

judgment in determining what type of rest, recreation and sanitary facilities shall be constructed in areas acquired for such purposes. (I might tell you that the Bureau has unofficially advised me that the construction of a picnic area within a recreation area is permissible). In giving this parting bit of advice I hope the Bureau's engineers and the State Highway Departments use the same dictionary in defining "good judgment".

WESTERN EXPERIENCE WITH SCENIC VIEW AND PROTECTION EASEMENTS

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My part of this program is to discuss western experience in the acquisition of scenic view and protection easements, in furtherance of the national beautification program.

Beauty is said to be an assemblage of graces or properties satisfying the eye, ear, intellect and aesthetic or moral sense. It just occurs to me that beauty is not the same thing to all persons. I am acquainted with a quite famous geologist who once observed with me a large segment of land, occupied by many homes, that had detached itself from the mainland and was slowly sliding into the Pacific Ocean. He thought the view was beautiful. Apparently the younger generation's idea of beauty, or at least with some of them, is a hair style that likens them to some species of sheep dogs. In fact, I have an adjective book that lists some 231 adjectives that can be used with the word "beauty". For instance, pristine, evanescent, ravishing, unattainable, naked and bridal, to mention a few. So much for my opening remarks regarding beauty.

There seems to be a complete dearth of experience in the western states in the acquisition of scenic easements, with a few minor exceptions. The bulk of the states who answered my inquiries have had no experience whatsoever.

The State of Washington, prior to 1965, had a very limited experience. If they desired to preserve an area because of its scenic value, they would purchase the land involved as a roadside rest area, but the conveyance to the state would not spell out the real purpose of the acquisition.

Two examples were furnished. One involved a vista point near the vantage crossing of the Columbia River in Central Washington. The area was acquired in fee and signed as a rest area as well as a vista point.

The other acquisition involved ten acres of land in Western Washington near the coast. The area was undeniably picturesque and had a great potential for recreational development. The need was outlined as for a rest area purpose. The necessity for the taking was contested by the owners. Following a court hearing on this point, the court, while siding with the state, commented that the state's analysis of the need of highway users for rest in that vicinity might be exaggerated.

In 1965, however, the Washington Legislature authorized acquisition of areas outside of the right of way for beautification purposes, but the authorization carries no authority to condemn.^{1/} It appears, therefore, that Washington has already accomplished some scenic control that others previously thought they had no authority to do.

South Dakota, while having no previous experience in this field, attempted in their 1965 legislative session to amend their highway law to enable them to acquire property for roadside parks, including such sanitary, rest, recreational and other facilities reasonably necessary to provide for the suitable accommodation of the public, and for landscape development for the preservation of the natural beauty through which the highway is constructed.^{2/}

This bill failed of passage. The Chief Counsel's opinion of this failure is based upon considerable anti-feeling on the part of the public and the legislature to the extension of power of the state to acquire property by condemnation. He informs me that there has been, in recent years, a tremendous number of cases brought to acquire properties for the Missouri River Reservoir development, and he is very skeptical about the reception by the legislature of a beautification act. [Ed. Note: The 1966 session of the South Dakota Legislature passed a law (S.B. 69) providing for acquisition of strips of land adjacent to federal aid highways for the restoration, preservation and enhancement of scenic beauty by purchase, exchange or condemnation.]

New Mexico has had no experience. Their Chief Counsel in answer to my inquiry stated that my desire to research western experience in this field left him breathless. He has, however, prepared enabling legislation for the next session of their legislature, which they have hopes will be received favorably. [Ed. Note: New Mexico has now passed a comprehensive law (S.19, 1966) providing for control of billboards and junkyards, and acquisition of property for scenic development.]

Arizona and Wyoming both report that they have had absolutely no experience with scenic view and protective easements.

While Colorado's experience is almost nonexistent, they do report that about 25 to 30 years ago the Colorado Department of Highways did acquire some planting easements for highway beautification purposes. This was done when land values were low and landowners were hard pressed for money. This was probably accomplished without legislative authority, since my informant tells me that the Attorney General's Office has now ruled they have no authority to acquire planting easements outside of the normal highway right of way. [Ed. Note: A law authorizing the acquisition of property for scenic development and roadside rests (H. 1017) has passed both houses of the state legislature at the time of going to press.]

