT, DDOT, MoDOT, NHDOT, PennDOT, TxDOT, and WVDOT); No (KDOT, SDDOT, and UDOT).
If your answer to question 13 is “Yes,” please provide information on one or more properties that your department was able or unable to acquire from the United States or a federal agency or department for a highway project.

ArDOT “routinely acquires property by easement or transfers for roads from the Department of Interior through the FHWA.”\textsuperscript{58} MoDOT’s response was that “[f]rom time to time we have difficulty acquiring [land] from federal agencies, but the problem is a delay rather than … opposition to the project.” NHDOT currently is “working on a land swap with [United States Fish and Wildlife] with which FHWA is assisting.”

DDOT stated that the “FHWA intervened to assist DDOT in obtaining a transfer of jurisdiction from NPS which is required for the construction of the Malcolm X Interchange.”

PennDOT reported that “[t]he United States Department of Interior, National Park Service (NPS), does not have the legal authority to transfer permanent interests in land.” However, “[i]n 2005, the FHWA, NPS and PennDOT coordinated a deed transferring perpetual easements to PennDOT for SR 2001, Section 403, in Pike County, Pennsylvania.”

TxDOT “requested FHWA assistance in acquiring, through the General Services Division, a U.S. Dept. of Agriculture property [that] had been declared surplus” and that the “FHWA signed the deed in this instance.”

TxDOT also reported having “significant difficulty acquiring (extinguishing) a long-term lease by the U.S. Postal Service [USPS] of property” that the department acquired that was subject to [a] lease “upon a determination that USPS likely had sovereign immunity from suit.” TxDOT said that it had to pay compensation “in an amount which, in large part, enabled USPS to acquire a replacement site and construct a new postal facility.”

WVDOT identified the New River Parkway, Hinton-Fall Branch that also involved land owned by the National Park Service.

14. Have there been occasions when the U.S. DOT and/or FHWA, pursuant to § 4(f) of the Department of Transportation Act of 1996, 49 U.S.C. § 303, hereinafter referred to as § 4(f), approved your department’s request for one or more transportation programs or projects that required the use of publicly owned land of a public park, recreation area, or wildlife or waterfowl refuge of national, state, or local significance, or land of an historic site of national, state, or local significance because the U.S. DOT and/or FHWA concluded that:

(a) there was no prudent and feasible alternative to using the land; and

(b) the program or project included all possible planning to minimize harm to the park, recreation area, wildlife and waterfowl refuge, or historic site resulting from your department’s proposed use?

\textsuperscript{58} Response of ArDOT.
A majority of the transportation departments responding to question 14(a) said that there have been occasions when the U.S. DOT and/or FHWA concluded that there was no prudent and feasible alternative to using protected land for their project.\(^59\) Likewise, the same DOTs said in response to question 14(b) that the U.S. DOT and/or FHWA concluded that the proposed program or project included all possible planning to minimize harm to the park, recreation area, wildlife and waterfowl refuge, or historic site resulting from their department’s proposed use.\(^60\)

If your answer to question 14(a) and/or (b) is “Yes,” please provide information on one or more of your department’s requests that were approved, including the approximate date of the approvals and the planning required to minimize harm to the public park, recreation area, wildlife or waterfowl refuge, or historic site.

ArDOT reported that the approval for land to be acquired from the Buffalo National River (Job 009784) was obtained on February 6, 2018. Measures to minimize harm [were agreed upon] through consultation with the National Park Service including avoiding important recreational and historic sites, aesthetic considerations for new structures and the use of native stone, among others.

DDOT advised that

[i]n 2007, FHWA, DDOT and the National Park Service (NPS) entered into a Programmatic Agreement (PA) and a Net Benefit Agreement (NBA) for the 11th Street Bridge. The Project impacted Anacostia Park (Park), a national park administered by NPS. Under Section 4(f) of the Federal Highway Act, DDOT had to mitigate the harm caused by the Project, and the NPS and FHWA had to agree to the mitigation. The 2007 PA and NBA … documented the agreed-upon mitigation measures and a series of enhancements to the Park. The documents were subsequently amended in 2015.

