#36.20(1) 3/25/70

Memorandum 70-34

Subject: Study 36.20(1) - Condemnation (The Declared Public Uses--Disposition of Section 1238(5)--Mining)

Subdivision 5 of Section 1238 is a very expansive condemnation authorization for takings for purposes incidental to the working of mines. This authorization was enacted in 1872 as an attempt to permit taking by private persons for mining uses. The California courts have invoked the constitutional doctrine of public use to prevent any takings under the subdivision. The staff recommends that this authorization not be continued when Section 1238 is repealed.

Attached as Exhibit I is a Comment to subdivision 5 which states briefly the reason why it is not continued. Also attached is a staff background study on subdivision 5.

The Commission should tentatively approve (1) not continuing subdivision 5 and (2) an appropriate Comment stating the reason the subdivision is not continued.

Respectfully submitted,

John H. DeMoully
Executive Secretary

Memorandum 70-34

EXHIBIT I

CODE OF CIVIL PROCEDURE § 1238

Staff recommendation

Subdivision 5

~~5.--Roads,-tunnels,-ditches,-flumes,-pipes,-aerial-and-surface tramways-and-dumping-places-for-working-mines;-also-outlets,-natural or-otherwise,-for-the-flow,-deposit-or-conduct-of-tailings-or-refuse matter-from-mines;-also-an-occupancy-in-common-by-the-owners-or possessors-of-different-mines-of-any-place-for-the-flow,-deposit,-or conduct-of-tailings-or-refuse-matter-from-their-several-mines.~~

Comment. Subdivision 5 is not continued. It is clear from the language of the subdivision itself, and from the statute that it superseded (Cal. Stats. 1870, Ch. CCCCIV, p. 569), that the Legislature intended to authorize takings by individual mine owners to facilitate the working of their mines. However, the California courts have refused to give the subdivision its intended application or any effect whatsoever. Sutter County v. Nichols, 152 Cal. 688, 93 P. 872 (1908); Amador Queen Min. Co. v. Dewitt, 73 Cal. 482, 15 P. 74 (1887); Lorenz v. Jacob, 63 Cal. 73 (1883); Consolidated Channel Co. v. Central Pac. R. Co., 51 Cal. 269 (1876). Although the courts have not held the subdivision unconstitutional, they have invoked the constitutional doctrine of public use to prevent any takings under the subdivision. The only possible application of the subdivision might have been under the former Placer Mining District Act (Pub. Res. Code §§ 2401-2512, repealed Cal. Stats. 1953, Ch. 1365, § 1, p. 2935). See Black Rock Placer Mining Dist. v. Summit

Water & Irrigation Co., 56 Cal. App.2d 513, 133 P.2d 58 (1943). Although the repeal of that act did not affect the existence or powers of any district previously organized pursuant to the repealed act, there are no such districts presently reporting financial transactions to the State Controller. See Financial Transactions Concerning Special Districts in California (Cal. State Controller 1965-66).

THE DECLARED PUBLIC USES

Mines and Mining

As enacted in 1872, subdivision (5) of Section 1238 of the Code of Civil Procedure contained a very expansive authorization for takings for purposes incidental to the working of mines.[1] It is clear from the language of the subdivision itself, and from the statute that it superseded,[2] that the Legislature intended to authorize takings by individual mine owners to facilitate the working of their mines. However, in an unvarying line of decisions the appellate courts of California have refused to give the subdivision its intended application or any effect whatever.[3] In keeping with the California appellate courts' usual treatment of condemnation statutes, these decisions have not declared the subdivision unconstitutional; rather the courts have simply invoked the constitutional doctrine of public use to prevent any takings under the subdivision.[4]

This appears to be the result reached in a majority of the states that have had occasion to consider condemnation for mining purposes.[5] However, in Strickley v. Highland Boy Gold Min. Co.,[6] the Supreme Court of the United States sustained the application of a statute of Utah that is virtually indistinguishable from the California provision. It is technically possible to distinguish the Strickley decision from the California cases on the basis that in the former case the taking was for an aerial tramway, two miles long, from the plaintiff's mine to the railroad, for the transportation of ore. In other words, it is possible to sustain a taking of a means of access to and from a mine, in the nature of a public road, although other types of takings to facilitate the mining would be

impossible.[7] However, the cleavage of authorities on the question of condemnation for mining purposes is too well recognized and the lines of authority too solidified to make any such distinction feasible.

