

#36(L)

3/25/66

Memorandum 66-14

Subject: Study 36(L) - Condemnation Law and Procedure (Possession Prior to Final Judgment and Related Problems)

Attached to this memorandum are a proposed constitutional amendment (Exhibit II--yellow) and drafts of legislation (Exhibit III--white). These have been prepared in general accordance with the discussion and consideration of this topic at the Commission's meeting in San Francisco on February 24-26, 1966. The extensive comments to each section of the legislation explain the intended effect, as well as the change made in existing law.

THE CONSTITUTIONAL AMENDMENT

At the February 1966 meeting, the Commission determined that Article I, Section 14, of the California Constitution should be amended to empower the Legislature by statute to extend the right of immediate possession to all condemnors and to takings for all purposes, provided just compensation be first paid or deposited. The Commission further determined to retain the existing constitutional grant of the right of immediate possession to public entities for right of way and for reservoir purposes, clarifying only its application in terms of the public entities encompassed and specifying that the procedures may be prescribed by legislation. The proposed constitutional amendment (Exhibit II--yellow) is designed to carry out these decisions.

In the proposed constitutional amendment, the confusing content of Section 14 has been reduced to five propositions, as follows:

Subdivision (a). This clause (limiting takings to those for "public use", assuring "just compensation" to the property owner, and providing for jury trial) has been retained without change. The requirement that compensation have "first been paid to, or paid into court for, the owner" has been retained notwithstanding the following explicit provisions as to "immediate possession." The requirement is not inconsistent with those provisions and is the source of certain constitutional doctrines that have nothing to do with possession prior to judgment.

Subdivision (b). This clause states, in simplified form, the existing constitutional authorization for immediate possession in right of way and reservoir cases. The existing confusing categorization of public entities has been restated by language intended to encompass all governmental agencies. California Supreme Court decisions seem to indicate that this is the appropriate construction of the existing language, although the matter is not clear. Moreover, the Commission was advised that public entities, such as school districts and rapid transit districts, exercise the right of immediate possession for right of way.

Subdivision (c). This clause states the essence of the 1961 recommendation of the Commission, but it is appropriately restricted to all proceedings other than those governed by the preceding clause.

Subdivision (d). This clause makes explicit the requirement that, before possession or use of the property is taken, just compensation be deposited subject to total withdrawal by the property owner. As pointed out in the research study (Possession Prior to Final Judgment in California Condemnation Procedure, 2/17/66 at page 21), there are substantial reasons for believing that the requirement of this clause is the essence of the

existing content of Section 14 of Article I. In short, the most probable view of the California Supreme Court would be that, so long as probable just compensation is made immediately available to the property owner, and a preliminary determination is made of other issues, jury assessment of compensation is not a necessary condition precedent to the taking of possession. However that may be, the entangled skein of judicial decisions (and amendments to this section and to the Code of Civil Procedure) cannot be clarified without a comprehensive revision of the section.

Subdivision (e). This provision for the exercise of eminent domain for logging or lumbering purposes was added to the section in 1911 and has never been judicially construed or applied. Its apparent purpose was to preclude any holding by the California Supreme Court that such takings might not be for a "public use." The view of the Public Utilities Commission that the provision is no longer necessary (see Exhibit V--buff) appears to be correct, and it is recommended that it be deleted.

Not the least of the benefits to be derived from the amendment would be the restoration of clarity, order, and readability. In view of the content suggested for Section 14, the amendment could be substantially justified as a clarification and updating of the Constitutional provision on eminent domain.

In addition to clarifying the matter of possession, the amendment would remove a cloud from the subject of "benefits" in California condemnation. The language seems to require, in takings other than those by the named governmental entities, that "full compensation" be made "irrespective of any benefits from any improvement proposed." However, in an early decision the California Supreme Court held that distinctions between condemnors for such purposes would be inconsistent with the equal protection clause of the 14th Amendment. The court accordingly construed the language to refer only to

"general" benefits that are not offset in any case. (Beveridge v. Lewis, 137 Cal. 619, 70 Pac. 1083 (1902)). Accordingly, Code of Civil Procedure Section 1248 has uniformly been construed as maintaining this distinction between "special" and "general" benefits, and permitting the offsetting of the former, but not the latter. The benefit of the amendment would lie in removing the constitutional pall from this subject, and leaving the matter to the Legislature.

Similarly, deletion of the detail on immediate possession procedure from the section is desirable in that the Constitutional statement of such detail conceivably could be held to preclude further legislation on the subject.

THE PROPOSED LEGISLATION

Generally

The draft of proposed legislation (Exhibit III--white) is prepared in bill form, together with the necessary repeals, although it is recognized that the content might eventually appear in a comprehensive statute. Disposition has been made of all existing sections dealing with deposits, immediate possession, and possession after judgment. Tables showing the disposition of existing sections and the source of new sections have been placed at the end of the draft.

The drafts consist of a new Title 7.1 of Part 3 of the Code of Civil Procedure; amendments to five existing sections of the Code of Civil Procedure; and the addition of a new article to the Government Code. Title 7.1 will be available after January 1, 1967, as the content of that title (evidence in eminent domain proceedings) is superseded by Sections 810-822 of the Evidence Code.

Most, if not all, of the ideas embodied in the legislation have been discussed in previous Commission meetings. Existing practice generally has been retained. An effort has been made, however, to solve certain problems of both condemnors and condemnees that inhere in the timing of the condemnation process.

Deposit of Probable Just Compensation (Chapter 1 of Title 7.1)

Existing practice with respect to deposits has been retained, but the provisions have been broadened to permit deposit without regard to the taking of possession prior to final order. The deposit provisions have been taken out of the context of the possession sections and placed in a separate chapter (see pages 1-13, Exhibit III--white). As explained in the comments to proposed Section 1268.01, the principal incentive to the condemnor to make such a deposit is to establish an earlier date of valuation (discussed hereinafter). Deposit is also made a means of avoiding the payment of interest; Code of Civil Procedure Section 1255b has been amended to preclude the accrual of interest if deposits are made for each separate interest in the property.

Immediate Possession

The existing statutory pattern has been revised considerably. In general, three distinct provisions have been made, as follows:

(1) Existing provisions and practice have been retained for all governmental entities when condemning for (a) rights of way, or (b) lands for reservoir purposes. (See proposed Section 1269.01, page 17 of Exhibit III--white). This section implements subdivision (b) of the proposed constitutional amendment.

(2) Immediate possession by ex parte order has also been made available to all public entities whose resolution is "conclusive evidence" of "public

necessity," whatever the purpose of the acquisition. The comment to proposed Section 1269.02 sets forth an exhaustive list of entities whose resolutions have that effect. The statutory pattern on public necessity is not altogether satisfactory for purposes of classification. There are certain overlapping and inconsistent statutory provisions on the subject. These problems are dealt with in our unfinished study on the right to take, and any problems in connection with this section will be resolved in the comprehensive statute submitted in 1969. For present purposes, it may be assumed that the entities named in the comment comprise all condemners who take possession pursuant to the proposed section, and that all other condemners are omitted.

The only substantial differences between immediate possession under this section and the preceding section are contained in subdivisions (d), (e) and (f) on page 16. In keeping with the Commission's recommendations of 1961, the property owner is given an opportunity to contest an order obtained under this section. Further, an appeal (with discretionary stay) is provided with respect to the order. As the condemnee is given a clear opportunity to contest the order for possession, his failure to do so is made a waiver of any issues as to the condemnor's right to acquire the property. The general, and desirable, effect is to produce a final, rather than merely preliminary, determination of such issues.

(3) Immediate possession by a noticed motion procedure has been provided for all public entities (including those whose resolution is not conclusive of public necessity), and for public utilities and common carriers when the necessity for their taking is evidenced by a certificate of convenience and necessity. Proposed Section 1269.03 has been adapted

from the immediate possession provisions existing in a number of states in which immediate possession is obtained only by noticed motion. The condemnor is required to show a need for immediate possession and the absence of any overriding hardship to the owner. See subdivision (b)(5) and (d)(2). As in the preceding section, the determination of issues other than just compensation is made final and appealable. See subdivision (f).

Notice to Occupant of Home, Farm or Business

A provision has been added to require that the occupant of a home, farm, or business be given 90 days notice before being required to move. See proposed Section 1269.05. The provision conforms to proposed Federal legislation, except that the Federal period of 180 days has been reduced to 90. The requirement has not been woven into the procedure for obtaining orders of possession, and has not been made a circumstance invalidating any order of possession. Emergency situations conceivably might arise justifying the enforcement of an order for possession without such notice, and provision has been made for reduction of the period to three days (as in the case of orders for possession in right-of-way and reservoir cases).

Exhibit I--pink (news item) lends considerable support to a requirement of more than three days' notice in cases in the usual case in which the order of immediate possession is now authorized by Section 14, Article I, of the California Constitution. This news item indicates that the Department of Water Resources is not the only agency that takes possession with little notice to occupants.

Requirement that the Condemnor Deposit Compensation

Proposed Section 1269.06 of the draft allows a motion to the property owner to compel the condemnor to deposit probable just compensation if the

condemnor has not done so within 30 days of the filing of the complaint. The section is similar to Section 407b of the Pennsylvania Eminent Domain Code and to proposed legislation pending in other states.

An exception has been made sufficiently broad to encompass all situations in which the State or other public entity does not have funds to make such a deposit. The exception would include cases in which funds are not available because of the necessity of selling bonds, collecting assessments, or obtaining an appropriation.

Possible objections to the section would not appear to be substantial. The filing of the proceeding necessarily follows mature deliberation of that step. If the effect of the section is to require even more thorough consideration, that effect would not appear to be undesirable. Further, the incentives provided by savings in interest and earlier dates of valuation should obviate any widespread resort to the procedure provided by the section.

Possession after Judgment or Pending Appeal

Existing provisions and practice have been retained and restated in convenient form. Unfortunately, it is not practicable to make one uniform provision for taking of possession prior to final order. After entry of judgment, although the judgment may be set aside or reversed, the appropriate deposit is determined and all issues have been at least tentatively determined. Also, there may be some merit in perpetuating the general distinction in common understanding between "immediate possession" and possession following the interlocutory judgment.

Date of Valuation

The most important amendment to other sections is made in Code of Civil Procedure Section 1249, which prescribes the date of valuation. Four changes have been made, as follows:

(1) The basic date of valuation has been changed from issuance of summons to date of trial, and the alternative date (date of trial if the issue is not tried within one year) has been eliminated. This change, however, is to be taken in connection with subdivision (d) of the proposed section (see page 35) which provides that if a deposit is made, the date of valuation is the date on which notice of such deposit is given. Convincing support for the change is contained in Exhibit IV--green, and in the letters attached as exhibits to the previous memorandum on this subject.

(2) In subdivision (b), a detailed but relatively minor provision has been made for situations in which the date initially set for trial is continued. Such a provision is necessary to prevent one party or the other from obtaining continuances to alter the date of valuation. The provision also eliminates the vexing problem under existing practice of determining when "delay is caused by the defendant." Subdivision (c) also resolves the question determined, under existing practice, in People v. Murata, 55 Cal.2d 1, 357 P.2d 833 (1960).

(3) As an alternative to the date of trial as the date of valuation, the plaintiff is permitted to establish an earlier date simply by making a deposit of probable just compensation. See subdivision (d). The purpose of this alternate date, of course, is to further the policy of making at least a substantial portion of the compensation available to property owners on the commencement of proceedings. The subdivision permits a single deposit (irrespective of any division of interests in the property), and, by reference to other sections, permits notice of the deposit to be given by mail in all situations in which service of the summons has previously been made.

(4) The pervasive problem of diminution in value, because of the imminence of the taking, prior to the date of valuation is dealt with in subdivision (f). This manner of protecting the property owner (i.e., disregarding the change in value in determining "fair market value") is the proposed Federal solution and has been adopted in virtually all the substantial revisions of eminent domain law in the other states. The Commission has previously adopted this approach in its October 1965 meeting. The subdivision would also clarify a vexing uncertainty under existing California decisional law. Although the several appellate decisions diverge widely, it is at least arguable that the subdivision merely obtains the result of the more thoroughly considered decisions. See the Comment to Section 1249.

It is recognized that these changes to Code of Civil Procedure Section 1249 are not a wholly satisfying solution to all problems that arise from the fact that a proceeding in eminent domain cannot be made a simple exchange of property for money, as in the situation of willing sellers and buyers. The changes should, however, do a great deal to alleviate hardships of property owners inhering in (i) the sometimes protracted period between first knowledge of the impending public improvement and the commencement of the proceeding, and (ii) the substantial and otherwise unavoidable delay in receiving payment following commencement of the proceedings.

Abandonment of Proceedings

Section 1255a of the Code of Civil Procedure has been amended, but basically the privilege of the condemnor to abandon proceedings has not been changed. The condemnor may still abandon any proceeding, even though possession has been taken prior to final order. However, the equitable principle stated in subdivision (b) would appear to apply to virtually all instances in which possession has been taken. Further, as to cases in which a deposit has been withdrawn, California law has never made any provision for

recovery in the event of abandonment. The bonding and repayment provisions, by their terms, apply only to erroneous payment or overpayment.

Essentially, the change to Section 1255a provides a uniform rule for (1) attorney's fees, and (2) all other expenses including appraisal fees, and eliminates the unjust provision that such other expenses are not recoverable if the action is dismissed 40 days or more prior to trial.

Payment of interest

Code of Civil Procedure Section 1255b, which deals with interest in eminent domain cases, has been amended in one minor and one major respect. Subdivision (b) has been changed merely to clarify the rule applicable to situations in which the condemnee remains in possession after interest is running.

Paragraph (5) has been added to subdivision (c) to preclude interest after the condemnor makes separate deposits for each interest in the property. This change is in keeping with the general provision made for deposits in Chapter I of the proposed legislation. Essentially, the provision eliminates the option of the condemnee in immediate possession cases to leave the deposit and draw 7% interest. The change will obviously be of substantial benefit to the tax-paying public, and will conform California practice to a Federal requirement applicable to highway funds. The provision has no application, however, in situations in which possession is not taken prior to entry of judgment, as interest does not accrue in such cases until such entry. The subdivision therefore does not obviate the need for the mentioned provisions (1) fixing an earlier date of valuation in cases in which a deposit is made, or (2) requiring the condemnor to make a deposit on motion of the defendant in certain situations.