MoDOT identified the “Page Avenue extension, approximately, 25 years ago.” Although the response stated that the department was “[n]ot sure of the details,” the department “extended the road through an area that [is a] habitat for birds.”

In Pennsylvania, PennDOT and FHWA “routinely” process § 4(f) evaluations.\(^61\) In the past three years, January 1, 2016 to January 1, 2019, PennDOT and FHWA have documented federally-funded CE-level projects for 12 individual evaluations; 32 programmatic evaluations;

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\(^{59}\) Yes (ArDOT, DDOT, MoDOT, SDDOT, TxDOT, and WVDOT); No (KDOT, NHDOT, PennDOT, and UDOT).

\(^{60}\) Yes (ArDOT, DDOT, MoDOT, SDDOT, TxDOT, and WVDOT); No (KDOT, NHDOT, PennDOT, and UDOT).

\(^{61}\) Response of PennDOT.
PennDOT’s response stated that “[t]o put that number into context, during that same period, PennDOT and FHWA approved nearly 3,600 CE-level documents for federally funded projects.”

Moreover, PennDOT and FHWA “have developed forms for documenting all but the individual section 4(f) evaluations, which help streamline the documentation, review, and approval of the use of property afforded protection under section 4(f).”

PennDOT also provided some examples of individual evaluations:

For the S.R. 0340, Section 011 Bridge project, the selected alternative involved replacement of a bridge that was a contributing element to a rural historic district and 0.172 acres from adjoining contributing properties. The mitigation included is (1) the new bridge [that] will be contextually sensitive to the historic district and (2) the width of the bridge [that] will be minimized. The … evaluation legal sufficiency memo was dated January 13, 2017.

For S.R. 3040, Section A02 Bridge project, the selected alternative involved replacement of a bridge that was a contributing element to a historic district, 0.1 acres from adjoining contributing structures, and the removal of a portion of a stone wall. The mitigation included was the stone from the wall removed [that] will be used as facing on the new wall, dismantling and reconstructing … the stone wall [that] will be documented, extra precautions and monitoring for the adjacent church building, bridge parapets and barrier [that] will be tinted to match the surrounding, sandstone instead of limestone [that] will be used …. [and] fencing and sidewalk [that] will be replaced…. The Section 4(f) evaluation legal sufficiency memo was dated July 28, 2017.

SDDOT said that it was providing an example that covers both questions – the reconstruction of the US 85 project in Deadwood, a project that involved five 4(f) properties: two historic quarry stone walls, the Deadwood Historic District, the Gordon Memorial Park (de minimis approval for impacts to the park), and the Mickelson Trail as to which the “FHWA concurred [that the] impact was exempt from 4(f) regulations.” The department said that “[m]easures to minimize harm to the 4(f) resources were implemented” and that “FHWA concurred [that] there was no feasible and prudent alternative to the use of the 4(f) resources.”

TxDOT reported that in December 2014, the FHWA delegated to the department “the authority to make Section 4(f) determinations for federally funded highway projects in Texas under a program known as ‘NEPA assignment.’” [See 23 U.S.C. § 327 and TxDOT’s NEPA assignment webpage at https://www.txdot.gov/inside-txdot/division/environmental/nepa-assignment.html , last accessed on March 25, 2019]).

Under the NEPA assignment program, TxDOT makes the determinations, not FHWA, that are required under Section 4(f) (except for determinations of a constructive use under Section 4(f), authority for which was retained by FHWA in the NEPA assignment MOU). Therefore, the department “does not ‘request approval’ by FHWA of TxDOT’s Section 4(f) determinations.”
However, TxDOT answered “Yes” with respect to both of the determinations listed in questions 14(a) and (b), because in any given year

TxDOT may make these determinations with [respect] to multiple projects that involve a use of a Section 4(f) resource that does not qualify as de minimis. For non-de minimis uses of a Section 4(f) resource, TxDOT typically uses one of the programmatic Section 4(f) evaluations established by FHWA (see 23 C.F.R. 774.3(d)), such as the Programmatic Section 4(f) Evaluation and Approval for FHWA Projects that Necessitate the Use of Historic Bridges.62

TxDOT also stated that in 2017, it

used this programmatic Section 4(f) evaluation to make the required Section 4(f) determinations with respect to a project that would replace the historic Lavaca River Bridge on County Road 260 in Lavaca County (0913-29-035). Before making the required Section 4(f) determinations, TxDOT first considered alternatives such as the no build alternative, building a new bridge on a new location, and rehabilitation of the existing historic bridge, and documented why none of those alternatives were “prudent and feasible.” TxDOT also marketed the historic bridge for 90 days (no new owner was found) and agreed to preserve the look and feel of the truss span by using the truss panels as attachments to the new bridge, but not as structural load carrying members.

