#36.80 5/15/73

Memorandum 73-51

Subject: Study 36.80 - Condemnation (Procedure)

SUMMARY

Attached to this memorandum is a staff draft (pink) of Chapter 8 (Procedure) of the Eminent Domain Law. This draft attempts to combine and harmonize the general and specific policy decisions already made in this general area by the Commission with staff proposals and ideas gleaned from the preliminary draft of the Uniform Eminent Domain Act. The memorandum attempts to indicate, without going into great detail, the present law and prior Commission decisions as well as staff divergencies or refinements that are presented in the draft.

ANALYSIS

Section 1260.110. This section has been tentatively approved. It reflects the Commission's decision to retain the substance of Code of Civil Procedure Section 1256 which provides that the general rules for California civil practice apply in eminent domain proceedings except where specifically provided otherwise.

Sections 1260.210-1260.250 (resolution of necessity). These sections have also been tentatively approved in connection with the right to take provisions. They are simply renumbered and relocated here pursuant to a prior Commission decision.

Section 1260.310 (jurisdiction). This section incorporates two previous Commission decisions. One, jurisdiction over eminent domain proceedings generally should remain in the superior court as at present. Two, such jurisdiction as the Public Utilities Commission may have under present law should be preserved. Subdivision (a) implements the first decision. Subdivision (b) implements the second in the form previously approved by the Commission.

Sections 1260.320-1260.340 (venue). These sections have also been tentatively approved. They continue the substance of present law and provide generally for commencement of the proceeding in the county where property is located and for change of place of trial as in civil actions.

Section 1260.410 (identification of parties). This section has been tentatively approved. It simply continues the current practice of referring to the condemnor as "plaintiff" and the condemnee as "defendant."

Section 1260.420 (naming defendants). The present rule that the plaintiff must name all persons having or claiming an interest in the property as defendants is continued in Section 1260.420. The consequence of a failure to name the proper persons is that the plaintiff runs the risk of failing to join a necessary party. The eminent domain proceeding cannot give title to the plaintiff as against a person not joined. The practical way for the plaintiff to avoid this problem is by naming persons unknown and serving them by publication and posting.

Where the plaintiff has an interest in the property, it may do one of two things. It may simply describe in the complaint the property it seeks to acquire, omitting a description of the property or interest it already claims; or, it may describe in the complaint the whole property, and then allege its interest in it. It need not name itself as a defendant.

The problem that arises when the recorded owner of property sought to be acquired is deceased is as follows:

(1) Upon death of the decedent, the title to the property passes to his heirs or devisees. Prob. Code § 300.

(2) However, the heirs and devisees are not ascertainable until after the probate of the will or estate, at which time the order of distribution by the probate court is recorded and the new owners of the property are specified. Prob. Code § 1222.

(3) Between the death of the decedent, therefore, and the recordation of the interests of the new owners, there is a hiatus. During this period, the property is subject to the possession of the decedent's personal representative and to the control of the probate court and is chargeable with the expenses of administering the estate and payment of debts and family allowance. Prob. Code § 300.

Since there is no clear owner of the property between the time of the decedent's death and the time it is distributed to named new owners, the logical person to name and serve in an eminent domain proceeding brought or pending in the interim is the personal representative. There is old case and statutory law to this effect, and this rule is codified in subdivision (b) of Section 1260.420.

Where no personal representative has been appointed, however, there is no one, other than potential heirs or devisees, primarily concerned to defend the law suit. Rather than making the condemnor await the appointment of a representative, however, Code of Civil Procedure Section 1245.3 permits the condemnor to name the heirs and devisees generally. This means, because the heirs and devisees are not yet known, that they may have to be served by publication. In addition to the possibility of lack of adequate notice, there is the added

likelihood that a person will not wish to defend an eminent domain action if he is not certain that he will be the ultimate recipient of the award. To curtail the circumstances under which this situation might occur, Section 1245.3 permits the naming of heirs and devisees only if all of the following conditions are met:

(1) The superior court of the county in which the property is located has not appointed a representative who is duly qualified.

(2) The superior court of another county has not appointed a representative who is duly qualified and acting.

(3) The plaintiff knows of no other duly qualified and acting representative.

(4) The plaintiff, or its attorney, avers all of the above facts in the complaint or in an affidavit filed with the complaint.

The staff believes that these limitations are overly restrictive since it is the manner and nature of service that is significant and not the naming of defendants. As a consequence, the staff draft, subdivision (b), proposes that a condemnor may name heirs and devisees simply if no duly qualified and acting personal representative is known to it. The methods of assuring adequate notice of the proceeding are discussed below under Sections 1260.510-1260.530. As a practical manner, the potential heirs and devisees have a pretty good idea whether their interest in the property is worth defending. And, in any case, naming a personal representative may have the result of a compromise negotiated sale to the condemnor by the representative who does not want to become involved with a condemnation action while trying to clear up the estate.

Section 1260.430 (intervention). Under present law, only persons who claim a legal interest in the property sought to be acquired may participate in the eminent domain proceeding. This condition may be overly restrictive

since holders of equitable interests in the property may be equally concerned to participate either to challenge the right to take itself or the adequacy of compensation. Examples of equitable interests that are not presently granted the right to participate, and that perhaps should be, include:

(1) Purchaser under an executory contract for sale;

(2) Shareholder in company whose property is sought to be acquired;

(3) Person who has been promised the land upon the death of the owner or at the age of 21.

These examples could be multiplied. The staff draft, Section 1260.430, permits claimants of equitable interests to appear and participate. It should be noted, however, that this does not permit third parties not interested in the title to or compensation from the property to do so. An example of such an excluded person would be someone who is affected by or opposed to the public use for which the property is being acquired.

Under the staff draft, the third party is treated as a defendant in that he must file an answer; however, the time within which he must answer is rather flexible in keeping with the fact that he is not a named defendant. See Section 1260.730 below. As an alternative to Section 1260.430, we could authorize intervention by a person claiming a legal or equitable interest in the manner provided by Code of Civil Procedure Section 387 (intervention generally). That is, Section 1260.430 could be changed to provide:

> 1260.430. Any person who claims a legal or equitable right or interest in the property described in the complaint may intervene in the proceeding in the manner provided by Section 387.

Both methods achieve the same result, and the staff has no real preference as to which method is used.

Sections 1260.510-1260.530 (summons).

Form of summons. The Commission has previously determined that the form of summons is to be the same as in civil actions generally. The summons in civil actions generally contains (Code Civ. Proc. § 412.20(a)):

(1) Title of the court.

(2) Names of parties.

(3) Direction to defendant to respond upon penalty of default.

(4) Bold-face invitation to seek the advice of an attorney.

Adoption of this simplified summons in Section 1260.510 will delete the following elements presently required for eminent domain summons by Code of Civil Procedure Section 1245:

(1) Statement of public use.

(2) Description of the property.

(3) Notice to appear and show cause why property should not be condemned.

However, where service is to be by publication, the published notice should describe the property. See Section 1260.530. This requirement is necessitated by the deletion of the description from the summons since the complaint containing a description is not published with the summons.

Service of summons. The Commission has previously determined that service of summons is to be in the same manner as in civil actions generally. The staff draft provides for this and also provides that, where service is by publication, a copy of the summons and complaint be posted on the affected property. This added provision is already applicable in eminent domain proceedings where "heirs and devisees" and other "persons unknown" are being served for the purposes of giving the eminent domain judgment an in rem effect. See Code Civ. Proc. § 1245.3. Since the object of service is to give the best possible notice, as required by due process, the staff draft makes this posting requirement applicable in any case where process is served by publication.

Section 1260.610 (complaint). Section 1260.610 contains an exclusive listing of the substantive allegations that must be contained in the complaint. Other procedural elements of the complaint, such as caption, request for relief, and subscription, must, of course, also appear.

The contents of the complaint vary from presently required contents in the following ways, all of which conform to the Commission's previous determinations:

(1) Provision for naming parties has been streamlined and requirements moved to other sections.

(2) Description of property need not indicate whether property is part of larger parcel.

(3) Statement of right of plaintiff to condemn is expanded and detailed.

(4) Map must accompany complaint in all cases, not merely for rights of way. Map is not intended to convey precision as much as to aid in general identification purposes.

In addition, the staff has added a provision that would require the plaintiff to state any interest it claims in the property. This provision, while not essential, will be extremely helpful to an early determination of preliminary issues.

Section 1260.620 (joinder of property in complaint). At present, any amount of property can be joined in a complaint so long as it is all in the same county and sought for the same project. Once joined, the property is tried together unless the parties move to separate for trial. Section 1260.620 implements the Commission's prior decision to limit the plaintiff to 10 tracts per complaint, each tract to be tried separately unless consolidated for trial. A discussion of separation and consolidation for trial appears below. The staff notes that the preliminary draft of the Uniform Eminent Domain Act (Section 406) initially limits joinder to properties "which are under substantially identical ownership" but then authorizes consolidation and severance as various issues are raised in the course of the proceedings.

