



4.3 LITIGATION PROCEDURES

For purposes of this chapter, the state of Wisconsin, Department of Transportation (WisDOT) (a.k.a., condemnor) will be referred to as the “defendant.” The property owner or parties of interest (a.k.a., condemnee) filing the appeal will be referred to as the “plaintiff.” The Department of Justice, Attorney General’s Office will be referred to as DOJ.

4.3.1 Proper/Improper Service

An appeal is proper when served on the WisDOT or DOJ. The appeal procedure is provided for in [Sections 32.05\(9\), \(10\) and \(11\), Wis. Stats.](#) Service of a notice of appeal is improper, if:

- Appeal from a deed is not filed and served within six months of the date of recording.
- Appeal from Award of Damages is not filed and served within two years of the date of recording.
- Appeal to County Condemnation Commission discloses dollar amount of Jurisdictional Offer, whether deed or Award of Damages.
- Notice of appeal is not served personally or by certified mail. Service by regular mail is insufficient service.

4.3.2 Service of Appeal

An appeal may be served on any one of the following. However, regardless of where the appeal is served, the regional litigation coordinator is responsible to get the introductory litigation letter to DOJ as soon as possible with copies to Office of General Counsel, the BTS-RE internal services coordinator and the BTS-RE litigation facilitator.

Regional WisDOT Office

The regional litigation coordinator will immediately send the appeal and copies via fax, email or regular mail to the following:

- BTS-RE internal services coordinator – copy of appeal stamped with receipt date and copy of envelope it arrived in.
- BTS-RE litigation facilitator – copy of introductory litigation letter.
- DOJ Attorney General’s Office – original appeal, stamped with receipt date, envelope it arrived in and introductory litigation letter found in READS.
- Office of General Counsel (OGC) – copy of appeal stamped with receipt date, copy of envelope and copy of introductory litigation letter.

Secretary’s Office and Office of General Counsel (OGC)

If the Secretary’s Office or the Office of General Counsel receives an appeal, that office will forward the appeal to BTS-RE. The BTS-RE internal services coordinator will then send the following documents via fax, email or regular mail to these departments:

- BTS-RE litigation facilitator – copy of introductory litigation letter.
- DOJ Attorney General's Office – original appeal, stamped with receipt date, envelope it arrived in and introductory litigation letter found in READS.
- Office of General Counsel (OGC) – copy of appeal stamped with receipt date, copy of envelope and copy of introductory litigation letter.
- Regional litigation coordinator – copy of appeal stamped with receipt date and copy of envelope it arrived in.

Department of Justice (DOJ)

DOJ will send copies of the appeal via fax, email or regular mail to the following:

- BTS-RE internal services coordinator – copy of appeal stamped with receipt date, copy of envelope it arrived in and copy of introductory litigation letter.
- BTS-RE litigation facilitator – copy of introductory litigation letter.
- Office of General Counsel (OGC) – copy of appeal stamped with receipt date, copy of envelope and copy of introductory litigation letter.
- Regional litigation coordinator – copy of appeal stamped with receipt date and copy of envelope it arrived in.

4.3.3 Preparing Attorney Working File

The regional litigation coordinator will prepare an attorney working file within ten working days (whenever possible) of receiving the appeal. If there is good cause for delay in preparing the attorney file, DOJ should be advised and at least the Litigation Report and Case Summary (RE1651) should be prepared and forwarded within the 10-day time frame. It is advisable that the litigation coordinator contact the assigned attorney to get an understanding of the attorney's preference as it relates to the specific content and organization of the working file. Guidance regarding open records requirements can be found in Section 1.2 of this manual. If this section does not answer your specific question, contact legal counsel assigned to the case at the Department of Justice, Attorney General's Office.

Attorney Working File

This file should, at a minimum, contain:

1. Copies of all materials found within project parcel file.
2. Copy of appeal and any related documents.
3. Copy of litigation letter found in READS.
4. Litigation Report and Case Summary (RE1651), including attachments referenced.

4.3.4 Initial Case Review Meeting

As soon as practicable after the attorney has received the attorney working file and Litigation Report and Case Summary (RE1651), a preliminary review meeting will be held. This is also an opportunity for the attorney and other meeting participants to view the subject property. It is suggested that the meeting participants include the attorney, the regional litigation coordinator, the review appraiser, the appraiser, the negotiator and regional management. The BTS-RE

litigation facilitator is also available to attend meetings involving the more complex or significant cases if requested by region or counsel. The purpose of this meeting will be to discuss the project history as it relates to the appeal; to assess the strengths and weaknesses of the respective contentions of the defendant and the plaintiff; to develop case strategy; and to analyze the risks of litigating the case. If appropriate, settlement options or positions may be discussed. There will also be a preliminary discussion about securing and preparing exhibits needed for trial as well as the need for the retention of expert witnesses. If updated or second appraisals are necessary, these reports may be submitted to the assigned BTS-RE review appraiser for review and comment, when deemed necessary. Prior to submitting such appraisals to BTS-RE, the region will do an initial review and submit their comments along with the appraisals for the BTS-RE reviewer's information. Note: The BTS-RE reviewer will not review any updated or second appraisals without an initial region review.

