

Revised September 26, 1969

Nonprofit Corporations

Memorandum 69-121 (sent 9/18/69)

3. Approval of Recommendations for Printing

a. Study 63 - Evidence Code

Memorandum 69-109 (sent 9/18/69)
Recommendation (attached to Memorandum)
First Supplement to Memorandum 69-109 (sent 9/24/69)

b. Study 60 - Representations as to Credit

Memorandum 69-110 (enclosed)
Recommendation (attached to Memorandum)

c. Study 50 - Leases

Memorandum 69-111 (sent 9/24/69)
Recommendation (attached to Memorandum)
First Supplement to Memorandum 69-111 (sent 9/24/69)

4. Study 44 - Fictitious Business Name Statute

Memorandum 69-112 (sent 9/24/69)
Revised Tentative Recommendation (attached
to Memorandum)
First Supplement to Memorandum 69-112 (to
be sent)

(Special Order
of Business
11:00 a.m. on
October 3

5. Study 66 - Quasi-Community Property

Memorandum 69-123 (sent 9/23/69)

6. Study 65.40 - Inverse Condemnation (Aircraft Noise Damage)

Memorandum 69-113 (sent 9/18/69)
Draft Statute (attached to Memorandum)
Kryter, An Example of "Engineering Psy-
chology": The Aircraft Noise Problem,
23 American Psychologist 240 (1968)
(reprint sent 9/23/69)
Kryter, Sonic Booms From Supersonic
Transport, 163 Science 359 (1969)
(reprint sent 9/23/69)
Research Study by Professor Van Alstyne
(sent 9/24/69)

(Special Order
of Business
1:30 p.m. on
October 3

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7. Study 52 - Sovereign Immunity

Claims Against Public Entities and the Statute of Limitations

Memorandum 69-114 (sent 9/18/69)
Recommendation (attached to Memorandum)
First Supplement to Memorandum 69-114 (sent 9/25/69)

8. Study 12 - Jury Instructions

Memorandum 69-120 (sent 9/23/69)

9. Study 36.40 - Condemnation (Excess Takings)

Memorandum 69-115 (enclosed)
Revised Recommendation (attached to Memorandum)

10. Study 36 - Condemnation (Constitutional Revision)

Memorandum 69-116 (sent 9/25/69)
Background Materials (attached to Memorandum)

11. Study 65.25 - Inverse Condemnation (Water Damage; Land Stability)

Memorandum 69-117 (sent 9/24/69)

MINUTES OF MEETING

of

CALIFORNIA LAW REVISION COMMISSION

OCTOBER 3 AND 4, 1969

San Francisco

A meeting of the California Law Revision Commission was held in San Francisco on October 3 and 4, 1969.

Present: Sho Sato, Chairman
Thomas E. Stanton, Jr., Vice Chairman
Carlos J. Moorhead, Member of the Assembly (October 3)
Roger Arnebergh (October 3)
John D. Miller
William A. Yale

Absent: Alfred H. Song, Member of the Senate
Lewis K. Uhler
Richard H. Wolford
George H. Murphy, ex officio

Messrs. John H. DeMouilly, Clarence B. Taylor, and Jack I. Horton, members of the Commission's staff, also were present.

The following observers were also present:

Dwight E. Bishop, Bolt, Beranek and Newman, Inc. (October 3)
William M. Bitting, Hill, Farrer and Burrill (October 3)
Ralph Clark, San Francisco (October 3)
Edward J. Connor, Jr., Department of Public Works (October 3)
Paul F. Dauer, Department of Water Resources
Ronald P. Denitz, Tishman Realty Co. (October 3)
Norval Fairman, Department of Public Works
William C. George, San Diego County Counsel's Office (October 3)
John N. McLaurin, Hill, Farrer and Burrill (October 3)
John M. Morrison, Attorney General's Office
Kenneth Nellis, Department of Public Works
Dennis C. Poulsen, Hastings Law Journal (October 3)
John D. Rogers, Rogers, Vizzard and Tallett (October 3)
Willard A. Shank, Attorney General's Office (October 3)
Milton N. Sherman, Los Angeles City Attorney's Office (October 3)
Terry C. Smith, Los Angeles County Counsel's Office
Charles E. Spencer, Department of Public Works
Gerald J. Thompson, Santa Clara County Counsel's Office (October 3)

ADMINISTRATIVE MATTERS

Approval of Minutes of September 4-6 Meeting. The minutes of the September 4-6, 1969 meeting were approved as submitted by the staff.

