

March 10, 1969

<u>Time</u>	<u>Place</u>
April 11 - 9:30 a.m. - 5:00 p.m.	State Bar Building
April 12 - 9:00 a.m. - 4:00 p.m.	1230 Third Street Los Angeles, Calif. 90017

TENTATIVE AGENDA

for meeting of

CALIFORNIA LAW REVISION COMMISSION

Los Angeles

April 11 and 12, 1969

1. Approval of Minutes of March 7-8 meeting (to be sent)

2. Study 65 - Inverse Condemnation

Water Damage

Memorandum 69-50 (to be sent)
Draft Statute (attached to Memorandum)

Concussion, Vibration, and Interference With Land
Stability

Memorandum 69-51 (to be sent)
Draft Statute (attached to Memorandum)

Escaping Fire and Chemicals

Memorandum 69-52 (to be sent)
Draft Statute (attached to Memorandum)

3. Study 52 - Sovereign Immunity

Ultrahazardous Activities

Memorandum 69-53 (to be sent)
Tentative Recommendation (attached to Memorandum)

Plan or Design Immunity

Memorandum 69-54 (to be sent)
Tentative Recommendation (attached Memorandum)

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4. Study 36 - Condemnation Law and Procedure

Moving Expenses

Memorandum 69-55 (to be sent)
Tentative Recommendation (attached to Memorandum)
1st Supplement to Memorandum 69-55
Excess Condemnation

Memorandum 69-56 (to be sent)
Tentative Recommendation (attached to Memorandum)

Litigation Expenses

Memorandum 69-57 (to be sent)
1st Supplement to Memorandum 69-57
5. Administrative Matters

Research Contracts .

Memorandum 69-58 (to be sent)

New Topics

Memorandum 69-59 (to be sent)

6. 1969 Legislative Program

Memorandum 69-60 (to be sent)

MINUTES OF MEETING

of

CALIFORNIA LAW REVISION COMMISSION

APRIL 11 AND 12, 1969

Los Angeles

A meeting of the California Law Revision Commission was held in Los Angeles on April 11 and 12, 1969.

Present: Sho Sato, Chairman
Carlos J. Moorhead, Member of the Assembly (April 11)
Roger Arnebergh
John D. Miller
Lewis K. Uhler
Richard H. Wolford (April 11)
William A. Yale

Absent: Alfred H. Song, Member of the Senate
Thomas E. Stanton, Jr., Vice Chairman
George H. Murphy, ex officio

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

The following observers also were present:

Peter Krichman, Los Angeles County Counsel's Office
James T. Markle, Department of Water Resources
John M. Morrison, California Attorney General's Office
Ken Nellis, Department of Public Works
Willard A. Shank, California Attorney General's Office
Terry C. Smith, Los Angeles County Counsel's Office
Charles E. Spencer, Department of Public Works
Gerald J. Thompson, Assistant County Counsel, Santa Clara County

ADMINISTRATIVE MATTERS

Minutes of March Meeting. The Minutes of the meeting held March 7 and 8, 1969, were approved as submitted.

Schedule for Receipt of Comments on Tentative Recommendations. The following schedule was briefly discussed by the Commission and the concensus was that the schedule should be revised as set out below and the revised schedule should be followed to the extent possible.

(Note: * indicates recommendations scheduled for submission to the 1970 legislative session.)

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 the 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 1, 1969

Fictitious Business Name Statute*

Sovereign Immunity (Plan or Design Immunity)*

Sovereign Immunity (Ultrahazardous Activities)*

Recommendations to be distributed for comment

Comments Due August 4, 1969

Condemnation Law and Procedure (Moving Expenses)*
(If uniform, comprehensive legislation on this subject not enacted
by 1969 Legislature)

Condemnation Law and Procedure (Excess Condemnation)

Condemnation Law and Procedure (Substitute Condemnation)

Sovereign Immunity (Liability Arising out of Use of Agricultural
Chemicals)*

Comments Due August 15, 1969

Civil Code Section 715.8 (Rule Against Perpetuities)*

Claims Statute (Repeal of unnecessary sections in special district
statutes)

Recommendations not listed above

Condemnation Law and Procedure (Litigation Expenses)

Inverse Condemnation (Water Damage)

Inverse Condemnation (Interference With Land Stability)

Future Meetings. Future meetings are scheduled as follows:

May 9 and 10	San Francisco (State Bar Building)
June 6 and 7	Los Angeles (State Bar Building)
June 26 (evening), 27, and 28 (morning)	San Diego
July, August	No Meeting
September 4, 5, 6 (three full days)	Los Angeles (State Bar Building)
October 3 and 4	San Francisco (State Bar Building)
November 7 and 8	Los Angeles
December 5 and 6	San Francisco

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STUDY 36 - CONDEMNATION (LITIGATION EXPENSES)

The Commission considered Memorandum 69-57 and the First Supplement thereto and the attached materials.

