

Special Challenges of Defending Construction Claims Related to Low-Volume Roads

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The author relates the special challenges of defending construction claims related to low-volume recreational roads as based on her experiences as counsel for the Eastern Federal Lands Highway Division of FHWA since 1984. Specifically, the author addresses (a) the unique design of low-volume roads, including the limited right-of-way and the efforts to design to "fit the land" and to provide a more accommodating ride; (b) the special qualifications required of the contractors, who may have to work in a "tight," or environmentally sensitive, area; (c) the difficulties of administering a contract in low-volume areas owing to the isolated nature of many low-volume road areas; and (d) the lack or misapplication of standard references, which were developed primarily for high-volume roads, and the impact on the potential for claims and on the focuses, strategies, and litigation support necessary to defend them.

As counsel for the Eastern Federal Lands Highway Division (formerly Eastern Direct Federal Division) of FHWA since 1984, the author has learned that there are still pioneers in the business of building roads, and many of them are working with low-volume roads. The Interstate system in the United States has been documented and standardized to the point that its design, construction methods, and even contract administration have become among the basic references for those in the field of highway construction. But the large number of potential users (i.e., the anticipated daily traffic) requires that the Interstate system, and other high-volume roads, of necessity incorporate a "first class approach," including the best engineering, materials, and low-risk contract administration, because of the serious potential impacts of such choices. For example, a simple collision ("fender bender" in American slang) between two cars at 55 mph is a far more serious matter than one at 35 mph. Low-volume roads, conversely, offer the potential for innovation, forced in part by the accompanying restrictions of the use of low-budget engineering concepts, because most low-volume roads are not granted the higher budgets per mile of the Interstate and primary systems. Thus, because low-volume road projects must use constrained right-of-way, locally available materials, short-cut site exploration, and other potentially high-risk procedures in order to meet their limited budgets, they encourage engineering innovation. Although this is not to say that innovation is not possible in the construction of Interstate and other high-volume roads, a primary source of innovative techniques in the highway

construction field in recent years has been the construction of low-volume roads.

This makes low-volume road construction an exciting field in which to be an engineer and a challenging field in which to be a lawyer, because construction claims frequently focus on those clauses, drawings, and so forth, that do not have a history of courtroom interpretation, that is, those that are by definition innovative. The special challenges of defending construction claims related to low-volume roads as based on the author's experience are addressed, specifically (a) the unique design of low-volume roads, (b) the special qualifications required of the contractors, (c) the difficulties of administering a contract in low-volume areas, and (d) the lack or misapplication of standard references and the impact on the potential for claims and the focuses, strategies, and litigation support necessary to defend them.

The author is not an engineer and does not have engineering training. Her viewpoint is of a lawyer who works daily with highway engineers in determining how to protect their work from the crippling impact of undue litigation. If engineers spend the majority of their time in court defending their work, they cannot carry out their assigned program. The description here of the engineering techniques that they employ is from that viewpoint and is not intended as an instructional treatise on engineering itself. Although this viewpoint may not at first appear valuable to an engineer, it should be noted that when engineers are involved in litigation regarding their work, the judge is more likely to have the author's background than theirs and even less experience in working with engineers. There is no court in the United States that hears only cases involving engineering concepts. Even the Boards of Contract Appeals, discussed later, limit their case law to anything involving contracts, including everything from general purchase to engineering administration. The result of this system is that engineering concepts must be explained to a non-engineer for a just decision to be issued. That is the lawyer's role and the role of the engineers with whom he or she works.

DESIGNING A LOW-VOLUME ROAD

Limited Right-of-Way

Unlike the Interstates, where sufficient right-of-way is acquired to allow a "total destruction" path for construction, low-volume roads are frequently designed to be sensitive to their environment, because of the nature of the land, the

deliberate effort to save adjoining properties, or the lack of funding to purchase a wider right-of-way. This means that the design of a low-volume road must often accommodate a limited width of right-of-way rather than the right-of-way accommodating the design.

To Fit the Land

In addition to the limited right-of-way, the design may have to take into account the fit of the road to the land. This may mean putting in a curve to avoid a body of water or a sudden elevation of the land rather than making a visually severe cut. It may mean designing the road so that it has a minimum aesthetic impact on the surrounding area, through use of colored pavements or specially detailed facings, for example. It may mean designing the road so that it has a minimum environmental impact, such as through detailed drainage considerations in a wetlands area.