WVDOT cited the Appalachian Corridor D, Blennerhassett Island Bridge (CHD-0282(105)) across the Ohio River that the FHWA approved in August 2003. The DOT stated that “[t]he bridge pier was placed on Blennerhassett Island at the location of a state park with potential impacts to birds, wetlands, and historical and archeological resources. Significant contact and planning with interested parties and agencies was used to coordinate mitigation efforts to minimize potential harm.”

15. Have there been occasions when the U.S. DOT and/or FHWA, pursuant to § 4(f), denied your department’s request for one or more transportation programs or projects that required the use of publicly owned land of a public park, recreation area, or wildlife or waterfowl refuge of national, state, or local significance, or land of an historic site of national, state, or local significance?

All DOTs responding to the question answered “No.”63

If your answer to question 15 is “Yes,” please provide information on one or more of your department’s requests that were denied, including the reason or reasons for the denials.

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63 No (ArDOT, DDOT, KDOT, MoDOT, NHDOT, PennDOT, SDDOT, TxDOT, UDOT, and WVDOT).
All responding DOTs having answered “No,” there was no additional information.

16. Have there been occasions when the U.S. DOT and/or FHWA, pursuant to § 4(f), approved your department’s request for one or more transportation programs or projects that required the use of publicly owned land of a public park, recreation area, or wildlife or waterfowl refuge, or land of an historic site because the impact of your department’s proposed program or project was determined to be de minimis?

All DOTs responding to the survey, except UDOT, answered “Yes” to question 16.64

If your answer to question 16 is “Yes,” please provide information on one or more examples when the U.S. DOT and/or FHWA determined that the impact of the department’s proposed program or project on publicly owned land of a public park, recreation area, or wildlife or waterfowl refuge, or land of an historic site would be de minimis.

ArDOT stated that “[a] recent safety improvement project (Job 061547) required the acquisition of 0.06 acre of land from a property on the National Register. A call of ‘no adverse effect’ was received from the State Historic Preservation Officer and FHWA approved a de minimis 4f for the project.”

DDOT reported that, in coordination with the Federal Transit Administration (FTA) and the FHWA,

the DOT conducted an Environmental Assessment (EA) for the proposed construction and operation of a modern streetcar and associated streetscape improvements in the [historic] Anacostia neighborhood of Washington, D.C. from the Anacostia Metro Station to Good Hope Road.

In Kansas, a highway project through a metropolitan area required the acquisition of right of way (primarily for drainage and occasional overflow) of city-owned property subject to § 4(f). In reviewing and approving the acquisition, the FHWA found that was “a de minimis impact on the parcel.”65

MoDOT said that there are frequent examples when the department is “touching a very small portion of a park,” perhaps at an entrance or when upgrading guardrail.

PennDOT stated that “most of the section 4(f) evaluations that PennDOT and FHWA do are de minimis determinations.”

64 Yes (ArDOT, DDOT, KDOT, MoDOT, NHDOT (identifying the Enfield X-A000(527), 13185D project that had de minimis impact on Shaker Recreational Park), PennDOT, SDDOT, TxDOT, and WVDOT (identifying the Coonskin Park Bridge Access Project, T220-CPA/DS-9)); No (UDOT).

65 Response of KDOT.
PennDOT provided two examples of projects that were cleared by *de minimis* use documentation.

- **SR 73 Bridge project over Skippack Creek approved in 2017.** The project involved 0.45 acres of permanent take and 0.63 acres of a slope easement from the Evansburg State Park (a 3,349-acre park). In the vicinity of the project, there is a parking lot and unofficial wooded foot paths upstream of the bridge – both are used primarily by fisherman. During construction, one of the entrances to the parking lot would need to be closed. A public meeting was held.

