

NCHRP

National Cooperative Highway Research Program

LEGAL RESEARCH DIGEST

November 1995

Number 35

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: I Planning, Administration, and Environment; II Design; III Materials, Construction, and Maintenance; IV Operations and Safety; V Aviation; VI Public Transit; VII Rail

Continuing Project on Legal Problems Arising Out of Highway Programs

14
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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 coordinating the research. The Principal Investigator responsible for the project is James B. McDaniel, TRB Counsel for Legal Research.

State highway and transportation departments have a continuing need to assemble, analyze, and evaluate 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 in identifying and evaluating legal options facilitates the handling of both the immediate and the long-range needs of the 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 Transportation Research Board (TRB) staff Counsel for Legal Research. To date, more than 100 study topics in the highway legal area have been established under this project. More study projects are currently being conducted. These studies are conducted by legal researchers and attorneys throughout the United States.

Selected Studies in Highway Law (SSHL) was introduced by TRB 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, environmental requirements, eminent domain, and evidence. 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 research reports. This orientation is particularly important as transportation systems become more complex and represent greater investments of money and resources.

The purpose of *SSHL* has been 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 that 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 and supplements to published topics. Updates to the bound volumes are issued by addenda. The fifth addendum was published in November 1991. Another addendum is scheduled for 1997. Between addenda, legal digests are issued to report completed research. The text of *SSHL* currently totals over 4,000 pages, comprising 86 papers (see Table 2).

At meetings held in November 1992 and February 1995, the Committee considered whether *SSHL* ought to be completely revised and redesignated *Selected Studies in Transportation Law*. Eventually, the Committee decided that the *SSHL* should be completely revised, that the revised version should include studies conducted by the Transit Cooperative Research Program's Legal Studies Project, "Legal Aspects of Transit and Intermodal Transportation Programs," and that the complete compilation should be redesignated *Selected Studies in Transportation Law (SSTL)*. The Project Committee has asked TRB staff to work cooperatively to accomplish the joint compilation.

Revisions are planned first for Volume 4 (Environmental Law, Tort Liability, Intergovernmental Relationships, and Motor Carrier Law). Volume 3 (Contract Law) will be revised after Volume 4 has been com-

pleted. Volume 1 will follow Volume 3, and Volume 2 will be last. The complete revision is expected to take 8-12 years.

Copies of *SSHL* have been sent, without charge, to NCHRP sponsors, certain other agencies, and selected university and state law libraries. In each state, the Attorney General, Chief Counsel, and Right-of-Way Director of the highway agency receive complimentary copies. Additional copies of *SSHL* are no longer available, pending the initiation of major revisions.

However, published papers from these studies are initially distributed in the *NCHRP Legal Research Digest Series* (see Table 2). Copies of all these digests can be obtained from the Transportation Research Board, Box 289, Washington, D.C. 20055.

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 statement or discussion of the problems.

The Principal Investigator for Project 20-6, James B. McDaniel, can be reached at (202) 334-3209, and the NCHRP Manager, Crawford F. Jencks, can be reached at (202) 334-2379.

TABLE 1. CONTENTS OF SELECTED STUDIES IN HIGHWAY LAW

<i>Volume 1</i>		
Chapter I	Eminent Domain: Conceptual Foundation	
	<ul style="list-style-type: none"> • Where Does Police Power End and Eminent Domain Begin • <i>Dammum Abseque Injuria</i> and the Concept of Just Compensation in Eminent Domain • The Meaning of Highway Purpose • Eminent Domain: A Look at Current Problems and Future Developments 	<ul style="list-style-type: none"> • Valuation in Eminent Domain as Affected by Zoning • Valuation Changes Resulting from Influences of Public Improvements • Right to Compensation in Eminent Domain for Abrogation of Restrictive Covenants
Chapter II	The Trial of a Highway Condemnation Case	Chapter IV
	<ul style="list-style-type: none"> • 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 	Special Problems in Highway and Land Use
Chapter III	Valuation Problems in Condemnation	
	<ul style="list-style-type: none"> • Valuation and Condemnation of Special Purpose Properties 	<ul style="list-style-type: none"> • 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
<i>Volume 2</i>		
	<ul style="list-style-type: none"> • 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 	

