

#36.35

10/20/71

Memorandum 71-80

Subject: Study 36.35 - Condemnation (Immediate Possession)

SUMMARY

The purpose of this memorandum is two-fold: to attempt to integrate the Commission's proposed immediate possession provisions with the general provisions relating to contesting the right to take and to suggest other unrelated changes in the immediate possession provisions.

INTEGRATING IMMEDIATE POSSESSION PROVISIONS

Before the plaintiff may take immediate possession of property, it must demonstrate to the court that it has the right to take the property by eminent domain. This opens the possibility of multiple hearings and determinations on the right to take issue since the defendant may also defeat the taking by demurrer or by objection.

The staff's proposed method of resolving this problem is basically to ~~not allow the defendant to raise these issues except by demurrer or objection.~~ Then the following scheme will ensue:

(1) When the plaintiff applies for an order of immediate possession, ex parte, the court makes an initial determination of right to take. If the court finds a right to take, it may issue the order. If the court does not find a right to take, the plaintiff may not take possession of the property. The fact that the court finds no right to take ex parte does not enable the court to dismiss the whole eminent domain proceeding but only to deny possession.

(2) If an order for possession is issued pursuant to (1), the defendant may only challenge the right to take or defects in the complaint by demurrer or objection. The 90-day delayed effectiveness of the order for possession

should afford the defendant sufficient time to object. The court may stay possession pending resolution of the objection. If the defendant is unsuccessful, the order for possession will stick. If the defendant is successful, the court will vacate the order and, if necessary, restore possession to the defendant with damages.

(3) If, on the other hand, the complaint is filed, the time to demur or object goes by, and then the plaintiff seeks an order for possession, the defendant may do nothing. He must rely on the court to catch any defects in the complaint.

These integrating provisions are incorporated in Sections 1269.01, 1269.025, and 1269.03 (Exhibit I, attached).

#### OTHER SUGGESTED CHANGES

There are several miscellaneous problems and changes the Commission should consider so long as it has the immediate possession provisions before it.

Condemnors claim time is too long. Attached as Exhibits II and III are two letters from public entities objecting to the Commission's basic scheme on the ground that it will cause undue delays in their acquisition programs. Their objections can be broken down into three basic points.

(1) If condemnors have to go through noticed-motion procedures to obtain immediate possession, acquisitions will be slowed up and condemnees will demand trials as a hold-up tactic. This objection appears to be based on a staff suggestion for noticed-motion that was not adopted by the Commission. The procedure approved by the Commission in July, as set out in Section 1269.01, is an ex parte procedure with an opportunity for the defendant to subsequently come in and stay or vacate the order. Such a procedure most likely comports with the requirements of due process as expressed in Sniadach and Randone,

since the defendant is not deprived of the use of his property before he has the opportunity to appear and be heard. There is a period of sufficient length before implementation of the order of possession and before the defendant is deprived of use in which he may object to the complaint or to the right to take.

(2) The determination whether to issue an order for possession should not be based on a weighing of the hardships of the parties. Like the previous objection, this appears to be based on a prior draft of the immediate possession provisions. The requirements for an order for possession approved by the Commission in July, embodied in Section 1269.01, are simply that the condemnor has the right to take the property by eminent domain, the condemnor needs immediate possession, and the condemnor has deposited probable just compensation. The staff believes that each of these requirements is appropriate and indispensable except as indicated immediately below.

It should be pointed out that the test for a stay of the order for possession based on hardship, as previously proposed by the staff, did involve a weighing of relative hardships. The Commission rejected this approach at the July meeting. The staff now suggests as an appropriate hardship test for obtaining a stay, the following: The condemnee may obtain a stay if the hardship to him of having possession taken is substantial and the hardship to the plaintiff of a stay would be insignificant. If this test is adopted, a prior determination of the plaintiff's need by the court ex parte would be both unnecessary and undesirable. The proposed staff draft of Sections 1269.01 and 1269.02 incorporates these features. The issue of hardship and need under the proposed staff draft is not presented by the initial ex parte application for the order; it is presented only if the defendant requests a stay.

