

#36(L)

5/11/64

Memorandum 64-28

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

Attached as Exhibit I is a letter from Mr. Bates Booth. This letter urges the Law Revision Commission to recommend to the 1965 Legislature that the right of immediate possession be extended to additional agencies, including public utility companies. (The specific suggestion is that the 1961 recommendation made by the Commission on this subject be submitted to the 1965 legislative session.)

The staff suggests that no recommendation on this subject be made to the 1965 legislative session. There are several reasons for this suggestion: First, we probably do not have time to reconsider the 1961 recommendation, and the staff believe that a reconsideration and some revision of the 1961 recommendation is needed if it is to have any chance of passage by the Legislature. Second, we already have tentatively decided to make a recommendation in 1965 on evidence in eminent domain proceedings and on right to moving expenses in eminent domain proceedings, and we also plan to consider recommending a corrective bill on governmental tort liability in 1965. These recommendations, together with the new evidence code, will constitute a more than adequate package for the 1965 legislative session.

Respectfully submitted,

John H. DeMouly
Executive Secretary

EXHIBIT I

BOOTH, MITCHEL, STRANGE & WILLIAN
Attorneys at Law

Los Angeles, California
April 17, 1964

John H. DeMouilly, Esq.
Executive Secretary
California Law Revision Commission
Room 30, Crothers Hall
Stanford, California 94305

Dear Mr. DeMouilly:

While preparing my comments on the proposed amendments on the subject of opinion testimony in condemnation actions, I would like to urge the Commission to revive its 1961 recommendations to expand the agencies vested with the right to immediate possession. My research in 1961, which was incorporated in a brief which I sent you on March 13, 1961, uncovered 22 states in which public utilities have the right to immediate possession, either after filing a condemnation action or after certain procedural steps devised to protect the landowner but well before the time of actual trial. I undertook to point out in that brief that public utilities could be given this right of immediate possession along with many other public agencies with complete safety and protection to property owners under the procedure that your Commission proposed.

Mr. Milford Springer, Vice President and General Counsel of Southern Counties Gas Company, in a speech before the Pacific Coast Gas Association, summarizes very well the problem confronting utilities along with other public agencies with a strong argument favoring the solution that you proposed, particularly pointing out how your proposals gave such complete protection to property owners that they could have no cause for complaint. For instance, right after condemnation the right to withdraw 100% of the appraised value of the property is quite an advantage to the property owner over the present system whereby he cannot have access to his funds for a long time after the project is planned which will eventually take his land.

I am sure it is not necessary to undertake now to review the very cogent arguments in favor of amending the Constitution and Code to include other agencies in this right of immediate possession. After all, you drafted the amendments. But I want you to know that we are strongly supporting this reform, and I am enclosing a copy of Mr. Springer's speech.

Indeed we are very hopeful that the Law Revision Commission will submit the same 1961 proposed amendments to the 1965 Legislature and will be of such assistance as we can to get a favorable consideration by the Legislature.

Yours truly,

BATES BOOTH

BB:gf

The Right to Immediate Possession

By MILFORD SPRINGER
Southern Counties Gas Company

THE right to immediate possession in condemnation cases will assume increasing importance in California with the necessary expansion of facilities to serve the growing population. It is estimated that California will grow from 15,700,000 people in 1960 to 27,800,000 by 1980.

The right of the condemnor to take private property is seldom disputed. The only question for judicial decision in most condemnation actions is the value of the property. Present California law permits possession to be taken prior to judgment only when certain public agencies are condemning property for right-of-way or reservoir purposes. Possession cannot be obtained in other condemnation actions until the Court renders judgment. Consequently many needed public improvements, including utility extensions, are delayed even though there is no great issue in the case concerning the condemnor's right to take the property. Many public improvements are financed by bond issues, and an undue delay in the acquisition of the property postpones construction so that the improvement cannot be constructed with the funds realized by a particular bond issue, or the improvement must be drastically curtailed.

The California Law Revision Commission has recommended legislation extending the right of immediate possession to all condemnors, including public utilities. The proposed law is to become effective if the Constitution is amended to permit the Legislature to determine who should have the right to immediate possession and the conditions under which the right may be exercised.

