

#36.65

7/12/71

Memorandum 71-52

Subject: Study 36.65 - Condemnation (Disposition of Existing Statutes--Code of Civil Procedure Sections 1240 and 1241)

Sections 1240 and 1241 of the Code of Civil Procedure deal respectively with what property may be taken by eminent domain and with certain procedural limitations on such takings. The Commission has previously considered different aspects of these sections primarily in connection with the resolution of necessity, condemnation for a "more necessary" public use, and condemnation for consistent uses. Subject to the tentative approval of Chapter 9 (Condemnation for Consistent Use) of Division 4 (see Memorandum 71-51), the staff believes that Sections 1240 and 1241 are ready to be repealed.

The Comments to the two sections (see Exhibit I) indicate the manner of disposition of these provisions. As indicated, prior action by the Commission has adequately disposed of Section 1241. Section 1240 has also been taken care of with two exceptions. The staff recommends that these two exceptions be dealt with as follows. One, the limitation on condemnation of certain state lands provided in paragraph (2) should be retained and set forth in Section 7994 to be added to the Public Resources Code. (See Exhibit I.) Two, the substance of the procedure stated in paragraph (8) should be retained in Division 8 of the Comprehensive Statute. We are not able to assign a number to this section at this time, but the section would read substantially as follows:

----- In any action brought to condemn property owned by the state, the summons and a copy of the complaint shall be served on the Attorney General, the Director of General Services, and the State Lands Commission of this state.

At the September meeting, the staff hopes that the Commission will tentatively approve the sections set forth in Exhibit I as well as the procedural section set forth above.

Respectfully submitted,

Jack I. Horton  
Assistant Executive Secretary

EXHIBIT I

CODE OF CIVIL PROCEDURE § 1240

Staff recommendation

Code of Civil Procedure Section 1240 (repealed)

~~1240.--The private property which may be taken under this title includes:~~

~~1.--All real property belonging to any person;~~

~~2.--Lands belonging to this state, including tide and submerged lands, not within the corporate limits of any city, or city and county, or to any county, incorporated city, or city and county, village or town, not appropriated to some public use; provided, that all 16th and 36th sections, both surveyed and unsurveyed, owned by the state or the United States, which may now or may hereafter be included within the exterior boundaries of a national reservation, or of a reserve, or within the exterior boundaries of lands withdrawn from public entry, shall be and hereby are withheld from the operation of this title and shall not be condemned as against the state or the United States;~~

~~3.--Property appropriated to public use; but such property shall not be taken unless for a more necessary public use than that to which it has already been appropriated; provided, that where any such property has been so appropriated by any individual, firm or private corporation, the use thereof for a state highway or a public street or highway of the state, or a county, city and county, or incorporated city or town, joint highway district, or the use thereof by the state or a county, city and~~

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county, incorporated city or town, joint highway district, or irrigation or municipal water district, for the same public purpose to which it has been so appropriated, or for any other public purpose shall be deemed more necessary uses than the public use to which such property has already been appropriated; and provided further, that where property already appropriated to a public use or purpose, by any person, firm or private corporation, is sought to be taken by the state, a county, city and county, incorporated city or town, joint highway district, irrigation or municipal water district, for another public use or purpose, which is consistent with the continuance of the use of such property or some portion thereof for such existing purpose, to the same extent as such property is then used, or to a less or modified extent, then the right to use such property for such proposed public purpose, in common with such other use or purpose, either as then existing, or to a less or modified extent, may be taken by the state, such county, city and county, incorporated city or town, joint highway district, or irrigation or municipal water district, and the court may fix the terms and conditions upon which such property may be so taken, and the manner and extent of the use thereof for each of such public purposes, and may order the removal or relocation of any structures, or improvements therein or thereon, so far as may be required by such common use. But property appropriated to the use of any county, city and county, incorporated city or town, or municipal water district, may not be taken by any other county, city and county, incorporated city or town, or

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municipal-water-district, while such property is so appropriated and used for the public purposes for which it has been so appropriated.

4. -- Property appropriated to any public use by any irrigation district, may be taken by another irrigation district for another public use and purpose, which is consistent with the use of such property for such existing purposes to the same extent as such property is then used; provided, that the right to such limited use in common shall include the right to enlarge, change or improve the property so taken; provided further, that such enlargement, change or improvement shall not interfere with the original use or any necessary extension or enlargement of such use.

5. -- Franchises for any public utility, and all kinds of property of any nature whatsoever used, either during the existence of or at the termination of said franchise, to supply and furnish the service of such public utility, but such franchise or property shall not be taken except for a mere necessary public use.

6. -- All rights-of-way for any and all the purposes mentioned in Section 1238, and any and all structures and improvements on, over, across or along such rights-of-way, and the lands held or used in connection therewith shall be subject to be connected with, crossed, or intersected by or embraced within any other right-of-way or improvements, or structures thereon. -- They shall also be subject to a limited use, in common with the owner thereof, when necessary; but such uses, crossings,

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~~intersections, -and-connections-shall-be-made-in-manner-most-compatible  
with-the-greatest-public-benefit-and-least-private-injury.~~

~~7.--All-classes-of-private-property-not-enumerated-may-be-taken  
for-public-use,-when-such-taking-is-authorized-by-law.~~

~~8.--Proceedings-to-condemn-lands-belonging-to-this-state-are  
hereby-authorized,-and-must-be-maintained-and-conducted-in-the-same  
manner-as-are-other-condemnation-proceedings-provided-for-in-this  
title;-except,-that-in-such-proceedings-the-summons-and-a-copy-of-the  
complaint-must-be-served-on-the-Governor,-Attorney-General,-and-the  
State-Lands-Commission-of-this-state.~~

Comment. Section 1240 is superseded by the provisions listed below.

