



**OREGON
PROPERTY OWNERS'
HANDBOOK:**

**Eminent Domain and
Just Compensation
Under Oregon Law**

**By: Neil N. Olsen
Brian J. Best**

TABLE OF CONTENTS

1.	INTRODUCTION	1
2.	EMINENT DOMAIN: THE POWER TO TAKE PRIVATE PROPERTY FOR PUBLIC USE.....	2
3.	JUST COMPENSATION	3
4.	PRELIMINARY STAGES	4
5.	THE OFFER	6
6.	RESPONDING TO THE OFFER	7
7.	NEGOTIATING WITH THE GOVERNMENT	9
8.	TRANSFER OF TITLE AND POSSESSION	10
9.	THE CONDEMNATION LAWSUIT	13
10.	AFTER THE TRIAL OR SETTLEMENT.....	17
11.	INVERSE CONDEMNATION	17

Disclaimer

This Handbook is intended to provide general legal principles relating to eminent domain. It is neither a complete legal text on eminent domain law nor is it a specific analysis of your particular legal position or claim. Sometimes the law changes by statute or by appellate court decisions. This Handbook may not reflect some of those recent changes. No legal advice is either express or implied, and all readers are encouraged to obtain competent and experienced eminent domain legal counsel to assess their specific legal rights and responsibilities. Failure to act timely can result in the loss of certain legal rights.

All rights reserved. No part of this document may be reproduced or transmitted in any form or by any means, electronic, mechanical, photocopy, recording, or otherwise, without the express prior written permission of Olsen Barton LLC.

About the Authors



Neil Olsen takes great pride in representing property owners in eminent domain proceedings, and ensuring they receive their constitutionally guaranteed rights to due process and just compensation. Over the past ten years, Neil has lead one of the most active eminent domain practices in Oregon. Based upon his expertise, experience and results, he is regularly asked to speak to professional and industry groups on eminent domain topics. He has also been recognized by his peers in publications such as Best Lawyers in America and Super Lawyers.

Neil Olsen can be reached at:

Email: neil@olsenbarton.com

Phone: (503) 451-5047



Brian Best enjoys working closely with property owners to guarantee their rights are protected and they receive full compensation for their property taken in eminent domain. Brian has represented property owners whose property is targeted for condemnation by a variety of authorities, including TriMet, Washington County, Clackamas County, the City of Lake Oswego, the City of Portland, and Clean Water Services. Brian is proud of the favorable results he has obtained for his clients, including just compensation that has exceeded the government's initial offer in every case. Based on his experience and the results obtained for his clients, Brian has been recognized by his peers as a rising star in eminent domain in the publication Super Lawyers.

Brian Best can be reached at:

Email: brian@olsenbarton.com

Phone: (503) 558-6214

1. INTRODUCTION

If you are reading this, you may be a property owner who is currently facing a governmental “taking” of your property. The government takes property by a formal process known as “condemnation.” Its power to take or condemn property is known as “eminent domain.”

You may have learned about the government’s designs on your property at a public meeting or through a notice you received in the mail. You may, by now, have received an “offer” for your property from the government. Wherever you may be in the process, this Handbook is for you. The more you know about the condemnation process, the more you can protect yourself and, in the end, obtain a fairer result.

As an initial matter, you may have been surprised to learn the government can take your property without your consent. Though the government is permitted to take private property for public use, the right to just compensation for such takings is protected by the Constitutions of the United States and the State of Oregon. In addition, the U.S. Congress and Oregon legislature have adopted a number of statutory protections for property owners, including a property owner’s right to recover attorney fees, appraisal fees, and other expenses from the government in many cases. Armed with these constitutional and statutory protections, you can confidently pursue the just compensation you deserve.

This Handbook describes in a general manner the government’s power of eminent domain and property owners’ rights to just compensation under Oregon law. It is designed to educate property owners at a basic level. After reading this Handbook, you should have a better understanding of your rights and how to protect them from start to finish. This Handbook is not, however, intended to substitute for the advice of an experienced eminent domain attorney who can assess your particular circumstances and advise you on your specific rights. Each parcel of land is unique, and the law in this area is specialized and ever-changing.