To Provide a More Accommodating Ride

Roads built with recreational considerations, such as those in state or national parks or forests, may be designed to make the ride more accommodating to the driver. This may mean softening or decreasing the degree of change throughout a curve. It may mean planning the roadway to provide a vista beyond the road. It may mean designing pull-outs and parking to make better use of the area. It may also mean including more directional or information signs in the total roadway package. But the same road may also be used by—and must accommodate—commuters (in the case of urban parkways, such as Rock Creek Parkway in Washington, D.C., which are both recreational and employed by local residents as part of the larger urban network), large recreational vehicles (RVs), tour buses, or even log trucks.

Impacts of Design Limitations on Litigation

For all of the reasons stated above, design and construction in accordance with the design must be more strictly controlled than in the design of high-volume roads. The law frequently examines the process involved in the interpretation of a design into construction with what is referred to as the “reasonable contractor” rule. In accordance with that rule, if a reasonable contractor would assume certain tolerances in the construction of a design, those tolerances will be accepted by the court. Nevertheless, what is reasonable for a mass-produced high-volume road with a wide right-of-way may not be reasonable for a site-specific designed low-volume road with special environmental, aesthetic, and rideability intentions. Therefore, it may be necessary for the lawyer handling the defense of a claim that addresses the feasibility and necessity of design constraints on a low-volume road to educate the judge in the special purposes of the particular road. This may be done by having someone testify as to why the road was designed in the manner that it was. Those preparing the contract for the construction or modification of the road must also make a decision, at that earlier stage, whether the specifications should

emphasize that these additional considerations have been taken into account in the design. As someone who must later prepare the defense of such specifications, the author favors inclusion of a standard clause that identifies the particular type of road involved. With such a clause, a judge can see that a contractor’s arguments based on what is reasonable for a high-volume road would be inappropriate for that particular type of low-volume road. Some examples of such clauses are as follows:

xxx.xx This project is being constructed in an environmentally sensitive area. The project was designed taking into consideration the potential impact on the area of the construction and the completed project from an environmental viewpoint. The contractor should be aware that specifications that are intended to control environmental impacts will be strictly controlled. This language is not intended to suggest that any other specification of the contract will not also be enforced.

xxx.xx This project is being constructed in a national park and is intended for use by the park visitors. The project was designed taking into consideration the potential aesthetic impact of the completed project. The contractor should be aware that specifications that are intended to control aesthetic impacts will be strictly controlled. This language is not intended to suggest that any other specification of the contract will not also be enforced.

xxx.xx This project is being constructed in a residential area. The project was designed taking into consideration the potential impact of the construction and the completed project on the residents. The contractor should be aware that specifications that are intended to control such impacts will be strictly controlled. This language is not intended to suggest that any other specification of the contract will not also be enforced.

xxx.xx This project is being constructed in an agricultural area. The project was designed taking into consideration the potential impact of the construction and the completed project on the surrounding farms. The contractor should be aware that specifications that are intended to control such impacts will be strictly controlled. This language is not intended to suggest that any other specification of the contract will not also be enforced.

One of the primary problems of construction law is that of interpreting what a uniquely written specification requires. It is not uncommon in claims litigation, in discussing the potential interpretation of one state’s specification for which there is no state court case law on point, to refer to how another state’s court has interpreted it. However, although comparing one state’s specifications for high-volume roads with another state’s specifications for high-volume roads may have some validity, comparing high-volume road specifications with low-volume road specifications is like comparing apples and oranges—it frequently does not work. In one specific instance involving the Eastern Federal Lands Highway Division, a contractor who was awarded a contract to build a road designed to accommodate restricted traffic in an extremely environmentally sensitive area tried to argue that the specifications should be interpretable by reference to standard state specifications. It became necessary during the course of the hearing for the contractors’ side to present evidence that the aver-

age daily traffic on a nearby Interstate was nearly 1,000 times higher than the traffic for which this particular road had been designed. Therefore, standards developed to provide for an adequate road base for Interstate roads were simply not related to the specifications regarding subbase on the low-volume road. This sort of argument becomes necessary when a contractor is attempting to offer what he considers a reasonable interpretation of specifications through analogy and when the low-volume road's specifications are actually so unique as to not be analogous to any other standards or specifications available.

