



## Department of Information Technology

TITLE: *Federal Grant Security Interest of  
Real Property Policy*

POLICY NUMBER: *DOIT-361-108-A Version 1.0*

POLICY OWNER: *Grants Office*

POLICY SPONSOR: *Secretary Ackley*

AGENCY: 361

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### 1. AUTHORITY:

- 1.1 Office of Management and Budget (OMB) Circular A-102 Grants and Cooperative Agreements with State and Local Governments
- 1.2 15 C.F.R. Part 14, Part 24 – Uniform Administrative Requirements for Grants.
- 1.3 New Mexico State Statute 13-6-1, 13-6-2, 13-6-2.1, 13-6-3 NMSA 1978 Sales of Public Property.
- 1.4 New Mexico State Statute 14-9-1 NMSA 1978 Instruments Affecting Real Estate; Recording
- 1.5 New Mexico State Statute 55 NMSA 1978 Uniform Commercial Code

### 2. REFERENCES:

- 2.1 Broadband Technology Opportunities Program Federal Interest Documentation Requirements FACT SHEET
- 2.2 Broadband Technology Opportunities Program Useful Life Schedule FACT SHEET
- 2.3 State of New Mexico Manual of Model Accounting Practices
- 2.4 Title 1 General Government Administration, Chapter 4 State Procurement, Part 1 Procurement Code Regulations
- 2.5 State Personnel Board Rule, 1 NMAC 7, 11 Discipline

### 3. PURPOSE AND SCOPE:

- 3.1 The purpose of the Federal Grant Security Interest of Real Property Policy is to assure that the Department as an Award Recipient follows Federal and State laws, rules,

regulations, policies and best practices in the management and disposition of property whose cost was charged to a project supported by a federal grant award.

- 3.2 The trust relationship between the Grantor and the Department exists throughout the duration of the useful life of the property acquired or improved, in whole or in part, with federal grant awarded funds.

#### 4. DEFINITIONS:

- 4.1 Agency: A department, commission, board, or institution of the State of New Mexico.
- 4.2 American Reinvestment and Recovery Act (ARRA or Recovery Act): Economic stimulus package enacted by the 111<sup>th</sup> U.S. Congress in February 2009.
- 4.3 ASD: The Department's Administrative Service Division.
- 4.4 Authorized Organization Representative (AOR): Individual authorized by an award recipient to act for the recipient organization and to assume the obligations imposed by the Federal laws, regulations, requirements, and conditions that apply to a grant application or grant award.
- 4.5 Award Recipient: Organization awarded a grant to implement a project. Recipient or Award Recipient is the preferred term in place a Awardee or Grantee.
- 4.6 BTOP: Broadband Technology Opportunities Program
- 4.7 Covenant: "Covenant of Purpose, Use and Ownership" document
- 4.8 Department: Department of Information Technology
- 4.9 DoIT: Department of Information Technology.
- 4.10 Federal Interest: Federal Government's interest in property acquired with Federal funds.
- 4.11 Grant: A federal grant is an award of financial assistance from a federal agency to a recipient to carry out a public purpose of support or stimulation authorized by a law of the United States.
- 4.12 Grant Files: The source of record for grant related documents and is known as the official grant file.
- 4.13 Grantor: A federal grantor agency; i.e. Department of Commerce
- 4.14 Lease: A contractual agreement by which one party conveys an estate in property to another party, for a limited period, subject to various conditions, in exchange for something of value, but still retains ownership.