Amending the complaint. The staff draft continues present law allowing amendment of complaints as in other civil actions. Thus, the amendments may

be either separate references to portions of the original complaint or may take the form of a complete amended pleading. The amendment is allowed as a right once before the answer is filed and upon order of the court where it will further justice. See Code Civ. Proc. §§ 432, 472, 473.

Section 1261.220 permits either party to dismiss the proceeding as contained in the superseded complaint or superseded portions. This provision in effect permits the defendant to recover the costs he incurred which would not have been incurred if the complaint as amended had been the original complaint. This is an expansion of the "partial abandonment" concept. See discussion under Sections 1261.210-1261.250 (dismissal).

Sections 1260.630-1260.660 (demurrer and answer). After service of process, a defendant has within 30 days to make a responsive pleading or be subject to entry of default.0 Section 1260.730. A person not a party who wishes to intervene should be required to do so within the time the last served party is required to respond or within such greater time as the court may allow.

The basic responsive pleading is the answer which the Commission has determined should contain the defendant's claim of interest in the property and any objections to the right to take which the defendant wishes to raise. The staff draft also adds the requirement that the defendant indicate an address for receiving notice of further proceedings. Sections 1260.650 and 1260.660 list the possible grounds for objecting to the right to take. Objections to the complaint on its face, e.g., that it is unclear, that it does not contain all required information, or that more than 10 tracts are joined in the complaint, are to be made by demurrer to the complaint. See Section 1260.630.

The grounds listed for objection to the right to take are all those that may be raised under the Commission's right to take proposal. One major change from present law is that, at present, the only way a defendant may assert lack

of public use is by alleging fraud or abuse of discretion in the sense that the plaintiff does not intend to use the property as it declares. The attached draft, recognizing that it is nearly impossible to demonstrate subjective intent, proposes as an alternate ground that there is no reasonable probability that the property will be devoted to the use declared within a reasonable time. The listing is not exclusive but allows objections on other grounds provided by law, should any exist.

Other possible responsive pleadings include motion to strike or to quash service. For a listing, see Code Civ. Proc. §§ 585, 586 (default entered if responsive pleading not made). See Section 1260.110.

Section 1260.670 (cross-complaints). The cross-complaint provisions of the Code of Civil Procedure, while designed for civil "actions," have in the past been applied to certain types of special "proceedings." Eminent domain proceedings, by virtue of Code of Civil Procedure Section 1256 (rules for civil actions apply in eminent domain), have been held to constitute one type of special proceeding in which cross-complaints are available. See People v. Buellton Development Co., 58 Cal. App.2d 178, 136 P.2d 793 (1943); People v. Clausen, 248 Cal. App.2d 770, 57 Cal. Rptr. 227 (1967); People v. Los Angeles County Flood etc. Dist., 254 Cal. App.2d 470, 62 Cal. Rptr. 287 (1967).

The cross-complaint provisions of the Code of Civil Procedure are applicable to eminent domain proceedings only on a limited basis, however. Section 1256 provides that the rules governing civil actions prevail except as otherwise provided in the specific eminent domain provisions. Because specific provisions indicate that value and damage to property are to be raised by answer (Section 1246), a cross-complaint is not available to raise these issues. Bayle-Lacoste & Co. v. Superior Court, 46 Cal. App.2d 636, 116 P.2d 458 (1941).

Likewise, the nature and extent of the estate claimed by the defendant should be raised by answer rather than by cross-complaint. People v. Buellton, supra.

What, then, may be raised by cross-complaint under present law? Initially, the claim must relate to the property that is the subject of the eminent domain proceeding. Code Civ. Proc. § 428.10(b)(2). Thus, if there is a conflicting claim to the property sought to be acquired, or if there is a trespass and damages to the property, the defendant may cross-complain to allege these facts. Buellton, supra; People v. Clausen, supra. In addition, if other property is so connected with the property sought as to constitute a unity, or if other property will be necessarily affected by the taking, a cross-complaint for damages may be appropriate. Buellton, supra. Contra: California P. R.R. Co. v. Central P. R. R., 47 Cal. 549 (1874)(consequential damages to other property), and El Monte School Dist. v. Wilkins, 177 Cal. App.2d 47, 1 Cal. Rptr 715 (1969) (conflicting regulations affecting the property). (These decisions are both pre-Buellton decisions and thus may have been decided purely on technical grounds that cross-complaints were not available in special proceedings such as eminent domain.)

It would be quite helpful to clarify by statute just when a cross-complaint in eminent domain is available. The staff suggests that cross-complaints not be available to assert an interest in the property sought to be acquired or to raise damages to the property or to other property by severance. This should be done in the answer (interest) and at pretrial proceedings (value, severance). However, other claims related directly to the property, whether against the plaintiff or against third parties, should be capable of being raised by cross-complaint. The court should have adequate authority to determine these related

claims but should be able to sever them for trial if not closely connected. Section 1260.670 is a staff draft of the proposed cross-complaint provision. See also Section 1261.020 (severance for trial).

Sections 1260.710-1260.730 (commencement of proceedings). Sections 1260.710 and 1260.720 continue present rules that proceedings are commenced by filing a complaint and that the plaintiff should file a lis pendens upon commencement. The staff draft is more technically accurate than Section 1243 which it supersedes, however, since Section 1243 appears, as drawn, to state that proceedings are commenced upon service of summons and that the plaintiff must file a lis pendens. The case law has in effect rewritten Section 1243 so as to state the law as preserved in the staff draft. It should be noted that Sections 1260.710 and 1260.720 are comparable to Code of Civil Procedure Sections 411.10 and 409 relating to commencement of actions and filing lis pendens in civil actions generally. Section 1260.730 provides time limits for a defendant's response which are comparable to the time limits in civil actions generally.

Sections 1260.810-1260.830 (contesting the right to take). The basic scheme the Commission has previously approved for contesting the right to take is one in which objections are raised at one time and resolved prior to the valuation portion of the proceeding. The attached draft of this procedural scheme is described below.

The attached draft also makes two significant changes from existing law intended to make it somewhat easier for a defendant to prove his objection to the right to take. These changes are predicated on the observation that present law makes it nearly impossible to prove lack of public use. The specific changes discussed below are (1) reasonable probability is added as a test for lack of public use and (2) the burden of proof by a preponderance of the evidence is placed uniformly on the plaintiff.

As indicated above, objections to the right to take are raised in the defendant's answer. These defenses must be specifically alleged and supporting facts stated. If this is not done, or if it is done in an unclear manner, the plaintiff may demur to the answer. The defendant has the opportunity to amend his answer so that it is not demurrable or to make other changes, just as answers in civil actions generally may be amended.

Either party may set the objections for hearing, but trial of the issue of just compensation may not generally occur until the objections are disposed of. At hearing, the burden of proof is on the plaintiff (see below). All the normal rules of civil procedure relating to the gathering and production of evidence are applicable in such a hearing. At the hearing, the court determines whether there is a right to take the property. If it finds a right to take all the property, it so orders and the proceeding continues. The issue may, in an appropriate case, be reviewed upon writ and is appealable following judgment. If it finds a right to take only some of the property, it so orders and dismisses the proceeding as to the rest. Recoverable costs and disbursements are available to the defendant upon dismissal for lack of right to take. The order of dismissal may be appealed while the proceeding as to the rest continues. And, if the court finds no right to take any of the property, it dismisses the proceeding entirely. The order of dismissal is a final judgment and is appealable.

Section 1260.830 also provides that the court, in lieu of taking the action indicated above, "may make such order as is appropriate to dispose of an objection in a just manner." This authority is not intended to permit the court to create condemnation authority where none exists but rather to permit amendment of pleadings or the taking of similar corrective or remedial action where appropriate. This provision is borrowed from a similar provision contained in the preliminary draft of the Uniform Eminent Domain Act.

Burdens and presumptions. The law governing which parties must plead and prove different facts and the applicable presumptions governing the proof is sufficiently confused to warrant statutory clarification in the comprehensive statute.

As nearly as we have been able to discern, the following represents present law governing right to take issues:

(1) The plaintiff in all cases has the burden of pleading public use and necessity.

(2) The defendant may contest the public use of the property--whether or not the plaintiff has the benefit of a conclusive resolution on the issue of necessity--by pleading specific facts indicating fraud or abuse of discretion in that the plaintiff does not intend to put the property to a public use. The burden of proof is upon the defendant on this issue. The plaintiff is aided by a presumption of regularity of official action if the plaintiff is a public entity.

(3) The defendant may contest the public necessity of the project by a specific denial in his answer if the resolution of the condemnor is not conclusive on the issue of necessity. Where the issue of necessity is for judicial determination, the three aspects of necessity are treated disparately:

(a) Whether the proposed improvement is necessary is not subject to judicial review.

