#36 7/1/65

First Supplement to Memorandum 65-39

Subject: Study No. 36(L) - Condemnation Law and Procedure (The Right to Immediate Possession)

A proposed constitutional amendment is set out on page 7 of Memorandum 65-39. The last paragraph of the existing constitutional section may be unnecessary and obsolete.

Code of Civil Procedure Section 1238 provides in part:

> 1238. Subject to the provisions of this title, the right of eminent domain may be exercised in behalf of the following public uses:
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> 11. Railroads, roads and flumes for quarrying, logging or lumbering purposes.

In view of this provision, it does not appear to be necessary to declare in the Constitution that such purpose is a public use. In fact, the Constitution appears, for example, to preclude the use of a diesel powered engine.

On the other hand, there is perhaps a need for retaining the portion that makes the railroad a common carrier if it exercises the power of eminent domain for logging or lumbering purposes. It seems, however, if this principle is sound, it should be extended to analogous cases. Should or does a different rule apply if an oil pipeline company exercises the power of eminent domain?

Accordingly, although the staff recommends that the amendment be approved as set out on page 7 of the memorandum, it is further recommended that the tentative recommendation be sent to the Public Utilities Commission with a request that the Commission provide us with any views they may have concerning the need for the last paragraph of the constitutional provision and any suggestions they believe will be helpful in redrafting the last paragraph if it is needed.

Respectfully submitted,

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Executive Secretary

1st Supp.
Memo 65-39

EXHIBIT I

EXCERPTS FROM 86 ALR 552-563 (1933)

Exercise of power of eminent domain for purposes of logging road or logging railroad

Where the logging road or railroad is merely for the use of private parties in lumbering operations, the right of eminent domain cannot generally be exercised for the obtaining of a right of way, under the usual constitutional provisions relating to the taking of property for public use; the use cannot be said to be a public one. Thus, it has been held that the power of eminent domain cannot be exercised to secure a right of way for a road to connect timberland of a single individual with a road, steamboat landing, or railroad station.

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Prior to the amendment of the Oregon Constitution in 1920 the courts of that state denied the right to condemn a right of way for private use by one party over lands of another for the transportation of timber. Apex Transp. Co. v. Garbade (1898) 32 Or. 582, 52 Pac. 573, 54 Pac. 367, 882, 62 L.R.A. 513; Anderson v. Smith-Powers Logging Co. (1914) 71 Or. 276, 139 Pac. 736, L.R.A.1916B, 1089.

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Some statutes conferring the right of eminent domain for the purpose of logging roads and railroads attempt to obviate the rule that the purpose of such roads must be public, by prescribing that all roads established under their provisions shall be public or available to the public. Thus, in Chapman v. Trinity Valley & N. R. Co. (1911; Tex. Civ. App.) 138 S. W. 440, where it was objected that the proposed railroad was organized primarily to subserve the interest of a certain lumber company by which it was owned, in transporting its lumber to market, it was held that, in view of the duties to the public imposed by statute upon it as a railroad, it must be deemed to be for the use of the public.

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And under a clause in a statute giving the power of eminent domain to companies organized to construct logging railroads, which requires such a railroad to "transport all timber products offered to it for carriage," the public service required is held, in State ex rel. Clark v. Superior Ct. (1911) 62 Wash. 612, 114 Pac. 444, to be sufficient to support the grant of the right of eminent domain.

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So, it was held in State ex rel. Oregon-Washington R. & Nav. Co. v. Superior Ct. (1930) 155 Wash. 651, 286 Pac. 33, that the Toll Logging Railroad Act of Washington was not unconstitutional, as taking property without due process of law, when applied to the taking by eminent domain, under its sanction, of a right of way for a logging railroad organized as a common carrier, even conceding that the principal shippers would be the owners and promoters of the road.

It has been held, also, under the Texas Constitution, declaring that railroads which had theretofore been constructed or which might thereafter be constructed in the state were public highways, and that railroad companies were common carriers, that a railway company by its act of incorporation becomes a common carrier, and that it is not a valid objection to the taking of land under eminent domain for its right of way that it was incorporated solely or primarily for the purpose of hauling lumber and mill products for the mill of a lumber company which owned and controlled the railway company, and that almost all the material and passengers would belong to or be connected with the lumber company. Chapman v. Trinity Valley & N. R. Co. (1911; Tex. Civ. App.) 138 S. W. 440.

