

Memorandum 66-19

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

Attached to this memorandum is a revised draft of legislation on this subject (white pages) and a revised constitutional amendment (green pages). The revisions reflect the determinations and suggestions of the Commission at its April meeting. The comments to the particular sections have also been revised in accordance with the changes made. The material is generally in the same arrangement and organization as that considered at the April meeting.

THE CONSTITUTIONAL AMENDMENT

This draft of proposed Section 14, Article I, of the California Constitution (green pages) would carry out the previous determinations of the Commission and would conform to the drafting suggestions made at the April meeting. This draft would reduce the existing prolix and confusing language of the section to four propositions, as follows:

Subdivision (a). The first sentence of this subdivision states, in time-honored language, the requirements of "public use" and "just compensation." The requirement that compensation be "first made to, or paid into court for, the owner" is retained as the Commission's position is that any provisions on possession prior to final judgment should be accompanied by provisions requiring deposit and authorizing withdrawal of the funds.

Incidentally, the proposed changes in this section would not affect the flourishing body of California law on "inverse condemnation." That body of law exists and grows in spite of, rather than because of, the constitutional requirement that compensation be first made before the taking or damaging of property.

In the second sentence of this subdivision, the reference to Section 23a of Article XII is necessary because that section authorizes the Public Utilities Commission to determine compensation in takings of public utility property (in other words, property already devoted to a public use). Re-adoption of Section 14 without the qualification might be considered to require jury trial in all cases. In other respects, the sentence clarifies the meaning of the existing unfathomable language specifying that, "compensation shall be ascertained by a jury, unless a jury be waived, as in other civil cases in a court of record, as shall be prescribed by law."

Subdivision (b). This subdivision restates the existing authorization for immediate possession in right of way and reservoir cases. The subdivision has been restated to conform to various suggestions as to language made at the April meeting, and to delete any specific authorization for the Legislature's placing limitations upon exercise of the prerogative conferred by the subdivision.

Subdivision (c). This subdivision reflects the determination of the Commission in 1961, and subsequently, that the Legislature should be empowered to legislate upon the subject of possession prior to final judgment free of restrictions, providing that probable just compensation is first deposited into court for the owner.

Commissioner McDonough had suggested preparation of an alternative draft that would not contain this explicit grant to the Legislature of the power to extend immediate possession. The alternative amendment would, however, delete all obsolete material and clarify existing law. A possible amendment, attached to this memorandum as Exhibit I (pink pages), would carry out this suggestion. The essential difficulty with such an amendment

is that in view of the unusual history and various interpretations of Section 14, it is difficult to make any changes in the section without resolving the open question whether the Legislature may authorize immediate possession in cases other than those specifically mentioned. The Commission would not want to recommend an amendment that explicitly denied such power to the Legislature. Hence, Exhibit I merely states the essentials of the section and leaves substantially unchanged the existing language respecting immediate possession in right-of-way and reservoir cases. An alternative idea would be to delete subdivision (c) from the proposed draft. Again, however, that would leave unresolved the constitutional question of immediate possession in other cases. It would seem, therefore, that any revision of Section 14 must make some determination of the question.

THE PROPOSED LEGISLATION

Generally

All of this proposed legislation has been revised to carry out the views expressed at the April meeting. The comments to the particular sections have been revised accordingly and set forth the intended effect of the changes. As in the former draft, the proposed legislation disposes of all sections dealing with deposits, immediate possession, and possession after judgment.

Chapter 1 (deposit of probable just compensation)

This chapter has been revised to delete any provision for deposit by the condemnor of segregated amounts for particular interests in the property. That earlier suggestion was intended to make it appropriate to cause interest to cease on any amount deposited to obtain immediate possession. In keeping with the Commission's finding that such deposits by the condemnor are

impractical, the amendments to the section of the Code of Civil Procedure governing interest (Section 1255b) have been revised to permit interest to accrue on deposits made to obtain immediate possession unless such deposits are withdrawn.

Proposed Section 1268.03 has been revised to require service of notice of the making of a deposit. There is no comparable provision in existing law, but there probably should be, as all deposits are now subject to withdrawal. Further, under this proposed legislation, deposits may be made whether or not an order for immediate possession is obtained.

The drafts of Sections 1268.04-1268.06, dealing with withdrawal of the deposit, have been extensively revised in the interest of clarity without substantive change.

Immediate possession

As in the earlier draft, three distinct provisions have been made for possession upon commencement of the proceeding. Proposed Section 1269.01 substantially continues existing practice in right of way and reservoir cases. Section 1269.02 provides for immediate possession, also by ex parte procedure, in all cases in which the condemnor's resolution is conclusive evidence of the necessity for the taking. Section 1269.03 provides a noticed motion procedure for obtaining possession in other cases.

In keeping with the Commission's suggestions, these sections have been revised to state their provisions as substantive law, rather than as requirements for motions, order, and other pleadings. These sections have also been revised in an effort to eliminate any possible confusion between the three distinct provisions and their ranges of application.