(b) Whether the property is necessary for the project, the burden of proof is on the plaintiff. Where the plaintiff is a public entity, the resolution of necessity (in cases where it is not conclusive) appears to create a presumption that shifts to the defendant the burden of going forward with the evidence. Where the plaintiff is a private person, it must prove the aspect of necessity by a preponderance of the evidence.

(c) Whether the project is located in a manner most compatible with greatest public good and least private injury, the burden of proof is on the defendant. The burden on the defendant is a difficult one since he must establish another location that is clearly better than that selected by the plaintiff.

The reasons for these varying burdens and presumptions are not clear. They appear from the few cases to have developed in a haphazard manner on an ad hoc basis. The staff proposes the following uniform set of burdens and presumptions:

(1) The defendant has the burden to raise any objections to the right to take or else they are waived.

(2) The plaintiff has the burden of proof on all objections to the right to take. The burden should be one of proof by a preponderance of the evidence.

(3) If the plaintiff is a public entity, it will be aided by presumptions. In certain cases, the resolution of necessity will be given conclusive effect; in others, merely rebuttable effect.

The justification for such a system is that a person ought not to have his property taken unless the taker can demonstrate to a court that it has the right to do so. As a practical matter, this amounts largely to a restriction on private condemnors only who are not aided by any presumption.

Exhibit II is a letter objecting to placing the burden of proof on the plaintiff with regard to the issue whether the project is located in the manner most compatible with the greatest public good and least private injury. The thrust of the letter is basically that public utilities and other private condemnors should be afforded a presumption of propriety that the property owner must rebut. The letter asserts that a burden on the condemnor may cause its acquisition costs to rise and may result in disparate decisions in neighboring counties.

In addition to these general rules on burdens, there will be provisions designed for special cases, e.g., future use, excess, more necessary, compatible. These provisions will specify their own burdens and presumptions.

Sections 1260.910-1260.990 (exchange of valuation data). Sometime ago, the Commission discussed the special procedure for exchange of valuation data provided by present Sections 1272.01 through 1272.09 of the Code of Civil Procedure. The Commission determined at that time to preserve these procedures but to permit any county to develop by court rule its own procedures and to have these supplant the general procedures if the Judicial Council determines that the county's procedures are an adequate substitute and serve the same purpose as the statutory procedures. At the same time, the Commission directed the staff to distribute a questionnaire to determine the usefulness and effectiveness of the present statutory procedures. The results of the questionnaire are summarized in Exhibit III (white) prepared by our consultant, Mr. Norman E. Matteoni. He concludes that no changes are needed, and we have accordingly incorporated Sections 1272.01 through 1272.09 without substantive change as Sections 1260.910 through 1260.990. We have, however, revised Section 1260.970 to authorize the various counties to develop their own special procedures.

Section 1261.010 (trial preference). The Commission previously determined to retain the present statutory trial preference (Section 1264) for eminent domain proceedings over all other civil actions. Section 1261.010 implements this decision.

Sections 1261.020-1261.030 (severance for trial of nonjury compensation issues). The Commission has previously approved the concept that preliminary issues relating to compensation for the property be determined by the court prior to jury trial. The staff draft of Sections 1261.020 and 1261.030

contemplates that determination of such issues may be sought by either party or by the court on its own motion at any time prior to trial of compensation. The court determination is not appealable until judgment in the proceeding has been rendered. A comparable, but slightly different, severance provision relating to right to take issues is set forth in Section 1260.810. The staff does not believe that this disparate treatment is necessary or desirable, and we suggest that one section be drafted that sets forth the general order in which issues will be tried but authorizes the court on motion of any party to vary this order on a showing of good cause. Such provision should also make clear the order for trial of all issues. Under the present scheme, it is still unclear where issues relating to title properly belong. For example, the plaintiff may assert an interest in the property it seeks to condemn or there may be a dispute among the defendants as to their respective interests. At present, the value of the property is first litigated and, then, parties who claim interests are left to resolve among themselves the existence of their interests so as to enable them to share in the award. If title claims were litigated beforehand, then only parties directly affected by the proceeding will need to become involved in it and to present evidence on value. If such a scheme is adopted, it might be advisable to have the answers of parties served among each other so that they will be aware early of any adverse claims. The Commission has, however, previously determined not to adopt such a requirement.

Separation and consolidation. Existing law governing separation or consolidation of parcels for trial is generally as follows:

(1) Parcels joined together in the complaint are generally tried together, absent a motion to separate.

(2) Parcels not joined together may be tried together upon court order to consolidate.

The standards governing consolidation and separation for trial are somewhat ambiguous. Code of Civil Procedure Section 1244(5) provides that the court may consolidate or separate for trial "to suit the convenience of the parties." Code of Civil Procedure Section 1048 provided (prior to 1971 amendment on Commission recommendation) that the court might consolidate or separate "whenever it can be done without prejudice to a substantial right." Under these criteria, the court has wide discretion, and its decision is not reversible unless it involves an abuse of discretion. See, e.g., County of San Luis Obispo v. Simas, 1 Cal. App. 175, 81 P. 972 (1905).

The 1971 amendment of Section 1048 provides more definite standards. Actions may be severed for trial "in furtherance of convenience or to avoid prejudice, or when separate trials will be conducive to expedition and economy." Actions may be consolidated for trial if they involve "a common question of law or fact."

Both Mr. Matteoni and the staff recommend that Section 1048 constitute the standard for separation and consolidation in eminent domain proceedings. Under this scheme, then, the plaintiff may join up to 10 tracts in a complaint, but each will be tried separately unless a motion to consolidate demonstrates that they involve common questions of law and fact. Different parcels or interests within each separate tract may also be severed for trial on the grounds of convenience, avoidance of prejudice, expedition, or economy.

This scheme will also preserve the rule stated in City of Los Angeles v. Klinker, 219 Cal. 198, 25 P.2d 826 (1933), that the grounds for consolidation and separation are entirely distinct from the grounds for joinder of tracts in a complaint and consolidation may be appropriate even where joinder might not be.

Adoption of this scheme will retain the rule that plaintiffs may consolidate proceedings to acquire different property for different purposes so long

as common questions of law or fact are involved. In City of Los Angeles v. Klinker, for example, the same plaintiff wanted portions of defendant's land for disparate uses. Consolidation of separate proceedings was allowed because the two portions of the land were interrelated in that severance damages to each depended in part upon the other. Thus, there were both common questions of fact and common questions of law involved. Similarly, in People v. Chevalier, 52 Cal.2d 299, 340 P.2d 598 (1959), disparate condemnors sought portions of defendant's property for aspects of the same public project. Since the same project was involved, the actions were interrelated, and consolidation was proper for purposes of evaluating the combined effects of the project on the remaining property. Thus, there were common questions of fact involved, and consolidation would be proper under Section 1048 of the Code of Civil Procedure. Our suggestion is implemented by Section 1260.110 (generally applicable rules of practice apply in eminent domain proceedings).

Section 1261.040 (consolidation where different plaintiffs seek property). Where several plaintiffs are trying to acquire the same property, the defendant obviously would like to avoid litigating several cases just as the plaintiffs would like to avoid subsequent disputes over who acquired the property. The staff believes that the simplest and most efficient way of resolving this problem is to allow any of the parties involved to move for consolidation of the proceedings. Upon consolidation, the court is to determine which of the uses is most necessary and which ones are compatible with it. The court will then allow the most necessary and compatible users to join together to complete the proceeding and will apportion the award among them for payment. The court will dismiss the proceeding as to the other plaintiffs. This scheme is set out in Section 1261.040.

Sections 1261.050 (limitations on expert witnesses) and 1261.060 (expert's fees). These sections reenact without change present Sections 1267 and 1266.2, respectively. We include them here for the purpose of soliciting comment on whether they should be adopted and, if so, in this form.

Section 1261.070 (order of proof and argument). This section implements a prior Commission decision to retain the present order of presentation of evidence and argument.

Sections 1261.110-1261.140 (post-trial proceedings). For the time being, we have placed in this article certain sections relating to procedure following the determination of the issue of compensation. It is our belief that, eventually, we should also integrate here the provisions relating to "post-judgment" possession (see Chapter 7) and interest on the award (see Chapter 5). Hence, for the time being, we seek review of only the policies indicated rather than the organization and drafting.

Section 1261.110 ("judgment" defined). This section merely continues a provision under existing law. Defining the term "judgment" in this manner is consistent with the Commission's prior decision to refer to the apportionment award as an order. It must be recognized, however, that substantial questions relating to apportionment may remain even after the judgment is entered.

Section 1261.120 (effect of judgment). This section, which specifies the effect of an eminent domain judgment, is intended to indicate the nature of an eminent domain proceeding. It says, in effect, that eminent domain is a quasi in rem proceeding and that the condemnor gets only the property interests of the persons it calls in and litigates against. Thus, failure to name and serve a person having an interest, or failure to file a lis pendens, may result in the plaintiff's failure to acquire all interests in the property it seeks.

