

## Memorandum 75-25

Subject: Study 36.35 - Eminent Domain (Possession Prior to Judgment)

Attached as Exhibit I is a letter from Mr. Dankert, a Commission consultant on eminent domain. Mr. Dankert is concerned that the recent adoption of new Article I, Section 19 of the California Constitution, may have deprived the condemnor of the right to immediate possession. He requests that the Commission sponsor urgency legislation to restore the right.

The staff is not convinced by Mr. Dankert's argument, and does not believe, should the case ever arise, that a court would hold that the adoption of new Section 19 has the effect of eliminating the right to immediate possession. The crux of Mr. Dankert's argument rests upon a Comment in the report of the Constitution Revision Commission to the effect that the commission also recommends enactment of implementing legislation to take effect at the time of adoption of the constitutional amendment. However, a look at the implementing legislation proposed by the commission reveals that it is nothing but reenactment as a statute of the precise language deleted from the Constitution, so that it will not be lost. See California Constitution Revision Commission, Proposed Revision of the California Constitution, Part 5 at 34 (1971). The report of the commission makes this clear:

Conversion to statutory form may be advisable for two primary reasons. The provisions may be so detailed as to have no place in a Constitution which is supposed to set forth fundamental law. The nature of the provisions may further require the flexibility that only the statutory form can provide. Id. at 33.

The commission was apparently unaware at the time it made its recommendation that the essence of the constitutional provisions that it recommended be continued as statutes was already embodied in Code of Civil Procedure

Sections 1243.4-1243.7. These statutes are not specifically tied to former Section 14 of Article I and, in fact, Section 1243.5 was amended in 1961 upon the recommendation of the Law Revision Commission to in part delete the specific reference to Section 14.

This analysis is bolstered by the observation that, while the commission did sponsor its recommended revision of the Constitution, it never sponsored its recommended implementing legislation; to have the implementing legislation enacted would have been silly in light of the fact that Sections 1243.4-1243.7 already embody its substance in more detail.

The staff has previously had correspondence on this matter with the City of Glendale, and has been able to satisfy the city that the repeal of Section 14 and adoption of Section 19 did not eliminate the right to immediate possession. See Exhibit II (yellow).

The Commission, in its discussion of immediate possession in the eminent domain recommendation, has assumed that existing law still exists as implementing legislation under Section 19 and makes its recommendations for change accordingly. The staff believes there is no need for urgency legislation on this matter.

Respectfully submitted,

Nathaniel Sterling  
Assistant Executive Secretary

EXHIBIT I

Thomas M. Dankert

ATTORNEY AT LAW

POST OFFICE BOX 1443

VENTURA, CALIFORNIA 93001

TELEPHONE 643-8677

PETER M. KUETZING  
ASSOCIATE

March 13, 1975

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

RE: Right To Possession Of Public  
Agencies Prior To Judgment

Dear Mr. DeMouilly:

Article I, Section 14 of the California Constitution, which provided for immediate possession prior to judgment in rights of way and reservoir cases, was repealed with the adoption of Proposition 7 (Declaration of Rights) in the general election of November 5, 1974. In its place also as a part of Proposition 7 was adopted Article I, Section 19, which provides:

"Sec. 19. Private property may be taken or damaged for public use only when just compensation, ascertained by a jury unless waived, has first been paid to, or into court for, the owner. The Legislature may provide for possession by the condemnor following commencement of eminent domain proceedings upon deposit in court and prompt release to the owner of money determined by the court to be the probable amount of just compensation."

Article I, Section 19 appears to contemplate legislation authorizing prejudgment possession. In this regard, I direct your attention to the comments on Article I, Section 19<sup>1</sup>

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<sup>1</sup>As originally proposed by the Constitution Commission it was numbered to Section 16.

Mr. John H. DeMouilly  
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of the California Constitution Revision Commission, which are attached hereto, along with the text of proposed Section 16, which actually became Section 19, and the text of prior Section 14. Of special concern to me is the last paragraph of the comments of the Constitution Revision Commission, which provides:

"The Commission recommends enactment of a statute, to become effective upon approval by the people of this amendment of the Constitution, preserving the rights of immediate possession given in present Section 14 to certain public agencies."

These comments appear to look to future legislation. (See also the attached analysis by the legislative analyst.) To my knowledge no such section was enacted in 1974. From what you have recently told me, the Law Revision Commission's section that might be applicable is C.C.P. Sec. 1243.4, which provides:

"In any proceeding in eminent domain brought by the State, or a county, or a municipal corporation, or metropolitan water district, municipal utility district, municipal water district, drainage, irrigation, levee, reclamation or water conservation district, or similar public corporation, the plaintiff may take immediate possession and use of any right-of-way, or lands to be used for reservoir purposes, required for a public use whether the fee thereof or an easement therefor be sought, in the manner and subject to the conditions prescribed by law."