4.3.5 Legal Pre-Trial Settlements

A legal settlement proposal may occur only after an appeal to the County Condemnation Commission or circuit court. Settlement situations can develop at any time prior to the Condemnation Commission award or circuit court jury verdict. Approval authority for legal settlements has been delegated to the regional directors, who, at their discretion, may delegate to their Technical Services or Real Estate management. Note: Any local project litigation settlements that have state or federal funding in real estate must also be approved by regional Real Estate management. Also see REPM 4.3.6 and LPA Manual for more detail. The BTS-RE litigation facilitator is available, upon request of either the region or the Attorney General's Office, to provide expertise or advice on any complex, significant case. They are also available to act as a facilitator if the region and DOJ are not in agreement as to the action that should be taken. DOJ will discuss any settlement recommendations with regional Real Estate management to determine the maximum acceptable amount. Counsel may then settle at any figure not in excess of the approved amount. Once a settlement has been reached and a judgment or stipulation and Order for Dismissal obtained, a Litigation Report and Case Summary (RE1651) is completed and signed by the region and counsel. See sub-section 4.3.7 - Litigation Report. Whenever possible, WisDOT counsel should obtain a stipulation and Order for Dismissal from opposing counsel indicating that the amount of proposed settlement is acceptable and that there will be no further appeal. This amount is reviewed and approved by the regional litigation coordinator and a Payment Request is prepared and submitted to the BTS-RE/Finance.

4.3.6 Federal Funding in Real Estate and State/Federal Funding in Local Public Agency (LPA) Projects

For local or state projects with federal funding in real estate, federal rules regarding compensability must also be considered. If the region suspects that any part of the settlement may be considered non-participating under federal regulations, they should contact the BTS-RE litigation facilitator who will discuss the settlement with FHWA. This is particularly important when reviewing LPA settlements of significant dollar increases. It is best if the local unit of government understands, up front, that FHWA may not participate in part or all of the settlement rather than being surprised at the time of reimbursement. For state projects, WisDOT may still decide that the settlement is in its best interest and choose to use only state funding for part or all of the settlement in question. The amount determined to be non-compensable with federal regulations should then be identified by the regional litigation coordinator as non-participating

when making the payment request. For local projects with federal or state funds in real estate, it is important that there is good communication between the regional LPA RE coordinator and regional litigation coordinator. Litigation coordinators should seek advice from their regional LPA RE coordinators on what steps are required for local agency litigations. The LPA Manual is also a good source of information.

4.3.7 Filing of Judgments

Timely filing of the judgment is important in order to protect the parties' interest. Judgment is "entered" when it is filed with the clerk of circuit court for the county in which it was rendered. Although either party may file the judgment, in most cases, the attorney for the party granted judgment would file it. However, there may be instances where it is in the best interest of the party against whom judgment has been granted to file the judgment. This is a matter for trial counsel's consideration. Note: Whenever there is a recommendation that a trial court determination be appealed to a higher court, OGC must be informed (by the assigned DOJ attorney) and will review and determine whether it is in the department's best interest to appeal or petition to the Court of Appeals or the Supreme Court. Every judgment properly entered in the judgment and lien docket shall be a lien for ten years on all real property of every person against whom the judgment is entered, in the county where it is entered. Judgments may be filed in other counties where the judgment debtors own real property. The period within which an appeal to the Court of Appeals can be initiated runs from the date on which the judgment is filed with the clerk of circuit court. See Section 4.1.5 of this manual for more detail.

4.3.8 Finalizing Litigation Report and Case Summary

The Litigation Report and Case Summary (RE1651) should be kept current throughout the litigation process by adding information as soon as events occur. All settlement approvals or Commission Awards or circuit court judgments must be documented on this report. The regional litigation coordinator and DOJ counsel jointly prepare the Litigation Report and Case Summary. The report includes the region's and counsel's written recommendations and reasons for the subsequent action and a factual account of the hearing or trial, including major issues and contentions by each party. Except for sections 3 and 4, the regional litigation coordinator is responsible for completing all information. They send the document to DOJ and they complete section 3, sign it and return it to the region. Regional Real Estate management (or their authorized designee per the delegation order) reviews report and completes section 4. The report may now be sent as part of the payment process. When the dates of the closing documents at the bottom of section 4 have been filled in, the original signed and completed report is filed in the region's litigation parcel file. Copies of the completed Litigation Report and Case Summary (RE1651) are sent to DOJ (Attn: Case Attorney), the Office of General Counsel (OGC), and to the BTS-RE litigation facilitator with a note directing them to discard all previous copies.