Proposed Section 1269.05, requiring 90 days' notice to occupants, has been substantially changed from the earlier draft. This draft is substantially

in the form of the proposed federal legislation, and simply states public policy in the matter. The sole consequence attached to the condemnor's failure to have given such notice is that such failure may be taken into account by the court in vacating or granting an order for immediate possession in cases other than those involving rights of way or reservoirs. At least the section would provide a convenient vehicle for conforming California law to the federal proposal if the latter should be enacted.

Section 1269.06, permitting the defendant to obtain an order determining probable just compensation, has also been substantially changed. In this draft of the proposed section, the sole consequence of the condemnor's failure to deposit the determined amount is that interest would begin to accrue 20 days after the entry of the order. Code of Civil Procedure Section 1255b has been changed accordingly,

Possession after judgment

The former draft of proposed Sections 1270.01 through 1270.8 have been extensively revised, in the interest of clarity and precision, without substantive change. The staff has considered the question whether security for withdrawal of a deposit after judgment should ever be required. Such a requirement can be easily added, but it would complicate procedure in that notification and an opportunity for hearing would have to be afforded the condemnor. Under existing procedure, withdrawal after judgment is a very simple matter. Further, the condemnor would probably be required to pay any bond premiums entailed. Also, the condemnor now has the unfettered option whether to make a deposit after judgment. Accordingly, the staff would suggest that such a requirement not be incorporated.

Code of Civil Procedure Section 1249 (date of valuation)

This draft of Code of Civil Procedure Section 1249 implements the Commission's determination that the date of valuation should be a date six months from the beginning of the proceeding. The extensive comment to the section generally explains the effect of such a date of valuation and the alternatives provided in the section. Subdivision (b) of this section permits a plaintiff to establish an earlier date of valuation, in all cases, by depositing probable just compensation. Subsections (e) and (f) continue in effect the existing provision that if the issue of compensation is not tried within one year, without fault of the defendant, the date of valuation is the date of trial. Subsection (g) reverses the result of the Murata decision, unless the condemnor preserves a date of valuation by deposit made either before or after judgment. Subdivision (h) is a revision of the statutory language, previously considered by the Commission, that would require that a diminution in market value resulting from the public improvement itself be taken into account in assessing compensation and damages. In form, this language is very similar to the proposed federal legislation and to measures adopted in other states.

Code of Civil Procedure Section 1249.1 (risk of loss)

This section has been amended to provide that when the defendant withdraws any portion of the deposit, and vacates the property, the risk of loss shifts to the condemnor in the same way that the risk is shifted when the condemnor takes possession pursuant to an order for possession. In keeping with the Commission's earlier determination, the language requires that the condemnor be notified in writing of the vacation of the property.

Final order in condemnation (Code of Civil Procedure Section 1253)

This section, dealing with the final order in condemnation, has been revised simply to correct internal references to other statutes.

Abandonment (Code of Civil Procedure Section 1255a)

This section has been amended to provide a uniform rule governing expenses, attorney's fees, and appraiser's fees. The changes also delete the existing provision that none of the expenses, other than attorney's fees, can be recovered if the action is dismissed 40 or more days prior to pretrial.

Payment of interest (Code of Civil Procedure Section 1255b)

In addition to clarifying the uncertain effect of subdivision (b) of this section, the changes incorporate changes proposed by Mr. Carlson of the Department of Public Works. The purpose and effect of these changes are well stated in the letter from Mr. Carlson, attached to this memorandum as Exhibit II. Subdivision (c) of the section, as proposed, would carry out the first change, and subdivision (d)(1), the second change.

New trial and appeal (Code of Civil Procedure Section 1257)

This section is changed merely to delete obsolete matter and to incorporate a provision (subdivision (b)) formerly misplaced in Code of Civil Procedure Section 1254.

Condemnation Deposits Fund (Government Code Sections 16425-16427)

This material has been revised in the interest of clarity, removed from Code of Civil Procedure Section 1254, and placed in an appropriate part of the Government Code.

Park and Playground Act of 1909

These two sections of the Park and Playground Act of 1909, and the following two sections of the Street Opening Act of 1903, are the only

provisions in California statutory law providing a date of valuation differing from that set forth in Code of Civil Procedure Section 1249. The discrepancy between them and the provisions of Code of Civil Procedure Section 1249 arises from changes made in Section 1249 that have not been reflected in these isolated and specialized sets of provisions for condemnation. The changes would conform the sections to the changes made in Section 1249.

Respectfully submitted,

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PROPOSED LEGISLATION

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

OBTAINING POSSESSION PRIOR TO FINAL JUDGMENT

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PROPOSED LEGISLATION.

An act to amend Sections 1249, 1249.1, 1253, 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, to amend Sections 38090 and 38091 of, 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, and to amend Sections 4203 and 4204 Streets and Highways 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 filing the complaint 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 the deposit is made. See Section 1249(b). Third, the risk of loss shifts to the condemnor when the defendant withdraws any portion of the amount deposited, moves from the property, and notifies the plaintiff in writing that he has moved. See Section 1249.1(d).