Future Meetings

The Commission concurred in the staff's suggestion that the meeting tentatively scheduled for early November be cancelled. The Commission considered Commissioner Uhler's written suggestions that a meeting be held at Stanford as soon as conveniently possible, perhaps in conjunction with "Big Game" weekend. The staff was directed to attempt to secure facilities for an early meeting at Stanford, if possible in the first week of December. Because of the difficulty in obtaining a quorum and the possible inconvenience to those members not desiring to attend the Stanford-California game, it was decided not to schedule a meeting at that time.

Status of Topics on Commission's Agenda

The Commission considered Memorandum 69-119. The staff was directed to continue its efforts to secure a consultant for a study on the procedural aspects of eminent domain and to obtain suitable new topics and related research studies.

With respect to Studies 23, 30, 39 and 76, the staff was directed to determine whether problems still exist in these areas, if so, the nature of the problems, and the feasibility of and necessity for further Commission action.

New Topic - Pleading and Practice

The Commission considered Memorandum 69-108 and Exhibit I attached thereto. The Executive Secretary was directed to contact Assemblyman Hayes and Senator Grunsky, to determine their attitudes towards granting the Commission a broad authority to undertake studies in this area, and to report back to the Commission at the next meeting concerning these attitudes.

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New Topic - Nonprofit Corporations

The Commission considered Memorandum 69-121 and directed that a statement be included in the Annual Report requesting authority to undertake a study to determine whether the law relating to nonprofit corporations should be revised.

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STUDY 12 - JURY INSTRUCTIONS

The Commission considered Memorandum 69-120 and the attached material. The material was approved for distribution as outlined in the memorandum. The letter of transmittal is to be revised to request that the persons who receive the material indicate whether they favor or oppose the general idea of sending the instructions into the jury room in civil cases, whether they believe that the instructions should go into the jury room only if a party so requests or on the court's own motion, and whether the mechanics should be governed by rules adopted by the Judicial Council or whether they should be specified in the statute and, if so, what procedure should be provided.

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STUDY 36 - CONDEMNATION (CONSTITUTIONAL REVISION)

The Commission considered Memorandum 69-116 and the materials attached thereto. The Executive Secretary was directed to advise the Constitutional Revision Commission as follows:

(1) The Law Revision Commission recommends that Section 14 1/2 of Article I be repealed in its entirety. This section is ineffectual and unnecessary.

(2) The Commission recommends that Section 14 of Article I be revised as set forth on page 1167-1168 of the Commission's tentative recommendation relating to condemnation law and procedure (possession prior to final judgment and related problems) except for the second sentence.

(3) Because of a diversity of views as to the proper disposition of the second sentence of Section 14 set forth in the recommendation, the Commission wished to defer making a recommendation as to this sentence. Since 1967, when the recommendation was prepared, the Commission has had a further opportunity to study the problems related to the procedures for determining just compensation. This study indicates that present procedures are not completely satisfactory, that new (nonjudicial) techniques may be desirable, and that it appears undesirable for the Constitution to preclude completely legislative experimentation. Accordingly, the Commission believed the second sentence of the printed tentative recommendation is unsatisfactory. The view of the Commission was that the Legislature itself would adequately protect the rights of condemners and that the second sentence should at least be revised to provide in substance no more than

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that "the owner is entitled to have just compensation determined by a jury." The question whether the second sentence should be deleted altogether was postponed. The staff was directed to place on the agenda for the next meeting consideration of the proper final disposition of this sentence.