Various other amendments, repeals, and changes have been made in the interest of clarity and statutory arrangement. They do not effect any substantive change in existing law.

Respectfully submitted,

Clarence B. Taylor
Special Condemnation Counsel

San Francisco Chronicle

THE VOICE OF THE WEST

FRIDAY, MARCH 11, 1966

10

Directors Of BART Picketed

By Michael Gries

Transportation problems and human concerns clashed for attention yesterday at a directors' meeting of the Bay Area Rapid Transit District.

While the directors deliberated over such matters as final design approval of three miles of East Bay line, more than 100 demonstrators picketed outside at 841 Mission street.

The pickets, members of a civil rights coalition called Justice on BART (JOBART), carried signs that read "Racist BART," "We Demand Moving Money" and "Fair Prices for Homes."

"We're protesting the high-pressure tactics of BART against home owners and tenants in the path of the system," said Elijah Turner, JOBART co-ordinator.

Home owners in West Oakland are being paid as little as \$6000 for "homes that BART is bulldozing that are worth triple that," he contended.

And, worse, the tenants are
See Page 13, Col. 1

From page 1

getting 3-day eviction notices," Turner said, and "no real effort is being made to find them other places."

As if that is not "bad enough," he added, there is the matter of BART's minority hiring practices—only three Negroes among 236 construction workers, according to a JOBART head count.

Outside the BART meeting, General Manager B. R. Stokes countered the claims and was particularly irate at a JOBART contention that transit officials had refused to meet with the group.

"Why, we talked with them recently and set up a joint meeting to discuss hiring practices Monday under FEPC auspices," Stokes said.

Without having exact figures available, he said the "main responsibility" was with the contractors and unions involved in the system.

RELOCATION

As for "unhappy tenants and home owners," Stokes said BART was bound by law to pay "the fair market price, whatever that is" and that Federal laws obliged the City of Oakland—not BART—to provide relocation help.

"We're glad to send them a list of tenants in need," he said, "but in our opinion there's no major problem."

At the meeting itself, attended at first by a trickle of demonstrators who were asked to park their signs outside, the attention of the directors was riveted on transportation problems—until the tail-end of the meeting.

For well over an hour, the Board discussed approvingly such matters as the mildly critical report on the system by State analyst A. Alan Post.

REPORT

"It's a fine report," said BART chairman Adrien J. Falk, "but all the suggestions have been under considera-

tion by the Board for the last seven years. . . . Aside from inflationary forces beyond our control, we're making progress."

And, in a business-as-usual spirit that ignored a new stream of demonstrators, suddenly seated in the aisle of the meeting room, the Board authorized seeking bids for transit line construction in El Cerrito.

The directors also approved an application for Federal funds for continued test track operations.

Finally, in the closing minutes, JOBART spokesmen were allowed the floor.

The Reverend J. Russell Brown, with the First African Episcopal Church in Oakland, pointed a finger at the raised platform that separated the directors from the audience.

"It's indicative—and almost inflammatory—that among all of you sitting back there we don't see any Japanese or Negroes or Chinese. . . . You've made no effort to train us for responsible jobs—you've shown no interest."

EVICTON

The hiring practices and eviction action by BART, he said, was causing "a considerable amount of bitterness" that could endanger the transit system far more than any financial troubles.

His remarks brought bursts of applause from audience which then listened impatiently to Falk who then listed "the limits imposed by law on BART. . . and impossibility of BART solving the problems of the world."

"You certainly have sympathy—I'm a member of a minority group myself added. "And rest assured these matters are in hands of experts."

EXHIBIT III

TITLE 7.1. DEPOSIT OF PROBABLE JUST COMPENSATION PRIOR TO JUDGMENT;
OBTAINING POSSESSION PRIOR TO FINAL JUDGMENT

	<u>page</u>
CHAPTER 1. DEPOSIT OF PROBABLE JUST COMPENSATION PRIOR TO JUDGMENT	3
1268.01. Order determining amount of probable just compensation	4
1268.02. Increase or decrease in amount of deposit	6
1268.03. Service of notice of deposit	7
1268.04. Application for withdrawal of deposit	8
1268.05. Withdrawal of deposit	9
1268.06. Security when amount in excess of original deposit withdrawn	12
1268.07. Withdrawal a waiver of all defenses except claim to greater compensation	14
1268.08. Repayment of amount of excess withdrawal	15
1268.09. Amount of deposit or withdrawal inadmissible in evidence	16
1268.10. Deposit in State Treasury unless otherwise required	17
CHAPTER 2. POSSESSION PRIOR TO JUDGMENT	18
1269.01. Possession by public entity for right of way or reservoir	18
1269.02. Possession where plaintiff's determination of necessity is conclusive	20
1269.03. Possession in other cases	28
1269.04. Service of the order for possession	33
1269.05. Notice to occupants	35

	<u>page</u>
1269.06. Deposit and possession on motion of defendant	37
1269.07. Right of plaintiff to appeal from judgment not waived	41
 CHAPTER 3. POSSESSION AFTER JUDGMENT OR PENDING APPEAL	 42
1270.01. Application for order to take possession after judgment or pending appeal	42
1270.02. Order for possession	43
1270.03. Service of order	44
1270.04. Increase or decrease in amount of deposit	45
1270.05. Withdrawal of deposit	46
1270.06. Taking possession does not waive right of appeal	47
1270.07. Repayment of amount of excess withdrawal	48
1270.08. Deposit in State Treasury unless otherwise required	49
 AMENDMENTS	 50
C.C.P. § 1249. Date of valuation	50
C.C.P. § 1249.1. Risk of loss	55
C.C.P. § 1255a. Abandonment	56
C.C.P. § 1255b. Interest	59
C.C.P. § 1257. New trial and appeal	62
 ADDED SECTIONS (GOVERNMENT CODE)	 63
ARTICLE 9. CONDEMNATION DEPOSITS FUND	63
16425. Condemnation Deposits Fund	63
16426. Investment of fund	64
16427. Apportionment and disbursement of fund	65

	<u>page</u>
REPEALS	66
C.C.P. § 1243.4. By whom and for what purposes immediate possession may be taken	66
C.C.P. § 1243.5. Order of immediate possession	67
C.C.P. § 1243.6. Deposit in State Treasury unless otherwise directed	70
C.C.P. § 1243.7. Withdrawal of deposit	71
C.C.P. § 1954. Possession after judgment or pending appeal	75
 OPERATIVE DATE	 79
 TABLES	
I - Existing Sections to Proposed Legislation	80
II - Proposed Legislation to Existing Sections	82

An act to amend Sections 1249, 1249.1, 1255a, 1255b, and 1257 of, to add Title 7.1 (commencing with Section 1268.01) to Part 3 of, and repeal Title 7.1 (commencing with Section 1268) of Part 3, and Sections 1243.4, 1243.5, 1243.6, 1243.7, and 1254 of the Code of Civil Procedure, and to add Article 9 (commencing with Section 16425) to Chapter 2 of Part 2 of Division 4 of Title 2 of the Government Code, relating to eminent domain.

The people of the State of California do enact as follows:

SECTION 1. Title 7.1 (commencing with Section 1268) of Part 3 of the Code of Civil Procedure is repealed.

Comment. Title 7.1 (commencing with Section 1268) was added to Part 3 of the Code of Civil Procedure by Chapter 1151, § 1, of the Statutes of 1965. Section 7 of that chapter provides that the title is repealed on the effective date of the Evidence Code. The Evidence Code becomes effective January 1, 1967, and Sections 810-822 of that code, pertaining to evidence in eminent domain proceedings, supersede the content of this title. The title, and included section numbers, are superseded by a new Title 7.1, dealing with deposits and possession. in eminent domain proceedings.

SEC. 2. Title 7.1 (commencing with Section 1268.01) is added to Part 3 of the Code of Civil Procedure, to read:

TITLE 7.1. DEPOSIT OF PROBABLE JUST COMPENSATION PRIOR TO JUDGMENT;

OBTAINING POSSESSION PRIOR TO FINAL JUDGMENT

Comment. This title consists of three chapters:

Chapter 1 (commencing with Section 1268.01), which relates to the deposit of the probable just compensation which will be made for the taking of the property and any damages incident thereto. (This chapter restates the substance of Code of Civil Procedure Sections 1243.6 and 1243.7 and the portions of Section 1243.5 that relate to the deposit and withdrawal of probable just compensation.)

Chapter 2 (commencing with Section 1269.01), which relates to the order for possession prior to judgment. (This chapter supersedes the provisions of Code of Civil Procedure Section 1243.4 and the portions of Code of Civil Procedure Section 1243.5 that relate to the order for possession prior to judgment.)

Chapter 3 (commencing with Section 1270.01), which relates to the order for possession after judgment or pending appeal. (This chapter supersedes the portions of Code of Civil Procedure Section 1954 which relate to the order for possession after judgment or pending appeal.)

CHAPTER 1. DEPOSIT OF PROBABLE JUST COMPENSATION PRIOR TO JUDGMENT

Comment. The condemnor may deposit the probable just compensation which will be made for the taking of the property and any damage incident thereto at any time after issuance of summons and prior to the entry of judgment, whether or not possession of the property is to be taken prior to judgment. The deposit under this chapter has several effects: First, the deposit is a condition to obtaining an order for possession prior to judgment. See Sections 1269.01(b), 1269.02(b), 1269.03(d)(3), 1269.06(b). Second, the date of valuation is determined in some cases by the date that notice of the deposit is served on all parties to the proceeding. See Section 1249(d). Third, the risk of loss shifts to the condemnor when the defendant withdraws any portion of the amount deposited and moves from the property. See Section 1249.1(d). Fourth, interest ceases to accrue, to the extent of the amount deposited, on the compensation and damages awarded in the proceeding on the date of withdrawal of the deposit or on the date notice of the deposit is served, depending on whether the condemnor makes a separate deposit for each divided interest in the property to be taken. See Section 1255b(c)(1), (5).

The deposit in cases where possession after judgment or pending appeal is sought is not determined by Chapter 1, but is covered by Chapter 3 (commencing with Section 1270.01).

1268.01. Order determining amount of probable just compensation

1268.01. (a) In any proceeding in eminent domain, the plaintiff may, at any time after the issuance of summons and prior to the entry of judgment, apply ex parte to the court for an order determining the amount to be deposited as the probable just compensation which will be made for the taking of the property and any damage incident thereto.

(b) Where there are two or more divided interests in the property sought to be condemned, the plaintiff may apply for an order as provided in subdivision (a) determining:

(1) The total amount to be deposited as the probable just compensation which will be made for the taking of the property and any damage incident thereto; or

(2) The amount to be deposited as the probable just compensation which will be made for the taking of each such interest in the property and any damage incident to such interest.

(c) The court shall determine the probable just compensation for the property sought to be condemned or, if requested, for each interest in the property sought to be condemned, and shall make an order determining the amount or amounts to be deposited.

(d) Neither an application for an order determining the amount to be deposited for each divided interest in the property nor the deposit or withdrawal of such deposits has any effect on the right of the plaintiff under Section 1246.1 to have the amount of the award for the property first determined as between the plaintiff and all defendants claiming any interest therein.

Comment. This section restates and clarifies existing law.

Subdivision (a) restates the substance of the first sentence of Code of Civil Procedure Section 1243.5(a) except that any condemnor, not just those having the right to take possession prior to judgment, may make a deposit.

Subdivision (b) makes it clear that the condemnor may, in its discretion, make one deposit covering all interests in the property or a separate deposit for each divided interest in the property. If a separate deposit is made for each divided interest in the property, interest ceases to accrue on the date that notice is served as provided in Section 1268.03. See Section 1255b(c)(5).

Subdivision (d) makes it clear that making a deposit for each separate interest has no effect on the right of the condemnor to have the amount of the award for the property first determined as between the plaintiff and all defendants claiming any interest therein. These subdivisions state what has generally been assumed to be the existing law. But see Weiler v. Superior Court, 188 Cal. 729, 207 Pac. 247 (1922); Marblehead Land Co. v. Superior Court, 61 Cal. App. 777, 215 Pac. 922 (1923), both decided before the enactment of Code of Civil Procedure Section 1246.1 which provides that the condemnor is entitled to have the amount of the award for the property first determined as between the condemnor and all defendants claiming any interest therein.

Subdivision (c) requires the court to determine the amount of the deposit or deposits as requested by the condemnor. This subdivision is based on the second sentence of Code of Civil Procedure Section 1243.5(a).

1268.02. Increase or decrease in amount of deposit

1268.02. At any time after the court has made an order determining the amount of the deposit, the court may, upon motion of any party to the eminent domain proceeding, order an increase or a decrease in the amount of the deposit if the court determines that the probable just compensation is different from the amount previously deposited. Prior to judgment, the amount of a deposit may not be reduced to an amount less than that already withdrawn pursuant to this chapter.

Comment. This section restates without substantive change the provisions of Code of Civil Procedure Section 1243.5(d) except that reference to the order for possession is eliminated.

1268.03. Service of notice of deposit

1268.03. At any time after the plaintiff has deposited the amount determined by order of the court, the plaintiff may serve a notice that the deposit has been made on all of the other parties to the proceeding. Service shall be made on such parties in the same manner as is provided in Section 1269.04 for service of an order for possession prior to judgment.

Comment. This section is not based on any existing statutory provision. The section permits, but does not require, the condemnor to serve a notice of the deposit upon the other parties to the proceeding. Serving such a notice has two important effects: First, the date of valuation is determined in some cases by the date that this notice is served. See Section 1249(d). Second, where a separate deposit is made for each divided interest in the property to be taken, service of the notice determines the date on which compensation and damages in the proceeding will cease to accrue on the amount deposited.