It places an additional burden on the defendant of a claim when the majority of precedent law on highway construction claims relates to high-volume roads. The defendant of a low-volume road claim must first discount the case law relating to high-volume roads as not being adequately analogous and then convince the board or court to develop new case law relating to low-volume roads. An example is the case law relating to the aesthetics of a roadway design. Of the less than two dozen cases addressing the issue of aesthetics and highway construction identified in a data base search conducted in March 1990, the majority addressed situations in which the parties arguing for an aesthetic viewpoint were organizations or individuals opposed to the construction of the highway, not the owners or administrators of such construction. (See Appendix A for examples of such cases.) It is hard with such a particular history to convince the courts that the government is indeed serious about aesthetic considerations relating to low-volume roads.

Another problem occurs when the special consideration is understood by those preparing the design but not articulated in the language of the specification. The owners or administrators of an aesthetically planned road must recognize that, to the courts, a change for aesthetic reasons is still a change. There is no open invitation in contract law to those making the substantial effort of preparing a uniquely designed road to "correct" their work as the construction proceeds. Although this "on-course correction" may appear to be the clearest solution from an engineering standpoint, it creates a substantial potential for claims. (See discussion on case law on point in Appendix B.)

In addressing claims involving design standards on low-volume roads, the attorney must rely more heavily on the engineering and technical assistance available. Because the prevalent standards are for high-volume roads and are therefore not analogous, the primary strategy in addressing a design-related claim is the use of expert witnesses. Frequently those experts are the designers themselves, but the use of outside experts may also prove valuable.

CONTRACTOR QUALIFICATIONS

The unique design considerations addressed above also affect the need that the contractor be qualified to perform the work. A contractor who has no experience in performing work in environmentally sensitive areas, for example, may be unable to properly assess the potential costs for performing such work. Not only may the techniques of performance vary, but

the preliminary stages—including obtaining appropriate permits—may be far more time-consuming, and therefore costly, than he had realized. Similar considerations are present for contractors who are constructing or reconstructing roads in remote areas for the first time. Access to supplies, labor, equipment repair, and even the site may be factors that have to be taken into account in determining both costs and techniques. The potential impact of these considerations becomes all too clear as the contractor gets deeper into trouble. There are three major impacts: delay claims, differing site condition claims, and terminations for default.

Delay Claims

From the viewpoint of a claims defense attorney, it seems that contractors never believe that delays are their fault. Of course this is true because claims never get to the attorney unless the contractor believes the delay was not his fault. Among the excuses for delays are that (a) the contract was generally inadequate (no specific inadequacy being referenced), (b) the contract was too strictly enforced, (c) the government did not protect the contractor from the government's subcontractors, and (d) the government did not allow the contractor to decide when his own workers should be endangered. Obviously, none of these excuses is directly addressed in the standard contract clauses on delay.

Analysis of a delay claim should begin with a straight examination of the facts—what happened, what happened next, and so on. Whose fault was it and how much it really increased the costs and who is going to pay for it are all secondary issues to the issue of what happened. Thus the most valuable tool in defending a delay claim is the project records. It is preferable in such situations not that the project engineer say anything and understand what was going on, but that he write down everything he sees. The first rule in defending a delay claim is to simplify it to the basic facts, and the lawyer cannot do that if the stories conflict and there is no record to answer questions. Basic contract administration (discussed further below) thus becomes crucial.

The facts enable the reconstruction of whether the delay was the government's or the contractor's fault. There is an advantage in working with low-volume road projects at this stage in that the lawyer can walk the project without being run down by a tractor-semitrailer. The projects are generally limited overall—in length, in people involved, and in contract items addressed. A low-volume road attorney can get to know the project intimately, and that enhances his or her potential presentation in court. The attorney can also get to know the people involved, including the contractor's laborers, since the contractors who can submit a responsible low bid are frequently local and have a fairly stable work force. Three years after the project has been completed—not an unusual length of time in contract claims litigation—it is still possible to trace most of those who worked on the project. The biggest concern then becomes which of several to call as witnesses rather than who if anyone can be found, as might be the case with a high-volume road. Each of these factors allows a more detailed defense of a delay claim.