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STUDY 36.40 - CONDEMNATION LAW AND PROCEDURE (EXCESS
CONDEMNATION--PHYSICAL AND FINANCIAL REMNANTS)

The Commission considered Memorandum 69-115 and the preliminary staff draft attached thereto. The following action was taken:

(1) A phrase should be added to the end of the first sentence of Section 1266 substantially as follows: "or by condemnation proceedings initiated with the consent of the owner."

(2) The second sentence of Section 1266 should be deleted as this matter is covered in subdivision (f) of Section 1266.1.

(3) The term "entire parcel" used in subdivision (a) of Section 1266.1 should be revised to make clear that it refers only to the part taken plus the remainder, or portion of the remainder, and not to the original larger parcel.

(4) Subdivision (c) of Section 1266.1 should be revised to provide for a waiver of the excess taking issue if a motion to have this matter heard is not timely made. The staff was directed to consider whether the timeliness of the motion should be determined with reference to the times fixed for an exchange of appraisal information.

(5) The last sentence of subdivision (c) of Section 1266.1 was deleted. The Comment to this section should state that the extent to which evidence introduced at a preliminary hearing can be introduced at the valuation trial shall be determined under the provisions of the Evidence Code.

(6) Under the procedure provided by Section 1266.1, written findings of fact and conclusions of law (C.C.P. § 632) should not be required if this will involve a risk of delay in the proceedings.

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(7) Section 1266.1 should be revised to require a condemnee to "accept" a "physical solution."

(8) The last sentence of subdivision (d) should be expanded and made a separate subdivision relating to any case arising under Section 1266.1. The new subdivision should provide in substance that the court shall determine the issue of excess taking raised by the answer and shall make its order accordingly. If the determination is in favor of the condemnee, the remainder, or portion of the remainder, shall be deleted from the property sought to be taken.

(9) The Comment to Section 1266.1 at the top of page 20 should be revised to qualify the examples listed, e.g., landlocked, assumes no physical solution is possible; reduced below minimum zoning, assumes no reasonable probability of a favorable zoning change.

(10) The Commission reconsidered the possibility of further judicial review of the issue of excess taking after the valuation trial and decided to make no changes in this regard. It was pointed out that a "second look" doctrine would further complicate the valuation trial, often require presentation of additional evidence, necessitate special findings by the jury, and encourage the trial judge to defer making a final decision until completion of the valuation trial.

(11) The staff was directed to revise the draft recommendation in accordance with these directions and return it for reconsideration at a future meeting.

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STUDY 36.55 - CONDEMNATION (ARBITRATION)

The staff was authorized to revise the recommendation relating to arbitration to include in a footnote the substance of the criticism of the present procedures for eminent domain valuation set forth in the dissenting opinion of Justice Friedman of the Court of Appeal in State v. Wherity, 275 Adv. Cal. App. 279, 79 Cal. Rptr. 591 (1969).

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STUDY 44 - FICTITIOUS BUSINESS NAME STATUTE

The Commission considered Memorandum 69-112, the attached tentative recommendation, and letters received from Mr. R. B. James, County Clerk of San Diego County and the following members of the State Bar Committee on the Uniform Commercial Code: Mr. John G. Eliot, Mr. Almon B. McCallum, Mr. Thomas E. Montgomery, Mr. Harold Marsh, Jr., Mr. Arlo D. Poe.

The following action was taken:

(1) The term "Massachusetts business trust" was changed to simply "business trust" wherever appropriate.

(2) Section 17911 was revised to read in part: "This chapter does not apply to a nonprofit corporation or association, including, but not limited to,"

(3) Section 17913 was revised to set forth the exact form of a blank statement footnoted to indicate what information is to be required in a completed statement.

(4) Sections 17920 and 17923 were revised permitting the filing and publication of a statement of withdrawal from a partnership to prevent expiration of an otherwise accurate fictitious business name statement. Paragraph (1) of subdivision (a) of Section 17924 was deleted to conform to this revision.

