

Right of Way Manual

Chapter 10: Settlements

Policies, Procedures and Information

Colorado Department of Transportation

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Exhibits

Exhibit A Form #227 Recommendation for Settlement

Section 10.1 – General Information

10.1.1 – Acronyms Common to the Right of Way (ROW) Manual and CDOT

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|--------------|---|
| BLM | Bureau of Land Management (Department of Interior) |
| BPR | Bureau of Public Roads (Predecessor to Federal Highway Administration) |
| BuRec | United States Bureau of Reclamation (Department of Interior) |
| CAD | Computer Aided Drafting |
| CE | Categorical Exclusion |
| CDPHE | Colorado Department of Public Health and Environment |
| CDOT | Colorado Department of Transportation |
| CFR | Code of Federal Regulations |
| CHARN | Colorado High Accuracy Reference Network |
| CJI-Civ. 4th | Colorado Jury Instructions, Civil 4th |
| CPA | Certified Public Accountant |
| CPW | Colorado Division of Parks and Wildlife (Colorado Department of Natural Resources) |
| CRS | Colorado Revised Statutes |
| EA | Environmental Assessment |
| EEO | Equal Employment Opportunity |
| EIS | Environmental Impact Statement |
| EPA | Environmental Protection Agency |
| EPS | Extended Purchasing System |
| ESA | Environmental Site Assessment |
| FEIN | Federal Employer Identification Number |
| FEMA | Federal Emergency Management Agency (U.S. Department of Homeland Security) |
| FHA | Federal Housing Administration (United States Department of Housing and Urban Development) |
| FHWA | Federal Highway Administration |
| FIR | Field Inspection Review |
| FIRREA | Financial Institutions Reform, Recovery, and Enforcement Act of 1989 (a federal law enacted in the wake of the savings and loan crisis of the 1980's) |
| FLPMA | Federal Land Policy and Management Act of 1976 (Public Law 94-579 94th Congress) |
| FLTC | Federal Land Transfer Coordinator |
| FMV | Fair Market Value |
| FONSI | Finding of No Significant Impact |
| FOR | Final Office Review |
| FS | Feasibility Study |
| GLO | General Land Office (US Dept of Interior, Bureau of Land Mgmt) |
| GPS | Global Positioning System |
| HB | House Bill |
| HBU | Highest and Best Use |
| HED | Highway Easement Deed |
| HLR | Housing of Last Resort |
| HUD | United States Office of Housing and Urban Development |
| IGA | Intergovernmental Agreement |

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|------------------|---|
| ISA | Initial Site Assessment |
| LOC | Letter of Consent |
| LPA | Local Public Agency |
| LSCD | Land Survey Control Diagram |
| MAP-21 | Moving Ahead for Progress in the 21st Century, P.L. 112-141 |
| MESA | Modified Environmental Site Assessment |
| MIDP | Mortgage Interest Differential Payment |
| MOA | Memorandum of Agreement |
| MOO | Memorandum of Ownership |
| MOU | Memorandum of Understanding |
| NEPA | National Environmental Policy Act |
| NGS | National Geodetic Survey (National Oceanic and Atmospheric Administration - NOAA) |
| NHS | National Highway System |
| NRHP | National Register of Historic Places (National Parks Service, US Dept of the Interior) |
| NSRS | National Spatial Reference System (National Oceanic and Atmospheric Administration - NOAA) |
| PBS | Primary Base Series (USGS Mapping Program) |
| PCD | Project Control Diagram |
| PL | Public Law |
| PLS | Public Land Surveyor (Licensed in the State of Colorado by Colo Dept of Regulatory Agencies) |
| PS&E | Project Specifications and Estimates |
| PSI | Preliminary Site Investigation |
| QA | Quality Assurance |
| QAL | Qualified Appraisers List |
| QC | Quality Control |
| QRAL | Qualified Review Appraisers List |
| REPM | Regional Environmental Project Manager |
| RFP | Request for Proposal |
| RHP | Replacement Housing Payment |
| RI | Remedial Investigation |
| ROD | Record of Decision (US Environmental Protection Agency) |
| ROW | Right of Way |
| ROWPR | Right of Way Plan Review |
| RS | Revised Statute (Federal - first official codification of the Acts of Congress) |
| RTD | Regional Transportation Director |
| SPCC | Spill Prevention and Countermeasure Plans |
| SSN | Social Security Number |
| State Land Board | State Board of Land Commissioners (Department of Natural Resources) |
| STIP | Statewide Transportation Improvement Program (4 year transportation planning document required by FHWA) |
| STURRA | Surface Transportation and Uniform Relocation Assistance Act of 1987 |
| SUP | Special Use Permit |
| TE | Transportation Enhancement (Moving Ahead for Progress in the 21st Century Act (MAP-21) replaced the TE Activities with the Transportation Alternatives Program (TAP)) |