1268.04. Application for withdrawal of deposit

1268.04. At any time after the plaintiff has deposited the amount determined by order of the court, the party whose property or interest in property is being taken may apply to the court for the withdrawal of all or any portion of the amount deposited for his property or property interest. The application shall be made by affidavit wherein the applicant shall set forth his interest in the property and request withdrawal of a stated amount. The applicant shall serve a copy of the application on the plaintiff.

Comment. This section restates existing law. The first sentence restates the substance of the first sentence of Code of Civil Procedure Section 1243.7(a). The second sentence is the same as the first sentence of Code of Civil Procedure Section 1243.7(c). The third sentence is the same as the first portion of the second sentence of Code of Civil Procedure Section 1243.7(c).

1268.05. Withdrawal of deposit

1268.05. (a) When an application is made pursuant to Section 1268.04, the court shall order that portion of the amount applied for, which the applicant is entitled to withdraw under the provisions of this chapter, to be paid to such applicant from the money deposited in connection with such property or property interest.

(b) No withdrawal shall be made until at least 20 days after service of a copy of the application on the plaintiff, or until the time for all objections has expired, whichever is later.

(c) Within the 20-day period, the plaintiff may object to such withdrawal by filing an objection thereto in court on the ground that an undertaking should be filed as provided in Section 1268.06 or that the amount of, or the sureties upon, such an undertaking are insufficient.

(d) Within the 20-day period, the plaintiff may object to such withdrawal by filing an objection thereto in court on the ground that other persons are known or believed to have interests in the property. In this event the plaintiff shall attempt to personally serve on such other persons a notice to such persons that they may appear within 10 days after such service and object to such withdrawal, and that failure to appear will result in the waiver of any right to such amount withdrawn or further rights against the plaintiff to the extent of the sum withdrawn. The plaintiff shall state in such objection the names and last known addresses of other persons known or believed to have an interest in the property, whether or not it

has been able to serve them with such notice and the date of such service. If the plaintiff in its objection reports to the court that it is unable to personally serve persons known or believed to have interests in the property within the 20-day period, the money shall not be withdrawn until the applicant causes such personal service to be made.

(e) If such persons so served appear and object to the withdrawal, or if the plaintiff so requests, the court shall thereupon hold a hearing after notice thereof to all parties and shall determine the amounts to be withdrawn, if any, and by whom. If the court determines that a party is entitled to withdraw any portion of a deposit which another party claims, the court may require such party, before withdrawing such portion, to file an undertaking executed by two or more sufficient sureties approved by the court to the effect that they are bound to the adverse claimant in such amount as is fixed by the court, but not to exceed double the portion claimed by the adverse claimant, for the payment to the person entitled thereto of any amount withdrawn that exceeds the amount to which such party is entitled as finally determined in the eminent domain proceeding, together with legal interest from the date of its withdrawal. No persons so served shall have any claim against the plaintiff for compensation for the value of the property taken and any damage incident thereto, or otherwise, to the extent of the amount withdrawn by all parties, but the plaintiff shall remain liable for such compensation to persons having an interest of record who are not so served.

Comment. This section restates existing law.

Subdivision (a) restates the substance of the second sentence of Code of Civil Procedure Section 1243.7(a).

Subdivision (b) is the same as the last portion of the second sentence of Code of Civil Procedure Section 1243.7(c).

Subdivision (c) is the same in substance as Code of Civil Procedure Section 1243.7(d).

Subdivision (d) is the same as Code of Civil Procedure Section 1243.7(e).

Subdivision (e) is the same in substance as Code of Civil Procedure Section 1243.7(f).

1268.06. Security when amount in excess of original deposit withdrawn

1268.06. (a) If the total amount sought to be withdrawn prior to judgment exceeds the amount of the original deposit, each applicant, before any of such excess is withdrawn, shall file an undertaking executed by two or more sufficient sureties approved by the court to the effect that they are bound to the plaintiff in double the amount of such excess for the return of any amount withdrawn by the applicant that exceeds the amount to which the applicant is entitled as finally determined in the eminent domain proceeding, together with legal interest from the date of its withdrawal.

(b) If there is more than one applicant and the total amount sought to be withdrawn exceeds the amount of the original deposit, the applicants, in lieu of filing separate undertakings, may jointly file an undertaking executed by two or more sufficient sureties approved by the court to the effect that they are bound to the plaintiff in double the amount of such excess for the return of any amount withdrawn by the applicants that exceeds the amount to which the applicants are entitled as finally determined in the eminent domain proceeding together with legal interest from the date of its withdrawal.

(c) If the undertaking required by this section is executed by an admitted surety insurer, the undertaking is sufficient in amount if the surety is bound only to the extent that the amount sought to be withdrawn exceeds the amount originally deposited.

(d) The plaintiff may consent to an undertaking that is less than the amount required under this section.

(e) If the undertaking is executed by an admitted surety insurer, the applicant filing the undertaking is entitled to recover the premium paid for the undertaking, but not to exceed 2 percent of the face value of the undertaking, as a part of the recoverable costs in the eminent domain proceeding.

Comment. This section is the same in substance as subdivision (b) of Code of Civil Procedure Section 1243.7.

1268.07. Withdrawal a waiver of all defenses except claim to greater compensation

1268.07. If any portion of the money deposited pursuant to this chapter is withdrawn, the receipt of any such money shall constitute a waiver by operation of law of all defenses in favor of the persons receiving such payment except a claim for greater compensation. Any amount so paid to any party shall be credited upon the judgment in the eminent domain proceeding.

Comment. This section restates the substance of subdivision (g) of Code of Civil Procedure Section 1243.7.

1268.08. Repayment of amount of excess withdrawal.

1268.08. When money is deposited pursuant to this chapter, any amount withdrawn by any party in excess of the amount to which he is entitled as finally determined in the eminent domain proceeding shall be paid to the party entitled thereto together with legal interest thereon from the date of its withdrawal, and the court in which the eminent domain proceeding is pending shall enter judgment therefor against the defendant. If the defendant does not pay the judgment within 30 days after the judgment is entered, the court may, on motion, enter judgment against the sureties for such amount together with the interest that may be due thereon.

Comment. This section restates the substance of subdivision (h) of Code of Civil Procedure Section 1243.7.

1268.09. Amount of deposit or withdrawal inadmissible in evidence

1268.09. The amount deposited by the plaintiff pursuant to this chapter and the amount of such deposit withdrawn by the defendant may not be given in evidence or referred to in the trial of the issue of compensation.

Comment. This section restates the substance of subdivision (e) of Code of Civil Procedure Section 1243.5.

1268.10. Deposit in State Treasury unless otherwise required

1268.10. (a). When money is deposited as provided in this chapter, the court shall order the money to be deposited in the State Treasury, unless the plaintiff requests the court to order deposit in the county treasury, in which case the court shall order deposit in the county treasury. If money is deposited in the State Treasury pursuant to this section, it shall be held, invested, deposited, and disbursed in the manner specified in Article 9 (commencing with Section 16425) of Chapter 2 of Part 2 of Division 4 of Title 2, of the Government Code, and interest earned or other increment derived from its investment shall be apportioned and disbursed in the manner specified in that article.

(b) As between the parties to the proceeding, money deposited pursuant to this chapter shall remain at the risk of the plaintiff until paid or made payable to the defendant by order of the court.

Comment. Subdivision (a) of this section is the same in substance as Code of Civil Procedure Section 1243.6. Subdivision (b) is based on the first two sentences of subdivision (h) of Code of Civil Procedure Section 1254.

CHAPTER 2. POSSESSION PRIOR TO JUDGMENT

1269.01. Possession by public entity for right of way or reservoir

1269.01. (a) In any proceeding in eminent domain brought by the state or a county, city, district, or other public entity to acquire a fee, easement, or other interest in a right of way or in lands to be used for reservoir purposes, the plaintiff may take possession and use of the property in accordance with this section.

(b) The plaintiff may, at any time after the issuance of summons and prior to the entry of judgment, apply ex parte to the court for an order for possession. If the court determines that the plaintiff is entitled to take the property by eminent domain and that the plaintiff has deposited the probable just compensation in accordance with Chapter 1 (commencing with Section 1268.01), the court shall by order authorize the plaintiff to take possession of and to use the property.

(c) The order for possession shall:

(1) Describe the property and the estate or interest therein sought to be condemned, which description may be made by reference to the complaint.

(2) State the purposes of the condemnation.

(3) State the amount or amounts deposited as probable just compensation in accordance with Chapter 1 (commencing with Section 1268.01).

(4) State the date after which the plaintiff is authorized to take possession of the property which date, unless the plaintiff requests a later date, shall be the earliest date on which the plaintiff would be entitled to take possession of the property if service were made under Section 1269.04 on the day the order is made.

Comment. Subdivision (a) restates the substance of Code of Civil Procedure Section 1243.4. The words "the State or a county, city, district, or other public entity" have been substituted for the words "the State, or a county, or a municipal corporation, or metropolitan water district, municipal utility district, municipal water district, drainage, irrigation, levee, reclamation or water conservation district, or similar public corporation." The substitution is in accordance with the construction of Section 14 of Article I of the California Constitution. See Central Contra Costa etc. Dist. v. Superior Court, 34 Cal.2d 845, 215 P.2d 462 (1950). The new language encompasses all proceedings by governmental entities, agencies, or officers to acquire rights of way or lands for reservoir purposes, whether the interest to be acquired is a fee, easement, or lesser interest.

Subdivision (b) restates the substance of subdivision (a) of Code of Civil Procedure Section 1243.5. The ex parte procedure for obtaining the order for possession is a continuation of existing law, but is to be contrasted with the methods for obtaining an order provided by Section 1269.02 (ex parte procedure with motion to modify) and Section 1269.03 (noticed motion procedure).

1269.02. Possession where plaintiff's determination of necessity is conclusive

1269.02. (a) In any proceeding in eminent domain in which a resolution, ordinance, or declaration is made conclusive evidence of the public necessity for taking the property sought to be condemned (whether by subdivision (2) of Code of Civil Procedure Section 1241 or by a statute applicable to the particular agency, entity, or officer), the plaintiff may take possession and use the property in accordance with this section.

(b) At any time after the issuance of summons and prior to the entry of judgment, the plaintiff may apply ex parte to the court for an order for possession. If the court determines that the plaintiff is entitled to take the property by eminent domain, that the taking is provided for by a resolution, ordinance, or declaration constituting conclusive evidence of the public necessity for such taking, and that the plaintiff has deposited the probable just compensation in accordance with Chapter 1 (commencing with Section 1268.01), the court shall by order authorize the plaintiff to take possession of and to use the property.

(c) The order for possession shall:

(1) Describe the property and the estate or interest therein sought to be condemned, which description may be made by reference to the complaint.

(2) State the purposes of the condemnation and refer to the resolution, ordinance, or declaration authorizing the taking.

(3) State the amount or amounts deposited in accordance with Chapter 1 (commencing with Section 1268.01).

(4) State the date after which the plaintiff is authorized to take possession of the property, which date shall not be less than 20 days after the date of the making of the order and may be at any later date specified by the plaintiff.

(d) At any time after the court has made an order for possession pursuant to this section and before the plaintiff has taken possession pursuant to such order, the court, upon motion of any owner or occupant of the property, may:

(1) Stay the effect of the order to such date as may be fixed by the court upon a showing by the owner or occupant that the hardship to the moving party of having possession taken on the date specified in the order clearly outweighs the hardship of the stay to the plaintiff.

(2) Vacate the order if the court determines that the plaintiff is not entitled to take the property by eminent domain or that the taking is not governed by a resolution, ordinance, or declaration conclusively establishing the public necessity therefor.

(e) The plaintiff may appeal from an order staying the effective date of an order for possession made under this section. Any aggrieved party or person may appeal from an order granting or denying the motion to vacate an order for possession made under this section. The appeal shall not stay the order from which the appeal is taken or the order for possession; but the trial or appellate court may, in its discretion, stay the order for possession pending review on appeal or for such other period as to it may appear appropriate.

(f) Failure of a party served with an order for possession obtained under this section to make a motion to vacate the order shall be deemed to be a waiver by such party of all defenses to the proceedings except his claim for greater compensation.

Comment. This section is new.

Subdivision (a). While Section 1269.01 makes available a procedure for obtaining possession prior to judgment if the taking is for right of way or reservoir purposes, the procedure provided by this section is available whatever the purpose of the acquisition if the taking is provided for by a resolution, ordinance, or declaration that constitutes conclusive evidence of the public necessity for the taking. In such cases, the right of the plaintiff to acquire the property by eminent domain is seldom disputed. Thus, serious problems are not presented by the necessity of determining any such issue for the purpose of an order for possession prior to judgment. The benefits to both plaintiff and defendant of an earlier change of possession and receipt of probable just compensation are therefore made available in such cases. Differences between acquisitions generally and acquisitions for rights of way and reservoirs (Section 1269.01), however, necessitate certain differences in procedure. See Recommendation and Study Relating to Taking Possession and Passage of Title in Eminent Domain Proceedings, 3 CAL. LAW REVISION COMM'N, REP., REC. & STUDIES, B-10--B-12 (1961).

