



Top Three Attorney Observations About Right of Way Agents

Explaining the how and why

BY MICHAEL F. YOSHIBA, ESQ.

Over the several years that I've been an eminent domain attorney, I've spoken to many attorneys who have shared their stories concerning interactions with right of way agents. Being a former right of way agent myself, I typically spend most of my reply time explaining the "how and why" perspective of right of way agents. As such, I've assembled the top three attorney observations about right of way agents and my explanations.

1. Right of way agents don't seem to understand the eminent domain process from beginning to end.

Right of way agents are a broad category of professionals that operate as specialists within the eminent domain process. Right of way specialists focus on acquisition, appraisals, utility relocation, relocation assistance, property management, resolution of necessity hearings, etc. Larger public agencies can hire full-time right of way agents and offer more generalized training by periodic rotations through some or all the major right of way sections. In the past, agencies such as the California Department of Transportation (Caltrans) were fully staffed with in-house right of way training. For example, Caltrans provided a yearly stipend for right of way agents to supplement their on-the-job experiences with classes provided by the Appraisal Institute, the IRWA and Federal Highway Administration (FHWA), among many others. Additionally, Caltrans reimbursed the right of way agents for membership dues in professional organizations such as IRWA. (Unfortunately, changes in the number of projects and how the projects are now funded eliminated those reimbursements for right of way agent professional advancement.)

But most public agencies don't have enough projects to justify full-time right of way agents. Instead, they use consultant firms with a team of right of way specialists. Right of way specialists, by definition, focus on one area of the right of way process and are not cross-trained in other areas. More importantly, right of way agents are not subject to state or federal licensing and testing similar to real estate agents, and they are certainly not required to know all aspects of the eminent domain process. Right of way agents that are members of the IRWA have better resources and more opportunities to be appropriately trained in the right of way and eminent domain process.

2. Right of way agents underestimate the importance of documentation in eminent domain matters.

Documentation by right of way agents is essential for memorializing completed tasks and project billing. Diary entries and billings of completed tasks are used by attorneys for recreating past events to demonstrate compliance with the statutory eminent domain requirements. Additionally, what right of way agents say to property owners during the eminent domain process is also important. Statements made to and by right of way agents will be interpreted, recalled and then highly dissected during the condemnation case. All statements must be concise, precise and correct. Attorneys for property owners use the same documentation and statements to disprove compliance by the public agency with the eminent domain process. Accuracy of the reporting is key to avoid inconsistencies in recollections for depositions and trial testimony. Effective deposition

and trial testimony present few or no opportunity for impeachment from errors and inconsistencies in documentation.

3. The right of way agent handling the file changes every few months.

The eminent domain process from beginning to end can extend from 24 to 36 months—or even more. There are certainly no guarantees that the same right of way agent will handle the case for the process duration. Because most projects involve the aforementioned assemblage of right of way specialists, the chances of eventual personnel changes increase dramatically. As with all professions, people leave for different reasons: promotional opportunity, compensation and innumerable other personal situations. In my experience, the shuffling of right of way agents is common and should be anticipated. An unfortunate consequence of the changing agents mid-project is that the new agent needs to familiarize themselves with the case details and reestablish the confidence of the process participants. Multiple right of way agents also means that there are additional persons that the attorney must prepare for deposition and

trial testimony, and thus additional litigation time for document review and costs.

By contrast, attorneys do not often change during the eminent domain process. Attorneys are charged with the ultimate responsibility for preparing the condemnation case litigation. Strategy and litigation preparation are based upon the components that include the participants as witnesses, documentation of project details, and sometimes overlapping issues of relocation assistance, fixtures and equipment, loss of business goodwill and landlord-tenant claims.

Bonus Observation: Right of way agents hate negotiated global settlements.

The legal process for eminent domain includes select opportunities for settlement of condemnation litigation. Settlement opportunities typically involve the use of mediators or the trial court judge. Most judges and mediators do not oversee many condemnation cases and rely upon their judicial training in assisting the parties reach settlement. Parties to a mediation or settlement conference will be asked right from the start (in confidence)

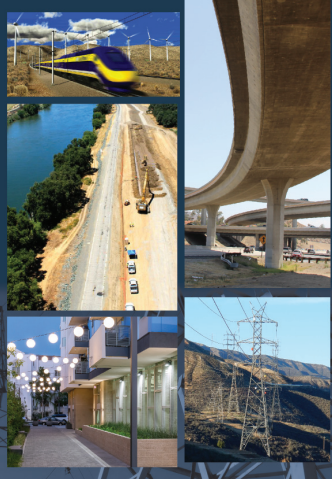
their bottom line settlement amounts. Where multiple damage claims are separated into categories, that increases the categories of potential dispute, and therefore tends to reduce the chances of pretrial settlement. There is a general preference towards global settlements that resolve all issues for one amount, but right of way agents dislike global settlements because eventually there is an ultimate accounting or project audit requiring documentation of how settlement funds were allocated and the compensation categories. Global settlements don't allocate payment categories thus the right of way department has the difficult task of trying to justify and categorize payments for auditing agency such as Caltrans or FHWA. ☘



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