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|-------------|--|
| TEA 21 | Transportation Equity Act for the 21st Century (enacted June 9, 1998 as Public Law 105-178) |
| TMOSS | Terrain Modeling Survey System (InRoads Computer Software) |
| Uniform Act | Uniform Relocation Assistance and Real Property Acquisition Policies of 1970, as amended (42 USC 4601 et seq.) |
| USC | United States Code |
| USCIS | United States Citizenship and Immigration Services (Homeland Security) |
| USDOT | United States Department of Transportation |
| USFS | United States Forest Service |
| USGS | United States Geological Survey |
| USPAP | Uniform Standards of Professional Appraisal Practice |

10.1.2 – Authorities

Authorities and references to Code of Federal Regulations (CFR) are:

- 49 CFR Part 24.102(i) and Appendix 24.102(i)
- 23 CFR Part 710.203(b)(1)(iv)

10.1.3 – Purpose – 49 CFR 24.102(i) and Appendix A, 24.102(i)

The purchase price for the property may exceed the amount offered as just compensation when reasonable efforts to negotiate an agreement at that amount have failed and an authorized Agency official approves such administrative settlement as being reasonable, prudent, and in the public interest. When Federal funds pay for or participate in acquisition costs, a written justification shall be prepared, which states what available information, including trial risks, supports such a settlement.

Section 10.2 – Administrative and Legal Settlement Procedure

10.2.1 – Types of Settlements

1. Administrative Settlement

An administrative settlement is:

- any settlement reached prior to filing a parcel for a condemnation proceeding
- made or authorized to be made by the responsible CDOT official
- in excess of CDOT's approved estimate of compensation (FMV)

2. Legal Settlement

A legal settlement is:

- any settlement reached by the legal representative (attorney) to CDOT
- after a condemnation action is filed with the court
- in excess of CDOT's approved estimate of compensation (FMV)

Legal settlements and administrative settlements are an alternative to judicial resolution of a difference of opinion on the value of a property, in order to avoid unnecessary litigation and congestion in the courts.

All relevant facts and circumstances should be summarized by the agent negotiating the acquisition for administrative settlements or CDOT's legal representative for legal settlements and considered by an Agency official delegated the authority to approve as specified in Section 10.2.21.

10.2.2 – Settlement Recommendation and Approval Authority

Administrative settlement is recommended by the negotiating agent. Legal settlement is recommended by the assigned attorney. Settlement Recommendation and approval require use of CDOT Form 227 (Exhibit A) and requires the signatures of the Right of Way Specialist or Trial Attorney recommending the settlement. Recommendation and/or approval of the settlement by the Region Right of Way Manager and/or Region Transportation Director is necessary, as applicable for settlements at the Region level. Settlements outside Region authority require recommendation by the Region Right of Way Manager and Region Transportation Director, prior to final approval at Headquarters by the Chief Engineer. Approval authority is as follows:

- Delegation of authority to approve any and all legal and administrative settlements may be delegated by the Region Transportation Directors (RTD's) to Region staff at a rank no lower than their respective Region Right of Way Manager up to \$150,000 over Fair Market Value (FMV).
- For any settlements that are over \$150,000 and up to \$500,000 over FMV, the RTD's written approval would be necessary and written notification (but not a requirement for approval) would be sent to the Chief Engineer.
- For an administrative or legal settlement \$500,000 over FMV, written approval of both the RTD and the Chief Engineer is required.

