

# NCHRP

National Cooperative Highway Research Program

# LEGAL RESEARCH DIGEST

February 1991

Number 19

Legal Research Digests are issued to provide early awareness and encourage application of research results emanating from NCHRP Project 20-6, "Legal Problems Arising Out of Highway Programs." These Digests contain supplements and new papers that are periodically compiled as addenda to the treatise, *Selected Studies in Highway Law*, published by the Transportation Research Board.

**Areas of Interest:** 11 administration, 12 planning, 14 finance, 15 socioeconomics, 17 energy and environment, 21 facilities design, 23 environmental design, 33 construction, 40 construction and maintenance equipment, 51 transportation safety, 54 operations and traffic control, 70 transportation law (01 highway transportation, 02 public transit, 03 rail transportation, 04 air transportation, 05 other)

## Continuing Project on Legal Problems Arising Out of Highway Programs



*This Legal Research Digest is an NCHRP staff digest of the progress and status of NCHRP Project 20-6, "Legal Problems Arising Out of Highway Programs," for which the Transportation Research Board is the agency conducting the research and is the publisher of Selected Studies in Highway Law. The Principal Investigator responsible for the project is Dr. Ross D. Netherton, TRB Counsel for Legal Research.*

A major and continuing need of state highway and transportation departments involves assembling, analyzing, and evaluating operating practices, administrative procedures, and legal issues associated with highway and transportation projects. Individual state legal experiences need to be compared and made available for possible wider application. Research to identify and evaluate legal options facilitates the handling of both immediate and long-range needs of engineering, planning and administrative aspects of transportation programs.

NCHRP Project 20-6 was established in 1968 to meet these needs. It is a continuing study under the direction of the TRB staff Counsel for Legal Research. To date more than 90 study topics in the highway legal area have been researched under this

project. More study topics are currently under contract for research or are pending selection of authors and execution of subcontracts. These studies are carried on at legal research centers or in transportation agencies throughout the United States.

Selected Studies in Highway Law (SSHL) was introduced by the Transportation Research Board in 1976 as part of NCHRP Project 20-6. It has been recognized as a significant contribution to the professional literature in this field. The term "highway law" embraces many branches of the law, including contracts, torts, eminent domain, evidence, and taxation. Although numerous texts and treatises have covered these traditional branches, none have given them the specialized treatment and orientation to transportation that is achieved

in these works. This orientation is particularly important as transportation systems become more complex and represent greater investments of money and resources.

The purpose of Selected Studies in Highway Law is to furnish thoroughly researched reference material on highway and transportation law, either directly through work performed at its direction or indirectly through its function as a clearinghouse for identifying, using and evaluating legal research from other sources. The focus of SSHL is periodically reviewed by an NCHRP Project Advisory Committee which recommends currently critical problems for research in the fields of highway and transportation law. Thereafter, research papers on these topics are prepared by the TRB legal staff or by consultant subcontractors.

Volumes 1 and 2 of SSHL, deal primarily with the law of eminent domain and the planning and regulation of land use. They were published and distributed in 1976. Two years later, in 1978, Volume 3, covering contract, tort liability and environmental law, was published and distributed. An expandable publication format was used to permit subsequent incorporation of material on new topics and supplements to original material. The first addendum of this sort, consisting of 5 new papers and supplements to 8 existing papers, was issued in 1979. A second addendum was issued in 1981, and a third in 1982. An additional expandable binder was issued in 1982 as Volume 4 of SSHL. In June 1988, the fourth addendum was published and included an index of all the addenda material published since the original material appeared. At present the text of SSHL totals over 4,000 pages comprising 75 topic papers, many of which have had at

least one supplement since their original publication (see Table 1).

Copies of SSHL have been sent, free of charge, to NCHRP sponsors, certain other offices of State and Federal agencies, and selected university and state law libraries. The officials receiving complimentary copies in each state are: the Attorney General and the Chief Counsel and Right-of-Way Director of the highway agency. Beyond this initial distribution, the volumes are for sale through the Publications Office of the Transportation Research Board.