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 filing the complaint and prior to entry of judgment, apply ex parte to the court for an order determining the probable just compensation for the property and any damage incident to the taking of the property. Upon such application, the court shall make and enter its order determining probable just compensation for the property or, if requested by plaintiff, for each separate interest in the property.

(b) At any time after the making of the order and prior to entry of judgment, the plaintiff may deposit the amount or amounts specified in the order. Such deposit may be made whether or not the plaintiff applies for, or is authorized by law to apply for, an order for possession.

Comment. This section restates the substance 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.

1268.02. Increase or decrease in amount of deposit

1268.02. At any time after the court has made an order determining probable just compensation, the court may, upon motion of any party, redetermine the amount or amounts if it determines that probable just compensation differs from the amount or amounts previously specified. If the plaintiff has taken possession of the property, and an increase is determined, then the court shall order the amount deposited increased accordingly. Prior to judgment, the amount deposited may not be reduced to an amount less than that already withdrawn by the defendants.

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. If the plaintiff deposits the amount determined by order of the court, the plaintiff shall 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 new. It requires the condemnor to serve a notice of the deposit upon the other parties to the proceeding to facilitate their withdrawal of the funds.

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, any defendant 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 verified, set forth the interest of the applicant 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 restates 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 for withdrawal is made, the court shall order that portion of the amount applied for, which the applicant is entitled to withdraw under this chapter, to be paid to the applicant from the money deposited in connection with his property or property interest. No withdrawal shall be ordered until 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.

(b) Within the 20-day period, the plaintiff may file objections to withdrawal on the grounds:

(1) That an undertaking should be filed by the applicant or that the amount of, or the sureties upon, an undertaking are insufficient; or

(2) That other persons are known or believed to have interests in the property.

(c) If objections are filed under paragraph (2) of subdivision (b), the plaintiff shall serve or attempt to serve on such other persons a notice that they may appear within 10 days after such service and object to the withdrawal. The notice shall advise such persons that their failure to object will result in waiver of any right to the amount withdrawn and any further rights against the plaintiff to the extent of the amount withdrawn. The plaintiff shall report to the court (1) the names of persons served and the dates of service, and (2) the names and last known addresses of persons not served. If the plaintiff reports to the court that it has been unable to serve persons known or believed to have interests in

the property, withdrawal shall not be ordered unless and until the applicant causes service to be made. Persons served shall have no claim against the plaintiff for compensation for the property taken or any damage incident to the taking to the extent of the amount withdrawn by all applicants. The plaintiff shall remain liable for such compensation to persons having an interest of record who are not served.

(d) If any person so served objects to the withdrawal, or if the plaintiff so requests, the court shall hold a hearing upon notice 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 that another person claims, the court may require such party, before withdrawing such portion, to file an undertaking in favor of the adverse claimant to secure 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. The undertaking shall be in such amount as is fixed by the court, but if executed by an admitted surety insurer the amount shall not exceed the portion claimed by the adverse claimant. If the undertaking is executed by two or more sufficient sureties approved by the court, the amount shall not exceed double the portion claimed by the adverse claimant.

Comment. This section restates the substance of Code of Civil Procedure Section 1243.7(a), (c), (d), (e) and (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 in favor of the plaintiff to secure 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 the undertaking is executed by an admitted surety insurer, the undertaking shall be in the amount by which the total amount to be withdrawn exceeds the amount originally deposited. If executed by two or more sufficient sureties approved by the court, the undertaking shall be in double such amount.

(b) If there are two or more applicants 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 a single undertaking in the amount required by subdivision (a).

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

(d) 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. Withdrawal of an amount in excess of the original deposit is possible only if the deposit has been increased on motion as provided for by Section 1268.02.

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 a party in excess of the amount to which he is entitled as finally determined in the eminent domain proceeding shall be paid to the person 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 party who received such excess. If the judgment is not paid within 30 days after it 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. Neither the amount deposited nor any amount withdrawn pursuant to this chapter shall 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 or, upon written request of the plaintiff filed with the 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 or 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 any lands to be used for reservoir purposes or any right of way, whether a fee or other interest be sought, the plaintiff may take possession and use of the property or property interest in accordance with this section.

(b) At any time after filing the complaint and prior to 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 and has deposited probable just compensation therefor in accordance with Chapter 1 (commencing with Section 1268.01), the court shall authorize the plaintiff to take possession of and to use the property.

(c) The order for possession shall:

(1) Recite that it has been made under this section and Article I, Section 14 of the Constitution of California.

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

(3) State the purposes of the condemnation.

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

(5) 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) and the first sentence of subdivision (b) 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).

Subdivision (c) is the same as Code of Civil Procedure Section 1243.5(b), except that the requirement that the order recite its authority has been added. The requirement is intended to avoid confusion with similar orders obtained under Section 1269.02.