- **SR 0915 Bridge Project over the Raystown Branch Juniata River and intersection improvement project between SR 0915 and SR 0026 approved in 2015.** The bridge is structurally deficient, and the intersection has poor geometry, sight distance, and other design deficiencies. The project involved 0.01 acres from a State Game Land (total acreage is 103.5 acres). Notices of the proposed impact were published in the local papers.

As previously explained, TxDOT stated that it, not FHWA, makes *Section 4(f) de minimis* determinations under the NEPA assignment program.

It is not uncommon for TxDOT to make a dozen or more such determinations in a given year. For example, on November 17, 2017, TxDOT made a *de minimis* determination for the State Loop 88, Segment 3 project in Lubbock (1502-01028). The project, which will convert a section of the existing two-lane rural FM 1585 to an access-controlled, four-lane divided freeway section with frontage roads and ramps, required the acquisition of approximately 14 acres from the Lubbock Sports Complex property. However, the City of Lubbock agreed that the function of the Lubbock Sports Complex would not be adversely affected by the project, and TxDOT was able to make a *de minimis* determination.

17. With respect to questions 13, 14, 15, and 16, have there been any administrative claims or litigation challenging a decision of the U.S. DOT and/or FHWA that approved your department’s use of publicly owned land of a public park, recreation area, or wildlife or waterfowl refuge, or land of an historic site for a highway project?

A majority of the DOTs responding to the survey answered “No” to question 17.66

If your answer to question 17 is “Yes,” please provide information on one or more claims or cases and, if a claim or case has been concluded, the outcome of the claim or case.

ArDOT reported that “[l]itigation is currently ongoing that includes a claim that measures to minimize harm for the acquisition of land from the White River National Wildlife Refuge were not completed correctly for the bridge replacement project at Clarendon (Job 110123).”

66 Yes (ArDOT, MoDOT, and WVDOT); No (KDOT, NHDOT, PennDOT, SDDOT, TxDOT and UDOT).
MoDOT stated that, although it was 25 years ago, it is believed that the department’s decision to extend Page Avenue was challenged in federal court but that the department must have prevailed, because the DOT proceeded with the project.

PennDOT reported on pending and past claims since 1996 when there were challenges to the department’s § 4(f) evaluations:

**Pending Section 4(f) Litigation**


On October 22, 2018, the Delaware Riverkeeper Network (Riverkeeper) filed a complaint for declaratory judgment against PennDOT and the Federal Highway Administration (FHWA) challenging (1) the level of documentation under the National Environmental Policy Act and (2) the Final Section 4(f) Evaluation required under the Section 4(f) of the U.S. Department of Transportation Act and its regulations for the Headquarters Road Bridge Project. This project involves a deficient bridge over the Tinicum Creek in Tinicum Township, Bucks County which is a contributing element to a historic district listed on the National Register of Historic Places. The project was cleared as a CE. The bridge has been closed to traffic since 2011. All of the allegations point to the Riverkeeper’s objection to the selected alternative – replacement of the bridge at the existing location. The Riverkeeper wants the bridge rehabilitated. We are in the process of assembling the administrative record and hope to have our Motion for Summary Judgment filed by the end of March 2019.

**Decided Section 4(f) Litigation**

*Concerned Citizens Alliance Inc., v. FHWA & PennDOT*, 176 F.3d 686 (3d Cir. 1999). This case involved the replacement of a bridge crossing the Susquehanna River. The selected alternative involved impacts to an historic district. Plaintiff alleged that PennDOT failed to comply with Section 4(f)(2) by not selecting the alternative that resulted in the least harm to the historic district and failed to consider an alternative suggested during the project development process upstream of the two alternatives considered. Also, the Advisory Council (ACHP) refused to sign the Section 106 MOA for this project so another issue was what deference was owed to ACHP. The court found that [the] FHWA ROD was not arbitrary or capricious. The court also found that although the Advisory Council was entitled to deference, the ACHP cannot mandate a particular result; rather their views should be considered.

