

# Memorandum

To: CHAIR AND COMMISSIONERS

CTC Meeting: June 25-26, 2008

Reference No.: 2.4a.(1)  
Action Item

From: CINDY McKIM  
Chief Financial Officer

Prepared by: Bimla G. Rhinehart  
Chief  
Division of Right of Way and  
Land Surveys

Subject: **RESOLUTION OF NECESSITY - APPEARANCE**

## **RECOMMENDATION:**

The California Department of Transportation (Department) recommends the California Transportation Commission (Commission) adopt Resolution of Necessity (Resolution) C-19916 summarized on the following page.

## **ISSUE:**

Prior to initiating Eminent Domain proceedings to acquire needed right of way for a programmed project, the Commission must first adopt a resolution, stipulating specific findings identified under Section 1245.230 of the Code of Civil Procedure, which are:

1. The public interest and necessity require the proposed project.
2. The proposed project is planned and located in a manner that will be most compatible with the greatest public good and the least private injury.
3. This property is necessary for the proposed project.
4. An offer to acquire the property in compliance with Government Code Section 7267.2 has been made to the owner of record.

In this case, the property owners are contesting the Resolution and have requested an appearance before the Commission to challenge the outstanding issues. However, at the request of the property owner, objections to the Resolution have been submitted in writing in lieu of a personal appearance before the Commission. The owner's objections are included as Attachment A. The Department's responses to the owner's objections are contained in Attachment B.

**BACKGROUND:**

Discussions have taken place with the owner, who has been offered the full amount of the Department's appraisal and, where applicable, advised of any relocation assistance benefits to which the owner may subsequently be entitled. Adoption of the Resolution will not interrupt the Department's efforts to secure an equitable settlement. In accordance with statutory requirements, the owner has been advised that the Department is requesting the Resolution at this time. Adoption will assist the Department in the continuation of the orderly sequence of events required to meet construction schedules.

**C-19916 - Neil Kasbergen, et al.**

06-Tul-198-PM 3.0 - Parcel 84903-1A, 1B - EA 3568U9.

Right of Way Certification Date: 10/01/08; Ready to List Date: 10/01/08. Expressway - two-lane conventional highway to four-lane expressway. Authorizes condemnation of land in fee for a State highway, extinguishment of abutter's rights of access, and underlying fee. Located in the unincorporated area of Tulare County at the northeast corner of State Route 198 and Road 68. APN 073-100-08.

**Attachments:**

Attachment A - Owners Written Objections dated November 29, 2007

Attachment B - Department response dated April 4, 2008

Attachment C - Fact Sheet

Exhibits A and B - Maps

LAW OFFICES OF

HERMAN H. FITZGERALD

A PROFESSIONAL CORPORATION

HERMAN H. FITZGERALD  
CHRISTINE C. FITZGERALD

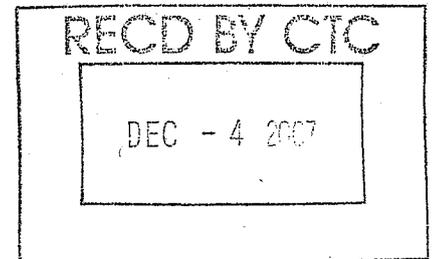
345 LORTON AVENUE, SUITE 302  
BURLINGAME, CALIFORNIA 94010  
TELEPHONE (650) 348-5195  
FACSIMILE (650) 348-3518

November 29, 2007

*Certified Mail, Return Receipt Requested*

Executive Director  
California Transportation Commission  
P. O. Box 942873, Mail Station 52  
Sacramento, CA 94273-0001

Re: Property Acquisition - 06-Tul-198-PM 3.0  
EA 3568U9  
Parcel 84903-1A, 1B  
Resolution of Necessity for Acquisition of  
Property by Eminent Domain: Neil Kasbergen, et al.