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 to be acquired (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 of the property or property interest in accordance with this section.

(b) At any time after filing of the complaint 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 that is conclusive evidence of the public necessity for such taking, and that the plaintiff has deposited probable just compensation therefor in accordance with Chapter 1 (commencing with Section 1268.01), the court shall authorize the plaintiff to take possession of and to use the property.

(c) The order for possession shall:

(1) Recite that it has been made under this section and refer to the resolution, ordinance, or declaration authorizing the taking.

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

(3) State the purposes of the condemnation.

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

(5) 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.

(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 subsequent date as may be fixed by the court upon a showing that the hardship to the owner or occupant of having possession taken on the date specified outweighs any need of the plaintiff for immediate possession.

(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 provided for by a resolution, ordinance, or declaration that is conclusive evidence of the public necessity therefor.

(e) Any aggrieved party may appeal from that portion of an order made under subdivision (d) determining that the plaintiff is or is not entitled to take the property by eminent domain. Such an appeal shall not stay the order for possession or further proceedings by the trial court in the eminent domain proceedings; but the trial or appellate court may, in its discretion, stay the order for possession pending the appeal or for such other period as to it may appear appropriate.

Comment. This section is new.

Subdivision (a). 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 Section 1269.02 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. These two sections and Section 1269.03 are not intended to be mutually exclusive. In a proceeding falling within more than one of the sections, the plaintiff may elect the section under which to obtain possession prior to judgment.

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. & HAV. 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).

Subdivision (e). 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). Basically these rules have not been changed. However, an appeal is allowed either party from the court's determination whether the plaintiff is entitled to acquire the property by eminent domain. Such determination includes the issues of public use, public necessity, and proper location. See People v. Chevalier, 52 Cal.2d 299, 340 P.2d 598 (1959). Final determination of such issues prior to trial 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 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 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.

1269.03. Possession in other cases

1269.03. (a) In any proceeding in eminent domain brought by or on behalf of any public entity, public utility, common carrier, or public service corporation, to acquire any property or property interest, the plaintiff may obtain an order for possession and use of the property or property interest in accordance with this section.

(b) At any time after filing the complaint and prior to the entry of judgment, the plaintiff may file, notice and serve a written motion applying to the court for an order for possession. The notice of motion shall be served in the same manner as an order for possession is served under Section 1269.04.

(c) The motion shall:

(1) 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.

(2) State the date upon which plaintiff requests to be authorized to take possession.

(3) 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 eminent domain proceeding.

(d) On hearing of the motion, the court shall consider all relevant evidence and shall make an order that authorizes 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 need of the plaintiff for immediate 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 probable just compensation in accordance with Chapter 1 (commencing with Section 1268.01).

(4) If the plaintiff is not a public entity and is a public utility, common carrier, or public service corporation, the public necessity of the proposed improvement is evidenced or supported by a certificate of public convenience and necessity obtained from the Public Utilities Commission in accordance with the provisions of the Public Utilities Code.

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

(f) Any aggrieved party may appeal from that portion of the order of the court determining that the plaintiff is or is not entitled to take the property by eminent domain. Such an appeal does not stay an order for possession or further proceedings by the trial court in the eminent domain proceedings, but the trial or appellate court may, in its discretion, stay the order for possession pending the appeal or for such other period 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 might not be

obtainable under 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, common carrier, or public service corporation" encompass persons and entities subjected to public regulation under provisions of the Public Utilities Code and related decisional law.

Subdivision (b). Subdivisions (b), (c), and (d) are 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 determination of the motion in keeping with motion practice generally. Paragraph (4) limits application of the section to those cases in which the Public Utilities Commission has issued its certificate of public convenience and 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 based on Code of Civil Procedure Section 1243.5(b)(4). As the order is obtained by regularly noticed motion, however, the period specified is computed from the date of the order, rather than the date of its service.

Subdivision (f). See Comment to Code of Civil Procedure Section 1269.02(e).

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 any one of those at the same address, or a single mailing of the order to those at the same address, as the case may be, 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 of this subdivision 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) It is hereby declared to be the public policy of the State of California that, to the greatest extent practicable, the construction or development of all public improvements shall be so scheduled that no person lawfully occupying a home, farm, or business location will be required 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. This policy contemplates that such written notice may be given before, as well as after, commencement of the proceeding in eminent domain, and that such notice 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 may be considered by the court in determining whether to stay an order obtained under Section 1269.02 or to make 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. A closely 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 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, notice and serve a motion for an order determining probable just compensation. The motion shall be heard and determined in the same manner as a motion made to modify an existing deposit under Section 1268.02.

