



## 4.1 APPEALS FOR GREATER COMPENSATION

### 4.1.1 General Information and Appeal Deadlines

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. The processes addressed in this section are applicable to highway related litigation with federal and/or state funds in any part of the project. Note: Drainage claims should not be included in valuation appeals. Litigation, as it relates to project acquisition, can be initiated in one of two ways:

1. An appeal from an Award of Damages. Any party of interest named on Award of Damages must file within two (2) years of date the Award of Damages was recorded.
2. An appeal from a deed. Any party of interest must file within six (6) months of date the deed was recorded.

Those appealing to the County Condemnation Commission may then appeal to the circuit court. Any circuit court verdict can be further appealed to the appellate court (court of appeals). In litigation actions, the Department of Transportation is the client or defendant and attorneys from DOJ serve as counsel. DOJ is responsible for representing the defendant (WisDOT) in litigation matters. If, through any part of this process, you receive an open records request, seek advice from the assigned attorney and review the basic guidance provided under open records.

### 4.1.2 Appeal to County Condemnation Commission

Any party having an interest in the property may apply to a judge of the circuit court for assignment to the County Condemnation Commission. The appeal (a.k.a., Notice of Application) will contain a description of the property condemned and the names and last known addresses of all parties of interest but it cannot disclose the amount offered or the amount of the Award of Damages, [s. 32.05\(9\), Wis. Stats.](#) Disclosure of the amount offered and/or the amount of the Award of Damages or deed nullifies the appeal. If any of these conditions are not followed, the Bureau of Technical Services-Real Estate (BTS-RE) litigation facilitator or regional litigation coordinator (depending on who receives the appeal) shall contact DOJ for appropriate action. The appeal is given to the clerk of the court and to all other parties named on the Award of Damages. The appeal can be given by personal service or by certified mail. In conducting hearings of this nature, the commissioners are not bound by common law or statutory rules of evidence. They will admit all testimony that has reasonable value in providing proof or evidence in the case. The amount of a prior Jurisdictional Offer (RE1786) or deed cannot be disclosed to the commissioners. Commissioners can adjourn each hearing once (for not more than seven days), but can grant other adjournments if stipulated by all parties. If a majority of the commissioners are present, a determination can be made in all matters. After the hearing’s conclusion, the County Condemnation Commission shall send their written judgment (Commissioner’s Award) to the clerk of the court within ten (10) days. The clerk of the court files the Commissioner’s Award in the court’s judgment book. The clerk of the court then

notifies the parties originally named on the Award of Damages (including WisDOT) that the document has been filed. An appeal, by either party, must be initiated within 60 days after the filing of the Commissioner's Award with the clerk of the court. Until the County Condemnation Commission submits the Commissioner's Award to the clerk of the court for filing, the 60-day appeal window will continue to move out into the future. Therefore, the litigation agent should stay abreast of the situation to make sure the Condemnation Commission does submit the Commissioner's Award to the clerk of the court in a reasonable time, so the 60-day appeal period may begin and end appropriately. The commissioners will also file, with the clerk of the court, a sworn voucher for the compensation due each member. Upon approval of the circuit judge, the defendant as described in [s. 32.08, Wis. Stats.](#), will then pay this sum.

### 4.1.3 Appeal from Condemnation Commission to Circuit Court

Any party to the County Condemnation Commission proceedings may appeal to the circuit court within 60 days after the Commissioner's Award is filed. The notice of such appeal shall be given to the clerk of the court and to all others that were parties to the Condemnation Commission proceedings. Such notice may be given by personal service or certified mail. The sole issues to be tried shall be questions of title and the amount of just compensation to be paid by the defendant. The amounts of any prior judgments or offering prices for the parcel cannot be disclosed to the jury during this trial. Disclosure is grounds for a mistrial.

