4/23/70

Memorandum 70-48

Subject: 1970 Legislative Program

There are a number of problems in connection with the Commission's 1970 legislative program that should be considered by the Commission so that the staff can resolve these problems in accord with the Commission's determinations.

General Status of Legislative Program

The attached gold sheet shows the situation as of April 22.

Assembly Bills. We are making excellent progress on the five Assembly Bills. One has been signed by the Governor; two have been sent to the Senate floor; and the remaining two have passed the Assembly and are set for hearing in the Senate.

Senate Bills. The progress of the Senate Bills is generally satisfactory. One Senate Bill (introduced by Senator Cologne) has been signed by the Governor; another Senate Bill has passed the Legislature and has been sent to the Governor for his approval; three other Senate Bills have passed the Senate (one of these is the fictitious business name statute bill introduced by Senator Grunsky), but one of these bills was killed in the Assembly Committee; another Senate Bill has been sent to the Senate floor; two Senate Bills remain in the Senate Committee, but one of these bills merely duplicates a provision included in the other bill.

Problems in Connection With Legislative Program

Senate Bill 98 - Fictitious Business Names. The newspapers plan to offer an amendment to require banks to refuse to open a bank account in a

fictitious business name unless evidence of compliance with the fictitious business name statute is provided to the bank. This amendment will be included in the bill if a majority of the members of the Assembly Judiciary Committee approves the amendment.

I have discussed the amendment with various persons. The staff of the Assembly Judiciary Committee plans to prepare a bill digest for the Committee that will take a dim view of the merits of the proposed amendment. The California Bankers Association and the State Bar will offer testimony in opposition to the amendment.

I do not believe that the amendment will be approved by the Assembly Committee. If it is and if the bill passes the Legislature, it would appear consistent with the views previously expressed by the Commission to advise the Legislature and the Governor that the Commission believes that the existing law is preferable to the bill as so amended.

Senate Bill 91 - entry for survey and testing. You will recall that the Commission has recommended the expansion of the authority to enter upon property being considered for acquisition for public use and to make such tests as are necessary to determine whether the property is suitable for that use. Under existing law, this authority exists only where the property is being acquired for reservoir purposes (unless, of course, the public entity has the right of immediate possession so that it can acquire the interest necessary to permit such tests by taking immediate possession of such interest). The bill provides for court supervision of the tests so that the property owner's right of possession and use is not unnecessarily interferred with.

The existing law provides that the property owner can recover attorney's fees in any action to contest the exercise of the right to enter to make

tests, and the like. The Commission recommended elimination of the right to recover attorney's fees in this type of action because it would encourage unmeritorious litigation. The Senate Judiciary Committee restored the attorney's fees requirement. The bill is now actively opposed by the Department of General Services and the Department of Public Works and perhaps by other public agencies. See Exhibit II (yellow) attached.

When the bill is heard by the Assembly Judiciary Committee, the staff recommends that the Commission representative indicate that the Commission has no objection to the deletion of the attorney's fees requirement and that the Commission believes that the arguments that will be presented by the representatives of the Department of General Services and the Department of Public Works in offering an amendment to delete the attorney's fees requirement are sound.

Senate Bills 92 and 94. The general governmental liability bill appears to be satisfactory to most public entities in its latest amended form. The Department of Public Works and the League of California Cities have no objections to the bill. However, the City of Los Angeles--acting on the advice of their City Attorney--objects to any revision of the law relating to governmental liability.

We have one serious problem with these bills. The Department of Water Resources (and perhaps the irrigation districts association) wants to further amend the plan or design immunity provision to provide that the immunity persists (notwithstanding any later changes that occur) if the improvement is a "canal" or "reservoir." They point to the case where the water project is designed without recreational use in mind and pressure is later applied to open the project to recreational use. They want to be immune from liability for dangerous conditions that will exist if the project

is used for recreational use. This is precisely the type of case where the Commission's proposal would provide an exception to the immunity. See letter attached as Exhibit I (pink). I have spent considerable time discussing this matter with representatives of the Department of Water Resources and of the irrigation districts. I believe that I have persuaded the representatives of the irrigation districts not to object to the bill, but the Department of Water Resources insists on the "reservoir-canal" amendment.

The staff believes that the Commission has gone as far as it should go in attempting to draft an acceptable plan or design provision. If the provision is not acceptable in its present form, the staff believes that it would be better to delete the provision from the general liability bill and to leave to the court's consideration whether the Cabell case should be overruled. In this connection, it should be noted that there are three other bills introduced in the Assembly to deal with the plan or design immunity. Hence, if we delete this from our bill, the Legislature will still have an opportunity to consider whether legislative changes should be made in this area of the law.

It should be noted also that there probably would be liability in the case where a reservoir not designed for recreational use is opened up to that use. The negligence in such a case would be opening up a place to recreational use when it was known or should have been known that the place created a substantial risk of injury when it was used with due care. We do not believe that the discretionary immunity would apply in such a case.