Differing Site Condition Claims

As mentioned earlier, because of the isolated nature and special design characteristics of low-volume roads, the contractor's understanding of the site may be quite limited. This results in a greater potential for differing site condition claims. If the contractor's ability to conduct a thorough site investigation is limited by the site, he is more likely to skew his bid. In the same light, the office responsible for the design of the job may have conducted a more limited geotechnical or other location review. Nevertheless, the design must be based—as in any project—on some assumptions, and sometimes those assumptions are inconsistent with the actual conditions that are discovered after work at the project site begins. When actual work at the site reveals that the representations made in the contract are incorrect, that is the basis for what is known as a Category I differing site condition. When the contract makes no representations but the contractor indicates that he was entitled to expect a differing situation than the one that he encountered, that is a Category II differing site condition. Category II is the real problem in defending low-volume road claims. The chance of such a claim increases with the decrease in the amount of actual experience—both in construction and in the specific geographic area—that the contractor has. Yet many contractors believe that low-volume road projects are easier to graduate to from such simpler construction efforts as commercial parking lots and residential developments, because of their limited size (such as length in miles) and lower overall cost. In fact, the truth is that the low-volume road is more likely than a high-volume road to present technical challenges because of its unique site, isolation, special design characteristics, and so on.

From a defense viewpoint, a Category II differing site condition on a low-volume road presents more of a challenge because there are less likely to be clearly available sources or obvious comparisons to other projects with which all parties (including the judge) may be familiar on which to base what a contractor should have reasonably expected in a low-volume road area. Although there is a substantial burden on the contractor to prove such a claim, it takes less to convince a judge who knows the area than either party. In those instances, preparing any kind of defense becomes an exercise in creativity. Again, this is an instance in which the assistance of an expert witness should be considered.

Termination for Default

When a contractor underbids a job—for any of the reasons referred to above—there is a greater likelihood that he will be terminated for default, either for financial difficulties or for failure to make progress for other reasons. The less experienced the contractor is, the more likely he is to mismanage a job and increase the costs of performance and, since construction payments are based on percent completion of work, the more likely he is to decrease his rate of earnings. Yet the less experienced the contractor is, the more likely he is to underbid the job. It is a vicious cycle, and when combined with the tendency of inexperienced contractors to think that low-volume road projects are easy starter projects, it creates

a greater potential for a termination for default. This problem has been exacerbated by the recently increasing use by contractors of individual or private sureties to bond the job. Individual sureties are less likely than corporate sureties to understand the potential complexities of any road construction job. Thus, when the contractor is defaulted, the individual surety is less likely to be able to adequately take over the job and complete it. In addition, the subcontractors and suppliers may have more difficulty in collecting from individual sureties, and they are likely to turn their frustrations on the contract administrator's representative on the site. The author strongly recommends that this additional emotional burden on the project engineer be recognized by his or her supervisors. One option is to refer the calls of the unpaid subcontractors and suppliers to someone other than the project engineer to coordinate—perhaps his or her supervisor or the office's counsel.

CONTRACT ADMINISTRATION

The isolated nature of many low-volume road projects can cause difficulty in the administration of the project and affect or contribute to legal claims. The potential problems include limited communication with supervisors and technical support staff (including the attorney—many a claim can be stopped at the dispute stage with a proper understanding of the chances of winning in court), inadequate staffing flexibility, inadequate records caused by limited office support or flexibility, and personality disputes affected by isolation. A contract administrator on an isolated project cannot go down the hall to get some help. A contract administrator on a high-volume project, on the other hand, may have access to established regional offices, local United States or state's attorneys, or universities. This situation is beginning to improve marginally for the contract administrator on the low-volume road project with the increased use in project trailers of computers, modems, facsimile machines, and telephones capable of conference calling.

The attorney must recognize that limitations on the administration of an isolated project may create special problems. The supervision may have not met the highest standards at all times because qualified substitutes were unavailable, such as in situations involving extended sick leave of the project engineer. It may be necessary, for example, to have everyone who served as project engineer meet with the attorney to reconstruct what happened on a particular project. In the same light, record keeping may have been inconsistent or incomplete. And contacts made with a supervisor in another area may not have been fully communicated to the people in the field. None of these problems are insurmountable with regard to litigation if they are recognized while the defense is being prepared. The problem occurs when they do not come to light until the hearing and no response has been prepared to an allegation of apparent mismanagement by the contract administrator.