- 4.15 MAPs: State of New Mexico Manual of Model Accounting Practices
- 4.16 Property: Real property, fixtures, and/or personal property other than supplies (both tangible, such as equipment, or intangible, such as licenses or permits) which are funded by a federal grand award.
- 4.17 Real Property: Real property is property that includes land, buildings, towers, and anything affixed to the land. Real property does not include equipment or items which can be removed.
- 4.18 Recipient: Organization awarded a grant to implement a project. Recipient or Award Recipient is the preferred term in place a Awardee or Grantee.
- 4.19 Security Interest: A property interest created by agreement or by operation of law over assets to secure the performance of an obligation.
- 4.20 Security Interest (55-1-201 NMSA 1978): "Security interest" means an interest in personal property or fixtures that secures payment or performance of an obligation. "Security interest" includes any interest of a consignor and a buyer of accounts, chattel paper, a payment intangible or a promissory note in a transaction that is subject to Chapter 55, Article 9 NMSA 1978. "Security interest" does not include the special property interest of a buyer of goods on identification of those goods to a contract for sale under Section 55-2-401 MSA 1978, but a buyer may also acquire a "security interest" by complying with Chapter 55, Article 9 NMSA 1978. Except as otherwise provided in Section 5-2-505 NMSA 1978, the right of a seller or lessor of goods under Chapter 55, Article 2 or 2A NMSA 1978 to retain or acquire possession of the goods is not a "security interest", but a seller or lessor may also acquire a "security interest" by complying with Chapter 55, Article 9 NMSA 1978. The retention or reservation of title by a seller of goods notwithstanding shipment or delivery to the buyer under Section 55-2-401 NMSA 1978 is limited in effect to a reservation of a "security interest". Whether a transaction in the form of a lease creates a "security interest" is determined pursuant to Section 55-1-201 NMSA 1978;
- 4.21 Sponsored Project: A project that has received a federal grant award to fund all or part of the project.
- 4.22 UCC: Uniform Commercial Code
- 4.23 UCC Filing: Filing a financing statement at the state and/or local jurisdiction, the security interest of the secured party is perfected. The document contains the names and addresses of the debtor and the secured party along with a description of the collateral (security interest). A financing statement is proof of a security interest in property.
- 4.24 Useful Life: The period during which a depreciable asset will be productive.

## 5. POLICY:

- 5.1 The Department shall comply with the Office of Management and Budget (OMB) Circular A-102 Grants and Cooperative Agreements with State and Local Governments and the 15 C.F.R. Part 24, Part 14 – Uniform Administrative Requirements for Grants.
- 5.2 The Department shall comply with the following New Mexico State Statute for the Sale of Public Property:
  - 13-6-1 NMSA 1978 Disposition of obsolete, worn out or unusable tangible personal property*
  - 13-6-2 NMSA 1978 Sale of property by state agencies or local public bodies; authority to sell or dispose of property; approval of appropriate approval authority*
  - 13-6-2.1 NMSA 1978 Sales, trades or leases; state board of finance approval*
  - 13-6-3 NMSA 1978 Sales, trade or lease of real property by state agencies; approval of legislature; exceptions.*
- 5.3 The Department shall follow the State of New Mexico Manual of Model Accounting Practices, Policy and Procedure FIN-6 Asset Management for Property funded by a federal grant award.
- 5.4 During the duration of the Federal Interest the Department shall not sell, lease, transfer, assign, convey, hypothecate, mortgage, or otherwise convey any interest in the Property without the prior written approval of the Grantor.
- 5.5 During the duration of the Federal Interest the Department shall not use the Property for purposes other than the purposes for which the federal grant award was made without the prior written approval of the Grantor.
- 5.6 The Department shall document and record the Federal Interest in Property consisting of Real Property, by preparing and properly recording a “Covenant of Purpose, Use and Ownership” (*see ATTACHMENT B*).
- 5.7 The Department shall file UCC documents for Property in accordance with the State’s codification of the Uniform Commercial Code, Chapter 55 NMSA 1978..
- 5.8 The Department shall attain Attorney Certification from counsel, licensed by the State that the Covenant and/or UCC documentation, as applicable, has been properly executed and recorded or filed in accordance with state law (*see ATTACHMENT C*).
- 5.9 The Department shall account for all Property acquired or improved with Federal Grant Award funds as part of the award closeout procedures.

## **6. PROCEDURES:**

- 6.1** All Department staff assigned work related to a grant should become familiar with the Federal Interest Documentation Requirements FACT SHEET and the Useful Life Schedule FACT SHEET.
- 6.2** The AOR should work with the Department's Fixed Asset Manager on all related matters regarding property funded by a grant awarded.
- 6.3** The Fixed Asset Manager working with the AOR should complete the Covenant document and properly record the document in the real property records in the jurisdiction in which the real property is located in order to provide public record notice to interested parties that there are certain restrictions on the use and disposition of the Covered Property during its useful life (*see Policy Attachment B*).
- 6.4** The Fixed Asset Manager working with the AOR should file the UCC documents in the central filing office as directed under the State's Uniform Commercial Code Chapter 55 NMSA 1789.
- 6.5** The AOR should provide the Grantor with a copy of the documentation of the Federal Interest, specifically the recorded Covenants and the filed UCC documents.
- 6.6** The AOR should assure that the documentation of the Federal Interest, specifically the recorded Covenants and the filed UCC documents are maintained in the Grant Files.
- 6.7** The amount of Federal Interest on a particular piece of real or personal property acquired or improved with awarded funds should be computed as the percentage of the current fair market value of the property that is attributable to the grant project.
- 6.8** The sample Attorney Certification document in Attachment C may be used or equivalent document provided by legal counsel for the Department's certification requirement within this policy.
- 6.9** All Department staffs assigned work related to a grant should read and sign the Acknowledgement Form for this policy.