Published papers from these studies have been distributed through the NCHRP Research Results Digest series as they are completed, and, since November 1988, have appeared in the NCHRP Legal Research Digest Series. (See Table 2). Copies of all these digests can be obtained from the Publications Office, Transportation Research Board, 2101 Constitution Avenue, N.W., Washington, D.C. 20418.

Future work in this continuing project will include research on new topics of current interest in the fields of highway and transportation law and research for the purpose of updating and supplementing published material. The NCHRP Project Advisory Committee for this project meets periodically to review research suggestions and select topics for future work. The membership of this committee is given in Table 3, and the topics which have been approved by the Committee but not yet completed are given in Table 4.

Candidate topics are suggested by members of the committee based on input from a variety of sources. State highway and transportation agency personnel may submit suggestions for study topics directly

to the NCHRP or, if desired, through their State TRB representative. Suggested topics must be accompanied by a brief scope statement or discussion of the problems.

The Principal Investigator for Project 20-6, Ross D. Netherton, can be reached at (202) 334-3205, and the NCHRP Senior Program Officer, Crawford F. Jencks, at (202) 334-2379.

Table 1. CONTENTS OF "SELECTED STUDIES IN HIGHWAY LAW"

Volume 2

Volume 1

Chapter I Eminent Domain: Conceptual Foundation

- Where Does Police Power End and Eminent Domain Begin
- Damnum Abseque Injuria and the Concept of Just Compensation in Eminent Domain
- The Meaning of Highway Purpose
- Eminent Domain: A Look at Current Problems and Future Developments

Chapter II The Trial of a Highway Condemnation Case

- Overview of Rules of Compensability and Valuation Evidence for Highway Land Acquisition
- Trial Strategy and Techniques Using the Income Approach to Valuation
- Trial Strategy and Techniques Using the Cost Less Depreciation Approach to Valuation
- Trial Strategy and Techniques to Exclude Noncompensable Damages and Improper Valuation Methods in Eminent Domain
- Trial Aids in Highway Condemnation Cases
- Rules of Discovery and Disclosure in Highway Condemnation Proceedings

Chapter III Valuation Problems in Condemnation

- Valuation and Condemnation of Special Purpose Properties

Chapter III (continued)

- Valuation and Condemnation of Advertising Signs and Related Property Interest Under the Highway Beautification Act
- First Amendment Aspects of Control of Outdoor Advertising
- Valuation and Condemnation Problems Involving Trade Fixtures
- Valuation in Eminent Domain as Affected by Recognition of Benefits to Remainder Property
- Valuation in Eminent Domain as Affected by Zoning
- Valuation Changes Resulting from Influence of Public Improvements
- Right to Compensation in Eminent Domain for Abrogation of Restrictive Covenants

Chapter IV Special Problems in Highway and Land Acquisition and Use

- Supplemental Condemnation: A Discussion of the Principles of Excess and Substitute Condemnation
- Acquisition of Uneconomic Remnants Under 23 U.S.C. 109(f)
- Theory and Practice in Inverse Condemnation for Five Representative States
- Recent Developments in the Law of Inverse Condemnation
- Recovery for Condemnation Blight Under Inverse Law
- Procedural Aspects of Inverse Condemnation - Title or Interest Acquired by Highway Department
- Planning and Precondemnation Activities as Constituting a Taking Under Inverse Law

- Liability for Highway Drainage Damage
- Advance Acquisition of Highway Right-of-Way
- Liability of the State for Highway Traffic Noise
- Legal Implications of Control of Access to Uncontrolled-Access Highways
- Payment of Attorney Fees in Eminent Domain and Environmental Litigation
- Payments to Public Utilities for Relocation of Facilities in Highway Rights-Of-Way
- Local Plans and Land-Use Controls in Relation to Highways and Their Use
- Mineral Rights in Rights-of-Way: Acquisition, Valuation and Disposition
- Exaction of Right-of-Way by Exercise of Police Power
- Legal Techniques for Reserving Right-of-Way for Future Projects Including Corridor Protection
- Rights of Abutting Property Owners Upon Conversion of Uncontrolled-Access Road Into Limited-Access Highway
- Legal and Procedural Issues Related to Relocation Assistance

