

Time

June 11 - 7:00 p.m. - 10:00 p.m.  
June 12 - 9:00 a.m. - 4:00 p.m.

Place

State Bar Building  
1230 W. Third Street  
Los Angeles 90017

FINAL AGENDA

for meeting of

CALIFORNIA LAW REVISION COMMISSION

Los Angeles

June 11 and 12, 1971

1. Minutes of May 28-29 Meeting (enclosed)
2. Administrative Matters
3. Study 71 - Pleading

Separate Statement of Causes of Action

Memorandum 71-40 (enclosed)

Tentative Recommendation (attached to Memorandum)

Compulsory Joinder of Causes

Memorandum 71-42 (enclosed)

Tentative Recommendation (attached to Memorandum)

*FIRST SUPPLEMENT TO MEMORANDUM 71-42*

4. Study 36.80 - Condemnation (Procedural Problems Generally)

Memorandum 71-41 (sent 6/3/71)

Background Study (attached to Memorandum)

5. Study 36.41 - Condemnation (Protective Condemnation)

Memorandum 71-13 (sent 4/19/71; another copy sent 6/2/71)

6. Study 36.43 - Condemnation (Open Space Acquisition)

Memorandum 71-27 (sent 4/21/71; another copy sent 6/2/71)

First Supplement to Memorandum 71-27 (sent 4/21/71; another copy sent 6/2/71)

7. Study 36.35 - Condemnation (Possession Prior to Final Judgment)

Memorandum 71-25 (sent 4/27/71; another copy sent 6/2/71)

Comprehensive Statute (you were sent this for prior meetings)

8. Study 36.20(1) - Condemnation--The Right to Take (Legislatively Declared Public Uses: Sewers)

Memorandum 71-39 (sent 6/2/71)

MINUTES OF MEETING  
of  
CALIFORNIA LAW REVISION COMMISSION  
JUNE 11 AND 12, 1971  
Los Angeles

A meeting of the California Law Revision Commission was held in Los Angeles on June 11 and 12, 1971.

Present: Thomas E. Stanton, Jr., Chairman  
John D. Miller, Vice Chairman  
Noble K. Gregory  
John N. McLaurin (June 12 only)  
Marc W. Sandstrom (June 11 only)

Absent: Alfred H. Song, Member of Senate  
Carlos J. Moorhead, Member of Assembly  
G. Bruce Gourley  
George H. Murphy, ex officio

Messrs. John H. DeMouilly, Jack I. Horton, E. Craig Smay, and Nathaniel Sterling, members of the Commission's staff, Mr. Norman E. Matteoni, the Commission's consultant on condemnation procedure, and Mr. Gideon Kanner, general consultant on condemnation matters, also were present.

The following observers were present for the portions of the meeting indicated:

Friday, June 11

Robert Bidlingmeyer, Department of Water Resources  
John M. Morrison, Office of Attorney General  
Jon D. Smock, Judicial Council  
Charles E. Spencer, Department of Public Works

Saturday, June 12

Robert Bidlingmeyer, Department of Water Resources  
Norval Fairman, Department of Public Works  
William C. George, County Counsel, San Diego  
John M. Morrison, Office of Attorney General  
Terry C. Smith, County Counsel, Los Angeles  
Charles E. Spencer, Department of Public Works

ADMINISTRATIVE MATTERS

Correction and Approval of Minutes of May 28-29, 1971, Meeting

The following corrections were made in the Minutes of the May 28-29, 1971, meeting:

- (1) On page 4, last line, change "from" to "for."
- (2) On page 16, indented quote, after "retirement," add "plan."

As thus corrected, the Minutes of the May 28-29, 1971, meeting were approved.

Future Meeting Schedule

The following is the schedule for future meetings:

July

July 15 (evening)	7:00 p.m. - 10:00 p.m.	San Francisco
July 16	9:00 a.m. - 5:00 p.m.	
July 17	9:00 a.m. - 1:00 p.m.	

August

No meeting

September

September 10	9:30 a.m. - 5:00 p.m.	Los Angeles
September 11	9:00 a.m. - 4:00 p.m.	

October

October 7 (evening)	7:00 p.m. - 10:00 p.m.	San Francisco
October 8	9:00 a.m. - 5:00 p.m.	
October 9	9:00 a.m. - 1:00 p.m.	

November

November 5	9:30 a.m. - 5:00 p.m.	Los Angeles
November 6	9:00 a.m. - 4:00 p.m.	

December

December 2 (evening)	7:00 p.m. - 10:00 p.m.	San Francisco
December 3	9:00 a.m. - 5:00 p.m.	
December 4	9:00 a.m. - 1:00 p.m.	

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Plaques for Legislative Members of the Commission

The Executive Secretary was directed to present to Senators Bradley and Song and Assemblyman Moorhead the plaques that he previously had been directed to have made for them.