To The Honorable California Transportation Commission:

This California Transportation Commission (hereinafter "Commission") has on its agenda for January 9 and 10, 2008, a hearing to consider adoption of a Resolution of Necessity for the acquisition of the above-entitled property (hereinafter "the subject property") by eminent domain. This office represents the Kasbergen family, which includes Neil and Martha Kasbergen, the owners of the property (hereinafter "the owner or owners"). We are submitting this letter on behalf of the owners in order to object to the Commission's proposed action on several grounds, including (1) that adoption of the resolution would be in violation of law because the Commission has failed to comply with applicable statutory procedures which are prerequisites to such a resolution, including the requirements of the California Environmental Quality Act ("CEQA"); and (2) the failure to furnish a proper Appraisal Summary Statement; and (3) the failure to conform to procedural requirements; and (4) the failure to make a proper Government Code 7267.2 offer; and (5) the failure to provide a form of the proposed resolution which effectively precludes any comment, objection, etc., by the owners, exacerbated by the inability to attend a meeting without sufficient notice; and (6) the Notice fails to satisfy the time requirements of CCP 1245.235 and CCP 1013.

ATTACHMENT A

A.

**THE COMMISSION MAY NOT ADOPT A RESOLUTION  
OF NECESSITY BECAUSE IT HAS FAILED TO COMPLY  
WITH STATUTORY PROCEDURES**

Sections 1245.230 et. seq., of the Code of Civil Procedure and Government Code Sections 7267.1 and 7267.2 set forth the procedures that must be followed prior to adoption of a resolution of necessity by a public entity. The Commission has failed to follow those procedures.

Under Government Code Section 7267.2, prior to adopting a resolution of necessity, the condemnor must make an offer to the owners of interests in the subject property to acquire the property, which must contain a written statement of, and summary of the basis for, the amount it has established as just compensation. The Commission has failed to make a bona fide offer under Government Code Section 7267.2 to the owners.

Case law has made it clear that the provisions of Section 7267.2 "are not merely discretionary guidelines, but mandatory requirements which must be observed by any public entity planning to initiate eminent domain proceedings through a resolution of necessity." City of San Jose v. Great Oaks Water Co., (1987) 192 Cal.App.3d 1005, 237 Cal.Rptr. 845, 849. Adoption of the proposed resolution is therefore premature until the Commission complies with these requirements.

The Commission has not made specific findings as required by law to establish the necessity of eminent domain proceedings, that the property in question is necessary for a proposed project, and that the project is planned or located in a manner that will be most compatible with the greatest public good and least private injury. Nor is there any credible evidence to support such conclusions.

The Commission action in proceeding to consider the proposed resolution without complying with these mandatory requirements, among others, reveals that the true intent behind

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this proposed action is to compel the owners to convey their property interest to the Commission at a lesser value.

**B.**

**THE COMMISSION CANNOT ADOPT THE RESOLUTION  
UNTIL THE REQUIREMENTS OF CEQA HAVE BEEN MET**

Similarly, the proposed resolution cannot validly be adopted until all of the requirements of CEQA and the State CEQA Guidelines have been met. California courts have established that public acquisition of property is a "project" within the meaning of CEQA, and therefore subject to all the requirements of CEQA and the State CEQA Guidelines. Nevertheless, the Commission will be in clear violation of CEQA, as well as other provisions of law.

The legislative committee comment to Code of Civil Procedure Section 1240.030 provides in pertinent part as follows:

"Subdivision (a) [of the statute] prevents the taking of the property by eminent domain unless the public interest and necessity require the project. 'Public interest and necessity' include all aspects of the public good including but not limited to social, economic, environmental and aesthetic considerations  
..."

The San Jose, supra, case stated further at page 1017 as follows:

"We conclude that the City violated CEQA by failing to make a determination whether a subsequent or supplemental EIR was required by the redesign of the project, or whether an addendum to the final EIR would suffice. There should be an opportunity for public hearings and comments prior to this determination. If at that time it does appear that the changes in the project design are sufficiently substantial to require revisions of the EIR - as appears to be the case from the evidence in the record - then a subsequent or supplemental EIR will be required."