### 4.1.4 Direct Appeal to Circuit Court

Any party of interest named in the Award of Damages or on a deed may waive the County Condemnation Commission hearing, and instead appeal directly to circuit court. The proceedings and provisions of this action shall be the same as specified in [s. 32.05\(11\), Wis. Stats.](#) Trial will be by jury unless waived by both plaintiff and defendant. If the court upon waiver of a jury tries the action, the determination of court damages will be considered in lieu of the words "jury verdict as approved by the court" where such language occurs in [Chapter 32, Wisconsin Statutes.](#) The judgment gives the name and address of the unsuccessful party and states the amount found to be due (and considers any amount paid by a prior award). The judgment is filed with the clerk of courts and when properly docketed, it becomes a lien on all real property owned or subsequently acquired by the unsuccessful party in any county where such judgment is docketed. A judgment in favor of the landowner never becomes a lien against property owned by the state. Note: The defendant's legal counsel should clearly define/allocate the compensation determined by the court and identify the time frames for payment.

### 4.1.5 Appeal from a Judgment

An appeal from the circuit court judgment may be made to the court of appeals, under [s. 808.03, Wis. Stats.](#) Typically, issues on appeal are: 1) court improperly exercised its discretion on an issue in the case, and 2) there was a question of law. If the defendant or plaintiff decides to initiate such an appeal, there are specific statutory time frames that must be adhered to. These time frames start from the date of entry of the final judgment or order (the date it's filed with the clerk of courts). For specific guidance, please reference [s. 808.04\(1\), Wis. Stats.](#) An interpretation of that statute is as follows:

- The party granted judgment has 21 days from the date the judgment is entered to provide “written notice” of the entry. If written notice is given within 21 days, the unsuccessful party must initiate the appeal to the court of appeals within 45 days of the entry.
- If written notice is not given within 21 days, then the unsuccessful party has 90 days from the date of entry to initiate the appeal.



## 4.2 ROLES AND RESPONSIBILITIES IN LITIGATION

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. Only WisDOT can approve transportation related offering prices, Awards of Damages, payment of County Condemnation Commission awards or circuit court judgments, stipulated settlements and related expenses for the state highway systems in accordance with [s. 84.01\(2\), Wis. Stats.](#) WisDOT, however, must consider the DOJ - Attorney General's recommendation regarding appellate action before action is taken. Within WisDOT, several positions play a key role in the litigation process. Wisconsin Statutes say:

- [Section 84.01\(2\)](#) - Powers and duties: general provision. The department shall have charge of all matters pertaining to the expenditure of state and federal aid for the improvement of highways, and shall do all things necessary and expedient in the exercise of such supervision.
- [Section 25.40\(2\)\(a\)](#) - Payments from the Transportation Fund shall be made only on the order of the secretary of Transportation, from which order the secretary of Administration shall draw a warrant in favor of the payee and charge the same to the Transportation Fund.

### 4.2.1 Office of General Counsel

These are the responsibilities and role of WisDOT’s Office of General Counsel (OGC) in the litigation process:

1. Manage and approve all legal services contracts and billing from DOJ and from any outside counsel.
2. Manage and approve DOJ direct hiring and billings of appraisers and expert witnesses for trial. For more information, reference these expert witness exception procedures.
3. Provide drainage and change of grade claim advice and assistance. If concerns regarding drainage and change of grade cannot be resolved at regional level and a formal claim is filed with WisDOT, forward that to OGC.
4. Provide pre-condemnation and relocation assistance advice (acquisition strategy, title, access, sign, and valuation issues) on request of BTS-RE litigation or acquisition facilitator.
5. Provide right of entry and writ of assistance advice and assistance.
6. Provide settlement advice upon request of BTS-RE litigation facilitator or DOJ.
7. 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 if it’s in the department’s best interest to appeal or petition to court of appeals or Supreme Court.

### 4.2.2 Real Estate Litigation Facilitator

This position has overall responsibility for the coordination and disposition of all litigation related matters. This individual provides functional guidance to all regional offices on the conduct of condemnation hearings or court trials and provides assistance to district attorneys, municipal or

village attorneys, corporation counsel, and other counsel. The litigation facilitator acts as the liaison for the BTS-RE and the DOJ.