Unfortunately, this section was enacted in 1961:

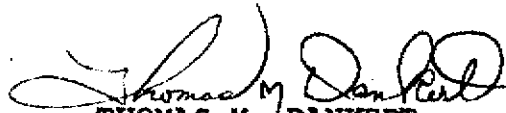
It is to be further noted that the proposed effective date of the Law Revision Commission's eminent domain legislation is July 1, 1977. In the interim period between November 5, 1974, and July 1, 1977, it is logically arguable that there is no right to prejudgment possession under California law because the

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necessary implementing legislation has not been enacted. Thus, we have a very possible hiatus in the law. The solution is to enact urgency legislation covering the matter. This could be done by a simple statement affirming the present legislative scheme.

The attention of the Commission to the above matter is urgently requested.

Very truly yours,

A handwritten signature in cursive script, appearing to read "Thomas M. Dankert".

THOMAS M. DANKERT  
Consultant to the Law  
Revision Commission

TMD:jp  
cc For all members of  
the Commission

**Proposed Constitution****Section 13**

Sec. 13. Private property may be taken or damaged for public use only when just compensation, ascertained by a jury unless waived, has first been paid to, or into court for, the owner. The Legislature may provide for possession by the condemnor following commencement of eminent domain proceedings on deposit in court and prompt release to the owner of money determined by the court to be the probable amount of just compensation.

**Existing Constitution****Section 14**

Sec. 14. Private property shall not be taken or damaged for public use without just compensation having first been made to, or paid into court for the owner, and no right of way or lands to be used for reservoir purposes shall be appropriated to the use of any corporation, except a municipal corporation or a county or the State or metropolitan water district, municipal utility district, municipal water district, drainage, irrigation, levee, reclamation or water conservation district, or similar public corporation until full compensation therefor be first made in money or ascertained and paid into court for the owner, irrespective of any benefits from any improvement proposed by such corporation, which compensation shall be ascertained by a jury, unless a jury be waived, as in other civil cases in a court of record, as shall be prescribed by law; provided, that in any proceeding in eminent domain brought by the State, or a county, or a municipal corporation, or metropolitan water district, municipal utility district, municipal water district, drainage, irrigation, levee, reclamation or water conservation district, or similar public corporation, the aforesaid State or municipality or county or public corporation or district aforesaid may take immediate possession and use of any right of way or lands to be used for reservoir purposes, required for a public use whether the fee thereof or an easement therefor be sought upon first commencing eminent domain proceedings according to law in a court of competent jurisdiction and thereupon giving such security in the way of money deposited as in the court in which such proceedings are pending may direct, and in such amounts as the court may determine to be reasonably adequate to secure to the owner of the property sought to be taken immediate payment of just compensation for such taking and any damage incident thereto, including damages sustained by reason of an adjudication that there is no necessity for taking the property, as soon as the same can be ascertained according to law. The court may, upon motion of any party to said eminent domain proceedings, after such notice to the other parties as the court may prescribe, alter the amount of such security so required in such proceedings. The taking of private property for a railroad run by steam or electric power for logging or lumbering purposes shall be deemed a taking for a public use, and any person, firm, company or corporation taking private property under the law of eminent domain for such purposes shall thereupon and thereby become a common carrier.

## PROPOSED REVISION OF THE CONSTITUTION

**Comment:** Existing Section 14 requires payment of just compensation for private property taken or damaged for public use through the power of eminent domain. The Commission recommends that this provision, and the right to have a jury determine the amount of compensation, be retained.

The final sentence in Section 14 declares that certain logging railroads constitute a public use and are common carriers. This provision was enacted for historic purposes and the same result could have been accomplished through statute. Because it is obsolete, the Commission recommends that it be deleted.

The balance of existing Section 14 is concerned with "immediate possession" of property by specified governmental entities. "Immediate possession" occurs when the condemning agencies take possession of the property before the final amount of compensation has been determined by a jury. This practice resulted from the necessity of obtaining possession to complete public works before determination of the final compensation by a lengthy judicial process. In the absence of such a provision, the single owner of a tract taken for freeway construction could delay completion of the entire project for several years. Since the power to take by eminent domain is clear, and only the amount of compensation is in doubt, such delays are unnecessary. Over the years Section 14 was amended several times to permit the State, counties, municipal corporations, metropolitan water districts, municipal utility districts, municipal water districts, drainage, irrigation, levee, reclamation or water conservation districts, or "other similar public corporations" to take prior possession for reservoirs and rights of way only. The phrase "other similar public corporation" has never been construed.