2. EMINENT DOMAIN: THE POWER TO TAKE PRIVATE PROPERTY FOR PUBLIC USE

a. What is the power of eminent domain? What is condemnation?

The power of eminent domain entitles governmental entities to take private property and convert it to public uses, such as highways, public transportation and schools. Governmental entities exercise their power of eminent domain through condemnation, which is the legal process for the taking of property.

b. Who has the power of eminent domain?

The power of eminent domain resides in federal and state governments. The federal and state governments can delegate the power to lesser entities, such as counties, cities, transportation districts, water districts and school districts. In some instances, the government can delegate its power of eminent domain to private entities, such as railroads and utilities. For simplicity, this Handbook will refer to governmental takings of property, though the procedures applicable to takings by private entities are generally the same.

c. How much of my property can or must the government take?

The government can take only as much property as it can justify for the particular public use. Similarly, it is not required or permitted to acquire a whole parcel of property if only part of the parcel is necessary for the public use.

d. What is an acceptable public use? Who decides?

The United States Supreme Court has defined what is an acceptable public use very broadly to encompass not only traditional public uses such as roads and schools, but also economic development – i.e., taking property from one private owner and then conveying it to another private owner for the purpose of developing the property in accordance with the development goals of the government. Most states, including Oregon, have narrowed state law on what is an acceptable public use. Ultimately, a judge may be called upon to decide if the desired use of the property by the government meets the public-use standard.

3. JUST COMPENSATION

a. What is just compensation?

When the government takes private property for a public use, it is constitutionally required to pay the property owner “just compensation” for the property. Just compensation embodies the fundamental idea that one private property owner should not shoulder an unfair share of the burden of providing for public uses.

b. How is just compensation determined?

Just compensation is the amount of money necessary to make whole a property owner for the taking of his or her property. This amount is determined by the fair market value of the highest and best use of the property taken by the government, plus, in the case of a partial taking, the reduction in fair market value to the remainder of the property. For example, if the government takes part of your property for a highway project, it must compensate you for the property it physically took, as well as for the diminished value of your remaining property based on its proximity to a highway.

c. What is fair market value?

In normal market conditions, fair market value is generally defined by what a willing buyer would pay a willing seller for the property at the time of the acquisition or taking.

d. What is highest and best use?

The highest and best use of real property is the most profitable use of the property. It can be a use other than the current use of the property if it is reasonably probable that the property has an actual potential for a higher and better use. For instance, if the property currently has a residential structure on it but, under current or reasonably imminent zoning laws, it could be developed as a retail shopping center, redevelopment as a retail shopping center is most likely its highest and best use.

e. What is included in the determination of just compensation? What is not included?

In the typical condemnation matter, in which the government is taking the whole or part of a parcel of real property, you are entitled to just compensation for: (1) the real property taken and the effects to remaining real property; and (2) fixtures (personal property that is considered part of the real property). You may also qualify for just compensation if the government takes from you permanent or temporary easements, or deed restrictions.

On the other hand, a property owner is not typically entitled to just compensation for: (1) private property that can be removed from the real property; (2) the costs of relocating a home or a business; and (3) loss in value to business – i.e., the value attached to a business being in the same place for 20 years, reduced revenue, etc. Certain relocation and business reestablishment costs, however, qualify for “reimbursement” under federal and state law.

f. Who determines just compensation?

The government will typically employ an appraiser to render an opinion of value of the property it intends to take. This is usually the basis for the government’s initial “offer.” The property owner will also typically employ an appraiser, in addition to formulating his or her own opinion of value.

The final amount of just compensation may be reached either in pre-trial negotiations or after a jury renders its verdict. In the latter case, subject to a judge’s instructions on the law, the jury will have the final say as to what constitutes just compensation for private property.

4. PRELIMINARY STAGES

a. How do I know that my property is targeted for acquisition or condemnation?