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STUDY 36.20(1) - CONDEMNATION--THE RIGHT TO TAKE  
(LEGISLATIVELY DECLARED PUBLIC USES: SEWERS)

The Commission considered Memorandum 71-39, proposing for repeal subdivision 8 of Section 1238 of the Code of Civil Procedure (declaring sewerage of towns, cities, and state and college buildings, and connection of private residences, to be public uses). The Commission approved for repeal subdivision 8 as set out in Exhibit I to Memorandum 71-39 and approved for inclusion in the comprehensive statute proposed Health and Safety Code Section 4967 (private persons may request a local public entity to make a sewer connection on their behalf) as set out in Exhibit II to Memorandum 71-39.

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STUDY 36.80 - CONDEMNATION (PROCEDURAL PROBLEMS GENERALLY)

The Commission considered Memorandum 71-41 and the attached research study prepared by its consultant, Mr. Matteoni, relating to procedural matters in condemnation, up to and including the answer. With the view toward drafting specific procedural provisions for the comprehensive statute, the Commission made the following general policy decisions:

Judicial System for Condemnation

The Commission noted that different jurisdictions have varying systems for handling eminent domain problems and determined that California should continue its judicial system as at present.

Public Hearing

The Commission considered a proposal that condemnors hold a public hearing at the early planning stages of their projects with notice and opportunity for affected persons to be heard. The Commission directed the staff to draft language for the Commission's consideration at the time it again considers the precatory prerequisites to condemnation presently before the Legislature (negotiation and formal offer).

Delay or Abandonment Before Condemnation

The Commission discussed at length the problems involved when a public entity's expressed intent to acquire property in the future hinders the property owner's ability to sell or develop the property. It was recognized that these problems are capable of resolution where the property is eventually acquired. However, where the property is never acquired, these problems have

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no easy solutions. The conflict between the need of the public entity to plan and the interest of the owner in his property was recognized, and the staff was directed to prepare a memorandum, accompanied by relevant law review articles, proposing possible methods of dealing with these problems.

Negotiations or Formal Offer as Prerequisite to Condemnation

The Commission examined the first three guidelines for property acquisition provided by the federal Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970. Those guidelines provide generally that a public entity should make every reasonable effort to acquire expeditiously real property by negotiation, that prior to initiation of negotiations, the entity should offer to purchase the property for an amount not less than an appraisal indicates is just compensation for the property (the appraisal data to be provided to the property owner), and that the owner be allowed to accompany the appraiser during his inspection of the property.

The Commission noted that these guidelines are merely precatory in the federal statute and that they apply only to federal and federally-assisted acquisitions. The Commission further noted that legislation presently before the state Legislature would apply these guidelines to all public entity acquisitions within the state; although there is presently in the proposed legislation no express language that these three guidelines are precatory, it is anticipated that they will be made so.

After considerable discussion of the merits of the proposed legislation, the Commission was unable to agree as to its disposition. Action on these matters was postponed for further consideration in the future.

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The Commission also considered a proposal that a concrete offer to purchase be made prerequisite to initiation of a condemnation action. The Commission determined not to include such a "jurisdictional offer" in the comprehensive statute.

#### Contents of Resolution of Necessity

The Commission considered whether environmental factors should be included in the resolution of necessity to condemn property. The Commission concluded that, although it may be desirable that condemnors consider environmental factors in planning their projects, these factors should not be raised in the context of an eminent domain proceeding. Accordingly, the Comments to Sections 302 and 313 of the comprehensive statute, relating to the contents and effect of the resolution of necessity, should be revised to reflect the fact that the conclusive effect given the resolution does not preclude raising any environmental considerations required by law in other contexts. The Comments should also make reference to the situations where a resolution of necessity is not conclusive and should include a reference to Rindge Co. v. County of Los Angeles, 262 U.S. 700 (1923).

#### Jurisdiction

The Commission determined to leave jurisdiction over eminent domain proceedings in the superior court as at present. The relationship of the jurisdiction of the Public Utilities Commission and judicial eminent domain procedure is to be explored at a future time.

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Jurisdiction of Court to Decide Issues Incident to Proceedings

The Commission decided that certain matters within the jurisdiction of the court--determination and regulation of common use, manner of making connections and crossings of rights of way, place and manner of removing or relocating structures and improvements, respective rights of parties seeking to condemn the same property, adverse or conflicting claims to the property, and allocation of the award--should be considered separately when substantive standards for making these determinations are adopted for inclusion in the comprehensive statute. For example, the authority of the court to determine and regulate common uses might include the power to impose conditions upon the uses so that they are consistent or compatible.