The Commission's recommended expansion of the right to immediate possession will benefit the landowner. By condemnation proceedings, a landowner is deprived of many valuable incidents of ownership. He cannot place improvements upon the property for which he will be compensated. He is practically precluded from selling or renting the property, because few persons wish to purchase a law suit. Yet, no compensation is given for this inconvenience and the compensation for the property is not paid in the ordinary case until the end of the litigation. Furthermore, when the condemnor takes possession of the property, under proposed legislation upon the commencement of the proceedings and the owner is given the right to withdraw the money deposit made by the condemnor, the condemnee will have most of the compensation available promptly and will be able immediately to plan for the future, including any relocation.

1. The Concept of Eminent Domain

The derivation of the phrase "eminent domain" is explained in an early opinion of the California Supreme Court.¹ Under the statutory definition, it means the right of the people or government to take private property for public use.² The constitutional requirement that the owner whose property is affected must be compensated applies to the damaging as well as the taking of private property.

The power to condemn private property for a public use has assumed vital importance in modern society as an indispensable legal aid in the development of natural resources and in the providing of utility services necessary to the progress of civilization.

While the California Government Code provides that the state may acquire private property for public use,³ the power of eminent domain is inherent in government and is inseparable from the idea of sovereignty.⁴ It rests on the concept that property privately owned is subject to the right of the state to take it if the common welfare is better served by its public than by its private use, and it is a right superior to property rights of private owners.⁵ The power is not given by the California Constitution, but the Constitution in an implied recognition of the pre-existence of the power, regulates⁶ and limits its exercise.⁷

Public projects cannot be obstructed by persons who own property in the path of the improvement; their property can be taken. When this is done, however, a right to compensation arises in their favor. Just compensation is the fair market value. California case law establishes value to mean value in exchange, not value in use to either owner or condemnor. The test for fair market values is the property's value in view of all the purposes to which it is naturally adapted.⁸

Balancing conflicting interests is common in many areas of the law; in the law of eminent domain it is of primary importance. One main concern of the courts in the law of eminent domain is to draw the line equitably between compensable and non-compensable governmental and public utility interferences with property owners. The process of arriving at a decision that is fair both to the public and to private interests involves a careful weighing and balancing of these interests.

II. Present California Law and Proposed Legislation

Important problems in eminent domain are determining when possession or title to the property should pass. Related problems involve the determination of when the condemnee loses the right to place improvements on the property for which he may be compensated, when the risk of loss of the improvements shifts to the condemnor, when interest on the award should commence and end and when taxes should be prorated.

After studying these matters, the California Law Revision Commission concluded that the existing law is unfair to condemnees and to condemning agencies. In other instances, the law is uncertain or difficult to ascertain.

The California Law Revision Commission has concluded that the law needs to be revised to protect more adequately the rights of the parties and has made the following recommendations:⁹

1. *Order of Immediate Possession:* There are no statutes specifying the procedure to be followed in obtaining an order of immediate possession, but in practice the order of immediate possession is issued upon ex parte application. The Commission thinks that this procedure does not need to be changed, but it should be set forth in the statutes. The Commission recommended the enactment of statutes providing that the condemnor may apply ex parte to the court for an order authorizing immediate possession. However, the order is not to be granted routinely; the court should not issue the order unless it determines that the plaintiff is entitled to take the property by eminent domain and is entitled to immediate possession of the property.

2. *Notice of Order to Owners and Occupants:* At the present time, both the record owners of the property being taken and the occupants must be notified that possession is to be taken. But the condemnor need give this notice only three days before possession is taken. The notice may be given by personal service or by certified mail. If the mail is delayed, an owner or occupant may be deprived of possession without any advance notice. Moreover, under existing law, the condemnor is permitted to determine the names of the owners of the property from the latest secured assessment roll in the county where the property is located. If the property was sold to a new owner after the tax lien date (the first Monday in March) preceding the condemnation proceeding, the actual owner of the property might not receive any notice, because his name would not be on the "latest secured assessment roll."

The present law does not assure that reasonable efforts will be made to notify an owner or occupant in sufficient time to enable him to prepare to vacate the property or to seek relief against the taking.

The Commission recommended that the condemnor not be allowed to take possession of the property unless the record owners and the occupants are notified at least 20 days before possession is to be taken. It also thinks that the court should have the power to shorten the required notification time if emergencies arise. If the person to be served has not received the summons and has not appeared, notice should be given by personal service of a copy of the order authorizing immediate possession or by mailing a copy to the last

1. "Ius eminenti" was the term used by the civilian lawyers for the supreme power of the state over its members and whatever belongs to them; when applied to property it was called "Dominium eminenti," or the right of eminent domain, and meant the right of the sovereign to use the property of its members for the public good or public necessity. *Gilmer v. Lime Point*, 18 C 229.