### **4.2.3 Real Estate Management (including, Technical Services Managers)**

Real Estate management will attend initial case review meeting and may, if appropriate, attend post litigation wrap-up conferences. The BTS-RE manager or Real Estate supervisor approves litigation reports for WisDOT. Regional Real Estate management has the authority to review and approve litigation settlements for state projects and local projects with state or federal funds in the right of way. DOJ and/or WisDOT may request the involvement of the BTS-RE litigation facilitator in settlement decisions regarding complex or significant cases. In making such decisions, consideration must be given to:

- Degree of risk if brought to trial.
- Possible cost benefit of avoiding further litigation expenses.
- Risk of a precedent-setting verdict.
- Strength of case.

### **4.2.4 Regional Litigation Coordinators**

The regional litigation coordinators are the main regional contact with the attorney assigned to the case. They are responsible for providing the necessary WisDOT support to the assigned attorney. Below is a detailed list of coordinator duties and responsibilities:

1. Receive and disperse Notice of Appeal in accordance with Section 4.3.2 of this manual
2. Prepare attorney working file
  - Identify people with knowledge of negotiation and acquisition history.
  - Include all relevant WisDOT file information and documents.
  - Tab and index file documentation in an organized manner.
3. Meet with counsel for preliminary evaluation of case
  - Identify and provide counsel with names and phone numbers of all potential witnesses, such as: 1) staff and fee appraisers; 2) WisDOT engineers, design supervisors, traffic engineers, etc.; 3) local highway authority personnel, zoning administrators and sewer authorities; and, 4) other state agencies.
  - Prior to meeting, become thoroughly familiar with project and parcel history.
  - Review existing appraisal reports, Negotiation Diary (RE2058), and other relevant documents.
4. Coordinate case with other agencies, when appropriate
5. Oversee coordination of appraisal reports
  - At direction of counsel, arrange for updated reports ensuring compliance with statutory rules governing just compensation.
  - Make recommendations on need for additional expert valuation witnesses.
  - Monitor and ensure new or updated reports are furnished to counsel in time to allow for review prior to date of exchange.
  - Provide names of possible fee appraisers and with concurrence of counsel, will hire and process contracts for expert trial witnesses.
  - Provide necessary documents, plats and other WisDOT materials to fee appraiser for use in appraisal of property.

- Provide or arrange for written analysis of appraisals (strengths/weaknesses, methodology, comparable sales, etc.).
6. Gather information (with direction of counsel)
    - Certified copies of deeds, survey maps or other recorded documents.
    - Contact, interview and summarize evidence by potential witnesses.
    - Relevant zoning ordinances.
  7. If owner's attorney requests to see WisDOT files and information
    - Assemble and review files, excluding documents subject to attorney-client privilege.
    - Assemble documents and information from WisDOT regions or BTS-RE files and forward to counsel.
    - Upon approval of counsel, arrange for and monitor owner's or owner's attorney's inspection of files.
  8. Depositions
    - Assist counsel in formulating questions for written interrogatories, oral depositions and request for admission of facts.
    - Assist counsel, as needed, to obtain supporting documentation and identify fact sources to prepare affidavits in support of motions.
    - Attend depositions.
  9. Attend/assist counsel at motion hearings, when requested
  10. Objectively participate in settlement/risk analysis process
  11. Attend pretrial conference when personal appearance of counsel is required
  12. Identify, locate and prepare exhibits in consultation with counsel
  13. Obtain, review and analyze jury questionnaires
  14. Attend commission hearings, where applicable
  15. Attend trial and with direction of counsel, assist in selection of jury, tracking or exhibits and coordinating witness appearances
  16. Calculate and voucher final payments
  17. Prepare Litigation Report and Case Summary (RE1651)
  18. Assist counsel, as necessary, in appellate court process

### 4.2.5 READS Data Entry - Litigation

Once an appeal has been received, it's the regional litigation coordinator's responsibility to create a litigation record in READS for each litigation case and to enter important dates, events and other key data in a timely manner. This will help to ensure the accuracy of this system for tracking litigation cases and reporting litigation expenditures. All fields in the litigation screen are considered mandatory. Many of the fields are used to calculate year-end performance indicator data or are needed to create the Litigation Report and Case Summary (RE1651). The following is a description of some of the litigation fields found in READS pertaining to litigation expenses:

- Amount (after Verdict/Decision date field) - This is total amount of verdict decision (including original award or deed amount that was already paid to owner). Note: Litigation reports are set up so that award amount is automatically deducted from calculation when only "difference" is to be calculated.
- Court/Commissioner Costs - Include such things as: court costs and disbursements; County Condemnation Commissioners fees and other miscellaneous commissioner costs; transportation of jury; filing fees; court reporter; payment for mistrial; costs associated with mediation; and, other miscellaneous legal fees.