You may learn months or years ahead of time through the press or other public notices that your property is a possible target for taking, especially in the case of large public infrastructure projects. Governmental entities may also post online their near- and long-term plans for “capital improvements.”

In any event, you will at some point receive formal notice from the government that it wants to acquire your property and will take it by condemnation if necessary. The notice may come in one or more of several forms:

- The government is required to provide the owner or occupant of the property notice prior to entering onto the property for the purposes of examining and surveying the property. ORS 35.220.
- The government’s appraiser must give the property owner at least 15 days’ written notice before a desired inspection of the property for appraisal purposes. ORS 35.346(3).

- As a precondition to actually taking the property, the government must also declare by ordinance or resolution the necessity and purpose for which the property is required. ORS 35.235(1). This Declaration of Public Necessity will, in most instances, require a public hearing for which notices will be published.
- In most situations, the government cannot take property that results in a relocation of the occupant of the property without at least 90 days' notice. ORS 35.505(2).
- Finally, at least 40 days before filing a condemnation action, the government must make a written offer to the property owner to acquire the property. ORS 35.346(1).

b. What can I do to prepare myself for possible condemnation?

You should always be aware of the possibility of condemnation, especially if your property is near major thoroughfares, railways, airports, schools or other existing public infrastructure. If you suspect the government may take your property, whether now or sometime in the future, you should consult with an attorney. Your actions or inactions now could greatly affect your interests later.

Leases with tenants and mortgage agreements with lenders may affect the amount of the condemnation proceeds to which you are entitled. Such agreements should be drafted with the possibility of condemnation in mind.

Land use and building approvals can have significant impact on the valuation of real property. You should pursue approvals with these impacts in mind.

Finally, in taking positions regarding the value of property, for example in property tax or estate tax proceedings, you should be mindful of the effects of your positions and statements on condemnation valuation.

c. What if I have tenants on my property?

Most leases contain a clause setting forth the rights of the landlord and tenant in the event of condemnation of the property. This clause may take into account such issues as the allocation of the condemnation proceeds between the landlord and the tenant, the landlord's obligation to reconstruct improvements partially taken, and the parties' lease termination rights in the event of condemnation.

If the tenant is entitled to share in the proceeds of the condemnation, the tenant will likely participate in the negotiations with the condemning authority and will, in the least, be party to allocation proceedings in the court. Aside from any lease terms, a tenant may be entitled to relocation compensation as well.

d. Can the government enter onto my property before it obtains legal possession or title?

Yes, if a property is targeted for condemnation, and subject to certain requirements, the government may enter onto the property, examine it, survey it, conduct tests upon it and take samples from it. The government, however, must first obtain the permission of the property owner or an order of the court to enter onto the property and conduct examination and testing. In addition, the government must pay the property owner reasonable compensation for any damage caused by the entry, examination and testing, and any interference with the use of the property. ORS 35.220.

5. THE OFFER

a. What kind of communication from the government will accompany the offer?

The government must attempt to reach agreement with you on the fair market value of the property and its acquisition. ORS 35.235(1). Without such an attempt, the government cannot initiate a condemnation proceeding. ORS 35.245(1). As part of this negotiation, the government must make you an unqualified offer based upon what the government contends is the just compensation for the property. The offer will be in the form of a letter from the government or a private right of way agent with whom the government has contracted.

b. What is the government's offer based upon?

In most cases, the government's offer must be accompanied and supported by a written appraisal. ORS 35.346(2). However, if the government determines that the amount of just compensation is less than \$20,000, it may provide you with a "written explanation of the bases and method" by which it arrived at fair market value, in place of a formal appraisal.

c. The offer mentions possible environmental issues. What is this about?

As part of the appraisal process, the government will oftentimes conduct an environmental review of the targeted property. This review is looking for evidence of possible environmental contamination stemming from present or past uses of the property. A common example giving rise to governmental concern is the presence of an underground storage tank for petroleum products. If the government determines that the property will require some level of environmental remediation, it may seek to have associated costs deducted from the determination of just compensation.

d. Am I entitled to relocation compensation?