#### Chapter V Multiple Use of Highway Corridors

- Valuation of Airspace
- Joint Development Under the Model Airspace Act

### Volume 3

#### Chapter VI Highway Contract Law

- Licensing and Qualification of Bidders
- Competitive Bidding and Award of Highway Construction Contracts
- Indemnification and Suretyship

- Labor Standards in Federal-Aid Highway Construction Contracts
- Control of Conflicts of Interest in Highway Construction Contract Administration
- Legal Problems Arising from Changes, Changed Conditions, and Disputes Clauses in Highway Construction Contracts
- Legal Effect of Representation as to Subsurface Conditions
- Liability for Delay in Completion of Highway Construction Contract
- Enforceability of the Requirement of Notice in Highway Construction Contracts
- Trial Strategy and Techniques in Highway Contract Litigation
- Minority and Disadvantaged Business Enterprise Requirements in Public Contracting
- Legal Implications in the Use of Penalty and Bonus Provisions of Highway Construction Contracts: The Use of Incentive and Disincentive Clauses as Liquidated Damages for Quality Control and for Early Completion

### Volume 4

#### Chapter VII Environmental Law

- Environmental Litigation: Rights and Remedies
- Trial Strategy and Techniques In Environmental Litigation

#### Chapter VIII Tort Liability

- Liability of State Highway Departments for Design, Construction, and Maintenance Defects
- Personal Liability of State Highway Department Officers and Employees
- Liability of State and Local Governments for Snow and Ice Control

- Liability of State and Local Governments for Snow and Ice Control
- Liability for Wet-Weather Skidding Accidents and Legal Implications of Regulations Directed to Reducing Such Accidents on Highways
- Liability of State and Local Governments for Negligence Arising out of the Installation and Maintenance of Warning Signs, Traffic Lights, and Pavement Markings
- Legal Implications of Highway Departments for Failure to Comply with Design, Safety, or Maintenance Guidelines
- Liability of the State for Injury-Producing Defects in Highway Surface
- Liability of State Highway Departments for Defects in Design, Construction, and Maintenance of Bridges
- Liability of State for Injury or Damage Occurring in Motor Vehicle Accidents Caused by Trees, Shrubbery, or Other Vegetative Obstruction Located in Right-of-Way or Growing on Adjacent Private Property
- Liability of the State for Injuries Caused by Obstructions or Defects in Highway Shoulder or Berm
- Duty of the State to Erect and Maintain Guardrails, Barriers, and Similar Protective Devices

#### Chapter IX Intergovernmental Relations

- The Federal-State Relationship In the Federal-Aid Highway Program
- State Highway Programs Versus the Spending Power of Congress
- The Effects of Federal and State Public Information Acts on Highway and Transportation Department Activities
- Legal Aspects of Historic Preservation in Highway and Transportation Programs

Table 2. NCHRP LEGAL RESEARCH RESULTS DIGESTS EMANATING FROM PROJECT 20-6

---

<u>RRD No.</u>	<u>Title</u>
3	Relocation Assistance Under Chapter Five of the 1968 Federal-Aid Highway Act (1969, \$1.00)
6	Standing to Sue for Purpose of Securing Judicial Review of Exercise of Administrative Discretion in Route Location of Federal-Aid Highways (1969, \$1.00)
11	Valuation Changes Resulting from Influence of Public Improvements (1969, \$1.00)
19	Advance Acquisition Under the Federal-Aid Highway Act of 1969 (1970, \$1.00)
22	Valuation in Eminent Domain as Affected by Zoning (1970, \$1.00)
25	Federal Environmental Legislation and Regulations as Affecting Highways (1971, \$1.00)