## **7. FORMS:**

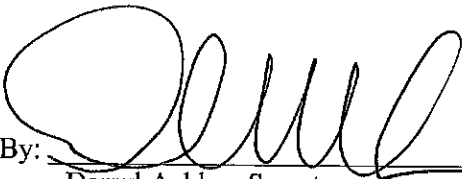
- 7.1** Policy Acknowledge Form
- 7.2** Covenant of Purpose, Use and Ownership Form (*specific to BTOP Awards*)
- 7.3** Attorney Certification Sample

## **8. MANAGEMENT:**

- 8.1** Appropriate and timely notification will be made regarding change(s) in policy or procedures, as deemed appropriate by the Department Secretary.

- 8.2 Each reported infraction of this policy will be handled on it's own merit and may be subject to disciplinary action in conjunction with the State Personnel Board Rule, 1 NMAC 7, 11 Discipline.
- 8.3 The Department's Office of Policy and Assessment will review this policy in accordance with the Department's Policy Management Plan.

**9. APPROVAL:**

Approved By:  Date: 26 SEP 11  
Darryl Ackley, Secretary  
Department of Information Technology

**ATTACHMENT A: Acknowledgement Form**

I have received, read, and understood the **Policy: *Policy Title* DOIT-361-107**. I understand it is my responsibility to adhere to this policy.

Should I have any questions I will notify the DoIT Human Resources Office.

\_\_\_\_\_  
Printed Name

\_\_\_\_\_  
Signature

\_\_\_\_\_  
Title

\_\_\_\_\_  
Date (mm/dd/yyyy)

## **ATTACHMENT B: Covenant of Purpose, Use and Ownership Form**

### **Covenant of Purpose, Use and Ownership**

THIS COVENANT OF PURPOSE, USE AND OWNERSHIP (hereinafter called "Covenant") dated this \_\_\_ day of \_\_\_\_\_, 20\_\_, by and between \_\_\_\_\_, whose address is \_\_\_\_\_ (hereinafter with its successors and assigns called "Recipient"); and the National Telecommunications and Information Administration, U.S. Department of Commerce, whose address is 1401 Constitution Avenue, N.W., Room 4812, Washington, D.C. 20230 (hereinafter with successors and assigns called "NTIA").

### **RECITALS**

WHEREAS, Recipient submitted an application to NTIA for financial assistance under the Broadband Technology Opportunities Program ("BTOP"), pursuant to the American Recovery and Reinvestment Act of 2009, Pub. L. No. 111-5, 123 Stat. 115 (Feb. 17, 2009) (hereinafter the "Act"); and

WHEREAS, by Offer of Award, dated \_\_\_\_\_, NTIA offered to Recipient a financial assistance award designated as Award No. \_\_\_\_\_ (the "Award") in the amount of \$\_\_\_\_\_ (hereinafter called "Award Amount") to assist in financing \_\_\_\_\_ (hereinafter called "Project"); and

WHEREAS, to execute such Project, Recipient has acquired or improved real property in whole or in part with funds made available through the Award [or applicable real property interest] described in Exhibit "A" attached hereto and incorporated herein (hereinafter with all improvements called the "Property"); and

WHEREAS, on \_\_\_\_\_, Recipient accepted the Award by signing Form CD-450 (together with all documents attached thereto or incorporated therein, the "Award Agreement") issued in connection with the Project and pertaining to the Award Number, thereby binding itself and making itself subject to the terms and conditions contained in the Award Agreement including, without limitation, the applicable requirements of 15 Code of Federal Regulations (C.F.R.), Parts 14 or 24, as applicable, and the terms of the First Notice of Funds Availability, 74 Fed. Reg. 33104 (Jul. 9, 2009) or the Second Notice of Funds Availability, 75 Fed. Reg. 3792 (January 22, 2010), as applicable; and

