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**Right of Way Process and Condemnation**

Wes Smith Condemnation Liaison ODOT/DOJ

Background

Why I'm here today

Discuss the origin of condemnation  
 Discuss survey rights to go on to private property  
 Discuss the right of way process( briefly)  
 Discuss what happens when a file gets recommended for condemnation.

I'm not an attorney and I couldn't find any right of way or surveyor jokes so...

Q: What happens when a lawyer takes Viagra?

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**What is condemnation?**

Origin is from English law

Used to describe the act of the government exercising the authority of eminent domain

Used when the acquisition of real property is necessary for completion of a public need. Like roads.

Tempered with the right that just compensation be paid

The 5<sup>th</sup> amendment to the US Constitution requires that just compensation be paid when eminent domain is used

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**Surveyors: Entry onto real property**

Two ORS statues

ORS 35.220 ORS

You can enter onto property to survey , conduct tests, take samples

Must provide actual notice first to the property owner or the occupant

If not actual notice then must post a notice in an obvious place

If the owner does not consent or objects to the survey you can not go on the property.

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the condemner may file a petition with the court for an order providing entry onto the property. The owner is entitled to reasonable compensation for any damages.

ORS 366.365

ODOT may go upon private property in the manner provided by ORS 35.220

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**Right of Way Section**

**Overview**

Dee Jones State Right of Way Manager HQ Salem  
 Richard Dunlap Operations Manager  
 Mike Kirby Program Manager  
 Howard Bergstrom Project Administration Manager

Five Region Right of Way Managers

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**Right of Way Section**

**Right of Way Acquisition Overview**

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### **Right of Way Acquisition Overview**

**Purpose**

- Acquisition of right of way
- Fee-simple, permanent and temporary easements, access rights
- Relocation assistance
- Clearing the right of way

**Goals**

- Compliance with federal and state laws
- Fair and respectful treatment of property owners
- Meet the project schedule timeframes

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### **Right of Way Acquisition Overview**

**Right of Way Departmental Structure**

- Regional Right of Way Offices (5)
- Centralized Right of Way Section

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### **Where Does Right of Way Acquisition Occur in Project Development**

- Commences at the Design Acceptance milestone
  - All design elements with right of way impacts have been addressed
  - Pens down state
- Completed prior to the PS&E milestone at Right of Way Certification

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### **Right of Way Maps & Legal Descriptions**

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### **R/W Maps & Legal Descriptions**

**Right of Way Maps & Drawings**

- Show needed rights of way
- Show existing features that require consideration or compensation
- Used by the real property appraiser
- Used by the negotiator and the property owner
- Used in condemnation proceedings
- Clarity is essential

**Right of Way Legal Descriptions**

- Centerline descriptions
- I.D. all parcels, fee takings as well as easements

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### **R/W Maps & Legal Descriptions**

**Right of Way Legal Descriptions**

- Incorporate into the final deeds and condemnation settlements for recording
- Accuracy is essential

**ODOT Requirements**

- Comply with the Right of Way Engineering Manual guidelines

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## Right of Way Authorization

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## Right of Way Authorization

**Authorization needed before appraisal and acquisition**

**Authorization requirements**

- Right of Way maps/drawings and legal descriptions
- Condemnation Resolution by the OTC for each property
- Right of Way cost estimate for programming which includes:
  - Land and improvements costs
  - Economic damages/Costs to Cures
  - Relocation costs
  - Demolition costs
  - Personnel and administrative costs
  - Legal costs and contingencies

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## Right of Way Authorization

- Authorization to ODOT from FHWA on Federal-aid projects
- Authorization to the Region from the ODOT Right of Way Section

**Time Requirements**

- 3-4 weeks on State-funded projects
- 6-8 weeks time on Federal-aid projects

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## Right of Way Appraisal

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## Right of Way Appraisal

**Compensation Requirements**

- Just compensation is required
- Just compensation is the fair market value

**The Appraisal is the Basis for Just Compensation**

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## Right of Way Appraisal

**What Is An Appraisal**

“A written statement independently and impartially prepared by a qualified appraiser setting forth an opinion of defined value of an adequately described property as of a specific date, supported by the presentation and analysis of relevant market information”.

