

11.

SETTLEMENTS

49 CFR §24.102(i)
23 CFR § 710.105
23 CFR § 710.203(b)(1)(iv)
23 CFR 710.203(b)(5)

REFERENCES

There will be times when settlements cannot be reached through the negotiation process and it may become necessary for the agency to consider making an administrative settlement or a subsequent legal settlement. There will be situations where it will be in the public interest to seriously consider the settlement of an acquisition with the

expediency of project completion and/or cost savings being a driving force or justification.

An **administrative settlement** is *any settlement, made or authorized to be made by the responsible acquiring official, which is in excess of the agency's approved offer of just compensation.* A **legal settlement** is *any settlement made by the responsible agency's legal representative.* Legal settlements which are based upon new or revised appraisal data as the principal justification should be coordinated with the responsible official having final authority over right-of-way matters.

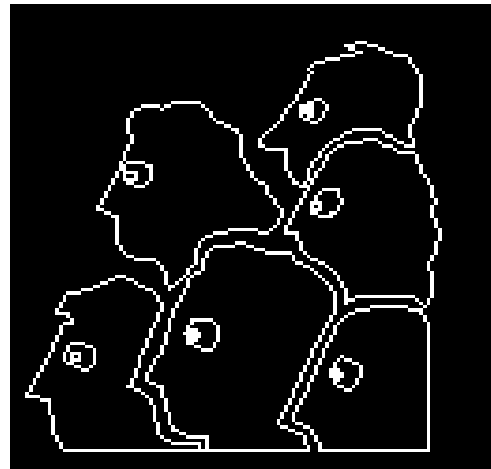
The **Uniform Act** requires that "*The head of a federal agency shall make every reasonable effort to acquire expeditiously real property by negotiation.*" Negotiation implies an honest effort by the acquiring agency to resolve differences with property owners. Additionally, the legislative history of the Uniform Act indicates that offers should not reflect a "take it or leave it position." Negotiations should recognize the inexact nature of the process by which just compensation is determined. Further, the law requires an attempt by agencies to expedite the acquisition of real property by agreements with owners and to avoid litigation and relieve congestion in the courts.

It should be noted that there are situations, such as when court awards have been excessive or because of high legal costs, where significant cost savings can be realized through the use of administrative and legal settlements. Cost savings are in the areas of salaries, witness fees, travel, per diem costs, excessive court awards, appraisers' fees, etc.

This chapter outlines the various settlements related to right-of-way acquisition.

SUMMARY

The use of administrative and legal settlements is a judgmental matter to be carefully considered on an optional basis by the agency. Some agencies are not realizing the full benefits of cost savings through the use of either type of these settlements permitted by the Uniform Act. There should be no reluctance by agencies to consummate a settlement in appropriate situations. FHWA endorses administrative settlements, to expedite agreement with owners. The administrative settlement process should be maintained separate from the appraisal/appraisal review function.



Administrative settlements are simply that -- settlements made for administrative reasons considered to be in the public interest and properly documented, and negotiators should be given the latitude to achieve them. If the support for a settlement is to be based on documentable appraisal related issues, then a revised fair market value/just compensation determination should be made. For instance, if there is a difference of opinion between the owner and the agency as to highest and best use (HBU) that is hard to document, this could be a plausible basis for settlement. (**NOTE:** If a new appraisal review determination is made as a result of such consultation, this revised amount must be offered the owner). However, if the agency's legal representative is attempting to negotiate an administrative settlement before triggering the legal side of the process, in mind that compliance with the Uniform Act requirements is still required. The Law requires agencies to attempt to expedite acquisitions by agreements with owners to avoid litigation and relieve congestion in the courts. There are also significant cost savings in the use of administrative settlements as shown by cost data from the Department of Justice.

11.1 ADMINISTRATIVE SETTLEMENTS

The purchase price for the property to be acquired may exceed the amount offered as just compensation when reasonable efforts to negotiate on that amount have failed and an authorized agency official approves such administrative settlement as being reasonable, prudent, and in the public interest. The agency's manual should include the agencies administrative settlement procedures.

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IDENTIFY OFFICIAL

An administrative settlement is precisely what it is labeled and is beyond the appraisal and appraisal review process. It is to be based on an administrative decision. The designated official must give full consideration to all pertinent information and prepare a written justification stating that available information (e.g., appraisals [including the owner's appraisal, if one is available], recent court awards, estimated trial costs, and valuation problems) supports such a settlement. The extent of the written explanation is a judgmental determination and should be consistent with the situation, circumstances, and amount of money involved.

Available information such as, appraisals, recent court awards, valuation problems and trial costs should support the administrative settlement

SUPPORT THE SETTLEMENT

Advantages of administrative settlements include:

- ! Cost savings, such as court costs and the potential necessity of paying increased court awards.
- ! Recognition of the shortcomings in the appraisal process by allowing for inexactness.
- ! Administrative settlements meet the intent of the law.
- ! Administrative settlements are under the control of Right-of-Way.