Section 1261.130 (payment of judgment). This section is similar in content and purpose to present Section 1251 and the first portion of Section 1252. Certain changes are noted in the Comment to the section. The section itself is drafted in a tentative way pending further review of the possession prior to judgment and work in lieu of money provisions set forth elsewhere. All that we seek here is approval of the basic 30-day time limit with no exceptions.

Section 1261.140 (order of condemnation). This section is substantively similar to present Section 1253. We have changed the form of the order to require only a description of the property taken and the judgment authorizing its condemnation. The description will include both a physical description of the property and the interest acquired therein. Present Section 1253 also requires a statement of the purpose of the condemnation and, if possession has previously been taken by the condemnor, the date of such possession. This information seems unnecessary in the order. We have eliminated it and simply require the order to identify the judgment upon which the order is based. The only purpose of the section now is to make clear when title vests in the plaintiff. When this section is integrated with the right to possession provisions, we may wish to include here provisions relating to the right of the plaintiff to take possession.

Costs. The following excerpts from Condemnation Practice in California (Cal. Cont. Ed. Bar 1973) summarize the present rules regarding costs.

> A. [§1.8] Court Costs
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> The client should be told that court costs will usually be borne by the condemnor if there is a trial. It has been held that to require a condemnee to pay the costs necessarily incidental to trial of issues would reduce the just compensation awarded by a sum equal to that paid by him for those costs. Decoto School Dist. v. M. & S. Tile Co. (1964) 225 CA2d 310, 315, 37 CR 225, 229; Sacramento & San Joaquin Drainage Dist. v. Reed (1963) 217 CA2d 611, 31 CR 754. This rationale

is also the basis for requiring the condemnor to pay the condemnee's costs on appeal. See *People v International Tel. & Tel. Corp.* (1972) 26 CA3d 549, 103 CR 63; *Regents of Univ. of Cal. v Morris* (1970) 12 CA3d 679, 686, 90 CR 816, 821; §10.30 for full discussion. While many attorneys contend that recovery of costs is a constitutional right of the condemnee, CCP §1255 nevertheless gives the court discretion to allow or deny such recovery. Normally, only "ordinary and usual" costs will be allowed. *People v Bowman* (1959) 173 CA2d 416, 343 P2d 267.

* * * * *

If condemnation proceedings are abandoned, all reasonable costs and disbursements may be recovered by the defendant. CCP §1255a(c). See §8.33. These include attorney's and appraiser's fees.

The preceding statements about court costs can be misleading. The client should know specifically that items included within the term "costs" are limited to:

(1) Filing and process fees and costs of certifying relevant documents (Govt C §§26720-26749, 26820-26859);

(2) Notary fees (Govt C §8211);

(3) Deposition fees (CCP §1032a);

(4) Ordinary witness fees ($12 per day) (Govt C §68093; but see §3.8 on fees of expert witnesses, which are normally not recoverable);

(5) Jury fees ($5 per day per juror) (CCP §§196, 1032.5. See also CCP §631.5);

(6) Mileage fees for witnesses and jurors (CCP §196; Govt C §68093. See also CCP §631.5); and

(7) Fees for official reporting of testimony and proceedings (Govt C §69948; contra, Govt C §69953 (cost of transcript)).

The party seeking to recover costs must file a verified memorandum of costs and disbursements within 10 days after judgment (or within 30 days after judgment of dismissal on motion of the condemnor (abandonment)). CCP §§1033, 1255a(c). The court, on objection by the condemnor, may disallow what it considers to be unnecessary expenses. See *Downey v Gonzales* (1968) 262 CA2d 563, 69 CR 34, for discussion of allowable costs.

* * * * *

C. [§10.30] Costs on Appeal

Although the court has specific statutory authority to use its discretion in apportioning costs among the parties (CCP §1255), it has been consistently held that the constitutional requirement of "just compensation" for the condemnee means that the condemnor must bear the litigation costs of all parties in a condemnation action. See §1.8. This rule also applies to appeals from judgments in direct condemnation; condemnation cases are an exception to the ordinary rule that "costs on appeal are awarded to a prevailing party 'as an incident to the judgment on appeal.'" *People v International Tel. & Tel. Corp.* (1972) 26 CA3d 549, 550, 103 CR 63, 64; see Cal Rules of Ct 26(a).

In all condemnation cases, when "the condemning agency is the appellant, the property owner is entitled to costs on appeal even if the condemnor is the prevailing party." *People v International Tel. & Tel. Corp., supra; Sacramento & San Joaquin Drainage Dist. v Reed* (1963) 217 CA2d 611, 31 CR 754.

When the condemnee is the appellant and his appeal is successful, he is entitled to costs under Cal Rules of Ct 26(a). *Regents of Univ. of Cal. v Morris* (1970) 12 CA3d 679, 90 CR 816. However, when his appeal is unsuccessful, the law on his recovery of costs is not settled: this question has been described as a "somewhat murky corner of the law." *People v International Tel. & Tel. Corp.* (1972) 26 CA3d 549, 554, 103 CR 63, 66.

An unsuccessful condemnee-appellant's "entitlement to costs appears to depend on the issue underlying his claim on appeal." *People v International Tel. & Tel. Corp.* (1972) 26 CA3d 549, 551, 103 CR 63, 64. If the issue does not concern the condemnation award's amount, but does concern the trial court's application of legal principles, the condemnee apparently may recover costs. See *In re Redev. Plan for Bunker Hill* (1964) 61 C2d 21, 71, 37 CR 74, 106 (public use and necessity); *People v International Tel. & Tel. Corp., supra* (contiguity of adjacent parcels); *Decoto School Dist. v M. & S. Tile Co.* (1964) 225 CA2d 310, 315, 37 CR 225, 229 (propriety of condemnor's abandonment). If the condemnee unsuccessfully asserts that the award amount is inadequate, however, he may be denied recovery of costs. *Oakland v Pacific Coast Lumber & Mill Co.* (1916) 172 C 332, 156 P 468; see discussion in *People v International Tel. & Tel. Corp., supra.*

The rule that the condemnee is entitled to costs unless his appeal on the amount of damages is unsuccessful has three exceptions:

(1) The appeal is frivolous, without merit, or entirely unsuccessful. See *Oakland v Pacific Coast Lumber & Mill Co., supra; Stafford v Los Angeles* (1963) 219 CA2d 770, 33 CR 475. In this situation, the condemnee must bear the condemnor's costs as well as his own. Penalties may also be imposed for frivolous or otherwise improper appeals. Cal Rules of Ct 26(a); California Civil Appellate Practice §§7.10-7.16, 15.88-15.90 (Cal CEB 1966).

(2) The condemnor attempts to abandon a condemnation action, the condemnee successfully resists this attempt, and the condemnor is then forced to appeal to amend his original complaint. *Yolo Water & Power Co. v Edmands* (1922) 188 C 344, 205 P 445. The condemnee must also pay the condemnor's appellate costs in this unusual situation.

(3) Determination of title between rival claimants is the issue on appeal. See CCP §1246.1; *Housing Authority v Pirrone* (1945) 68 CA2d 30, 156 P2d 39.

The party awarded costs must claim them by filing and serving on the other party a verified memorandum of costs within 30 days after the remittitur is filed with the court clerk. CCP §1034. Items that may be claimed as costs on appeal are set forth in Cal Rules of Ct 26(c); the listing is exclusive.

When the condemnee obtains a new trial, the rule on recovery of costs is more stringent. He must be successful in increasing the award's amount if the condemnor is to bear the costs of the new trial. CCP §1254(k); *Los Angeles, Pasadena & Glendale Ry. v Rumpp* (1894) 104 C 20, 37 P 859; see *Consumers Holding Co. v Los Angeles* (1962) 208 CA2d 419, 25 CR 215. This rule may be challenged on constitutional grounds if the new trial is necessitated by the condemnor's misconduct.

From the foregoing discussion, the staff concludes that Section 1255 should be amended or repealed because it does not reflect the current state of the law. Beyond this, the staff solicits your direction as to whether we should attempt to codify the rules stated above or modify them in some constitutionally permissible manner.

Sections 1261.210-1261.250 (dismissal). The Commission has previously approved, at various times, awarding costs and fees to a condemnee where the proceeding is dismissed for any of the following reasons:

(1) The plaintiff failed to bring the action to trial within the statutorily required time limits.

(2) The plaintiff abandoned the proceeding.

(3) The plaintiff failed to deposit the award within statutorily prescribed time limits.

(4) The defendant defeated the right to take.

In addition, the Commission directed the staff to explore the adequacy of reimbursement where amendment of the complaint causes wasted money by the condemnee ("partial abandonment").

The staff draft gathers all these provisions together under an article headed "dismissal." The draft makes provisions for dismissal of a proceeding as to a superseded complaint, as well as for dismissal in all four of the situations listed above, or where the proceeding is dismissed for any other reason. Upon dismissal of a proceeding, the defendant is entitled to his reasonable costs and expenses; and, if he has been dispossessed, he is entitled to repossession and to any damages caused by possession. In the case of a partial abandonment or where the plaintiff amends the complaint, the defendant is entitled to only those expenses that he would not have incurred had the proceeding been commenced originally as it was finally concluded.