(3) Sixty days is too long a time to wait for possession. Again, this objection is based on a previous draft. In July the Commission tentatively lengthened the period to 90 days. The reason for this lengthened period is that federal law now requires 90-days notice after the plaintiff acquires a right to possession before the defendant may be required to move. See Section 301(5) of the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970. It would seem that, since both objecting letters from the entities are concerned with federal funding, those entities perhaps more than others would be subject directly to the federal 90-day limitation.

It should be noted, however, that this federal 90-day limitation does not apply to all property but only to property on which a person is occupying a dwelling or operating a business or farm. As one of the letters notes, much of the land the entities are concerned with is unoccupied. The order for possession can and should be made operative 30 days after service in the case of vacant property. The staff believes this approach is a sound one and has drafted Sections 1269.01 and 1269.04 accordingly.

Definition of record owner. The definition of "record owner," formerly subdivision (a) of Section 1269.04, is made an independent definition applicable to the whole code. See proposed Section 112 (Exhibit I). The staff believes that this is a potentially useful definition that should be grouped with the other general definitions at the beginning of the code. It is already being used in two provisions--Sections 1269.02 and 1269.04.

Order of possession enforceable as matter of right. The enforcement provision (Section 1269.08) is amended to grant the plaintiff the power to enforce an order for possession as a matter of right. This conforms with a previous Commission determination prompted by the information that some courts have issued orders for possession and then been reluctant to issue a writ of assistance where needed to oust a recalcitrant condemnee. See Exhibit I for a draft of this provision.

Effect of federal statute. The staff has yet to review the provisions relating to possession after judgment and pending appeal to see whether they will need to be amended to reflect changes in federal or state law, such as 90-days delay prior to possession. This will be done at a later time.

Respectfully submitted,

Nathaniel Sterling  
Legal Counsel

Memorandum 71-80

EXHIBIT I

COMPREHENSIVE STATUTE § 112

Tentatively approved September 1970  
Renumbered November 1971

§ 112. "Record owner" defined

112. "Record owner" means both (1) the person in whom the legal title to the fee interest in property appears to be vested by duly recorded deeds or other instruments and (2) the person, if any, who has an interest in the property under a duly recorded lease or agreement of purchase.

§ 1269.01. Order for possession prior to judgment

1269.01. (a) At the time of filing the complaint or 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 under this chapter, and the court shall authorize the plaintiff to take possession of the property if all of the following conditions are satisfied:

(1) The plaintiff is a public entity or public utility.

(2) The plaintiff is entitled to take the property by eminent domain.

(3) The plaintiff has deposited pursuant to Chapter 1 (commencing with Section 1268.01) an amount that satisfies the requirements of that chapter.

(b) The court's order for possession shall describe the property of which the plaintiff is authorized to take possession, which description may be by reference to the complaint, and shall state the date after which the plaintiff is authorized to take possession of the property.

Comment. Section 1269.01 prescribes the procedures to be followed in order for the plaintiff to obtain possession of property prior to judgment, and describes the content of an order for possession. With respect to the relief available from an order for possession prior to judgment, see Sections 1269.02, 1269.025, and 1269.03.

Subdivision (a). Subdivision (a), like former Code of Civil Procedure Section 1243.5(a), provides an ex parte procedure for obtaining an order for possession prior to judgment.

Subdivision (a) contains three prerequisites to issuance of an order for possession:

(1) The plaintiff must be a public entity or public utility. Under former Code of Civil Procedure Section 1243.4, possession prior to judgment was limited to certain public entities; public utilities did not have the right to obtain possession prior to judgment.

(2) The plaintiff must be entitled to take the property by eminent domain. This requirement is derived from former Code of Civil Procedure Section 1243.5(b). However, under former Code of Civil Procedure Section 1243.4, possession prior to judgment was permitted only if the taking was for right of way or reservoir purposes. This limitation is not continued. Likewise, the requirement formerly found in Code of Civil Procedure Section 1243.5(b) that the plaintiff was authorized to take possession prior to judgment is no longer continued since any public entity or utility may take possession in any case in which it is entitled to take by eminent domain.

