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Acquisition of Uneconomic Remnants Under 23 U.S.C 109(f)

A report prepared under ongoing NCHRP Project 20-6, "Legal Problems Arising Out of Highway Programs," for which the Transportation Research Board is the Agency conducting the Research. The report was prepared by John C. Vance. Robert W. Cunliffe, TRB Counsel for Legal Research, was principal investigator, serving under the Special Technical Activities Division of the Board at the time this report was prepared.

THE PROBLEM AND ITS SOLUTION

State highway departments and transportation agencies have a continuing need to keep abreast of operating practices and legal elements of specific problems in highway law. This report addresses the conflict between the provisions of 23 U.S.C. 109(f) and the terms of 42 U.S.C. 4651(9) as they relate to the purchase of "uneconomic remnants" of land involving Federal participation. An uneconomic remnant is defined as: "A remaining part of land, after a partial acquisition, that is of little or no utility or value to the owner."

This paper will be included in a future addendum to a text entitled, "Selected Studies in Highway Law." Volumes 1 and 2, dealing primarily with the law of eminent domain, were published by the Transportation Research Board in 1976; and Volume 3 dealing with contracts, torts, environmental and other areas of highway law, was published in 1978. An addendum to "Selected Studies in Highway Law," consisting of five new papers and updates of eight existing papers, was issued during 1979, a second addendum, consisting of two new papers and 15 supplements, was distributed early in 1981, and a third addendum consisting of eight new papers, seven supplements, and an expandable binder for Volume 4 was dis-

tributed in 1983. The text now totals more than 2,200 pages comprising 56 papers. Copies have been distributed to NCHRP sponsors, other offices of state and federal governments, and selected university and state law libraries. The officials receiving copies in each state are: the Attorney General, the Highway Department Chief Counsel, and the Right-of-Way Director. Beyond this initial distribution, the text is available through the TRB publications office at a cost of $90.00 per set.

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INTRODUCTION

In the acquisition of real property for highway construction it not infrequently happens that the landowner's property is cut up in such way as to leave him with a fragment of land that is of little or no value to him. The situation arises in the case of a partial take where the State highway department (or other condemning agency) acquires only that portion of a tract of land that is needed for road purposes, and the landowner is left with a tract (commonly known as "remnant") which by reason of small size, irregular or peculiar configuration, or the fact that it is landlocked, is of little or no market value. The owner is, of course, compensated for the injury to such remainder by way of severance damage, but the property that remains on the tax rolls in his name is sometimes as much as an economic burden as an asset. Because the highway department is prohibited under fundamental principles of eminent domain law from acquiring more land than is directly needed for highway use (i.e., excess condemnation is proscribed except where expressly authorized by statute), the department is, generally speaking, powerless to avoid the creation of uneconomic remnants through the mechanism of acquiring more land than is actually needed for a public improvement.

The principle that no more land shall be taken than is needed for a public improvement appears in codified form as relating to the taking of land for highway purposes, in the provisions of 23 U.S.C. 109(f).

This section of the United States Code was first enacted into law pursuant to the provisions of the Federal-Aid Highway Act of 1944, P.L. 78-521, December 20, 1944, 58 Stat. 838. Section 2 thereof provided that "the Commissioner of Public Roads shall not, as a condition precedent of any project for Federal aid hereunder, require any State to acquire title to, or control of, any marginal land lying along the proposed highway in addition to that reasonably necessary for road surfaces, median strips, gutters, ditches, and side slopes and sufficient width to provide service roads for adjacent property to permit safe access at controlled locations in order to expedite traffic, promote safety, and minimize roadside parking."

These provisions of the Federal-Aid Highway Act of 1944 remain in the United States Code today in form that is not changed in any substantial particular. Section 109(f) of Chapter 23 presently reads as follows:

> The Secretary shall not, as a condition precedent to his approval under section 106 of this title,[1] require any State to acquire title to, or control of, any marginal land along the proposed highway in addition to that reasonably necessary for road surfaces, median strips, bikeways,[2] gutters, ditches, and side slopes, and of sufficient width to provide service roads for adjacent property to permit safe access at controlled locations in order to expedite traffic, promote safety, and minimize roadside parking.

Thus, the provisions of 23 U.S.C. 109(f) constitute a statutory enumeration of the purpose for which land may be taken for highway use. By applying the maxim *expressio unius est exclusio alterius* (the mention of one thing is the exclusion of another) the acquisition of land not needed for any of the statutorily enumerated purposes is prohibited. The acquisition of remnants of land that are not required for any of the stated purposes (i.e., "road surfaces, median strips, bikeways, gutters, ditches, and side slopes," etc.) is proscribed insofar as Federal participation in the acquisition of land for highway right-of-way is concerned. The Act does not, of course, seek to prohibit the exclusive use of State funds for purposes other than those specified.

Over the years the provisions of 23 U.S.C. 109(f) presented little problem to the States in the acquisition of land for highway purposes involving Federal funding, for the reason that, absent local statutory authorization of excess condemnation, the States were, generally speaking, prohibited under their own laws from acquiring lands for highway use for purposes other than those specified in 23 U.S.C. 109(f). No significant problem arose in respect to remnant acquisition until the passage on January 2, 1971, by the United States Congress of the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, P.L. 91-646, 84 Stat. 1894. The problem arose in connection with Section 301(9) of Title III of said Act, which contained the following provision:

> If the acquisition of only part of a property would leave its owner with an uneconomic remnant, the head of the Federal agency concerned shall offer to acquire the entire property.

Title III of said Act wherein such language appears was entitled "Uniform Real Property Acquisition Policies Act," and, as the name indicates, was intended to establish uniform policies to be followed by all agencies of the Federal Government in the acquisition of land for public use.

It is readily apparent that the above quoted provisions of Section 301(9) of the Uniform Real Property Acquisition Policies Act [42 U.S.C. 4651(9)], requiring an offer to acquire the entire property wherever during the course of Federal land acquisition the landowner is left with an "uneconomic remnant" appear to be in conflict with the provisions of 23 U.S.C. 109(f), proscribing the acquisition of land other than for the specific purposes set forth and enumerated therein, which purposes do not include the acquisition of uneconomic remnants.

Such conflict is the subject matter of this paper. The paper will review the rules of statutory construction that have evolved over the years in the interpretation of apparently conflicting statutes, and through the application of such rules, seek to make determination as to how the States are affected in respect to land acquisition involving Federal participation,

by the apparent conflict between the provisions of 23 U.S.C. 109(f) and the terms of 42 U.S.C. 4651(9).