The individuals who staff these projects must be aggressive about asking for the help they need. They must also think well enough of their own understanding of the requirements of the contract and their authority to administer it to stand

firm when challenged by the contractor. Such strong egos often result in exacerbation of disputes by personality clashes. This problem is also increased by the social interactions that arise in isolation. A contract administrator on an isolated project may either associate more with the position of the contractor than his or her supervisors in another area (and allow a lesser performance than should have been required) or feel that he is the "only outpost of justice" in the area and refuse to consider reasonable requests for flexibility.

The attorney who must step into the area of dispute when it becomes a claim would do well to start by identifying any personality disputes going on. This identification may, at the worst extreme, result in a decision to limit the use of the project engineer as a witness because his emotionalism would interfere with his credibility as a professional. Other individuals may be able to perform adequately as witnesses after discussing the situation with the lawyer, their supervisors, or a neutral third party. The attorney must also consider how the trial or hearing will affect future relationships between the project engineer and local contractors. Testimony should be factual, emotionless, and considerate, even if the attorney must work with the witnesses to achieve this. A "once-burned" witness is valueless on future claims.

VARIANCES BETWEEN FEDERAL AND FEDERAL-AID OR STATE LAW

What Is the Law?

There exist significant differences in the law applicable to contracts administered by the federal government and those administered by the states with federal financial assistance. The major reason for this variance is a codification of law known as the Federal Acquisition Regulations, or FAR, which governs all federally administered contracts. FAR is a peculiar beast, since it was intended to cover all federally administered contracts, whether they are for the purchase of a major weapons system, the acquisition of a service contract to provide cleaning services for any Army base, the purchase of a single piece of specialized office equipment, the study of a government-related research issue, or the construction of a road. Thus FAR contains many restrictions on contracting, including providing notice of availability, restrictions on noncompetition, award approval, bid protest procedures, contractor bonding, and contract modification, that affect federally administered contracts but not federally assisted contracting. Although there are states that have copied portions of FAR into their own contract administration law, the majority of state law is not comparable. Thus the low-volume road contractor is likely to be required to work with both FAR and local state contract law. The systems that are most likely to vary, depending on the extent to which a particular state has chosen to adopt FAR procedures, are the areas of bid mistake and bid protest, contractor bonding, and contractor novation or termination. The author has been contacted by contractors attempting to build a case against the state on a bid mistake issue by arguing their interpretation of FAR provisions, and no amount of pointing out that FAR is simply not applicable will dissuade them (nevertheless, the author always shares such contacts with the appropriate regional

counsel for FHWA). Similarly, contractors will come before the boards and special courts attempting to argue that FAR has no greater weight than local state law for a project built entirely on federal land. Although there is no way to avoid such confusion on the part of contractors, assuming that the references in the contract are clear, the attorney specializing in low-volume road contract litigation should be aware of which jurisdiction of law governs.

What Kind of Court Is This?

The other unique aspect of federally administered contracting is the litigation system that has been established for it. Unlike in the states, claims are not filed in the principal federal or district court. Instead, federal law provides for a two-branched system to be used at the option of the contractor. After presenting a claim to the contracting officer and having it denied, the contractor can file an appeal of that denial either with the United States Claims Court or with the appropriate board of contract appeals. The Claims Court is a formal court, at a level equivalent with the district court, and appeal from it goes to the Court of Appeals, just as for the district courts. The Board of Contract Appeals, on the other hand, is an administrative court established in most of the executive departments. (Departments that have few contract claims, such as the Department of Justice, share the board of another department.) Generally, one judge presides at the hearing—the equivalent of the court trial—but the decision must be concurred in by the other members of the board. Procedures before the boards follow standard Rules of Federal Civil Procedure but are permitted some flexibility, depending upon the determination of the presiding judge. Thus, timetables for discovery and filings can be shortened by the judge in order to expedite the scheduling of the hearing itself. It is not unusual for a trial to be scheduled over a year after the initial filing with the Claims Court, whereas a hearing may be scheduled within 4 to 6 months, or, with an even more expedited procedure allowed for smaller claims, within 60 days. The documents submitted and the number of witnesses called by either party may also be restricted by the presiding judge.