(3) The plaintiff must have made the deposit required by Chapter 1. This requirement is derived from former Code of Civil Procedure Section 1243.5(b).



COMPREHENSIVE STATUTE § 1269.01

Tentatively approved July 1971  
Staff revision November 1971

It should be noted that the determination of the plaintiff's right to take is preliminary only. The granting of an order for possession does not prejudice the defendant's right to demur to the complaint under Section 2050 or to contest the taking under Section 2100. See also Sections 1269.025 and 1269.03.

Subdivision (b). Subdivision (b) describes the contents of an order for possession. The contents are substantially the same as those of former Code of Civil Procedure Section 1243.5(b). However, the requirement that the order state the amount of the deposit has been eliminated since Section 1268.02 requires that a notice of the making of a deposit be served on interested parties. The requirement that the order state the purpose of the condemnation has been omitted since possession prior to judgment is now authorized for any public use by a public entity or public utility. And, the requirement that the order describe the "estate or interest" sought to be acquired has been omitted as unnecessary since the term "property" includes rights and interests therein. See Section 101 (defining "property").

Subdivision (b) is limited by the requirement of a 30-day or 90-day period following the service of the order before possession can be physically assumed. See Section 1269.04.

COMPREHENSIVE STATUTE § 1269.02

Staff recommendation November 1971

§ 1269.02. Stay of order for hardship

1269.02. At any time after the court has made an order authorizing possession prior to judgment and before the plaintiff has taken possession pursuant to such order, the court, upon motion of the record owner or an occupant of the property, and upon considering all relevant information, including the schedule or plan of operation for execution of the public improvement and the situation of the property with respect to such schedule or plan, may stay the order if the hardship to the moving party of having possession taken at the time specified in the order is substantial and the hardship to the plaintiff of a stay would be insignificant.

Comment. Section 1269.02 is new. It grants authority to the court to stay an order for possession prior to judgment upon motion of the record owner or occupant. See Section 112 ("record owner" defined). Section 1269.02 permits the court to stay the order if the hardship to the dispossessed will be quite substantial, whereas the plaintiff would not be significantly harmed by a delay. This provision, which is new to California law, is comparable to provisions in other jurisdictions that make the plaintiff's need for possession prior to judgment a prerequisite to such possession. See, e.g., Ill. Stat. Ann., Ch. 47, §§ 2.1-2.3 (Supp. 1966); Dep't of Pub. Works & Bldgs. v. Butler Co., 13 Ill.2d 537, 150 N.E.2d 124 (1958). See also Taylor, Possession Prior to Final Judgment in California Condemnation Procedure, 7 Santa Clara Lawyer 37, 81-86 (1966).

§ 1269.025. Stay of order where right to take contested

1269.025. If the plaintiff has been authorized to take possession of the property under Section 1269.01 and the defendant has objected, in the manner provided in Chapter 7 (commencing with Section 2100) of Division 8, to the plaintiff's right to take the property by eminent domain, the court, in its discretion, may stay the order for possession until the objections to the right to take are disposed of.

Comment. Section 1269.025 is new. Because the sole means by which the defendant may contest the right to take is the statutory objection, Section 1269.025 is intended to, for example, permit the court to mitigate the effect of an order for possession pending resolution of the objection in a case where the court believes there is merit to objection. Cf. Section 1269.03(b).

§ 1269.03. Vacating order for possession

1269.03. (a) If, after the plaintiff has been authorized to take possession of property under Section 1269.01, the court determines that the conditions specified in Section 1269.01 for issuance of the order for possession are not satisfied, the court shall vacate the order.

(b) Notwithstanding subdivision (a), the court may vacate an order for possession on the ground that the plaintiff is not entitled to take the property by eminent domain only if the defendant has objected, in the manner provided in Chapter 7 (commencing with Section 2100) of Division 8, to the right of the plaintiff to take the property by eminent domain and the court has determined pursuant to that chapter that the plaintiff does not have the right to take the property.

Comment. Because the order for possession is issued following an ex parte application by the plaintiff, the court may determine to vacate an order for possession prior to judgment, whether upon motion of the defendant or upon its own motion, if it subsequently determines that the requirements of Section 1269.01 are not satisfied.