Subdivision (2) of Code of Civil Procedure Section 1241 and other statutes give a conclusive effect to the resolutions and ordinances of various public entities. Under these statutes, the procedure of Section 1269.02 is available to the following agencies and entities:

STATE OF CALIFORNIA

STATUTE

AGENCY

State Pub. Works Bd.	GOVT. CODE § 15855
State Hwy. Comm'n	STS. & HWYS. CODE § 103
State Reclam. Bd.	WATER CODE § 8595
Dep't of Water Resources	WATER CODE § 251
Dep't of Water Resources (Central Valley Project)	WATER CODE § 11582
University of California	EDUC. CODE § 23152
State Housing Comm'n	HEALTH & SAF. CODE § 34878
State Lands Comm'n	PUB. RES. CODE § 6808
Cal. Toll Bridge Auth.	STS. & HWYS. CODE § 30404

LOCAL PUBLIC ENTITIES

ENTITY

County	CODE CIV. PROC. § 1241(2)
	STS. & HWYS. CODE § 6121 (Improvement Act of 1911)
	STS. & HWYS. CODE § 4189 (Street Opening Act of 1903)
	STS. & HWYS. CODE § 11400 (Pedestrian Mall Law of 1960)
City	CODE CIV. PROC. § 1241(2)
	STS. & HWYS. CODE § 6121 (Improvement Act of 1911)
	STS. & HWYS. CODE § 4189 (Street Opening Act of 1903)
	STS. & HWYS. CODE § 11400 (Pedestrian Mall Law of 1960)
	GOVT. CODE § 38081 (Park and Playground Act of 1909)
	STS. & HWYS. CODE §§ 31590, 31592 (Acquisitions for parking districts)

LOCAL PUBLIC ENTITIES (continued)	STATUTE (continued)
School Dist.	CODE CIV. PROC. § 1241(2)
Sanitary Dist.	CODE CIV. PROC. § 1241(2)
Irrigation Dist.	CODE CIV. PROC. § 1241(2)
Transit Dist.	CODE CIV. PROC. § 1241(2)
Rapid Transit Dist.	CODE CIV. PROC. § 1241(2)
Public Utility Dist.	CODE CIV. PROC. § 1241(2)
County Sanitation Dist.	CODE CIV. PROC. § 1241(2)
Water Dist.	CODE CIV. PROC. § 1241(2)
Joint Hwy. Dist.	STS. & HWYS. CODE § 25052
Parking Dist.	STS. & HWYS. CODE § 35401.5
Recreational Harbor Dist.	HARB. & NAV. CODE §§ 6590, 6593, 6598 (repealed)
Harbor Improvement Dist.	HARB. & NAV. CODE § 5900.4
Joint Muni. Sewage Disp. Dist.	HEALTH & SAF. CODE §§ 5740.01, 5740.06 (repealed)
Muni. Utility Dist.	PUB. UTIL. CODE § 12703
Port Dist.	HARB. & NAV. CODE § 6296
Regional Park Dist.	PUB. RES. CODE § 5542
Regional Sewage Disp. Dist.	HEALTH & SAF. CODE §§ 5991, 5998 (repealed)
Bridge and Hwy. Dist.	STS. & HWYS. CODE § 27166
County Water Auth.	WATER CODE APP. § 45-5(5)
L. A. Metro. Auth.	PUB. UTIL. CODE APP. 1, § 4.7
S.F. Bay Area Rapid Transit Dist.	PUB. UTIL. CODE § 28954
Mt. San Jacinto Winter Park Auth.	Cal. Stats. 1945, Ch. 1040, § 4.9, p. 2013, Cal. Gen. Laws Ann., Act. 6385 (Deering 1954)

LOCAL PUBLIC ENTITIES (continued)

STATUTE (continued)

American River Flood Cont. Dist.	WATER CODE APP. § 37-23
Antelope Valley-East Kern Water Agency	WATER CODE APP. § 98-61(7)
Lassen-Modoc County Flood Cont. & Water Conserv. Dist.	WATER CODE APP. § 92-3(f)
Mendocino County Flood Cont. & Water Conserv. Dist.	WATER CODE APP. § 54-3(f)
Morrison Creek Flood Cont. Dist.	WATER CODE APP. § 71-3(f) (repealed)
Plumas County Flood Cont. & Water Conserv. Dist.	WATER CODE APP. § 88-3(f)
San Mateo County Flood Control Dist.	WATER CODE APP. § 87-3(8)
Santa Cruz County Flood Cont. & Water Conserv. Dist.	WATER CODE APP. § 77-24
Sierra County Flood Cont. & Water Conserv. Dist.	WATER CODE APP. § 91-3(f)
Siskiyou County Flood Cont. & Water Conserv. Dist.	WATER CODE APP. § 89-3(f)
Sonoma County Flood Cont. & Water Conserv. Dist.	WATER CODE APP. § 53-3(f)
Tehama County Flood Cont. & Water Conserv. Dist.	WATER CODE APP. § 82-3(f)
Vallejo Sanitation and Flood Cont. Dist.	WATER CODE APP. § 67-23
Yolo County Flood Cont. & Water Conserv. Dist.	WATER CODE APP. § 65-3(f)

The procedure will also be available to other entities or agencies whose resolution or ordinance is made conclusive evidence of necessity by subsequently enacted statutes.

Subdivisions (b) and (c). These subdivisions are patterned after Code of Civil Procedure Section 1243.5.

Subdivision (d). This subdivision provides a new procedure, applicable only to orders obtained under this section, whereby the property owner may contest the granting of the order for possession. For the source of this provision, see Recommendation and Study Relating to Taking Possession and Passage of Title in Eminent Domain Proceedings, 3 CAL. LAW REVISION COMM'N, REP., REC. & STUDIES, B-7, B-14 (1961). The subdivision requires that the motion be made within the 20-day period following service of the order for possession. See Code of Civil Procedure Section 1269.04(b). Paragraph (1) is intended to allow the court a broad discretion in determining whether the order for possession should be stayed, including stay until entry of judgment, at which time possession may be taken pursuant to Chapter 3 (commencing with Section 1270.01).

Subdivision (e). This subdivision permits the plaintiff to appeal from an order staying the effective date of an order for possession, and any party to appeal from an order disposing of a motion to vacate the order for possession. Under existing law, an appeal may not be taken from an order authorizing or denying possession prior to entry of judgment. Mandamus or prohibition are the appropriate remedies. See, Central Contra Costa Sanitary Dist. v. Superior Court, 34 Cal.2d 845, 215 P.2d 462 (1950); State v. Superior Court, 208 Cal. App.2d 659, 25 Cal. Rptr. 363 (1962). However, the order for possession following entry of judgment is an appealable order. San Francisco Unified School Dist. v. Hong Mow, 123 Cal. App.2d 668, 267 P.2d 349 (1954). These rules have not been changed as to the order obtained under Section 1269.01. In view of the broad application of Sections 1269.02 and 1269.03, appeals are provided as to orders obtained under these sections. Appeal by the defendant

from an order denying stay of an order for possession is not provided for as the question involved would become moot by the time the appeal is decided unless the order of possession is stayed pending the appeal. To stay the order for possession would, in effect, nullify the right of immediate possession. An appeal by the plaintiff is provided since the appeal might be determined prior to entry of judgment in the proceeding, and thereby be of value to the plaintiff. See Recommendation and Study Relating to Taking Possession and Passage of Title in Eminent Domain Proceedings, 3 CAL. LAW REVISION COMM'N, REP., REC. & STUDIES, B-6 (Recommendation 3) (1961). An appeal is allowed either party from an order disposing of a motion to vacate the order for possession. Such determination is based upon a determination of the plaintiff's right to take the property, including the issues of public use and necessity. See People v. Chevalier, 52 Cal.2d 299, 340 P.2d 598 (1959).

Subdivision (f). This subdivision is new. It requires the defendant to raise any issues as to the right of the plaintiff to acquire the property by eminent domain prior to the time that possession is taken. As relinquishment of possession and possible withdrawal of the deposited probable just compensation is inconsistent with any contention that the property may not be taken by eminent domain, an implied waiver is provided.

1269.03. Possession in other cases

1269.03. (a) In any proceeding in eminent domain brought by the state or a county, city, district, or other public entity or by a public utility or common carrier, the plaintiff may take possession and use of the property sought to be condemned in accordance with this section.

(b) At any time after the issuance of summons and prior to the entry of judgment, the plaintiff may file a written motion applying to the court for an order for possession. The motion shall:

(1) Describe the property and the estate or interest therein sought to be condemned, which description may be made by reference to the complaint.

(2) State the purposes of the condemnation.

(3) Request that the court determine the amount of the deposit to be made in accordance with Chapter 1 (commencing with Section 1268.01) if the amount of the deposit has not already been determined or, if the amount has been determined, state the amount of the deposit.

(4) State the date upon which plaintiff requests to be authorized to take possession, which date shall not be less than 20 days after the date fixed by the court for hearing and determination of the motion.

(5) Set forth the schedule or plan of operation for the execution of the project or improvement for which the property is being taken, the situation of the property with respect to such schedule or plan, the necessity for taking possession and use of the property in the manner requested in the motion, and any other facts or information indicating the necessity of taking possession and use of the property prior to entry of judgment in the proceeding.

(c) The court shall fix a date, not less than 10 nor more than 20 days after the filing of such motion, for the hearing thereon, and shall require that notice of the motion be given in the same manner as an order for possession is served under Section 1269.04.

(d) At the hearing, the court shall hear such evidence as it considers necessary and proper and shall by order authorize the plaintiff to take possession and use of the property if the court determines that:

(1) The plaintiff is entitled to take the property by eminent domain.

(2) The necessity of the plaintiff to take possession of the property outweighs any hardship the owner or occupant of the property will suffer if possession is taken.

(3) The plaintiff has deposited the probable just compensation in accordance with Chapter 1 (commencing with Section 1268.01).

(4) If the plaintiff is a public utility or common carrier, the public necessity of the proposed improvement is evidenced or supported by a certificate of convenience or necessity obtained from the Public Utilities Commission in accordance with the provisions of the Public Utilities Code.

(e) The order for possession shall:

(1) Describe the property and the estate or interest therein sought to be condemned, which description may be by reference to the complaint.

(2) State the purposes of the condemnation and the court's determination that the plaintiff is entitled to take the property by eminent domain.

(3) State the amount or amounts deposited in accordance with Chapter 1 (commencing with Section 1268.01).

(4) State the date after which the plaintiff is authorized to take possession of the property, which date shall not be less than 20 days after the date of the making of the order and may be any later date specified by the plaintiff.

(f) The order of the court, including the determination that the plaintiff is entitled to take the property by eminent domain, shall be a final order, and any aggrieved party may appeal therefrom. An appeal does not stay an order for possession, but the trial or appellate court may, in its discretion, stay the order for possession pending review on appeal or for such other period or periods as to it may appear appropriate.

Comment. This section is new.

Subdivision (a). This section provides a procedure for obtaining possession prior to judgment in cases in which such possession cannot be obtained pursuant to Sections 1269.01 or 1269.02. The words "the State or a county, city, district, or other public entity" encompass all proceedings brought by governmental entities. The words "public utility or common carrier" encompass persons and entities subjected to public regulation under provisions of the Public Utilities Code and related decisional law.

Subdivision (b). This subdivision is the same in substance as Code of Civil Procedure Section 1243.5(b). Paragraph (5) is patterned after provisions in other states which provide for obtaining possession prior to judgment by noticed motion procedure and which require the plaintiff to show a necessity for such taking of possession. See, e.g., ILL. REV. STAT. 1957, Ch. 47, § 2.1; Dept. of Pub. Works & Bldgs. v. Butler Co., 13 Ill.2d 537, 150 N.E.2d 124 (1958).

Subdivisions (c) and (d). These subdivisions provide for the motion and its determination in keeping with motion practice in other types of proceedings. Paragraph (4) of subdivision (d) limits the application of the section in proceedings brought by public utilities or common carriers to those cases in which the Public Utilities Commission has issued its certificate of convenience or necessity applicable to the proposed project or improvement. See Public Utilities Code Section 1000; San Diego Gas & Electric Co. v. Lux Land Co., 194 Cal. App.2d 472, 14 Cal. Rptr. 899 (1961).

Subdivision (e). This subdivision is the same in substance as Code of Civil Procedure Section 1243.5 and provides for an order of possession, after determination of the motion, as in other cases. See Code of Civil Procedure Sections 1269.01(c) and 1269.02(c).

Subdivision (f). This subdivision permits an appeal by either party from an order disposing of the motion to obtain an order for possession. Unlike proceedings to which Code of Civil Procedure Section 1269.02 relates, the proceedings in which this section apply are not affected by a resolution, ordinance, or declaration conclusively establishing the public necessity for the taking. Therefore, court determination of issues as to the plaintiff's right to acquire the property is necessary if any such issues are raised. Final determination of the plaintiff's right to take the property by eminent domain, for purposes of possession prior to judgment, is new to California practice. Determination of all such issues prior to trial of the issue of compensation, however, is the Federal practice applicable to all proceedings. See Federal Rules of Civil Procedure, Rule 71A(h). Generally, issues going to the plaintiff's right to acquire the property by eminent domain (including public use, public necessity, and

proper location) are susceptible to being raised and determined on declarations and in keeping with usual California motion practice. See Sparrow, Public Use and Necessity, California Condemnation Practice at p. 133 (CAL. CONT. ED. BAR 1960). A broad discretion is allowed both trial and appellate courts in staying or refusing to stay the order for possession pending an appeal.

1269.04. Service of the order for possession

1269.04. (a) As used in this section, "record owner or owners of the property" means both the person or persons in whose name the legal title to the fee appears by deeds or other instruments duly recorded in the recorder's office of the county in which the property is located and the person or persons, if any, in possession of the property under a written and duly recorded lease or agreement of purchase.

(b) At least 20 days prior to the time possession is taken pursuant to an order for possession obtained pursuant to this chapter, the plaintiff shall serve a copy of the order for possession on the record owner or owners of the property and on the occupants, if any.

(c) Service of the order shall be made by personal service unless the person on whom service is to be made has previously appeared in the proceeding or has previously been served with a copy of the summons and complaint in the manner prescribed by law, in which case service of the order may be made by mail upon such person and his attorney of record, if any.

(d) If a person upon whom a copy of the order for possession is required to be personally served under this section resides out of the State, or has departed from the State or cannot with due diligence be found within the State, the plaintiff may in lieu of such personal service send a copy of the order by registered or certified mail addressed to such person at his last known address. If a copy of the order is sent by registered or certified mail in lieu of personal service, the plaintiff shall file an affidavit in the proceeding

setting forth the facts showing the reason personal service could not have been made.

(e) The court may, for good cause shown by affidavit, authorize the plaintiff to take possession of the property without serving a copy of the order for possession upon a record owner not occupying the property.

(f) A single service upon or mailing of the order for possession to those at the same address is sufficient.

