

**Office of Real Estate Services - Project Development Guide
Chapter 11**

Settlements

49 CFR 24. 102(i)

23 CFR 710.105

**23 CFR
710.203(b)(1)(iv)**

23 CFR 710.203(b)

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 (ROW) matters.

The **Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, P.L. 91-646, (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, appraiser fees, etc.

This chapter outlines the various settlements related to ROW 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. The Federal

Highway Administration (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 (FMV) or 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 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, keep 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 U.S. 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 agency's administrative settlement procedures.

The agency's manual should include administrative settlement procedures.

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 support 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 the ROW office.

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 just compensation 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 illustrates an example guideline for administrative settlements.

ADMINISTRATIVE ADJUSTMENTS

The ROW agent should make a concerted effort to settle all claims on the basis of the approved appraisal. The agent should normally avoid administrative adjustments to approved appraisals in the beginning stages of a project because this will hinder negotiation on other claims on the project. The state Departments of Transportation (DOTs) have 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 are discouraged in the beginning stages of negotiations, and the agent should not construe administrative increases as being an easy way to settle difficult ROW claims. Administrative adjustments normally will be made immediately prior to litigation and in some circumstances after litigation has begun. Administrative adjustments exceeding an established

amount, say \$2,500, will be recommended on the administrative adjustment form which is to be signed by the division or senior ROW agent and the ROW negotiator. This form is to be submitted to the central office, in triplicate, and a copy will be returned to the division ROW agent and the 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 _____ 20__."

Administrative adjustments exceeding an established amount, say \$5,000 or \$10,000 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 ROW agents are authorized to make administrative adjustments up to \$2,500. Senior ROW agents are authorized to make administrative adjustments up to \$5,000. Division ROW agents are authorized to make administrative adjustments up to \$15,000. Division ROW 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. Administrative adjustments exceeding the foregoing limits may be authorized by the manager, assistant manager of the ROW branch, or the ROW negotiator. Only the original approved administrative adjustment form is forwarded to the central office.

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 with information supporting a determination that it is 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 are:

- All appraisals, including the owner's, 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 FMV for cases that went to trial.
- The negotiator's record of the actual negotiations.

- Valuation problems including the probable range of testimony as to FMV by both sides should the case go to court 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.

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 the ROW office. 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 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 ROW unit regarding coordination. It is during this period, after the case is filed and prior to the trial, that legal settlements may be accomplished.

It is at this point that our obligations under the Uniform Act are completed by the ROW office. The acquisition is now turned over to the legal department.

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

- Honest disagreements about FMV.
- 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 ROW 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 along with 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 the 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 ROW matters.

In some states, there are specific situations where use of a board of valuers, or court-appointed appraisers, can be an additional step in the 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

The 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 ROW determined by condemnation proceedings, the FHWA must be assured that Federal requirements were satisfied; 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 action to 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 FMV 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 the legal department. 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 negotiator's 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, i.e., 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 owner's demands.
- A clear set of ROW 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 with the head of the acquisition section before they are made.

recommend settlement or trial, discuss the taking with the ROW 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, based on elements compensable under applicable state law, 23 CFR 710.203(b)(3).

11.5. SPECIAL COUNSEL

Many years ago the FHWA had to approve the use of contract negotiators and special counsel. This approval is no longer required. Federal funds may participate in payments for services performed by contractors, including special counsel.
