

36.21

5/13/70

Memorandum 70-61

Subject: Study 36.21 - Condemnation (The Right to Take--The Right to Take
a Fee or Any Lesser Interest)

Attached to this memorandum is a copy of Comprehensive Statute Section 303, which was tentatively approved at the April 1970 meeting. This section permits "a public entity, public utility, or nonprofit college" to condemn any type of interest necessary for its purposes. The sole effect of this section is to designate the type of property interest that may be taken by a condemnor.

At the May 1970 meeting, the question arose as to the effect of this section on the condemnation authority of private mutual water companies (nonpublic utilities). You will recall that, at the March meeting, the Commission approved Public Utilities Code Section 2729 (new) which continues, without substantive change, the authority of mutual water companies to "exercise the power of eminent domain for water, water rights, canals . . . and pipes for irrigation of lands" Section 2729 authorizes condemnation and provides in essence a statement of public use; however, neither Section 2729 nor the other sections (Sections 2725 through 2728) in the Public Utilities Code dealing with mutual water companies specify the type of interest that may be acquired. For this aspect of condemnation, any condemnor should be able to look to Comprehensive Statute Section 303. Accordingly, the staff suggests that Section 303 be revised to substitute the words "any person" for the phrase "a public entity, public utility, or nonprofit college." This change would not affect in any way the issues of public use or necessity. It would, however, permit any condemnor to take the interest that is necessary

for a particular use and accordingly fill the existing hiatus in our statutory scheme. The staff suggestion would be accomplished by the amended section set out in Exhibit II, which we hope can be approved at the June meeting.

Respectfully submitted,

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Associate Counsel

Tentatively approved April 1970

The Right to Take§ 303. Right to acquire a fee or any lesser interest

303. Except to the extent limited by statute, a public entity, public utility, or nonprofit college that is authorized to acquire property for a particular use by eminent domain may exercise the power of eminent domain to acquire the fee or such other right or interest in property that is necessary for that use.

Comment. Section 303 supersedes Section 1239 of the Code of Civil Procedure insofar as that section specified the type of interest--whether a fee or lesser interest--that might be acquired by eminent domain.

Section 303 generally codifies the former law that permitted a public entity to take whatever interest it determined to be necessary. See Code Civ. Proc. § 1239(4)(local public entities). However, under former law, most privately owned public utilities were permitted to acquire only an easement unless the taking was for "permanent buildings." See Code Civ. Proc. § 1239(1).

"Property" is broadly defined in Section 101 of the Comprehensive Statute to include the fee or any interest or right in property.

Note. Only the interest that is necessary for a particular use may be taken. The decision of what interest is necessary and the procedures for making such decision and the related decisions concerning the issues of "necessity" are a separate subject.

The Right to Take

§ 303. Right to acquire a fee or any lesser interest

303. Except to the extent limited by statute, any person authorized to acquire property for a particular use by eminent domain may exercise the power of eminent domain to acquire the fee or such other right or interest in property that is necessary for that use.

Comment. Section 303 supersedes Section 1239 of the Code of Civil Procedure insofar as that section specified the type of interest--whether a fee or lesser interest--that might be acquired by eminent domain.

Section 303 permits any condemnor to take whatever interest is required for a particular use subject, of course, to a showing that such interest is necessary for such use. See Section 302 of the Comprehensive Statute. Section 303 is generally consistent with the former law that permitted a public entity to take a fee rather than merely an easement. See Code Civ. Proc. § 1239(4)(local public entities). However, under former law, most privately owned public utilities were permitted to acquire only an easement unless the taking was for "permanent buildings." See Code Civ. Proc. § 1239(1).

Cross Reference:

Comprehensive Statute § 101 ("property" defined).