(b) The court shall enter its order determining the probable just compensation and authorizing the plaintiff to take possession and use of the property 20 days after the date of the order if, before the expiration of the 20-day period, the plaintiff deposits the determined amount in accordance with Chapter 1 (commencing with Section 1268.01). If the deposit is not made within the 20-day period, the compensation and damages awarded in the proceedings to the moving party shall draw legal interest from the twentieth day of such period. If the proceeding is subsequently 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 eventually 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 ever made, then such interest shall be computed on the amount of probable just compensation as determined on the motion. The moving party shall be entitled to the full amount

of such interest without offset for rents or other income received by him or the value of his continued possession of the property.

(c) 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 claim for greater compensation.

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 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. Section 1269.06 is intended to make available to the defendant a procedure by which probable just compensation may be ascertained within a brief period after commencement of the proceeding. Although the plaintiff is not required to deposit the amount determined, if it does not, interest on the eventual award is made to begin to accrue. 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).

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 for whom money has been paid into court upon any judgment is entitled to demand and receive the full amount thereof at any time thereafter upon obtaining an order from the court. Upon application by such defendant, the court shall order that such money be paid to him upon his filing (1) a satisfaction of the judgment or (2) a receipt for the money and an abandonment of all defenses to the proceeding except his claim to any greater amount of compensation that may be awarded to him on a new trial. Receipt of payment by 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 a person in excess of the amount to which he is entitled as finally determined in the proceeding shall be paid without interest to the plaintiff or other party entitled thereto, and the court shall enter judgment therefor against such person.

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 or, upon written request of the plaintiff filed with the 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 provided in subdivisions (h) and (i), 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 and its~~ actual value of the property on the date of valuation ~~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~~ under 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) In any case where the plaintiff has deposited probable just compensation in the State Treasury or county treasury within six months of the date of the filing of the complaint, the date of valuation is the date on which such deposit is made. In all other cases, the date of valuation is determined under subdivisions (c), (d), (e), and (f).

(c) If the issue of compensation and damages is tried within six months after the date of the filing of the complaint, the date of valuation is the date of trial.

(d) If the issue of compensation and damages is not tried within six months after the date of the filing of the complaint but is tried within one year from such date, the date of valuation is the date six months after the date of the filing of the complaint.

(e) If the issue of compensation and damages is not tried within one year after the date of the filing of the complaint and the delay is caused by the defendant, the date of valuation is the date six months after the date of the filing of the complaint.

(f) If the issue of compensation and damages is not tried within one year after the date of the filing of the complaint and the delay is not caused by the defendant, the date of valuation is the date of trial.

(g) In any case in which a new trial is granted as a result of a motion therefor, an appeal, or any other reason, the date of valuation is the date of the new trial unless the plaintiff has deposited probable just compensation as provided in Section 1268.01 or the plaintiff has, within 20 days after rendition of the jury verdict or announcement of the court's decision, deposited the amount of such verdict or decision in accordance with Chapter 3 (commencing with Section 1270.01) of Title 7.1. In either of these events, the date of valuation in the new trial shall be the same date provided for in the original trial.

(h) For the purpose of assessing compensation and damages, any increase or decrease in market value prior to the date of valuation that is substantially due to the general knowledge that the public improvement or project was likely to be made or undertaken shall be disregarded.

(i) 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.

Comment. This section states the measure of compensation for proceedings in eminent domain and specifies alternative dates of valuation.

Subdivision (a). This subdivision restates the "actual value" measure of compensation. The phrase "date of valuation" has been substituted for language concerning accrual of the right to compensation and damages in the interest of clarity. The dates of valuation specified in Section 1249 no longer govern allocation of the risk of loss. See Code of Civil Procedure Section 1249.1 and Redevelopment Agency v. Maxwell, 193 Cal. App.2d 414, 14 Cal. Rptr. 170 (1961).

Subdivision (b). This subdivision permits the plaintiff, in any case, to establish an early date of valuation by depositing probable just compensation pursuant to Chapter 1 (commencing with Section 1268.01) of Title 7.1 of the Code of Civil Procedure. A date of valuation once established by such deposit is not subject to variance by any of the circumstances mentioned in the following subdivisions. The date of the filing of the complaint, rather than the date of the issuance of summons, is used in determining the date of valuation. Code of Civil Procedure Section 1243 requires that all proceedings in eminent domain "be commenced by filing a complaint and issuing a summons." Ordinarily the dates are the same, but this is not always the case. See Harrington v. Superior Court, 194 Cal. 185, 228 Pac. 15 (1924). As the issuance of summons is no longer essential to establish the court's jurisdiction over the property (see Harrington v. Superior Court, supra), the date of the filing of the complaint is a more appropriate date.

Subdivision (c). Subdivisions (c) through (f) provide alternative dates of valuation for cases in which probable just compensation is not deposited. With respect to the phrase, "six-months from the date of the filing of the complaint," Code of Civil Procedure Section 17(4) provides

that, "The word 'month' means a calendar month, unless otherwise expressed." For the method of resolving any difficulty arising from months having an unequal number of days, see Messner v. Superior Court, 101 Cal. App. 172, 281 Pac. 503 (1929); Church Mfg. Co. v. Superior Court, 79 Cal. App. 637, 250 Pac. 705 (1926); Barbee v. Young, 79 Cal. App. 119, 249 Pac. 15 (1926). With respect to the use of date of trial as the date of valuation, see 3 NICHOLS, EMINENT DOMAIN § 8.5[2](3a ed. 1963); 1 ORGEL, VALUATION UNDER THE LAW OF EMINENT DOMAIN § 21 (2d ed. 1953).