Yes, property owners, as well as tenants, are often entitled to reimbursement for certain relocation and business reestablishments costs resulting from displacement from the taken property. Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, 42 U.S.C. § 4601 et seq.; ORS 35.500 to 35.530. Relocation compensation is determined by an administrative process different from the process used to determine just compensation for the taking of the property.

e. Am I entitled to loss of value to my business?

Technically, no. In the event of a partial taking of property, however, the taking could affect your ability to use the property for a particular business purpose, which also happens to be its highest and best use – for example, a restaurant adjacent to a highway. If the taking results in a less intensive highest and best use, you may be entitled to resulting damages.

6. RESPONDING TO THE OFFER

a. Are there benefits to securing a team of experienced advisors?

Yes, definitely. A team of advisors experienced in condemnation matters can help you achieve just compensation, advise you on relocation issues, and assist you with tax planning in regard to the proceeds of condemnation. Your team may include a condemnation attorney, appraiser, relocation specialist, real estate broker, and tax planner. In certain circumstances, you may need to also enlist the services of surveyors, land use planners, architects, and engineers.

In addition, the Oregon legislature in ORS Chapter 35 has placed very specific requirements on the government when it seeks to condemn property. Failure by the government to strictly comply with these requirements may necessitate dismissal of the action and entitle you to reasonable costs and attorney fees. ORS 35.335. An attorney experienced in condemnation matters can quickly evaluate the government's compliance with such requirements and determine whether dismissal is appropriate.

An added and important benefit to securing an attorney early in the process, and coordinating your team through the attorney, is that much, if not all, of the correspondence and documentation generated by the team can remain confidential and shielded from disclosure to the government.

b. Will it be cost-effective to hire an attorney instead of just accepting the offer?

The Oregon legislature has provided that a property owner is entitled to recover reasonable costs, including those related to hiring an expert appraiser, as well as attorney fees from the government if:

- (1) The government abandons the condemnation lawsuit or the lawsuit is dismissed for the government's failure to comply with ORS Chapter 35;
- (2) The property owner obtains just compensation that exceeds the government's highest written offer prior to filing the condemnation lawsuit; or
- (3) The court finds the government's first written offer was not a good-faith amount the government reasonably believed to be just compensation. ORS 35.335, 35.346(7).

An experienced condemnation attorney's goal is to obtain for you just compensation, usually well beyond the government's highest written offer before filing the condemnation lawsuit, plus a recovery of your attorney fees and costs as determined reasonable by a court.

c. How much time do I have to respond to the offer? Do I have to accept or reject the government's offer within this time?

The government must give you at least 40 days to respond to the offer before filing a condemnation lawsuit. ORS 35.346(1). It is important to note, however, that you are not required to respond to the offer. If you fail to respond, the offer will be considered rejected. The government may initiate the condemnation lawsuit, but negotiations will most likely continue regarding fair market value and the government's acquisition of title up to and through the litigation process.

d. If I reject the offer or do not respond to it, will the government lower its offer?

No, the government generally cannot lower its offer as a negotiation strategy. For practical purposes, the government's initial offer represents a floor for the negotiations regarding just compensation. As a matter of law, the government cannot lower the amount of its initial offer except upon an order of the court, and that order cannot be entered less than 60 days before trial. ORS 35.346(2).

e. Should I obtain an independent appraisal?

Yes, in most circumstances, you should obtain an independent appraisal. Though the appraiser contracted by the government is a professional and bound by professional standards, he or she is hired by the government. You also need an analysis performed by an independent professional. Further, if you know the government's offer is imminent, obtaining an independent appraisal before receiving the offer will, in certain situations, provide you and your advisors the necessary information to develop a proper negotiation strategy.

If you reject the government's offer and obtain a separate appraisal, you must disclose a copy of the appraisal to the government at least 60 days before any trial or arbitration. ORS 35.346(4). If you fail to disclose an appraisal to the government, you may not be able to use the appraisal at the trial or arbitration to help establish just compensation. ORS 35.346.