The Commission has failed to comply with the requirements of CEQA and has not addressed the significant effects on the environment which may be caused by the Commission's proposed project.

Adoption of the proposed resolution is therefore premature until the Commission complies with these requirements.

**ATTACHMENT A**

C.

**THE COMMISSION'S FAILURE TO SATISFY PUBLIC INTEREST  
AND NECESSITY AND OTHER REQUIREMENTS OF THE EMINENT  
DOMAIN LAW PRECLUDES THE ADOPTION OF THE RESOLUTION**

1. The proposed project is not planned or located in a manner that will be the most compatible with the greatest public good and least private injury. The Commission has not properly or adequately evaluated or considered the private injury which will occur to the owners from the project, and has not weighed or balanced other alternatives which would lessen the private injury while permitting the proposed project.
2. The acquisition of the property as proposed is not necessary for the project.
3. The vote by the Commission in deciding whether to adopt the Resolution of Necessity will be affected by a conflict of interest or other improper influence.
4. The proposed acquisition will not be used for the stated purpose within the time period required by law.
5. The proposed taking is of excess property not authorized by law.
6. The proposed taking is for a use not authorized by law.
7. The condemnor lacks the power to take the affected properties by eminent domain.
8. The proposed acquisition is not for a public use.
9. The Commission is not authorized to acquire the properties for the stated use.
10. The property being acquired, and the totality thereof, is not necessary for the project.
11. Portions of the proposed taking are already devoted to an existing public use, and the proposed project and takings are not a more necessary public use.

D.

**CONCLUSION**

The owners object to the Resolution and request that this letter be submitted to the Commission and included as an Exhibit to the hearing and part of the Administrative Record to

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serve as owners' objections to the adoption of the resolution, and further request the Commission to allow the opportunity to appear and be heard at the Resolution Hearing to argue the objections if this office deems it necessary.

In the event that this letter cannot serve as the owners' formal objections, please advise me in writing substantiated with any legal basis.

For the above reasons, it is respectfully submitted that the resolution not be passed.

Very truly yours,



HERMAN H. FITZGERALD

HHF:seh  
cc: Neil and Martha Kasbergen  
L/Commission.Kasbergen

ATTACHMENT A

**DEPARTMENT OF TRANSPORTATION**

855 M Street Suite 200  
Frsno CA 93721  
PHONE (559) 445-6896  
FAX (559) 445-6215  
spiros\_karimbakas@dot.ca.gov



*Flex your power!  
Be energy efficient!*

April 4, 2008

Mr. Herman H. Fitzgerald  
345 Lorton Avenue, Suite 302  
Burlingame, CA 94010

06-TUL-198-PM 0.0/R3.4[a1]  
Parcel: 84903-1, 2  
EA: 3568U9  
Grantor: Neil Kasbergen, et al.

Dear Mr. Fitzgerald:

This letter is in response to your letter dated November 29, 2007, which was addressed to the Executive Director of the California Transportation Commission (Commission). In your letter you addressed specific concerns and objections to the Commission's proposed action on several grounds.

Per your written request, your letter will be submitted to the Commission in lieu of a personal appearance and will be part of the official record.

The subject of the amount of compensation for the property of Mr. Kasbergen, your client, is not an issue for the Commission and will not be considered by them. The District's acquisition agent will continue to be available to you and your client to discuss the compensation and other project related issues.

Your client owns a 150.78-acre parcel improved with row crops and a single-family residence located at the northwest corner of State Route (SR) 99 and SR 198 in Tulare County. The area being affected is located along the southwest portion of the property along Road 68. The required area is 2.11 acres in Fee, along with 0.90 acres of Underlying Fee. The residence will not be impacted by this project. Road 68 will have an overcrossing of SR 198. At a future date, this overcrossing will be relinquished to the County of Tulare. Currently, your client's access on Road 68 is approximately 100 feet north of SR 198. In the after condition his access will be located approximately 800 feet further north due to the overcrossing.

