

Revised May 23, 1969

<u>Time</u>	<u>Place</u>
June 6 * 9:00 a.m. - 5:00 p.m.	State Bar Building
June 7 - 9:00 a.m. - 4:00 p.m.	1230 W. Third Street Los Angeles, Calif. 90017

FINAL AGENDA

for meeting of

CALIFORNIA LAW REVISION COMMISSION

Los Angeles

June 6 and 7, 1969

1. Approval of Minutes of May 9-10 meeting (enclosed)
2. Administrative Matters
3. 1969 Legislative Program

Memorandum 69-71 (sent 5/22/69)

4. Study 52 - Sovereign Immunity

Damage From Use of Agricultural Chemicals

First Supplement to Memorandum 69-64 (sent 5/20/69)
Revised Tentative Recommendation (attached to
Supplement)

Memorandum 69-64 (sent 4/28/69)
Research Study (attached to Memorandum)

5. Study 65 - Inverse Condemnation

Losses Caused by Highway and Street Improvements

Memorandum 69-68 (sent 5/15/69)
Research Study entitled, "Statutory Modification
of Inverse Condemnation: Intangible Detriment"
(sent 5/12/69)

First Supplement to Memorandum 69-68 (sent 5/22/69)
Background materials (attached to Supplement)

Water Damage

Memorandum 69-62 (sent 4/29/69)
Draft Statute (attached to Memorandum)

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Interference With Land Stability

Memorandum 69-51 (sent 4/29/69)

First Supplement to Memorandum 69-51 (sent 4/29/69)

6. Study 36 - Condemnation Law and Procedure

Litigation Expenses

Memorandum 69-66 (sent 4/28/69)

First Supplement to Memorandum 69-66 (to be sent)

Substitute Condemnation (Condemnation for Exchange
Purposes)

Memorandum 69-61 (sent 3/20/69)

Draft Statute (attached to Memorandum)

Research Study (attached to Memorandum)

7. Study 52 - Sovereign Immunity

Repeal of Unnecessary Claims Provisions

Memorandum 69-63 (sent 4/29/69)

MINUTES OF MEETING

of

CALIFORNIA LAW REVISION COMMISSION

JUNE 6 AND 7, 1969

A meeting of the California Law Revision Commission was held in Los Angeles June 6 and 7, 1969.

Present: Sho Sato, Chairman
Thomas E. Stanton, Jr., Vice Chairman
Roger Arnebergh
John D. Miller
Lewis K. Uhler
William A. Yale (June 6)

Absent: Alfred H. Song, Member of the Senate
Carlos J. Moorhead, Member of the Assembly
Richard H. Wolford
George H. Murphy, ex officio

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

The following observers also were present:

William M. Bitting, Hill, Farrer & Burrill, Los Angeles
Donald K. Byrne, Los Angeles County Counsel's Office
Professor Eric Edwards, Western Australia Law Revision Commission
Gideon Kanner, Fadem & Kanner, Los Angeles
James T. Markle, Department of Water Resources
Ken Nellis, Department of Public Works
Willard A. Shank, California Attorney General's Office
Charles Spencer, Department of Public Works

RESEARCH CONTRACTS

The Executive Secretary reported that research contracts have been made with the following persons:

- (1) Professor Babette B. Barton (right of non-resident aliens to inherit)
- (2) Professor Robert H. Cole (collateral source rule)
- (3) Professor Jack Friedenthal (counterclaims and cross-complaints) and
(joinder of causes of action)
- (4) Professor Justin Sweet (liquidated damages)

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INDEXING CONTRACT FOR VOLUME 9

The Commission considered a staff suggestion that Mrs. Margaret Loftus, who is employed by the Continuing Education of the Bar, be retained as the indexer for Volume 9 of the Commission's Reports, Recommendations, and Studies. It was noted that Mrs. Loftus has extensive experience in indexing legal publications for the Continuing Education of the Bar, has previously indexed publications for the Law Revision Commission, and is well qualified to index Volume 9. The staff estimated that Volume 9 would consist of approximately 450 pages and the contract price, which was approved by the Commission, is \$450. This will compensate the Contractor at a rate of approximately \$1.00 per page for indexing. A motion was unanimously adopted that the Executive Secretary be directed to execute the contract on behalf of the Commission.

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STUDY 36.85 - CONDEMNATION LAW AND PROCEDURE (LITIGATION EXPENSES)

The Commission considered Memorandum 69-66 and the First Supplement thereto. The Commission considered the numerous schemes for compensating litigation expenses presented in the above memoranda. No action was taken. Consideration of A.B. 1756 relating to offers to settle civil cases was deferred until a future meeting.

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STUDY 52 - SOVEREIGN IMMUNITY (CLAIMS STATUTE--REPEAL OF UNNECESSARY PROVISIONS)

The Commission considered Memorandum 69-63. The Commission determined not to submit a recommendation to the Legislature on this topic.