Although the cases are legion in which the courts have been faced with the task of seeking to reconcile and give effect to seemingly conflicting provisions of statute, certain rules have emerged from the multitudinous words written on the subject that are clear cut and capable of uniform application in approaching the problem of interpreting apparently disharmonius statutory provisions. Before proceeding to a discussion of these rules and their application it is necessary, however, first to advert briefly to two fundamental rules of construction that underly all statutory interpretation.

Legislative Intent as Governing

No canon of construction is more firmly established than the rule that the legislative intent is the controlling factor in the interpretation of statute law. Such rule is, in fact, the primary rule of construction. As stated in 73 AM. JUR. 2d, *Statutes,* §§ 145–146:

> In the interpretation of statutes, the legislative will is the all-important or controlling factor. Indeed it is frequently stated in effect that the intention of the legislature constitutes the law. Accordingly, the primary rule of construction of statutes is to ascertain and declare the intention of the legislature, and to carry such intention into effect to the fullest degree....
>
> In the interpretation of a statute, the intention of the legislature is gathered from the provision enacted, by the application of sound and well-settled canons of construction. However, since all rules for the interpretation of statutes of doubtful meaning have for their sole object the discovery of the legislative intent, every technical rule as to the construction of a statute must yield to the paramount will of the legislature. It has even been declared that the intention of the legislature, when discovered, must prevail, any rule of construction declared by previous act to the contrary notwithstanding.

Statutes In Pari Materia

As an aid in ascertaining the all-important legislative intent it is presumed that the legislature had knowledge of all other enactments pertaining to the same subject matter. This is expressed in terms of the rule that statutes *in pari materia* (dealing with the same thing, object, or subject) must be read and construed together. The rule is stated in 82 C.J.S., *Statutes,* § 366, as follows:

> Under the so-called "pari materia" rule of construction, it is well established that in the construction of a particular statute, or in the interpretation of its provisions, all statutes relating to the same subject, or all statutes having the same general purpose, that is, statutes which are in pari materia, should be read in connection with it; and such related statutes may or should be construed together as though they constituted one law, that is, they must be construed as one system, and governed by one spirit and policy, and the legislative intention must be ascertained; not alone from the literal meaning of the words of a statute, but from a view of the whole system of which it is but a part. This rule of construction applies although the statutes to be construed together were enacted at different times, and contain no reference to one another; and it is immaterial that the statutes are found in different chapters of the revised statutes and under different headings.

Plainly, in so far as 23 U.S.C. 109(f) and 42 U.S.C. 4651(9) both relate to the acquisition of marginal land in the taking of real property for a public use, they are *in pari materia;* but, equally plainly, reading the two statutes together, and as if constituting one act, does not make manifest the legislative intent, nor resolve the conflict in statutory provisions. Thus, we are led directly to the cases involving the problem of seeking to reconcile and harmonize apparently conflicting provisions of statute law.

RULES OF CONSTRUCTION RELATING TO DISHARMONIOUS STATUTES

The rules of construction relating to disharmonious statutes can be simply stated. They break down into the three steps as follows:

1. Study of the legislative history to determine legislative intent.
2. Application of the presumption that the legislature did not intend to effect repeal by implication.
3. Application of the doctrine of implied repeal where all reasonable means of reconciling apparently conflicting statutes have been exhausted.

For purposes of convenience they will be taken here in reverse order.

Repeal By Implication

Statutes are to be construed as harmonious wherever possible. However, where statutes are plainly repugnant one to another, and cannot by any reasonable interpretation be reconciled, resolution of the inconsistency is accomplished by giving effect to the doctrine of repeal by implication. That is to say, the latest expression of the legislative will is deemed impliedly to supersede and repeal the prior legislative expression. Such doctrine is described in SUTHERLAND, STATUTORY CONSTRUCTION (4th Ed.), Vol. 1A, § 23.09, as follows:

> As part of the power to repeal one finds the judicial doctrine of implied repeals. The legislatures cannot be expected to have complete knowledge of the detail contained in the statute laws of a state, nor have they the time to extensively research the mass of statutory provisions in order to specify what statutes should be repealed. In the course of enacting legislation, it is only natural that subsequent enactments could declare an intent to repeal preexisting laws without mention or reference to such laws. A repeal may arise by necessary implication from the enactment of a subsequent act.... When a subsequent enactment covering a field of operation coexistent with a prior statute cannot by any reasonable construction be given effect while the prior law remains in existence because of irreconcilable conflict between the two acts, the latest legislative expression prevails, and the prior law yields to the extent of the conflict.

The following is stated in 82 C.J.S., *Statutes,* §§ 291–292, in respect to the doctrine of repeal by implication:

> Where two legislative acts are repugnant to, or in conflict with, each other, the one last passed, being the latest expression of the legislative will, although it contains no repealing clause, govern, control, or prevail, so as to supersede and implicitly repeal the earlier act to the extent of the repugnancy.... The general rule that a statute prevails over and impliedly repeals a prior inconsistent one to the extent of the repugnancy applies where both statutes relate to the same subject.... Where a later statute covers the whole subject matter of, and shows that it was intended as a substitute for, earlier acts, and to cover the whole subject and prescribe the only rules with respect thereto, it operates as a repeal of all former statutes relating to the subject, even though it makes no reference to the earlier statute.

The operation of the doctrine of repeal by implication is illustrated in the following cases:

Plains Electric Generation and Transmission Cooperative, Inc. v. Pueblo of Laguna, 542 F.2d 1375 (C.A. 10, 1976), involved the interpretation of two Acts of Congress authorizing the acquisition by condemnation of rights-of-way across lands of the Pueblo Indians in New Mexico. The first of such Acts authorized condemnation without the consent of the United States Secretary of the Interior, and the later legislation authorized acquisition of right-of-way "under such rules, regulations, and conditions as the Secretary of the Interior may prescribe." In holding that the language of the two Acts was in irreconcilable conflict, and that the later Act repealed by implication the prior legislation, the Court, quoting from the decision of the Supreme Court of the United States in *Posadas v. National City Bank,* 296 U.S. 497, 56 S. Ct. 349, 80 L.Ed. 351 (1936), stated:

> There are two well-settled categories of repeals by implication: (1) Where provisions in the two acts are in irreconcilable conflict, the later act to the extent of the conflict constitutes an implied repeal of the earlier one; and (2) if the later act covers the whole subject of the earlier one and is clearly intended as a substitute, it will operate similarly as a repeal of the earlier act.