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Where the logging road is open to use by the public, it seems to be immaterial, as regards the present question, to what extent the public has availed itself of the privilege of such use.

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The rule in Oregon was changed by the constitutional Amendment of 1920. Prior to that time the right to condemn a right of way for private use by one party over lands of another for the transportation of timber was denied. See cases from this state cited under subd. II. supra. In 1920, the constitutional provision declaring that private property shall not be taken for public uses was amended by an additional provision declaring that "the use of all roads and ways necessary to promote the transportation of the raw products of mine or farm or forest is necessary to the development and welfare of the state, and is declared a public use." Following this amendment, in 1921, the legislature enacted a statute relating to the condemnation of lands for logging railways, and expressly granting to any person or corporation the right to acquire land necessary for logging roads or ways to promote the transportation of logs or raw products of the forest, and to condemn so much thereof as necessary for such purposes. The statute further declared that any logging road necessary for the transportation of a single tract of timber should come within the provisions of the act, whether the same is a common carrier or otherwise, and that the road should not come under the jurisdiction of the public service commission of the state unless the owners thereof declare it to be a common carrier. See Flora Logging Co. v. Boeing (1930; D.C.) 43 F. (2d) 145, holding that the statute was constitutional, and that a logging company which owned a large tract of timberland was entitled to condemn a right of way for a logging railroad over land which constituted the only feasible route for the transportation of its timber.

EXHIBIT II

EXCERPTS FROM 67 ALR 588 (1930)

Logging or mining road as a common carrier

As already indicated, the mere fact that a company owns and operates a logging or mining railroad does not make it a common carrier. In fact, in the great majority of the cases the courts have held that the railroad in question was not a common carrier. If there is no holding out of the railroad for use by the public generally, but the line of road is used exclusively in the interest of a lumber company, which owns it, in getting its products to market, it has been held that the railroad is not a common carrier.

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In some cases special constitutional or statutory provisions have affected the question under consideration.

Thus, it has been held that a constitutional provision making all railroad companies common carriers does not apply to a lumber company which operates a logging railroad upon its own property for its own purposes, in bringing logs from the lands of the company to a sawmill. Wade v. Lutcher & M. C. Lumber Co. (1896) 33 L.R.A. 255, 20 C.C. A. 515, 41 U. S. App. 45, 74 Fed. 517.

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And see the reported case (CODD v. McGOLDRICK LUMBER CO. ante, 580), holding that a constitutional provision making all railroads public highways does not apply to a logging railroad built by a lumber company merely for the purpose of hauling its own materials, and never operated as a common carrier, or holding itself out as such.

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Logging companies were expressly declared common carriers by the Washington statute which is cited in State ex rel. Clark v. Superior Ct. (1911) 62 Wash. 612, 114 Pac. 444. The statute declared that two or more persons might incorporate a company having for its principal object the construction, maintenance, and operation of logging roads, etc., for the transportation of logs and other timber products; that such corporation should have power to build and operate logging roads, etc.; that, after any such logging road was constructed, the company should transport all timber products offered to it for carriage that its means of transportation were adapted to carry; and that such a company should be deemed a quasi public company and public carrier, and should have the right of eminent domain. The case was one of eminent domain proceedings, in which it was held that the proposed railroad was not a private enterprise merely by reason of the fact that all of its stock was held by a timber company or its stockholders, which company was the owner of the largest part of the timber accessible to the line of the proposed road.

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The question whether a logging or mining railroad is a common carrier does not depend necessarily on the right to exercise, or the exercise of, the power of eminent domain. At least this is true under some constitutional and statutory provisions.

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But the fact that a logging railroad is authorized to exercise the right of eminent domain may apparently be a factor in reaching the conclusion that it is a common carrier.

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And the fact that a lumber company which operates a logging railroad has never exercised the right of eminent domain, and does not claim that right, will not preclude its being a common carrier if its conduct otherwise stamps it as such.