4.3.9 Payment of Litigation Costs

The plaintiff's attorney will submit their litigation expenses to DOJ. The state's attorney for reasonableness must review these expenses. If expenses are not considered reasonable, the regional litigation coordinator will be contacted and the expenses will be contested. The regional litigation coordinator is responsible for the review of the expenses being vouchered and to ensure their appropriateness and accuracy. The interest should accrue on the difference between the jury verdict and the amount of the Award of Damages. The DOJ attorney will let

the regional litigation coordinator know to whom the check is to be made payable. If payment is made by one check naming both the owner and attorney, and indicating the total amount of proceeds (attorney fees and additional compensation), the attorney receives the 1099-Misc with the full amount included in Box 14 – Gross Proceeds Paid to an Attorney. The 1099-Misc is addressed to the attorney. When separate checks are cut, the attorney gets a 1099-Misc with the amount of their fees included in Box 7 – Non-Employee Compensation and the property owner(s) receives a 1099-Misc with the amount of the additional compensation or damages (determined by settlement or decision) included in Box 3 – Other Income. See 1099 Information. The regional litigation coordinator is responsible for the preparation of the Payment Request (RE1630) requesting payment for the:

- Calculated interest due on judgment (see calculation of interest topic below).
- Commission or court judgment
- Other litigation expenses (i.e., attorney fees) as per [s. 32.28, Wis. Stats.](#)

They will indicate "approval to pay" by initialing the invoice or Order for Payment and attaching it to the Payment Request along with any other support documentation that is appropriate. A Commissioner's Award must be paid within 70 days after it is filed, unless an appeal is made to circuit court within that time frame. If the appeal is dismissed before trial, payment must be made within 60 days after the dismissal date.

Calculation of interest

1. STATE LOSES: When court-approved judgment exceeds Award of Damages by 15% and that 15% is at least \$700. Multiply highest written offer by 1.15 and that is amount they will have to exceed in hearing/trial to get their litigation fees paid.
 - Plaintiff will recover additional compensation, plus simple interest at legal rate of 5% from date, which is 14 days after date of taking to date of payment, plus any other appropriate litigation expenses as detailed in [s. 32.05\(11\) Wis. Stats.](#)
 - In an appeal from County Condemnation Commission to circuit court, interest, as a result of Calaway vs. Brown decision, will be:
 - 5% from date, which is 14 days after date of taking, to date of entry of judgment ([Wisconsin Statute 32.05\(10\)\(b\)](#)); and,
 - 12% from date circuit court enters judgment to date of payment of judgment ([Wisconsin Statute 815.05\(8\)](#)).
2. STATE WINS: When court-approved judgment does not exceed Award of Damages:
 - Defendant will have a judgment against plaintiff for difference, plus simple interest from date of taking, to date of payment and any other appropriate expenses as detailed in [s. 32.05\(11\) Wis. Stats.](#) According to DOJ, under rationale of Calaway decision, rate of interest is 12% because the word "legal" does not appear before the word "interest" in [s. 32.05 \(11\)\(a\) Wis. Stats.](#) CAUTION: If you have a case that you have to calculate interest for this type of judgment, consult with DOJ.
 - In an appeal from County Condemnation Commission to circuit court, Calaway vs. Brown decision will apply, and legal interest will be:

- 5% from date of taking to date of entry of judgment; and,
- 12% from entry of judgment to date of payment.

To keep the computation of this interest uniform, the regional litigation coordinator adds to the date of judgment the number of days elapsed to the current date. They must add an additional ten days or more to allow for submittal to and processing by BTS-RE/Finance, obtaining the check and transmittal of same to DOJ. Contact BTS-RE/Finance for a time estimate. Copies of the judgment, Litigation Report and Case Summary (RE1651), bill of costs (indicating regional approval), and Payment Request (RE1630) for the total payment are submitted to BTS-RE/Finance. Enter a comment on the Payment Request (RE1630) to send the check to DOJ who is responsible for sending the check to the plaintiff's counsel along with the appropriate documents to be signed.

4.3.10 Post Litigation Wrap-Up Conference

A wrap-up conference is strongly recommended and should take place, if possible, within five working days of the pre-trial settlement, the commission award or court verdict. For smaller cases, this can be accomplished by a conference phone call, if desired. On larger, more complex cases, a meeting is appropriate. Participants in these conferences may vary depending on the complexity of the case, but as a rule, will at least include the regional litigation coordinator, DOJ and perhaps, regional management. This information is to be included in the Litigation Report and Case Summary. If deemed beneficial, a jury poll may be taken.

4.3.11 Litigation Files

The official litigation files will be kept at the region offices. The regional litigation coordinator is responsible to ensure that these files contain all litigation correspondence and documentation including, but not limited to such things as the appeal; Litigation Report and Case Summary; Judgment; Satisfaction of Judgment or the Stipulation and Order for Dismissal; and, copies of litigation expense checks, etc. The regional litigation coordinator can consider the file closed when they receives either a copy of the Satisfaction of Judgment or the Stipulation and Order for Dismissal. It is the responsibility of the regional litigation coordinator to ensure that all files contain either the Satisfaction or the Stipulation before closing the file. BTS-RE will also retain copies of all appeals and Litigation Report and Case Summary materials.