10.2.3 – FMV Settlements

A Settlement Recommendation or Form 227 is not required for settlements at Fair Market Value (FMV). The following procedure applies for approval of the Memorandum of Agreement or other Contract:

- Region ROW Manager approves, subject to Region settlement levels, if authority has been delegated by Chief Engineer and/or RTD.
- If Region ROW Manager is absent from office for an extended time period:
 - Region Engineer, Program Engineer III, or RTD can approve settlement.
 - Region ROW Manager/Supervisor may issue **written** delegation of signature authority to lower level employee **only in exceptional circumstances** as it authorizes the expenditure of public funds.
 - Copy of delegation must include name of the delegate, be signed by the Region ROW Manager, and be provided to the Acquisition Unit Leader, Project Development Branch, Headquarters ROW.

10.2.4 – Region and Project Development Branch, Headquarters ROW Review Process Responsibilities

- In cases of a legal or administrative settlement which is subject to the Chief Engineer's approval, Regions will coordinate with Headquarters ROW and with the AG's office. The Statewide ROW Program Manager in Project Development Branch, Headquarters ROW will receive a copy of the proposed Settlement Recommendation prior to being submitted to the Chief Engineer.
- Project Development Branch, Headquarters ROW will provide review and comments of the Settlement Recommendation, when requested. Headquarters ROW will maintain the final documentation of all settlements within the parcel files.

Section 10.3 – Settlement Support Data and Justification Factors

Recommendations for settlement will be prepared on Form 227 (Recommendation for Settlement). Recommendations will be prepared by the negotiator for an administrative settlement or by the attorney for a legal settlement. The responsibility of the Region ROW Manager is to ensure that written recommendations provide an explanation that the settlement is reasonable, prudent and in the public interest. The extent of the explanation and documentation required shall depend on the circumstances and the amount of money involved. The recommendation must identify and explain amounts awarded for land, improvements, real estate damages, fees and costs, etc., to the greatest extent possible.

The following factors should be considered and addressed if relevant to the settlement, in a Recommendation for Settlement.

1. Information Contained in All Available Appraisals, Including those of the Owner:

Consider any information in available reports which might create exposure to a higher value being determined at trial. The written narrative should:

- Clearly state the information and estimate the monetary effect; and
- Explain the use of any information which was specifically rejected by the review appraiser as inappropriate or unsupported.

2. Substantial Differences of Opinion Regarding Valuation Issues:

Consider the impact that a substantial difference of opinion between experts may have on the outcome of litigation (for example, the determination of highest and best use). The written narrative should:

- Set out the specific issues causing the difference of opinion;
- Clearly explain the legitimacy of the opposing opinion, including whether it is supported by an appraisal report or other written information;
- Explain how this difference may create a substantive exposure at the time of litigation;
- Provide a monetary estimate of the exposure; and
- Document the results of discussion of the issues with the review appraiser.

3. Complexity of Severance or other Issues Leading to Uncertainty in Value:

Identify complex valuation issues such as severance damages which may have an unfavorable impact on the litigation outcome. The written narrative should:

- Provide a specific analysis of the issues and the estimated monetary exposure; and
- Indicate the results of discussion of the issues with the review appraiser.

4. Handling of Legal Issues in Approved Appraisals:

Identify any items in the approved appraisal which are not in accordance with the current assessment of relevant legal issues as interpreted by CDOT's attorney. The written narrative should:

- Explain the specific circumstances and the possible impact on value; and
- Document the results of discussion of the issues with the review appraiser.