(5) Subdivisions (a) and (c) of Section 17921 were deleted, and subdivision (b) was revised to provide for sending the notice required to the principal place of business of the registrant. A conforming change was made in subdivision (c) of Section 17929.

(6) Subdivision (a) of Section 17922 and subdivision (c) of Section 17923 were revised to make the filing of the affidavit of publication mandatory.

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(7) Subdivision (d) was added to Section 17923 to provide in substance:
"The withdrawal of a general partner shall not cause a fictitious business name to expire if a statement of withdrawal is filed and published in compliance with this section."

(8) Subdivision (b) of Section 17927 was revised to permit the destruction of statements of abandonment and withdrawal nine years after filing.

(9) The fee provided in subdivision (a) of Section 17929 was increased from five to ten dollars.

(10) The fine provided in Section 17930 was reduced to five hundred dollars and a conforming change was made in paragraph (3) of subdivision (a) of Section 17924.

Subject to these changes and minor editorial revisions, the recommendation was approved for printing and submission to the Legislature.

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STUDY 50 - LEASES

The Commission considered Memorandum 69-111 and the First Supplement to Memorandum 69-111 and the tentative recommendation relating to real property leases.

The Commission discussed the problem of a possible "windfall" to the lessor when future rents are recovered. The Commission noted that the recommendation would be acceptable to lessors' representatives if subdivision (a) of Section 1951.2 (as set out in the tentative recommendation) were revised to delete paragraph (3), renumber paragraphs (4) and (5) as (3) and (4), respectively, and to revise former paragraph (5) to read:

~~(5)~~ (4) ~~If the lease so provides, any~~ Any other amount necessary to compensate the lessor for all the detriment, other than that described in paragraphs (1), (2), and (3), proximately caused by the lessee's failure to perform his obligations under the lease or which in the ordinary course of things would be likely to result therefrom.

The Commission concluded that the revision was not desirable. Lessors under leases prepared by lessees (such as oil company site leases) could suffer if this revision were made. Moreover, there is little chance that a lessor will decline to relet the property in order to obtain a windfall since he will prefer to obtain the sure rental payment upon reletting instead of the mere possibility of collecting damages for loss of future rent from the original lessee. In addition, the rental loss is only the difference between the lease rent and the reasonable rental value.

The Commission made the following revisions in the tentative recommendation. The remedy of recovery for rental loss is not to be limited by a requirement that such remedy be provided in the lease. Section 1951.7 and the Comment thereto were revised to read as set out on the next page:

§ 1951.7. Notice required upon reletting property

Sec. 6. Section 1951.7 is added to the Civil Code, to read:

1951.7. (a) As used in this section, "advance payment" means moneys paid to the lessor of real property as prepayment of rent, or as a deposit to secure faithful performance of the terms of the lease, or any other payment which is the substantial equivalent of either of these. A payment that is not in excess of the amount of one month's rent is not an advance payment for the purposes of this section.

(b) The notice provided by subdivision (c) is required to be given only if:

- (1) The lessee has made an advance payment;
- (2) The lease is terminated pursuant to Section 1951.2; and
- (3) The lessee has made a request, in writing, to the lessor that he be given notice under subdivision (c).

(c) Upon the initial reletting of the property, the lessor shall send a written notice to the lessee stating that the property has been relet, the name and address of the new lessee, and the length of the new lease and the amount of the rent. The notice shall be delivered to the lessee personally, or be sent by regular mail to the lessee at the address shown on the request, not later than 30 days after the new lessee takes possession of the property. No notice is required if the amount of the rent due and unpaid at the time of termination exceeds the amount of the advance payment.

Comment. Section 1951.7 does not in any way affect the right of the lessor to recover damages nor the right of a lessee to recover prepaid rent,

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a security deposit, or other payment. The section is included merely to provide a means whereby the lessee whose lease has been terminated under Section 1951.2 may obtain information concerning the length of the term of the new lease and the rent provided in the new lease. The notice is required only if the lessee so requests and only upon the initial reletting of the property. If the new lease is terminated, the notice, if any, required by Section 1951.7 need be given only to the lessee under the new lease.