Disadvantages may be:

- ! Administrative settlements could establish a precedent on a project.
- ! They have the potential for abuse by the agent. Administrative settlements must have a review process so agents do not see it as the easy way out when negotiations become difficult.
- ! They require additional documentation and justification.

11.1.1 ADMINISTRATIVE SETTLEMENT CONSIDERATIONS

Consider for a moment the property owner's perspective. There may be relatively little difference in the opinion of the value of the property from that of the agency or there may be other issues clouding agreement. Settlement may be between the FMV offer and the owner's counter-offer. Agency reluctance to enter into an administrative settlement can result in a missed opportunity for resolution and thus pass on the responsibility of acquiring the property to an attorney. At this point, in most agencies, the acquisition unit

is no longer in control of the situation. The property owner is now confronted with negotiating with an attorney and probably will have to retain and pay for the cost of legal counsel for this as well as subsequent court appearances. Each situation where settlement can not be reached must be carefully analyzed from the stand point of whether additional compensation may resolve the acquisition to the benefit of all parties concerned. The impact of a settlement from a project-wide perspective should also be considered.

11.1.2 ADMINISTRATIVE SETTLEMENT PROCEDURES

49 CFR 24.102(i), provides that if Federal funds participate in acquisition costs, a written justification shall be prepared which indicates all available information supports such a settlement. Depending on whether an organization operates on a centralized or decentralized basis, its delegation of authority to approve administrative settlements will dictate who has the approval responsibility. This authority is important and should be used carefully.

One or more individuals may recommend a proposal for an administrative settlement to an approving official. This proposal may be prepared by either the property owner or the agent or by both, but the agent should be the one who submits the proposal to the approving official. As an example, Figure 11-1 depicts illustrative state guidelines for administrative settlements.

ADMINISTRATIVE ADJUSTMENTS

The Right-of-Way Agent should make a concerted effort to settle all claims on the basis of the approved appraisal. The agent should not make any administrative adjustments to approved appraisals in the beginning stages of a project because this will hinder negotiation on other claims on the project. The Department has found it to be economical in the latter negotiation stages of the project to settle some claims for nominal amounts above the approved appraisals. This reasoning is based upon past court experience and court costs. As previously mentioned, administrative increases should not be made in the beginning stages of negotiations, and the agent should not construe administrative increases as being an easy way to settle difficult right-of-way claims. Administrative adjustments normally will be made immediately prior to litigation and in some circumstances after litigation has begun. Administrative adjustments exceeding \$2,500 will be recommended on the Administrative Adjustment Form which is to be signed by the Division or Senior Right of Way Agent and the Area Right of Way Negotiator. This form is to be submitted to the Raleigh Central Office, in triplicate, and a copy will be returned to the Division Right-of-Way Agent and the Area Negotiator indicating approval or disapproval. Administrative adjustments from \$1.00 to \$2,500 can be made by including the following information in the Justification for Settlement portion of the Final Report:

"The administrative increase is not considered significant and is less than the cost of trial. This settlement was authorized by _____ on _____ 200_."

Administrative adjustments exceeding \$2,500 should be based upon actual similar court experience or other extenuating circumstances as indicated on the Administrative Adjustment Form. All particulars should be explained in the remarks column of the form.

On both State and Federal-aid projects, capable, skilled, Right-of-Way Agents are authorized to make administrative adjustments up to \$1,000. Senior Right-of-Way Agents are authorized to make administrative adjustments up to \$2,500. Division Right-of-Way Agents are authorized to make administrative adjustments up to \$3,000 on claims up to \$15,000. Division Right-of-Way Agents are authorized 20% administrative adjustment authority on claims from \$15,000 to \$30,000 and 10% administrative adjustment authority on claims from \$30,000 to \$100,000. Area Right-of-Way Negotiators are authorized to make administrative adjustments on all right of way claims up to \$30,000. On Claims from \$30,000 to \$200,000, Area Right-of-Way Negotiators are authorized to make adjustments up to 20%. On claims from \$200,000 to \$500,000, Area Right-of-Way Negotiators are authorized to make adjustments up to 10%. Administrative adjustments exceeding the foregoing limits may be authorized by the Manager and Assistant Manager of the Right of Way Branch and the State Right-of-Way Negotiator. Only the original approved Administrative Adjustment Form needs to be forwarded to the Central Office on those adjustments authorized by Division Right of Way Agents and Area Right of Way Negotiators.

FIGURE 11-1

11.1.3 ADMINISTRATIVE SETTLEMENT DOCUMENTATION

In order to properly document the decision to proceed to an administrative settlement it is always appropriate to document the recommendation as being reasonable, prudent, and in the public interest. With proper documentation, the approving official will not have to spend his time further justifying the recommendation.