2. CCP §1237.

3. Gov. C. §184.

4. *Gilmer v. Lime Point*, 18 C. 229; *Lindsay Irr. Co. v. McArten*, 97 C. 676. There is no such thing as extinguishing the right of eminent domain; and any attempt to do so by one legislature has no binding force on its successors. *Southern Pac. Co. v. Southern Calif. R. Co.*, 111 C.221.

5. *Sacramento v. Swanson*, 29 CA 212.

6. *Gilmer v. Lime Point*, 18 C. 229; *Lindsay Irr. Co. v. McArten*, 97 C. 676 (not conferred by Constitution, but restrained in exercise by limitations contained in Constitution); *Rose v. State*, 19 C2d 713 (does not depend on specific grant in Constitution).

7. *Sin Alvaro County v. Colburn*, 130 C. 631; *Rose v. State of California*, 19 C2d 711.

8. *City of Napa v. Navoni*, 56 C.A. 2d 289.

9. State of California Law Revision Commission, Recommendation and Study Relating to Taking Possession and Passage of Title in Eminent Domain Proceedings, October 1960.

known address of the person to be served. The Commission urges that service of the order be made on the persons revealed by the records to be the owners of the property.

3. *Delay in Effective Date of Order:* The Commission thinks that within the 20-day period after notice is given, the owner or an occupant of the property should be able to apply to the court for an order postponing the date that immediate possession may be taken if he can demonstrate to the court that the hardship to him outweighs the hardship that a delay may cause the public. There is no existing law that permits the court to relieve a condemnee from hardship. The Commission suggests the condemnor be given the right to appeal from an order granting a stay of an order for immediate possession.

4. *Withdrawal of Deposit:* Both the United States and California Constitutions require the condemnor to make a money deposit for just compensation to the owner, and gives the condemnee a challenge of the amount. However, unless the property is taken for highway purposes, there is no right to withdraw immediately any of the deposit. If the property is taken for highway purposes, the condemnee is permitted to withdraw only 75 per cent of the original deposit, but this often leaves nothing for the owner after lienholders are paid. In many cases, the condemnee must vacate the property, locate new property to replace that taken and move to the new location at a time when there is little money available from the condemnation. To remedy this situation the Commission recommended that the condemnee be authorized to withdraw the entire deposit that has been made by the condemnor. This will make the money deposited available to the condemnee when he needs it. There may be a danger that the amount ultimately awarded the condemnee will be less than the amount deposited and withdrawn, and the condemnor may have difficulty in recovering the difference. For this reason, the court should have the power in appropriate cases to require the filing of an undertaking to secure the condemnor against loss.

5. *Vacating the Order of Immediate Possession:* There is no existing provision that permits the condemnee to contest in advance the right of the condemnor to take immediate possession of the property. Legally, however, the condemnee has the right to challenge public use in every condemnation proceeding, and the necessity for the taking of the particular property under certain circumstances. But the right to raise these questions may be meaningless if the condemnor has demolished all improvements on the property, denuded the site, constructed pipes, and inundated the property. The Commission recommended that the owner or the occupant of the property be given the right to contest the condemnor's right to take the property and his right to obtain immediate possession by filing a motion to vacate the order for immediate possession made prior to the time possession is taken.

6. *Possession Pending Appeal:* Under existing law, the condemnor is permitted to take possession of the property after entry of judgment even though there is an appeal. It also has been held that the condemnor waives his right of appeal by taking possession of the property. This rule is unfair to the condemnor: if the condemnor takes possession, it will have to pay the award even though it is based upon an error by the trial court, but if it appeals, a needed public improvement may be delayed for years and then abandoned if rising costs exceed the amount available for construction.

The present law causes hardship to condemnees too. The condemnor may refuse to take possession of the property and withhold payment of the judgment to preserve its right of appeal. Then the period during which the condemnee is not compensated and is precluded from renting, selling or improving his property will be prolonged until the appeal is decided. On the other hand, if the condemnor were permitted to take possession after depositing the amount of the judgment in court and still appeal, the condemnor would often do it to avoid delay in starting the project. This deposit would then be available for the condemnee in contesting the condemnor's appeal and in pursuing the condemnee's plans for the future.