Venue

The Commission decided to retain and redraft for clarity presently existing venue provisions for instituting an eminent domain action. The Commission further noted that the rules governing change of venue, particularly in Code of Civil Procedure Section 394, may not be adequate as applied to condemnation proceedings. The Commission directed the staff to investigate the change of venue problems as they relate to eminent domain, particularly whether holding land should be deemed "doing business" and whether unincorporated business associations should be covered by change of venue provisions.

Rules of Practice

The Commission determined to retain the substance of Code of Civil Procedure Section 1256, which provides that the prevailing rules for California civil practice generally control eminent domain proceedings, except where more specific rules are provided.

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Name of Proceedings and Parties

The Commission considered suggestions that the names of the proceedings and parties to a condemnation action be changed so that the action is for "eminent domain," that the plaintiff is a "petitioner," that the defendant is a "respondent," that the complaint is a "petition," and that the answer is a "notice of appearance." The Commission determined that any psychological value that might result from a name change was insignificant compared with the possible confusion and problems the name change would cause and, hence, decided to retain traditional terminology.

Commencement of an Eminent Domain Proceeding

The Commission determined that an eminent domain proceeding should be commenced by the filing of a complaint and that issuance of summons should not mark the commencement of an action.

Contents of Complaint

The Commission determined to retain basically the scheme provided in Code of Civil Procedure Section 1244 for the contents of the complaint. Several modifications were approved for this scheme:

(1) The naming of defendants should be streamlined and the manner of their service clarified.

(2) The statement of the plaintiff's right to condemn should be substantially expanded to include the specific statutory authority for the particular taking. This requirement could be satisfied by attaching an appropriate resolution or declaration to the complaint.

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(3) A map showing the land to be taken and its location in relation to the improvement should be attached to the complaint.

#### Allegation of Value in the Complaint

The Commission considered a proposal that the plaintiff make allegations of value in its complaint. The Commission determined not to add such a requirement. In addition, the Commission determined that the defendant need not make allegations of value in his answer. It was believed that an early requirement of alleging value by either party is unrealistic and serves no useful purpose.

#### Verification of Complaint

The Commission discussed proposals to require verification of the complaint or to require an attorney to sign the complaint. After prolonged debate, the Commission was unable to reach agreement and, hence, concluded not to adopt these proposals but to leave the law in its existing state: A public entity need not verify its complaint, but the complaint calls for a verified answer.

#### Joining Several Parcels in a Single Complaint

The Commission determined that a condemnor should be able to join up to ten ownerships in a single complaint, with provision that the ownerships be tried separately unless they are held in common or unless the court grants a motion to consolidate. The provision should also define "ownership" so that a single parcel in common ownership is deemed only one parcel and that several "parcels" in a single ownership are deemed only one ownership. This

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provision should not be jurisdictional. The Comment to such a provision should indicate that the condemnor is free to include only one parcel per complaint but may join any number up to ten as it deems appropriate.

#### Joint Complaint for Joint Use by Condemnors

The staff was directed to further investigate problems involved in consolidation of complaints for disparate uses of a defendant's land by several entities with the view to retaining such presently existing authority.

#### Amending the Complaint

The Commission decided to retain presently existing procedures and requirements governing amendment of a complaint. The staff was directed to investigate the problems of abandonment that arise where the complaint is amended to alter the take, whether the alteration is to increase, decrease, or change the property sought.

#### Lis Pendens

The Commission determined that, at the time a complaint is filed, a notice of the pendency of the action should be filed with the recorder for the county where the property is located. Failure to file the notice should not be a jurisdictional defect but should render title of the condemnor invalid as against subsequent bona fide purchasers and encumbrancers for value.

#### Summons and Service

The Commission determined that the summons in an eminent domain proceeding should be generally in the same form and served in the same manner

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as summons in civil actions generally. The statute should grant the Judicial Council authority to prescribe the form of summons.

#### Demurrers

Demurrers should be available to parties, as at present, to attack defects on the face of the pleadings. However, demurrers should not be available to challenge the right to take. Such a challenge must be raised by objections to the right to take.

#### Objections to the Right to Take

The Commission approved a general scheme whereby objections to the right to take must be raised by a defendant within 30 days of the service of summons. Longer time periods should be available upon proper application. The objections may be filed concurrently with the answer but not in lieu of the answer and should be contained in a separate document. The trial of the action may not proceed until the preliminary objections have been resolved. It is the duty of the parties to set the objections for hearing with notice to the opposition.

#### Contents of Answer

The Commission made the following determinations with regard to the contents of the defendant's answer:

- (1) The answer need not contain allegations of value.
- (2) The answer should indicate the interest claimed by the defendant in the property described in the complaint.

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Service of Pleadings Among Parties

The Commission considered a proposal to require the condemnor to serve copies of answers filed by unnamed defendants (Does or intervenors) upon the named defendants to the suit. The Commission decided not to adopt such a requirement in view of the burden on the condemnor and the practical alternatives readily available to the condemnee, especially in light of the relative infrequency that this situation arises.