- 31 Proposed Legislation to Authorize Joint Development  
of Highway Rights-of-Way (1971, \$1.00)
- 32 Changes in Existing State Law Required by the Uniform  
Relocation Assistance and Real Property Acquisition  
Policies Act of 1970 (1971, \$2.00)
- 39 Legal Effect of Representation as to Subsurface  
Conditions (1972, \$1.00)
- 40 Appeal Bodies for Highway Relocation Assistance  
(1972, \$1.00)
- 41 Trial Strategy and Techniques to Exclude  
Noncompensable Damages and Improper Valuation  
Methods in Eminent Domain Cases (1972, \$1.00)
- 42 Supplemental Condemnation: A Discussion of the  
Principles of Excess and Substitute Condemnation  
(1972, \$1.00)
- 45 Exclusion of Increase or Decrease in Value Caused  
by Public Improvement for which Lands are Condemned  
(1973, \$1.00)
- 47 Trial Strategy and Techniques Using the Comparable  
Sales Approach to Valuation (1973, \$1.00)
- 54 Trial Strategy and Techniques Using the Income  
Approach to Valuation (1973, \$1.00)
- 68 The Meaning of Highway Purpose (1975, \$1.00)
- 79 Personal Liability of State Highway Department  
Officers and Employees (1975, \$3.00)
- 80 Liability of State Highway Departments for Design,  
Construction, and Maintenance Defects (1975, \$3.00)
- 83 Liability of State and Local Governments for Snow  
and Ice Control (1976, \$3.00)
- 95 Legal Implications of Regulations Aimed at Reducing  
Wet-Weather Skidding Accidents on Highways (1977,  
\$3.00)
- 99 Liability of the State for Highway Traffic Noise  
(1978, \$3.00)
- 103 Payment of Attorney Fees in Eminent Domain and  
Environmental Litigation (1978, \$3.00)
- 108 Trial Strategy and Techniques in Highway Contract  
Litigation (1979, \$3.00)
- 109 Control of Conflicts of Interest in Highway  
Construction Contract Administration (1979, \$3.00)
- 110 Liability of State and Local Governments for  
Negligence Arising Out of the Installation and  
Maintenance of Warning Signs, Traffic Lights,  
and Pavement Markings (1979, \$3.00)
- 111 Trial Aids in Highway Condemnation Cases  
(1979, \$3.00)
- 112 Legal Implications of Control of Access to  
Uncontrolled-Access Highways (1979, \$3.00)
- 113 Right to Compensation in Eminent Domain for  
Abrogation of Restrictive Covenants (1979, \$3.00)
- 116 Payments to Public Utilities for Relocation of  
Facilities in Highway Rights-of-Way (1980, \$3.00)

- 119      Condemnation Blight Under Inverse Law (1980, \$3.00)
- 129      Legal Implications of Highway Department's Failure  
to Comply with Design, Safety, or Maintenance  
Guidelines (1981, \$3.00)
- 134      Procedural Aspects of Inverse Condemnation -  
Title on Interest Acquire by Transportation  
and Other Public Agencies (1982, \$3.00)
- 135      Liability of the State for Injury Producing Defects  
in Highway Surface (1982, \$3.00)
- 136      State Highway Programs Versus Spending Powers  
of Congress (1982, \$3.00)
- 137      The Effects of Federal and State Public Information  
Acts on Highway and Transportation Department  
Activities (1982, \$3.00)
- 138      Legal Aspects of Historic Preservation in Highway  
Programs (1982, \$3.00)
- 141      Liability of State Highway Departments for Defects  
in Design, Construction, and Maintenance of Bridges  
(1983, \$3.00)
- 145      First Amendment Aspects of Control of Outdoor  
Advertising (1985, \$5.00)
- 146      Minority and Disadvantaged Business Enterprise  
Requirements in Public Contracting (1985, \$5.00)
- 147      Mineral Rights in Rights-of-Way: Acquisition,  
Valuation, and Disposition (1985, \$5.00)
- 149      Exaction of Right-of-Way by Exercise of Police Power  
(1986, \$5.00)
- 150      Planning and Precondemnation Activities as  
Constituting a Taking Under Inverse Law  
(1986, \$5.00)
- 151      Liability of State for Injury or Damage Occurring  
in Motor Vehicle Accident Caused by Trees,  
Shrubbery, or Other Vegetative Obstruction Located  
in Right-of-Way or Growing on Adjacent Private  
Property (1986, \$5.00)
- 152      Enforceability of the Requirement of Notice in  
Highway Construction Contracts (1986, \$5.00)
- 153      Liability of the State for Injuries Caused by  
Obstructions or Defects in Highway Shoulder or  
Berm (1986, \$5.00)
- 154      Trial Strategy and Techniques in Enforcing Laws  
Relating to Truck Weights and Sizes (1986, \$5.00)
- 156      Continuing Project on Legal Problems Arising Out  
of Highway Programs. A Status Report (1986)
- 157      Supplement to Licensing and Qualification of  
Bidders in Selected Studies in Highway Law  
(1986, \$5.00)
- 158      Legal and Procedural Issues Related to Relocation  
Assistance (1986, \$5.00)
- 160      Acquisition of Uneconomic Remnants Under  
23 U.S.C. 109(f) (1987, \$5.00)
- 161      Public and Private Partnerships for Financing  
Highway Improvements (1987, \$5.00)