Oregon has long been cognizant of the need of beautifying its highway system. In 1920, the Chief Counsel, in his biennial report, made this comment:

"It often develops that state highways could be made more convenient and more beautiful and their scenic features improved if the State Highway Commission or some other department of state government had the authority to acquire by purchase, agreement or by the exercise of the power of eminent domain, additional land for parking privileges and purposes.* * *

Closely related to the subject just mentioned, is the matter of preserving the trees along the highways for a certain distance back from the right of way. There should be some legislation which would make this possible; such legislation would, of course, necessitate appropriation of private property for the purpose of beautifying or otherwise adding to public highways, and therefore, some means or measures would be necessary to compensate the owners of the property."3/

The 1921 legislature, as a result, gave to the highway commission the necessary authority to acquire land for the purposes enumerated.4/

It is interesting to note, however, that with this authority, the state never resorted to the use of easements to protect scenic views along highways, with one exception. Oregon's experience in providing beautification to its highway system has always been by the acquisition of fee title to adjacent areas for this purpose, primarily for park, wayside and roadside rest development. The one exception involved the preservation of groves of myrtle trees located along the

Oregon Coast highway. As you may know, the two areas in the world in which these trees predominate are Oregon and the Holy Land. The agreement form used, a copy of which is attached,5/ might be characterized as a scenic or protection easement.

There is also established in Oregon a Scenic Area Board.6/ The Board is appointed by the Governor and consists of two members at large, representing the public, and one member each to be selected from the following groups:

- a. Motoring clubs
- b. Labor organizations
- c. Outdoor advertising industry
- d. Oregon State Highway Commission
- e. Roadside service industries.

This board has authority to create and vacate the establishment of scenic areas adjacent to or along public highways, with certain exceptions.7/ In the area so designated, no advertising panel, structure or sign, the primary purpose of which is to be viewed from the highway, is permitted. Lawfully existing signs have seven years in which to move.

The state was going to rely upon its police power in forcing the removal of signs, where necessary, but the beautification act of 1965 decrees otherwise.

Of all the western states, California appears to have had more experience with protection easements than all of the others. An excellent paper on "Acquisition of Scenic Easements" was delivered at the 1965 Workshop on Highway Law by John B. Matheny, Ass't. Chief Counsel, California Department of Public Works. I have borrowed copiously from his paper in reference to California's experience.

More than 35 years ago in California there were some areas acquired that were designated as scenic easements. All were acquired through negotiation. They did not relate to their highway system, but rather to their park system.

Their start on a scenic easement program relating to highways commenced in 1963,8/ and was limited and related to the construction of Interstate Highway No. 5. Further scenic highway legislation became effective on July 1, 1964.9/

The initial system was the result of a study by the Citizens Advisory Committee on Scenic Highways which advises the Department of Public Works in relation to establishing and applying planning and

design standards for development of scenic highways. Guidelines and standards have been adopted in this connection.10/

Last, but not least, my own state of Nevada. I can cover our experience by simply stating we have had none.

In conclusion it appears we in the west are entering in a new field with not a great deal of precedent to guide us. The type of document to use will not pose too great a problem, perhaps, but the valuation and subsequent cost of scenic easement may result in a headache or two.

FOOTNOTES

1/ WASHINGTON: Extra Sess. of 1965, Ch. 170

Sec. 60 - "The State highway commission and the joint committee on highways are authorized and directed to undertake a survey and prepare a program for the utilization of federal-aid funds available under 23 U.S.C. Sec. 319, or any other similar federal program, providing for highway landscaping, safety rest areas and acquisition of strips of land adjacent to our highways for the preservation of its natural beauty. The program shall be submitted to the 1967 Legislature prior to its convening."

Sec. 62 - "The State Highway Commission is authorized to acquire title to or any interests or rights in real property adjacent to state highways for the preservation of natural beauty, historic sites or view points or for safety rest areas."

