

#36.205

3/13/70

Memorandum 70-18

Subject: Study 36.205 - Condemnation (The Declared Public Uses--Condemnation for Federal Purposes)

The federal power of eminent domain extends to lands within the state, including state-owned lands, and is not dependent on state authority, nor can the exercise of the power be limited in any manner by the state.

While title to property may be acquired without the state's consent, exclusive jurisdiction may be exercised only where the property has been acquired "by the consent of the legislature of the state" in which the property is situated. U.S. Const., Art. I, § 8, clause 17. Accordingly, a number of California statutes provide such consent, but these are not statutes needed to authorize federal exercise of the power of eminent domain.

There is no need to provide in the state statutes that the federal government has power to condemn property. (See the attached background study prepared by the staff.) Accordingly, the staff recommends that subdivision (1) of Section 1238 not be continued as a part of the California statutes and that Exhibit I (attached) be approved by the Commission.

Respectfully submitted,

John H. DeMouilly
Executive Secretary

Memorandum 70-18

EXHIBIT I

CODE OF CIVIL PROCEDURE § 1238

Staff recommendation

§ 1238 (repealed)

~~1238.---Subject-to-the-provisiens-of-this-title,-the-right-of eminent-domain-may-be-exercised-in-behalf-of-the-following-public uses:~~

Subdivision 1 (repealed)

~~1.---Fertifiations,-magazines,-arsenals,-Navy-yards,-Navy-and Army-stations,-lighthouses,-range-and-beason-lights,-coast-surveys, and-all-other-public-uses-authorized-by-the-Government-of-the-United States.~~

Comment. Subdivision 1, which was intended to authorize taking for federal purposes, is not continued since it no longer serves any useful purpose. The 1872 Code Commissioner's Note to subdivision 1 cites two California cases expressing doubt that the federal government had an independent right of eminent domain. It is now clear, however, that federal eminent domain power is not dependent on state authority and cannot be limited by the state. Kohl v. United States, 91 U.S. 367 (1875); C. M. Patten & Co. v. United States, 61 F.2d 970 (9th Cir. 1932).

CONDEMNATION FOR FEDERAL PURPOSES--CODE OF
CIVIL PROCEDURE SECTION 1238(1)*

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The Commission assumes no responsibility for any statement made in this study, and no statement in this study is to be attributed to the Commission. The Commission's action will be reflected in its own recommendation which will be separate and distinct from this study. The Commission should not be considered as having made a recommendation on a particular subject until the final recommendation of the Commission on that subject has been submitted to the Legislature.

Copies of this study are furnished to interested persons solely for the purpose of giving the Commission the benefit of the views of such persons, and the study should not be used for any other purpose at this time.

CONDEMNATION FOR FEDERAL PURPOSES--CODE OF
CIVIL PROCEDURE SECTION 1238(1)

Condemnation by the federal government under state law is authorized by subdivision 1 of Section 1238, which provides for condemnation for the following public uses:

1. Fortifications, magazines, arsenals, Navy yards, Navy and Army stations, lighthouses, range and beacon lights, coast surveys, and all other public uses authorized by the Government of the United States.

This subdivision was enacted in 1872 and has not been amended. It has been cited in only one appellate case.¹

The reason for the enactment of subdivision 1 of Section 1238 is clear. At the time the code was enacted, it was doubtful that the federal government possessed an independent power of eminent domain.² In the early days of the republic, federal acquisitions were not made without consent of the state legislature or without resort to state courts and state laws.³ In some cases, the United States was the nominal condemner, theoretically exercising a delegated power of the state.⁴ In others, the state condemned the land and turned it over to the federal government.⁵ Subdivision 1 was enacted to fill this apparent void and authorize the federal government to condemn for specified uses.⁶ It was not until 1875--three years after the Code of Civil Procedure was enacted--that the indisputable right of the federal government to exercise the power of eminent domain in its own right was clearly recognized and definitely asserted for the first time.⁷ The famous case of Kohl v. United States⁸ established that property within the geographical limits of the jurisdiction of the United States is held subject to the authority of the federal government to take it by eminent domain for such objects as are germane to the execution of the powers granted to it.⁹ The eminent domain power of the federal government extends to state-owned lands.¹⁰