(Uniform Relocation Assistance and Real Property Acquisition Policies Act)

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### **Right of Way Appraisal**

**Appraiser Qualifications**

- Certified or licensed contract appraisers
- Competent in eminent domain appraising
- Trained and experienced ODOT staff

**Appraisal Review**

- Required by law
- Handled by the ODOT Right of Way Section
- Sets Just Compensation
- A revised appraisal requires a new review and timeline

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### **Right of Way Appraisal**

**Appraisal Standards**

- Set by FHWA

**References**

- ODOT Right of Way Manual – Chapter 4 (2005)
- ODOT Contractor Services Guide (09/2005)
- Uniform Standards of Professional Appraisal Practice (USPAP)

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### **Right of Way Negotiations**

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### **Right of Way Negotiations**

**Acquisition of Private Property**

- Sensitivity toward property owners
- Direct personal contact with people affected by our projects
- Build rapport and trust
- Treat people with respect and uniformly
- Treat people in a fair and equitable manner

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### **Right of Way Negotiations**

*Richard Dunlap, Operations Manager*

**Legal Requirements**

- Notice to Owners
- Appraisal and invitation to owner to accompany the appraiser
- Written offer of just compensation and copy of appraisal
- Reasonable opportunity to consider the offer
- Conduct negotiations without any attempt to coerce the property owner
- 90-30 Day Notices
- Right to payment before possession
- ~~Obligation to offer to purchase uneconomic remnant~~

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### **Right of Way Negotiations**

*Richard Dunlap, Operations Manager*

**Administrative Settlements**

- After reasonable effort to negotiate an agreement
- Any amount over just compensation must be justified in writing
- Settlement decision is the Agency's responsibility
- Delegated authority to State Right of Way Manager
- Sub-delegations in place
- ODOT Form – the Final Report package

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**Right of Way Negotiations**  
*Richard Dunlap, Operations Manager*

**When Negotiations Fail**

- Alternative Dispute Resolution (ADR)
- Recommending Condemnation
- ODOT Form
- Documentation – the Negotiator’s Diary of Contact

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**Right of Way Relocation**

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**Right of Way Relocation**

**Right of Way Legal Requirements Under the Uniform Act**

- Purpose is to minimize disruption and provide equitable treatment
- Reimbursement program
- Relocation is a high-risk area

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**Right of Way Relocation**

**Timelines**

- 30/90 day notice
- Displaced person must be given reasonable time to relocate

**Relocation Duties Must Be Performed by Qualified Agents**

- Those with training in the Uniform Act
- Those with training and experience in relocation

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**Right of Way Relocation**

**Importance of Planning**

- Relocation plan is a requirement
- Part One: Overall view of relocations within a project
- Part Two: Individual relocation plans

**Relocation Advisory Assistance Is Mandatory**

- Relocation payments alone are not enough

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**Right of Way Relocation**

**Documentation**

- Owner Contact Report

**References and Standards**

- Uniform Act
- Right of Way Manual, Chapter 6
- Contractors Services Guide

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**Right of Way Condemnation**

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**Right of Way Condemnation**  
*Richard Dunlap, Operations Manager*

**What is Condemnation?**

- Court determination of just compensation
- Last Resort - used when negotiated settlement can't be reached
- State Law requires a minimum 40 day period after Initial Offer to property owner before Condemnation can be started

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**Right of Way Condemnation**

**Condemnation Process**

- Recommendation for Condemnation (RC)
- Final Offer Letter
- Condemnation Complaint
- Deposit of Just Compensation
- Possession
- Oregon Dept. of Justice handles Condemnation
- Availability of negotiators to assist DOJ
- Follow Contractor Services Guide

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**Right of Way Condemnation**

**Time Requirements**

- Contract negotiators submit RC's at least 17 weeks prior to the letting of construction contract
- Case can take 6-12 months or longer to go to trial
- Very few condemnation trials

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**Right of Way Condemnation**

What happens after the file goes to DOJ?

The Condemnation Liaison ( Wes Smith) may be working for a settlement with the owner or their attorney .

The file may be considered for mediation (David Ross).

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**Right of Way Condemnation**

What happens after the file goes to DOJ?