Some of the items that can assist the approving official in his action are:

! All appraisals, including the owners, if appropriate. (**Caution:** If an appraisal issue becomes apparent, the appraisal unit or review appraiser should be consulted. For example, where two acceptable agency appraisals were obtained, and the offer was based on the "lower" appraisal, consideration should be given to settling up to the supported part of the "higher" appraisal if an honest difference of opinion exists).

! The approved offer of just compensation.

! Recent court awards, showing the average percentage increase over the fair market value for cases that went to trial.

! The negotiator's record of the actual negotiations.

! Valuation problems including the probable range of testimony as to fair market value by both sides should the case go to trial.

! The estimate of trial costs in conjunction with other information developed.

! The opinion of legal counsel, as appropriate.

In summary, the documentation should fit the situation. An increase of \$150 on an offer of \$10,000 would not need the same degree of support as an increase of \$2,500 on the same \$10,000 offer.

11.2 LEGAL SETTLEMENTS

The legal settlement is the attempt to reach a settlement after all reasonable efforts by the negotiator have failed, including attempts at an administrative settlement. It is at this point, as mentioned earlier, that control over the acquisition usually leaves Right-of-Way. When the negotiator decides that further negotiation with the property owner is futile and sends the acquisition case to the legal representative for resolution, the legal representative must try to resolve the

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LOSS OF CONTROL

case either by condemnation or through a legal settlement. The acquiring agency must identify the official responsible for making legal settlements and the relationship between the legal official and the right-of-way unit regarding the coordination between the two. It is during this time period between when the case is filed and the trial occurs that legal settlements may be accomplished.

Some legitimate reasons for proceeding to this step in the process may be:

- ! Honest disagreements about fair market value.
- ! Title problems.
- ! Disagreements about the need for the amount of taking.
- ! Property owner obstinacy.

Careful attention to eminent domain considerations is vital to the legal settlement process, and your legal counsel should be an integral member of the right-of-way team.

Legal Counsel should be involved from the beginning. During the planning and design stages, he or she may be able to detect complex title or valuation pitfalls which can be avoided or minimized during the appraisal process. Counsel should be called upon for advice on such matters as the law on benefits, before value\after value appraisals, and compensability of particular items. Counsel should be given an opportunity to offer advice prior to the determination to condemn. Once a case is referred for condemnation, counsel must have all pertinent information relative to the case. This includes: facts on the construction of the project and its effect on the taking, and any remaining property after the acquisition, information gathered by negotiators, appraisers, appraisal reviewers and competent witnesses. Counsel should know the weak points as well as the strong points of each case. In addition, counsel should be furnished and kept current on FHWA requirements for documentation of settlements and awards in order to ensure that counsel is sufficiently knowledgeable to provide appropriate justification for the actions taken.

The appropriate agency file shall be documented whenever a legal settlement in excess of the amount established as just compensation is made. The rationale for the settlement shall be set forth in writing. Legal settlements which are based upon new or revised appraisal data as the principal justification should be coordinated with and by the responsible official of the acquiring agency having final authority over right-of-way matters.

In some States, there are specific situations where a Board of Valuers or Court-appointed appraiser is an additional step in this condemnation process. It is very

important to follow State law and court procedures in these cases, and will certainly require the assistance of your counsel for proper compliance.

11.2.1 PREPARING FOR CONDEMNATION

Once the condemnation process has started, the agent can still have a significant amount of input into a successful attempt at a legal settlement. Some of the things the agent can do are:

! Maintain a good diary which will show the good faith effort of the agency in fulfilling the requirements of the regulations to negotiate in good faith.

! Submit information to the attorney handling the case which reflects what has happened and concludes with why negotiations were unsuccessful. It should also include all documentation necessary for the attorney to file the case in the appropriate court.

! Provide a recommendation to any administrative review board which might exist within the highway organization.

! In most cases all previous offers and any points of negotiation previously agreed to are withdrawn. Since you (the agency) are now moving towards a more adversarial role with regard to the process of acquisition any previous forms agreed to during the bargaining\negotiation process are no longer valid.

11.3 COURT AWARDS

FHWA does not question the judicial action of State courts. There are few specific Federal guidelines or requirements that address going to trial. However, if Federal funds are to participate in costs of rights-of-way determined by condemnation proceedings, the FHWA must be assured that the court and jury have had the benefit of a sound presentation of the State's case , and that the state has reasonably exercised all appropriate legal procedures, such as motions for a new trial or remittitur, or taking an appeal. An essential ingredient of success in condemnation is effective coordination. Most of the activities are governed by State statute and procedure. However, the Uniform Act under Title III, Section 301(4), provides that:

"No owner shall be required to surrender possession of real property before the head of the Federal agency concerned pays the agreed purchase price, or deposits with the court ... for the benefit of the owner, an amount not less than the agency's approved appraisal of the fair market value of such property, or the amount of the award of compensation in the condemnation proceeding for such property".