The Court of Appeals for the Eleventh Circuit had before it in *Estate of Flanagan v. Commissioner of Internal Revenue,* 743 F.2d 1526 (1984), the construction of conflicts in two sections of the United States Internal Revenue Code, both relating to charitable deductions, the one being enacted into law in 1956, and the other in 1969. In holding that because of irreconcilable conflict the later enactment must prevail, and that the prior legislation was the subject of implied repeal, the Court stated:

> Despite the lack of an affirmative showing of an intent to repeal, the rule against implied repeals is not violated here because [the sections of the Internal Revenue Code] are irreconcilable, i.e., they can not be interpreted in such way as to give each full effect.

In giving effect to the doctrine of repeal by implication the Court in *St. Joseph's Hospital and Medical Center v. Maricopa County,* 138 Ariz. 127, 673 P.2d 325 (1983), stated:

> We are aware that the repeal of statutes by implication is not favored and that the courts should harmonize apparent conflicts in statutory provisions if possible. We have attempted to do so in this case but we cannot.... [W]here it appears by reason of repugnancy or inconsistency in the provisions of statutes that the two statutes cannot operate contemporaneously it must be implied that the legislature intended to repeal the earlier statement.

Because the rule itself is clear and simple the abstraction of further cases showing application of the rule is not here required. The reader is referred instead to the listing below[3] of recently decided cases which illustrate the rule and its application.

These cases give detailed illustration of the fact that implied repeal will be decreed where necessary in order to resolve statutory conflicts.

Presumption Against Repeal by Implication

Although as shown by the foregoing cases the doctrine of repeal by implication is well entrenched in the law and has been given expression in many cases, in order to give effect to such doctrine there must first be overcome what has frequently been described as a "very strong" presumption against implied repeal. This presumption is reflected in the oft-repeated statement by the courts that "repeal by implication is not favored." The presumption is of such weight that all reasonable possibilities of reconciling conflicting statutory language must be exhausted before the doctrine of implied repeal can be invoked. The presumption is stated in SUTHERLAND, STATUTORY CONSTRUCTION (4th Ed.), Vol. 1A, § 23.10, as follows:

> The presumption against implied repeals is founded upon the doctrine that the legislature is presumed to envision the whole body of the law when it enacts new legislation. Therefore, the drafters should expressly designate the offending provision rather than leave the repeal to arise by implication from the later enactment.

It is stated in 82 C.J.S., *Statutes,* § 288, that:

> The repeal of statutes by implication is not favored. The courts are slow to hold that one statute has repealed another by implication, and they will not make such an adjudication if they can avoid doing so consistently or on any reasonable hypothesis, or if they can arrive at another result by any construction which is fair and reasonable. Also, the courts will not enlarge the meaning of one act in order to hold that it repeals another by implication; nor will they adopt an interpretation leading to an adjudication of repeal by implication unless it is inevitable and a very clear and definite reason therefor can be assigned.
>
> Furthermore, the courts will not adjudge a statute to have been repealed by implication unless a legislative intent to repeal or supersede the statute plainly and clearly appears. The implication must be clear, necessary, irresistible, and free from reasonable doubt.

The Supreme Court of the United States has dealt with the presumption against implied repeal in a number of cases. For example, in holding that the Agricultural Marketing Agreement of 1937 did not operate to repeal by implication provisions of the Sherman Anti-Trust Act, the Court in *United States v. Borden,* 308 U.S. 188, 198, 60 S.Ct. 182, 188, 84 L.Ed. 181, 190 (1939), stated that: "It is a cardinal principle of construction that repeals by implication are not favored. When there are two acts upon the same subject, the rule is to give effect to both if possible. . . . The intention of the legislature to repeal 'must be clear and manifest.' . . . It is not sufficient, as was said by Mr. Justice Story in *Wood v. United States,* 16 Pet. 342, 362, 363, 'to establish that subsequent laws cover some or even all of the cases provided for by [the prior act]; for they may be merely affirmative, or cumulative, or auxiliary.' There must be 'a positive repugnancy between the provisions of the new law, and those of the old; and even then the old law is repealed by implication, only *pro tanto* to the extent of the repugnancy.' "

In *Morton v. Mancari,* 417 U.S. 535, 550, 94 S.Ct. 2474, 2482–83, 41 L.Ed.2d 290, 300 (1974), the Supreme Court said that: "In the absence of some affirmative showing of an intention to repeal, the only permissible justification for a repeal by implication is when the earlier and later statutes are irreconcilable." And in *Radzanower v. Touche Ross & Co.,* 426 U.S. 148, 154, 155, 96 S. Ct. 1989, 1993, 48 L.Ed.2d 540, 546, 547 (1975), the Court stated that: " 'It is, of course, a cardinal principle of statutory construction that repeals by implication are not favored' and 'when two statutes are capable of co-existence, it is the duty of the courts . . . to regard each as effective.' "

In following and applying the pronouncements of the highest court the Federal Court of Appeals for the District of Columbia stated, in *United States v. Hansen,* 772 F.2d 940, 944 (1985), in respect to the rule disfavoring implied repeal, that:

> It is a venerable rule, frequently reaffirmed by the Supreme Court, that "repeals by implication are not favored" (citations omitted) and will not be found unless an intent to repeal is "clear and manifest." (Citations omitted.) It will not do to give this principle of statutory construction mere lip service and vacillating practical application. A steady adherence to it is important, primarily to facilitate not the task of judging but the task of legislating. It is one of the fundamental ground rules under which laws are framed. Without it, determining the effect of a bill upon the body of preexisting law would be inordinately difficult, and the legislative process would become distorted by a sort of blind gamesmanship, in which Members of Congress vote for or against a particular measure according to their varying estimates of whether its implications will be held to suspend the effects of an earlier law that they favor or oppose.

Again, the abstraction of further cases is not required. The reader is instead referred to the listing below[4] of recently decided cases, wherein the presumption against repeal by implication was invoked and the courts refused to give effect to implied repeal.

It may be noted at this point that in the catalogue of cases dealing with the construction of apparently disharmonious statutes, the cases wherein the courts have found some means of reconciling apparently conflicting statutory provisions far outnumber the cases wherein repeal by implication has been decreed. The presumption against implied repeal is strong in practical application as well as in theory.

Next for consideration is an examination of the legislative history of the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970 with a view to determining whether there appears therein persuasive evidence of Congressional intent as relating to the reconcilability, or irreconcilability, of the provisions of 23 U.S.C. 109(f) and 42 U.S.C. 4651(9).

Legislative History

The passage in 1956 of the Act creating the Federal Interstate and Defense Highway System was probably the initiating force behind the eventual enactment of the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970. That is to say, the 1956 Act led to what has been described as the greatest land acquisition program since Roman times, and during the course thereof, certain inequities in the land acquisition policies and programs of the United States Government became apparent. The 1970 Act addressed itself to the problems so perceived.