The owners must file a response to the complaint or Request that our attorney provide them an extension and agree not file a default request with the court without 10 days written notice.

If ODOT is able to reach a settlement shortly after the condemnation is filed then a final report is submitted and a request after recording the deed is made to DOJ by ODOT to have the condemnation case dismissed.

Any relocation issues are continued to be dealt with by ODOT or their agents.

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### Right of Way Condemnation

What happens after the file goes to DOJ?  
The attorneys may discuss ways to settle the file.  
The attorneys may also discuss any title issues they may be able to agree to eliminate by default.  
DOJ coordinates with ODOT to either have the fee appraisal updated or hires a new appraiser depending on the situation and the case.  
Discovery of all relevant documents are requested by both attorneys.  
ODOT must comply with the discovery request and supply all relevant requested documents.  
Trial date is set by the court

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### Right of Way Condemnation

What happens after the file goes to DOJ?  
  
Depositions  
Sharing of appraisals if appropriate  
Court ordered settlement conference  
  
30 day offer  
  
Attorneys file motions with the court to narrow the issues in the case.

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### Right of Way Condemnation

What happens after the file goes to DOJ?  
The trial  
  
Both sides present their cases call witnesses to testify as to the amount of just compensation for the property based on the date of the deposit of the money into court.  
  
Jury instructions by the judge  
  
Jury reaches a verdict on compensation  
  
Either side has the right to appeal the verdict

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### Right of Way Condemnation

What happens after the file goes to DOJ?  
  
ODOT wins if the verdict is more than the highest offer ever made at least 30 days before the trial. ODOT does not recover attorney fees.  
  
The property owner wins if the award is equal to or less than ODOT's highest offer. The owner gets the amount of the award and all reasonable attorney fees for the case.  
  
The court signs a judgment. This serves as a deed.

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### Right of Way Certification

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### Right of Way Certification

**Purpose of the Right of Way Certification**

- Identify and affirm that no additional right of way and relocation assistance is required for construction of the project
- Certify that Right of Way has been acquired in accordance with federal and state requirements
- Certify that Relocation assistance has been provided to any displaced person or business in accordance with federal and state requirements
- Clearance of the right of way is coordinated with construction to avoid delays
- Identify existence and status of any hazardous waste in the right of way

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### Right of Way Certification

**Exceptions to the Certification**

- Exceptions are properties not in State's possession by the contract let date
- Should be rare
- If necessary and approved, identify property not in possession and date possession can be reasonably assured
- Property is identified in Plans and Specifications as not available
- Requires a Public Interest Statement from ODOT

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### Right of Way Certification

**Timing of the Certification**

- Region Right of Way Manager is authorized to sign
- Part of PS&E Package (Plans, Specifications & Estimate)
- Coordinated by the ODOT Office of Pre-Letting
- Required 6-12 weeks prior to Let Date

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### Right of Way Certification

**References and Standards**

- Uniform Act and Federal Regulations
- ODOT Right of Way Manual, Chapter 3
- ODOT Contractor Services Guide

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### Right of Way Acquisition: Achieving Success or Avoiding Condemnation

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### R/W Acquisition: Achieving Success

All Right of Way needs and impacts are fully defined by the Design Acceptance milestone in the project development process.

- Changes after that point can force changes in right of way descriptions and appraisals, requiring that the entire acquisition timeline must be restarted.

Sufficient time for the right of way acquisition should be built into the project schedule

- Time requirements under federal and state laws
- Quantity
- Complexity
- The "Human" factor

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### R/W Acquisition: Achieving Success

**Communicate! Communicate! Communicate!**

- Negotiations with property owners
- Relocation assistance
- Updating ODOT
- No last minute surprises
- Internal communication between Regions and the Right of Way Section

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***R/W Acquisition: Achieving Success***

**Obstacles to Success**

- Offers or promises made to property owners by non-Right of Way staff
- Real or perceived impression that ODOT or its consultants are not negotiating in good faith
- Real or perceived pressure or coercion by ODOT or its consultants
- Ripple effect of design changes, errors and omissions
- Rudeness or arrogance in contacts with property owners and displacees

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***R/W Acquisition: Achieving Success***

Try and keep a sense of humor through it all

The End