STUDY 52.10 - SOVEREIGN IMMUNITY (CLAIMS STATUTE--SENATE BILL 100)

The Commission considered Memorandum 69-71 and S.B. 100 as amended May 29, 1969. The Commission approved the bill as submitted to it. The Commission determined that further revision of the Claims Statute should be deferred indefinitely.

STUDY 52 - SOVEREIGN IMMUNITY (NUISANCE LIABILITY)

The staff was directed to prepare a memorandum for a future meeting as to whether liability of a public entity can be based on a theory of nuisance and whether any change in the law in relation to this question is needed.

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STUDY 52.60 - SOVEREIGN IMMUNITY (DAMAGE FROM USE OF
PESTICIDES)

The Commission considered Memorandum 69-64 and the First Supplement thereto and the attached Tentative Recommendation. The Tentative Recommendation was revised as follows:

(1) The last line of the text on page 6 was revised to read "stances upon a theory of inverse condemnation.²⁵"

(2) Footnote 26 was deleted and the following sentence added to footnote 25: "As to the possibility of basing liability upon a theory of nuisance, see Van Alstyne, California Government Tort Liability § 5.10 at 126 (Cal. Cont. Ed. Bar 1964)."

As revised, the Tentative Recommendation was approved for distribution to interested persons for comment. Commissioners Sato and Stanton turned in edited copies of the Tentative Recommendation to the staff and the suggested editorial changes are to be taken into account in revising the Tentative Recommendation before it is sent out for comment.

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STUDY 63.20-40 - EVIDENCE (MARITAL TESTIMONIAL PRIVILEGES)

The Executive Secretary reported on Senate Bill 103 which was introduced to effectuate the Commission's recommendation relating to revision of the Privileges Article of the Evidence Code. He reported that questions were raised when the bill was debated on the Assembly floor concerning the marital testimonial privileges portion of the bill. Assemblyman Foran, who was carrying the bill for the Commission, suggested that this portion of the bill be deleted and submitted next session so that passage of the remainder of the bill--the portion relating to the psychotherapist-patient privilege--would not be delayed.

The Commission discussed the submission of the same recommendation on the marital testimonial privileges to the 1970 Legislature. The staff was directed to prepare a recommendation for consideration at the June 26-28 meeting.

STUDY 65.25 - INVERSE CONDEMNATION (WATER DAMAGE)

The Commission considered Memorandum 69-62, the draft statute attached thereto, and the First Supplement to Memorandum 69-62. The staff was directed to redraft the statute to incorporate the following changes or additions.

Section 870. The single phrase--"alteration of the natural flow"-- is to be used as the all-inclusive term designating the damage causing factor. The word "alteration" should be further defined to include "diversion, obstruction, acceleration, concentration, or augmentation" of the flow of waters.

Section 870.2. This section was amended as follows:

870.2. This article establishes the rules governing the liability of a public entity under Article I, Section 14, of the California Constitution for water damage caused by an improvement as designed and constructed by the public entity.

The legislative intention to provide a scheme sufficiently comprehensive to serve as the exclusive basis of inverse condemnation liability for water damage, while recognizing the ultimate constitutional source for this liability, should be stated in the Comment to Section 870.2. It should be provided that the term "property" as used in this article is to have the same meaning as the term is used in Article I, Section 14 of the California Constitution.

Section 870.4. The term "improvement" should be defined to include all possible works, facilities, and systems owned by a public entity, thereby encompassing not only improvements originally constructed by an entity but also those subsequently acquired.

The Comment to this section should note the complementary sources of liability in the Government Code, the exclusion here of liability for bodily injury, and the attempt to deal only with the public sector. No attempt is

made to provide rules applicable in the private sector or to predict the effect of this legislation on that body of law. The possible existence of two separate bodies of law in this area and its undesirability should be brought to the attention of the Legislature when the recommendation is submitted to the Legislature.

Section 870.6. No change was made in this section but the staff was directed to provide additional background concerning the problem of proximate causation and concurring causes.

Section 870.8. Subdivision (a) was amended as follows:

870.8. (a) A public entity is not liable under Section 870.4 for damage which the public entity establishes could have been avoided by reasonable steps available to the owner of property to minimize or prevent damage to his property proximately caused or imminently threatened by the improvement.

The Comment to this section should emphasize the strict construction of "imminent" desired by the Commission.

Section 871. No change.

Section 871.2. This section was amended as follows:

871.2. Nothing in this article affects the law governing the right to use of water either in quantity or quality.

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STUDY 65.30 - INVERSE CONDEMNATION (INTERFERENCE WITH LAND
STABILITY)

The Commission considered Memorandum 69-51, the Draft Statute attached thereto, and the First Supplement to Memorandum 69-51. The staff was directed to redraft the statute to provide that Civil Code Section 832 is to govern the liability of public entities, as well as private persons, for removal of lateral support.