WVDOT identified Corridor H, Project No. X342-H-40.21 00, NHPP-0484(317), a project that “involved a comprehensive settlement among various public agencies, environmental groups, historic preservation groups, and other interested parties.”
18. Have there been administrative claims or litigation against your department, the U.S. DOT, and/or FHWA alleging, although there was no actual taking of property protected by § 4(f), that one or more of your department’s transportation programs or projects constituted a constructive use of publicly owned land of a public park, recreation area, or wildlife or waterfowl refuge, or land of an historic site in violation of § 4(f)?

Only TxDOT reported that there had been administrative claims or litigation against its department, the U.S. DOT, and/or FHWA alleging that one or more of the department’s transportation programs or projects constituted a constructive use of publicly owned land of a public park, recreation area, or wildlife or waterfowl refuge, or land of an historic site in violation of § 4(f).67

If your answer to question 18 is “Yes,” please provide information on one or more claims or cases and, if a claim or case has been concluded, the outcome of the claim or case.

TxDOT cited district court’s decision in Fath v. Tex. DOT & Cent. Tex. Reg’l Mobility Auth.68

19. For takings of public-use property described in your department’s answers to questions numbered 8 and 9, please provide information on the method or methods of valuation that your department, or a court that decided valuation, used to determine the required amount of compensation or just compensation for the public-use property, or an interest therein, and/or any severance damages to the remainder of the property not taken, such as (a) the fair market value method based on comparable sales; (b) the income method; (c) the replacement or substitution cost method; or (d) other methods.

In Arkansas, “[f]air market value [is] based on comparable sales. A cost to cure the damages from the acquisition may be used as an aid to determine the after value of the property and compensation. For temporary construction easements, the temporary rental value is calculated based upon a two-year rental rate based on the fair market value.”69

KDOT’s approach is “fair market value based on comparable sales as determined by court-appointed appraisers.”70 MoDOT said that it uses all three approaches noted in [the] question as

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67 Yes (TxDOT); No (ArDOT, KDOT, MoDOT, NHDOT, PennDOT, SDDOT, UDOT, and WVDOT).


69 Response of ArDOT.

70 Response of KDOT. The UDOT also stated that the method of valuation that is used is based on “comparable sales”).
the department did not “have a special valuation method for publicly owned property.” NHDOT identified only the comparable sales method.

In Pennsylvania,

[t]he same basic appraisal policies and procedures are applicable to public-use property that are applicable to all other types of property. Individual characteristics of the claim may impact a specific scope of [the] work. For example, railroad takings are generally based upon direct damages to land based on comparable sales as opposed to entire rail corridor valuations. Also, deed restrictions, as noted, are not to be used to limit the property’s highest and best use.71

SDDOT stated that its valuations comply with the Code of Federal Regulations’ “requirements for valuation and determination of just compensation.”

In Texas,

[i]n most instances, if the property is of a type for which comparable sales exist, the measure of “adequate compensation” (the Texas Constitution’s equivalent of just compensation) is the fair market value of the property taken plus the diminution in value, if any, of the remaining property after (as a result of) the taking and considering the likely use to which the acquired parcels are to be put. This measure was applied to a Texas Dept. of Public Safety commercial driver’s license driver testing facility, which consisted of land and pavement.

In other instances, such as with the Dallas County jail [noted in the DOT’s response to question 9(b)], for which comparable sales did not exist, the measure of adequate compensation was the undepreciated replacement or substitution cost method. The doctrine calls for the measurement of compensation for the acquisition of public facilities to be, generally, the reasonably necessary cost to replace the remaining land and facilities to the same or a reasonably equal utility as existed prior to the taking.

However, the Texas Supreme Court, in what is at this time the seminal case in Texas on the substitute facilities doctrine, has pointed out [that] the viability of the substitute facilities doctrine has been called into question, and the United States Supreme court has ruled [that] it does not have to be applied to all public takings but only to those particular cases where the facts show the property to be acquired has no fair market value. Religious of the Sacred Heart of Texas v. City of Houston, 836 S.W.2d 606: 608-611 (Tex. 1992); see also United States v. 50 Acres of Land, 469 U.S. 24, 105 S. Ct. 451, 83 L.Ed.2d 376 (1984).