Assembly Bill 171 - leases. The section relating to attorney's fees was deleted from the lease bill at the Senate hearing. One member of the Committee objected to this provision; and, since there was only a bare quorum, Assemblyman Hayes concluded the section should be deleted. Both

Assemblyman Hayes and I believe that the general attorney's fees section relating to contracts applies to leases and, hence, the specific provision in the bill was not essential. I have prepared a report for Assemblyman Hayes that would revise the official comments to reflect the deletion of the attorney's fees section and would avoid any implication that the deletion means that the general contract provision is not applicable to leases.

Respectfully submitted,

John H. DeMoully
Executive Secretary

Memo 70-48 EXHIBIT I

TE OF CALIFORNIA—RESOURCES AGENCY WILLIAM R. GIANELLI, Director

EPARTMENT OF WATER RESOURCES
O. BOX 388
CRAMENTO

APR 20 1970

Honorable Alfred H. Song, Senator
Twenty-eighth Senatorial District
Room 2054, State Capitol
Sacramento, California 95814

Dear Senator Song:

Reference is made to our letters of March 11 and April 14, 1970, regarding Senate Bills 92 and 94, which would amend Section 830.6 of the Government Code to modify the present immunity from tort liability of a public agency for a dangerous condition of property created by an approved plan or design.

We have again reviewed this legislation, as amended on April 8, 1970, and continue to be of the opinion that these bills excessively expose public agencies to liability in connection with the construction of canals and reservoirs. There are many such facilities throughout California which have been built over the years. The ability of their owners to modify their design is exceedingly limited. There is, however, increasing pressure from recreational interests for the use of these facilities for recreation purposes. Under these circumstances, we do not believe that the owners of such facilities should be forced to accept the risk of litigation and liability which would arise from your proposed modification of Government Code Section 830.6.

You have now excepted streets and highways from this proposed modification of the design immunity. While we have no objection to this exception, we believe that the reasons for eliminating canals and reservoirs from its effect are even more compelling and we urge that such an amendment be placed in both bills.

As indicated in our letter of April 14, 1970, this may be done by amending Senate Bill 92 at line 34 on page 2 and Senate Bill 94 at line 22 on page 3 by the insertion of the following words after the words "of a": "canal, reservoir,"

We are most willing to discuss this proposed amendment with you or your representatives at any time.

Sincerely yours,

W R Gianelli
Director

cc: Honorable Gordon Cologne, Chairman
Senate Judiciary Committee
Room 3086, State Capitol
Sacramento, California 95814

Memo 70-48 EXHIBIT II

STATE OF CALIFORNIA RONALD REAGAN, Governor

DEPARTMENT OF GENERAL SERVICES

April 17, 1970

Senator Alfred H. Song
Member, California State Legislature
State Capitol
Sacramento, California 95814

Re: Senate Bill No. 91

Dear Senator Song:

We wish to advise you of our department's concern with your proposed legislation relating to rights of entry.

In analyzing your bill as originally written, we were of the opinion that the existing law was adequate for the public agency to gain entry onto property for studies, surveys, etc., and equally adequate for the property owner in obtaining relief for any damage. Although it was believed your proposed changes could encourage harrassment by those very few property owners who will take any steps possible to interfere with the legitimate ends of a public agency in locating a public facility and who may claim substantial damages even though in fact only trivial damages result, our position was not to actively oppose your bill.

As this legislation was amended March 12, 1970 to require public agencies to pay attorney fees in addition to any damage, we must now actively oppose its passage. With the elimination of this cost, property owners will have little to lose in pursuing claims for damages.

Sincerely,

C. E. Dixon
Director of General Services

cc: Assemblyman James A. Hayes
Committee on Judiciary

April 22, 1970

1970 LEGISLATIVE PROGRAM--LAW REVISION COMMISSION

Adopted or Enacted (5)

AB 123 (rule against perpetuities) Ch. 45
SB 266 (proof of foreign documents) Ch. 41
SCR 6 (nonprofit corporation study) Res. Ch. 54
SCR 7 (inverse condemnation study) Res. Ch. 45
SCR 8 (general authority to study topics) Res. Ch. 46

Sent to Governor (1)

SB 129 (res ipsa loquitur)

Sent to Floor in Second House (2)

AB 171 (leases) (section on attorney's fees deleted in Senate)
AB 126 (public entity--statute of limitations)

Passed First House (4)

AB 124 (quasi-community property) (set for hearing in Senate on April 28)
AB 125 (arbitration in eminent domain) (set for hearing in Senate on May 19)
SB 91 (entry for survey) (not yet set for hearing in Assembly)
SB 98 (fictitious business names) (not yet set for hearing in Assembly)

Sent to Floor in First House (1)

SB 90 (representations as to credit)

Still in Committee in First House (2)

SB 92 (plan or design immunity) (set for hearing on April 28)
SB 94 (governmental liability) (set for hearing on April 28)

Defeated (1)

SB 95 (general evidence bill)

This bill passed the Senate after two sections (psychotherapist-patient privilege) were deleted. The Assembly deleted two more sections (marital testimonial privilege), leaving only the res ipsa loquitur section which was approved by the Assembly Committee in SB 129, making SB 95 unnecessary.