There have been many unsuccessful attempts to create additional agencies and purposes entitled to rights of prior possession. The Commission recommends that the existing specific references to agencies and purposes be deleted and that the Legislature be specifically authorized to provide for rights of prior possession. The Commission proposal provides for a deposit of money into court by an agency taking by prior possession, the money to be released promptly to the owner of the property. This device, which is presently provided by statute, assures that the property owner will at once receive in substance the amount of the award.

This recommended change in the law of prior possession conforms to the recommendation of the California Law Revision Commission, which has done extensive research on the subject of prior possession.

The Commission recommends enactment of a statute, to become effective upon approval by the people of this amendment of the Constitution, preserving the rights of immediate possession given in present Section 14 to certain public agencies.

## Ballot Title

**DECLARATION OF RIGHTS, LEGISLATIVE CONSTITUTIONAL AMENDMENT.** Reorganizes and sub-  
sively amends various provisions of Article I and relocates portions of Articles IV and XX of California Constitu-  
Amendments include, among others, right to interpreter at state expense for criminal defendant who cannot understand  
English, provision that court may grant release on own recognizance, provision that property rights of noncitizens be  
the same as for citizens, and revision of eminent domain provisions. Deletes, among others, provisions respecting crimi-  
nal libel actions, provisions regarding right to sell or rent real property, provisions concerning acquisition of land for  
public improvements. Financial impact: No increase in government costs.

## FINAL VOTE CAST BY LEGISLATURE ON ACA 60 (PROPOSITION 7):

ASSEMBLY—Ayes, 57  
Noes, 18

SENATE—Ayes, 27  
Noes, 4

## Analysis by Legislative Analyst

## PROPOSAL:

This proposition revises Article I of the State Constitution, which declares the fundamental rights of the people of the state. The proposition (1) deletes obsolete provisions, (2) clarifies existing law, (3) puts into the Constitution some rights which now exist in the federal Constitution, (4) defines the rights of those charged with crime, (5) authorizes the Legislature to revise eminent domain and grand jury proceedings, and (6) deletes material suitable for statutory enactment.

**Obsolete Provisions Deleted.** The proposition deletes two provisions from the California Constitution because the United States Supreme Court has found they conflict with the federal Constitution. One provision relates to trial court procedure when a person accused of a crime chooses not to testify on his own behalf. The other provision relates to discrimination in real estate transactions.

**Clarification of Existing Law.** First, the proposition says the noncitizens have the same property rights in California as citizens. Second, the proposition says that rights guaranteed by the State Constitution are not dependent on those guaranteed by the federal Constitution.

**Federal Rights in State Constitution.** The proposition puts the following three rights into the State Constitution. These rights presently are contained in the federal Constitution.

(a) The Legislature shall make no law respecting the establishment of religion.

(b) A person may not be deprived of life, liberty, or property without due process of law.

(c) A person may not be denied equal protection of the laws.

**Rights of Persons Accused of Crime.** Presently the State Constitution gives specific rights to persons accused of crime. This proposition adds the following:

(1) The accused person has the right to be confronted with the witnesses against him.

(2) The accused person has a right to have the assistance of a lawyer.

(3) The accused person has a right to be personally present with a lawyer at the trial.

(4) If the accused person does not understand English, he has the right to an interpreter.

(5) Instead of being released on bail prior to trial, the accused person may be released on his or her own recognizance at the discretion of the court.

These rights already exist either in the United States Constitution or in present law. The amendment makes them part of the California Constitution.

**Revision of Eminent Domain Procedure.** If a state or local government takes real property for public use, the owner of the property has a right to be compensated. If the owner of the property and the government agree over the proper amount of compensation, the dispute is settled by a trial.

Presently, the government may take possession of property before the trial takes place by depositing money with the court as security for payment. The court decides how much the security deposit must be. This procedure is called "immediate possession."

The present Constitution limits the power to take immediate possession to specified governments, in specified circumstances, and for specified uses. This proposition will allow the Legislature to determine when immediate possession may take place, and who may act as a claimant. (Emphasis added by TMO)

**Grand Juries.** Presently the Constitution requires each county to summon a grand jury once each year. Without changing that requirement, this proposition allows the Legislature to provide for summoning more than one grand jury each year.

**Deletion of Material Suited for Statutory Enactment.** The proposition deletes from the Constitution (a) detailed rules of criminal indictment procedure and (b) detailed rules of procedure in criminal prosecutions involving libel.

## FISCAL EFFECT:

This proposition does not increase government costs.