First, the allowance of moving and related costs (being in the law of eminent domain purely a creature of statute) was seen in need of revision to allow for more fairness to landowners forced to relocate on a massive scale. These problems were addressed in Title II of the Act, which rewrote the existing Federal law relating to relocation assistance.

Second, the Congress concluded that the existing law relating to Federal land acquisition policies was in need of revision chiefly because of the fact that the different Federal agencies were interpreting in divergent manner the existing Federal statute law relating to such policies. Title III of the Act addressed this problem and sought to bring uniformity to the land acquisition policies of the United States Government. These policies were set forth in Section 301 of the Act.

This paper is concerned solely with Subsection 9 of Section 301. However, in order to understand the comment contained in the Report of the Committee on Public Works of the United States House of Representatives (which follows later herein and is highly instructive with respect to Congressional intent), it is necessary to set forth Section 301 at length.

Section 301 of Title III of the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970 provides as follows:

> In order to encourage and expedite the acquisition of real property by agreements with owners, to avoid litigation and relieve congestion in the courts, to assure consistent treatment for owners in the many Federal programs, and to promote public confidence in Federal land acquisition practices, heads of Federal agencies shall, to the greatest extent practicable, be guided by the following policies:
>
> (1) The head of a Federal agency shall make every reasonable effort to acquire expeditiously real property by negotiation.

(2) Real property shall be appraised before the initiation of negotiations, and the owner or his designated representative shall be given an opportunity to accompany the appraiser during his inspection of the property.

(3) Before the initiation of negotiations for real property, the head of the Federal agency concerned shall establish an amount which he believes to be just compensation therefor and shall make a prompt offer to acquire the property for the full amount so established. In no event shall such amount be less than the agency's approved appraisal of the fair market value of such property. Any decrease or increase in the fair market value of real property prior to the date of valuation caused by the public improvement for which such property is acquired, or by the likelihood that the property would be acquired for such improvement, other than that due to physical deterioration within the reasonable control of the owner, will be disregarded in determining the compensation for the property. The head of the Federal agency concerned shall provide the owner of real property to be acquired with a written statement of, and summary of the basis for, the amount he established as just compensation. Where appropriate the just compensation for the real property acquired and for damages to remaining real property shall be separately stated.

(4) No owner shall be required to surrender possession of real property before the head of the Federal agency concerned pays the agreed purchase price, or deposits with the court in accordance with section 258a of Title 40, for the benefit of the owner, an amount not less than the agency's approved appraisal of the fair market value of such property, or the amount of the award of compensation in the condemnation proceeding for such property.

(5) The construction or development of a public improvement shall be so scheduled that, to the greatest extent practicable, no person lawfully occupying real property shall be required to move from a dwelling (assuming a replacement dwelling as required by sub-chapter II of this chapter will be available), or to move his business or farm operation, without at least ninety days' written notice from the head of the Federal agency concerned, of the date by which such move is required.

(6) If the head of a Federal agency permits an owner or tenant to occupy the real property acquired on a rental basis for a short term or for a period subject to termination by the Government on short notice, the amount of rent required shall not exceed the fair rental value of the property to a short-term occupier.

(7) In no event shall the head of a Federal agency either advance the time of condemnation, or defer negotiations or condemnation and the deposit of funds in court for the use of the owner, or take any other action coercive in nature, in order to compel an agreement on the price to be paid for the property.

(8) If any interest in real property is to be acquired by exercise of the power of eminent domain, the head of the Federal agency concerned shall institute formal condemnation proceedings. No Federal agency head shall intentionally make it necessary for an owner to institute legal proceedings to prove the fact of the taking of his real property.

(9) If the acquisition of only part of a property would leave its owner with an uneconomic remnant, the head of the Federal agency concerned shall offer to acquire the entire property.[5]

The legislative history of the foregoing Section 301 is found in the Report of the Committee on Public Works of the United States House of Representatives, numbered 91-1656, appearing in *U.S. Code Congressional and Administrative News,* 1970, Vol. 3, p. 5850, which Report was unanimous. In discussing the provisions of Section 301, the Committee reviewed the past practices of differing Federal agencies in making land acquisition for public works, and made clear that fault was to be found in the fact that the existing policies of the Federal Government in respect to land acquisition, as expressed in terms of statute law, were being interpreted in different manner by the varying Federal agencies. The Committee Report provides, in part, as follows:

> Items (1), (2) and (3)[6] seek to assure that government agencies will deal fairly with the owners of real property needed for Federal programs. Prior to 1960 the Corps of Engineers and a number of other agencies followed a "one price" policy. The Corps' stated policy was to obtain two appraisals for each property to be acquired and ordinarily to offer the property owner the higher of the two. The policy was reported to be rigid and inflexible. Offers were made on a "take it or leave it" basis and there were no serious efforts made to resolve reasonable differences of opinion concerning the value of the property. The Corps of Engineers, the General Services Administration and a number of other agencies have followed a policy since 1960 of making an initial offer and often acquiring property at an amount below its approved appraisal of the property. The Corps justified this policy on the basis of its interpretation of the Land Acquisition Policy Act of 1960.
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> During hearings by this Committee last year members of the Committee made it abundantly clear that the Army interpretation of the Land Acquisition Policy Act of 1960 is not in agreement with that of the Committee that drafted the language and presented it to the Congress for enactment. On March 12, 1970, representatives of the Department of Justice testified before the Public Works Committee that the Department encourages the Federal agencies to make offers at the full amount of their approved appraisals. The Department of Justice further stated that a letter had been written specifically advising the Army that the Department did not believe that the Act of 1960 confined the Army to the policy it was following. On March 18th a representative of the then Bureau of the Budget testified before the Committee and took exception to such policy of negotiation for the purchase of real property at prices below the Government's approved appraisals. The Army has recently partially changed its policy, but not to the complete satisfaction of the Committee. The General Services Administration has not.
>
> The General Services Administration, in testimony before the Public Works Committee on March 17, 1970 suggested that another reason for objecting to the item (3) policy is that "it would establish the appraised fair market value of the property as an infallible figure whereas it is common knowledge that an appraisal is an educated estimated value at most." On the contrary, the proposed policy recognizes that individual appraisers and appraisals are not infallible, and for that reason places the responsibility on the acquiring agency to determine, in advance of negotiations, an amount which it regards as the fair market value of such

property, and to make an offer to the property owner for the full amount so determined. If the amount of just compensation as determined by the head of the Federal agency is less than the agency's approved appraisal, it would appear that an indepth review of the methods employed in determining the amount of just compensation or in making the appraisal is called for.