Under subdivision (a), one ground for vacating the order for possession is that the plaintiff is not entitled to take the property by eminent domain. See Section 1269.01. However, the defendant may not raise this issue under Section 1269.03 but may only do so by objection to the right to take. If the proceeding is dismissed for this or any other ground so that the plaintiff

is not entitled to take the property by eminent domain, the order must, of course, be vacated.

Under former statutes, judicial decisions held that an appeal may not be taken from an order authorizing or denying possession prior to judgment. Mandamus, prohibition, or certiorari were held to be the appropriate remedies. See Central Contra Costa Sanitary Dist. v. Superior Court, 34 Cal.2d 845, 215 P.2d 462 (1950); Weiler v. Superior Court, 188 Cal. 729, 207 P. 247 (1922); State v. Superior Court, 208 Cal. App.2d 659, 25 Cal. Rptr. 363 (1962); City of Sierra Madre v. Superior Court, 191 Cal. App.2d 587, 12 Cal. Rptr. 836 (1961). However, an order for possession following entry of judgment has been held to be an appealable order. San Francisco Unified School Dist. v. Hong Mow, 123 Cal. App.2d 668, 267 P.2d 349 (1954). No change is made in these rules as to orders made under Section 1269.01 or Chapter 3 (commencing with Section 1270.01).

§ 1269.04. Service of order

1269.04. (a) The plaintiff shall serve a copy of the order for possession issued under Section 1269.01 on the record owner of the property and on the occupants, if any. If the property is lawfully occupied by a person dwelling thereon or by a farm or business operation, service shall be made not less than 90 days prior to the time possession is to be taken pursuant to the order. In all other cases, service shall be made not less than 30 days prior to the time possession is to be taken pursuant to the order. Service may be made with or following service of summons.

(b) At least 30 days prior to the time possession is taken pursuant to an order for possession made under Section 1269.06, the plaintiff shall serve a copy of the order on the record owner 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 been served with summons in the proceeding. If the person has appeared or been served with the summons, service of the order for possession may be made by mail upon such person and his attorney of record, if any.

(d) If a person required to be personally served 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.

Tentatively approved September 1970  
Revised July 1971  
Staff revision November 1971

(e) The court may, for good cause shown on ex parte application, 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 or mailing to one of several persons having a common business or residence address is sufficient.

Comment. Section 1269.04 is derived from former Code of Civil Procedure Section 1243.5(c). The requirement that an affidavit be filed concerning service by mail has been eliminated. Subdivision (f) is a clarification of a sentence in the first paragraph of former Code of Civil Procedure Section 1243.5(c). The term "address" refers to a single residential unit or place of business, rather than to several such units or places that may happen to have the same street or post office "address." For example, each apartment is regarded as having a separate address although the entire apartment house may have a single street address. The term "record owner" is defined in Section 112.

The requirement that, in certain instances, service be made not less than 90 days before possession is to be taken conforms to the requirement of Section 7267.3 (AB 533) of the Government Code. Because the order is obtained ex parte rather than on noticed motion, the time periods are computed from the date of service rather than the date of the order. The plaintiff may, of course, obtain a specific date later than the 90-day or 30-day date in his request for an order for possession. The 90-day and 30-day dates are also subject to decrease in case of emergency. See NOTE to this section, infra.

Note: The 90-day notice requirement does not, of course, apply to an emergency taking pursuant to the police powers, a matter that also is under study.

§ 1269.08. Court may enforce right to possession

1269.08. The court in which a proceeding in eminent domain is brought has the power to:

(a) Determine the right to possession of the property, as between the plaintiff and the defendants, in accordance with Division 7 (commencing with Section 1268.01).

(b) Enforce any of its orders for possession by appropriate process. The plaintiff is entitled to enforcement of an order of possession as a matter of right.

(c) Stay any actions or proceedings brought against the plaintiff arising from possession of the property.