The Commission discussed the problem of increased litigation that would be generated by a proposal to allow attorney fees and appraiser fees in condemnation cases. There was a general feeling that something needs to be done for small cases.

The Commission discussed the staff suggestion concerning a modified jurisdictional offer provision with a fixed schedule for determination of the amount of litigation expense allowance. The following suggestions were made:

(1) The property owner should not be required to waive any recovery in excess of a stated amount.

(2) The jurisdictional offer should be made within 45 days after the demand.

STUDY 36 - CONDEMNATION LAW AND PROCEDURE (MOVING EXPENSES)

The Commission considered Memorandum 69-55, the First Supplement thereto, and the attached materials.

The Commission determined that, as a matter of policy, there should be a uniform statute governing relocation expenses and services. No decisions were made as to the details of such a statute since the Commission concluded that work on this aspect of eminent domain should be suspended until it can be determined what disposition will be made of legislation introduced at the current legislative session on this subject.

If it appears that a uniform relocation assistance statute will not be enacted by the current session, the staff is to include this subject on the agenda for a future meeting. If such legislation is not enacted, every effort should be made by the Commission to submit a recommendation to the 1970 Legislature relating to uniform relocation assistance.

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STUDY 36 - CONDEMNATION (RESEARCH CONTRACT WITH PROFESSOR AYER)

The Commission considered Memorandum 69-58.

The Commission entered into Agreement 1966-67(4) with Professor Douglas R. Ayer of the Stanford School of Law. This agreement provided for the production of a comprehensive research study of the procedural aspects of condemnation law and procedure and included a detailed outline of the matters to be covered in the study. The compensation for the study was to be \$5,000.

Professor Ayer produced a law review article covering what is probably the most difficult aspect of the subject--the condemnee's right to recover attorney's fees, appraisal fees, and other litigation expenses. The article also deals with a number of other incidental problems (right to an independent appraisal and use of arbitration).

Professor Ayer has concluded that he is unable to prepare a study covering the remainder of the procedural aspects of eminent domain. For a number of personal reasons (including his feeling that he needs a rest after the major effort he devoted to the study already produced), he has asked to be relieved of the obligation to complete the remainder of the study.

After discussion, a motion was unanimously adopted that the Executive Secretary be directed to execute on behalf of the Commission an agreement providing for the payment to Professor Ayer of \$1,500 as full payment for the work completed and relieving him and the State from any further obligations under the existing contract which would be terminated. (The original agreement provided for payment of \$5,000 for the complete study.) It is estimated by the Executive Secretary that the time devoted by Professor Ayer to the portion of the study completed would be compensated at a rate of less than \$5.00 an hour if he is paid \$1,500.

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STUDY 36 - CONDEMNATION (RESEARCH CONTRACT ON PROCEDURAL ASPECTS)

The Commission discussed Memorandum 69-58. The Commission determined that a comprehensive study of the procedural aspects of eminent domain is needed as soon as possible. A motion was unanimously adopted that the Executive Secretary be authorized to execute a research contract with a consultant to be selected by him and the Chairman in an amount of \$5,000 for the preparation of a study of the procedural aspects of eminent domain. The scope of the study would be generally the same as that called for in the contract with Professor Ayer. If more than one consultant is retained, the \$5,000 compensation is to be allocated between the consultants in proportion to their relative responsibilities if the consultants so desire.

The contract would be in the same general form as other Commission research contracts and would include not more than \$500 to cover the cost of consultant's attending Commission meetings when the study is considered if the Commission determines that they should be present at that time.

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STUDY 50 - LEASES

The Commission considered a letter from the California Land Title Association suggesting that Senate Bill 101 be amended as follows:

AMENDMENT NO. 1

On page 4, line 23 of the printed bill, as amended in the Senate on March 3, 1969, after "Where" insert:

a lease or

The Commission determined that this amendment should be made to the bill and the Executive Secretary is to amend the bill when it is heard in the Assembly.