Because of their structure, the boards are semi-independent. Appeal can be taken from them to the Court of Appeals, but this is unlikely. Thus the boards create their own case law on new issues. A board may or may not consider the position taken by their fellow boards, or even the position taken by the Claims Court. An example of this is the issue of whether a contractor could appeal a termination for default when he suffered no direct monetary costs. For years, one board held that he could, whereas the other boards and the Claims Court held that he could not. The issue was finally decided by the Court of Appeals in favor of the contractor. This peculiarity means that an attorney researching the relevant law must look first to whether the issue has been addressed by the Court of Appeals (which is unlikely), then to whether the Claims Court has discussed it (only occasionally true, because contractors tend to prefer the boards, which provide a faster decision), then to whether any of the boards has addressed it (more likely), and then to whether the particular Board that will hear the appeal has addressed it and has or has not agreed with the other boards or the Claims Court. The legal argu-

ments (or brief) must then address not just what the precedent law is, but which forum issued it and how persuasive that forum is to the one hearing the appeal. Contract law as it is being developed by the courts and boards thus is more closely analogous to a multibranch tree than to a simple linear progression from lower court to upper.

AVOIDING OR CONTROLLING LITIGATION

The primary issue in litigation involving low-volume roads is the same as that for high-volume roads: how can litigation be avoided? Litigation cannot be entirely avoided except by the unlimited payment of all claims presented. It can, however, be limited or controlled by the following efforts.

First, the contract should be written to anticipate potential problems. If a particular effort is required to comply with a specification, that should be noted. Perhaps that will educate—if not deter—the less experienced contractor. Special caution should be taken in the preparation of specifications that are intended to produce a subjective result, such as aesthetics. Courts will not enforce subjectivity and will treat such a clause as ambiguous. Thus, an aesthetic standard must be translated into an objective requirement.

Second, the contract should be enforced as written or else modified accordingly. The contract administrator's only defense is the contract itself. If the contract was not enforced, there is no other authority for the contractor's actions.

Third, in administering a contract, warning signs—such as a contractor's financial difficulty or failure to make progress—should be watched for and addressed promptly. An experienced contract administrator may realize that an inexperienced contractor is getting into trouble before the contractor does. Problems addressed at an early stage may keep the matter out of court. At worst, they put the government in the position of saying in court that everything possible was done to avoid or limit the impact of the problem.

Fourth, problems on the project should not become personal problems. The contract administrator has the right to require the contractor to do whatever is in the contract, or to require the contractor to perform in accordance with an appropriate modification, or to delay the contractor for a valid purpose. The contractor is entitled to be paid for his work, including the changes, or for any delay to performance. Neither is a personal issue. Personality only makes the legal arguments unclear.

Fifth, meticulous records of what occurred on the project must be kept. This is especially true if litigation appears imminent. Because not all litigation can be anticipated, it is better to apply this rule to all projects. Although recordkeeping is a major cut into an engineer's time (a recent Freedom of Information Act request to the author's division for all of the documents related to a specific project resulted in the identification of over 6,000 separate documents), good records can win cases.

Sixth, the engineer should work with the lawyer to educate him as to what the engineer was doing or trying to do on the project. The best legal cases in highway construction law are clear presentations of engineering positions.

Finally, the courts are impressed by the professionalism of engineers. The judges recognize their own limitations in

understanding the specific considerations of highway engineering, and they will give great credence to an engineer-witness who is professional in demeanor, tone, and discussion. Therefore, an engineer witness should present himself with pride and speak objectively but with authority with respect to his areas of expertise. For purposes of this case and this judge, he is the noted expert in his field.

APPENDIX A: CASE LAW REGARDING AESTHETICS VERSUS ROAD CONSTRUCTION

Coalition Against a Raised Expressway v. Dole, U.S. Court of Appeals, 11th Circuit, Jan. 13, 1988.

This case held that noise impacts of a proposed raised highway could constitute "constructive use" of an adjacent park. *The County of Bergen v. Dole*, 620 F. Supp. 1009 (1985).

In this case, a citizens' group opposed the construction of a segment that would complete Interstate 287 in New Jersey because of severe aesthetic impacts, despite the fact that studies of the proposed alignment included studies of the aesthetics from both the potential users' and the nonusers' viewpoints.

San Antonio Conservation Society Members v. Texas Highway Department, 496 F.2d 1017 (1974).

An earlier case decided that a road was still subject to environmental review despite the fact that the state had withdrawn its request for federal funds to build it. That decision was overturned in the cited case.

Indian Lookout Alliance v. Volpe, 345 F. Supp. 1167 (D.La. 1972).