Comment. Section 1269.08 is new. Subdivision (c) is derived from a sentence formerly contained in Code of Civil Procedure Section 1254. In general, the section codifies judicial decisions which hold that, after an eminent domain proceeding is begun, the court in which that proceeding is pending has the exclusive power to determine the respective rights of the plaintiff and of the defendants to possession and to enforce its determination. See, e.g., Neale v. Superior Court, 77 Cal. 28, 18 P. 790 (1888); In re Bryan, 65 Cal. 375, 4 P. 304 (1884); San Bernardino Valley Municipal Water Dist. v. Gage Canal Co., 226 Cal. App.2d 206, 37 Cal. Rptr. 856 (1964). In addition to the writs of possession or writs of assistance which the court may issue and enforce in exercise of its general jurisdiction (see Marblehead Land Co.



COMPREHENSIVE STATUTE § 1269.08

Tentatively approved September 1970  
Revised November 1971

v. Los Angeles County, 276 Fed. 305 (S.D. Cal. 1921); 3 B. Witkin, California Procedure, Enforcement of Judgment, § 64 (1954)), orders for possession contemplated by the section include those made under Chapter 2 (commencing with Section 1269.01) of Division 7, Chapter 3 (commencing with Section 1270.01) of Division 7, and [Section 1253 of the Code of Civil Procedure].

Memorandum 71-80

EVELLE J. YOUNGER  
ATTORNEY GENERAL

EXHIBIT II  
STATE OF CALIFORNIA



OFFICE OF THE ATTORNEY GENERAL

**Department of Justice**

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September 7, 1971

Mr. John H. DeMouilly  
Executive Secretary  
California Law Revision Commission  
School of Law - Stanford University  
Stanford, California 94305

Dear Mr. DeMouilly:

Re: Sections 1269.01 et seq. Comprehensive  
Statute Order for Immediate Possession.

This letter is being written on behalf of one of our clients, the State Reclamation Board. This Board is deeply concerned over the probable effect sections 1269.01 et seq. of the comprehensive statute may have on the Board's acquisition program. The critical provisions referred to are the following: the elimination of the ex parte order for immediate possession, the requirement for a 60-day waiting period before possession can be obtained, and the requirement that the court consider the need of the public entity for immediate possession and the relative hardship that the owner or occupant will suffer if possession is taken before judgment.

As you may know, the Reclamation Board acquires the necessary lands, easements, and rights of way for federal flood control projects constructed in the Central Valley of California. These projects are generally funded on a yearly basis by the state and federal governments. The construction and final design monies provided the Corps of Engineers by Congress are usually not available before July 1, the commencement of the federal fiscal year. At the time these monies are available for construction the government completes its final design, advises the Reclamation Board of the property rights required to be obtained for construction, and lets the project out for bid. It may be several days or even weeks after the July 1 date before the Board knows what property rights they are required to obtain. Many of the projects are required to be constructed within a one year period. Hence,

Mr. John H. DeMouilly

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September 7, 1971

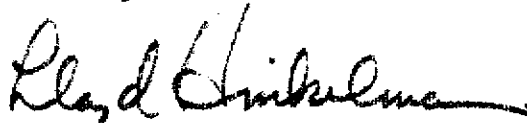
with these projects the construction period is quite limited due to financing, climatic conditions, and requirements that levees be intact during flood periods (in the San Joaquin Valley this is generally from November 15 to June 1). Quite often the Board's lead time is non-existent. Thus, time is of the essence with respect to property acquisition and construction of many flood control projects and any delay in property acquisition generally creates a grave hardship.

Under existing law the Board is continually fighting the sands of the hourglass to provide the Corps of Engineers' contractor timely property rights to enable construction of the project at the earliest date possible. Changes in existing law as proposed by section 1269.01 et seq. of the statute could cause undue delays of a year or more of much needed flood control projects. The 60-day waiting period proposed could prevent any construction along the San Joaquin River during a fiscal year period. Also, the requirement for a hearing to determine relative hardship could postpone construction for more than a year. These projects generally involve more than a single ownership of real property interests and in a two judge county you could have one judge finding hardship in favor of a property owner and thereby denying immediate possession, while another judge or possibly the same judge considering similar facts involving adjacent property may make an opposite finding. Such findings could prevent immediate possession and frustrate construction of a needed project, which we believe it is contrary to the best public interest.