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STUDY 52 - SOVEREIGN IMMUNITY (ULTRAHAZARDOUS ACTIVITIES)

The Commission considered Memorandum 69-53 and the tentative recommendation attached thereto, and again discussed attempting to define precisely an "ultrahazardous activity" and eliminating any defense based on the mere fact that the public entity was authorized or required by statute to engage in the activity in question. It was decided not to include such provisions and, subject to editorial revisions, the tentative recommendation was approved for distribution for comment.

STUDY 52 - SOVEREIGN IMMUNITY

Senate Bill 100 - Claims Statute Revision

The Commission discussed Memorandum 69-60 and suggested additional amendments handed out by the staff at the meeting. The Commission determined that the following amendments should be made in Senate Bill 100.

AMENDMENTS TO SENATE BILL NO. 100

AS AMENDED IN SENATE MARCH 3, 1969

AMENDMENT NO. 1

In line 2 of the title after "910.8," insert "911.6," and after "945.6," insert "946.6,".

AMENDMENT NO. 2

In line 3 of the title after "Code," insert:

and to amend Section 34 of the San Joaquin County Flood Control and Water Conservation District Act (Chapter 46 of the Statutes of 1956, First Extraordinary Session), Section 10 of the Kern County Water Agency Act (Chapter 1003 of the Statutes of 1961), Section 23 of the Desert Water Agency Law (Chapter 1069 of the Statutes of 1961), and Section 23 of the San Gorgonio Pass Water Agency Law (Chapter 1435 of the Statutes of 1961),

AMENDMENT NO. 3

On page 2, between lines 20 and 21, insert:

Sec. 3. Section 911.6 of the Government Code is amended to read:

911.6. (a) The board shall grant or deny the application within 45 days after it is presented to the board. If the board does not act upon

the application within 45 days after the application is presented, the application shall be deemed to have been denied on the 45th day.

(b) The board shall grant the application where:

(1) The failure to present the claim was through mistake, inadvertence, surprise or excusable neglect or because of lack of knowledge of the requirement that a claim be presented and the public entity was not prejudiced by the failure to present the claim within the time specified in Section 911.2; or

(2) The person who sustained the alleged injury, damage or loss was a minor during all of the time specified in Section 911.2 for the presentation of the claim; or

(3) The person who sustained the alleged injury, damage or loss was physically or mentally incapacitated during all of the time specified in Section 911.2 for the presentation of the claim and by reason of such disability failed to present a claim during such time; or

(4) The person who sustained the alleged injury, damage or loss died before the expiration of the time specified in Section 911.2 for the presentation of the claim.

AMENDMENT NO. 4

On page 2, line 21, strike out "Sec. 3." and insert:

Sec. 4.

AMENDMENT NO. 5

On page 2, line 26, strike out "Sec. 4." and insert:

Sec. 5.

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AMENDMENT NO. 6

On page 3, line 1, strike out "Sec. 5." and insert:

Sec. 6.

AMENDMENT NO. 7

On page 3, line 17, strike out "Sec. 6." and insert:

Sec. 7.

AMENDMENT NO. 8

On page 3, between lines 50 and 51, insert:

Sec. 8. Section 946.6 of the Government Code is amended to read:

946.6. (a) Where an application for leave to present a claim is denied or deemed to be denied pursuant to Section 911.6, a petition may be made to the court for an order relieving the petitioner from the provisions of Section 945.4. The proper court for filing the petition is a court which would be a competent court for the trial of an action on the cause of action to which the claim relates and which is located in a county or judicial district which would be a proper place for the trial of such action, and if the petition is filed in a court which is not a proper court for the determination of the matter, the court, on motion of any party, shall transfer the proceeding to a proper court.

(b) The petition must show (1) that application was made to the board under Section 911.4 and was denied or deemed denied, (2) the reason for failure to present the claim within the time limit specified in Section 911.2 and (3) the information required by Section 910. The petition shall

be filed within six months after the application to the board is denied or deemed to be denied pursuant to Section 911.6.

(c) The court shall relieve the petitioner from the provisions of Section 945.4 if the court finds that the application to the board under Section 911.4 was made within a reasonable time not to exceed one year after the accrual of the cause of action and was denied or deemed denied pursuant to Section 911.6 and that:

(1) The failure to present the claim was through mistake, inadvertence, surprise or excusable neglect or because of lack of knowledge of the requirement that a claim be presented unless the public entity establishes that it would be prejudiced if the court relieves the petitioner from the provisions of Section 945.4; or

(2) The person who sustained the alleged injury, damage or loss was a minor during all of the time specified in Section 911.2 for the presentation of the claim; or

(3) The person who sustained the alleged injury, damage or loss was physically or mentally incapacitated during all of the time specified in Section 911.2 for the presentation of the claim and by reason of such disability failed to present a claim during such time; or

(4) The person who sustained the alleged injury, damage or loss died before the expiration of the time specified in Section 911.2 for the presentation of the claim.