Among the Federally assisted programs, the Federal Highway Administration's procedures have for some years required the State highway departments to offer property owners the full amount of their approved value estimates, and this principle was approved by the Congress in section 141 of the Federal-Aid Highway Act of 1968 (23 U.S.C. 141(3)). The Department of Housing and Urban Development apparently has a similar requirement in the urban renewal program, but there are indications that the full fair offering price policy may have been equated with the inflexible "one price" policy. The Committee emphasizes that this clearly is not the intent of item (3).

Any policy which does not entitle the property owner to an offer of the full amount of the agency's approved value estimate, where the owner must sell, is unfair. It is fundamental that all citizens should be dealt with fairly by their government.

It is clear from the foregoing expression of Congressional discontent, with the varying interpretations of existing Federal law made by the different Federal agencies, that the intent and purpose of the new Act was to secure uniformity in all Federal policies (and their administration) relating to the acquisition of land for public works projects. To this end the Congress in Section 306 of the Act repealed the provisions of three prior statutes.

Statutes Repealed

The provisions of said repealer Section 306 are as follows:

> Sections 401, 402, and 403 of the Housing and Urban Development Act of 1965 (42 U.S.C. 3071-3073), section 35(a) of the Federal-Aid Highway Act of 1968 (23 U.S.C. 141) and section 301 of the Land Acquisition Policy Act of 1960 (33 U.S.C. 596) are hereby repealed. Any rights or liabilities now existing under prior Acts or portions thereof shall not be affected by the repeal of such prior Act or portion thereof under this section.

Because the repeal of prior statutes is strongly indicative of legislative intent in the enactment of new legislation it is necessary briefly to examine the provisions of the repealed acts.[7]

First: The significant language of the Housing and Development Act of 1965, P.L. 89-117, August 10, 1965, 79 Stat. 451, 42 U.S.C. 3071, 3072, and 3073, that was repealed, reads as follows:

> As a condition precedent of eligibility for Federal assistance pursuant to a development program, each applicant for such assistance shall satisfy the Administrator that the following policies will be followed in connection with the acquisition of real property by eminent domain in the course of such program[8]—
>
> (1) the applicant shall make every reasonable effort to acquire the real property by negotiated purchase;
>
> (2) no owner shall be required to surrender possession of real property before the applicant pays to the owner (A) the agreed purchase price arrived at by negotiation, or (B) in any case where only the amount of the payment to the owner is in dispute, not less than 75 per centum of the appraised fair value of such property as approved by the applicant; and
>
> (3) the construction or development of any public improvement shall be so scheduled that no person lawfully occupying the real property shall be required to surrender possession on account of such construction or development without at least 90 days' written notice from the applicant of the date on which such construction or development is scheduled to begin.

Second: The next provision of statute repealed by Section 306 was Section 35(a) of the Federal-Aid Highway Act of 1968, P.L. 90-495, August 23, 1968, 82 Stat. 815, 23 U.S.C. 141, reading as follows:

> Before approving projects under this chapter, the Secretary shall obtain from the State highway department the following assurances:
>
> (1) that every reasonable effort shall be made to acquire the real property by negotiation;
>
> (2) that the construction of projects shall be so scheduled that to the greatest extent practicable no person shall be required to move from his home, farm, or business location without at least 90 days' written notice from the State or political subdivision having responsibility for such acquisition; and
>
> (3) that it will be the policy of the State, before initiating negotiations for real property, to establish an amount which is believed to be just compensation, under the law of the State, and to make a prompt offer to acquire the property for the full amount so established.

Third: The last provision of statute repealed by Section 306 was Section 301 of the Land Acquisition Policy Act of 1960, P.L. 86-645, July 14, 1960. 74 Stat. 480, p. 502, 33 U.S.C. 596, reading as follows:

> Sec. 301. It is hereby declared to be the policy of the Congress that owners and tenants whose property is acquired for public works projects of the United States of America shall be paid a just and reasonable consideration therefor. In order to facilitate the acquisition of land and interests therein by negotiation with property owners, to avoid litigation and relieve congestion in the courts, the Secretary of the Army (or such other officers of the Department of the Army as he may designate) is authorized in any negotiation for the purchase of such property to pay a purchase price which will take into consideration the policy set forth in this section.

The Land Acquisition Policy Act of 1960 then goes on to specify that the Chief of Engineers shall issue regulations designed to provide property owners affected by Federal land acquisition with knowledge in respect to: "(1) factors considered in making the appraisals; (2) desire to purchase property without going to court; (3) legal right to submit to condemnation proceedings; (4) payment for moving expenses or other losses not covered by appraised market value; (5) occupancy during construction; (6) removal of improvements; (7) payments required from

occupants of Government acquired land; (8) withdrawals by owners of deposits made in court by Government; and (9) use of land by owner when easement is required."

It may fairly be concluded from the foregoing review of statutory provisions repealed that part of the disharmony among Federal agencies was due less to vagaries of interpretation than to the fact that the statutes themselves failed to present a clear and coherent body of law relating to Federal land acquisition policies. In any event, a review of the statutes repealed, when read in connection with the terms of the newly enacted Section 301, makes clear that the Congress intended by the terms of the new Act to supplant and supersede all prior Federal law pertaining to land acquisition policies of the United States Government. Thus, Subsection 9 of Section 301, relating to acquisition of "uneconomic remnants", is clearly intended to be part of a restatement of Federal policy in respect to land acquisition.

However, Subsection 9 is more than a restatement of Federal land acquisition policy. It also constitutes a change in the substantive law pertaining to land acquisition by the Federal Government, in that it authorizes for the first time the expenditure of Federal funds for the acquisition of land not directly required for a public project, but instead land that is to be acquired solely for the reason that it constitutes an "uneconomic remnant" remaining out of the real property that is taken and directly needed for a public project. Although the acquisition of land on the "remnant theory" was thus new to Federal law, it has a long and established history under State law, being a creature of statute and part of the law of excess condemnation.

EXCESS CONDEMNATION UNDER THE REMNANT THEORY

In the law of eminent domain questions of public purpose and necessity are deemed to be legislative matters and hence not subject to judicial review. However, there are limits beyond which the legislature cannot go and the courts are empowered to intervene in order to protect constitutional rights. As stated in NICHOLS, EMINENT DOMAIN, Vol. 1A, § 4.11[2]:

> [I]t is obvious that, if property is taken in ostensible behalf of a public improvement which it can never by any possibility serve, it is being taken for a use that is not public, and the owner's constitutional rights call for protection by the courts. So, also, the due process clause protects the individual from spoliation under the guise of legislative enactment, and while it gives the courts no authority to review the acts of the legislature and decide upon the necessity of particular takings, it would protect an individual who was deprived of his property under the pretense of eminent domain in ostensible behalf of a public enterprise for which it could not be used.