In addition, where the plaintiff voluntarily abandons the proceeding after entry of judgment, the staff draft eliminates one significant feature of present law: The defendants at present have the option to seek execution of the judgment or to recover costs and expenses. The staff draft deletes the option to have execution for several reasons. Where many defendants are involved, some may want to go one way, some another; the plaintiff is caught in the middle. And the opportunity for the defendant to force an acquisition limits the plaintiff's right to abandon, creating a situation where unwanted property is forced into public ownership. The most economically sound resolution is to make the defendants whole and leave the property in private ownership.

Respectfully submitted,

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EMINENT DOMAIN LAW

CHAPTER 8. PROCEDURE

EMINENT DOMAIN LAW

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Comment. This chapter contains rules of practice expressly applicable to eminent domain proceedings. However, unless otherwise provided in this chapter, the general rules of civil practice also apply to such proceedings. See Section 1260.110 and Comment thereto.

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Article 1. General Provisions

§ 1260.110. Rules of practice

1260.110. Except as otherwise provided in this title, the rules of practice that govern civil actions generally are the rules of practice for eminent domain proceedings.

Comment. Section 1260.110 provides the general rule that eminent domain proceedings are to be governed by the same general principles as other civil actions. See Felton Water Co. v. Superior Court, 82 Cal. App. 382, 256 P. 255 (1927). It supersedes the more restrictively worded provision of former Code of Civil Procedure Section 1256. The general object of Section 1260.110 is to give a trial by jury on the damage issue in every case if demanded, and when not demanded and on nonjury issues, a trial by the court and to conform the practice in these proceedings as nearly as practicable to that in civil actions. Cf. People v. Clausen, 248 Cal. App.2d 770, 57 Cal. Rptr. 227 (1967); People v. Buellton Dev. Co., 58 Cal. App.2d 178, 136 P.2d 793 (1943); Holman v. Toten, 54 Cal. App.2d 309, 128 P.2d 808 (1942). The advantage to having the practice in different proceedings in the courts as nearly uniform as possible is manifest. See Code Commissioners' Note to former Code of Civil Procedure Section 1256.

Generally speaking, the rules of practice that govern civil actions may be found in Part 2 (Sections 307-1062a) of this code. In addition, provisions

in other portions of the Code of Civil Procedure and many nonstatutory rules of procedure may be applicable to eminent domain proceedings if they are applicable to civil actions generally. The test of whether such general rules of practice are incorporated by Section 1260.110 is whether the Eminent Domain Law provides a different rule. Express rules specifically applicable to eminent domain proceedings may be found in this chapter. Some of these rules may be inconsistent with general rules of practice, and some may be consistent. As to rules not expressly covered in this chapter, the test whether a general rule of practice applies is whether it would be consistent with the provisions of this title. Cf. Harrington v. Superior Court, 194 Cal. 185, 228 P. 15 (1924); City of Santa Rosa v. Fountain Water Co., 138 Cal. 579, 71 P. 1123 (1903) (dissenting opinion). As a rule, the mere fact that a provision of the Code of Civil Procedure utilizes the term "action" rather than "proceeding," and the fact that a provision has not been applied to other special proceedings, does not preclude its applicability in eminent domain proceedings. The intent of Section 1260.110 is to include as many rules of practice as would be consistent with the efficient administration of the provisions of this title.

There follows below an indication of some of the major rules of civil practice that are incorporated by Section 1260.110.

Commencement of the proceeding. An eminent domain proceeding is commenced by the filing of a complaint. See Section 1260.710. See also Section

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411.10. This provision supersedes a portion of former Code of Civil Procedure Section 1243 which provided that eminent domain proceedings were commenced by filing a complaint and issuing summons. Section 1243 is repealed. Sections 411.10 and 1260.710 make clear that the filing of a complaint alone is sufficient to commence an eminent domain proceeding with its attendant consequences.

The filing of a complaint in the proper court confers subject matter jurisdiction on the court. See Harrington v. Superior Court, 194 Cal. 185, 228 P. 15 (1924); Bayle-Lacoste & Co. v. Superior Court, 46 Cal. App.2d 636, 116 P.2d 458 (1941). See also Section 1261.120 (effect of judgment in eminent domain).

Service of process. The Code of Civil Procedure provisions relating to the form of summons and manner of service apply to eminent domain proceedings. See Sections 1260.510 and 1260.530. See also Sections 412.10-412.30, 413.10 et seq. Failure of a party to respond to summons may result in a default judgment against him. See Sections 585 and 586.

Lis pendens. The plaintiff in an eminent domain proceeding should file a lis pendens after the proceeding is commenced in order to assure that it acquires full title to the property that it seeks. See Section 1260.720. See also Section 409. This provision supersedes a portion of former Code of Civil Procedure Section 1243 requiring the plaintiff to file a lis pendens after service of summons. Section 1243 is repealed. Sections 1260.720 and 409 et seq. make clear the obligation to file a lis pendens and the consequences of failure to do so.

Failure of the plaintiff to record a notice of the pendency of the proceeding pursuant to the provisions of Section 409 does not deprive the court of subject matter jurisdiction, but relieves innocent third parties from the operation of a judgment affecting the property in dispute. See Bensley v. Mountain Lake Water Co., 13 Cal. 306 (1859); Housing Authority v. Forbes, 51 Cal. App.2d 1, 124 P.2d 194 (1942). See also former Code Civ. Proc. § 1243 (duplicating the requirements of Section 409) and Roach v. Riverside Water Co., 74 Cal. 263, 15 P. 776 (1887)(Section 409 applicable to condemnation proceedings).

Change of venue. The change of venue provisions of the Code of Civil Procedure are generally applicable to eminent domain proceedings. See Section 1260.340 and Yolo Water & Power Co. v. Superior Court, 28 Cal. App. 589, 153 P. 394 (1915). But see City of Santa Rosa v. Fountain Water Co., 138 Cal. 579, 71 P. 1123, 1136 (1903).

Pleadings, amendments, time extensions. The contents of the complaint, demurrer, answer, and cross-complaint are specified in this chapter. See Sections 1260.610-1260.670. However, otherwise the rules governing pleadings and motions generally are applicable to eminent domain proceedings. Thus, the provisions of Code of Civil Procedure Section 1010 et seq., relating to notices and filing and service of papers, are fully applicable. Code of Civil Procedure Section 1054, relating to time extensions for filing pleadings, is applicable to pleadings in eminent domain. See Bottoms v. Superior Court, 82 Cal. App. 764, 256 P. 422 (1927). Likewise, Code of Civil Procedure Sections 432, 472, and 473, governing pleading amendments, are applicable. See Kern County Union High School v. McDonald, 180 Cal. 7, 179 P. 180 (1919).

Pretrial activities. Between the time of pleading and trial, there may be many activities specified in and controlled by the Code of Civil Procedure. Although Article 9 (commencing with Section 1260.910) provides a special procedure for exchange of valuation data, the parties may proceed with depositions and other discovery techniques. Section 1985 et seq. The judge may be subject to disqualification due to financial interest or prejudice. Sections 170 and 170.6. See John Heinlen Co. v. Superior Court, 17 Cal. App. 660, 121 P. 293 (1911); Kohn v. Superior Court, 239 Cal. App.2d 428, 48 Cal. Rptr. 785 (1966). Section 1261.010 provides a trial preference for eminent domain proceedings; however, Code of Civil Procedure Section 594, which provides generally for setting an action for trial, is not displaced. Sections 1260.810, 1261.020, and 1261.040 provide for severance and consolidation of causes and issues for trial but these sections merely supplement Section 1048. See City of Los Angeles v. Klinker, 219 Cal. 198, 25 P.2d 826 (1933); City of Oakland v. Darbee, 102 Cal. App.2d 493, 227 P.2d 909 (1951). And, of course, the court has the power to grant a continuance where necessary. See, e.g., Section 594a.

Jury or court trial. The provisions of the Code of Civil Procedure that specify a court determination of questions of law and jury determination of questions of fact, unless waived, are incorporated by this section. See Sections 309 and 592. See also California S.R.R. v. Southern Pac. R.R., 67 Cal. 59, 7 P. 123 (1885); Wilmington Canal & Reservoir Co. v. Dominguez, 50 Cal. 505 (1875); Vallejo & N.R.R. v. Reed Orchard Co., 169 Cal. 545, 147 P. 238 (1915). It should be noted, however, that the court in an eminent domain proceeding may try preliminary issues related to the right to take and foundational matters related to compensation as well as other incidental issues. Sections

1260.810 and 1261.020. Only trial of just compensation is left to the jury where demanded. See Cal. Const., Art. I, § 14; People v. Ricciardi, 23 Cal.2d 390, 144 P.2d 799 (1943).

