Inverse Condemnation and The Uniform Relocation Act

By Richard Moeller, Vice President

In the last issue of The Acquirer, there was an article about inverse condemnation – when a government agency takes an owner’s property interest, but doesn’t compensate the owner for the loss. This article will discuss how the inverse condemnation concept interfaces with Uniform Act (URA) requirements.

Legislative and Regulatory Background

The URA provides added protections for the property owner as well as responsibilities for the acquiring agency in the event of an inverse condemnation situation. Section 4651(8) of 49 U.S.C. of the URA (Title III, Section 301(8) of P.L 91-646) addresses this situation, and specifies that “…no federal agency head shall intentionally make it necessary for an owner to institute legal proceedings to prove the fact of the taking of his real property.” The specific regulation relevant to these protections and responsibilities is found at 49 CFR 24.107.

§24.107 Certain litigation expenses

The owner of the real property shall be reimbursed for any reasonable expenses, including reasonable attorney, appraisal, and engineering fees, which the owner actually incurred because of a condemnation proceeding, if:

(a) The final judgment of the court is that the Agency cannot acquire the real property by condemnation;
(b) The condemnation proceeding is abandoned by the Agency other than under an agreed-upon settlement; or
(c) The court having jurisdiction renders a judgment in favor of the owner in an inverse condemnation proceeding or the Agency effects a settlement of such proceeding.

The relevant element of 49 CFR 24.107 is subsection (c) pertaining to the concept and use of an inverse condemnation proceeding by a property owner.

When an agency conducts its right of way program under the Uniform Act requirements, a basic premise is to make every reasonable effort to acquire the necessary property amicably through fair negotiations with the property owner. Because of these negotiations and other URA protections, inverse suits are seldom seen in the context of Federal or federally-assisted real property acquisitions.

This doesn’t mean that property owners never bring inverse condemnation claims against public agencies using federal funds. Let’s look at an example of how this could happen.
An Example of Inverse Condemnation

Sometimes, impacts to real property can occur after construction due to unforeseen circumstances. These situations might involve an adverse impact to a remainder of an acquired property or the project may affect other property where an earlier acquisition had not occurred. As an example, let's say a State DOT adds lanes to an existing facility. Topographical changes as the result of a project causes water runoff to begin ponding onto private land. Although this was an unanticipated impact by the DOT, it may cause a change in highest and best use (HBU) of the property since it may no longer be suitable for development or growing crops. In such a case, the owner would typically bring this to the attention of the acquiring agency; that is, something has been taken from me without compensating me for it. The owner could then expect the DOT to either correct the problem or, failing that, acquire the necessary interest in the property being impacted.

If the agency does not correct the water ponding problem or resolve it by acquiring a real property interest (like a ponding easement) in the impacted land area to mitigate the damage being caused, the property owner can seek relief through filing an inverse condemnation suit. The owner must then demonstrate to the court that a property interest has been taken for which he has not been compensated. (Remember that different standards apply in the fifty states.)

If the owner prevails with either a judgment in his favor or the agency agrees to a settlement of the proceeding, the owner is entitled to the reimbursement of certain expenses, which must be reasonable and actually incurred. The likely reasonable expenses the owner would incur in our example would be fees for an engineer to determine the cause of the runoff and ponding, and an appraiser to provide an opinion about the value of his property as of the current date and condition. The owner would also need an attorney to represent him in the inverse condemnation proceeding. ■

Example: An additional lane being added to an existing roadway might result in runoff onto a nearby field. This runoff might alter the property's highest and best use, and if the agency does not correct the issue, the owner could seek relief through inverse condemnation.
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ORC Utilities and Infrastructure to Begin Work on Rapids-Muessel Transmission Line Project

AEP (Indiana Michigan Power) has proposed 6 major projects in 2017. The Central South Bend Reliability Project is one of six major electric transmission projects in the Powering Up Greater South Bend Program. The approximately $20 million project is critical to meeting the electric demand of South Bend customers and improving reliability for the region. The project strengthens the local transmission grid – the backbone of the electric system – by replacing two aging substations and constructing an underground transmission line near downtown South Bend. ORC was selected for the Rapids to Muessel project.

The Rapids-Muessel project is a proposed 34.5kV underground transmission line. The current Colfax Substation is to be retired and replaced with the new Rapids Substation. The existing Drewry’s Substation is being relocated across the street and will be called the Muessel Substation. The project will involve the acquisition of 50’ easement rights to build 3 miles of the 34.5kV transmission line. The new line will be designed as a 69kV double circuit line to be operated at 34.5kV. It will extend South Bend-Colfax and pass through the historical streets of Leeper Ave to Angela Blvd. This portion of the rebuild will be built in road right of way. This project will take major planning and communication with AEP, City of South Bend, Notre Dame University, ORC and all other parties involved to get this project completed in the expected timeframe and keep the integrity of the historical downtown.

ORC Training Division Awarded Contract for NTI/FTA Course Revisions

The National Transit Institute (NTI) currently offers a two-day course titled FTA Real Estate Requirements, which is targeted at transit project sponsors and grantees receiving federal funding. The Federal Transit Administration (FTA) recently issued Circular FTA C 5010.1E, Award Management Requirements. This circular is a re-issuance of guidance in 5010.1D, Grant Management Requirements for post-award administration and management activities for all applicable FTA federally assisted programs.