Subdivision (d). This subdivision establishes the principal date of valuation for cases in which the date of valuation has not been established by deposit or probable just compensation in accordance with subdivision (b). The date specified is new to California practice and supersedes the former basic date of valuation (date of issuance of the summons) and the alternate date (date of trial if the issue of compensation is not tried within one year).

Subdivision (e). This subdivision retains the date specified in subdivision (d) as the date of valuation in any case in which the delay in reaching trial is caused by the defendant. This subdivision restates the effect of the proviso formerly contained in this section.

Subdivision (f). This subdivision restates and continues in effect the substance of the proviso formerly contained in this section.

Subdivision (g). Under the former language of this section, questions arose whether the original date of valuation or the date of the new trial should be employed in new trials in eminent domain proceedings. The Supreme Court of California ultimately held that the date of the first trial, rather than the date of the new trial, should be used.

People v. Murata, 55 Cal.2d 1, 357 P.2d 833 (1960). This subdivision reverses the result of that decision unless the date of valuation has been established by the deposit of probable just compensation or the plaintiff deposits the amount of the judgment in accordance with Code of Civil Procedure Section 1270.01. The subdivision applies whether the new trial is granted by the trial court or by an appellate court.

Subdivision (h). 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. Zverman, 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 at

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.). The method of proving value, including the matters upon which an expert opinion of market value may be based, is set forth in Article 2 (commencing with Section 810) of Division 7 of the Evidence Code.

Subdivision (1). This subdivision retains, without change, an existing provision of Section 1249.

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~~ vacates 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), vacates the property, and notifies the plaintiff in writing of the vacation of 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 vacation of the property after having withdrawn the deposit is substantially equivalent to his moving from the property in compliance with an order for possession, such vacation with notice to the condemnor is given the same effect under the section. -49-

SEC. 5, Section 1253 of the Code of Civil Procedure is amended to read:

1253. When payments have been made and the bond given, if the plaintiff elects to give one, as required by Sections 1251 and 1252, the court shall make a final order of condemnation, which shall describe the property condemned, the estate or interest acquired therein, the purposes of such condemnation, and if possession is taken pursuant to ~~Section--1243,5-ex-1254~~ Chapter 2 (commencing with Section 1269.01) or Chapter 3 (commencing with Section 1270.01) of Title 7.1 prior to the making and entry of the final order of condemnation, the date of such possession. For the purposes of this section, the date of possession shall be the date upon or after which the plaintiff is authorized by order of the court to take possession of the property. A certified copy of the order shall thereupon be recorded in the office of the recorder of the county in which the property is located. The title to the property described in the final order of condemnation vests in the plaintiff for the purposes described therein upon the date that a certified copy of the final order of condemnation is recorded in the office of the recorder of the county.

Comment. This section is amended to change the references to the appropriate statutory provisions.

SEC. 6. 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 Recoverable costs and disbursements shall include all necessary expenses incurred in preparing for trial and during trial and, reasonable attorney fees actually incurred, reasonable and appraisal fees actually incurred. These costs and disbursements, including expenses and ~~attorney~~ 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 if 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 attorney fees and appraisal fees: to be recovered, they must be reasonable and actually incurred. As to all expenses, the subdivision provides that if they are actually incurred, they may be recovered without regard to the date that the proceeding is abandoned or dismissed.

SEC. 7. 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 ~~authorising--the-plaintiff-to-take~~ for possession.

(4) As to any amount determined to be probable just compensation on motion of a defendant made under Section 1269.06, the twenty-first day following the date of the order determining such amount.

(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 . This subdivision shall not apply to interest accrued under Section 1269.06.

(c) Interest, including interest accrued due to possession or damaging of the property by the plaintiff prior to the final order in condemnation, and any offset against interest as provided in subdivision

(b), shall be assessed by the court rather than by jury.

(e) (d) 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 1268.01 , the date that such amount is withdrawn by the person entitled thereto , or if not withdrawn, on the date that judgment is entered.

(2) As to any amount deposited pursuant to Section 1269.06, the date of such deposit.

(2) (3) As to any amount paid into court pursuant to Section ~~1254~~ 1270.01, the date of such payment.

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

(4) (5) 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.

Comment. In subdivision (a), paragraphs (2) and (3) are modified, without substantive change, to conform to usage throughout Title 7.1 (commencing with Section 1268.01). Paragraph (4) is added to reflect the effect of Code of Civil Procedure Section 1269.06.