WHEREAS, the Award Agreement provides the purposes for which the Award Amount may be used and provides, inter alia, that Recipient holds title to the Property in trust for the public purposes of the Project, and may not sell, lease, transfer, convey, hypothecate, mortgage, or otherwise alienate any right to or interest in the Property, or use the Property for purposes other than, and different from, those purposes set forth in the Award Agreement and the application made by Recipient therefore (hereinafter called "Project Purposes"), such alienation and use being prohibited by 15 C.F.R. Parts 14 or 24, as applicable, and the Award Agreement, without the prior written approval of the BTOP Grants Officer, or his /her designee or successor (hereinafter called the "Grants Officer"); and

WHEREAS, under the authority of the Act and the Award Agreement, Recipient may not use the Property for purposes other than Project Purposes and may not lease, sell, transfer, convey, mortgage or hypothecate or otherwise alienate the Property to any party without prior written approval from the Grants Officer, unless NTIA is repaid its Federal Interest in the Property, as defined and more particularly described herein; and



WHEREAS, Recipient, as owner of all or part of the Property, agreed to record this Covenant in the appropriate office for the recording of public records affecting real property in the jurisdiction where the Property is located so as to constitute notice to all persons of the restrictions contained herein on title to and use of the Property for the benefit of the public purposes of the Project; and

WHEREAS, the \_\_\_\_\_ located at \_\_\_\_\_ is the proper office to record this Covenant:

NOW THEREFORE, in consideration of financial assistance rendered and/or to be rendered by NTIA and of other good and valuable consideration, the receipt and adequacy of which is hereby acknowledged, and to assure that the benefits of the Project will accrue to the public and be used as intended by both NTIA and Recipient, Recipient hereby covenants and agrees as follows:

1. For purposes of this Covenant, the useful life of the Property is set forth in Exhibit A, as determined by the BTOP Schedule of the Useful Life of Property, attached as Exhibit B hereto.
2. Recipient agrees that for the useful life set forth above, Recipient will not lease, sell, transfer, convey, hypothecate, mortgage, or otherwise alienate any interest in the Property, nor shall Recipient use the Property for purposes other than the Project Purposes without the prior written approval of the Grants Officer. However, such approval may be withheld until such time as Recipient first pays to NTIA the Federal Interest (as hereinafter defined) in the Property as provided in 15 C.F.R. Part 14 or Part 24, as applicable. The Federal Interest is that percentage of the then current fair market value of the Property attributable to the NTIA participation in the Project (after deducting actual and reasonable selling and fix-up expenses, if any, incurred to put the property into condition for sale). The Federal share excludes that value of the Property attributable to acquisition or improvements before or after NTIA's participation in the Project and not included in Project costs. As of the date of this Covenant, it is hereby agreed that NTIA's percentage participation in the Project is [*this percentage is equal to the federal share ratio under the BTOP award*] (XX%) percent.
3. Recipient further covenants that in the event NTIA permits the Property to be used for purposes other than the Project Purposes, or if the Property is sold, leased, transferred, conveyed, hypothecated, mortgaged, or otherwise alienated, Recipient will compensate the Federal Government for the Federal Interest in the Property. Such Federal Interest shall be and is hereby made a charge and lien of the first priority against the Property until fully satisfied.
4. Recipient further agrees that, as a condition of accepting the disbursement of any portion of the Award Amount, Recipient shall provide NTIA with evidence that it has executed and placed on record against the Property, this Covenant and shall provide the Grants Officer with evidence of such recording. NTIA will in its sole discretion determine whether this Covenant is satisfactory and may require an opinion of counsel for the Recipient that: (i) the Covenant is valid and enforceable according to its terms; (ii) the Covenant has been properly recorded; and (iii) that there is no lien or encumbrance on or pertaining to the Property superior to the Covenant.
5. Recipient further agrees that whenever the Property is sold, leased, or otherwise conveyed, Recipient or the transferor shall add to the instrument of conveyance, pursuant to the requirement of 15 C.F.R. Part 14, a covenant of purpose, use and ownership. NTIA will, in its sole discretion, determine whether such covenant is satisfactory. In connection with any such transfer, NTIA may require an opinion of counsel for the Recipient or for the transferor that the covenant is valid and enforceable according to its terms and has been properly recorded.

6. It is stipulated and agreed that the terms hereof constitute a reasonable restraint on alienation of use, control, and possession of or title to the Property given the Federal Interest expressed herein.