You and your client were requested to participate in a Condemnation Evaluation Meeting and Condemnation Panel Review. These meetings are a forum to communicate issues and concerns, and to discuss and resolve project and acquisition issues. On December 6, 2007, you and your client verbally waived the opportunity to attend both meetings. A letter dated December 6, 2007 was mailed to you confirming the waiver.

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The following is a list of your concerns and objections stated in your letter to the Commission dated November 29, 2007 followed by the Department's responses.

**Owner:**

"That adoption of the resolution would be in violation of law because the Commission has failed to comply with applicable statutory procedures which are prerequisites to such a resolution, including the requirements of the California Environmental Quality Act ("CEQA")."

**Department:**

The Department has followed all environmental guidelines of both California Environmental Quality Act (CEQA) and National Environmental Protection Act (NEPA). An Environmental Assessment to construct an expressway facility on SR 198 from PM 0.497 east of SR 43 to PM 0.372 west of SR 99 near Visalia was approved by the Federal Highway Administration (FHWA) on June 12, 2003. A Finding of No Significant Impact was approved on June 19, 2003. An Environmental Re-evaluation of both the CEQA and the NEPA was approved on November 20, 2007.

**Owner:**

"The failure to furnish a proper Appraisal Summary Statement."

**Department:**

A written offer for the full amount of the Department's approved appraisal in the form of an Appraisal Summary Statement was personally delivered and reviewed by the State's acquisition agent with the grantors present on September 28, 2007, in full compliance with Government Code 7267.2.

**Owner:**

"The failure to conform to procedural requirements."

**Department:**

The Department followed all required policies and procedures to acquire the parcel.

**Owner:**

"The failure to make a proper Government Code 7267.2 offer."

**Department:**

A written offer for the full amount of the Department's approved appraisal in the form of an Appraisal Summary Statement was personally delivered to the grantors on September 28, 2007 in full compliance with Government Code 7267.2.

**Owner:**

"The failure to provide a form of the proposed resolution which effectively precludes any comment, objection, etc., by the owners, exacerbated by the inability to attend a meeting without sufficient notice."

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**Department:**

The owners and their legal counsel were given the opportunity to participate in the Department's Condemnation Evaluation and Condemnation Panel Review meetings. These meetings are a forum to communicate issues and concerns, and to discuss and resolve project and acquisition issues. On December 6, 2007, you and your client verbally waived the opportunity to a Condemnation Evaluation Meeting and Condemnation Panel Review. A letter dated December 6, 2007 was mailed to you confirming the waiver.

**Owner:**

"The Notice fails to satisfy the time requirements of California Civil Code of Procedure (CCP) 1245.235 and CCP 1013."

**Department:**

CCP 1245.235 addresses the adoption of a Resolution of Necessity by a governing body of a public entity. It requires that each person whose name appears on the last equalized county assessment roll and whose property is to be acquired by eminent domain, receive a Notice of Intent letter by First Class mail at least fifteen days prior to said meeting of the intent of the governing body to adopt the resolution, and the right of each person to appear and be heard. CCP 1013 addresses the procedure of service by mail, Express Mail, or facsimile. CCP 1245.235 and CCP 1013 mailing requirements were met.

The Notice of Intent for the January 9-10, 2008 Commission meeting was mailed November 21, 2007 to you and your client 50 days prior to the January 9-10, 2008 Commission meeting. A subsequent notice was mailed on February 22, 2008, 48 days prior to the upcoming April 9-10, 2008 Commission meeting. In both cases, the Department clearly exceeded the statutory requirements.

Part "C" of the referenced letter dated 11-29-2007 address's eleven additional issues. The Departments responses will reference the concerns by their assigned numbers. The group below combines owner's issues 1,2,8,10 and 11 into one Departmental response. Also, owner's issues 7 and 9 were combined for the same purpose.