- 163 Supplement to Competitive Bidding and Award of  
Construction Contracts in SSHL (1987, \$5.00)
- 164 Rights of Abutting Property Owner Upon Conversion  
of Uncontrolled-Access Road Into Limited-Access  
Highway (1987, \$6.00)
- 165 Legal Techniques for Reserving Right-of-Way for  
Future Projects Including Corridor Protection  
(1987, \$6.00)

LRD No. (Legal papers issued as of November 1988)

- 1 Staff Digest on Continuing Project on Legal  
Problems Arising Out of Highway Programs  
(1988, \$3.00)
- 2 Supplement to Liability of State Highway  
Departments for Design, Construction, and  
Maintenance Defects (1988, \$6.00)
- 3 Supplement to Liability of State and Local  
Governments for Negligence Arising Out of the  
Installation and Maintenance of Warning Signs,  
Traffic Lights, and Pavement Markings  
(1988, \$3.00)
- 4 Supplement to Personal Liability of State Highway  
Department Officers and Employees (1988, \$3.00)
- 5 Supplement to Labor Standards in Federal-Aid  
Highway Construction Contracts (1989, \$6.00)
- 6 Impact of the Discretionary Function Exception  
on Tort Liability of State Highway Departments  
(1989, \$6.00)
- 7 Liability of Public Agencies Arising Out of  
Rejection of Bids and Misaward of Contracts  
(1989, \$6.00)
- 8 Staff Digest on Continuing Project on Legal  
Problems Arising Out of Highway Programs  
(1989, \$6.00)
- 9 Supplement to Liability of State and Local  
Governments for Snow and Ice Control  
(1990, \$6.00)
- 10 Supplement to Liability of States for  
Injury-Producing Defects in Highway Surface  
(1990, \$6.00)
- 11 Impact of 42 USC § 1983 (Civil Rights Act)  
on Highway Departments, Personnel, and  
Officials (1990, \$6.00)
- 12 Suspension, Debarment and Disqualification  
of Highway Construction Contractors  
(1990, \$6.00)
- 13 Civil RICO (Racketeer Influenced and Corrupt  
Organizations Act) Applications in the Highway  
Construction Industry (1990, \$6.00)
- 14 Supplement to Liability of State Highway Departments  
for Defects in Design, Construction, and Maintenance  
of Bridges (1990, \$6.00)



- 15 The Application of NEPA (National Environmental Policy Act) to Federal Highway Projects (1990, \$6.00)
- 16 Supplement to Payment of Attorneys Fees in Eminent Domain and Environmental Litigation (1990, \$6.00)
- 17 The Public Duty Defense to Tort Liability (1990, \$6.00)
- 18 Planning and Precondemnation Activities as Constituting a Taking Under Inverse Law (1991, \$6.00)