The Commission recommended that the statutes permitting the condemnor to take possession pending appeal be revised to provide that the condemnor does not waive its right of appeal by taking of possession.

7. *Passage of Title:* Related to possession of property is the question of title. At the present time, if immediate possession is not taken, title passes by recording the final order of condemna-

tion. However, if possession is taken prior to that time under an order of immediate possession, title passes to the condemnor upon withdrawal of the deposit. There is no similar provision for the passage of title when possession is taken after judgment but pending appeal. To make the rules relating to passage of title uniform, the Commission recommended that title pass in all condemnation proceedings upon the recording of the final order of condemnation.

8. *Compensation for Improvements:* The law relating to compensation for improvements on condemned property is uncertain. First, while Section 1249 of the California Code of Civil Procedure provides that the condemnee is not entitled to compensation for improvements placed upon the property after the service of summons, there is no explicit provision that the condemnee should receive compensation for improvements on the property at that time. Second, Section 1249 can be interpreted to mean that the value as enhanced by improvements is fixed on the date summons is issued, even though the improvements are destroyed before the property is taken.

The Commission recommended that the condemnee be entitled to compensation for all improvements on the property on the date of service of summons unless they are removed or destroyed prior to the date the condemnor takes title or is authorized to take possession of the property.

9. *Abandonment by the Condemnor:* Under existing law, even though the condemnor has taken possession and constructed the contemplated improvement on the property, the condemnor may abandon the project at any time until 30 days after final judgment and recover the money deposited. The condemnor must compensate the owner for the use of the property and any damage to it, but the land owner who has been forced to give up his home or his business and relocate may find that it is as great a hardship to be forced, in effect, to buy back the original property as it was to move. The deposit may have been withdrawn and spent in the acquisition of a new location; the good will of the business may have been re-established in the new location; or the original property may be altered so that it is no longer useful to the condemnee.

The Commission recommended that if the condemnee has substantially changed his position in justifiable reliance upon the condemnation proceeding and cannot be restored to his original position, the condemnor not have the right to abandon the condemnation. If in other cases the condemnation is abandoned or is not completed for any other reason, provision should be made for compensating the condemnee for damage suffered and for any injury to his property while the plaintiff was in possession.

10. *Interest:* Interest upon the award in eminent domain cases usually runs from the date of entry of judgment. If possession is taken prior to entry of judgment, interest is computed from the effective date of the order of possession. After judgment, interest ceases upon payment of the judgment to the condemnee or into court for his benefit. Of course, if any portion of a deposit is withdrawn, interest ceases to accrue on the portion withdrawn. These rules have been established by cases and statutes but some of them are difficult to find and others have been questioned.

The Commission recommended the enactment of legislation that would gather the rules of interest in eminent domain cases into one section.

11. *Property taxes:* Property taxes are prorated from the date the condemnor takes title or possession of the property if the condemnor is a public agency. However, under present law the condemnee loses the benefit of this rule if he has already paid the taxes, for there is no provision for refund by the taxing authority or reimbursement by the condemnor. To remedy this, the Commission recommended that a provision for refund be inserted in the Revenue and Taxation Code.

The Commission also suggested that any non-public agency condemnor be required to reimburse the condemnee for the pro rata share of the taxes paid and attributable to the portion of the tax year following the date the condemnor acquires the title or the possession of the property.

12. *Constitutional Revision:* The Commission concluded that the existing Section 14 of Article I of the California Constitution granting the right to immediate possession should be revised. These provisions grant immediate possession rights only to a limited number of public agencies in right-of-way and reservoir cases. They do not assure the property owner that he will receive compensation at the time his property is taken.

A person's property should not be taken unless he has the right to be paid concurrently, because it is at the time of the taking that he faces the expenses of locating and purchasing property to replace that taken and moving to the new location.

Another defect in the present Constitutional provisions is that they limit the agencies and the purposes for which immediate possession may be taken. The right to immediate possession has great value to the public, for it permits the prompt construction of needed public projects. The Legislature should, therefore, have the power to decide from time to time what agencies are to have the power and for what purposes the power may be exercised. It should not be necessary to amend the Constitution each time a change in the needs of the people warrants an extension or contraction of the purposes for which the right of immediate possession may be exercised.