(d) A copy of the petition and a written notice of the time and place of hearing thereof shall be served not less than 10 days before the hearing on (1) the clerk or secretary or board of the local public entity, if the respondent is a local public entity, or (2) the State Board of Control or its secretary, if the respondent is the state.

(e) The court shall make an independent determination upon the petition. The determination shall be made upon the basis of the petition, any affidavits in support of or in opposition to the petition, and any additional evidence received at the hearing on the petition.

(f) If the court makes an order relieving the petitioner from the provisions of Section 945.4, suit on the cause of action to which the claim relates must be filed in such court within 30 days thereafter.

AMENDMENT NO. 9

On page 3, line 51, strike out "Sec. 7." and insert:

Sec. 9.

AMENDMENT NO. 10

On page 4, following line 22, insert:

Sec. 10. Section 34 of the San Joaquin County Flood Control and Water Conservation District Act (Ch. 46, Stats. 1956, 1st Ex. Sess.) is amended to read:

Sec. 34. Claims against the district whether arising out of contract, tort, or the taking or damaging of property without compensation ~~must be made in writing and filed with the board within six months after the cause of action arises. -- Claims shall be presented in the general form and manner prescribed by general law relating to the making and filing of claims against counties. -- Such claims may be amended within said six months to correct defects in form or statement of facts. -- No action against the district shall be commenced or maintained unless such claim relating thereto has been filed as hereinabove prescribed and action thereon commenced within~~

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~~one-year-after-the-cause-of-action-arises.~~ shall be governed by Part 3
(commencing with Section 900) and Part 4 (commencing with Section 940)
of Division 3.6 of Title 1 of the Government Code.

Sec. 11. Section 10 of the Kern County Water Agency Act (Ch. 1003, Stats. 1961) is amended to read:

Sec. 10. Claims against the agency whether arising out of contract, tort, or the taking or damaging of property without compensation shall be governed by ~~Chapter 2 (commencing with Section 700) of Division 3.5~~ Part 3
(commencing with Section 900) and Part 4 (commencing with Section 940) of
Division 3.6 of Title 1 of the Government Code.

Sec. 12. Section 23 of the Desert Water Agency Law (Ch. 1069, Stats. 1961) is amended to read:

Sec. 23. All claims for money or damages against this agency are governed by ~~Chapter 2 (commencing with Section 700) of Division 3.5~~ Part 3
(commencing with Section 900) and Part 4 (commencing with Section 940) of
Division 3.6 of Title 1 of the Government Code, except as provided therein,
or by other statutes or regulations expressly applicable thereto.

Sec. 13. Section 23 of the San Geronio Pass Water Agency Law (Ch. 1435, Stats. 1961) is amended to read:

Sec. 23. All claims for money or damages against this agency are governed by ~~Chapter 2 (commencing with Section 700) of Division 3.5~~ Part 3
(commencing with Section 900) and Part 4 (commencing with Section 940) of
Division 3.6 of Title 1 of the Government Code, except as provided therein,
or by other statutes or regulations expressly applicable thereto.

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The staff is to prepare a bill repealing all references in various special district statutes to the claims statute during the summer when time permits.

The Report Prepared for the Assembly Committee on Judiciary should state that the lack of knowledge of the requirement that a claim be presented may be a lack of knowledge by the claimant or, if he has an attorney, by both the claimant and his attorney.

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STUDY 52 - SOVEREIGN IMMUNITY (PLAN OR DESIGN OF A PUBLIC IMPROVEMENT)

The Commission considered Memorandum 69-54, the attached recommendation, and a letter from the Department of Public Works dated April 7, 1969. The following actions were taken:

(1) The section was revised to provide expressly that the court--as distinguished from the jury--determines whether or not the proposed exception to the plan or design immunity is applicable.

(2) The section is to be revised to provide access to records of prior accidents if such information is presently deemed confidential.

(3) The section was revised to provide that the public entity must have actual notice of the injuries which demonstrate the dangerousness of the public improvement.

The tentative recommendation as revised was approved for distribution for comment to interested persons and organizations. However, before the tentative recommendation is distributed for comment, the members of the Commission should be allowed one week prior to the general distribution to review it.