Subdivision (b) is changed to clarify existing language. Under the subdivision, the plaintiff is entitled to offset against interest (1) the value of possession and (2) the net amount of rents or other income received, if such rents or income are attributable to the period after interest accrues. The last sentence of the subdivision is added to conform to Code of Civil Procedure Section 1269.06.

Subdivision (c) is added to clarify existing law and to specify that the court, rather than the jury, assesses interest, including interest constitutionally required as compensation for possession or damaging of property prior to conclusion of the eminent domain proceeding. The subdivision also clarifies existing law to specify that the amount of the offset against interest provided by subdivision (b) is assessed by the court and to provide, in effect, that any evidence on that issue is to be heard by the court, rather than the jury.

Subdivision (d) is changed to make paragraphs (1) and (3) refer to the appropriate statutory provisions. Paragraph (2) has been added to conform to Code of Civil Procedure Section 1269.06, which permits the defendant, under certain circumstances, to obtain an order determining probable just compensation.

SEC. 8. 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-build-the-fences and-cattle-guards,-as-provided-in-section-twelve-hundred-and-fifty-one,-the-plaintiff-shall-be-entitled-to-enter-into,-improve, and-hold-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 no-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. 9. 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. 10. Section 38090 of the Government Code is amended to read:

38090. ~~The right-to-compensation-or-damages-accrues-at-the date-of-the-order-appointing-referees-or-the-order-setting-the cause-for-trial.--The-actual-value-of-the-property-at-that-date is-the-measure-of-compensation-for-property-actually-taken-and the-basis-of-damages-to-property-not-taken-but-injuriouly affected.~~ date of valuation in proceedings under this article shall be determined in accordance with Section 1249 of the Code of Civil Procedure. In cases in which compensation is ascertained by referees appointed pursuant to this article, the date of the filing of their report with the court shall be deemed the date of trial for the purpose of determining the date of valuation.

Comment. This section of the Park and Playground Act of 1909 (Government Code Sections 38000-38213) was enacted in 1913 (Stats. 1913, Ch. 246, p. 417, § 3). It has not been amended to conform to the various changes that have been made over the years in Code of Civil Procedure Section 1249, which specifies the date of valuation in eminent domain proceedings generally. The section is amended to conform, as near as may be, to the Code of Civil Procedure.

SEC. 11. Section 38091 of the Government Code is amended to read:

38091. Improvements placed upon the property after ~~publication of the notice of passage of the ordinance of intention~~ the service of summons shall not be included in the assessment of compensation or damages.

Comment. This section of the Parks and Playgrounds Act of 1909 (Government Code Sections 38000-38213) was enacted in 1913 (Stats. 1913, Ch. 246, p. 417, § 3). With respect to the construction of this section and related sections, see City of Los Angeles v. Glassell, 23 Cal. 44, 262 Pac. 1084 (1928). The section is amended to conform to Code of Civil Procedure Section ~~1249~~, which provides that improvements placed upon the property after the service of summons shall not be included in the assessment of compensation of damages.

SEC. 12. Section 4203 of the Streets and Highways Code is amended to read:

4203. ~~For the purpose of assessing the compensation and damages, the right thereto shall be deemed to have accrued at the date of the issuance of summons, and the actual value at that date shall be the measure of compensation for all property to be actually taken, and also the basis of damages to property not actually taken but injuriously affected, in all cases where such damages are allowed by the provisions of this part. -- If, however, a motion to set the action for trial is not made within one year after the date of the issuance of the summons in the action, the right to compensation and damages shall be deemed to have accrued at the date of the hearing of the motion to set the action for trial, and the actual value at that date shall be the measure of compensation and the basis of damages.~~

The date of valuation in proceedings under Chapters 7. . . . through 10 of this part shall be determined in accordance with Section 1249 of the Code of Civil Procedure. In cases in which compensation is ascertained by referees appointed pursuant to this chapter, the date of the filing of their report with the court shall be deemed the date of trial for the purpose of determining the date of valuation.

Comment. This section of the Street Opening Act of 1903 (Streets and Highways Code Sections 4000-4443) derives from an enactment of 1909 (Stats. 1909, Ch. 684, p. 1038, § 5). The section is intended to accord, as near as may be, with Code of Civil Procedure Section 1249, which specifies the

date of valuation for condemnation proceedings generally. See City of Los Angeles v. Oliver, 102 Cal. App. 299, 283 Pac. 298 (1930); City of Los Angeles v. Morris, 74 Cal. App. 473, 241 Pac. 409 (1925). The section is amended to accord with amendments of Code of Civil Procedure Section 1249.

SEC. 13. Section 4204 of the Streets and Highways Code is amended to read:

4204. No improvements placed upon the property ~~proposed to be taken~~, subsequent to the ~~date at which the right to compensation and damages has accrued~~, service of summons shall be included in the assessment of compensation or damages.

Comment. This section of the Street Opening Act of 1903 (Streets and Highways Code Sections 4000-4443) is amended to conform to Code of Civil Procedure Section 1249, which provides that improvements placed upon the property after the service of summons shall not be included in the assessment of compensation or damages.