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 in Highway Construction Contracts; The Use of Incentive and Disincentive Clauses as Liquidation 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 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

RRD No.	Title
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 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)

TABLE 2. CONTINUED

RRD No.	Title
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 in 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
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 <i>SSHL</i> (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	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 Contract (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)

TABLE 2. CONTINUED

LRD No.	(Legal papers issued starting November 1988)
11	Impact of 43 U.S.C. 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 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)
25	Supplement to Minority and Disadvantaged Business Enterprise Requirements in Public Contracting (1992, \$6.00)
26	Supplement to Legal Implications of Highway Departments' Failure to Comply with Design, Safety or Maintenance Guidelines (1992, \$6.00)
27	Supplement to Liability of the States 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 (1993, \$6.00)
28	Preventing and Defending Against Highway Construction Contract Claims: The Use of Changes or Differing Site Condition Clauses and New York State's Use of Exculpatory Contract Provisions and No Claims Clause (1993, \$8.00)
29	Highway and the Environment: Resource Protection and the Federal Highway Program (1994, \$8.00)
30	Legal Issues Relating to the Acquisition of Right-of-Way and the Construction and Operation of Highways Over Indian Lands (1994, \$8.00)
31	Federal Air Quality Laws Governing State and Regional Transportation Planning (1994, \$8.00)
32	Federalism and the Intermodal Surface Transportation Efficiency Act of 1991 (1995, \$8.00)
33	Freedom of Information Acts, Federal Data Collection, and Disclosure Statutes Applicable to Highway Projects and the Discovery Process (1995, \$8.00)
34	Transportation Agencies as Potential Responsible Parties at Hazardous Waste Sites (1995, \$8.00)
35	Staff Digest and Report on Continuing Project on Legal Problems Arising Out of Highway Programs (1995, \$8.00)

TABLE 3. TOPICS APPROVED FOR STUDY

Topic No.	Title
8-04	Drug and Alcohol Testing (A joint study with Transit Cooperative Research Programs Legal Project) (In pre-planning)
8-07	The Legal Aspect of Privatization Public/Private Partnerships for Financing, Constructing and Operating Transportation Facilities (Draft report was due August 1, 1995.)
8-08	Revision of tort liability articles into a report dealing with "Transportation Tort Liability." (Subcontract has been awarded, and this project, which is expected to take 2 years, is just beginning.)
8-09	Legal Aspects of Implementing the Clean Air Act Requirements—The Potential for Litigation (Draft report due September 1995.)
8-10	Photographic/Video Enforcement of Traffic Violations (Draft report was due July 1995. This project is slightly behind schedule.)
9-01	Risk Management for Transportation Programs Employing Written Guidelines (In planning, with publication planned for fall 1996.)
9-02	Legal Methods to Reinforce Mitigation Commitments—Survey of Federal, State and Local Governments (In planning, with publication scheduled for fall 1996.)
9-03	Liability of Highway Departments for Damages Caused by Stormwater Runoffs, a Summary of State Requirements (In planning, with publication planned for winter 1997.)
9-04	Indemnification and Insurance Requirements for Design Consultants on Highway Projects (In planning, with publication scheduled for winter 1997.)
9-05	Liability of Contractors to State for Latent Defects in Construction Discovered After Acceptance of the Project (In planning, with publication scheduled for winter 1997.)

ACKNOWLEDGMENTS

This legal study was performed under the overall guidance of NCHRP Project Committee SP20-6. The Committee is chaired by Delbert W. Johnson (formerly with Office of the Attorney General of Washington). Members are Robert F. Carlson, Carmichael, California (formerly with California Department of Transportation); Michael E. Libonati, Temple University School of Law; Spencer A. Manthorpe, Pennsylvania Department of Transportation; Walter A. McFarlane, Department of Correctional Education, Commonwealth of Virginia; Joseph M. Montano, Denver, Colorado (formerly with Colorado Department of Highways); Marilyn Newman, Boston, Massachusetts; 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, and Crawford F. Jencks represents the NCHRP staff.