Subdivision 1 of Section 1238 was not designed to deal with the problems of state or local condemnations of land for conveyance to and use by the federal government. As enacted, the only condemnor envisioned was the federal government. No case has held differently. Subdivisions 2 and 3 of Section 1238 were the condemnation provisions relating to takings by the state or local entities. Where local entities desired the power to condemn land for grant to the United States, specific statutes have been enacted.¹¹

The extent to which the state can condemn on behalf of the federal government has been questioned. It has been argued that the state may not make itself an instrumentality of federal land acquisition because such a taking is not for a public use of the state.¹² This doctrine has been subsequently limited to condemnations for a public use which, under the constitutional distribution of power between the federal and state governments, could only be performed by the federal government.¹³ In accord with this doctrine, the California courts have permitted local condemnation of land to be donated to the federal government for incorporation into the national park system.¹⁴ The rule appears to be that a state may take land on behalf of the United States if the purpose for which the power is exercised is a public use under the state constitution. This rule may obtain even though the purpose for which the land is condemned by the state is one for which the federal government could not itself condemn the land.¹⁵

Subdivision 1 of Section 1238 has outlived its historic purpose and no longer serves any useful purpose since federal condemnation almost universally is conducted under federal law. It serves no other purpose than to provide the federal government with duplicative condemnation powers. Subdivision 1 of Section 1238 should therefore be repealed.

FOOTNOTES--CONDEMNATION FOR FEDERAL PURPOSES

1. C.M. Patten & Co. v. United States, 61 F.2d 970 (9th Cir. 1932)(federal condemnation held proper under both federal and state law).
2. See Gilmer v. Lime Point, 18 Cal. 229 (1861); 1 P. Nichols, Eminent Domain § 1.24 (3d ed. 1964).
3. 1 P. Nichols, Eminent Domain § 1.24 (3d ed. 1964); 143 A.L.R. 1040 (1943).
4. Gilmer v. Lime Point, 18 Cal. 229 (1861); Burt v. Merchant's Insurance Co., 106 Mass. 356 (1871).
5. Nichols, The Meaning of Public Use in the Law of Eminent Domain, 20 Bost. U. L. Rev. 615, 639-640 (1940).
6. The official comment to Section 1238(1) cites two California cases expressing doubt that the federal government had an independent right of eminent domain: Gilmer v. Lime Point, 18 Cal. 229 (1861); People v. Folsom, 5 Cal. 373 (1855).
7. In a Note in 9 So. Caro. L.Q. 474 (1957), the author concludes that, notwithstanding the weight of authority contra, Article I, Section 8, of the United States Constitution, clearly mandates that the federal government can acquire property within a state only with consent of the state legislature.
8. 91 U.S. 367 (1875).
9. The Federal Rules of Civil Procedure, Section 71a, recognize and govern the exercise of the federal government's power of eminent domain.

10. E.g., California v. United States, 395 F.2d 261 (9th Cir. 1968). See also C.M. Patten & Co. v. United States, 61 F.2d 970 (9th Cir. 1932).
11. See, e.g., Govt. Code §§ 25431, 50366; Mil. & Vets. Code § 439; Pub. Res. Code § 8402.
12. People v. Humphrey, 23 Mich. 471 (1871). See also Gilmer v. Lime Point, 18 Cal. 229 (1861).
12. 1 P. Nichols, Eminent Domain § 2.113[3] (3d ed. 1964). See generally 143 A.L.R. 1040 (1943).
14. San Benito County v. Cooper Mt. Mining Co., 7 Cal. App.2d 82, 45 P.2d 428 (1935).
15. State v. Oliver, 162 Tenn. 100, 35 S.W.2d 396 (1931). See also Nichols, The Meaning of Public Use in the Law of Eminent Domain, 20 Bost. U. L. Rev. 615, 639-640 (1940).