**Owner:**

1. "The proposed project is not planned or located in a manner that will be the most compatible with the greatest public good and least private injury. The Commission has not or adequately evaluated or considered the private injury that will occur to the owners from the project, and has not weighed or balanced other alternatives, which would lessen the private injury while permitting the proposed project."
2. "The acquisition of the property as proposed is not necessary for the project."
8. "The proposed acquisition is not for a public use."
10. "The property being acquired, and the totality thereof, is not necessary for the project."
11. "Portions of the proposed taking are already devoted to an existing public use, and the proposed project and takings are not a more necessary public use."

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**Department:**

Eight "build" alternatives were considered throughout the Project Development process. The Department followed all environmental guidelines of both CEQA and NEPA to evaluate all viable alternatives. The proposed alternative meets the project need, is the most cost effective, and has the least impact on the environment. The Tulare County portion of this project is included in the 2001 Regional Transportation Plan (RTP) and is listed as the second highest priority under their State Transportation Improvement Program (STIP) funding program. The Kings County portion of this project appears in their 2001 RTP and is listed as the number one priority under the Flexible Congestion Relief program. For that reason, this alignment, adopted several years ago, is consistent with local planning.

The subject parcel is required for the widening of the northeast portion of the proposed Road 68 overcrossing. This proposed overcrossing was designed in accordance with Tulare County's plans. After the completion of this project, the non-State highway areas of Road 68 will be relinquished to the County of Tulare for the continued use as a public road, which will include those land areas already in the public use domain as underlying fee of the current Road 68.

**Owner:**

3. "The vote by the Commission in deciding whether to adopt the Resolution of Necessity will be affected by a conflict of interest or other improper influence.

**Department:**

The Department is unclear as to what is being asserted. There are no known conflicts of interests or improper influences known at this time or at any other time during the acquisition process.

**Owner:**

4. "The proposed acquisition will not be used for the stated purpose within the time period required by law."

**Department:**

The construction contract for this project is proposed to be awarded by July 2009 and construction to commence soon there after, which is well within the time period required by law.

**Owner:**

5. "The proposed taking is of excess property not authorized by law."

**Department:**

Only the land necessary to construct this project is being acquired and there will be no excess land on this parcel.

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**Owner:**

6. "The proposed taking is for a use not authorized by law."

**Department:**

Private property or interests therein will be acquired in accordance with Article I, Section 19 of the California Constitution.

*Sec. 19. "Private property may be taken or damaged for public use only when just compensation, ascertained by a jury unless waived, has first been paid to, or into court for, the owner. The Legislature may provide for possession by the condemnor following commencement of eminent domain proceedings upon deposit in court and prompt release to the owner of money determined by the court to be the probable amount of just compensation."*

**Owner:**

7. "The condemnor lacks the power to take the affected properties by eminent domain."

9. "The Commission is not authorized to acquire the properties for the stated use."

**Department:**

The Commission is the governing body of the Department to grant the Resolution of Necessity.

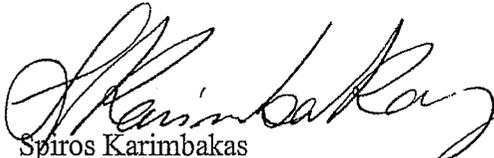
*Sec. 102 of the Streets and Highways Code states, "In the name of the people of the State of California, the Department may acquire by eminent domain any property necessary for state highway purposes."*

*Sec. 104 of the Streets and Highways Code states in part, "That the Department may acquire, either in fee or in any lesser estate or interest, any real property which it considers necessary for state highway purposes. Real property for such purposes includes, but is not limited to, real property considered necessary for any of the following purposes:*

*(a) For rights-of-way, including those necessary for state highways within cities."*

If you have any questions, you can reach Gerald Janigian at (559) 445-6234.

Sincerely,



Spiros Karimbakas  
Deputy District Director-Right of Way  
Central Region

**ATTACHMENT B**

# Resolution of Necessity Appearance Fact Sheet

## PROJECT DATA

06-Kin/Tul-198-PM R21.5/R28.3, PM 0.0/R3.4  
Expenditure Authorization: 3568U9

Location: State Route (SR) 198 near Hanford in Kings and Tulare Counties.