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SAL BIANCO  
ADMINISTRATIVE ASSISTANT

Memorandum 75-25

EXHIBIT II  
**Assembly**  
**California Legislature**

COMMITTEES  
EDUCATION  
JUDICIARY, VICE CHAIRMAN  
LABOR RELATIONS  
CONSTITUTIONAL AMENDMENTS  
SELECT COMMITTEE ON  
REVISION OF THE  
CORPORATIONS CODE  
CALIFORNIA LAW REVISION  
COMMISSION  
COMMISSION ON  
SPECIAL EDUCATION

ALISTER MCALISTER  
ASSEMBLYMAN, TWENTY-FIFTH DISTRICT

February 3, 1975

Mr. John H. DeMouly, Executive Secretary  
California Law Revision Commission  
Stanford, School of Law  
Stanford, California 94305

Dear John:

Would you please reply to Richard Marston,  
Glendale City Attorney.

Does AB 11 need to be amended to take care of  
his problem?

Sincerely yours,

  
ALISTER MCALISTER

AM:ia  
Enclosure

City of GLENDALE



CALIFORNIA

OFFICE OF THE CITY ATTORNEY

613 EAST BROADWAY  
GLENDALE, CALIFORNIA 91208  
TELEPHONE (213) 958-2080

January 28, 1975

Mrs. Carlyn F. Reid  
League of California Cities  
1108 "O" Street  
Sacramento, California 95814

pm

Re: AB 11, Eminent Domain and OIP's.

Dear Carlyn:

Help! Somebody has stolen my OIP! Rumor has it that it was removed from its resting place in Article 1, Section 14 of the Constitution by voters in the November election who didn't know any better. They "traded" by leaving behind a new Section 19 which leaves it up to the Legislature to repair the damage. Please note that C.C.P. Section 1243.5 only talks about "if" the plaintiff is authorized by law to take immediate possession. Without Article 1, Section 14, there is no more "if". I note from your circular #1-1975 that AB 11 will, among other things, "revise procedures for obtaining orders of immediate possession". I hope they don't forget, in the process, to restore the authority for an OIP. If something isn't done as an emergency measure, many of us could be in a lot of trouble.

To my friend, Assemblyman Al McAlister, I would ask (with apologies, in advance):

Oh where, oh where has my OIP gone?  
Oh where, oh where can it be?  
With its "O" cut short,  
And its "I" made long,  
Oh where, oh where can it "P"?

Very truly yours,

*Dick*

Richard W. Marston,  
City Attorney

RWM/ps

cc: Honorable A. McAlister  
Honorable M. Antonovich

ab 11

February 5, 1975

Richard W. Harston, Esq.  
City Attorney  
613 East Broadway  
Glendale, California 91205

Dear Mr. Harston:

Assemblyman Alister McAlister has asked me to respond to your letter of January 28, 1975, concerning AB 11 and orders of immediate possession.

You express concern that there is no longer any statutory authority for an order for immediate possession in view of the substitution of Section 19 for former Section 14 of Article I of the California Constitution. You have overlooked Section 1243.4 of the Code of Civil Procedure which continues in statutory form the authority formerly duplicated in Section 14 of Article I. Accordingly, there is no need for an emergency measure to authorize orders of immediate possession.

You also ask whether AB 11 satisfactorily covers the matter of immediate possession. AB 11, which is drafted in light of the adoption of the measure which resulted in the substitution of new Section 19 for old Section 14, will implement Section 19 by extending the right of immediate possession to all condemnors for all purposes--not just rights of ways and lands to be used for reservoir purposes--but at the same time will provide procedural protections designed to prevent abuse to the right of early possession.

I know that you will be interested in the background report on AB 11 (and the 10 other bills in the eminent domain package). This report should be distributed late this month, and you will receive a copy. If you would like to have your name added to the list of persons and organizations to whom we send copies of pamphlets distributed on a complimentary basis, please complete and return the enclosed blue form.

I hope that this letter will satisfy you that no immediate problem is presented by the adoption of the measure at the November election.

Sincerely,

John H. DeMouilly  
Executive Secretary

JHD:aj  
cc: Hon. Alister McAlister  
Mrs. Carolyn F. Reid

*City of* GLENDALE



CALIFORNIA

OFFICE OF THE CITY ATTORNEY

612 EAST BROADWAY  
GLENDALE, CALIFORNIA 91208  
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February 10, 1975

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

Re: AB11 and Eminent Domain OIP's  
Our file No.: 75L-71R.

Dear Mr. DeMouilly:

Thank you for your letter dated February 5, 1975. I agree that the authority for OIP's has been covered by C.C.P. Section 1243.4. You are quite correct also that I overlooked that section before writing Mrs. Reid. The next time I'm in a clever or poetic mood, I'll try spending a little more time with my law books instead.

I will appreciate receipt of a copy of your report on AB11, et al. Enclosed is the completed blue form which you kindly furnished with your letter. Thanks once again.

Very truly yours,

*Richard W. Marston*  
Richard W. Marston,  
City Attorney

RWM/ps  
encl.

cc: Hon. Alister McAlister  
Hon. Mike D. Antonovich  
Mrs. Carlyn F. Reid