It follows that the condemnation of land in excess of that which is needed for a valid public purpose has been held subject to judicial scrutiny and review, and the courts have generally proscribed the taking of land in an amount in excess of that directly needed for a public purpose.

There have, however, been three traditional exceptions to this rule. Excess condemnation has been justified on what are termed the "remnant," "protective," and "recoupment" theories. It is to be emphasized that all of these theories are merely descriptive of varying statutory enactments, there being no right at common law to engage in excess condemnation. These three theories are described in NICHOLS, EMINENT DOMAIN, Vol. 2A, § 7.25, as follows:

> Briefly stated, the distinctions and application of these concepts are as follows: the remnant theory permits an excess taking only where the property that remains after the necessary taking is of such shape or size as to be of no practical value to its land owner; the protective theory sanctions the taking of additional property where it is deemed necessary to preserve and protect a public improvement or to secure the desirable development of its surroundings; and the recoupment theory allows the state to condemn property to be sold in order to diminish the over-all cost of a particular improvement.

For the purposes of this paper we are concerned only with excess condemnation on the remnant theory. Such theory is described in NICHOLS, EMINENT DOMAIN, Vol. 2A, § 7.25[1], as follows:

> The remnant theory was the first vehicle used to justify excess condemnation. Originally, remnants were confined to parcels remaining after condemnation, which were small, irregular in shape, and of little practical use to the condemnee. This type of remnant is known as physical remnant since its main characteristic is minimal size. The term remnant has been judicially expanded to include both economic remnants, where there is an economic advantage to the condemnor in condemning a remnant, and financial remnants, whereby the condemnor avoids paying excessive severance damages by condemning the entire tract of land.

The classification by NICHOLS of remnants into the three categories of: (a) physical, (b) economic, and (c) financial, and the distinctions and differences between such categories, are set forth in Vol. 2A, § 725[1], as follows:

> [a] Physical remnant
>
> A physical remnant occurs when the remainder of a condemned parcel is left in such a condition that it will be of little value to the owner. For example, it often happens that when a highway is laid out or widened in a district in which the land is divided into small holdings and covered with small buildings owned by different individuals, the result of the taking will be that many buildings will be substantially destroyed and the owners will be left with parcels of such size and shape as to be practically worthless. Based on statutory authority, a condemnor, instead of paying severance or consequential damages, is permitted to take the whole parcel, since it is, in effect, already paying for the entire parcel. . . .
>
> [b] Economic remnant
>
> In areas of complex development, the taking of physical remnants may no longer suffice to fit the needs of an expanding society. In response to these needs new statutes have been enacted which are essentially economically oriented and provide for condemnation of an entire parcel when only part is needed for the right of way if the best interests of the public

is thereby served. Takings under such statutes have been held to be in the public interest when condemnation of the entire parcel is the least expensive alternative available to the condemnor; especially where landlocked strips are involved.

[c] Financial remnant

The distinction between an economic and financial remnant is simply one of degree in that the financial remnant theory permits the condemnor to acquire a remnant solely for the purpose of avoiding excessive severance damages, because in such a case the severance damages would be virtually equivalent to full fee value. Under this theory it is the amount of compensation which is the determining factor in deciding whether excess land should be condemned. The public use requirement is satisfied when the condemnor takes a remnant to avoid paying excessive severance damages.[9]

Relating the foregoing definitions and descriptions of "remnants" to the term "uneconomic remnant," as used in Section 301(9), it is to be noted first that the latter has been defined by the Federal Highway Administration, the official definition accorded the term by FHWA being as follows:

> A remaining part of land, after a partial acquisition, that is of little or no utility or value to its owner.[10]

Such definition would appear sufficiently broad to meet the requirements of either a "physical," "economic", or "financial" remnant, as described and discussed in NICHOLS, *supra.* In any event, it clearly encompasses such real property as is authorized to be taken under the traditional remnant theory of excess condemnation, that is to say, property which by reason of being of marginal value is justified to be acquired as a valid alternative to the payment of severance or consequential damages.

This is precisely the interpretation placed on the term "uneconomic remnant" by the Committee on Public Works of the United States House of Representatives in the previously discussed Committee Report. The Report (see *U.S. Code Congressional and Administrative News,* 1970, Vol. 3, p. 5873) has the following to say with respect to the legislative intent and purpose embodied in the provisions of Section 301(9):

> The assemblage of remnants can provide important opportunities for the development of replacement housing sites, recreation and other open space facilities, etc. No property owner should be forced into the position of retaining an uneconomic remnant in any case. Moreover, when this does occur, the acquiring agency frequently pays most if not all of the value of such remnants as severance damages, but the public does not get the benefit of the property.

Thus,the Committee Report specifies that the provisions of Subsection 9 of Section 301 have the two-fold purposes of: (1) providing equitable treatment for the landowner, and (2) benefitting the public by the assemblage of remnants, title to which is acquired as a valid alternative to the payment of severance damages. The latter purpose is a clear statement of the justification for land acquisition under the traditional remnant theory. Thus, the Committee Report appears to make clear that the legislative purpose behind the enactment of Section 301(9) was to effect substantial justice for landowners left with marginal land after a taking, and to premise the acquisition of such property on established principles of eminent domain law relating to allowable excess condemnation.

Evidence of legislative intent being made sufficiently clear by the Committee Report, there remains for consideration the interpretation placed on Section 301(9) by the courts.

Judicial Interpretation of Section 301(9)

The case law relating to the interpretation of Section 301(9) is indeed scant. At the time of this writing, there appear to be but two reported cases. Although one of the cases does not yield instruction for purposes here,[11] the other requires examination.

In *State of New Mexico, ex rel. New Mexico State Highway Department v. United States,* 665 F.2d 1023 (Ct.Cl. 1981), plaintiff State of New Mexico, acting through the New Mexico State Highway Department, brought suit against the United States, acting through the Federal Highway Administration, to recover damages for failure of defendant to participate in the cost of acquisition of a parcel of land claimed to be an "uneconomic remnant" within the meaning of that term as used in Section 301(9) of the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970. It was undisputed that plaintiff acquired title to the tract in question prior to the passage of said Act, but it was claimed that the provisions of said Section 301(9) operated retrospectively. It was further asserted that if Section 301(9) did not operate retroactively, plaintiff was nonetheless entitled to recover pursuant to the provisions of regulations issued by the Federal Highway Administration and contained in Policy and Procedure Memorandum 80-1.