NTI awarded a contract to ORC’s training division to identify the necessary revisions to this FTA course and incorporate them into the course materials. This updated guidance affected real estate acquisition in two areas: preliminary activities before completion of NEPA and land exchanges. The updated FTA Joint Development Circular (7050.1A) will also be included in the revised course materials.

FTA Real Estate Requirements was originally developed by ORC subject matter experts Bob Merryman and Ron Fannin to address the needs of transit agencies that must acquire real property in compliance with the Uniform Act and FTA requirements. ORC is also contracted to deliver this course, which is offered 3-4 times each year in various locations. It is available at no charge to public agency employees.
ORC Welcomes Dan McNickol

ORC Utility & Infrastructure Land Services, LLC is pleased to announce the addition of Dan McNickol, SR/WA, to oversee projects in Virginia and West Virginia. An accomplished Right-of-Way Professional with more than 30 years in the industry, Dan began his career (1986) in the pipeline sector as an entry level Agent with Texas Eastern Transmission Corporation (TETCO) and was promoted to Rights-of-Way & Land Supervisor of the South Division in 2000.

After moving on from TETCO, he held supervisory positions in the pipeline (Panhandle Energy), midstream gas & oil (Chesapeake Energy), & electric transmission line (Duke Energy) sectors.

In 2010, McNickol joined Denbury Resources in Plano, Texas, as a Right-of-Way Project Manager where he was responsible for all phases of right-of-way acquisition for pipeline projects in the Rockies Region (Wyoming, Montana & North Dakota).

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TCI Talk on Cathy’s 4-3-2 Plan for Success

On March 23, Cathy Muth was invited to do a Coffee Talk on her new book for The Commonwealth Institute (TCI). Twenty-five professional women from the community gathered at The Tower Club in Fort Lauderdale to hear her 4-3-2 Plan for Success from Chapter 9 of *Inspiring Confidence in Progress: The History of O. R. Colan Associates*. The book is available now on Amazon.

Cathy shared the 4 Qualities, 3 Abilities and 2 Principles that she feels have been important to her success as a leader.

Using a workshop format, she encouraged those participating to share what they recognize as their personal attributes that make them strong leaders and professionals.

The Commonwealth Institute recognizes the Top 50 Women Led Businesses annually. O. R. Colan Associates was just notified that we will be receiving this award again this year.

Succession planning is important to ORC where we are committed to hiring and training the next generation of right of way professionals. Currently, 22% of our employees have come through our Jr. Agent training program. Twenty percent of our managers originated in this program. Our goal is to hire people with the potential to be our future leaders.

ORC’s employees attend training in Cleveland, OH.
A few years ago I wrote an article about the great barbecue that is available in Texas. And I wrote another article regarding the variety of Mexican food available in San Antonio. Texas is big so it can have great BBQ and great Mexican food all rolled into one state.

Recently, I was in Austin instructing a National Highway Institute course for the Texas DOT. TxDOT has an ongoing training program for its right of way employees which includes offering all the NHI courses periodically. This affords an opportunity for their staff, consultants and local government partners to enhance their skills. At any given time, TxDOT has a large variety of projects, posing a lot of new issues. So the classes are always interesting and a challenge for instructors. The courses are instructed by one contractor (ORC presently has the NHI instructor contract for real estate courses) and one FHWA Resource Center employee. This is a great mix that assures practical field implementation and policy are both addressed in the classroom.

The training facility at TxDOT in Austin has an employee cafeteria that offers a limited fare, but is usually pretty good. On the first day at lunch, I recalled that one of the dishes they served was named King Ranch Chicken. So I asked the lead cook if they would be serving King Ranch Chicken that week. She said she had not planned on it, but would do it if I would spread the word to the class. I agreed and invited the entire class to sample King Ranch Chicken on Thursday.

King Ranch Chicken has nothing to do with ranch dressing. I would call it an open-faced chicken enchilada in a casserole type dish. It is reportedly served on the King Ranch in southern Texas, which covers a mere 825,000 acres. The ranch has many employees, so it is logical that they would offer some good food.
Nearly everyone in the class ate in the cafeteria on King Ranch Thursday! I was a bit worried the dish might not live up to my hype, but it turned out great. Both the local attendees and those from out of town all thought it was very good.

I also knew that Austin was known for its innovative tacos. Their local magazine had featured them several times. A quick online review narrowed the search to two that seemed to merit a visit. The first was Valentina’s. Valentina’s is a BBQ truck that also uses the meat to make tacos on homemade flour tortilla shells. Wow, it was great! It is easily one of the best tacos I have ever had. The tacos are huge, so one makes a meal.

The second taco place we wanted to try was La Posada. Their tacos were very good, just a tad below those at Valentina’s. What they did have was delicious fresh salsa and taco sauce. The salsa was loaded with chopped vegetables, a little jalapeño, and lime juice. It was like a delicious salad rather than just a topping for the taco. The class enjoyed the 3-day NHI course and we all enjoyed some interesting meals in Austin, Texas.

A smoked brisket taco from Valentina’s.  
Similar to Valentina’s, the menu at La Posado features both bbq and tacos.  
King Ranch Chicken, served at TxDOT in Austin.  
The Valentina’s food truck serves both bbq and tacos.