(g) Where the order for possession is obtained under Section 1269.01, the court may, for good cause shown by affidavit, shorten the time specified in subdivision (b) to a period of not less than three days.

Comment. This section is the same in substance as Code of Civil Procedure Section 1243.5(c). Subdivision (g) is taken from the last sentence of the first paragraph of Code of Civil Procedure Section 1243.5(c). The language has been qualified to limit its application to orders for possession obtained under Section 1269.01 (takings for right of way or reservoir purposes), and to exclude application to orders obtained under Sections 1269.02 and 1269.03.

1269.05. Notice to occupants

1269.05. (a) Notwithstanding any other provision of this chapter, an order for possession shall not be obtained in any case in which execution of the order would require an occupant of a home, farm, or business location to move from such home, farm, or business location without at least 90 days' written notice of the date by which the move is required, but the court may, for good cause shown by affidavit, shorten the period of notice to not less than three days. Such written notice may be given by the plaintiff before, as well as after, commencement of the proceeding in eminent domain, and need not be given to any person who became such an occupant less than 90 days before the date the move is required.

(b) Failure to have given such written notice shall not invalidate an order for possession obtained pursuant to this chapter, and compliance with this section need not be shown in an application or motion for such an order. However, the plaintiff's failure to have given such notice entitles the person or persons affected to have the order set aside or its effective date postponed. Appropriate relief shall be granted to the persons affected on motion to set aside or modify an order obtained under Sections 1269.01 and 1269.02 or on hearing of the motion to obtain an order under Section 1269.03.

Comment. This section is new. The written notice contemplated by the section is not otherwise provided for by statute, but customarily is given by acquiring agencies in keeping with good administrative practice. Such notice is not made a requisite in condemnation proceedings generally, but the failure to give such notice is made grounds for denying or setting aside

an order for possession prior to judgment. The exception permitting the court to shorten the period to three days, for good cause shown, allows for certain remote contingencies that sometimes arise in emergency highway and flood repair work. An analogous provision, requiring 180 days' notice, is contained in proposed Federal legislation. See Sections 101(a)(6) and 112(a)(2) of the "Fair Compensation Act of 1965" as that act would have been adopted by Senate Bill No. 1201 (89th Congress)(1st Sess.); Staff of Select Subcomm. on Real Property Acquisition, House Comm. on Public Works, 88th Cong., 2d Sess., Study of Compensation and Assistance for Persons Affected by Real Property Acquisition in Federal and Federally Assisted Programs, at 122-124 (Comm. Print 1964). The second sentence of subdivision (a) permits the plaintiff to give appropriate notices before commencing the proceeding, and eliminates any requirement that repeated notices be given to occupants who became such after the time of the initial notification.

1269.06. Deposit and possession on motion of defendant

1269.06. (a) At any time after 30 days from the date of the filing of the complaint and prior to the entry of judgment in any eminent domain proceeding, if the plaintiff has not deposited probable just compensation in accordance with Chapter 1 (commencing with Section 1268.01), any defendant may file with the court a motion for an order determining probable just compensation and requiring the plaintiff to deposit the same. Notice of the motion may be made by mail upon the plaintiff and its attorney of record, and the motion shall be heard and determined in the same manner as a motion made by the plaintiff under Chapter 1 (commencing with Section 1268.01).

(b) On hearing of the motion, the court shall determine the probable just compensation and order that the same be deposited by the plaintiff in accordance with Chapter 1 (commencing with Section 1268.01). The plaintiff is entitled to make a single deposit of the total amount of the probable just compensation that will be made for the taking of all interests in the property and any damage incident thereto. The court shall also authorize the plaintiff to take possession of and to use the property by its order made in accordance with Section 1269.03. The order requiring the plaintiff to deposit probable just compensation shall require that such amount be deposited within 20 days, or not later than the date upon which the plaintiff is authorized to take possession and use of the property under the order for possession, whichever is the earlier.

(c) If the plaintiff is the State of California or a county, city, district, or other public entity, and it appears by affidavit that

funds necessary to make the deposit are not and will not be available to the plaintiff on the date deposit is required, then the court shall not require deposit or make an order for possession of the property. However, if deposit and an order for possession is not made for such reason, the compensation and damages awarded in the proceedings to the moving party shall draw legal interest from the date of the hearing of the motion. If the proceeding is abandoned by the plaintiff, the amount of such interest may be recovered as costs in the proceeding and may be recovered in the manner provided for the recovery of other costs and disbursements on abandonment. If, in the proceeding, the court or a jury verdict determines the compensation and damages that would have been awarded to the moving party, then such interest shall be computed on the amount of such award. If no such determination is made, then such interest shall be computed on the amount of probable just compensation as determined on the motion.

(d) The filing of a motion pursuant to this section constitutes a waiver by operation of law, conditioned upon subsequent deposit by the plaintiff of the amount determined to be probable just compensation, of all defenses in favor of the moving party except his claims for greater compensation.

(e) If the plaintiff fails to deposit the amount determined to be probable just compensation as ordered by the court, the court shall, upon motion of the moving party, order that the proceeding be dismissed. Such dismissal shall be an abandonment of the proceeding by the plaintiff. If a proceeding is so abandoned, the plaintiff shall not commence another proceeding to acquire the property for the same public improvement for a period of three years from the date of such dismissal.

Comment. This section is new. The procedure of this section apart, deposit of probable just compensation pursuant to Chapter 1 (commencing with Section 1268.01) or the taking of possession pursuant to this chapter or Chapter 3 (commencing with Section 1270.01) is entirely optional with the plaintiff. If a deposit is not made and possession is not taken, the defendant is not entitled to be paid until 30 days after final judgment. See Code of Civil Procedure Sections 1251 and 1268. If bonds must be issued and sold to pay the award, payment need not be made until one year after final judgment. See Code of Civil Procedure Section 1251. The section makes available to the defendant a procedure by which probable just compensation may be obtained by the defendant within a more reasonable period after commencement of the proceeding. For an analogous provision, see Section 407(b), Pennsylvania Eminent Domain Code (Act of June 22, 1964, P.L. 84).

Subdivisions (a) and (b). This section contemplates that the court determine probable just compensation on motion of the defendant as it does in other cases in which such determination is made on motion or application of the plaintiff. On depositing probable just compensation as determined by the court, the plaintiff is entitled to possession and use of the property, and a court order for this purpose is authorized.

Subdivision (c). This subdivision provides an exception in case the plaintiff is a public entity and funds are not available because bonds must be issued and sold, special assessments must be collected, or an appropriation must be obtained for the acquisition. If such exception is claimed, however, interest on the eventual award is made to begin to accrue from the date of the motion. If an award is not eventually made by

the court or jury, the interest is computed on the amount determined by the court to be probable just compensation. This subdivision apart, interest would not begin to accrue until entry of judgment. See Code of Civil Procedure Section 1255d(a)(1).

Subdivision (d). This subdivision, in effect, makes the procedure of the section unavailable to a defendant who contests the right of the plaintiff to acquire the property by eminent domain. As a deposit made pursuant to this section may be withdrawn as in other cases, deposit is not required if issues remain as to the right of the plaintiff to acquire the property.

Subdivision (e). This subdivision provides for dismissal of the proceeding if a deposit required by order of the court is not made. The subsection thus has no application to situations in which the exception provided by subdivision (c) is claimed. Dismissal for such reason is made an abandonment of the proceeding governed by Code of Civil Procedure Section 1255a. Such an abandonment precludes another action to acquire the property for the same public improvement for a period of three years. Otherwise, successive actions might be brought subject only to the discretionary control of the court. See City of Los Angeles v. Abbott, 217 Cal. 184, 17 P.2d 993 (1932).

1269.07. Right of plaintiff to appeal from judgment not waived

1269.07. The plaintiff does not abandon or waive the right to appeal from the judgment in the proceeding by taking possession of the property prior to judgment pursuant to this chapter.

Comment. This section is the same in substance as Code of Civil Procedure Section 1243.5(f). The language has been changed to preclude implied waiver of appeal by taking possession pursuant to any order obtained under this chapter, including orders under Sections 1269.01, 1269.02, 1269.03, and 1269.06.

CHAPTER 3. POSSESSION AFTER JUDGMENT OR PENDING APPEAL

1270.01. Application for order to take possession after judgment or pending appeal

1270.01. In any case in which the plaintiff is not in possession of the property sought to be condemned, the plaintiff may, at any time after trial and judgment entered or pending an appeal from the judgment and after payment into court for the defendant of the full amount of the judgment and such further sum as may be required by the court as a fund to pay any further damages and costs that may be recovered in the proceeding, apply ex parte for an order authorizing it to take possession of and to use the property sought to be condemned.

Comment. This section is the same as subdivision (a) of Code of Civil Procedure Section 1254.

1270.02. Order for possession

1270.02. If in the judgment the court determined that the plaintiff is entitled to acquire the property by eminent domain and if the court determines that the plaintiff has made the required payment into court, the court shall by order authorize the plaintiff to take possession of and use the property during the pendency of and until the final conclusion of the litigation, and shall, if necessary, stay all actions and proceedings against the plaintiff on account thereof. The order shall state the date after which the plaintiff is authorized to take possession of the property which date, unless the plaintiff requests a later date, shall be 10 days after the date of the order.

Comment. This section is the same as subdivision (b) of Code of Civil Procedure Section 1254.

1270.03. Service of order

1270.03. At least 10 days prior to the time possession is taken, the plaintiff shall serve upon the defendants and their attorneys, either personally or by mail, a copy of the order of the court authorizing it to take possession of the property. A single service upon or mailing to those at the same address is sufficient.

Comment. This section is the same as subdivision (c) of Code of Civil Procedure Section 1254.

1270.04. Increase or decrease in amount of deposit

1270.04. At any time after the court has made an order authorizing the plaintiff to take possession pursuant to this chapter, the court may, upon motion of any party to the eminent domain proceeding, order an increase or a decrease in the amount that the plaintiff is required to pay into court as a further sum pursuant to this chapter.

Comment. This section is the same in substance as subdivision (d) of Code of Civil Procedure Section 1254.

1270.05. Withdrawal of deposit

1270.05. The defendant who is entitled to the money paid into court for him upon any judgment is entitled to demand and receive the full amount of the judgment at any time thereafter upon obtaining an order therefor from the court. The court, or a judge thereof, upon application by such defendant, shall order and direct that the money so paid into court for him be delivered to him upon his filing a satisfaction of the judgment, or upon his filing a receipt therefor, and an abandonment of all defenses to the action or proceeding, except as to the amount of damages that he may be entitled to in the event that a new trial is granted. A payment to a defendant under this section shall be deemed to be an abandonment by such defendant of all defenses interposed by him, excepting his claim for greater compensation.

Comment. This section is the same in substance as subdivision (f) of Code of Civil Procedure Section 1254.

1270.06. Taking possession does not waive right of appeal

1270.06. The plaintiff does not abandon or waive the right to appeal from the judgment by paying into court the amount of the judgment and such further sum as may be required by the court and taking possession of the property pursuant to this chapter.

Comment. This section is the same in substance as subdivision (e) of Code of Civil Procedure Section 1254.

1270.07. Repayment of amount of excess withdrawal

1270.07. When money is deposited pursuant to this chapter, any amount withdrawn by any party in excess of the amount to which he is entitled as finally determined in the eminent domain proceeding shall be paid without interest to the party entitled thereto, and the court in which the eminent domain proceeding is pending shall enter judgment therefor against such party.

Comment. This section is the same in substance as subdivision (g) of Code of Civil Procedure Section 1254.

1270.08. Deposit in State Treasury unless otherwise required

1270.08. (a) When money is deposited as provided in this chapter, the court shall order the money to be deposited in the State Treasury, unless the plaintiff requests the court to order deposit in the county treasury, in which case the court shall order deposit in the county treasury. If money is deposited in the State Treasury pursuant to this section, it shall be held, invested, deposited, and disbursed in the manner specified in Article 9 (commencing with Section 16425) of Chapter 2 of Part 2 of Division 4 of Title 2, of the Government Code, and interest earned or other increment derived from its investment shall be apportioned in the manner specified in that article.

(b) As between the parties to the proceeding, money deposited pursuant to this chapter shall remain at the risk of the plaintiff until paid or made payable to the defendant by order of the court.

Comment. This section, which is the same as proposed Section 1268.10, supersedes the first three sentences of subdivision (h) of Code of Civil Procedure Section 1254. The remainder of subdivision (h), together with subdivisions (i) and (j), of Code of Civil Procedure Section 1254 is superseded by Sections 16425-16427 which are proposed to be added to the Government Code.

SEC. 3. Section 1249 of the Code of Civil Procedure is amended to read:

1249. (a) Except as otherwise provided in this section, for the purpose of assessing compensation and damages the right thereto shall be deemed to have accrued at the date ~~of the issuance of summons~~ initially set for trial and its actual value at that date shall be the measure of compensation for all property to be actually taken, and the basis of damage to property not actually taken but injuriously affected, in all cases where such damages are allowed as provided in Section 1248 ~~;- provided that in any case in which the issue is not tried within one year after the date of the commencement of the action, unless the delay is caused by the defendant, the compensation and damages shall be deemed to have accrued at the date of the trial .~~

(b) Except as provided in subdivision (d), if trial is continued upon the motion of a party to the proceeding, the date of valuation is, at the option of the opposing party, either the date then set for trial or the date to which trial is continued. If trial is continued upon motion of the court, the date of valuation is, at the option of the defendant, the date then set for trial or the date to which trial is continued. If there is more than one defendant, all the defendants must join in the exercise of the option. A party having the option under this subdivision may exercise the option by serving upon the opposing party and filing a notice stating the date of valuation elected. The notice shall be served and filed at any time within 10 days after the court's order granting the continuance. Failure to exercise the option

in the manner provided in this subdivision shall be deemed to be an election of the date to which trial is continued as the date of valuation.

(c) Except as provided in subdivisions (b) and (d), where a new trial is granted, the date of valuation is the date initially set for the new trial.