2/ SOUTH DAKOTA: 4th Sess. 1965, H.B.683

"Amending SDC 1960 Supp. 28.13A01 - From and after the effective date of this act, whenever any land or lands, easements in same or material is necessary for right of way in order to make a safe or proper grade, or for widening, changing, relocating, constructing, reconstructing, maintaining or repairing any portion of the state trunk highways, or whenever it is necessary for providing cut slopes, borrow pits, channel changes, **ROADSIDE PARKS, INCLUDING SUCH SANITARY, REST, RECREATION AND OTHER FACILITIES REASONABLY NECESSARY TO PROVIDE FOR THE SUITABLE**

ACCOMODATION OF THE PUBLIC, LANDSCAPE DEVELOPMENT FOR THE PRESERVA-
TION OF THE NATURAL BEAUTY THROUGH WHICH THE HIGHWAY IS CONSTRUCTED,
or to afford unobstructed vision of said trunk highways at any point
of danger to public travel, for right of way and borrow pit,*****"

3/ History of Oregon State Parks (1917-1963) - Page 2, Compiled by
Chester H. Armstrong.

4/ ORS 366.345.

5/ Oregon Easement - Myrtle Trees

AGREEMENT

THIS AGREEMENT, made and entered into this 12th day of July,
1946, by and between the STATE OF OREGON, by and through its State
Highway Commission, hereinafter called the "State", party of the
first part, and A. J. Sweet, his heirs or assignee, hereinafter called
the "Owners", parties of the second part;

WITNESSETH:

RECITALS:

1. The undersigned Owners hold fee title to the real property hereinafter described, on which property or portions thereof there are growing myrtle trees of such value as to justify special effort and special means for their preservation.
2. That said real property abuts upon the Oregon Coast Highway, which is a part of the Oregon state highway system and is one of the scenic roads of the State.
3. Because of the fact that only in a few places in the world, one of which is the State of Oregon, are there found groves of myrtle trees, it is the considered judgment of the Commission that sufficient of the myrtle trees growing upon real property bordering and paralleling the Oregon Coast Highway should be preserved to form a myrtle lane. It is further the judgment of the Commission that the area immediately surrounding the trees should be cleared of underbrush and dead and other offensive growth, and the entire setting converted into and thereafter kept in a condition suitable and fitting for such rare and classic trees as the myrtle.

NOW, THEREFORE, in consideration of the things to be done by the State and in consideration of the mutual benefits and public good which will for all time be shared and enjoyed by the Owners and the public generally, the said Owners hereby sell, transfer and convey to the State of Oregon, by and through its State Highway Commission, and/or its successors, an undivided joint, common and equal interest in and title to all of the myrtle trees now standing or growing or which may hereafter grow upon the following described real property situated in Coos County, State of Oregon, to wit:

A parcel of land in the W 1/2 NE 1/4 of Section 30, Township 28 South, Range 13 West, W.M., being more particularly described as follows:

Beginning at a point on the easterly right of way line of the Oregon Coast Highway opposite and 30 feet distant from Engineer's centerline Station 243 + 00 of said highway, thence South 69° 34' East 470 feet, thence southerly 700 feet more or less to a point that is North 87° 53' East a distance of 600 feet from Engineer's centerline Station 233 + 41.3 P.C. of said highway, thence southwesterly 900 feet to a point on the east and west centerline of the said section 30, thence west along said east and west centerline 600 feet to the center of the said section 30, thence north to the southerly right of way line of the said highway, thence northeasterly along said right of way line to the place of beginning, save and except 0.81 acres previously deeded to the state for stockpile purposes, leaving a net area of approximately 16 acres,

together with the perpetual right and privilege to go upon said property for the purpose of cleaning up underbrush, trimming, cutting or otherwise removing dead limbs and other growth, and burning or otherwise disposing of waste material, and for the purpose of doing such other things as in the opinion of the State Highway Commission are necessary and appropriate for the preservation and development of said trees, and their settings and surroundings; provided that in the doing of any of said things the State Highway Commission, its officers, agents and employees shall always keep in mind the historic significance, the forest dignity and the primitive aspect which the myrtle possesses among the trees and woods of the world.

The State shall from time to time consult with the Owners, or their successors, to the end that the interests of the Owners and of the public may at all times be promoted and conserved.

Nothing in this conveyance, transfer or sale shall be in anywise construed or deemed to pass, convey or vest in the State any interest in or title to the real property hereinabove described, save and except such interest as may be incidental to the growth, the preservation, the culture and development of said trees.