7. NEGOTIATING WITH THE GOVERNMENT

a. Will the government negotiate with me?

The government will sometimes negotiate with you, as opposed to your attorney, but typically only up to a certain limit. In most cases, it is only after the government knows you are represented by an experienced attorney willing and able to take the case to trial that it will negotiate in the range of the just compensation to which the property owner is entitled.

b. Will my statements in negotiations be used against me if we go to court?

Possibly. Though there are certain protections against statements in negotiations being used against parties in court proceedings, you must be very careful about the positions you stake out in negotiations and the statements made in support of those positions. In addition to the possibility that such statements may be used against you later in court proceedings, it is often difficult or impossible to "un-ring the bell" in regard to stated positions. This is true whether or not you understood the full implications of what you stated at the time.

c. How long will negotiations take?

The length of the negotiation process depends on many factors, including the size and complexity of the taking, the magnitude of the difference between the government's and your opinion of just compensation, and project scheduling. Each case is unique, and there is no standard length. Negotiations can take a matter of weeks or go on for months, ultimately with or without success, as trial preparation goes on.

d. What is mediation?

Mediation is a process designed to facilitate settlement of disputes. Mediation involves a neutral third party – oftentimes a retired judge or experienced attorney – called the mediator. The mediator meets with the parties, listens to the parties’ respective positions, explains to each party privately his or her perception of the strengths and weaknesses of the parties’ respective positions and encourages the parties to settle the case, rather than proceed to trial. Mediation is a voluntary process in the sense that a party cannot be forced to settle a case. In certain circumstances, the parties may be forced to attend a mediation or judicial settlement conference by order of the court.

e. When does mediation take place?

It varies depending on the circumstances of each case. Mediation may take place early in the life of the dispute between government and property owner, on the eve of trial or anywhere in between. As noted above, courts may also order the parties to attend a mediation in the form of a judicial settlement conference before proceeding to trial.

8. TRANSFER OF TITLE AND POSSESSION

a. How does title transfer to the government if we reach a negotiated agreement?

If you reach a negotiated agreement with the government prior to it filing a condemnation lawsuit, title will most likely pass by deed. The form of the deed is important. Always consult with an attorney before using any form of deed provided by the government.

If you and the government reach a negotiated agreement after the government files a condemnation lawsuit, title typically transfers by a “stipulated judgment,” which is a document filed with the court indicating that title transfers to the government in exchange for certain compensation.

b. Can the government take title to or possession of my property before just compensation is determined by settlement or by a jury?

The government cannot take title to property without (1) the property owner voluntarily conveying title by way of deed or stipulated judgment; or (2) a judgment following trial.

The government, however, may take possession of property upon: (1) filing of the condemnation complaint; (2) depositing the funds it contends represents just compensation with the court; and (3) obtaining a court order indicating that governmental possession is immediately necessary to facilitate construction of the public project. ORS 35.265, 35.352.

In the event of the rare “emergency that poses a threat to persons or property,” the government may also take immediate possession of property upon the filing of a condemnation lawsuit. ORS 35.348.

c. What if the property has a lien or mortgage on it? How does that affect my right to the deposited funds?

If your property has a mortgage or lien on it, the holders of those interests may have a claim to a portion of the condemnation proceeds, including the government’s deposit into court. In general, the holders of those interests in your property will be limited to the amount of condemnation proceeds they are entitled to collect based on the mortgage or lien document. In the event a lawsuit is filed by the government, any holders of interest in your property will also be named as defendants. Hiring an experienced condemnation attorney will help streamline this process and ensure you receive your fair share of condemnation proceeds available.

d. If the government deposits with the court the amount it contends represents just compensation, may I access those funds while the difference between the government’s valuation and my valuation is being litigated?

Yes, upon court order, you may withdraw the funds from the court. Your withdrawal of the funds does not signal that you agree with the government’s opinion of just compensation and will not prejudice your case. ORS 35.365. You should be entitled to at least as much as the government has deposited, and you should continue to fight for the remainder of just compensation for the government’s taking.

e. What can I do with those funds?

