

#36.65

6/30/71

Memorandum 71-49

Subject: Study 36.65 - Condemnation (Right to Acquire any Necessary Right or Interest—Disposition of Code of Civil Procedure Section 1239)

The Commission has approved Section 303 of the Eminent Domain Code. Section 303 supersedes Code of Civil Procedure Section 1239 which deals with the same subject.

The staff presents for approval the repeal of Section 1239 of the Code of Civil Procedure. The proposed Comment to the repealed section merely refers over to Section 303. The Comment to Section 303 contains a discussion of the extent to which that section changes existing law.

Respectfully submitted,

John H. DeMouly
Executive Secretary

EXHIBIT I

CODE OF CIVIL PROCEDURE § 1239

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Code of Civil Procedure § 1239

1239.--The following is a classification of the estates and rights in lands subject to be taken for public use:

1.--A fee simple, when taken for public buildings or grounds, or for permanent buildings, for reservoirs and dams, and permanent flooding occasioned thereby, or for an outlet for a flow, or a place for the deposit of debris or tailings of a mine, or for the protection of water bearing lands from drought therefrom of any character whatsoever from any adjacent lands.

2.--Except as provided in subsections 3 and 4, or specifically in any other statute, an easement, when taken for any other use; provided, however, that when the taking is by a municipal corporation, and is for the purpose of constructing, equipping, using, maintaining or operating any works, road, railroad, tramway, power plant, telephone line, or other necessary works or structures, for the preparation, manufacture, handling or transporting of any material or supplies required in the construction or completion by such municipal corporation of any public work, improvement, or utility, a fee simple may be taken if the legislative body of such municipal corporation shall, by resolution, determine the taking thereof to be necessary; and provided, further, that, when any land is taken for the use of a bypass, or drainage way, or overflow channel, or a levee, or an embankment, or a cut required by the plans of the California Debris Commission referred to in that certain act of the

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Legislature, entitled "An act approving the report of the California Debris Commission transmitted to the Speaker of the House of Representatives by the Secretary of War on June 27, 1911, directing the approval of plans of reclamation along the Sacramento River or its tributaries or upon the swamp lands adjacent to said river, directing the State Engineer to procure data and make surveys and examinations for the purpose of perfecting the plans contained in said report of the California Debris Commission, and to make reports thereof, making an appropriation to pay the expenses of such examinations and surveys, and creating a Reclamation Board and defining its power," approved December 24, 1911, or any modifications or amendments that may be adopted to the same, either a fee simple or easement may be taken as a reclamation board shall by resolution determine may be necessary. -- Such resolution shall be conclusive evidence that a taking of the fee simple or easement, as the case may be, is necessary.

3. -- The right of entry upon and occupation of lands, and the right to take therefrom such earth, gravel, stones, trees, and timber as may be necessary for some public use.

4. -- When the property is taken by any mutual water system, county, city and county, or incorporated city or town, or a municipal water district, or other political subdivision, regardless of the use, a fee simple may be taken if the legislative or other governing body of such mutual water system, county, city and county, or incorporated city or town, or municipal water district, or other political subdivision, shall, by resolution, determine the taking thereof in fee to be necessary. -- Such

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~~resolution shall be conclusive evidence of the necessity for the taking of the fee simple. -- Where the fee is taken, the decree of condemnation shall specifically provide for the taking of a fee simple estate.~~

~~The provisions of this subsection shall not be applicable where the property is taken under the authority conferred by subsection 1 hereof.~~

Comment. Section 1239 is superseded by Section 303 of the Eminent Domain Code. A background study, prepared for the Law Revision Commission, on Section 1239 is published as Taylor, The Right to Take--The Right to Take the Fee or Any Lesser Interest, 1 Pac. L.J. 555 (1970).