(d) If the plaintiff has made a deposit under Chapter 1 (commencing with Section 1268.01) of Title 7.1 of Part 3 of this code of the amount of the probable just compensation that will be made for the taking of the property and any damage incident thereto, the date of valuation is the date on which a notice of the deposit is served in accordance with Section 1268.03 by the plaintiff on all of the other parties to the proceeding. A single deposit of the total amount of the probable just compensation that will be made for the taking of all interests in the property and any damage incident thereto is sufficient for the purposes of this subdivision.

(e) No improvements put upon the property subsequent to the date of the service of summons shall be included in the assessment of compensation or damages.

(f) Any change in market value prior to the date of valuation that was substantially due to the general knowledge that the improvement was likely to be made, other than that due to physical deterioration of the property resulting from the condemnee's failure to reasonably maintain the property, shall be disregarded in determining market value.

Comment. This section deals primarily with the date of valuation.

Subdivision (a). This subdivision provides a new basic date of valuation for eminent domain proceedings; i.e., the date of trial, rather than the date of issuance of summons. See, however, the earlier alternate date provided by subdivision (d) if probable just compensation is deposited. The change adopts the basic date of valuation used in a majority of American jurisdictions. See 3 NICHOLS, EMINENT DOMAIN, § 8.5[2](3d ed. 1963); 1 ORGEL, VALUATION UNDER THE LAW OF EMINENT DOMAIN § 21 (2d ed. 1953). The words "date initially set for trial" are used instead of "date of trial" because of the options as to date of valuation provided in subdivision (d). The proviso to the section is deleted as its content is meaningful only if the basic date of valuation is a date other than the date of trial.

Subdivision (b). This subdivision provides three alternatives covering situations in which the date initially set for trial is continued in the trial court, as follows:

(1) If the date initially set for trial is continued on motion of a party to the proceeding, the opposing party may elect either that date or the date to which the trial is continued.

(2) If the trial is continued on motion of the court, the defendant is given the same option as if the continuance were on motion of the plaintiff.

(3) Failure of any party to exercise an option in the manner provided results in the date being the date of trial.

Subdivision (c). This subdivision specifies that, if a new trial is granted, the date of valuation is the date of the new trial. The rule is subject to variance only if there are continuances of the date set for the

new trial (subdivision (b)) or if probable just compensation is deposited (subdivision (d)). The subdivision applies whether the new trial is granted by the trial court or by an appellate court. For the former rule applicable under the proviso to subdivision (a), see People v. Murata, 55 Cal.2d 1, 357 P.2d 833 (1960).

Subdivision (d). This subdivision permits the plaintiff to establish an earlier date of valuation by depositing probable just compensation and giving notice of such deposit. The requirement that notice of the deposit be served facilitates withdrawal of the deposit by the defendant or defendants. The subdivision applies whether the defendant deposits the total amount of probable just compensation for all interests in the property in keeping with Code of Civil Procedure Section 1268.01(b)(1) or separate amounts for each interest in the property in keeping with Code of Civil Procedure Section 1268.01(b)(2). Interest on the amount of the deposit (if otherwise accruing), however, ceases only if the deposit is made under the latter provision. See Code of Civil Procedure Section 1255b(c)(5).

Subdivision (e). This subdivision retains, without change, an existing provision of Section 1249.

Subdivision (f). This subdivision is new and clarifies decisional law. See City of Oakland v. Partridge, 214 Cal. App.2d 196, 29 Cal. Rptr. 388 (1963); People v. Lucas, 155 Cal. App.2d 1, 317 P.2d 104 (1957); Atchison, T. & S.F.R.R. v. Southern Pac. Co., 13 Cal. App.2d 505, 57 P.2d 575 (1936). Compare Redevelopment Agency of the City of Santa Monica v. Zwerman, 240 A.C.A. 70 (1966); People v. Lillard, 219 Cal. App.2d 368, 33 Cal. Rptr. 189 (1964); County of Los Angeles v. Hoe, 138 Cal. App.2d 74, 219 P.2d 98 (1955); City of Pasadena v. Union Trust Co., 138 Cal. App. 21, 31 P.2d 463 (1934). See, generally, 4 NICHOLS, EMINENT DOMAIN § 12,

3151 (3d ed. 1963); 1 ORGEL, VALUATION UNDER THE LAW OF EMINENT DOMAIN, § 105 (2d ed. 1953); ANDERSON, CONSEQUENCE OF ANTICIPATED EMINENT DOMAIN PROCEEDINGS - IS LOSS OF VALUE A FACTOR, 5 SANTA CLARA LAWYER 35 (1964). For analogous provisions in other jurisdictions, see Section 604, Pennsylvania Eminent Domain Code (Act of June 22, 1964, P.L. 84); Md. Stat. 1962, Ch. 52, § 6. For proposed Federal legislation to the same effect, see Sections 102(a)(b)(1)(A) and 112(c)(2) of the "Fair Compensation Act of 1965" as that act would have been adopted by Senate Bill 1201, 89th Cong. (1st Sess.).

SEC. 4. Section 1249.1 of the Code of Civil Procedure is amended to read:

1249.1. All improvements pertaining to the realty that are on the property at the time of the service of summons and which affect its value shall be considered in the assessment of compensation, damages and special benefits unless they are removed or destroyed before the earliest of the following times:

- (a) The time title to the property is taken by the plaintiff.
- (b) The time the possession of the property is taken by the plaintiff.
- (c) The time the defendant moves from the property in compliance with an order of possession.
- (d) The time the defendant withdraws any portion of the amount deposited under Chapter 1 (commencing with Section 1268.01) and moves from the property.

Comment. Section 1249.1 was added in 1961 to specify the times at which risk of loss of improvements should pass to the plaintiff and the times at which improvements upon the property should be considered in determining value. See 3 CAL. LAW REVISION COMM'N, REP., REC. & STUDIES, Recommendation and Study Relating to Taking Possession and Passage of Title in Eminent Domain Proceedings at B-1, B-8, B-53 to B-55 (1961). The plaintiff may deposit probable just compensation pursuant to Chapter 1 (commencing with Section 1268.01) whether or not possession of the property is taken prior to judgment. See the Comment to Chapter 1. As the defendant's moving from the property after having withdrawn the deposit is substantially equivalent to his moving from the property in compliance with an order for possession, such moving is given the same effect under the section.

SEC. 5. Section 1255a of the Code of Civil Procedure is amended to read:

1255a. (a) The plaintiff may abandon the proceeding at any time after the filing of the complaint and before the expiration of 30 days after final judgment, by serving on defendants and filing in court a written notice of such abandonment; and failure to comply with Section 1251 of this code shall constitute an implied abandonment of the proceeding.

(b) The court may, upon motion made within 30 days after such abandonment, set aside the abandonment if it determines that the position of the moving party has been substantially changed to his detriment in justifiable reliance upon the proceeding and such party cannot be restored to substantially the same position as if the proceeding had not been commenced.

(c) Upon the denial of a motion to set aside such abandonment or, if no such motion is filed, upon the expiration of the time for filing such a motion, on motion of any party, a judgment shall be entered dismissing the proceeding and awarding the defendants their costs and disbursements, which shall include all necessary expenses incurred in preparing for trial and during trial and reasonable attorney fees and appraisal fees actually incurred . These costs and disbursements, including expenses and attorney fees and appraisal fees , may be claimed in and by a cost bill, to be prepared, served, filed and taxed as in civil actions; provided, however, that upon judgment of dismissal on motion of plaintiff, defendants, and each of them, may file a cost bill within 30 days after notice of entry of such judgment ; ~~that said costs and~~

~~disbursements shall not include expenses incurred in preparing for trial where the action is dismissed 40 days or more prior to the time set for the pretrial conference in the action or, if no pretrial conference is set, the time set for the trial of the action .~~

(d) If, after the plaintiff takes possession of or the defendant moves from the property sought to be condemned in compliance with an order of possession, the plaintiff abandons the proceeding as to such property or a portion thereof or it is determined that the plaintiff does not have authority to take such property or a portion thereof by eminent domain, the court shall order the plaintiff to deliver possession of such property or such portion thereof to the parties entitled to the possession thereof and shall make such provision as shall be just for the payment of damages arising out of the plaintiff's taking and use of the property and damages for any loss or impairment of value suffered by the land and improvements after the time the plaintiff took possession of or the defendant moved from the property sought to be condemned in compliance with an order of possession, whichever is the earlier.

Comment. The purpose and effect of subdivision (c) is to recompense the defendant for all expenses necessarily incurred whenever the plaintiff fails to carry an eminent domain proceeding through to conclusion. Pacific Tel. & Tel. Co. v. Monolith Portland Cement Co., 234 Cal. App.2d 352, 44 Cal. Rptr. 410 (1965); Oak Grove School Dist. v. City Title Ins. Co., 217 Cal. App.2d 678, 32 Cal. Rptr. 288 (1963); Kern County v. Galatas, 200 Cal. App.2d 353, 19 Cal. Rptr. 348 (1962). Reasonable attorney's fees

actually incurred thus may be recovered irrespective of the time when the legal services are rendered. Decoto School Dist. v. M. & S. Tile Co., 225 Cal. App.2d 310, 37 Cal. Rptr. 225 (1964). Other reasonable and necessary expenses, including appraisers' fees, however, are subject to the proviso to the subdivision and may not be recovered in any case in which the action is dismissed 40 days or more prior to pre-trial or trial. La Mesa-Spring Valley School Dist. v. Otsuka, 57 Cal.2d 309, 369 P.2d 7 (1962). The changes to the subdivision provide a uniform rule for all expenses: (1) To be recovered, they must be reasonable and actually incurred; and (2) if reasonable and actually incurred, they may be recovered without regard to the date that the proceeding is abandoned or dismissed.

SEC. 6. Section 1255b of the Code of Civil Procedure is amended to read:

1255b. (a) The compensation and damages awarded in an eminent domain proceeding shall draw lawful interest from the earliest of the following dates:

(1) The date of the entry of judgment.

(2) The date that ~~the possession of the property sought to be~~ ~~condemned is taken or~~ the damage thereto occurs.

(3) The date after which the plaintiff may take possession of the property as stated in an order ~~authorizing the plaintiff to~~ ~~take for possession.~~

(b) If , after the date that interest begins to accrue , the defendant continues in actual possession of ~~or receives rents,~~ ~~issues--and-profits-from~~ the property or receives rents or other income attributable to the period after interest begins to accrue , the value of such possession and the net amount of such rents or other income ~~;-issues-and-profits~~ shall be offset against the interest ~~that accrues during the period the defendant continues in actual possession or receives such rents;-issues-and-profits~~ .

(c) The compensation and damages awarded in an eminent domain proceeding shall cease to draw interest on the earliest of the following dates:

(1) As to any amount deposited pursuant to ~~Section 1243.5~~ paragraph (1) of subdivision (b) of Section 1268.01 , the date that such amount is withdrawn by the person entitled thereto.

(2) As to any amount paid into court pursuant to ~~Section 1254~~
Chapter 3 (commencing with Section 1270.01) of Title 7.1 of Part
3 of this code , the date of such payment.

(3) As to any amount paid to the person entitled thereto,
the date of such payment.

(4) If the full amount the defendant is then entitled to receive
as finally determined in the eminent domain proceeding together with
the full amount of the interest then due thereon is paid into court
for the defendant after entry of judgment, the date of such payment.

(5) As to any amount deposited pursuant to paragraph (2) of
subdivision (b) of Section 1268.01 or pursuant to Section 1269.06,
the date on which notice of such deposit is served by the plaintiff
on all the other parties to the proceeding in the manner provided
by Section 1268.03.

Comment. In subdivision (a), paragraph (3) is changed to refer to
an "order for possession," rather than an "order authorizing the plaintiff
to take possession" to conform to the usage throughout Title 7.1 (commencing
with Section 1268.01) in referring to any order for possession prior to the
final order in condemnation.

Subdivision (b) is changed to clarify existing language. Under the
subdivision, the plaintiff is entitled to offset against interest (1) the
value of possession, or (2) the net amount of rents or other income received,
as though the property were purchased by the plaintiff on the date that
interest begins to accrue.

Subdivision (c) is changed to make paragraphs (1) and (2) refer to
the appropriate statutory provisions. Paragraph (5) has been added to

provide two new instances in which the compensation and damages awarded in the proceeding cease to draw interest. Code of Civil Procedure Section 1268.01(b)(2) permits the plaintiff to deposit probable just compensation for each interest in the property sought to be condemned. On service of notice of such a deposit, interest is made to cease. Section 1269.06 requires the plaintiff, under certain circumstances, to deposit probable just compensation on motion of the defendant. Interest is made to cease on notice of such a deposit whether the plaintiff makes a single deposit or a deposit for each interest in the property.

SEC. 7. Section 1257 of the Code of Civil Procedure is amended to read:

1257. (a) The provisions of part two of this code, relative to new trials and appeals, except in so far as they are inconsistent with the provisions of this title, apply to the proceedings mentioned in this title ;-provided,-that-upon-the-payment-of-the-sum-of-money assessed,-and-upon-the-execution-of-the-bond-to-built-the-fences and-cattle-guards,-as-provided-in-section-twelve-hundred-and-fifty-one,-the-plaintiff-shall-be-entitled-to-enter-into,-improve, and-held-possession-of-the-property-sought-to-be-condemned-(if not-already-in-possession)-as-provided-in-section-twelve-hundred-and-fifty-four,-and-devote-the-same-to-the-public-use-in-question;-and re-motion-for-new-trial-or-appeal-shall,-after-such-payment-and-filing of-such-bond-as-aforesaid,-in-any-manner-retard-the-contemplated improvement.--Any-money-which--shall-have-been-deposited,-as-provided in-section-twelve-hundred-and-fifty-four,-may-be-applied-to-the payment-of-the-money-assessed,-and-the-remainder,-if-any-there-be, shall-be-returned-to-the-plaintiff .

(b) In all cases where a new trial has been granted upon the application of the defendant, and he has failed upon such trial to obtain greater compensation than was allowed him upon the first trial, the costs of such new trial shall be taxed against him.