You can put the funds to use immediately, whether reinvesting them in other property or investing them for use as a legal defense fund in your effort to obtain just compensation. In any event, you should consult with your tax advisor, as there may be tax consequences to the withdrawal and tax deferral strategies you can lawfully employ.

f. Can the government wait to take possession until after just compensation is determined by a jury?

Yes. If the government does not need a particular property immediately, it can wait to take possession until after the final determination of just compensation. In such a case, it would not make the above-referenced deposit of funds with the court. In certain rare circumstances, if the jury returns a verdict for just compensation that the government does not want to pay, it will dismiss the case and not take possession or title to the property. In such an event, the government would be required to file an election not to take the property within 60 days after the verdict and pay the property owner's court-determined attorney fees and costs in defending the condemnation lawsuit. ORS 35.335(3).

g. Am I entitled to interest between the time of the transfer of possession and the judgment on just compensation?

If the government deposits what it contends is just compensation with the court, you are not generally entitled to interest on this amount, but you are entitled to interest at the statutory rate of 9% on the difference between the amount the government deposited and any amount you receive beyond the deposit, whether through negotiation, mediation or trial. This 9% interest runs from the date the government took possession of the property.

h. Is there a chance I may receive a just compensation determination less than what the government deposited in court, requiring me to possibly return a certain portion of the funds I withdrew?

Technically, yes, but highly unlikely.

9. THE CONDEMNATION LAWSUIT

a. What gives rise to a condemnation lawsuit? Who files the lawsuit?

If you cannot reach agreement with the government as to just compensation after initial negotiations, the government must file a condemnation lawsuit to obtain possession of and title to the property. The condemnation lawsuit is formally initiated by the filing of a "Complaint." The Complaint will name the property owner and all holders of legal interests in the property (mortgage lenders, etc.) as defendants in the lawsuit. ORS 35.245. The Complaint will also describe the government's eminent domain powers, allege that the property is necessary for a particular public use, and assert the amount the government contends is just compensation. ORS 35.255. The government's just compensation allegation will most likely restate its original offer to you.

b. Is arbitration available?

Yes, arbitration is available in certain circumstances at the election of the property owner. Arbitration is a process similar to trial, but less formal. In arbitration, rather than have a judge or jury decide the case, an experienced attorney or retired judge acts as the sole decision maker or "arbitrator." If the total amount claimed by any party as just compensation does not exceed \$20,000, you may elect binding arbitration, meaning that the decision of the arbitrator is final and not appealable except for very limited reasons. If the total amount claimed by any party exceeds \$20,000, but is less than \$50,000, you may elect non-binding arbitration, which allows either party unsatisfied with the outcome of the arbitration to appeal the case for a normal trial. ORS 35.346(6).

c. How long does the lawsuit take?

A condemnation lawsuit may last between 12 and 24 months if it goes all the way through trial. That being said, the lawsuit can possibly settle at any time.

d. What happens in the lawsuit before the trial?

Prior to the trial, there are a number of important milestones following the Complaint.

- Immediate Possession: If the government needs immediate possession of the property, which is often the case for construction purposes, it will file a "Notice of Immediate Possession" at or near the time of the Complaint. ORS 35.352. The Notice of Immediate Possession basically asks the court for an order allowing the government to take possession of the property prior to trial. Except in the most extreme of cases, the court grants such requests.