WVDOT said that it “employs licensed appraisers who utilize the appropriate methodology for valuing the subject property within the scope of his/her professional license. The valuation

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71 Response of PennDOT.
methodologies include each of the above as appropriate for a proper valuation of the subject property.”

20. Does your department have a right-of-way manual or the equivalent and/or other policies and practices that provide guidance on the acquisition or taking by your department of public-use property for a highway project?

A majority of the DOTs responding to the survey said that their department has a right-of-way manual or the equivalent and/or other policies and practices that provide guidance on the acquisition or taking by their department of public-use property for a highway project.72

If your answer to question 20 is “Yes,” please provide an Internet link or a copy of your department’s right-of-way manual and/or policies or practices that apply to acquisitions or takings of public-use property.

ArDOT stated that although its right-of-way manual provides guidance on federal land transfers, it is “not specific to any other acquisition of public-use properties.”

PennDOT identified the following publications as being applicable: Pub. 378, Appdx. C.01.B., Acquisitions from Government Entities; Pub. 378, Appdx. C.01.C., Acquisitions for Mitigation; Pub. 378, Ch. 3, Section 3.03.R., Acquisitions from Railroads; and Pub. 10X, Appdx. AG., Stafford Act and Other Flood Hazard Mitigation.

TxDOT referred to its Acquisition Manual and stated:

Specifically, see Chapter 10 (Acquisition of State-owned Lands for Right of Way) and Chapter 1 (Right of Way Acquisition of Federal Lands). Also, see excerpt from TxDOT’s Appraisal and Review Manual, Ch. 3 (Valuation-Legal Aspects and Policy) and Ch. 5 (Procedures on Appraisals of Specific Types & Situations) under subsection entitled “County, City, State, or Federal Property….73

TxDOT noted that the latter subsection states that

[w]hen county, city, state or federal lands that were acquired for other than highway, street, road or alley purposes are needed for the construction or operation of the State Highway System, such lands should be appraised in the same manner as lands under private ownership. For property adjustment work in the acquisition of Federal lands and in the acquisition of property from U.S. Forest Service, Corps

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72 Yes (ArDOT, MoDOT (directing readers to its website for its Engineering Policy Guide), PennDOT, SDDOT (providing a copy of its right-of-way manual), TxDOT, WVDOT) (stating that the agency’s Right of Way Manual is in the process of being finalized); No (KDOT, NHDOT, and UDOT).

73 Response of TxDOT.
of Engineers, Bureau of Land Management, U.S. Fish and Wildlife Service. See the ROW Acquisition Manual, Chapter 11, ROW Acquisition of Federal Lands.\textsuperscript{74}

For all the parcels to be purchased from a county or city, a note should be made on the form ROW-A-10, Tabulation of Values and right of way map, stating that the parcel was not acquired by the county or city for public road purposes.

Appendix F to the digest provides a link to the state DOT’s right-of-way manuals. Part XVI of the digest discusses key features and provisions of state right-of-way manuals.

\textbf{21(a). Based on your department’s experience with takings of public-use property, what is your department’s estimate of the percentage of acquisitions of public-use property that are resolved through negotiations rather than by the use of eminent domain?}

In responding to subpart (a) of the question, the DOTs reported that the percentage of acquisitions of public-use property resolved through negotiations rather than by the use of eminent domain range from 90\% to 99\%.\textsuperscript{75}

\textbf{(b) If your department has recommendations on how to negotiate the acquisition of public-use property, please identify and discuss them and provide a copy of any agreement or forms that your department uses when acquiring public-use property through negotiations.}

ArDOT “utilizes its standard documents for acquisition of public-use properties unless the other party requests the use of their own documents.”\textsuperscript{76}

MoDOT said that it had “no formal recommendations.”

NHDOT said that “[a]n agent makes a presentation of the appraisal to the governing (i.e., select board, school board), [and] they then have a minimum of 45 days to consider the offer, after which [they] are served with a notice of offer and condemned … 30 days later.”

PennDOT stated that it had no exact percentage of takings of public-use property that are resolved by negotiations.

However, no formal takings are ever filed where an MOU or IA is available. No formal takings are filed where the PUC has taken jurisdiction over a highway/railroad crossing. Formal declarations of taking will be filed for public lands (other than land used already being used for highways, roads and bridges)

\textsuperscript{74} Emphasis supplied.