The Owners shall and do reserve the right to use the said real property freely and at all times for any and all purposes not inconsistent with the purpose and objective of this agreement; provided, however, that in the use of said property the Owners shall employ every reasonable means and adopt all measures and methods necessary for the preservation of the trees and such measures and methods as will conserve, supplement and implement the work done from time to time by the State for the beautification and preservation of said trees and their surroundings.

It is agreed that no trees shall be cut or trimmed by the Owners without first procuring the written consent of the State Highway Commission or its successors. In the event that any tree or part of a tree is trimmed, cut or felled with the permission and consent of the State Highway Commission, the tree or portion of the tree cut or felled shall, if it have commercial or other value, become the property of the Owners, and the State shall have no interest therein.

If improvements or structures are hereafter placed or erected on any part of said real property by the Owners the preservation and protection of the trees upon the land shall be given first and paramount consideration.

The State shall not place on said real property any structure of any kind or character, except signs or other structures the purpose of which is to give information to the general public with respect to the character of said area and the purpose of the State and the Owners in protecting and conserving the same.

Nothing in this agreement shall be permitted or construed in such manner as to impair or in any way affect the right of the State to acquire title to said property by purchase, donation or agreement or by the exercise of the power of eminent domain.

It is agreed that the judgment and decision of the Highway Commission with respect to the method, the extent, the type and the character of the improvement, and the maintenance of said myrtle land in general and of the above described section thereof in particular shall be final.

The purpose or objective sought to be accomplished by this compact is one of mutual interest to the Owners and the general public, and

therefore, each party to this agreement pledges to the other complete and wholesome cooperation, to the end that by their joint and continued effort there may be for all time preserved for the people the stately grandeur of trees which are peculiar and native to the State of Oregon -- the myrtle tree.

IN WITNESS WHEREOF, the parties hereto have subscribed their names and affixed their seals the day and year first above written.

ATTEST:

STATE OF OREGON, by and through its State Highway Commission,

Secretary

By _____
As Chairman

APPROVED:

By _____
As Commissioner

State Highway Engineer

By _____
As Commissioner

APPROVED:

Party of the First Part

State Parks Superintendent

Parties of the Second Part

STATE OF OREGON)
) ss.
COUNTY OF COOS)

On this 12th day of July, 1946, before me, a Notary Public in and for said county and state, personally appeared the within named A. J. Sweet, to me personally known to be the identical person described in and who executed the within instrument, and who acknowledged to me that he executed the same freely and voluntarily for the uses and purposes therein named.

Witness my hand and official seal this the day and year last above written.

Notary Public for Oregon
My commission expires April 11, 1949.

6/ ORS 377.505 et seq.

7/ ORS 377.520 (2)

8/ California Government Code Sections 7000-7001

7000. INTENT TO PROVIDE MEANS FOR STATE DEPARTMENTS TO OBTAIN REAL PROPERTY INTEREST IN CERTAIN SCENIC LAND FOR PUBLIC USE. It is the intent of the Legislature in enacting this chapter to provide a means whereby the Department of Water Resources, Parks and Recreation, Fish and Game, and Finance, of the State of California, may acquire by purchase, gift, grant, bequest, devise, lease, condemnation or otherwise, the fee or any lesser interest or right in real property in order to protect, preserve, maintain, improve, restore, limit the future use of, or otherwise conserve for public use and enjoyment any of the lands and areas, identified below, alongside the Westside Freeway, Interstate Route 5, and the California Aqueduct, which have significant scenic values:

(a) Between the California Aqueduct and the Westside Freeway from Highway 41 north to Milham Avenue.

(b) Between the California Aqueduct and the Westside Freeway from Ness Avenue north to Pioneer Road.

(c) Between the California Aqueduct, the Westside Freeway and the Delta-Mendota Canal from Cottonwood Road north to the freeway-aqueduct crossing at Orestimba Creek, and between the aqueduct and freeway north of that point to the Alameda county line.

The Department of Public Works may acquire scenic easements along said Westside Freeway, provided that funds for such easements are obtained pursuant to the provisions of Section 319 of Title 23 of the United States Code relating to the purchase of interests in land adjacent to highway rights-of-way, provided further that the federal government reimburses the State for the costs of such scenic easements, and also provided that the use of money for this purpose will not reduce the amount of funds which would otherwise be available to the State for highway purposes.