7. This Covenant shall run with the land.

8. This Covenant shall be construed in a manner consistent with the terms and conditions of the Award Agreement and applicable regulations; *provided, however*, that if there is a conflict, the terms and conditions of the Award Agreement shall control.

IN WITNESS WHEREOF, the recipient has hereunto set their hand as of the day and year first above written by their duly authorized officer. A completed duly recorded copy of this Covenant shall be forwarded to NTIA. (The appropriate acknowledgment must be included for recording in Recipient's jurisdiction.)

Recipient: \_\_\_\_\_

By: \_\_\_\_\_

Title: \_\_\_\_\_

ATTEST:

By: \_\_\_\_\_

Title: \_\_\_\_\_

Exhibit A (Legal Description of the Property)

Exhibit B (BTOP Schedule of the Useful Life of Property)

**ATTACHMENT C: SAMPLE Attorney Certification**

RE: [Covenant of Purpose, Use and Ownership and/or UCC-1 Form(s)]

NTIA BTOP Grant No. \_\_\_\_\_

Pursuant to 28 U.S.C. § 1746, I hereby certify as follows:

I am legal counsel at \_\_\_\_\_.

I am licensed to practice law in the State of \_\_\_\_\_ having been a license holder of said state and in good standing since \_\_\_\_\_.

[For Covenants] Attached hereto is a certified copy of that document entitled "Covenant of Purpose, Use and Ownership" reflecting that this document was filed in the \_\_\_\_\_ on \_\_\_\_\_, 201\_\_\_\_, bearing the recording data evidencing that this document is recorded as [Insert recording data, e.g., instrument number, book and page number, etc.] and consists of \_\_\_\_\_ recorded pages as certified by \_\_\_\_\_ of \_\_\_\_\_.

[For UCC-1s] Attached hereto is a certified copy of UCC-1 form(s) reflecting that this document was filed in the \_\_\_\_\_ on \_\_\_\_\_, 2011, bearing the following filing information [insert filing data, e.g., instrument number, etc.] and consists of \_\_\_\_\_ recorded pages as certified by the Secretary of State of \_\_\_\_\_.

I certify that this [Covenant of Purpose, Use and Ownership and/or UCC-1 form(s)] has/have been validly executed and properly recorded as noted above.

I certify under the penalty of perjury that the foregoing is true and correct.  
Executed on this \_\_\_\_\_ day of \_\_\_\_\_.

\_\_\_\_\_  
(Attorney name and title)  
(Address and phone number)

**ATTACHMENT C: SAMPLE Attorney Certification**



**BROADBANDUSA**  
CONNECTING AMERICA'S COMMUNITIES

**FACT SHEET**  
**Broadband Technology Opportunities Program**  
**Useful Life Schedule**

| Category                            | Type   | Estimated Useful life  |
|-------------------------------------|--|--|
| <b>Buildings</b>                    | ■ Construction of new buildings, prefabricated buildings, or concrete pads   | ■ 20 years   |
|                                     | ■ Modification, rehabilitation, or outfitting of existing buildings  | ■ 15 years   |
| <b>Outside Plant</b>                | ■ Aerial coaxial plant, aerial copper plant, aerial fiber plant, buried copper plant, buried coaxial plant, buried fiber plant, underground plant, taps, amplifiers, drops, NIDs, etc.   | ■ 20 years   |
| <b>Towers and Poles</b>             | ■ Construction of new towers or poles or modifications of existing towers or poles   | ■ 20 years   |
|                                     | ■ Emergency power generation equipment at tower site   | ■ 10 years   |
| <b>Network and Access Equipment</b> | ■ Broadband switching equipment, broadband routing equipment, broadband transport equipment, network broadband access equipment (e.g., CMTSs, DSLAMs, Radio Network Controllers, etc.), wireless base stations, antennas, emergency power supply equipment | ■ 10 years   |
| <b>Operating Equipment</b>          | ■ Billing/Operations systems   | ■ 10 years   |
|                                     | ■ Office furniture and fixtures  | ■ 10 years   |
|                                     | ■ Work equipment and vehicles  | ■ Five years for non-construction related motor vehicles; 10 years for work-related motor vehicles |
| <b>Customer Premise Equipment</b>   | ■ Customer broadband access equipment (e.g., cable modems, DSL modems, wireless modems, etc.), general purpose computers and peripheral equipment, office machinery  | ■ Five years   |