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STUDY 52 - SOVEREIGN IMMUNITY (ESCAPING FIRE)

The Commission considered Memorandum 69-52 and the attached staff draft relating to liability of public entities arising out of the escape of fire. After discussion, the Commission determined not to make any amendment of existing law (Health and Safety Code Sections 13007-13009). The relationship between the immunity for firefighting and the liability for escape of fire creates a difficult problem of statute drafting and the Commission did not consider the problem to be one that would justify the expenditure of the time necessary to resolve the problems.

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STUDY 52 - SOVEREIGN IMMUNITY (LIABILITY ARISING OUT OF USE OF AGRICULTURAL
CHEMICALS)

The Commission considered Memorandum 69-52 and the attached draft statute relating to liability for use of injurious agricultural chemicals. After discussion, the Commission directed that the text of the sections of the Agricultural Code that determine the conditions of, and impose liability in connection with, the use of injurious agricultural chemicals be included with the next memorandum on this subject. No decision was made on the policy to be adopted in this area of liability.

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STUDY 65 - INVERSE CONDEMNATION (WATER DAMAGE)

The Commission considered Memorandum 69-50 and the working draft of a statute relating to inverse condemnation liability for water damage. Following are the primary issues and concerns that can be identified after lengthy discussion of the draft statute and background material prepared by the staff.

Section 869

The Commission decided in principle that the final product should be a "closed-end" statute, i.e., inverse condemnation liability for all water damage should, after enactment of this chapter, be predicated on its provisions alone. The Commission recognized, however, that the effect of this decision would only become clear after the remainder of the statute is drafted and that the soundness of this decision was dependent upon the assumption that satisfactory comprehensive legislation dealing with this subject could be created.

Section 870

Section 870 states the basic conditions of liability. For convenience, the various categories of water damages were separately stated. For each category, the Commission considered the existing law relating to private persons and the existing law relating to public entities, and discussed the effect of a rule that would provide absolute liability for damage proximately caused by a public improvement as designed and constructed.

Of special interest with regard to surface waters were the questions:
(1) what constitutes "reasonable" conduct on the part of a plaintiff under

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the Keys v. Romley rule? (2) does "alteration" of surface flow include both augmentation and diversion of surface water? With respect to stream waters, the Commission agreed that no distinction should be made between diversion and obstruction of natural stream flow. In view of the apparent existing rule of nonliability for augmentation and acceleration of stream waters, it was suggested that these categories be excluded, but no consensus was reached. With respect to flood waters, concern was expressed that the suggested rule would not insure proper cost allocation and would discourage or at least fail to encourage property owners to take reasonable steps to protect themselves.

Section 870.2

The Commission approved the principle that a public entity should not be liable for damage which would have resulted had the improvement not been constructed. An exception was noted where reasonable reliance interests based on a long-standing improvement are thwarted by a second improvement that causes damage no worse than would have resulted had the original improvement never been constructed.

Section 870.4

The staff was directed to give further consideration to excluding liability for damage brought about by the operation of a force of nature beyond the control of the entity, not set in motion or contributed to by the improvement and beyond the reasonable expectation of the entity.

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Sections 870.6 and 870.8

The Commission recognized that some form of the doctrine of avoidable consequences should be included in the statutory scheme. However, the staff was directed to consider here exclusion of liability for trivial expenses and provisions for declaratory relief and notice to and cure by the public entity prior to steps by the potential plaintiff.

Section 871

The Commission approved in principle the offset of benefits against damages under a rule consistent with that to be provided for direct condemnation after this aspect of direct condemnation has been studied.

Section 871.2

The Commission decided that the statute should specifically exclude from coverage interference with the right to the use of water.

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STUDY 69 - POWERS OF APPOINTMENT

The Commission considered a letter from the California Land Title Association suggesting that Senate Bill 98 be amended as follows:

AMENDMENT NO. 1

On page 6, line 18, of the printed bill, after "(d)" insert:

No power of appointment affecting real property, where the creating instrument was previously recorded or where the creating instrument was a will and the order or decess of distribution has been previously recorded, shall be terminated, in whole or in part, as to such appointive real property by the execution of a release of such power until such release is recorded in the office of the county recorder of the county in which the appointive property is located.

(e)

The Commission determined not to amend Senate Bill 98 as suggested. The suggested amendment is unnecessary if the California Land Title Association is concerned with notice to a bona fide purchaser since the release would not be constructive notice unless it was recorded as suggested. The suggested amendment, however, might have undesirable consequences. For example, adverse tax consequences might result if the release is not recorded. In short, the amendemnt was considered to be undesirable.