During the trial, the court has all its normal and usual powers, including the authority to control the number of expert witnesses and to appoint its own expert. See Evid. Code §§ 352 and 730. See also Section 1261.050.

Upon trial of the eminent domain proceeding, judgment must be rendered and entered as in other civil actions. See, e.g., Sections 632 and 668. Fountain Water Co. v. Dougherty, 134 Cal. 376, 66 P. 316 (1901).

Attacking judgments. A judgment in an eminent domain proceeding may be attacked in the same manner as judgments in civil actions generally. Relief from default may be obtained. Section 473. Also, equitable relief from judgment on the basis of fraud may be available. See generally, 5 B. Witkin, California Procedure Attack on Judgment in Trial Court §§ 175-198 at 3744-3770 (2d ed. 1970). The applicable statute of limitations in such a case is prescribed in Code of Civil Procedure Section 338(4) as three years from discovery of the fraud.

Civil writs may be available to attack interlocutory orders and judgments of the court. See, e.g., 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); People v. Rodoni, 243 Cal. App.2d 771, 52 Cal. Rptr. 857 (1966).

The provisions regulating appeals in civil actions apply to eminent domain proceedings. See Sections 901-923; San Francisco Unified School Dist.

v. Hong Mow, 123 Cal. App.2d 668, 267 P.2d 349 (1954).

Dismissal. Some specific grounds for dismissal are listed in Article 12 of this chapter. Moreover, dismissal may occur where there is a finding of no right to take pursuant to Section 1260.830. However, these grounds should not be construed to be the exclusive grounds. Certain provisions of the Code of Civil Procedure relating to dismissal are also applicable in eminent domain proceedings. E.g., Section 581a (failure to timely prosecute); Section 583 (failure to timely bring to trial). See Bayle-Lacoste & Co. v. Superior Court, 46 Cal. App.2d 636, 116 P.2d 468 (1941); City of San Jose v. Wilcox, 62 Cal. App.2d 224, 144 P.2d 636 (1944); Dresser v. Superior Court, 231 Cal. App.2d 68, 41 Cal. Rptr. 473 (1964); Harrington v. Superior Court, 194 Cal. 185, 228 P. 15 (1924).

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Article 2. Resolution of Necessity

§ 1260.210. "Governing body" defined

1260.210. As used in this article, "governing body" means:

(a) In the case of a taking by a local public entity, the governing body of the local public entity.

(b) In the case of a taking by the Sacramento and San Joaquin Drainage District, the State Reclamation Board.

(c) In the case of a taking by the State Public Works Board pursuant to the Property Acquisition Law, Part 11 (commencing with Section 15850) of Division 3 of Title 2 of the Government Code, the State Public Works Board.

(d) In the case of a taking by the Department of Public Works (other than a taking pursuant to Section 30100 of the Streets and Highways Code), the California Highway Commission.

(e) In the case of a taking by the Department of Public Works pursuant to Section 30100 of the Streets and Highways Code, the California Toll Bridge Authority.

(f) In the case of a taking by the Department of Water Resources, the California Water Commission.

(g) In the case of a taking for the University of California, the Regents of the University of California.

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Comment. Section 1260.210 defines the term "governing body" as used in this article.

Subdivision (a). A local public entity is any public entity other than the state. Section 1230.040. The governing bodies of such entities are specified by statute. E.g., Govt. Code §§ 23005 (board of supervisors governs county) and 34000 (legislative body of municipal corporation is board of trustees, city council, or other governing body).

Subdivision (b). The San Joaquin Drainage District, while by definition a local public entity (Section 1230.040), is comparable in some ways to an agency of the state. Its work is in the interest of the entire state. See San Joaquin Drainage Dist. v. Riley, 199 Cal. 668, 251 P. 207 (1926). It is partially funded by the state. See Water Code § 8527. Its management and control are vested in a state agency--the Reclamation Board--which is its governing body. See Water Code § 8502.

Subdivision (c). Takings for all general state purposes (other than state highways, toll bridges, state water projects, and the University of California) are made by the State Public Works Board under the Property

Acquisition Law (Govt. Code § 15850 et seq.). Under former law, there may have been cases where the Department of General Services or other state agencies could condemn on behalf of the state under authority formerly found in Government Code Section 14661 or other provisions (basically where an appropriation was made not subject to the Property Acquisition Law), but this authority is not continued. See Govt. Code § 15855 and Comment thereto. It should be noted that the Public Works Board may condemn property only with the approval of the agency concerned. Govt. Code § 15853.

Subdivision (d). Takings for state highway purposes are accomplished on behalf of and in the name of the state by the Department of Public Works. Sts. & Hwys. Code § 102. The governing body for the Department of Public Works in such takings is the California Highway Commission. This continues a provision formerly found in Streets and Highways Code Section 102.

Subdivision (e). Takings for toll bridges and other transportation facilities designated by Streets and Highways Code Section 30100 are accomplished on behalf and in the name of the state by the Department of Public Works. Sts. & Hwys. Code § 30400. The governing body for the Department of Public Works in such takings is the California Toll Bridge Authority. Sts. & Hwys. Code § 30400. See also former Section 30404.

Subdivision (f). Takings for state water and dam purposes and for the Central Valley Project are accomplished on behalf and in the name of the state by the Department of Water Resources. Water Code §§ 250 and 11575. The governing body of the Department of Water Resources is the California Water Commission. This supersedes provisions formerly found in Sections 250 and 11581 of the Water Code that required a declaration of necessity by the Director of Water Resources with the concurrence of the Water Commission.

Subdivision (g). The Regents of the University of California, while comparable to an agency of the state, is a separate corporation administering the public trust known as the University of California. The Regents is authorized to condemn property for the university in its own name and is, therefore, the governing body of the university for purposes of Section 1260.220. See Cal. Const., Art. IX, § 9 and Educ. Code § 23151. Cf. Educ. Code §§ 23201 and 23204.

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§ 1260.220. Resolution of necessity required

1260.220. A public entity may not commence an eminent domain proceeding until its governing body has adopted a resolution of necessity that meets the requirements of this article.

Comment. Before a public entity begins condemnation proceedings, its governing body must adopt a resolution of necessity that meets the requirements of Sections 1260.230 and 1260.240. See Section 1240.040 and Comment thereto.

It should be noted that failure to commence an eminent domain proceeding within six months after adoption of a resolution of necessity constitutes a cause of action for inverse condemnation. Section [CCP § 1243.1].

Matters Noted for Future Consideration:

1. Problems with amending the resolution of necessity when complaint is amended.
2. Availability of declaratory relief and its effect on the requirement of a resolution of necessity.
3. Acquisition of interests in inverse condemnation proceeding.

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§ 1260.230. Contents of resolution

1260.230. The resolution of necessity shall contain all of the following:

(a) A general description of the proposed project with a reference to the specific statute or statutes authorizing the public entity to acquire property for such project.

(b) A description of the property to be acquired for the proposed project and its use in the proposed project.

(c) A declaration that the governing body of the public entity has found and determined each of the following:

(1) The public interest and necessity require the proposed project.

(2) The proposed project is planned or located in the manner that will be most compatible with the greatest public good and the least private injury.

(3) The property described in the resolution is necessary for the proposed project.

Comment. Section 1260.230 prescribes the contents of the resolution of necessity by a public entity. The resolution is an administrative determination that the statutory prerequisites for taking particular property have been met. Section 1260.230 supersedes various provisions that required a resolution of necessity by different public entities.

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Subdivision (a). The resolution of necessity must contain a general description of the proposed project. A statement, for example, that the project is an "elementary school and grounds" or "right of way for a freeway" would satisfy this requirement.

The resolution also must make reference to the specific statute or statutes authorizing the exercise of the power of eminent domain for the project. Only persons authorized by statute to condemn for a particular public use can condemn for that use. Section 1240.020. Such authorizing statutes may be of several types. The state, the University of California, cities, counties, and school districts, for example, may condemn any property necessary to carry out any of their powers or functions. See, e.g., Educ. Code §§ 1047 (school districts), 23151 (Regents of the University of California); Govt. Code §§ 15853 (Public Works Board), 25350.5 (counties), 37350.5 (cities). Many special districts have similar broad authority, but some may condemn only for limited or special purposes. Additionally, if the condemnor is acquiring property under authority of certain general public uses, it must specify that authority. E.g., Sections 1240.220 (future use), 1240.320 and 1240.330 (substitute), 1240.420 (excess), 1240.510 (compatible use), 1240.610 (more necessary use). The purpose of this subdivision is to enable a defendant better to determine whether the taking of his property is authorized.

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Subdivision (b). The resolution of necessity must contain a description of the property, right, or interest to be taken. See Section 1230.070 ("property" defined). The description must be sufficiently precise to enable the owner to determine the physical extent and the interests sought. The resolution must also indicate in what way the property will be used for the proposed project.

