



**A VOLUNTARY
APPROACH TO
GOVERNMENT
LAND ★ ★ ★ ★ ★ ★ ★ ★
ACQUISITION**

By David Cavanaugh

The president and Congress have the authority to pass legislation allowing the “take” of property for public use and benefit upon payment of just compensation. Federal agencies have developed uniform policies and procedures for acquiring property under the threat of condemnation. This process favors the government especially when there is a sense of urgency. ♦ Agency procedures to acquire property often make no distinction between acquisitions by condemnation (involuntary transactions) and without condemnation authority.¹ As a result, the property owners are often treated the same; the agency chooses the appraiser, reviews the appraisal report, makes an offer based on the appraisal, and the property owner is left with a take it or leave it offer. This approach can discourage cooperation between a willing seller and the agency, and frustrate reasonable settlements, especially when market value is not easily estimated by an appraisal. ♦ This article makes a distinction between involuntary and voluntary transactions and advocates allowing property owners to be more directly involved in the appraisal and acquisition process. It also encourages agencies to better utilize the knowledge and skills of appraisers in helping the agency and property owner reach agreement on value.



ACQUISITION OF PROPERTY

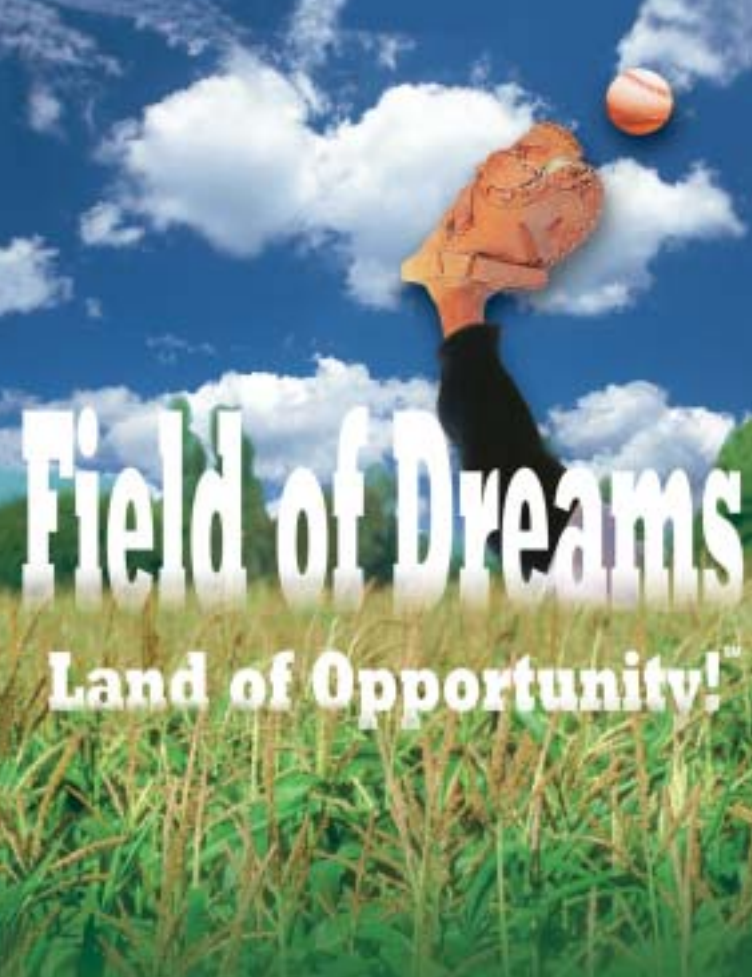
Government agencies acquire private property for numerous reasons that include construction of highways, buildings and water control projects. A less understood reason for agency acquisition of property is to conserve sensitive environmental and cultural areas, mitigate previous land abuses, and improve agency management of parks, wildlife and recreation areas. All projects must be in the public interest and must pass through a rigorous public involvement process.

INVOLUNTARY TRANSACTIONS

The Takings Clause — the Fifth Amendment to the Constitution — requires the payment of just compensation to a property owner when the government physically takes and occupies the property for some public purpose.² Depriving a property owner of certain constitutionally protected property rights cannot occur without the government paying just compensation. What constitutes a taking or just compensation is issues often adjudicated by the courts. Condemnation is the government’s action of legally taking private property. However, the right to payment of just compensation is protected by the Constitution. Each state has their own laws regulating state condemnation procedures. Federal agencies are required to pay related relocation and incidental costs associated with the transaction.

The process of acquiring property under the threat of condemnation is an expensive, adversarial and often coercive process — the government agency is in control. The property owner must accept appraisal information provided by the agency, or hire an appraiser and/or attorney to protect his/her interest. Many agencies, however, are reluctant to involve the property owner in the appraisal process or share the appraisal since it may be detrimental to later litigating their case.

Implicit throughout discussions with the property owner is that if there is no agreement on value, the agency will initiate legal action to condemn or take ownership of the property. Consequently, the condemnation process often polarizes the parties, each side being somewhat guarded and distrustful.



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Resources, Responsiveness, Results

The agency has a difficult role and responsibility of treating the property owner fairly, and at the same time protecting the government's interest.