Comment. The proviso to this section was added in 1877 in connection with related changes to Code of Civil Procedure Section 1254, which deals with possession after judgment or pending appeal. See Code Am. 1877-78, Ch. 651, p. 109, §§ 1-2. Various subsequent changes to Section 1254 have rendered the language of the proviso meaningless. The general provision as to fences and cattle-guards remains in Code of Civil Procedure Section 1251.

Subdivision (b) is the same as Code of Civil Procedure Section 1254(k) (repealed in this recommendation).

SEC. 8. Article 9 (commencing with Section 16425) is added to Chapter 2 of Part 2 of Division 4 of Title 2 of the Government Code, to read:

ARTICLE 9. CONDEMNATION DEPOSITS FUND

16425. Condemnation Deposits Fund

16425. The Condemnation Deposits Fund in the Treasury is continued in existence. The fund consists of all money deposited in the Treasury under Title 7.1 (commencing with Section 1268.01) of Part 3 of the Code of Civil Procedure and all interest earned or other increment derived from its investment. The State Treasurer shall receive all such moneys, duly receipt for, and safely keep the same in the fund, and for such duty he is liable to the plaintiff in the eminent domain proceeding upon his official bond.

Comment. Sections 16425-16427 restate the substance of a portion of subdivision (h) and all of subdivisions (i) and (j) of Section 1254 of the Code of Civil Procedure.

16426. Investment of fund

16426. (a) Money in the Condemnation Deposits Fund may be invested and reinvested in any securities described in Section 16430, Government Code, or deposited in banks as provided in Chapter 4 (commencing with Section 16500) of Part 2 of Division 4 of Title 2, Government Code.

(b) The Pooled Money Investment Board shall designate at least once a month the amount of money available in the fund for investment in securities or deposit in bank accounts, and the type of investment or deposit and shall so arrange the investment or deposit program that funds will be available for the immediate payment of any court order or decree. Immediately after such designation the Treasurer shall invest or make deposits in bank accounts in accordance with the designations. For the purposes of this subdivision, a written determination signed by a majority of the members of the Pooled Money Investment Board shall be deemed to be the determination of the board. Members may authorize deputies to act for them for the purpose of making determinations under this section.

Comment. See the Comment to Section 16425.

16427. Apportionment and disbursement of fund

16427. Interest earned and other increment derived from investments or deposits made pursuant to this article, after deposit of money in the State Treasury, shall be deposited in the Condemnation Deposits Fund. After first deducting therefrom expenses incurred by the Treasurer in taking and making delivery of bonds or other securities under this article, the State Controller shall apportion as of June 30th and December 31st of each year the remainder of such interest earned or increment derived and deposited in the fund during the six calendar months ending with such dates. There shall be apportioned and paid to each plaintiff having a deposit in the fund during the six-month period for which an apportionment is made, an amount directly proportionate to the total deposits in the fund and the length of time such deposits remained therein. The State Treasurer shall pay out the money deposited by a plaintiff in such manner and at such times as the court or a judge thereof may, by order or decree, direct.

Comment. See the Comment to Section 16425.

SEC. 9. Section 1243.4 of the Code of Civil Procedure is repealed.

1243.4. ~~Section 1243.4 of the Code of Civil Procedure is repealed.~~
~~In any proceeding in eminent domain brought by the State, or a county, or a municipal corporation, or metropolitan water district, municipal utility district, municipal water district, drainage, irrigation, levee, reclamation or water conservation district, or similar public corporation, the plaintiff may take immediate possession and use of any right-of-way, or lands to be used for reservoir purposes, required for a public use whether the fee thereof or an easement therefor be sought, in the manner and subject to the conditions prescribed by law.~~

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type

Comment. Section 1243.5 is superseded by Code of Civil Procedure Sections 1269.01, 1269.02, 1269.03, and 1269.06.

SEC. 10. Section 1243.5 of the Code of Civil Procedure is repealed.

1243.5.

(a) In any proceeding in eminent domain, if the plaintiff is authorized by law to take immediate possession of the property sought to be condemned, the plaintiff may, at any time after the issuance of summons and prior to the entry of judgment, apply ex parte to the court for an order determining the amount to be deposited as security for the payment of the just compensation which will be made for the taking of the property and any damage incident thereto. Such security shall be in the amount the court determines to be the probable just compensation which will be made for the taking of the property and any damage incident thereto. After depositing the security, the plaintiff may, at any time prior to the entry of judgment, apply ex parte to the court for an order authorizing it to take immediate possession of and to use the property sought to be condemned.

(b) If the court determines that the plaintiff is entitled to take the property by eminent domain and to take immediate possession thereof, and if the court determines that the plaintiff has deposited the security, the court shall by order authorize the plaintiff to take immediate possession of and to use the property sought to be condemned. The order authorizing immediate possession shall:

(1) Describe the property and the estate or interest therein sought to be condemned, which description may be made by reference to the complaint.

(2) State the purposes of the condemnation.

(3) State the amount of the deposit.

(4) State the date after which the plaintiff is authorized to take possession of the property which date, unless the plaintiff requests a later date, shall be the earliest date on which the plaintiff would be entitled to take possession of the property if service were made under subdivision (c) of this section on the day the order is made.

(c) At least 20 days prior to the time possession is taken, the plaintiff shall serve a copy of the order on the record owner or owners of the property and on the occupants, if any. Service of the order shall be made by personal service unless the person on whom service is to be made has previously appeared in the proceeding or has previously been

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served with a copy of the summons and complaint in the manner prescribed by law, in which case service of the order may be made by mail upon such person and his attorney of record, if any. If a person upon whom a copy of the order authorizing immediate possession is required to be personally served under this section resides out of the State, or has departed from the State or cannot with due diligence be found within the State, the plaintiff may in lieu of such personal service send a copy of the order by registered or certified mail addressed to such person at his last known address. If a copy of the order is sent by registered or certified mail in lieu of personal service, the plaintiff shall file an affidavit in the proceeding setting forth the facts showing the reason personal service could not have been made. The court may, for good cause shown by affidavit, authorize the plaintiff to take possession of the property without serving a copy of the order of immediate possession upon a record owner not occupying the property. A single service upon or mailing to those at the same address shall be sufficient. The court may, for good cause shown by affidavit, shorten the time specified in this subdivision to a period of not less than three days.

As used in this subdivision, "record owner or owners of the property" means both the person or persons in whose name the legal title to the fee appears by deeds or other instruments duly recorded in the recorder's office of the county in which the property is located and the person or persons, if any, in possession of the property under a written and duly recorded lease or agreement of purchase.

(d) At any time after the court has made an order authorizing immediate possession, the court may, upon motion of any party to the eminent domain proceeding, order an increase or a decrease in the security that the plaintiff is required to deposit pursuant to this section if the court determines that the security which should be deposited for the taking of the property and any damage incident thereto is different from the amount of the security theretofore deposited. Prior to judgment, such security may not be reduced to an amount less than that already withdrawn pursuant to Section 1243.7.

(e) The amount required to be deposited by the plaintiff and the amount of such deposit withdrawn by the defendant may not be given in evidence or referred to in the trial of the issue of compensation.

(f) The plaintiff shall not be held to have abandoned or waived the right to appeal from the judgment by taking possession of the property pursuant to this section.

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Comment. Section 1243.5 is superseded by Chapter 1 (commencing with Section 1268.01) and Chapter 2 (commencing with Section 1269.01) of Title 7.1 of Part 3 of the Code of Civil Procedure. The provisions relating to the deposit are superseded by provisions contained in Chapter 1; the provisions relating to an order for possession prior to judgment are superseded by provisions contained in Chapter 2.

The disposition of the various provisions of Section 1243.5 is indicated below:

<u>Section 1243.5</u>	<u>Recommended Legislation</u>
Subdivision (a) - first sentence -----	1268.01(a)
- second sentence -----	1268.01(c)
- third sentence -----	1269.01(b), 1269.02(b), 1269.03(b)
Subdivision (b) - first sentence -----	1269.01(b) (second sentence) 1269.02(b) (second sentence) 1269.03(d)
- second sentence -----	1269.01(c), 1269.02(c), 1269.03(e)
Subdivision (c) -----	1269.04
Subdivision (d) -----	1268.02
Subdivision (e) -----	1268.09
Subdivision (f) -----	1269.07

SEC. 11. Section 1243.6 of the Code of Civil Procedure is repealed.

1243.6.

When money is required to be deposited as provided by Section 1243.5, the court shall order the money to be deposited in the State Treasury, unless the plaintiff requests the court to order deposit in the county treasury, in which case the court shall order deposit in the county treasury. If money is deposited in the State Treasury pursuant to this section it shall be held, invested, deposited, and disbursed in the manner specified in Section 1254, and interest earned or other increment derived from its investment shall be apportioned and disbursed in the manner specified in that section.

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Comment. Section 1243.6 is superseded by Section 1268.10 of the Code of Civil Procedure.

SEC. 12. Section 1243.7 of the Code of Civil Procedure is repealed.

1243.7.

(a) At any time after money has been deposited as provided in Section 1243.5, the party whose property or interest in property is being taken may apply to the court, in the manner hereinafter provided, for the withdrawal of all or any portion of the amount deposited for his property or property interest. Under such application, the court shall order that portion of the amount applied for, which the applicant is entitled to withdraw under the provisions of this section, to be paid to such applicant from the money deposited in connection with such property or property interest.

(b) If the total amount sought to be withdrawn prior to judgment exceeds the amount of the original deposit, each applicant, before any of such excess is withdrawn, shall file an undertaking executed by two or more sufficient sureties approved by the court to the effect that they are bound to the plaintiff in double the amount of such excess for the return of any amount withdrawn by the applicant that exceeds the amount to which the applicant is entitled as finally determined in the eminent domain proceeding, together with legal interest from the date of its withdrawal.

If there is more than one applicant and the total amount sought to be withdrawn exceeds the amount of the original deposit, the applicants, in lieu of filing separate undertakings, may jointly file an undertaking executed by two or more sufficient sureties approved by the court to the effect that they are bound to the plaintiff in double the amount of such excess for the return of any amount withdrawn by the applicants that exceeds the amount to which the applicants are entitled as finally determined in the eminent domain proceeding together with legal interest from the date of its withdrawal.

If the undertaking required by this subdivision is executed by an admitted surety

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insurer, the undertaking is sufficient in amount if the surety is bound only to the extent that the amount sought to be withdrawn exceeds the amount originally deposited.

The plaintiff may consent to an undertaking that is less than the amount required under this subdivision.

If the undertaking is executed by an admitted surety insurer, the applicant filing the undertaking is entitled to recover the premium paid for the undertaking, but not to exceed 2 percent of the face value of the undertaking, as a part of the recoverable costs in the eminent domain proceeding.

(c) The application shall be made by affidavit wherein the applicant shall set forth his interest in the property and request withdrawal of a stated amount. The applicant shall serve a copy of the application on the plaintiff and no withdrawal shall be made until at least 20 days after such service of the application, or until the time for all objections has expired, whichever is later.

(d) Within the 20-day period, the plaintiff may object to such withdrawal by filing an objection thereto in court on the ground that an undertaking should be filed or that the amount of, or the sureties upon, such an undertaking are insufficient.

(e) Within the 20-day period, the plaintiff may object to such withdrawal by filing an objection thereto in court on the ground that other persons are known or believed to have interests in the property. In this event the plaintiff shall attempt to personally serve on such other persons a notice to such persons that they may appear within 10 days after such service and object to such withdrawal, and that failure to appear will result in the waiver of any right to such amount withdrawn or further rights against the plaintiff to the extent of the sum withdrawn. The plaintiff shall state in such objection the names and last known addresses of other persons known or believed to have an interest in the property, whether or not it has been able to serve them with such notice and the date of such service. If the plaintiff in its objection reports to the court that it is unable to personally serve persons known or believed to have interests in the property within the 20-day period, said money shall not be withdrawn until the applicant causes such personal service to be made.

(f) If such persons so served appear and object to the withdrawal, or if the plaintiff so requests, the court shall thereupon hold a hearing after notice thereof to all

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parties and shall determine the amounts to be withdrawn, if any, and by whom.

If the court determines that a party is entitled to withdraw any portion of a deposit which another party claims, the court may require such party, before withdrawing such portion, to file an undertaking executed by two or more sufficient sureties approved by the court to the effect that they are bound to the adverse claimant in such amount as is fixed by the court, but not to exceed double the portion claimed by the adverse claimant, for the payment to the person entitled thereto of any amount withdrawn that exceeds the amount to which such party is entitled as finally determined in the eminent domain proceeding, together with legal interest from the date of its withdrawal. No persons so served shall have any claim against the plaintiff for compensation for the value of the property taken or severance damages thereto, or otherwise, to the extent of the amount withdrawn by all parties; provided, the plaintiff shall remain liable for said compensation to persons having an interest of record who are not so served.

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(g) If withdrawn, the receipt of any such money shall constitute a waiver by operation of law of all defenses in favor of the persons receiving such payment except his claim for greater compensation. Any amount so paid to any party shall be credited upon the judgment in the eminent domain proceeding.

(h) Any amount withdrawn by any party in excess of the amount to which he is entitled as finally determined in the eminent domain proceeding shall be paid to the party entitled thereto together with legal interest thereon from the date of its withdrawal, and the court in which the eminent domain proceeding is pending shall enter judgment therefor against the defendant. If the defendant does not pay the judgment within ~~thirty~~ after the judgment is entered, the court may, on motion, enter judgment against the sureties for such amount together with the interest that may be due thereon.

Comment. This section is superseded by Chapter 1 (commencing with Section 1268.01) of Title 7.1 of Part 3 of the Code of Civil Procedure.

SEC. 13. Section 1954 of the Code of Civil Procedure is repealed.

1254.

(a) In any case in which the plaintiff is not in possession of the property sought to be condemned, the plaintiff may, at any time after trial and judgment entered or pending an appeal from the judgment and after payment into court for the defendant of the full amount of the judgment and such further sum as may be required by the court as a fund to pay any further damages and costs that may be recovered in the proceeding, apply ex parte for an order authorizing it to take possession of and to use the property sought to be condemned.