The Court rejected both of these contentions. It may be noted that in so doing the Court accepted the Federal Highway Administration's definition of "uneconomic remnant," *supra,* as being valid for the purposes of the case. The first argument was disposed of on the ground that Section 301(9) could not be construed to operate retrospectively, the Court stating that "Section 301(9)'s terms are wholly and plainly inconsistent with any such construction." The second or alternative claim was rejected on the ground that P.P.M. 80-1 did no more than delineate the manner and method of Federal participation in the payment of severance damages, the Court concluding therefrom, that plaintiff's "'excess land' contention has no validity."

If the case is germane for purposes here it is to the extent that the Court recognized that prior to the enactment of Section 301(9), the Federal Highway Administration was neither obligated nor authorized to participate in remnant acquisition. This is in harmony with the legislative interpretation of Section 301(9), as set forth in the Committee Report, *supra.*

Thus, Section 301(9) represents a departure from existing Federal law in that it authorizes for the first time Federal participation in land

acquisition under the remnant theory, i.e., the acquisition of title to land of marginal value as an alternative to the payment of severance or consequential damages.

Obligation to Provide Assurances

It need be pointed out that in order to bring about State compliance with Federal land acquisition policies, the States are required, as a condition of Federal assistance, to give assurances that they will comply "to the greatest extent practicable under State law" with the provisions of the Uniform Real Property Acquisition Policies Act.

Section 305 of the Act (84 Stat. 1906, 42 U.S.C. 4655) provides as follows:

> Notwithstanding any other law, the head of a Federal agency shall not approve any program or project or any grant to, or contract or agreement with, a State agency under which Federal financial assistance will be available to pay all or part of the cost of any program or project which will result in the acquisition of real property on and after January 2, 1971, unless he receives satisfactory assurances from such State agency that —
>
> (1) in acquiring real property it will be guided, to the greatest extent practicable under State law, by the land acquisition policies in section 301....

Thus, unless lacking in authority under local law so to do, the States are required as a condition precedent to the receipt of Federal funding for right-of-way acquisition, to "offer to acquire the entire property" in the case where "the acquisition of only part of a property would leave its owner with an uneconomic remnant."[12]

This brings to a conclusion the review of established rules of statutory construction, pertinent provisions of statutes and regulations, legislative history, and the case law applicable to the question under consideration. Next are the conclusions that may be drawn from the review herein made.

CONCLUSION

As shown previously in this paper, it is the primary duty of the courts in matters of statutory construction to ascertain and give effect to the legislative intent. In so doing it is to be presumed that in the enactment of legislation the legislative body was cognizant of all prior statute law relating to the same subject matter. This gives rise to the presumption that the legislature did not intend to repeal prior law by implication, particularly in the case where the legislature makes express repeal of former statutes relating to the same subject matter. Such presumption is expressed in terms of the frequently repeated maxim that "repeal by implication is not favored."

However, it is also recognized that the legislature may on occasion fail to find and expressly repeal prior legislation that is inconsistent. When this occurs the doctrine of repeal by implication arises. This doctrine is given force and effect, however, only where the prior legislation is wholly repugnant to the newly enacted legislation, and all reasonable means of giving force and effect to the language of each of the apparently inconsistent statutes has been exhausted. Although the courts are reluctant to invoke the doctrine of repeal by implication, there is no alternative to giving force and effect to such doctrine when conflicting statutes cannot by any reasonable construction be harmonized. When this occurs the latest expression of the legislature on the subject must govern and control. Such appears to be the case in attempting to reconcile the conflicting provisions of 23 U.S.C. 109(f) and 42 U.S.C. 4651(9).

23 U.S.C. 109(f) specifies and enumerates the purposes for which land may be acquired for highway right-of-way. Remnant acquisition is excluded from such purposes. However, 42 U.S.C. 4651(9) expressly requires an offer to acquire such "uneconomic remnant" of land as may remain after a partial take. As a result the two statutes are placed in irreconcilable conflict. *There is no reasonable means by which a statute prohibiting remnant acquisition and a statute requiring remnant acquisition can be reconciled and force and effect given to the terms of each.* Being wholly repugnant one to the other the doctrine of repeal by implication arises and must be given effect. Only by giving effect to such doctrine can the whole body of the law be reconciled and made consistent.

It follows that the provisions of 42 U.S.C. 4651(9) operate to repeal *pro tanto* the provisions of 23 U.S.C. 109(f). That is to say, 23 U.S.C. 109(f) is repealed to the extent that it prohibits the acquisition of uneconomic remnants. The States are required "to the greatest extent practicable under State law"[13] to "offer to acquire"[14] such "uneconomic remnant"[15] of land as may remain after a partial take of land for highway right-of-way. This offer is an enforceable condition precedent to the receipt of Federal funding for right-of-way acquisition. Hence, States in the land acquisition process are required to be on the lookout for, identify, and make provision for the acquisition of land meeting the description of "uneconomic remnant." They are to be guided in this process by the definition of "uneconomic remnant" made by the Federal Highway Administration as: "A remaining part of land, after a partial acquisition, that is of little or no utility or value to the owner."[16] Such definition, although broad in scope and somewhat indeterminate, has been accepted by the judiciary,[17] and is the significant guideline to be followed in identifying what constitutes an "uneconomic remnant." An offer to make acquisition thereof is required in order to effect compliance with Section 301(9) of the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, and constitutes a necessary condition precent to qualification for Federal assistance in the acquisition of land for right-of-way.

[1] Section 106 pertains to approval by the United States Secretary of Transportation of plans, specifications, and estimates.

[2] The inclusion of "bikeways" in the enumerated purposes was made pursuant to the provisions of the Federal-Aid Highway Act of 1978, P.L. 95-599, November 6, 1978, § 141(f), 92 Stat. 2689, at 2711.