VOLUNTARY TRANSACTIONS

Voluntary transactions are very different. They involve willing sellers and there is no explicit or implied threat of condemnation.³ In many cases, natural resource agencies do not have legislative authority to condemn and must find and use other reasonable methods to justify and pay fair market value.



These types of projects normally do not involve large capital improvements (buildings, highways, bridges, dams, or expenditures). Instead, they often involve acquisition of land or other rights and interests to protect and conserve natural, cultural or scenic resources. Time is not critical unless there is imminent threat to the resource needing protection.

The Bureau of Land Management (BLM) identifies lands or resources it would like to acquire through land use planning processes. The public is involved and informed throughout this process. The properties or resources identified possess important public benefits or improve use and management of existing lands.

Property owners whose lands have been identified as possessing important natural resources may contact the BLM. If there is sufficient interest, both parties may agree to initiate the transaction process, usually a land exchange. Until such time the parties sign a sale commitment, a party may withdraw from the proposed transaction. However, BLM controls the acquisition and appraisal process. The agency selects and pays the appraiser, provides appraisal instructions, reviews the appraisal report, and makes an offer based on the technically approved appraisal report.

Often a BLM representative tells the property owner that their offer and settlement cannot exceed the agency-approved appraisal. Although the BLM will share the appraisal and review report with the property owner, other agencies will not. This can impact good faith discussion with the property owner.

Manuals and customary practice discourage negotiated settlements with the property owner. Managers are reluctant to approve "over appraised" values. Certain funding sources require over appraised value settlements be submitted to the congressional committees for concurrence. This causes extraordinary uncertainty, delay, and undermines the normal negotiating process.

The realty agent must convince the property owner that every effort has been taken by the agency to secure an acceptable appraisal report that is considered by the agency to be accurate, fair and reasonable. During this process, both parties may discover concerns and raise questions for the appraiser, which may result in a modification of the appraisal report and its conclusion of value.

This approach can discourage property owners and reduce opportunities to acquire lands with valuable natural resources. Owners pursuing sale of their property can become distrustful, which then hinders the ability of the parties to reach a mutually satisfactory agreement.

To be successful, voluntary transactions require a sharing of

responsibilities. Both parties must make a mutual commitment to the process, by developing a working arrangement to resolve a variety of issues that occur during the acquisition process, and alleviate unnecessary obstacles to a reasonable settlement. Both parties have different, but not necessarily mutually exclusive, interests in completing the transaction. The property owner has a stake in getting a reasonable value in the absence of a competitive market. The government agency's interest is to pay the property owner an amount that is fair, reasonable, and compensates the owner for the property acquired. A well-documented and supported appraisal is the primary tool for generating discussion, building support for the appraisal analysis, and helping the parties reach agreement on value.

Land exchanges are a form of voluntary transaction.⁴ Instead of paying cash, parties enter into a preliminary agreement to exchange lands of approximately equal value. Within limits, differences in the agreed upon value can be reduced or eliminated with the buyer or seller paying a cash equalization payment. The preliminary agreements can cover a number of items including:

- What property interest will be acquired (i.e. fee simple, limited fee, access, conservation easements)?
- Procurement of preliminary title information to ensure the seller has good or sufficient title.
- Who will procure and pay for the appraisal? This can be a shared cost or a cost reimbursed at closing by the property owner or agency.
- When will the pre-appraisal meetings be scheduled? The meetings involve the appraiser(s), reviewer, and often the property owner to obtain information regarding the property and tips on other comparable sales.
- What is the role of the review appraiser? Does the reviewer approve the value for the agency, recommend a value, or approve an appraised value? Does the reviewer have authority to approve or recommend a value different from the agency's accepted appraisals?
- Who will be responsible for various costs associated with preparing the appraisal (i.e. soil, mineral, water rights or engineering studies)?
- Who will be responsible for developing the appraisal instructions and should they be shared with the property owner?
- What is the protocol for sharing the appraisal reports? Does the agency require review and approval of the appraisal report before being shared, or can the completed appraisal report be shared simultaneously with both parties to the transaction? Appraisal reports can be seriously flawed and establish unrealistic expectation. Regardless, appraisals prepared for federal agency use must be reasonable and consistent with agency standards.
- Should the property owner have an opportunity to review the appraisal report and any review prepared by the agency?
- How can disagreements on value be reconciled or resolved? If both parties believe it is in their best interest to continue pursuing the transaction, what voluntary dispute resolution processes can reasonably be employed?

The understanding or agreement establishes a working relationship between the federal agency and the property owner, and also improves the odds for a reasonable settlement.

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RECOMMENDED CHANGES

There are a number of simple solutions an agency can apply to improve the voluntary acquisition of private lands. They include:

- Require a non-binding, upfront agreement that outlines the process and responsibilities of the agency and property owner. The non-binding agreement should include some form of commitment by the property owner, (payment for preliminary title report and agreement on time schedules for completing certain tasks).
- Involve the property owner in the process. Treat the owner as a responsible partner who is interested in selling their land at a reasonable market price.
- Make it standard practice to share the appraisal and review report with the property owner.
- Clearly advise the property owner that the agency must reasonably support any settlement requiring the expenditure of government funds.