The Commission directed that the Executive Secretary and Assemblyman Moorhead should meet and discuss this matter with Assemblyman Hayes. Commissioner Miller indicated that he would like to be present at the meeting. The Executive Secretary is to report to the Commission at the December meeting on the results of the meeting.

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STUDY 52 - SOVEREIGN IMMUNITY (STATUTE OF LIMITATIONS)

The Commission considered Memorandum 69-114 and the attached draft statute and the First Supplement to Memorandum 69-114 and the attached letter from Mr. Howard C. Erickson, West Covina attorney.

The Commission indicated approval (but no formal motion was made) of the staff suggestion that the substance of its 1968 recommendation relating to sovereign immunity (statute of limitations) be submitted to the 1970 session. The measure should exclude the provisions that were added to the 1969 bill after introduction to deal with the problem of late filing of claims but should include the technical corrections in special district statutes and in one additional special district statute that the staff reported contained an incorrect reference.

The Commission declined to make any recommendation concerning the late filing of claims.

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STUDY 60 - REPRESENTATIONS AS TO CREDIT

The Commission considered Memorandum 69-110 and the attached Tentative Recommendation relating to Representations as to Credit.

The Commission approved the Recommendation for printing and submission to the 1970 Legislature.

The Executive Secretary reported that he had not received any comments from the Bankers or the State Bar. He had called both groups several times. He stated that he believed that a reaction would be forthcoming and, if it was adverse to the recommendation, he would bring it to the attention of the Commission.

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STUDY 63 - EVIDENCE CODE (RES IPSA LOQUITUR)

The Commission considered Memorandum 69-109, the First Supplement to that Memorandum, and the tentative recommendation on evidence.

Proposed Evidence Code Section 646 was revised to read as follows:

646. (a) The judicial doctrine of res ipsa loquitur is a presumption affecting the burden of producing evidence. If the defendant introduces evidence which would support a finding that he was not negligent or that any negligence on his part was not a proximate cause of the occurrence, the court may, and upon request shall, instruct the jury that it may draw the inference that a proximate cause of the occurrence was some negligent conduct on the part of the defendant if the facts that gave rise to the res ipsa loquitur presumption are established. If such an instruction is given, the jury shall also be instructed in substance that it should find that the occurrence was caused by the negligence of the defendant only if, after weighing the circumstantial evidence of negligence together with all of the other evidence in the case, it believes that it is more probable than not that the occurrence was caused by the negligence of the defendant.

(b) As used in this section, "defendant" means the party against whom the res ipsa loquitur presumption operates.

The Comment should be revised to reflect the clarifying changes in the statute.

As so revised, the recommendation was approved for printing and submission to the Legislature.

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STUDY 65.25 - INVERSE CONDEMNATION (WATER DAMAGE; LAND STABILITY)

The Commission considered Memorandum 69-117, the First Supplement to Memorandum 69-117 and the letters attached thereto from the Department of Public Works. Their author, Mr. Edward J. Connor, Jr., discussed these letters and the position taken by the Department with respect to the Commission's tentative recommendation on water damage.

The Commission directed the staff to prepare a statement to be included in the Annual Report requesting authority to study those areas of private law which are related to the areas of inverse condemnation law which are being studied by the Commission to determine whether comprehensive revision or other changes in the private area are necessary or desirable in connection with revision of the law relating to inverse condemnation. The staff was further directed to review the present tentative recommendation on water damage and interference with land stability and identify those areas of inconsistency between the private law and the rules suggested for governing the liability of public entities for inverse condemnation.

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STUDY 65.40 - INVERSE CONDEMNATION (AIRCRAFT NOISE DAMAGE)

The Commission heard and considered comments on Memorandum 69-113, the attached draft statute, and related issues from the following persons: Dwight E. Bishop, accoustical engineer, Bolt, Beranek & Newman, Inc.; Ralph Clark, appraiser; John N. McLaurin, attorney, Hill, Farrer & Burrill; John D. Rogers, attorney, Rogers, Vizzard & Tallett; Milton N. Sherman, Assistant City Attorney, City of Los Angeles.

