

NCHRP

National Cooperative Highway Research Program

LEGAL RESEARCH DIGEST

November 1989

Number 8

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 (1 highway transportation, 2 public transit, 3 rail transportation, 4 air transportation, 5 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 SSHL. The Principal Investigator responsible for the project is Robert W. Cunliffe, TRB Counsel for Legal Research, serving under the Special Projects Division (B) of the Board.

A major and continuing need of state highway and transportation departments involves the assembly, analysis, and evaluation of operating practices and legal issues associated with highway projects. Individual state legal experiences need to be compared and made available for possible application nationally. A need also exists for research on both immediate and longer range highway legal problems.

NCHRP Project 20-6 was established in 1968 to meet these needs. It is a continuing study under the direction of the TRB Legal Counsel for Legal Research, serving under the Special Projects Division of the Board. To date more than 80 study topics in the highway legal area have been researched under this project. More than 15 study topics are under contract for research, and in excess of 15 study topics are pending with authors being sought or subcontracts being processed. These studies are

carried out by the Counsel for Legal Research or by legal consultants for an average fee of less than \$10,000 each.

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 received as a significant contribution to the 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 treat these traditional branches, specialized treatment is not given to the large body of case law that has an important impact on the administration and operation of the nation's highway system. The purpose of Selected Studies in Highway Law is to fill this void in American legal writings by furnishing a reference that is directly and exclusively concerned with highway law. This compilation of cases dealing with

highways provides a clearinghouse for analysis and discussion of the rules of law announced therein. To accomplish this objective, critical problems in the field of highway law were identified, and research papers were prepared by the TRB legal staff and consultants.

Volumes 1 and 2 of SSHL, dealing primarily with the law of eminent domain, were published and distributed in 1976. Volume 3, dealing with contracts, torts, environmental and other areas of highway law, was published and distributed early in 1978. An expandable publication format was used to permit future supplementation and the addition of new papers. The first addendum to SSHL, consisting of 5 new papers and supplements to 8 existing papers, was issued during 1979, and a second addendum, including 2 new papers and supplements to 15 existing papers, was released at the beginning of 1981. In December 1982, a third addendum, consisting of 8 new papers, 7 supplements, as well as an expandable binder for Volume 4, was issued. In June 1988, NCHRP published 14 new papers and 8 supplements and an index that incorporates all the new papers and supplements that have been published since the original publication in 1976, except two that will be published when Volume 5 is issued in a year or so. The text, which totals about 3,000 pages (see Table 1 for contents), comprises 67 papers, 38 of which are published supplements in the Selected Studies in Highway Law. Copies of SSHL have been sent, free of charge, to NCHRP sponsors, other offices of State and Federal governments, 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 this study have also received distribution through the NCHRP Research Results Digest series and, since November 1988, appear in the NCHRP Legal Research Digest series (see Table 2). Copies of all requests 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 highway legal field. Updating and supplementing the text book will also be continued. NCHRP Project Committee SP20-6 meets periodically to select topics for study under Project 20-6. The membership of this committee is given in Table 3. Topics 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 departments 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 problem.

The Principal Investigator for Project 20-6, Robert W. Cunliffe, 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 Qualifications 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 Accident Caused by Trees, Shrubbery, or Other Vegetative Obstruction Located in Right-of-Way or Growing on Adjacent Private Property
- 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
- 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)

Table 3. NCHRP PROJECT COMMITTEE SP20-6

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

^a Formerly with Texas Office of the Attorney General

^b Formerly with Federal Highway Administration

^c Formerly with California Department of Transportation

^d 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) |
| 4-22 | Suspension and Debarment of Highway Construction Contractors (In Progress) |
| 4-24 | Update of Chapter in <u>SSHL</u> on Legal Aspects of Historic Preservation in Highway and Transportation Programs (In Progress) |
| 4-25 | Impact of Civil Rights Act on Departments, Programs and Officials (Completed; to be published as LRD) |
| 4-26 | Legal Aspects of Hazardous Waste Containments in Highway Programs (Dropped) |
| 5-2 | Condemnation Blight and Project Enhancement (In Progress) |
| 5-3 | Application of National Environmental Policy Act to Highway Planning and Highway Programs (In Progress) |
| 5-4 | Public Duty Defense to Tort Liability (In Progress) |
| 5-5 | Legal Obligation of State to Permit Highway Occupancy of New Technologies (e.g. Fibre Optics and CATV) Dropped. |
| 5-6 | State Highway Liability for and Ability to Recover Attorney Fees and Costs (Pending) |
| 5-7 | Obligation of State Highway Departments in Coastal Zones (Dropped) |
| 5-8 | Update Paper in <u>SSHL</u> on Liability of the State for Highway Traffic Noise (In Progress) |
| 5-9 | Racketeer Influenced and Corrupt Organizations Act - RICO Cases (Civil) in the Highway Program (In Progress) |
| 5-10 | The Use, Implementation, and Enforcement of Liquidated Damage Provisions in Highway Construction Contracts (In Progress) |
| 5-11 | Supplement to Legal Implications of Highway Departments' Failure to Comply with Design, Safety, or Maintenance Guidelines (In Progress) |
| 5-12 | Supplement to Liability of the State for Injury Producing Defects in Highway Surface (In Progress) |

- 5-13 Supplement to Liability of State Highway Departments for Defects in Design, Construction, and Maintenance of Bridges (In Progress)
- 5-14 Supplement to Liability of State and Local Governments for Snow and Ice Control (Completed; to be published as LRD)
- 5-15 Supplement to Liability for Wet-Weather Skidding Accidents and Legal Implication of Regulations Directed to Reducing Such Accidents on Highways (Hold. Dearth of Cases.)
- 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 Progress)
- 5-18 Supplement to Minority and Disadvantaged Business Enterprise Requirements in Public Contracting (In Progress)
- 5-19 Supplement to Payment of Attorney Fees in Eminent Domain and Environmental Litigation (In Progress)

Topics Approved October 24, 1989

- 6-01 Supplement to "Legal and Procedural Issues Related to Relocation Assistance"
- 6-02 "Legal Issues Relating to the Acquisition of Right of Way and the Construction and Operation of Highways Over Indian Land"
- 6-03 "Practical Aspects of Implementing the D.B.E. Program"
- 6-04 "Authority of State Departments of Transportation to Mitigate the Environmental Impact of Transportation Projects"
- 6-05 Supplement to "First Amendment Aspects of Control of Outdoor Advertising"
- 6-06 "Federalism and Its Effect on the Federal-State Highway Program"
- 6-07 Supplement to "Trial Strategy and Techniques in Environmental Litigation"