Cross-Complaints in Eminent Domain

The Commission directed the staff to investigate the extent to which cross-complaints are available and should be available either between defendants to an action or between plaintiff and defendant. Since there are relatively few eminent domain cross-complaint cases, it was suggested that the availability of cross-complaints in special proceedings generally be investigated.

Bifurcation of Preliminary Issues From Issue of Valuation

The Commission determined that it would be desirable to allow nonjury preliminary questions to be decided prior to the jury trial on valuation. The Commission noted that, if proposed Code of Civil Procedure Section 1048 is enacted, the court will have adequate authority to sever out these preliminary issues for advance trial. Nonetheless, the Commission directed the staff to investigate the merits of drafting a special provision tailored to fit the needs of eminent domain proceedings.

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Jury Trial

The Commission considered a proposal to remove the right of jury trial in eminent domain cases. The Commission determined to retain the system of jury trial in its present form.

Limitation on Expert Witnesses

The Commission considered a proposal to limit expert appraiser testimony in eminent domain cases to two appraisers appointed by the court with provision for appointment of a third appraiser if a divergence greater than ten percent exists between the two appraisals. The Commission noted that a bill embodying this proposal is presently before the Legislature and that it has been amended to allow each party to present one expert witness on value, and the judge is to select a third in case of a ten percent spread.

The Commission approved neither of the above proposals. It believes the judge, at present, already has adequate authority to control the number of expert witnesses, and the judge has authority to appoint an expert witness if needed. In addition, there is opposition from both condemnors and condemnees to both of these proposals to limit expert appraisal testimony. It appears to the Commission that the proposal will not benefit the conduct of eminent domain proceedings but may, in fact, be detrimental.

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#### STUDY 71 - PLEADING

The Commission considered Memorandum 71-40, Memorandum 71-42 and the First Supplement to Memorandum 71-42, and the attached tentative recommendations drafted by the staff.

#### Separate Statement of Causes of Action

The Commission considered the staff draft of the tentative recommendation attached to Memorandum 71-40. The Commission made the following decisions:

(1) On page 2 of the tentative recommendation, add to footnote 3, a reference to the current volume of Witkin where he explains, for a different purpose, the confusing concept of what constitutes a cause of action.

(2) On page 4, take out reference to Witkin in Comment at bottom of page. Add a reference to Witkin's explanation of the difference between a cause of action and the theory of a cause of action. Also, the Comment should make clear that the deletion of the separate statement provision does not change the substantive law as to what constitutes a cause of action.

With these changes, the tentative recommendation was approved for distribution to members of the State Bar Committee on the Administration of Justice.

#### Compulsory Joinder of Causes of Action

The Commission considered the staff draft of the tentative recommendation attached to Memorandum 71-42 and the two additional sections and Comments attached to the First Supplement to Memorandum 71-42. The Commission made the following decisions:

(1) The preliminary portion of the tentative recommendation was revised to read substantially as follows: In the 8th line from the bottom on page 2,

the word "apparent" was inserted before "tactical." "Plaintiffs' attorneys have been known to abuse this advantage." was deleted. Add: "On the other hand, the plaintiff may not realize that collateral estoppel will bar the later personal injury action where the property damage suit results in a judgment for the defendant because plaintiff failed to vigorously prosecute the property damage suit because of the small amount of money involved." It was suggested that it might be noted that, under existing law, the plaintiff can bring the property damage suit in one county and the personal injury damage suit in another.

(2) Proposed Section 426.20 was revised to read:

426.20. Except as otherwise provided by statute, if the plaintiff fails to allege in his complaint a related cause of action which (at the time his complaint is filed) he has against any party named as a defendant in his complaint who is served or appears in the action, the plaintiff may not thereafter in any other action assert such related cause of action against such party.

(3) The Comment to Section 426.20 should include a discussion of the effect of the section on assigned causes.

(4) Section 431.70 (First Supplement to Memorandum 71-42) was approved for inclusion in the tentative recommendation.

(5) Section 426.70 (First Supplement to Memorandum 71-42) was approved for inclusion in the tentative recommendation after the phrase "agreement between the insurers or" was deleted from subdivision (b)(2). In the second paragraph of the Comment to Section 426.70, the substance of the following should be added: "Of course, the determination of the subrogated matter between the insurers is binding on the insured." The last paragraph of the Comment to Section 426.70 should be reviewed to determine whether assignment of actions is given adequate consideration. For example, the person providing medical payments may be subrogated to the personal injury claim to the extent of the benefits provided.

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With these changes, the tentative recommendation was approved for distribution to the members of the State Bar Committee on the Administration of Justice.