<u>Section 1240</u>	<u>Eminent Domain Code</u>
Paragraph 1- - - - -	See §§ 101, 303
Paragraph 2- - - - -	See [Public Resources Code § 7994]
Paragraph 3- - - - -	See §§ 450-455, 470-471
Paragraph 4- - - - -	See §§ 470-471
Paragraph 5- - - - -	See §§ 450-455. See also §§ 101, 303
Paragraph 6- - - - -	See §§ 470-471. See also §§ 101, 303
Paragraph 7- - - - -	See §§ 101, 303
Paragraph 8- - - - -	[to be determined later]

Code of Civil Procedure Section 1241 (repealed)

~~1241. -- Before property can be taken, it must appear:~~

~~1. -- That the use to which it is to be applied is a use authorized by law;~~

~~2. -- That the taking is necessary to such use; provided, when the board of a sanitary district or the board of directors of an irrigation district, of a transit district, of a rapid transit district, of a public utility district, of a county sanitation district, or of a water district or the legislative body of a county, city and county, or an incorporated city or town, or the governing board of a school district, shall, by resolution or ordinance, adopted by vote of two thirds of all its members, have found and determined that the public interest and necessity require the acquisition, construction or completion, by such county, city and county, or incorporated city or town, or school district, or sanitary, irrigation, transit, rapid transit, public utility, county sanitation, or water district, of any proposed public utility, or any public improvement, and that the property described in such resolution or ordinance is necessary therefor, such resolution or ordinance shall be conclusive evidence; -- (a) of the public necessity of such proposed public utility or public improvement; -- (b) that such property is necessary therefor, and -- (c) that such proposed public utility or public improvement is planned or located in the manner~~

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which will be most compatible with the greatest public good, and the least private injury; provided, that said resolution or ordinance shall not be such conclusive evidence in the case of the taking by any county, city and county, or incorporated city or town, or school district, or sanitary, irrigation, transit, rapid transit, public utility, county sanitation, or water district, of property located outside of the territorial limits thereof.

3. -- If already appropriated to some public use, that the public use of which it is to be applied is a more necessary public use; provided, that where such property has been so appropriated by any individual, firm or private corporation the use thereof for a public street or highway of the State, a county, city and county, or any incorporated city or town, or joint highway district, or the use thereof by the State, a county, city and county, or any incorporated city or town, or joint highway district, or a municipal water district or an irrigation district, a transit district, a rapid transit district, a public utility district, or a water district for the same purposes to which it has been appropriated or for any public purpose, shall be deemed a more necessary use than the public use to which such property has been already appropriated; and provided, further, that property of any character, whether already appropriated to public use or not, including all rights of any nature in water, owned by any person, firm or private corporation may be taken by a county, city and county,



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or any incorporated city or town or by a municipal water district, or an irrigation district, a transit district, a rapid transit district, a public utility district, or a water district, for the purpose of supplying water, or electricity for power, lighting or heating purposes to such county, city and county, or incorporated city or town, or municipal water district, or an irrigation district, a transit district, a rapid transit district, a public utility district, or a water district, or the inhabitants thereof, or for the purpose of supplying any other public utility, or for any other public use. And such taking may be made, either to furnish a separate and distinct supply of such water, and such electricity for power, lighting or heating purposes, or to provide for any such separate and distinct other public utility or other public use, to furnish such a supply or provide for any such other public utility or other public use in conjunction with any other supply or with any other public utility or other public use that may have been theretofore provided for or that may thereafter be provided for in so supplying or providing for such county, city and county, or incorporated city or town, or municipal water district or an irrigation district, a transit district, a rapid transit district, a public utility district, or a water district, or the inhabitants thereof; or in conjunction with any other supply or with any other public utility or other public use that may have been theretofore determined upon or that may thereafter be determined upon in accordance with law by the people of any such

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~~county, city and county, incorporated city or town or municipal water district or an irrigation district, a transit district, a rapid transit district, a public utility district, or a water district. -- Nothing herein contained shall be construed as in any way limiting such rights as may be given by any other law of this State to counties, cities and counties, incorporated cities or towns or municipal water districts or irrigation districts, transit districts, rapid transit districts, public utility districts, or water districts.~~

~~But private property appropriated to the use of any county, city and county, incorporated city or town, or municipal water district, or irrigation district, or transit district, or rapid transit district, or public utility district, or water district, may not be taken by any other county, city and county, incorporated city or town, or municipal district, or irrigation district, or transit district, or rapid transit district, or public utility district, or water district, while such property is so appropriated and used for the public purposes for which it has been so appropriated.~~

Comment. Section 1241 is superseded by provisions of the Eminent

Domain Code indicated below.

<u>Section 1241</u>	<u>Eminent Domain Code</u>
Paragraph 1 - - - - -	§§ 300, 301
Paragraph 2 - - - - -	§§ 302, 310-313
Paragraph 3 - - - - -	§§ 450-455

PUBLIC RESOURCES CODE § 7994

Staff recommendation

DIVISION 6. PUBLIC LANDS

Part 3. Sale of Public Lands

Chapter 4. Provisions Relating to Public Lands Generally

Article 9. Miscellaneous Provisions Relating to State Lands

Public Resources Code Section 7994. Limitation on condemnation of state lands

Sec. . Section 7994 is added to the Public Resources Code, to read:

7994. Notwithstanding any other provision of law, all 16th and 36th sections, both surveyed and unsurveyed, owned by the state or the United States, which are now or may hereafter be included within the exterior boundaries of a national reservation, a reserve, or lands withdrawn from public entry, are exempt from taking by eminent domain.

Comment. Section 7994 continues without substantive change the limitation upon condemnation of state lands stated in paragraph 2 of former Code of Civil Procedure Section 1240.