For the next meeting, the staff was directed to prepare materials that would, as far as possible, identify the issues raised in this area and present possible solutions to these problems.

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STUDY 66 - QUASI-COMMUNITY PROPERTY

The Commission considered Memorandum 69-123 and the attached letter from Gerald E. Lichtig, suggesting that the Commission recommend legislation dealing with the problem of when a court has jurisdiction to divide quasi-community property upon dissolution of a marriage--i.e., whether the court has jurisdiction when one spouse is domiciled in California and it has personal jurisdiction over the other spouse.

After some discussion, the Commission believed that it would be extremely difficult to attempt to state in a statute the circumstances under which a court should undertake to divide quasi-community property. Generally, it was believed that such property should be divided in any case where the court has jurisdiction to grant a divorce or separate maintenance and has personal jurisdiction over the parties. Nevertheless, there may be some circumstances where the court should be permitted to decline to divide the property. The Commission noted that a research study would be needed before a recommendation could be made on this matter and funds are not available to finance such a study. Accordingly, the Commission determined not to undertake a study of the problem.

*Memorandum
Oct*

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O. T. GILBANK
SENIOR COUNSEL

September 29, 1969

FILE _____

Sho Sato, Chairman
California Law Revision Commission
Boalt Hall School of Law
University of California
Berkeley, California

Dear Sho:

As I have previously indicated, I will be unable to participate in the October Commission meeting. However, I would like to bring several items to the attention of the Commission for consideration. They are as follows:

1. At the September meeting, several of us discussed the fact that we had not visited the Law Revision Commission facilities at Stanford Law School, nor had we had an opportunity to get to know the secretarial staff. I think it would be most appropriate if we accomplished this at the earliest possible time. A logical and practical approach would be to re-schedule our November meeting at Stanford, and in accordance with past practice, schedule it for Thursday at 7:00 p.m. through Saturday noon, preceding the big game.
2. The Commission has considered from time to time additional things that we can do to relate to both Bench and Bar. I am confident that a good many Bar Associations, and the judges who function within those geographical areas, would enjoy getting together with the Commission for an exchange of views and to hear what the Commission is working on. We could accomplish this by regularly devoting luncheon time on Friday or Friday evenings meeting with various of these groups. In addition to the other benefits, this would constitute awfully good PR for the Commission.

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3. To assist the Commissioners in their preparation for each meeting, and possibly to make the Commission's deliberations more precise, I suggest that we prepare and utilize a "short form" cover sheet which will enable us to read ourselves into the problem quickly, avoid redundant deliberations and, especially, assist Commissioners who have been absent during prior discussion of the topic. To this end I enclose a suggested cover sheet form for your consideration.

Best wishes for a successful meeting. I'll look forward to seeing you in November (hopefully at Stanford).

Kindest regards,

LEWIS K. UHLER

LKU:dkn

cc: Thomas E. Stanton, Jr.
Roger Arnebergh
John D. Miller
Richard H. Wolford
William A. Yale
John H. Demouilly

CALIFORNIA LAW REVISION COMMISSION

1. TOPIC.
2. BACKGROUND ON THIS ASSIGNMENT (why we are working on this topic, date upon which it was undertaken, any prior work and results thereof).
3. DEFINING THE PROBLEMS (included here should be questions of public and other policy inherent in the topic, the relationship of this problem to existing decisional and statutory law, drafting problems, etc.)
4. COMMENTS FROM OUTSIDE THE COMMISSION (included should be the date of such comment, from whom received and the nature of the comment, etc.).
5. ACTIONS AND DECISIONS OF THE COMMISSION TO DATE (this should identify the date of the meeting at which action was taken, the major points of discussion, major areas of concern, votes and other decisions already made).
6. OBJECTIVES FOR THIS MEETING. (policy and problems remaining unresolved, what decisions and general progress should we seek at this meeting).