The only possible application of subdivision (5) appears to be illustrated by a comparatively recent decision of the California court of appeal. In Black Rock Placer Mining Dist. v. Summit Water & Irrigation Co.,[8] the court dealt with the eminent domain provisions of the since repealed Placer Mining District Act.[9] The act declared all property required by a district to fully carry out the purposes of the act to be a public use. However, the court expressed the view that placer mining is to be recognized as a "private enterprise" to which the doctrine of eminent domain does not apply. Nevertheless, the court indicated that such a district might have been able to take private property for a specific public purpose other than the general facilitation of placer mining, and hence it did not declare the condemnation authorization unconstitutional.

It would therefore appear to be appropriate to omit subdivision (5) in any revision of Section 1238 because there is no longer any application of the subdivision. In indicating the interest in property that may be required by condemnation, Section 1239 provides that a fee simple may be taken "for an outlet for a flow, or a place for the deposit of debris or tailings of a mine." This provision should also be omitted.

THE DECLARED PUBLIC USES
MINES AND MINING
FOOTNOTES

1. As enacted in 1872, subdivision (5) of Section 1238 provided:

> Roads, tunnels, ditches, flumes, pipes, and dumping places for working mines; also, outlets, natural or otherwise, for the flow, deposit, or conduct of tailings or refuse matter from mines; also, an occupancy in common by the owners or possessors of different mines of any place for the flow, deposit, or conduct of tailings or refuse matter from their several mines . . . .

The subdivision has been amended only once, to add "aerial and surface tramways" after "pipes." Cal. Stats. 1921, Ch. 141, § 1, p. 140.

2. Cal. Stats. 1870, Ch. CCCCIV, p. 569. Section 1 of that chapter provided: "The owner or owners of mines or mining claims in this State shall have a right of way for ingress or egress, for all necessary purposes, over and across the land or mining claims of others . . . ." Subsequent provisions provided that such purposes included water ditches, flumes or tunnels, and places to deposit tailings.

3. Sutter County v. Nicols, 152 Cal. 688, 93 Pac. 872 (1908); Amador Queen Min. Co. v. Dewitt, 73 Cal. 482, 15 Pac. 74 (1887); Lorenz v. Jacob, 63 Cal. 73 (1883); Consolidated Channel Co. v. Central Pac. R. Co., 51 Cal. 269 (1876).

4. The rationale of these decisions is perhaps best stated in the Consolidated Channel case, supra, note 3 at 271:

> The proposed flume is to be constructed solely for the purpose of advantageously and profitably washing and mining plaintiff's mining ground. It is not even pretended that any person other than the plaintiff will derive any benefit whatever from this structure when completed. No public use can possibly be subserved by it. It is a private enterprise and is to be conducted solely for the personal profit of the plaintiff, and in which the community at large have no concern.

The court relied upon Loan Association v. Topeka, 87 U.S. (20 Wall.) 655 (1874), in which the Supreme Court held that bonds issued by the defendant city to encourage the manufacture of iron bridges within the city were void as being issued for a private rather than a public purpose.

5. 2 Nichols, Eminent Domain § 7.624, p. 875, and n. 1 (rev. 3rd ed. 1963); 1 Lewis, Eminent Domain § 2 2, p. 561 (3rd. ed. 1909).

6. 200 U.S. 527 (1906).

7. See the discussions of "byroads," infra, at .

8. 56 Cal. App.2d 513, 133 P.2d 58 (1943).

9. Cal. Pub. Res. Code §§ 2401-2512 (repealed Cal. Stats. 1953, Ch. 1365, § 1, p. 2935). The repealing act contains a savings clause which provides that the repeal shall not affect the existence or powers of any district previously organized pursuant to the repealed chapter. However, there are no such districts presently reporting financial transactions to the State Controller. Financial Transactions Concerning Special Dists. in Cal. (Cal. State Controller 1965-66).