Table 3. NATIONAL COOPERATIVE HIGHWAY RESEARCH PROGRAM  
NCHRP Project Advisory Committee SP20-6

---

<p>Chairman Nolan H. Rogers Maryland Office of the Attorney General</p>	
<p>Watson C. Arnold <sup>a</sup> Austin, Texas</p>	<p>Walter A. McFarlane Office of the Governor State of Virginia</p>
<p>Ruth J. Anders <sup>b</sup> Melbourne, Florida</p>	<p>Joseph M. Montano <sup>d</sup> Denver, Colorado</p>
<p>James M. Brown George Washington University</p>	<p>Lynn B. Obernyer Colorado Department of Law</p>
<p>Robert F. Carlson <sup>c</sup> Carmichael, California</p>	<p>Jean G. Rogers Federal Highway Administration</p>
<p>Kingsley T. Hoegstedt Sacramento, California</p>	<p>James S. Thiel Wisconsin Department of Transportation</p>
<p>Delbert W. Johnson Office of the Attorney General State of Washington</p>	<p>Richard L. Tiemeyer Missouri Highway and Transportation Commission</p>
<p>Michael E. Libonati Temple University School of Law</p>	
<p>Spencer A. Manthorpe Pennsylvania Department of Transportation</p>	
<p>Edward V. A. Kussy FHWA Liaison Representative Crawford F. Jencks NCHRP Staff</p>	

---

<sup>a</sup> Formerly with Texas Office of the Attorney General

<sup>b</sup> Formerly with Federal Highway Administration

<sup>c</sup> Formerly with California Department of Transportation

<sup>d</sup> Formerly with Colorado Department of Highways

Table 4. TOPICS APPROVED FOR STUDY

Topic No.	Title
4-13	The Use of Alternative Design Specifications and Value Engineering Clauses in Highway Contracts (In Progress)
4-19	Wetlands and Floodplain Protection and the Federal-Aid Highway Program (In Progress)
4-20	What Constitutes the Administrative Record in Highway Cases (In Progress)
4-21	Effect of Clean Air Act Requirements on Regional Transportation Planning (Pending)
4-24	Update of Chapter in <u>SSHL</u> on Legal Aspects of Historic Preservation in Highway and Transportation Programs (In publication process)
5-2	Condemnation Blight and Project Enhancement (In Progress)
5-6	State Highway Liability for and Ability to Recover Attorney Fees and Costs (In publication process)
5-8	Update Paper in <u>SSHL</u> on Liability of the State for Highway Traffic Noise (In publication process)
5-10	The Use, Implementation, and Enforcement of Liquidated Damage Provisions in Highway Construction Contracts (Pending)
5-11	Supplement to Legal Implications of Highway Departments' Failure to Comply with Design, Safety, or Maintenance Guidelines (In Progress)
5-15	Supplement to Liability for Wet-Weather Skidding Accidents and Legal Implication of Regulations Directed to Reducing Such Accidents on Highways (Pending)
5-16	Supplement to Valuation Changes Resulting from Influence of Public Improvements (In Progress)
5-17	Supplement to Planning and Precondemnation Activities as Constituting a Taking Under Inverse Law (In publication process)
5-18	Supplement to Minority and Disadvantaged Business Enterprise Requirements in Public Contracting (In publication process)
6-01	Supplement to "Legal and Procedural Issues Related to Relocation Assistance" (In Progress)
6-02	"Legal Issues Relating to the Acquisition of Right of Way and the Construction and Operation of Highways Over Indian Land" (Pending)
6-03	"Practical Aspects of Implementing the D.B.E. Program" (Pending)

- 6-04 "Authority of State Departments of Transportation to Mitigate the Environmental Impact of Transportation Projects" (In Progress)
- 6-05 Supplement to "First Amendment Aspects of Control of Outdoor Advertising" (Pending)
- 6-06 "Federalism and Its Effect on the Federal-State Highway Program" (Pending)
- 6-07 Supplement to "Trial Strategy and Techniques in Environmental Litigation" (Pending)