[3] Smith v. Bentley, 493 F.Supp. 916 (E.D., Ark. 1980); Benton v. Union Pacific Railroad Company, 430 F.Supp. 1380 (D.C., Kan. 1977); Merrell v. City of

Huntsville, 460 So.2d 1248 (Ala. 1984); Nance v. Williams, 263 Ark. 237, 564 S.W.2d 212 (1978); *In re* School Finance Cases, 221 Cal.Rptr. 720 (1985); Southern Connecticut Gas Company v. Housing Authority of the City of New Haven, 191 Conn. 514, 468 A.2d 574 (1983); Wilson v. State, 500 A.2d 605 (Del.Super. 1985); Oldham v. Rooks, 361 So.2d 140 (Fla. 1978); Kyles v. State, 254 Ga. 49, 326 S.E.2d 216 (1985); Richards v. Etzen, 231 Kan. 704, 647 P.2d 1331 (1982); Blair v. State Tax Assessor, 485 A.2d 957 (Me. 1984); Mirageas v. Massachusetts Bay Transportation Authority, 391 Mass. 815, 465 N.E.2d 232 (1984); Bigelow v. Bigelow, 119 Mich.App. 784, 327 N.W.2d 361 (1982); *In re* Estate of Patterson, 652 S.W.2d 252 (Mo.App. 1983); State v. Des Marets, 92 N.J. 62, 455 A.2d 1074 (1983); Public Service Commission v. Village of Freeport, 110 App.Div.2d 704, 488 N.Y.S.2d 22 (1985); Commonwealth v. Milano, 446 A.2d 325 (Pa. Super. 1982); Parsons v. South Dakota Department of Social Security, 314 N.W.2d 863 (S.D. 1982); Looker v. City of Rutland, 476 A.2d 141 (Vt. 1984); and Local No. 497, Affiliated with International Brotherhood of Electrical Workers, AFL-CIO v. Public Utility District No. 2 of Grant County, 103 Wash.2d 786, 698 P.2d 1056 (1985).

[4] FAIC Securities, Inc. v. United States, 768 F.2d 352 (C.A., D.C. 1985); Loveshin v. Department of Navy, 767 F.2d 826 (C.A., F.C. 1985); McLean v. Central States, Southeast and Southwest Areas Pension Fund, 762 F.2d 1204 (C.A. 4, 1985); Wisconsin Winnebago Business Committee v. Koberstein, 762 F.2d 613 (C.A. 7, 1985); Nebraska Public Power District v. 100.95 Acres of Land in Thurston County, 719 F.2d 956 (C.A. 8, Neb. 1983); State of Tennessee v. Harrington, 622 F.Supp. 923 (M.D., Tenn. 1985); United States v. Benerson, 616 F.Supp. 167 (S.D., N.Y. 1985); State v. Torrez, 141 Ariz. 537, 687 P.2d 1292 (1984); Uberoi v. University of Colorado, 686 P.2d 785 (Colo. 1984); Blue Sky Bar, Inc. v. Town of Stratford, 4 Conn. App. 261, 493 A.2d 908 (1985); State v. Gill, 173 Ga.App. 848, 328 S.E.2d 561 (1985); State v. Pacariem, 67 Haw. 46, 677 P.2d 463 (1984); Littleton v. State, 708 P.2d 829 (Haw.App. 1985); People v. Moffitt, 92 Ill.Dec.2d 702, 138 Ill.App.3d 106, 485 N.E.2d 513 (1985); State v. Magnuson, 488 N.E.2d 743 (Ind.App. 1986); State v. Armstrong, 238 Kan. 559, 712 P.2d 1258 (1986); City of New Orleans v. New Orleans Public Service Incorporated, 471 So.2d 233 (La. App. 1985); Carroll County Education Association, Inc. v. Board of Education of Carroll County, 448 A.2d 345 (Md.App. 1982); Dedham Water Company v. Town of Dedham, 395 Mass. 510 480 N.E.2d 1016 (1985); Emerson College v. City of Boston, 393 Mass. 303, 471 N.E.2d 336 (1984); Ficano v. Lucas, 133 Mich. App. 268, 351 N.W.2d 198 (1983); Roberts v. Mississippi Republican Party State Executive Committee, 465 So.2d 1050 (Miss. 1985); Forest Hills Country Club v. Fred Weber, Inc., 691 S.W.2d 361 (Mo.App. 1985); Wright v. Martin, 674 S.W.2d 238 (Mo.App. 1984); State v. Bakker, 199 Mont. 385, 649 P.2d 456 (1982); Sarpy County Public Employees Association v. County of Sarpy, 220 Neb. 431, 370 N.W. 2d 495 (1985); Clothier v. Lopez, 103 N.M. 593, 711 P.2d 870 (1985); Town of Morehead City v. North Carolina Department of Transportation, 327 S.E.2d 602 (N.C. App. 1985); City of Tulsa v. Smittle, 702 P.2d 367 (Okla. 1985); State v. Shumway, 291 Ore. 153, 630 P.2d 796 (1981); Pennsylvania Industries for the Blind and Handicapped v. Commonwealth State System of Higher Education, 485 A.2d 1233 (Pa. Cmwlth. 1985); State v. Bodiford, 318 S.E.2d 567 (S. Car. 1984); Freels v. Northrup, 678 S.W.2d 55 (Tenn. 1984); Benavides v. State, 652 S.W.2d 464 (Tex.App. 1983); State v. Foley, 140 Vt. 643, 443 A.2d 452 (1982); and Paulson v. County of Pierce, 99 Wash.2d 645, 664 P.2d 1202 (1983).

[5] Section 302 deals with payment for buildings and structures situate on Federally acquired land; §303 relates to payment for certain expenses incidental to transfer of title; §304 is concerned with payment of litigation expenses under certain circumstances; and §305 deals with the furnishing of assurances by the States.

[6] The reference is to subsections (1), (2), and (3) of §301, *supra*.

[7] The savings clause in the above set forth §306, relating to vested rights and liabilities, need not here be considered. See SUTHERLAND, STATUTORY CONSTRUCTION (4th Ed.), Vol. 1A, §21.12.

[8] The term "applicant" is defined to mean "any public body or other agency authorized to receive Federal assistance under a development program," and the term "Federal assistance" is given the meaning of a "grant, loan, contract of guaranty, annual contribution, or other assistance provided by the United States."

[9] For a valuable further discussion of the remnant theory and other matters pertaining to excess condemnation see the paper by John P. Holloway, entitled "Supplemental Condemnation: A Discussion of the Principles of Excess and Substitute Condemnation," appearing in *Selected Studies in Highway Law* (Transportation Research Board, 1976), Vol. 2, p. 767.

[10] See 39 Fed. Reg. 26416; 23 C.F.R. 710.104(g).

[11] Nall Motors, Inc. v. Iowa City, Iowa, 410 F. Supp. 111 (S.D., Iowa 1975).

[12] Section 301(9), *supra*.

[13] 42 U.S.C. 4655.

[14] 42 U.S.C. 4651(9).

[15] *Id.*

[16] 23 C.F.R. 710.104(g).

[17] State of New Mexico, ex rel. State Highway Department v. United States, 665 F.2d 1033 (Ct. Cl. 1981).

APPLICATIONS

The forgoing research should prove helpful to highway and transportation administrators, their legal counsel, right-of-way officials, federal administrators, and others involved in the purchase of right-of-way and in the defense of the state in lawsuits regarding partial acquisitions. The author's opinion on the resolution of the apparent conflict between the two provisions of the U.S. Code, based on a review of the case law, should provide useful guidance in future cases.

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