

OPE 21-29

Jurist Leans Toward Remand In Park I-40 Case

United States Dist. Judge Bailey Brown said yesterday he is "now of the opinion" he should remand the Overton Park expressway case for a new decision by current Transportation Secretary Claude Stout Brinegar.

In a conference with attorneys, from both sides he said he feels former Transportation Secretary John Volpe's determination of the case was "incomplete," and should be reconsidered.

However, before making a final decision on whether to remand, the judge said he will consider written arguments by the attorneys. He gave them 10 days in which to file the briefs.

The remand was sought by J. Alan Hanover, special counsel for the state Transportation Department. In a petition filed Feb. 1, he said Mr. Volpe misconstrued Judge Brown's original remand order by failing to select a specific alternate route for Interstate 40.

After hearing 27 days of testimony in the environmental battle, Judge Brown remanded the case to Mr. Volpe Jan. 5, 1972. In his order, the judge said the remand was "only for the purpose of making a route determination. . . ."

Mr. Volpe rejected the state's proposed park route,

but did not choose an alternate. Charles F. Newman and John Vardaman, attorneys for the Citizens to Preserve Overton Park, had presented testimony in the trial in an effort to show that at least one other route was "feasible and prudent" as an alternative.

Most of their testimony was in favor of a route paralleling the L&N Railroad tracks across the city.

Judge Brown said Mr. Volpe's decision would have been final, or, at least, reviewable if he had urged construction of the expressway along the L&N route.

"Mr. Volpe said he felt like there was a feasible and prudent alternative to the park route, but I don't see how I can review his determination. . . unless he says what the feasible and prudent alternative is."

Mr. Newman argued the state should be forced to prove its contention that there is no reasonable alternative to the park route.

However, Judge Brown said the secretary of transportation is legally required to make that decision. "The burden is on the secretary, and if he doesn't have adequate funds to do it, it's his fault, not the state's."

United States Atty. Thomas F. Turley Jr. said, "I think we've discussed this case far beyond its just deserts. I think it's time we sent it to the secretary for a decision that can be called final, one way or another."

As an alternative to a remand order, Mr. Hanover had asked that Judge Brown dissolve the injunction which now forbids completion of the 3.5-mile Overton Park segment of I-40. Without the injunction, the state contends, it would be free to build the highway with state and local funds.

Judge Brown said that request will have to be considered later. "It would be a moot point if we decide to remand the case."

CA.
March 25, 1973