- Deposit of Funds by Government; Property Owner Withdrawal: In order to obtain immediate possession, the government must deposit with the court what it contends is just compensation for the taking of the property. ORS 35.265. Upon order of the court, you are then permitted to withdraw those funds from the court without prejudicing your case. ORS 35.285. The withdrawal process can be more complicated if there is more than one defendant, particularly when there is a mortgage or other lien on your property.
- Property Owner's Answer: Your "Answer" is the formal response to the government's Complaint. It is generally due 30 days after the filing and service of the Complaint, and failure to timely file an Answer may result in your being "defaulted" or forfeiting the right to challenge the government's assertion of just compensation. The Answer responds to the government's allegations, sets forth any available defenses to the government's exercise of its eminent domain power, and alleges the amount you believe to be just compensation. ORS 35.295. In certain situations, you may also allege in coordination with the Answer counterclaims against the government, including those for "inverse condemnation," which is described below.
- Discovery: "Discovery" is the formal process by which parties to a lawsuit obtain documents and information from each other prior to trial. This process may involve requests for production of documents, requests that parties admit certain facts, and depositions of parties. The parties may also request documents and depositions of third parties by way of subpoena. In Oregon state court, there is no "expert discovery," so a party may not seek documents from or depose the other party's appraiser or other experts prior to trial.
- Exchange of Appraisals: While the government must, in most cases, provide the property owner an appraisal with its original offer, Oregon law requires the exchange of appraisals at certain times prior to trial. The parties may exchange subsequent appraisals at any point in the process as part of their negotiations. Appraisals not exchanged prior to trial, however, cannot be used at trial. ORS 35.346(5).
- Settlement Conference or Mediation: Many courts will require the parties to engage in a judicial settlement conference before allowing a case to proceed to trial. The parties may also engage in private mediation. This process is described above.

e. Will I testify?

Yes, in many cases you, as the property owner, may testify regarding your opinion of the value of the property taken and, as applicable, the damages to the remaining value of the property.

f. Who else will testify?

Depending on the nature of the taking, a variety of fact and expert witnesses may testify at trial as to just compensation. These witnesses will include, in the least, the respective appraisers hired by the government and the property owner.

g. Will the jury view my property?

Yes, in most cases the jury will take a court-sanctioned trip called a “jury view” to view the property. Either party may request the jury view by motion to the court prior to the formation of the jury. ORS 35.315. In many cases, by the time of trial and the jury view, the government has taken possession of the property and the project for which the property was taken is under construction or complete.

h. How long will the trial take?

Generally, a trial on a condemnation action may take three to four days. Depending on the complexity of the case and the number of witnesses for each side, the trial could last longer.

i. What happens after the jury returns a verdict?

The verdict is reduced to a judgment, which is a document that states the just compensation the government must pay the property owner. Upon the government’s satisfying the judgment, the judgment also operates to transfer title to the property to the government. ORS 35.325. In many cases, the property owner is also then entitled to petition the court for an award of attorney fees and costs. Based upon the court’s determination of the property owner’s reasonable attorney fees and costs, a supplemental judgment is typically entered, requiring the government to pay the property owner in such an amount.

j. What kinds of fees and costs are involved in such a lawsuit?

Property owners can expect to incur attorney fees, expert witness fees, filing fees, the costs associated with appraising the property, related planning and engineering costs, and general expenses associated with litigation. Depending on the nature of the case, other types of fees and costs may be incurred. The amount of fees and costs varies widely, depending on the complexity of the matter, the length of the dispute, and other factors.

k. Can I recover my fees and costs from the government?

In many cases, yes. As discussed above in Section 6, Oregon law allows a property owner to recover reasonable fees and costs, as determined by the court, if: (1) the government abandons the condemnation lawsuit or the lawsuit is dismissed for the government’s failure to comply with ORS Chapter 35; (2) the property owner obtains just compensation that exceeds the government’s highest written offer prior to filing the lawsuit; or (3) the property owner obtains just compensation that exceeds the government’s highest written offer of compromise. ORS 35.335, 35.346(7), 35.300.

If the government does not abandon the lawsuit, its first offer was in good faith, and the jury's determination of just compensation does not exceed the government's highest written offer before filing its Complaint, the government is entitled to a judgment against the property owner for certain limited costs and disbursements, but not attorney and expert witness fees. ORS 35.346(9).