(b) If in the judgment the court determined that the plaintiff is entitled to acquire the property by eminent domain and if the court determines that the plaintiff has made the required payment into court, the court shall by order authorize the plaintiff to take possession of and use the property during the pendency of and until the final conclusion of the litigation, and shall, if necessary, stay all actions and proceedings against the plaintiff on account thereof. The order shall state the date after which the plaintiff is authorized to take possession of the property which date, unless the plaintiff requests a later date, shall be 10 days after the date of the order.

(c) At least 10 days prior to the time possession is taken, the plaintiff shall serve upon the defendants and their attorneys, either personally or by mail, a copy of the order of the court authorizing it to take possession of the property. A single service upon or mailing to those at the same address is sufficient.

(d) At any time after the court has made an order authorizing the plaintiff to take possession pursuant to this section, the court may, upon motion of any party to the eminent domain proceeding, order an increase or a decrease in the amount that the plaintiff is required to pay into court as a further sum pursuant to this section.

(e) The plaintiff shall not be held to have abandoned or waived the right to appeal from the judgment by paying into court the amount of the judgment and such further sum as may be required by the court and taking possession of the property pursuant to this section.

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(f) The defendant, who is entitled to the money paid into court for him upon any judgment, shall be entitled to demand and receive the full amount of the judgment at any time thereafter upon obtaining an order therefor from the court.

The court, or a judge thereof, upon application by such defendant, shall order and direct that the money so paid into court for him be delivered to him upon his filing a satisfaction of the judgment, or upon his filing a receipt therefor, and an abandonment of all defenses to the action or proceeding, except as to the amount of damages that he may be entitled to in the event that a new trial is granted. A payment to a defendant, as aforesaid, shall be held to be an abandonment by such defendant of all defenses interposed by him, excepting his claim for greater compensation.

(g) Any amount withdrawn by any party in excess of the amount to which he is entitled as finally determined in the eminent domain proceeding shall be paid without interest to the party entitled thereto, and the court in which the eminent

domain proceeding is pending shall enter judgment therefor against such party.

(h) The payment of the money into court, as hereinbefore provided for, shall not discharge the plaintiff from liability to keep the said fund full and without diminution; but such money shall be and remain, as to all accidents, defalcations, or other contingencies (as between the parties to the proceedings), at the risk of the plaintiff, and shall so remain until the amount of the compensation or damages is finally settled by judicial determination, and until the court awards the money, or such part thereof as shall be determined upon, to the defendant, and until he is authorized or required by rule of court to take it. If, for any reason, the money shall at any time be lost, or otherwise abstracted or withdrawn, through no fault of the defendant, the court shall require the plaintiff to make and keep the sum good at all times until the litigation is finally brought to an end, and until paid over or made payable to the defendant by order of court, as above provided. The court shall order the money to be deposited in the State Treasury, unless the plaintiff requests the court to order deposit in the county treasury, in which case the court shall order deposit in the

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county treasury. If the court orders deposit in the State Treasury, it shall be the duty of the State Treasurer to receive all such moneys, duly receipt for, and to safely keep the same in the Condemnation Deposits Fund, which fund is hereby created in the State Treasury and for such duty he shall be liable to the plaintiff upon his official bond. Money in the Condemnation Deposits Fund may be invested and

reinvested in any securities described in Section 16430, Government Code, or deposited in banks as provided in Chapter 4 (commencing with Section 16500) of Part 2 of Division 4 of Title 2, Government Code. The Pooled Money Investment Board shall designate at least once a month the amount of money available in the fund for investment in securities or deposit in bank accounts, and the type of investment or deposit and shall so arrange the investment or deposit program that funds will be available for the immediate payment of any court order or decree. Immediately after such designation the Treasurer shall invest or make deposits in bank accounts in accordance with the designations.

(i) For the purposes of this section, a written determination signed by a majority of the members of the Pooled Money Investment Board shall be deemed to be the

determination of the board. Members may authorize deputies to act for them for the purpose of making determinations under this section.

(j) Interest earned and other increment derived from investments or deposits made pursuant to this section, after deposit of money in the State Treasury, shall be deposited in the Condemnation Deposits Fund. After first deducting therefrom expenses incurred by the Treasurer in taking and making delivery of bonds or other securities under this section, the State Controller shall apportion as of June 30th and December 31st of each year the remainder of such interest earned or increment derived and deposited in the fund during the six calendar months ending with such dates. There shall be apportioned and paid to each plaintiff having a deposit in the fund during the six-month period for which an apportionment is made, an amount directly proportionate to the total deposits in the fund and the length of time such deposits remained therein. The State Treasurer shall pay out the money deposited by a plaintiff in such manner and at such times as the court or a judge thereof may, by order or decree, direct.

(k) In all cases where a new trial has been granted upon the application of the defendant, and he has failed upon such trial to obtain greater compensation than was allowed him upon the first trial, the costs of such new trial shall be taxed against him.

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Comment. The disposition of the provisions of Section 1954 is indicated below.

<u>Section 1954</u>	<u>Recommended Legislation</u>
Subdivision (a) -----	1270.01
Subdivision (b) -----	1270.02
Subdivision (c) -----	1270.03
Subdivision (d) -----	1270.04
Subdivision (e) -----	1270.06
Subdivision (f) -----	1270.05
Subdivision (g) -----	1270.07
Subdivision (h) - first three sentences -	1270.08
- remainder -----	Government Code §§ 16425-16427
Subdivisions (i) and (j) -----	Government Code §§ 16425-16427
Subdivision (k) -----	1257(b)

SEC. 14. This act shall become operative only if Senate Constitutional Amendment No. _____ of the 1967 Regular Session of the Legislature is approved by the vote of the electors, and in such case this act shall become operative on January 1, 1969.

Comment. There is some doubt whether the right to take possession of property prior to judgment can be extended to persons and for purposes not listed in Section 14, Article I, of the California Constitution. The Constitutional Amendment referred to in Section 14 of this act would make it clear that the Legislature may by statute extend this right to additional persons and for additional purposes. The recommended legislation would become effective only if the recommended Constitutional Amendment is adopted by the people.

PARALLEL TABLES

TABLE I

EXISTING SECTIONS TO PROPOSED LEGISLATION

Code of Civil Procedure

<u>Existing Section</u>	<u>Proposed Legislation</u>
<u>1243.4</u> -----	1269.01(a) 1269.02(a) 1269.03(a)
<u>1243.5</u>	
Subdivision (a) - first sentence	1268.01(a)
- second sentence	1268.01(c)
- third sentence	1269.01(b), 1269.02(b), 1269.03(b)
Subdivision (b) - first sentence	1269.01(b), 1269.02(b), 1269.03(d)
- second sentence	1269.01(c), 1269.02(c), 1269.03(e)
Subdivision (c) -----	1269.04
Subdivision (d) -----	1268.02
Subdivision (e) -----	1268.09
Subdivision (f) -----	1269.07
<u>1243.6</u> -----	1268.10, 1270.08
<u>1243.7</u>	
Subdivision (a) - first sentence	1268.04
- second sentence	1268.05(a)
Subdivision (b) -----	1268.06
Subdivision (c) - first sentence	1268.04
- second sentence	1268.04, 1268.05(b)
Subdivision (d) -----	1268.05(c)
Subdivision (e) -----	1268.05(d)
Subdivision (f) -----	1268.05(e)
Subdivision (g) -----	1268.07
Subdivision (h) -----	1268.08

Code of Civil Procedure

<u>Existing Section</u>	<u>Proposed Legislation</u>
<u>1249</u> ----- AMENDED	. . .
<u>1249.1</u> ---- AMENDED	. . .
<u>1254</u>	
Subdivision (a) -----	1270.01
Subdivision (b) -----	1270.02
Subdivision (c) -----	1270.03
Subdivision (d) -----	1270.04
Subdivision (e) -----	1270.06
Subdivision (f) -----	1270.05
Subdivision (g) -----	1270.07
Subdivision (h) - first three sentences ---	1268.10, 1270.08
- remainder -----	Government Code 16425, 16426(a)
Subdivision (i) -----	Government Code 12426(b)
Subdivision (j) -----	Government Code 16427
Subdivision (k)	1257(b)
<u>1255a</u> ---- AMENDED	. . .
<u>1255b</u> ---- AMENDED	. . .
<u>1257</u> ----- AMENDED	. . .

PARALLEL TABLES

TABLE II

PROPOSED LEGISLATION TO EXISTING SECTIONS

Code of Civil Procedure

<u>Proposed Legislation</u>	<u>Existing Section</u>
<u>1249</u> ----- AMENDED	. . .
<u>1249.1</u> --- AMENDED	. . .
<u>1255a</u> ---- AMENDED	. . .
<u>1255b</u> ---- AMENDED	. . .
<u>1257</u> ----- AMENDED	. . .
<u>1268.01</u>	
Subdivision (a) -----	1243.5(a)
Subdivision (b) -----	New
Subdivision (c) -----	1243.5(a)
Subdivision (d) -----	New
<u>1268.02</u> -----	1243.5(d)
<u>1268.03</u> -----	New
<u>1268.04</u>	
First sentence -----	1243.7(a)
Second sentence -----	1243.7(c)
<u>1268.05</u>	
Subdivision (a) -----	1243.7(a)
Subdivision (b) -----	1243.7(c)
Subdivision (c) -----	1243.7(d)
Subdivision (d) -----	1243.7(e)
Subdivision (e) -----	1243.7(f)
<u>1268.06</u> -----	1243.7(b)

Code of Civil Procedure

Proposed Legislation

Existing Section

<u>1268.07</u> -----	1243.7(g)
<u>1268.08</u> -----	1243.7(h)
<u>1268.09</u> -----	1243.5(e)
<u>1268.10</u> -----	1243.6, 1254(h)
<u>1269.01</u> -----	1243.4, 1243.5(a), (b)
<u>1269.02</u> -----	New
<u>1269.03</u> -----	New
<u>1269.04</u> -----	1243.5(c)
<u>1269.05</u> -----	New
<u>1269.06</u> -----	New
<u>1269.07</u> -----	1243.5(f)
<u>1270.01</u> -----	1254(a)
<u>1270.02</u> -----	1254(b)
<u>1270.03</u> -----	1254(c)
<u>1270.04</u> -----	1254(d)
<u>1270.05</u> -----	1254(f)
<u>1270.06</u> -----	1254(e)
<u>1270.07</u> -----	1254(g)
<u>1270.08</u> -----	1243.6, 1254(h)

Government Code

<u>16425</u> -----	1254(h), Code of Civil Procedure
<u>16426</u>	
Subdivision (a) -----	1254(h), Code of Civil Procedure
Subdivision (b) -----	1254(i), Code of Civil Procedure
<u>16427</u> -----	1254(j), Code of Civil Procedure

THOMAS G. BAGGOT
ATTORNEY AT LAW
550 SOUTH FLOWER STREET
LOS ANGELES, CALIFORNIA 90017
TELEPHONE 626-6451

February 22, 1966

California Law Revision Commission
Room 30, Crothers Hall
Stanford University
Stanford, California 94305

Gentlemen:

This is in response to your letter of December 22, 1965 asking for recommendations in the field of condemnation law.

I submit herewith a recommendation with respect to the date of value question. The enclosure indicates a proposed amendment to the section and the arguments in favor of the proposed amendment. I have been thinking about this question for a long time and have had considerable actual experience with the question.

The arguments are in brief form only, and I would be glad to enlarge upon the same if the Commission should so request.

Very truly yours,

THOMAS G. BAGGOT

TGB/hp
Enclosure

PROPOSED AMENDMENT TO CODE OF CIVIL PROCEDURE, SECTION 1249

It is proposed that Code of Civil Procedure, Section 1249, be amended so as to read as follows:

For the purpose of assessing compensation and damages the right thereto shall be deemed to have accrued at the date initially set for trial and its actual value at that date shall be the measure of compensation for all property to be actually taken, and the basis of damages to property not actually taken but injuriously affected, in all cases where such damages are allowed as provided in Section 1248; provided, that if trial is continued upon the motion of a party to the proceeding the date of value shall be, at the option of the opposing party, either the date then set for trial or the date to which trial is continued. If trial is continued upon motion of the court, the date of value shall be, at the option of the defendant, the date then set for trial or the date to which trial is continued. In either case, said option shall be exercised by serving upon the opposing party and filing a notice stating the date of valuation elected. Said notice shall be served and filed at any time within ten (10) days after the court's order granting the continuance. A failure to exercise said option as hereinabove provided shall be deemed to be an election of the date to which trial is continued as the date of value. No improvements put upon the property subsequent to the date of the service of summons shall be included in the assessment of compensation for damages.

ARGUMENT IN FAVOR OF ABOVE AMENDMENT

The major effect of this amendment would be to change the date of value in eminent domain proceedings from the date of issuance of summons to the date of trial. The amendment would accomplish this while still retaining provisions that would prevent a party from improving his position by his own delay, whether the market be rising or falling.

There are at least four good reasons for this amendment, to wit:

1. It would provide for valuation in eminent domain proceedings at current prices in keeping with the real estate market in general where properties are bought and sold at current prices rather than, as under the existing CCP 1249, as of a price level existing approximately 8 to 12 months prior to trial. This is both fair and realistic whether the market be rising, falling or remaining static.

2. It would facilitate the trial of eminent domain proceedings, particularly when tried to a jury in that the trier of fact would not be required to perform the mental gymnastic feat of projecting his thinking backward for a period of 8 to 12 months.

3. It would eliminate the frequently occurring and troublesome question of who caused a delay in the trial of an eminent domain proceeding, which exists under the present form of CCP 1249.

4. It would eliminate the anomalous and unfair situation where, on a falling market, (a) the condemnee by his own delay can secure a higher price for his property and its market value at date of trial and (b) the condemnor by delaying can acquire the property at a lower price. See People vs. Murata, 55 C2d 1, footnote pages 5 and 6.