Accordingly, the Commission recommended that Section 14 of Article I of the Constitution be amended as follows:

The Constitution should guarantee the owner prompt compensation whenever immediate possession of his property is taken.

The Legislature should be given the power to prescribe the agencies having the right to immediate possession and the procedure in such cases, subject to the Constitutional right of the owner to be promptly compensated.

The phrase "irrespective of any benefits from any improvement proposed by such corporation" should be stricken from the Constitution. This phrase is applicable only to private corporations and precludes, in condemnations for rights of way for reservoirs, setting off the benefits which would result to the condemnee's remaining land against the condemnee's claim for damages to such land. The phrase is discriminatory in that it is not applicable to unincorporated condemnors and may be unconstitutional under the equal protection clause of the Federal Constitution. The phrase is uncertain in meaning, for some courts have held that it states a rule applicable to all condemnors that "general" benefits may not be set off, while others have indicated that it refers to "special" benefits which other condemnors are permitted to set off.

III. Need by Public Utilities for the Right to Immediate Possession

Privately-owned public utilities, lacking the right to immediate possession, have been forced to pay exorbitant prices for a few holdout easements.¹⁰ For example, in a recent large-diameter, 120-mile gas pipeline construction project two landowners held out, on advice of counsel, and succeeded in exacting unusually high prices for each long right of way. The contractor was approaching the point where the utility had been unable to acquire easements by negotiation. It would cost the utility an additional \$25,000 to skip that section of the pipeline and return later to install the one mile of pipe. Knowing that it requires six months or more to process a condemnation case in court to judgment granting possession, the utility made the practical decision to pay the landowners' price. The cost of the two easements exceeded \$80,000 and resulted in paying two to three times the fair price paid by the utility for adjoining comparable easements along the pipeline route. Those costs will be reflected in gas consumers' bills.

The landowner has an unreasonable advantage over privately-owned utilities under existing law enabling him to hold out and to contest the condemnation in court on the issues of public use and the necessity for taking particular property. Utilities need the right to immediate possession.

Since the Constitutional requirement that the taking be for a public use is a Constitutional limitation upon the power of eminent domain, whether a proposed use is a public use, even though designated a public use by the legislature, is always open to a final adjudication in condemnation proceedings.¹¹

Within the judicial issue of public use the property owner may challenge the legislative declaration itself, or he may question the condemnor's intention to devote the property to the public use for which it is sought, or the condemnor's intention to devote the property to the proposed public use within a reasonable time. For a utility, the certificate of public convenience and necessity from the Public Utilities Commission becomes convincing evidence on the issue of public use of the project.

The legislature has limited the exercise of the right of condemnation for privately-owned public utilities to the taking of land or rights of way when the proposed public use is located in a man-

ner which will be "most compatible with the greatest public good and least private injury."¹²

Courts have restricted the question of "necessity" to consideration of the suitability and usefulness of the property to the proposed public use.

Twenty-two states allow public utilities to take immediate possession on the filing of a condemnation action, or after preliminary appraisal, or permit it by a procedure commencing with trespass followed by judgment for damages.

Legislation sponsored this year by the California Law Revision Commission, if enacted, will give privately-owned public utilities, along with all others having the right to eminent domain, the valuable right to immediate possession. The property owners' interests also will be protected. Well managed utilities will not abuse the right to immediate possession, because they will be public relations conscious.

Senate Bill No. 206, dated January 16, 1961, would amend the eminent domain title in the Code of Civil Procedure to provide in immediate possession cases: (1) 20 days' notice to the owner and occupants instead of three, (2) court may increase or decrease amount of money required to be deposited, (3) court may vacate or stay order for immediate possession, (4) owner may withdraw 100% of the amount deposited instead of 75%, and (5) allowance of damages to owner in event condemnation is abandoned.

Senate Bill No. 207 would amend the Code of Civil Procedure to allow all condemning powers, including privately-owned public utilities, to take immediate possession. This Bill is conditioned upon approval of a companion Constitutional amendment, that is in the 1961 Legislature, by vote of the electors. If that approval is obtained then the new code provisions will become operative on January 1, 1963.

The proposed legislation is equitable and the California Law Revision Commission has won our admiration.

10. CCP §1238 gives public utilities the right of eminent domain.

11. *State v. Cavalieri*, 52 C2d 299, 304.

12. CCP §1242 on land and §1240(6) on rights of way.