SEC. 14 Section 1243.4 of the Code of Civil Procedure is repealed.

1243.4. ~~...~~
~~...~~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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Comment. Section 1243.5 is superseded by Code of Civil Procedure Sections 1269.01, 1269.02, 1269.03, and 1269.06.

SEC. 15. 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 10 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. 14 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. 17 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.

(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 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.

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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.

The disposition of the various provisions of Section 1243.7 is indicated below.

<u>Section 1243.7</u>	<u>Recommended Legislation</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

SEC. 18. 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. 18. 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.

PROPOSED CONSTITUTIONAL AMENDMENT

A resolution to propose to the people of the State of California an amendment to the Constitution of the State by amending Section 14 of Article I thereof, relating to eminent domain.

Resolved by the Senate, the Assembly concurring, That the Legislature of the State of California at its 1969 Regular Session commencing on the ____ day of January, 1969, two-thirds of the members elected to each of the two houses of the Legislature voting therefor, hereby proposes to the people of the State of California that the Constitution of the State be amended by amending Section 14 of Article I thereof, to read:

SEC. 14. [a] Private property shall not be taken or damaged for public use without just compensation having first been made to, or paid into court for, the owner . Subject to the provisions of Section 23a of Article XII, just compensation shall be assessed in a court of record as in other civil cases and, unless a jury is waived, shall be determined by jury. ~~, -and-no-right-of-way-
-
-lands-to-be-used-fer-reserveir-purposes-shall-be-appropriated-to
-
-the-use-of-any-corporation,-except-a-municipal-corporation-or-a
-
-county-or-the-State-or-metropolitan-water-district,-municipal
-
-utility-district,-municipal-water-district,-drainage,-irrigation,
-
-levee,-reclamation-or-water-conservation-district,-or-similar-public
-
-corporation-until-full-compensation-therefor-be-first-made-in-money
-
-or-ascertained-and-paid-into-court-for-the-owner,-irrespective-of
-
-any-benefits-from-any-improvement-proposed-by-such-corporation,-
-
-which-compensation-shall-be-ascertained-by-a-jury,-unless-a-jury
-
-be-waived,-as-in-other-civil-cases-in-a-court-of-record,-as-shall
-
-be-prescribed-by-law;-provided,-that--in-any-proceeding-in-eminent
-
-domain-brought-by-the-State,-or-a-county,-or-a-municipal-corporation,~~

er-metropolitan-water-district,-municipal-utility-district,
municipal-water-district,-drainage,-irrigation,-levee,-recla-
mation-or-water-conservation-district,-or-similar-public-corpora-
tion,-the-aforesaid-State-or-municipality-or-county-or-public
corporation-or-district-aforesaid-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-upon-first-commencing- eminent
domain-proceedings-according-to-law-in-a-court-of-competent
jurisdiction-and-thereupon-giving-such-security-in-the-way-of
money-deposited-as-the-court-in-which-such-proceedings-are
pending-may-direct,-and-in-such-amounts-as-the-court-may
determine-to-be-reasonably-adequate-to-secure-to-the-owner-of
the-property-sought-to-be-taken-immediate-payment-of-just-com-
pensation-for-such-taking-and-any-damage-incident-thereto,
including-damages-sustained-by-reason-of-an-adjudication-that
there-is-no-necessity-for-taking-the-property,-as-seen-as-the
same-can-be-ascertained-according-to-law.--The-court-may,-upon
motion-of-any-party-to-said- eminent-domain-proceedings,-after
such-notice-to-the-other-parties-as-the-court-may-prescribe,
alter-the-amount-of-such-security-as-required-in-such-proceedings-

(b) In any proceeding in eminent domain brought by the State
or a county, city, district, or other public entity to acquire any
lands to be used for reservoir purposes or any right of way, whether
a fee or other interest be sought, the plaintiff may take possession
and use of the property or property interest following commencement
of the proceeding and prior to the final judgment. Before possession

or use is taken, the plaintiff shall deposit probable just compensation in accordance with subsection (d).

(c) With respect to all other proceedings in eminent domain, the Legislature may specify and classify the entities or persons by which, the public purposes for which, and the manner in and time at which, possession or use of the property may be taken following commencement of the proceeding and prior to final judgment.

(d) Before possession or use of property is taken, just compensation shall have first been made to the owner or the plaintiff shall deposit such amount of money as the court determines to be the probable just compensation to be made for the property and any damage incident to the taking. The money so deposited shall be available immediately to the person or persons the court determines to be entitled thereto and may be withdrawn in accordance with such procedure and upon such security as the Legislature may prescribe.

The-taking-of-private-property-for-a-railroad-run-by-steam-or electric-power-for-logging-or-lumbering-purposes-shall-be-deemed-a taking-for-a-public-use,-and-any-person,-firm,-company-or-corporation-taking-private-property-under-the-law-of-eminent-domain-for such-purposes-shall-thereupon-and-thereby-become-a-common-carrier.