Subdivision (c). The resolution of necessity must contain a declaration that the governing body of the public entity has found and determined the existence of each of the three elements of public necessity required by Section 1240.030 to be established for a taking. See Section 1240.030 and Comment thereto. This provision is modeled after similar provisions formerly applicable to various condemnors. See, e.g., former Code Civ. Proc. § 1241(2), former Water Code § 8595, former Sts. & Hwys. Code § 25052.

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§ 1260.240. Adoption of resolution

1260.240. Except as otherwise provided by statute, the resolution must be adopted by a vote of a majority of members of the governing body of the public entity.

Comment. Section 1260.240 states the general rule that, to be valid, the resolution of necessity must be adopted by a majority of all of the members of the governing body of the entity, not merely a majority of those present at the time of adoption. In the past, it was not clear whether a majority of those present could authorize condemnation. Cf. 52 Ops. Cal. Atty. Gen. 56 (1969)(majority of those present needed for city ordinance).

Section 1260.240 continues the majority vote requirement for takings by the state. See, e.g., former Govt. Code § 15855 and Sts. & Hwys. Code § 102. Section 1260.240 also continues the majority vote requirement formerly applicable to most takings by local public entities under numerous specific provisions superseded by Section 1260.240. Section 1260.240 supersedes the provision of former Code of Civil Procedure Section 1241(2) that made the resolutions of certain local public entities conclusive on necessity if the resolution was adopted by a two-thirds vote.

The introductory proviso of Section 1260.240 recognizes that differing vote requirements may be imposed by special statute. See, e.g., Educ. Code § 23151 (two-thirds vote required for taking by Regents of the University of California).

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§ 1260.250. Effect of resolution

1260.250. (a) Except as otherwise provided by statute, a resolution of necessity adopted by the governing body of the public entity pursuant to this article conclusively establishes the matters referred to in Section 1240.030.

(b) If the taking is by a local public entity and the property described in the resolution is not located entirely within the boundaries of the local public entity, the resolution of necessity creates a presumption that the matters referred to in Section 1240.030 are true. This presumption is a presumption affecting the burden of producing evidence.

(c) For the purposes of subdivision (b), a taking by the State Reclamation Board for the Sacramento and San Joaquin Drainage District is not a taking by a local public entity.

Comment. Section 1260.250 provides a uniform rule governing the effect to be given to a resolution of necessity. It continues the conclusive effect given to the resolution in state takings. See, e.g., former Govt. Code § 15855. It supersedes numerous sections of various codes that afforded disparate treatment to the resolution of necessity of various types of local public entities and generalizes the conclusive effect given the resolution of certain local public entities by former Code of Civil Procedure Section 1241(2).

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Subdivision (a). Under Section 1260.250, a valid resolution of necessity conclusively establishes the matters of public necessity specified in Section 1240.030 (1) in all takings by local public entities where the property taken is entirely within the boundaries of the condemning entity and (2) in all takings by state entities regardless of the location of the property taken. The conclusive effect afforded the resolution of necessity is constitutionally permissible. Rindge Co. v. County of Los Angeles, 262 U.S. 700 (1923), aff'g County of Los Angeles v. Rindge Co., 53 Cal. App. 166, 200 P. 27 (1921); City of Oakland v. Parker, 70 Cal. App. 295, 233 P. 68 (1924). Among the matters encompassed in the conclusive resolution are the extent of and interest in necessary property. See Section 1260.230 and Comment thereto.

A valid resolution precludes judicial review of the matters specified in Section 1240.030 even where it is alleged such matters were determined by "fraud, bad faith, or abuse of discretion." See People v. Chevalier, 52 Cal.2d 299, 340 P.2d 598 (1959). However, the resolution is conclusive only on the matters specified in Section 1240.030; it does not affect in any way the right of a condemnee to challenge a taking on the ground that the project is not an authorized public use or on the ground that the condemnor does not intend to put the property to its declared public purpose. See Sections 1240.010 and 1260.650. Nor does the conclusive presumption granted the resolution on matters of necessity affect the right of a defendant to contest the right to take his property on specific statutory grounds provided in the Eminent Domain

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Law. See Sections 1240.220 (future use), 1240.340 (substitute), 1240.420 (excess), 1240.510 (compatible), and 1240.610 (more necessary). Likewise, the condemnor must demonstrate its compliance with any other requirements and regulations governing the institution of public projects. Cf. Comment to Section 1240.030.

The initial proviso of Section 1260.250 recognizes that there may be exceptions to the uniform conclusive effect given the resolution of necessity. One important exception is in subdivision (b)(extraterritorial acquisitions by local public entity). As to the effect of the resolution of necessity where the taking is by a city or county for open space, see Government Code Section 6953.

Subdivision (b). Subdivision (b) provides that a resolution of necessity of a local public entity creates a presumption affecting the burden of producing evidence with regard to public necessity if the property described in the resolution is not located entirely within the boundaries of the local public entity. See Evid. Code § 604.

Subdivision (b) continues the portion of former Code of Civil Procedure Section 1241(2) that denied conclusive effect of a resolution to property lying outside the territorial limits of certain local public entities. Under that provision, necessity and proper location were justiciable questions in the condemnation proceeding. See City of Hawthorne v. Peebles, 166 Cal. App.2d 758,333 P.2d 442 (1959); City of Carlsbad v. Wight, 221 Cal. App.2d 756, 34 Cal. Rptr. 820 (1963); City of Los Angeles v. Keck, 14 Cal. App.3d

920, 92 Cal. Rptr. 599 (1971). Subdivision (b) extends this limition on the effect of the resolution of necessity to all local public entities condemning property outside their territorial jurisdiction and also makes the question whether the proposed project is necessary a justiciable question in such a condemnation proceeding.

Subdivision (c). The limitation contained in subdivision (b) is not applicable to acquisitions for the Sacramento and San Joaquin Drainage District. Acquisitions for this district are undertaken by the State Reclamation Board. See Water Code § 8590 and Section 1260.210 and Comment thereto. The conclusive effect given resolutions of the board by former Water Code Section 8595 is continued under subdivisions (a) and (c).

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Article 3. Jurisdiction and Venue

§ 1260.310. Jurisdiction of court; Public Utilities Commission jurisdiction preserved

1260.310. (a) Except as otherwise provided in subdivision (b) of this section and in Chapter 9 (commencing with Section 1265.010) of this title, all eminent domain proceedings shall be commenced and prosecuted in the superior court.

(b) Nothing in this title affects any other statute granting jurisdiction over any issue in eminent domain proceedings to the Public Utilities Commission.

Comment. Section 1260.310 declares the basic rule that eminent domain proceedings are to be conducted in the superior court. This declaration continues prior law. See former Code Civ. Proc. § 1243. For demurrer based on lack of jurisdiction, see Section 1260.630.

However, the jurisdiction of the superior court is not exclusive. The issue of just compensation may be submitted to arbitration. See Chapter 9. Moreover, Section 1260.310 preserves such jurisdiction as the Public Utilities Commission may have over issues in eminent domain proceedings. For example, the Public Utilities Commission has concurrent jurisdiction over certain eminent domain proceedings. See, e.g., Pub. Util. Code § 1401 et seq. (local public entities may petition Public Utilities Commission to acquire public utility property by eminent domain) and Pub. Util. Code § 1351 (Public Utilities Commission may ascertain value of public utility property in such proceeding). Cf. Cal. Const., Art. XII, § 23a (legislative power to provide

Public Utility Commission jurisdiction to ascertain just compensation). Section 1260.310 supersedes the portion of former Section 1243 of the Code of Civil Procedure which provided that the jurisdiction of the Public Utilities Commission to ascertain just compensation was not affected by eminent domain law.

The Public Utilities Commission has exclusive jurisdiction over railroad crossings. See, e.g., Pub. Util. Code § 1201 et seq. and Northwestern Pac. R.R. v. Superior Court, 34 Cal.2d 454, 211 P.2d 571 (1949)(Public Utilities Commission jurisdiction over crossings extends to eminent domain proceedings in superior court); cf. Cal. Const., Art. XII, § 23 (legislative power to provide Public Utilites Commission control of public utilities) and Pub. Util. Code § 7537 (farm and private crossings). In addition, there may be specific grants of jurisdiction to the Public Utilities Commission over certain issues involved in particular eminent domain acquisitions. See, e.g., Pub. Util. Code §§ 861 (Public Utilities Commission jurisdiction over controversies concerning relocation of utility improvements), 30503 (Public Utilities Commission review of acquisition of railroad property by Southern California Rapid Transit District), and 102243 (Public Utllities Commission jurisdiction in proceedings of Sacramento Regional Transit District). Whether the Public Utilities Commission has jurisdiction over the place and manner of relocation of utility property generally is not clear. Compare Pub. Util. Code § 851 (Public Utility Commission approval required before utility property may be disposed of) with People v. City of Fresno, 254 Cal. App.2d 76, 62

Cal. Rptr. 79 (1967)(Section 851 not applicable in condemnation of public utility property).