- Dates to signify a case is closed - Whenever a case is closed, it is necessary to enter a date in at least one of following fields. The READS reports will query any litigation case that has a date entered in either of these fields and will then consider it a closed case for reporting purposes. If no date is found in either field, case will remain on active list.
  - Satisfaction Judgment Date - This date is used when a case goes to trial (court). When “loser” pays what is owed, winning attorney signs Satisfaction. That Satisfaction is filed with court.
  - Stipulation Order for Dismissal - This date applies in a pre-trial settlement situation and is provided by state's legal counsel.
  - In case of a Condemnation Commission hearing, there appears to be no formal document that signifies an end or close of hearing. In these situations, it is suggested that litigation coordinator receive an appropriate closing date from state's legal counsel and enter that date in “Satisfaction Judgment” field (for READS reporting purposes only).
- Plaintiff's Costs Owed/Amount Owed - Check box if verdict came in at more than 15% above our highest written offer. Then, in Amount Owed field, enter total amount of any owner attorney fees or owner appraisal fees owed by department.
- Settlement Amount (after Pre-Trial Settlement Date) - This should be total settlement amount (including original award or deed amount already paid to owner). If settlement gives an allocation of other administrative costs such as attorney fees, etc., these should be broken out and reported in bottom part of screen under appropriate field such as “Plaintiff's Costs Owed,” “Other State Associated Expenses,” etc. If administrative costs are not broken out, then amount put in “Settlement Amount” field will need to include these costs. Note: Litigation reports are set up so award amount is automatically deducted from calculation when only “difference” is to be calculated.
- State Associated Expenses - May include: witness fees; photo and exhibits; court preparation; special witnesses; and, litigation consultant fees (use of counsel other than DOJ). Note: Use of fee counsel other than Department of Justice is not allowed.



## 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.



## 4.4 CLAIMS AND LEGAL ACTIONS

### 4.4.1 Drainage and Change of Grade Claims

Typically, drainage and change of grade concerns are initially directed to the project engineer. If Real Estate is the owner's first point of contact, Real Estate should involve the Project Development Section (PDS) and Maintenance, if appropriate, to investigate owner's claim and make a determination as to course of action. If the problem cannot be remedied and the owner files a formal claim, the claim should be forwarded to the Office of General Counsel (OGC). The property owner's claim must be filed with WisDOT within three years after alleged damage occurred. Claim must be filed with WisDOT per [s. 88.87 Wis. Stats.](#), within three years after the alleged damage occurred. Note: There is no WisDOT form. Property owners generate claims.

#### 4.4.1.1 Drainage Claim Details

The claim shall include a written, sworn statement from the landowner of the alleged faulty construction and a legal description of the land alleged to have been damaged by excessive flowing or pooling waters. Within 90 days after receiving the claim, WisDOT has three options:

1. Correct causes of damages. Send BTS-RE appraisal manager - claim from landowner. Verification from project engineer that claim is warranted, (i.e., it is determined that project directly caused alleged problem); and, provide a written estimate to correct problem and a recommendation from region.
2. Acquire right to use land for drainage or overflow purposes. If drainage rights or easements are to be purchased or condemned as provided in [s. 88.87\(2\)\(b\) Wis. Stats.](#), region will develop a plat defining area of easement (as a new parcel) and proceed with purchase under our standard acquisition process. An existing project plat may be used if that project has not yet been closed.
3. Deny claim. If BTS-RE appraisal manager denies claim, region will be notified in writing and region is required to notify property owner in writing of this denial. If no action is taken within 90-day period, property owner may consider claim denied or may bring an inverse condemnation action under [s. 32.10, Wis. Stats.](#)