Limits: Between SR 43 and SR 99.

Contract Limits: Near Hanford from 0.5 miles east of SR 43 to 0.4 miles west of SR 99 near Visalia.

Cost: Right of Way: \$13,000,000  
Construction: \$92,000,000

Funding Source: State, Traffic Congestion Relief Program Funds, Corridor Mobility Improvement Account, and Federal Demonstration funds

Number of Lanes: Existing (SR 198): Two mixed flow lanes (Conventional Highway)  
Proposed (SR 198): Four mixed flow lanes (Expressway)

Proposed Major Features: Converting a two-lane conventional highway to a four-lane expressway. Grade separation at Road 68 (no ramp connections). Frontage road (FR) between Road 68 and Road 64; FR east of Road 68 connects to existing county road; FR west of 7<sup>th</sup> Avenue both north and south of SR 198, connects to existing country roads; FR east of 1 ½ Avenue to Kit Carson Elementary School. All existing intersections will be improved.

Traffic: Existing 2005: Average Annual Daily Traffic (AADT) - 16,400  
Kings County, 16,200 Tulare County  
Projected 2025: AADT - 28,500 Kings County, 24,900 Tulare County

## PARCEL DATA

Property Owner: Neil Kasbergen, et al.

Parcel Location: Northeast corner of SR 198 and Road 68 in Tulare County.  
Assessors Parcel Number 073-100-08.

Present Use: Agricultural

Area of Property: 150.78 Acres

Area Required: Parcel 84903-1A - 2.11 Acres - Fee  
Parcel 84903-1B - 0.90 Acres - Underlying Fee

ATTACHMENT C

EXHIBIT A

T. 18 S., R. 23 E., M.D.B. & M.

TULARE



SECTION 26

SECTION 25

SECTION 30

ROAD 56

ROAD 60

ROAD 64

ROAD 68

T. 18 S., R. 23 E.

T. 18 S., R. 24 E.

FWY

84903-1A

84903-1B

60

TO HANDFORD

STATE

ROUTE

198

TO VISALIA

COUNTY

SECTION 35

SECTION 36

SECTION 31

RESOLUTION OF NECESSITY  
AREA MAP

NO SCALE

06-TUL-198 P.M. 3.0

EXHIBIT A

10-31-2007

EXHIBIT A

T. 18 S., R. 23 E., M.D.B. & M.

SECTION 25

84903-1B

SW COR. SEC. 30, 18/24  
FD. BRASS CAP MON. IN WELL PER STATE  
HWY. MAP BOOK 5, PG. 85, T.C.R.  
N 2,002,458.5312  
E 6,437,529.6905

POINT OF BEGINNING

RANGE LINE R. 23 E.  
R. 24 E. ROAD 68

1310.58  
2654.53'  
50°20'02"W  
1310.35  
N89°39'58"W 70.00'  
1309.82'

84903-1A

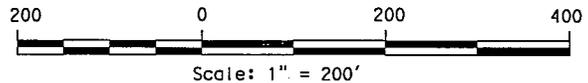
SECTION 30

T. 18 S., R. 24 E., M.D.B. & M.

W/COR. SEC. 30, 18/24  
FD. TUL. CO. MON. FLUSH IN CONCRETE PER  
TUL. CO. COR. REC. 11/16/92. VANZANDER.  
N 2,005,113.0206  
E 6,437,545.1629

LEGEND

- PARCEL 84903-1A FEE
- PARCEL 84903-1B UNDERLYING FEE



RESOLUTION OF NECESSITY MAP  
06-TUL-198 P.M. 3.0

CONVERSION FACTOR: This survey is in feet.  
Divide by 3937/1200 to convert to meters.

This survey is based on the California Coordinate  
System of 1983, Zone 4. Divide distances by  
0.9999471 to convert to ground distances.