The amount of fees and costs to which you are entitled may be affected by an "offer of compromise" by the government. An offer of compromise is a formal offer by the government to settle the case after filing the Complaint. If you reject the offer of compromise but do not obtain a judgment after trial in an amount greater than the offer, your entitlement to fees and costs may be reduced. ORS 35.300. In particular, an offer of compromise serves to potentially cut off a property owner's entitlement to attorney fees. For instance, if the government's initial offer of just compensation is \$50,000 and the government subsequently sends an offer of compromise for \$75,000, the property owner would need to receive just compensation in excess of \$75,000 to recover his or her fees and costs for the entire case. If the property owner recovered \$60,000, he or she would only be entitled to his or her reasonable fees and costs through the date of the offer of compromise. An experienced condemnation attorney will be able to fully advise you concerning any offer of compromise from the government.

Finally, attorney fees and costs should be included in negotiations with the government, and they are often accounted for in settlement agreements reached with the government.

l. Can either side appeal? Am I entitled to fees and costs on appeal?

Yes, either the government or you may appeal a judgment of the court. An appeal, however, will not prevent the government from taking possession of the property and using it for the designated public use. If you prevail on appeal, you are entitled to an award of reasonable attorney fees and costs incurred during the appeal process. ORS 35.355.

m. What is the effect of withdrawing funds awarded by the jury on my appeal rights?

If you withdraw from the court the compensation awarded by the jury and deposited by the government (as opposed to the government's original deposit of its contention of just compensation), you will likely waive your right to appeal. ORS 35.365.

10. AFTER THE TRIAL OR SETTLEMENT

a. Am I taxed on the condemnation proceeds?

If the government's taking of your property results in your receiving more for the property than you paid for it, you may be subject to taxation on that technical "gain." Because, however, the disposition of the property is involuntary, you may be able to defer taxation on the gain through reinvestment of the proceeds in accordance with Section 1033 of the federal Internal Revenue Code. You should consult with a tax professional in this regard.

b. Do I have a right to repurchase my property if the government does not use it for the purpose for which it was taken?

Yes. If, within the time specified in a judgment or settlement agreement, the government does not use the property for the purpose for which it was taken, and you have not waived the right to repurchase the property, you may repurchase the property in an amount determined by a statutory formula. ORS 35.385 to 35.415.

11. INVERSE CONDEMNATION

a. What is "inverse condemnation"?

Inverse condemnation occurs when the government takes property interests without invoking its eminent domain power and paying the owners or holders of such interests just compensation. Examples of inverse condemnation include, but are not limited to, when:

- The government or the "natural consequences of its actions" physically occupy or invade property, such as flooding caused by water diverted by the government.
- Governmental activity substantially interferes with the use and enjoyment of property, such as noise or vibrations caused by low-flying aircraft.
- Governmental regulations deprive the property of all economically beneficial use.
- The government conditions approval of a land use application on the property owner's "agreeing" to dedicate certain property or property interests to the government.
- The government fails to identify and compensate holders of all affected property interests when the government affirmatively condemns property using its eminent domain power, such as in the case of deed restrictions.

b. Who brings a claim for inverse condemnation?

The affected property owner or interest holder brings the claim against the government.

c. What is the deadline or statute of limitations for filing inverse condemnation claims?

The statute of limitations – the deadline for filing a lawsuit – for an inverse condemnation claim is six (6) years from the date of the taking. ORS 12.080(3). It should be noted, however, that inverse condemnation claims can be brought in conjunction with other claims which may carry shorter statutes of limitations. You should not delay in having an experienced attorney evaluate your claim. Failure to file a lawsuit in a timely manner may forever bar you from bringing a claim.

d. Am I entitled to fees and costs if I prevail on an inverse condemnation claim?

Yes, a property owner or interest holder who prevails on an inverse condemnation claim is entitled to court-determined attorney fees and costs. ORS 20.08

OLSEN  BARTON^{LLC}
ATTORNEYS

5 Centerpointe Drive, Suite 220
Lake Oswego, Oregon 97035
Tel: (503) 468-5573 / Fax: (503) 820-2933
www.olsenbarton.com

Copyright © 2020 by Olsen Barton LLC
All rights reserved.