7001. ACQUISITION OF PROPERTY INTEREST A PUBLIC PURPOSE: POWERS OF DEPARTMENTS: LEASE OF PROPERTY UNDER CONTRACT TO CONSERVE SCENIC VALUE OF PROPERTY. The Legislature hereby declares that the acquisition of interests or rights in real property for the preservation and conservation of the scenic lands and areas provided for in Section 7000 constitutes a public purpose for which public funds may be expended or advanced, and that any of the state departments specified in this chapter may acquire, by purchase, gift, grant, bequest, devise, lease, condemnation or otherwise, the fee or any lesser interest, development right, easement, covenant or other contractual right necessary to achieve the purposes of this chapter. Any of said departments may also acquire the fee to any of the property for the purpose of conveying or leasing said property back to its original owner or another person under such covenants or other contractual arrangements as will conserve the scenic character and value of the property in accordance with the purposes of this chapter.

9/ California Streets and Highway Code Sections 227, 228, 229, 229.1

227. CREATION; COMPOSITION; APPOINTMENT; TERM - The Advisory Committee on a Master Plan for Scenic Highways, hereafter referred to in this chapter as the advisory committee, is hereby created. The advisory committee shall consist of seven members appointed by the Governor from among officials of cities and counties, persons having special competence in the field of landscape architecture as it relates to scenic conservation and others interested in highways, land planning and park problems.

Of the seven members first appointed by the Governor, two shall serve until July 1, 1964, two until July 1, 1965, two until July 1, 1966, and one until July 1, 1967. Thereafter appointments shall be for a four-year term. Each member shall hold office until the appointment and qualification of his successor. Vacancies occurring prior to the expiration of a term shall be filled by appointment for the unexpired term. (Formerly 220, added Stats. 1963, c. 1788, p. 3600. Renumbered 227 and amended Stats. 1965, c. 155, p.____, 2.)

228. CONSULTATIONS; ASSISTANCE - The advisory committee may consult with representatives of the State Office of Planning, the Department of Public Works, the Department of Parks and Recreation, and the Department of Water Resources who are appointed by the officer in charge of such office or department. These representatives shall supply to the advisory committee such technical and other assistance as the advisory committee requests. (Formerly 221, added Stats. 1963, c. 1788, p. 3600. Renumbered 228 and amended Stats. 1965, c. 155, p. ____, 3).
229. MEETINGS; EXPENSES - The advisory committee shall meet upon call of the Director of Public Works. The members of the advisory committee shall serve without compensation, but shall be reimbursed for all necessary expenses incurred in the performance of their duties. (Formerly 222, added Stats. 1963, c. 1788, p. 3600. Renumbered 229 and amended Stats. 1965, c. 155, p. ____, 4).
- 229.1. DUTIES - The advisory committee shall develop a master plan for scenic highways, shall advise and counsel the department with regard to the establishment and application by the department of standards for official scenic highways, and shall advise and counsel the department regarding the designation by the department of highways in the state scenic highway system as official state scenic highways when such highways meet the standards prescribed by the department for official scenic highways, including the concept of the "Complete Highway," as described in Section 261. The committee shall also advise and counsel the department regarding the authorization by the department to a county to designate a county highway as an official county scenic highway. (Formerly 223, added Stats. 1963, c. 1788, p. 3600. Renumbered 229.1 and amended Stats. 1965, c. 155 p. ____, 5).

10/ Guidelines and Standards

1. Location to preserve the natural environment and to unfold new scenic locations;
2. A design to fit the character of the area minimizing unsightly scars on the terrain;
3. Avoid cutting valuable trees and growth insofar as suitable alternatives are available and utilizing timber screens to hide unsightly views;

4. Wide medians, curvilinear alignment, and independent roadways on multilane facilities;
5. Consideration of bridges, tunnels, and artistic retaining walls in lieu of cuts and fills;
6. Additional flattening of slopes and planting of ground cover;
7. Careful consideration to location and design of structures;
8. Avoid old material sites;
9. Concealment of drainage facilities where possible; and
10. Careful landscaping of interchange areas and particularly with the use of indigenous growth.