Title III of the Uniform Act, Section 301(7) states that:

"In no event shall the head of a Federal agency either advance the time of condemnation, or defer negotiations or condemnation and the deposit of funds in court for the use of the owner, or take any other action coercive in nature, in order to compel an agreement on the price to be paid for the property".

At this point it is the responsibility of the agent to coordinate the flow of information about a case to legal counsel. One suggestion is to prepare a Summary Report to be provided to Legal. It is suggested that, as a minimum, the report should contain the following:

% A brief statement of offers and counter offers and any pertinent comments to establish what the landowner is asking. The Negotiation Diary should be submitted in its entirety, if possible.

% Date when possession of the property is needed, so that any notices to relocate may be given and possession obtained.

% Information about any other involvement by the agency with the owner. ie. (Has the property owner been difficult to deal with in past acquisitions?)

% An inventory of improvements and fixtures, lease information, if appropriate, and existing uses.

% An updated title report.

% Copies of any correspondence with the owner to establish veracity and responsiveness of the agency to the owners demands.

% A clear set of right-of-way plans, and a listing of any physical impacts to the property, especially if there is any remainder which may be damaged.

% A copy of any internal condemnation review board, pre-condemnation commission, or board of property review meeting minutes, if applicable in your jurisdiction.

% All appraisals and appraisal reviews, as well as appraisers comments.

% Any noted access problems.

% Any other situations, such as land service facilities which should be brought to the attention of the attorney.

The purpose of the **Summary Report** is to give the attorney an accurate and descriptive detailed background on how the highway project impacts the property to be acquired.

The attorney must be as fully informed as the agent in order to develop a strategy for the upcoming court case. The acquisition agent can be a productive member of the team and help bring about better court settlements and awards. Generally, legal settlements should be coordinated in by the Chief of the Acquisition section before they are made.

It is expected that an agency trial attorney will, in preparing a case and deciding whether to recommend settlement or trial, discuss the taking with the right-of-way director, the negotiator, agency's reviewing appraiser, and other necessary expert and lay witnesses. Counsel should inspect the real property being acquired and, in appropriate instances, properties that may be used during the trial as comparable sales. Counsel should be familiar with the appraisal process, as discussed in Chapters 7 and 8 and carefully review with the witnesses all of the information which may develop on direct and cross examination. Counsel should assure that the appraisals conform to the date of valuation under State and local law and are based on a consideration of all compensable elements of damage which are applicable to the case. Counsel should analyze with the experts the testimony anticipated from opposing witnesses, and discuss possible weaknesses or errors in such testimony. An evaluation should be made of the probable effectiveness of witnesses and also a determination whether additional or substitute witnesses are required. Counsel should attempt to have appraisers reconcile any factual or legal differences without, in any way, influencing their independent exercise of judgment.

Federal funds may participate in amounts greater than the amount established as just compensation if there is supporting documentation in the appropriate agency file which includes:

! A trial report, signed by the trial attorney.

! A signed statement concurred in by the legal counsel in charge of representing the agency in condemnation litigation stating his concurrence in the reasoning and disposition of the case.

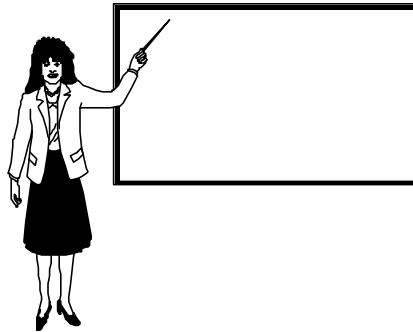
11.4 COMPENSABLE ITEMS

Federal funds may participate in the cost of severance and/or consequential damages to remaining real property resulting from a partial acquisition, actual or constructive, of real property for a project are based on elements compensable under applicable State law. [23 CFR 710.203(b)(5)]

11.5. SPECIAL COUNSEL

If part-time assistants or legal counsel are regularly employed for federal-aid right-of-way acquisition (and this is set forth in the acquiring organizations manual or procedures and accepted by FHWA), reimbursement may be claimed for the eligible cost of the services of such attorney. Federal participation may be allowed under a proper showing that the employment of special counsel is in the public interest and the fee is reasonable.

Federal participation is allowed in payment to a city or county attorney for work performed in connection with the acquisition of rights-of-way where he/she is obligated to perform such work without additional compensation. In those cases where the normal duties of the attorney includes the acquisition of property for highway purposes, federal funds may participate in payments to him for services performed, provided there is a proper showing of the facts. [23 CFR 710.203 (b)(5)]



Show The Facts!

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