5. Consideration of Time to Anticipated Title Transfer Date:

Apply a time adjustment to the amount of just and full compensation, if appropriate. The written narrative should:

- State the basis for the time adjustment including the adjustment calculation; and
- If the approved appraisal did not include a time adjustment explain why such an adjustment is applicable despite its omission from the approved report.

6. Recent Court Awards for Eminent Domain Takings:

Consider recent jury verdicts for similar properties acquired in the same geographic area by eminent domain. The written narrative should:

- Not presume a verdict based on a 50/50 split between CDOT's and owner's testimony; and
- Include a specific analysis of verdicts considered and the source of all data.

7. Credibility of Expert Witnesses:

Identify the strengths and weaknesses of expert witnesses for both CDOT and the owner. The written narrative should:

- Identify any anticipated weaknesses in CDOT's expert witness testimony, and the possible impact on the litigation outcome; and
- Indicate whether this criterion is being considered as a major or minor factor in the recommendation.

8. Likelihood of Jury Sympathy for the Owner:

Analyze intangible items such as an owner's age, health, or public image which might influence a jury. The written narrative should:

- State why there is a presumption of jury sympathy; and
- Document whether this criterion is considered a major or minor factor in the recommendation.

9. Possibility of Obtaining an Unbiased Jury:

Juries are presumed to be unbiased. However, if a rare set of specific circumstances exists, which are expected to create a bias against CDOT, this may be considered as a factor in recommending a settlement. The written narrative should:

- Explain why a jury may be biased; and
- Document whether this criterion is considered a major or minor factor.

10. Potential Cost of Litigation:

Consider the anticipated cost of supporting the eminent domain action and identify the savings expected to result from avoiding some, or all, of this cost. The cost of potential litigation refers to any cost that would be incurred in the future if the parcel were not settled; i.e., an estimate of additional cost beyond that already incurred. Cost of litigation can include, but is not limited to:

- The owner's attorney fees;
- Expert witness fees, CDOT's and owners;
- Any other court costs, court reporters, jury transportation, etc.; and
- Statutory interest on the difference between the deposit and the anticipated verdict. The recommendation must include a calculation of the estimated interest exposure and an explanation of the basis of that calculation.

The written narrative should list each litigation cost that is expected to be avoided by approval of the settlement.

11. Other Relevant Information:

If there is other relevant information which would support a settlement, it should be explained in the written recommendation. Occupancy of a property at below-market rent subsequent to CDOT taking possession to a property may be considered, however it is CDOT's policy that the first 30 days of occupancy may be permitted without charge, where feasible. See section 4.16.1 for more information.

If the settlement includes a non-monetary benefit, an explanation and quantification of the benefit must be included.

NOTE: When the settlement is a legal settlement, the criteria described in items (7), (8), (9), and (10) should be discussed with the Attorney General's Office and the discussion should be documented in the recommendation.

Section 10.4 – Relocation Payments and Settlements

10.4.1 – Inclusion of Relocation Payments in Settlements

Relocation payments are not an acquisition cost and cannot be used to support an administrative settlement in whole or in part. Administrative settlements must be justified on acquisition issues only.

10.4.2 – Settlement Amounts in Excess of Fair Market Value (FMV)

Amounts in excess of the FMV, paid to a property owner that is a 90-day occupant, have the same effect as relocation payments due the property owner. Such excess amounts should be used to offset relocation replacement housing payments to which the property owner would otherwise be entitled. CDOT must be able to clearly demonstrate that the property owner, if eligible for relocation payments, was clearly advised prior to the time of an administrative/legal settlement that any excess amounts will be credited against the amount of the property owner's relocation payment.

Note: The acquisition and relocation agents should be careful to avoid giving tax advice and refer any specific tax questions to a tax professional. However, it is permissible to inform the property owner that relocation payments are not considered income for tax purposes.

See **Chapter 5, Relocation**, of the CDOT ROW Manual for:

- Form # 759 - Owner Entitlement – 90-Day Notice; and
- Form #1197 - Relocation Owner Entitlement – 90-Day Notice (Housing of Last Resort).