#### 4.4.1.2 Change of Grade Claim Details

When a street or highway improvement project causes a change of grade that damages an adjacent property but does not require a taking, the property owner may file a claim for damages within 90 days following the completion of the project. The claim can only be filed for damages if there was not a prior taking from the property. The claim for such damages is more completely described in [s. 32.18 Wis. Stats.](#) The original claim and a regional analysis of the change of grade claim along with a recommendation for approval or denial should be sent to the BTS-RE appraisal manager. If a cost to cure is recommended, an estimate must accompany the submittal. If a dollar recommendation is submitted, it must be accompanied with an appraisal. Within 90 days after receiving the claim the department has three options:

1. Correct alleged cause or damage.
2. Approve claim.
3. Deny claim.

If the claim is denied, the owner may file an action against the department within 90 days. If an action is filed, the region follows the same procedure as if it was an appeal under [Chapter 32, Wisconsin Statutes](#). See sub-section 4.3.1 of this manual.

#### **4.4.2 Incidental Expenses to Transfer Property**

Claims must be filed as per [s. 32.195 Wis. Stats](#). Claims eligible for reimbursement are listed on the Relocation Claim - Application and Release (RE1527). Region/CO approves claim and supporting documentation is placed in the file.

#### **4.4.3 Claim or Action Against a State Employee**

Claims must be served on the Attorney General as provided for in [Sections 893.82](#) and [895.46, Wis. Stats](#). Original documents are sent to Risk Management.

#### **4.4.4 Construction Claim**

Any claim during construction is forwarded to the regional Project Development Section (PDS).

#### **4.4.5 Crop Loss Damage Claim**

For a crop loss damage claim (caused by survey crews), the regional Survey Unit completes the Survey Damage Agreement, ED717-71 and voucher payment, if warranted.

#### **4.4.6 Notice of Claim Filed with Claim Board**

Any party receiving a Notice of Claim from the Claims Board must contact Risk Management to see if they have been served.

#### **4.4.7 Lawsuits Naming the State**

In actions in which the state of Wisconsin or WisDOT is named as a defendant, use the same procedure for handling an appeal under [Chapter 32, Wisconsin Statutes](#). Also see sub-section 4.3.1 of this manual.

#### **4.4.8 Subpoena**

Any party served a subpoena to appear at an administrative proceeding or civil act or criminal proceeding must contact the Office of General Counsel. Contact should be made via phone since this is usually time sensitive and the original documents must be forwarded immediately.

#### **4.4.9 Inverse Condemnation**

Inverse condemnation is a condemnation proceeding instituted by the property owner rather than WisDOT. If the property owner believes his or her property has been taken or damaged by the actions of the WisDOT, without receiving just compensation, he or she may commence an inverse condemnation action. See [s. 32.10 Wis. Stats.](#) for details. To be handled the same as an appeal from a deed or the Award of Damages. Also see sub-section 4.3.2 of this manual.

#### 4.4.10 Right to Take

An owner may contest the taking by commencing an action in circuit court (not the Condemnation Commission) of the county in which the property is located within 40 days from the day of service or date of publication of the Jurisdictional Offer. This action shall not prevent the condemnor from proceeding with the condemnation. Note: The acceptance and retention (i.e., cashing the check) of any compensation resulting from an award made prior to the commencement of such an action shall be an absolute bar to such action [s. 32.05\(3\)\(h\) Wis. Stats.](#) The regional litigation coordinator should make an effort to monitor the payment status of the award check when a right to take is filed within the 40-day statutory period and to promptly advise the attorney representing WisDOT when the check is cashed. When a right to take appeal has been filed, we suggest that the regional litigation coordinator contact the BTS-RE/Finance to determine if the acquisition check has been cashed. If the check has not been cashed, give BTS-RE/Finance the payee's name and the check number and have them contact the regional coordinator if the check comes in. The day before depositions and the day before court, the regional coordinator should again contact the BTS-RE/Finance to confirm that the check has not been cashed.