

#36.42

6/18/70

Memorandum 70-73

Subject: Study 36.42 - Condemnation (The Right to Take--Future Use)

At the June meeting, Sections 400 and 401 of the Comprehensive Statute were tentatively approved. These sections relate to takings for future use. For the text of the sections, see the Comprehensive Statute attached to Memorandum 70-67.

Subdivision (b) of Section 401 makes the resolution of the public entity conclusive on the issue of necessity if it declares that the property taken will be devoted to the use for which it is taken within seven years. The seven-year period was based on the federal provisions relating to advance acquisitions of rights of way.

Attached as Exhibit I is a letter from the Department of Public Works giving further information on the federal provisions and an analysis of their effect. You should read the letter and determine whether the seven-year period provided in subdivision (b) of Section 401 should be extended and, if so, how long should the period be.

Respectfully submitted,

John H. DeMouly
Executive Secretary

STATE OF CALIFORNIA--TRANSPORTATION AGENCY

RONALD REAGAN, G

DEPARTMENT OF PUBLIC WORKS

LEGAL DIVISION

369 PINE STREET, SAN FRANCISCO 94104

June 12, 1970

Mr. John DeMouilly
California Law Revision Commission
School of Law
Stanford, California

Re: Study 36.42 - Condemnation (The Right to Take--
Taking for Future Use)

Dear Mr. DeMouilly:

Attached please find Xerox copy of the pertinent portion of the Federal Aid Highway Act of 1968 relating to advance acquisition of rights of way.

This Section appears in 23 U.S.C.A., Section 108. The code reference indicates some interesting legislative history which might have bearing on both the draftsmanship and the time period set forth in the Commission's proposed Section 401. According to the annotation in U.S.C.A. previously to a 1959 amendment, a five year period existed within which actual construction had to commence to qualify the advance acquisition for Federal Aid. In 1959, the time period was increased to seven years and the requirement was that actual construction of a road on the right of way had to be accomplished.

In pertinent part, this section reads: ". . . The agreement between the Secretary and State Highway Department for the reimbursement of the cost of such rights-of-way shall provide for the actual construction of the road on such rights-of-way within a period not exceeding 7 years following the fiscal year in which such request is made."

Finally, in 1968 the present provision was enacted adopting the 7 year period from the end of the fiscal year within which construction only has to be commenced.

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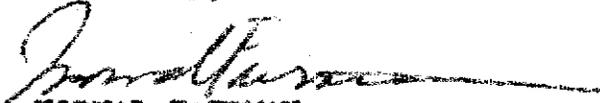
Mr. John DeMouilly

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June 12, 1970

When one considers that the time of 7 years only commences at the end of the fiscal year, it is apparent that the time period is actually 7 to 8 years. When one considers the fact that highway projects oftentimes takes as long as two years to complete, we may be reapproaching the ten year period originally written into the proposed Section 401, if that section is interpreted to require completion rather than commencement of the project.

Sincerely,



NORVAL FAIRMAN
Assistant Chief Counsel

cc: Robert Carlson
Charles Spencer, Jr.

out of any money in the Treasury not otherwise appropriated, not to exceed \$120,000,000 for the fiscal year ending June 30, 1966, not to exceed \$120,000,000 for the fiscal year ending June 30, 1967, and not to exceed \$20,000,000 for the fiscal year ending June 30, 1970. The provisions of chapter 1 of this title relating to the obligation, period of availability, and expenditure of Federal-aid primary highway funds shall apply to the funds authorized to be appropriated to carry out this subsection after June 30, 1967."

(g) There is authorized to be appropriated, out of any money in the Treasury not otherwise appropriated, for necessary administrative expenses in carrying out sections 131, 136, and 319(b) of title 23, United States Code, not to exceed \$1,250,000 for the fiscal year ending June 30, 1969, and \$1,250,000 for the fiscal year ending June 30, 1970.

ADVANCE ACQUISITION OF RIGHTS-OF-WAY

Sec. 7. (a) Subsection (b) of section 108 of title 23, United States Code, is amended by striking out "this section" and inserting in lieu thereof "subsection (a) of this section".

(b) Section 108 of title 23, United States Code, is amended by adding at the end thereof the following new subsection:

"(c)(1) There is hereby established in the Treasury of the United States a revolving fund to be known as the right-of-way revolving fund which shall be administered by the Secretary in carrying out the provisions of this subsection. Sums authorized to be appropriated to the right-of-way revolving fund shall be available for expenditure without regard to the fiscal year for which such sums are authorized.

"(2) For the purpose of acquiring rights-of-way for future construction of highways on any Federal-aid system and for making payments for the moving or relocation of persons, businesses, farms, and other existing uses of real property caused by the acquisition of such rights-of-way, in addition to the authority contained in subsection (a) of this section, the Secretary, upon request of a State highway department, is authorized to advance funds, without interest, to the State from amounts available in the right-of-way revolving fund, in accordance with rules and regulations prescribed by the Secretary. Funds so advanced may be used to pay the entire costs of projects for the acquisition of rights-of-way, including the net cost to the State of property management, if any, and related moving and relocation payments made pursuant to section 133 or chapter 5 of this title.

"(3) Actual construction of a highway on rights-of-way, with respect to which funds are advanced under this subsection, shall be commenced within a period of not less than two years nor more than seven years following the end of the fiscal year in which the Secretary approves such advance of funds, unless the Secretary, in his discretion, shall provide for an earlier termination date. Immediately upon the termination of the period of time within which actual construction must be commenced, in the case of any project where such construction is not commenced before such termination, or upon approval by the Secretary of the plans, specifications, and estimates for such project for the actual construction of a highway on rights-of-way with respect to which funds are advanced under this subsection, whichever shall occur first, the right-of-way revolving fund shall be credited with an amount equal to the Federal share of the funds advanced, as provided in section 120 of this title, out of any Federal-aid highway funds apportioned to the State in which such project is located