In this case, the plaintiffs argued that separate impact statements should be prepared for segments of a proposed 1,900-mi roadway. The court held that it was too early to declare that the proposed segments were federal action, since only general corridors, and not specific routes, had been designated.

Citizens to Preserve Overton Park v. Volpe, 91 S.Ct. 814 (1971).

This is probably the best-known case in the field of environmental law versus highway construction. The local organization sought to stop the construction of a road that would take a portion of parkland.

Miller v. United States Department of Transportation, 710 F.2d 656 (1983).

This case may serve as an example of a contrary viewpoint. In this case, plaintiffs, a husband and wife who were injured when their car slid off of the road in icy conditions, charged that the Department of Transportation had acted improperly in approving plans to construct a portion of an Interstate in a mountainous area without guardrail, despite the fact that Title 23, U.S. Code, Section 109(h)(2), directs the consideration of "aesthetic values" in approving the design of any project. Thus aesthetics may be used as a tool by the plaintiffs in the environmental cases, but may not be an adequate defense in a tort claim.

APPENDIX B: CASE LAW INTERPRETING AESTHETIC SPECIFICATIONS

Appeal of Wayne L. Grist, Inc., ENG BCA No. 5503, Corps of Engineers Board of Contract Appeals, 90-2 BCA (CCH) P22,915, May 10, 1990.

The contract that was the focus of this litigation required the contractor to take steps to prevent "environmental pollution," which was defined in part as "the presence of chemical, physical, or biological elements" that "degrade the utility of the environment for aesthetic or recreational purposes." The board allowed this provision to be read with another provision to limit areas in which the underbrush that had to be cleared could be burned rather than excavated. The provision would not have been enforceable by itself, however, according to the interpretation of the board. The other provision held to be necessary to effect the "aesthetic" provision required that burning limits be set. Thus work that is otherwise required to be limited can be required to be limited for aesthetic reasons as well.

Appeal of Reynolds Construction, Inc., ASBCA No. 32047, Armed Services Board of Contract Appeals, 89-3 BCA (CCH) P22,126, June 28, 1989.

In this case, the government directed additional work (the application of a slurry seal to a ravelling road surface that appeared open-graded) as an "esthetic solution" for the appearance of the work. The contract did not contain a specification that addressed aesthetic considerations. And the board concluded that the open-graded appearance was the result of the aggregate size that the government had directed the contractor to use. Therefore, the board held that the government could not direct such a change for aesthetic reasons without paying for it. On the other hand, to the extent that the addition of the slurry seal corrected the ravelling—which the board held to be a workmanship defect—the government was entitled to direct the additional work without creating any entitlement in the contractor.

Appeal of J. D. Abrams, ENG BCA No. 4332, Corps of Engineers Board of Contract Appeals, 89-1 BCA (CCH) P21,379.

In this case, the government directed the contractor to add additional rock spalls to the wall of a dam in order to improve its appearance from a distance. The government argued that the method chosen by contractor to place the rock spalls created an unsatisfactory appearance, but the board held that the government had not specified how the work was to be performed nor how it should look when finished, and therefore had no basis to order the additional rock without creating an entitlement in the contractor. "[T]he Board is of the opinion that the visual criteria relating to the rock spalls which was imposed by the Government amounted to a constructive change for which Appellant is entitled to an equitable adjustment."

Appeal of Snider Lumber Products Co., AGBCA No. 78-171-5, Department of Agriculture Board of Contract Appeals, 81-2 BCA (CCH) P15,218, July 10, 1981.

In this case, the board upheld an amount set in the contract by the Forest Service for damage to or the cutting of trees as an impact on an aesthetic consideration. It is unlikely, however, that the board would have allowed such a deduction or damage charge if it had not been specified in the contract. In other words, the time to anticipate aesthetic damage is in the contract.

Gifford-Hill & Company, Inc., v. Federal Trade Commission, et al., U.S. District Court for the District of Columbia, Civil Action No. 74-1265, 389 F. Supp 167, November 13, 1974.

"All agencies which undertake activities relating to environmental values, particularly those values relating to amenities and aesthetic considerations, are authorized and directed to make efforts to develop methods and procedures to incorporate those values in official planning and decisionmaking." Dicta (i.e., a quote that has no value except to show the viewpoint of the court). Aesthetic considerations are "motherhood and apple pie," but they are not law.