An agency-approved appraisal is the basis for initiating negotiations. The appraisal assists in supporting any agreement on value. However, the agency should not use the appraisal report to coerce agreement if there are legitimate, unresolved issues within the context of the appraisal report. This reduces potential misunderstandings and places responsibility on the agency authorized official to justify the acquisition.

- Develop communication and problem solving training that allows appraisers to be more directly involved as a consultant in the dispute resolution process. In many respects, the appraiser is working for both the property owner and agency, since without their confidence in the appraiser's work a transaction is unlikely. Under appropriate conditions, appraisers can provide an important service and comply with the Uniform Standards of Professional Appraisal Practice (USPAP). They should be an advocate for their appraisal and be able to assist the agency and owner in reaching a fair settlement, without jeopardizing their credibility, independence and integrity.
- Develop closing statement or transaction summary reports that allow management justification for reasonable negotiated settlements. The summary report could be part of the public notification published prior to closing of the transaction.

This change would alleviate sole reliance by the agency manager on appraisal reports and provide flexibility for legitimate and reasonable settlements. This would reduce pressure on the appraiser and reviewer to reach expected values and reduce the costs and delays associated with correcting appraisal reports that although not perfect, can reasonably support the agreed upon value.

The key to voluntary and involuntary transactions is the experience of staff negotiators or realty agents. They must work closely with the property owner: explaining the agency's acquisition process, anticipating potential problems, solving them, and ensuring a balancing of property owner and agency interests. Their interpersonal and communication skills can minimize differences in opinion and misunderstandings. They, not the appraiser, are responsible for developing and managing the process, and facilitating resolution of value disputes.

THE ROLE OF THE APPRAISER IN VOLUNTARY TRANSACTIONS

The appraiser has a limited, but important role in the acquisition process. The appraiser provides an independent opinion of market value. However, the appraisal should not be a substitute for the normal negotiations that take place in the market.

The appraisal is a reasonable approximation of what the appraiser believes the property will sell for as of the date of the appraisal.

Saying the appraiser or appraisal report "determines" value is an unfortunate characterization of the appraisal process. Appraisers provide a supported opinion or estimate of value for the clients use.

The involvement of the appraiser is essential in assisting the parties involved in the prospective transaction. They provide supporting data, clarify the analysis used, and respond to questions and provide additional explanation when necessary. Their impartiality, analytical and problem solving skills can help parties resolve factual issues and assist them in reaching agreement on value.

SUMMARY

Government acquisition of private property has changed over the years. These changes are in part a result of legislative and regulatory efforts to ensure fair and equitable treatment of property owners by government agencies. It is also a result of efforts to replicate normal market conditions and alleviate unnecessary and protracted disagreements on value.

Many government acquisitions are voluntary. There is no one best way to acquire property. However, the property owner has a stake in the outcome of the acquisition process. The appraisal and review process should facilitate cooperation between the parties and not be used to force or coerce settlements. There should be sufficient flexibility to allow property owner participation to the extent it is fair and reasonable, and there are legitimate concerns.

Agencies are beginning to recognize the benefits of having a more open process and involving property owners. However, regulations and changes are necessary to modify traditional approaches and

common attitudes used to process voluntary transactions. Direct involvement of the property owner in the process, and agency flexibility to handle property owner concerns builds confidence, trust, and increases the likelihood of reaching an amicable settlement.

The views and opinions in this article do not necessarily represent the views or position of the Department of Interior, Bureau of Land Management or other agencies. The views, assumptions and conclusions expressed are those of the author only.

REFERENCES:

- 1 1987 Amendments to the Uniform Relocation Assistance and Real Property Acquisition Policies Act, 1970 limited application of the Act to agencies having condemnation authority. Although voluntary transactions are not covered by Title III, it is unclear how a dual standard benefits agencies or property owners.
- 2 The Takings Clause, also referred to as the Just Compensation Clause, is the final clause of the Fifth Amendment to the United States Constitution. The Fifth Amendment provides "... nor shall private property be taken for public use without just compensation."
- 3 Bureau of Land Management acquisition and land exchange program in St. George, Washington County, Utah is a different category of voluntary transactions. Property owners were unable to sell or develop their property without addressing endangered species issues. As a result, the uncertainty and costs of obtaining take permits allowing development within the designated tortoise habitat area reduced development potential and increased the value of other lands outside the habitat conservation area. Landowners were motivated to reach a settlement with the BLM to alleviate further uncertainty if they tried to sell or develop their property. (BLM did not have condemnation authority, but there was a potential for an inverse condemnation suit if BLM did not make a good faith effort to acquire the property.)
- 4 The Federal Land Facilitation Act of August 20, 1988 directed the Secretaries of the Interior and Agriculture to develop new, uniform, comprehensive appraisal standards applicable to land exchanges. Agency regulations also provided for a valuation dispute resolution in an effort to facilitate worthwhile land exchanges in the public interest. Land exchanges are a voluntary transaction requiring mutual agreement by the parties.

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