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STUDY 65.35 - INVERSE CONDEMNATION (INTANGIBLE DETRIMENT - LOSSES
CAUSED BY HIGHWAY AND STREET IMPROVEMENT)

The Commission considered Memorandum 69-68 and Part I of the research study entitled "Statutory Modification of Inverse Condemnation: Intangible Detriment." Additional background was provided by the materials attached to the First Supplement to Memorandum 69-68 and by the comments of the observers present.

The following actions were taken:

(1) With respect to the issue of "proximity damage" (damage resulting from the location of the property in proximity to the highway and exposure to loss of light, view and air, or to noise, dust, fumes, and other deleterious influences as a consequence of such proximity), the staff was directed to concentrate on the partial taking situation and to prepare a draft statute providing in such cases a strict before and after measure of compensation. That is, the condemnee should be awarded the difference, if any, between the fair market value of the entire property in its before condition and the fair market value of the remainder in its after condition. There should be no distinction between general and special benefits; benefits should be offset against the value of the part taken as well as any claimed severance damage, and all elements relevant to valuing the property remaining in its after condition (including noise, dust, fumes, loss of light, air, view, and the like) should be considered in making the determination of just compensation. The staff was also directed to obtain additional information, if available, regarding the effect of highway improvements on the value of property adjacent to the improvement, towards the end of providing a scheme for the recoupment of benefits resulting from the improvement, thereby enabling a broader scheme for compensating owners of property damaged but no part of which is formally condemned for the improvement. The staff was further

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directed to prepare a memorandum dealing with the problems (a) resulting when an improvement on which an offset of benefits is based is not actually completed or is subsequently abandoned, and (b) in the initial eminent domain trial of evidence relating to the possibility of abandonment.

(2) With respect to the issue of access rights, tentative decisions were reached (a) rejecting the principle that no new rights of access should be created in land abutting on new highway projects, and (b) retaining the present rule of no liability for damage resulting from regulatory ("police power") measures.

The staff was directed to draft statutory alternatives which would state (a) a clear test to form the basis for a court determination of whether there has been a substantial impairment of access and (b) an adequate standard for the fact finder (jury) to use to measure the amount of compensation required where there has been a substantial impairment. All possible alternatives are to be considered, including but not limited to (a) codification of existing law, (b) a strict before and after market value test, (c) separate rules for residential, commercial and industrial properties, and (d) separate rules for damage to improvements and loss of value to land.

June 1, 1969

CALIFORNIA LAW REVISION COMMISSION
PROJECTS UNDER ACTIVE CONSIDERATION

TENTATIVE RECOMMENDATIONS DISTRIBUTED FOR COMMENT

Comments Due May 1, 1969

Inverse Condemnation (Right to Survey and Examine Property)*
Condemnation Law and Procedure (Byroads)
Condemnation Law and Procedure (Possession Prior to Final Judgment
and Related Problems)

Comments Due June 2, 1969

Sovereign Immunity (Prisoners and Mental Patients)*
Taking Instructions Into Jury Room in Civil Cases*
Quasi-Community Property*
Representations as to Credit*
Condemnation Law and Procedure (Arbitration)*

Comments Due July 1, 1969

Evidence (Res Ipsa Loquitur)*

Comments Due August 4, 1969

Fictitious Business Name Statute*
Sovereign Immunity (Plan or Design Immunity)*
Sovereign Immunity (Ultrahazardous Activities)*

TENTATIVE RECOMMENDATIONS IN PREPARATION

Sovereign Immunity (Liability Arising Out of Use of Pesticides)*
Condemnation Law and Procedure (Moving Expenses)*
Condemnation Law and Procedure (Reminent Acquisitions)
Condemnation Law and Procedure (Protective Acquisitions)
Condemnation Law and Procedure (Substitute Condemnation)
Civil Code Section 715.8 (Rule Against Perpetuities)*
Public Entity Claims Statute (Repeal of Unnecessary Sections in
Special District Acts)*

OTHER MATTERS UNDER ACTIVE CONSIDERATION

Condemnation Law and Procedure (Litigation Expenses)
Condemnation Law and Procedure (Right of Former Owner to Repurchase
Property When it Is to Be Sold by Public Entity)

* Possible recommendations to 1970 Legislature.

Inverse Condemnation (Water Damage)
Inverse Condemnation (Interference With Land Stability)
Inverse Condemnation (Damage From Highway Projects When No Property
Taken From Person Suffering Damage)
Inverse Condemnation (Aircraft Noise Damage)

RESEARCH STUDIES IN PROGRESS

Condemnation Law and Procedure (The Right to Take)
Condemnation Law and Procedure (Compensation and Measure of Damages)
Sovereign Immunity (The Collateral Source Rule)
Arbitration
Oral Modification of a Written Contract
Joinder of Causes of Action
Cross-Complaints and Counter Claims
Liquidated Damages
Right of Nonresident Aliens to Inherit
Evidence Code
 Conforming B and P Code to Evidence Code
 Conforming CCP to Evidence Code