\textsuperscript{75} ArDOT (90\%); KDOT (99\%); MoDOT (99\%); NHDOT (95\%); SDDOT (99\%); TxDOT (90\%); and WVDOT (95\%). UDOT answered the question by stating “minimal.”

\textsuperscript{76} Response of ArDOT.
held by local governments and authorities where amicable acquisitions cannot be negotiated.

PennDOT provided a copy of one of its MOUs.

TxDOT “seeks to avoid the acquisition of public use property by eminent domain, except as a last resort. Successful negotiations require a high degree of flexibility and, frequently, the payment of a value premium. TxDOT does not have a separate form system for negotiating acquisitions of public use properties.”

WVDOT “has found that the negotiation approach is dependent upon the peculiar nature of the property and the scope of the project, including the potential for a precedent of inflated valuations of future parcels or other parcels associated with the project.”

22. Based on your department’s experience, what are some of the best practices that your department uses when your department seeks to take public-use property by eminent domain belonging to:

(a) the state or a state agency or department or to a municipality, county, or other local public entity or agency?

ArDOT said that it had “[n]o notable best management practices” to share. KDOT “negotiate[s] an acquisition prior to eminent domain proceedings.” MoDOT “communicate[s] early, often and with as much detail as possible.” NHDOT keeps “the political subdivision involved in the planning process.” PennDOT uses the “MOU or IA process, as applicable. Also, mitigation can be provided for replacement lands. Just compensation is paid.”

SDDOT also relies on “[c]ommunication and collaboration early in the project design phases along with regular communication as design elements are adjusted to accommodate negotiated common ground for construction needs and adjacent owner interests.”

TxDOT seeks “to avoid the acquisition of public use property by eminent domain, except as a last resort. Successful negotiations require a high degree of flexibility and, frequently, the payment of a value premium.”

UDOT emphasized “[g]ood communication along with relocation where possible.”

Finally, the WVDOT stated that “[b]est practices are dependent upon the purpose, need, and necessity of the applicable parcel of real property.”

(b) a utility or common carrier, including a pipeline or railroad?

ArDOT said, once more, that it had “[n]o notable best management practices.” KDOT, as it answered subpart (a) of the question, stated that it “negotiate[s] acquisition prior to eminent

77 Response of WVDOT.
domain proceedings.” MoDOT repeated its prior answer, stating that “it communicate[s] early, often and with as much detail as possible.” Once more, NHDOT emphasized that it keeps “the political subdivision involved in the planning process.”

PennDOT noted that a “[s]ubstitute right-of-way can be provided. 36 P.S. § 670-412.” Also, “[s]pecialized acquisition documents are drafted,” and “[j]ust compensation is paid.”

Several DOTs responded in the same manner they had to subpart (a) of the question.78

23. Have there been any takings by your department of public-use property by eminent domain for a highway project that should be the subject of one of the case studies for the Report?

All DOTs responding to the question stated that the department had not had any takings of public-use property by eminent domain for a highway project that should be the subject of a case study for the Report. SDDOT stated that it had had no takings that were “unique or significant.”

If your answer to question 23 is “Yes,” please (a) describe the takings of public-use property for a highway project and (b) identify the person or persons (name, telephone number, and e-mail address) who may be contacted for more information.

As a result of the DOTs’ answers to question 23, the departments did not provide additional information.

24. Please include any other information that your department wants to furnish regarding your department’s takings of public-use property by eminent domain for highway projects.

TxDOT stated that “Texas law exists regarding the doctrine of ‘[p]aramount use,’” [which applies] when there is a conflict between an existing public use and proposed public use.”

The other respondents to the survey provided no additional information.

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78 SDDOT (referring to its prior answer); TxDOT (stating that the department “seeks to avoid the acquisition of public use property by eminent domain, except as a last resort” and that “[s]uccessful negotiations require a high degree of flexibility and, frequently, the payment of a value premium”); UDOT (identifying “[g]ood communication along with relocation where possible”); and WVDOT (stating, once more, that “[b]est practices are dependent upon the purpose, need, and necessity of the applicable parcel of real property”).