The Reclamation Board feels that any change in the law which could delay prompt possession of needed property rights should be carefully considered. The provisions of existing law appear preferable to the comprehensive statute as it relates to order of immediate possession.

Very truly yours,

EVELLE J. YOUNGER  
Attorney General



LLOYD HINKELMAN  
Deputy Attorney General

LH:vdb

**DEPARTMENT OF WATER RESOURCES**P.O. BOX 388  
SACRAMENTO  
95802

September 7, 1971

Mr. John DeMouilly  
Executive Secretary  
California Law Revision Commission  
Stanford University  
Stanford, California 94305

Subject: Condemnation--Orders for Immediate  
Possession

Dear Mr. DeMouilly:

The Department of Water Resources wishes to take this opportunity to present its views on Sections 1269.01 et seq., of the Comprehensive Statute on condemnation. These sections establish a notice and hearing procedure for obtaining orders for possession prior to judgment in eminent domain proceedings. This is a change from present law which provides for an ex parte proceeding through which, upon proper showing, certain condemners may obtain orders for immediate possession and obtain possession 20 days after the order is served (Code of Civil Procedure, Sections 1243.4 - 1243.5).

In the past, the Department has used the ex parte procedure quite frequently because of inadequate lead time for the acquisition of property rights needed for projects. These instances usually have involved Corps of Engineer projects for which the Department obtains the lands, easements, or rights-of way. It is not unusual for the Department to have less than eight weeks to make the acquisitions. For this reason the Department obtained approximately 75 orders for immediate possession in the past year. The proposed notice and hearing procedure, which would require a minimum of approximately 70 days from date of application to date of possession, would definitely create problems in our acquisition program for these projects. Since these projects normally involve small parcels and only rarely involve property containing improvements, it is difficult to foresee a hardship being suffered by the condemnee which would warrant a 70 day waiting period. In effect, the proposed revision removes the "immediate" from the constitutional provision which establishes the right to immediate possession (Article I, Section 14, California Constitution).

Mr. John DeMouilly

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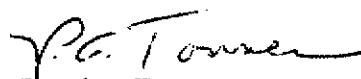
September 7, 1971

Along with the problem this proposal would create with respect to the time schedules per se, the more lengthy procedure for obtaining immediate possession might also be used as a bargaining tool by condemnees. If the property rights are needed immediately, a condemnee could use the time-consuming notice and hearing procedure as a threat in hopes of obtaining a higher negotiated price. This type of pressure might best be applied in a reservoir project which normally involves several landowners. If all the condemnees but one agree to allow the condemnor immediate possession, the lone holdout could attempt to pressure the condemnor into an unrealistically high negotiated price regardless of the merit of his claim of hardship. Thus, one condemnee could disrupt the scheduling for an entire project unless he is "bought off."

We feel that the proposed revision may also lead to another problem in that Section 1269.02 appears to give the court much more discretion in issuing orders for immediate possession than it has under the present law. Presently, an order for immediate possession is granted when the court has determined that the condemnor is entitled both to take the property by eminent domain and to take immediate possession, and that the condemnor has made a security deposit in the amount established by the court (Section 1243.5(b), Code of Civil Procedure). The proposed statute would add another element by requiring the court to make a determination that the condemnor needs possession of the property prior to judgment. In making the determination, the need of the condemnor is to be balanced against any hardship to the condemnee. This, we feel, gives the court an inordinate amount of discretion and unnecessarily erodes the right of condemnors to immediate possession as provided for in Article I, Section 14 of the California Constitution. Since the present law satisfies the requirements imposed by Article I, Section 14 with regard to the issuance of orders for immediate possession, it is our view that the proposed revision would only be harmful surplusage.

For the above reasons, the Department feels that the present statutory provisions are much preferred to the proposed provisions in the Comprehensive Statute. If the ex parte procedure should be found unconstitutional, as your comment to Section 1269.01 suggests, then the Department would advocate a revision which would allow a much shorter time span in which to obtain immediate possession and would also allow the court much less discretion than is presently proposed in the Comprehensive Statute.

Sincerely yours,

  
P. A. Towner  
Chief Counsel