

NCHRP

National Cooperative Highway Research Program

LEGAL RESEARCH DIGEST

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Number 24

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 summary 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. The Principal Investigator responsible for the project is James B. McDaniel, 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 projects 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* (SSHL) 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 Committee which recommends 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 consultants.

Volumes 1 and 2 of SSHL deal primarily with the law of eminent domain and the planning and regulation of land use. Volume 3 covers government contracts. Volume 4 covers environmental and tort law, intergovernmental relations and motor carrier law (Table 1). An expandable format permits the incorporation of both new topics as well as supplements to published topics. Updates to the bound volumes are issued by addenda. The 5th Addendum was published in November, 1991. Addenda are published on an average of every three years. Between addenda, legal digest reports are issued to report completed research. Presently the text of SSHL totals over 4,000 pages comprising 75 papers (see Table 2).

Copies of SSHL have been sent, without charge, to NCHRP sponsors, certain other 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 4-volume set is for sale through the Transportation Research Board (\$185.00).

Published papers from these studies are distributed as 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 Committee meets periodically to review research suggestions and select topics for future work. The topics which have been approved, but are not yet completed, are given in Table 3.

Topics are suggested by members of the committee, based on input from a variety of sources and by the chairman of the committees within the Group 4, Legal Resources Group of the Technical Activities Division. 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 of statement or discussion of the problems.

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

ACKNOWLEDGMENTS

This legal study was performed under the overall guidance of NCHRP Project Committee SP20-6. The Committee is chaired by Delbert W. Johnson, Office of the Attorney General of Washington. Members are: Ruth J. Anders, Melbourne, Florida (formerly with Federal Highway Administration); Watson C. Arnold, Austin, Texas (formerly with Texas Office of the Attorney General); James M. Brown, George Washington University; Robert F. Carlson, Carmichael, California (formerly with California Department of Transportation); Kingsley T. Hoegstedt, Carmel, California; Michael E. Libonati, Temple University School of Law; Spencer A. Manthorpe, Pennsylvania Department of Transportation; Walter A. McFarlane, Office of the Governor, Commonwealth of Virginia; Joseph M. Montano, Denver, Colorado (formerly with Colorado Department of Highways); Lynn B. Obernyer, Colorado Department of Law; Jean G. Rogers, Federal Highway Administration; James S. Thiel, Wisconsin Department of Transportation; and Richard L. Tiemeyer, Missouri Highway and Transportation Commission. Edward V.A. Kussy provides liaison with the Federal Highway Administration.

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

Volume 1

Chapter I Eminent Domain: Conceptual Foundation

- Where Does Police Power End and Eminent Domain Begin
- Damnum Absque 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

Volume 2

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 of 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
- Payment 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

TABLE 1. CONTINUED

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 Offices and Employees
- Liability of State and Local Governments for Snow and Ice Control
- Liability of 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 Departments Activities
- Legal Aspects of Historic Preservation in Highway and Transportation Programs

Chapter X Motor Carrier Law

- Trial Strategy and Techniques in Enforcing Laws Relating to Truck Weights and Sizes

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 Acquired 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)

TABLE 2. CONTINUED

<u>RRD No.</u>	<u>Title</u>
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 in Legal Problems Arising Out of Highway Programs. A Status Report (1986)
157	Supplement to Licensing an Qualification of Bidders in Selected Studies in Highway Law (1986, \$5.00)
158	Legal and Procedural Issues Related to Relocation Assistance
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 <u>SSHL</u> (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 starting November 1988)

2	Supplementing 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 Contract (1989, \$6.00)
9	Supplement to Liability of States for Injury-Producing Defects in Highway Surface (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)

TABLE 2. CONTINUED

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- 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)
- 20 Supplement to "Legal Aspects of Historic Preservation in Highway and Transportation Programs" (1991, \$6.00)
- 21 Liability of the State for Highway Traffic Noise (1991, \$6.00)
- 22 Authority of State Departments of Transportation to Mitigate the Environmental Impact of Transportation Projects (1992, \$6.00)
- 23 Supplement to "Valuation Changes Resulting from Influence of Public Improvements" (1992, \$6.00)
- 24 Staff Digest and Report on Continuing Project on Legal Problems Arising Out of Highway Programs (1992, \$6.00)

TABLE 3. TOPICS APPROVED FOR STUDY

<u>Topic No.</u>	<u>Title</u>
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 planning)
4-20	What Constitutes the Administrative Record in Highway Cases (In pre-planning)
4-21	Effect of Clean Air Act Requirements on Regional Transportation Planning (In planning)
5-02	Condemnation Blight and Project Enhancement (In pre-planning)
5-06	State Highway Liability for and Ability to Recover Attorney Fees and Costs (In pre-planning)
5-10	The Use, Implementation, and Enforcement of Liquidated Damage Provisions in Highway Construction Contracts (In pre-planning)
5-11	Supplement to Legal Implications of Highway Departments' Failure to Comply with Design, Safety, or Maintenance Guidelines (In publication)
5-15	Supplement to Liability for Wet-Weather Skidding Accidents and Legal Implication of Regulations Directed to Reducing Such Accidents on Highways (In planning)
5-18	Supplement to "Minority and Disadvantaged Business Enterprise Requirements in Public Contracting" (In publication process)
6-02	Legal Issues Relating to the Acquisition of Right of Way and the Construction and Operation of Highways Over Indian Land (In planning)
6-03	Practical Aspects of Implementing the D.B.E. Program (In abeyance)
6-05	Supplement to "First Amendment Aspects of Control of Outdoor Advertising (In planning)
6-06	Federalism and Its effect on the Federal-State Highway Program (In abeyance)
6-07	Supplement to "Trial Strategy and Techniques in Environmental Litigation" (Being evaluated)
7-02	Exculpatory Provisions in Construction Contracts (In progress)

TABLE 3. CONTINUED

<u>Topic No.</u>	<u>Title</u>
8-01	Supplement to 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 Private Property (In progress)
8-02	Supplement to Liability of State for Injuries Caused by Obstruction or Defects in Highway Shoulder or Berm. (In progress)
8-03	Supplement to Duty of State to Erect and Maintain Guardrails, Barriers, and Similar Protective Devices (In progress)
8-04	Drug and Alcohol Testing (In pre-planning)
8-05	Discovery and Public Disclosure Laws (In pre-planning)