The superior court sitting in an eminent domain proceeding has the usual and ordinary judicial powers to dispose of all issues necessarily involved in or incident to the proceeding. See City of Los Angeles v. Pomeroy, 124 Cal. 597, 609, 57 P. 585, ___ (1899), dismissed 188 U.S. 314 ( ); Felton Water Co. v. Superior Court, 82 Cal. App. 382, 388, 256 P. 255, ___ (1927).

In addition to adjudicating the right to take and the amount of just compensation (subject to jury trial of facts), for example, the court may also decide any subsidiary issues such as liability for property taxes, the rights of parties under an executory sale contract, damage to other property of parties, claims of adverse interests in the property, and the like. See, e.g., City of San Gabriel v. Pacific Elec. R.R., 129 Cal. App. 460, 18 P.2d 996 (1933), and City of Los Angeles v. Darms, 92 Cal. App. 501, 268 P. 487 (1928)(title to condemned property). See also Sacramento & San Joaquin Drainage Dist. v. Truslow, 125 Cal. App.2d 478, 499, 270 P.2d 928, ___, 271 P.2d 930, ___ (1954)(protection of lienholders). See also City of Los Angeles v. Dawson, 139 Cal. App. 480, 34 P.2d 236 (1934)(construing assignment of right and interest in award). Compare former Code Civ. Proc. §§ 1247, 1247a, 1264.9 (jurisdiction of court to determine various incidental issues). See also Section 1260.670 (cross-complaints). Contrast California Pac. R.R. v. Central Pac. R.R., 47 Cal. 549, 553-554 (1874), and Yolo Water & Power Co. v. Edmonds, 50 Cal. App. 444, 450, 195 P. 463, ___ (1920)(denying power of court to determine damage to other property of parties). Cf. Section 1260.430 and

City of Alhambra v. Jacob Bean Realty Co., 138 Cal. App. 251, 31 P.2d 1052 (1934)(denying right of third party alleging consequential damages to intervene).

The fact that a particular issue is not specified under this code does not preclude the court from deciding the issue, provided it is reasonably related to the parties or property involved in the proceeding. Thus, a court has jurisdiction to determine causes of action raised by cross-complaint pursuant to Section 1260.670.

Moreover, the court has inherent power to do any and all acts necessary to the full and effective exercise of its jurisdiction. See Sections 128 and 187; see also 1 B. Witkin, California Procedure Courts §§ 116-118 (2d ed. 1970). This general power to render and enforce judgments and orders includes the specific power to issue writs of possession or assistance. Thus, a plaintiff who has obtained an order for possession is entitled to enforcement of the order as a matter of right. See Section 1255.410 and Comment thereto. See also Taylor, Possession Prior to Final Judgment in California Condemnation Procedure, 7 Santa Clara Lawyer 37, 85-86 (1966), reprinted in 8 Cal. L. Revision Comm'n Reports 1171, 1221-1222 (1967).

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§ 1260.320. Place of commencement

1260.320. (a) Except as provided in subdivision (b), an eminent domain proceeding shall be commenced in the county in which the property sought to be taken is located.

(b) When property sought to be taken is situated in more than one county, the plaintiff may commence the proceeding in any one of such counties.

Comment. Section 1260.320 specifies where an eminent domain proceeding must be brought. Because eminent domain is basically a proceeding quasi in rem, failure to bring the proceeding in the proper county is a failure to vest the necessary jurisdiction in the court. See Sections 1261.120 and 1260.630 and Comments thereto. For provisions authorizing transfer of the proceedings for trial, see Section 1260.340. For demurrer on ground of lack of jurisdiction, see Section 1260.630.

Section 1260.320 does not authorize joinder in a complaint of more property than would be allowed under Section 1260.620. Nor does it authorize a condemnor to condemn property beyond its territorial limits. See Section 1240.050. For provisons requiring separation of property in a complaint for trial, see Section 1260.620.

Section 1260.320 recodifies the substance of the venue provisions of former Code of Civil Procedure Section 1243.

Subdivision (a). Generally speaking, the only place an eminent domain proceeding may be brought is the county in which the property sought to be acquired lies.

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Subdivision (b). Where property straddles a county line, the plaintiff has the option to bring suit on either side of the line, and the county so chosen is the proper place of trial for all the property even though a portion is not located in the county. See Section 1260.330. Under former law, where property situated in more than one county was sought to be acquired, the plaintiff could elect to bring separate proceedings relating to separate portions of the property in the county where such portion was situated. See former Code Civ. Proc. § 1243. Subdivision (b), however, requires the plaintiff in this situation to make an election and bring the proceeding in one of the counties in which the tract is situated. In certain situations, relief from the plaintiff's choice of county may be obtained pursuant to Section 1260.340. See Section 1260.340 and Comment thereto.

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§ 1260.330. Place of trial

1260.330. (a) Except as provided in subdivision (b), the county in which an eminent domain proceeding is commenced pursuant to Section 1260.320 is the proper county for trial of the proceeding.

(b) Where the court changes the place of trial pursuant to Section 1260.340, the county to which the proceeding is transferred is the proper county for trial of the proceeding.

Comment. Section 1260.330 continues the substance of a portion of former Code of Civil Procedure Section 1243.

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§ 1260.340. Change of place of trial generally

1260.340. The provisions of the Code of Civil Procedure for the change of place of trial of actions apply to eminent domain proceedings.

Comment. Section 1260.340 makes clear that the rules of practice for civil actions generally govern venue change in eminent domain proceedings. This continues prior law. See former Code Civ. Proc. § 1243 and Yolo Water & Power Co. v. Superior Court, 28 Cal. App. 589, 153 P. 394 (1915). See also Section 1260.110. Contrast City of Santa Rosa v. Fountain Water Co., 138 Cal. 579, ___, 71 P. 1123, 1136 (1903).

Included in the provisions incorporated by Section 1260.340 is Section 394 of this code. Under the applicable portions of Section 394, if a local public entity commences an eminent domain proceeding in a county in which it is situated against a defendant who is not situated, doing business, or residing in such county, either party may move to have the proceeding transferred for trial to another county. Alternatively, if a local public entity commences an eminent domain proceeding in a county in which it is not situated, either the entity or any defendant who is not situated, doing business, or residing in such county may move to have the proceeding transferred for trial to another county. Upon such motion, the court is obligated to transfer the trial to as nearly a neutral county as possible. The county to which the proceeding may be transferred includes the county (1) upon which the parties agree, (2) in which, as nearly as possible, no party is situated, doing

business, or residing, or (3) in which, as nearly as possible, all parties are situated, doing business, or residing. Where the property is located in a neutral county to begin with, the court need not transfer the proceeding even though a motion to transfer would be authorized under Section 394. See City of Stockton v. Wilson, 79 Cal. App. 422, 249 P. 835 (1926). See also City of Los Angeles v. Pacific Tel. & Tel. Co., 164 Cal. App.2d 253, 330 P.2d 888 (1958).

Section 394 applies to proceedings commenced by any public entity other than the state. See Section 394(3). See also People v. Spring Valley Co., 109 Cal. App.2d 656, 241 P.2d 1069 (1952)(Section 394 not applicable in action by state); Riverside etc. Dist. v. Joseph W. Wolfskill Co., 147 Cal. App.2d 714, 306 P.2d 22 (1957)(Section 394 not applicable in action by state agency); Georgetown Divide Pub. Util. Dist. v. Bacchi, 204 Cal. App.2d 194, 22 Cal. Rptr.27 (1962)(Section 394 applicable in action by special district having status of local public entity).

Section 394 applies to any defendant, including unincorporated associations, and regardless of the interest the defendant claims in the property sought to be taken. See Georgetown Divide Pub. Util. Dist. v. Bacchi, supra (joint owners may take advantage of Section 394); City of Oakland v. Darbee, 102 Cal. App.2d 493, 227 P.2d 909 (1951)(separate owners may take advantage of Section 394); City of Long Beach v. Lakewood Park, 118 Cal. App.2d 596, 258 P.2d 538 (1953)(owners of divided interests may take advantage of Section 394). The mere fact that the proceeding is a "mixed action," one in which only some of the defendants fall within the terms of this section, does not

preclude its applicability. See 1 J. Chadbourn, H. Grossman, A. Van Alstyne, California Pleading § 367 (1961). See also People v. Ocean Shore R.R., 24 Cal. App.2d 420, 75 P.2d 560 (1938)(relating to motion for change of venue by only some defendants on grounds of impossibility of impartial trial).

The term "doing business" as used in Section 394 is intended to mean conducting some substantial activity, e.g., holding one's self out to others as engaged in the selling of goods or services. See City of Los Angeles v. Pacific Tel. & Tel. Co., supra. Ownership of property alone does not amount to doing business.

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Article 4. Parties

§ 1260.410. Identification of parties

1260.410. (a) A person seeking to take property by eminent domain shall be known as the plaintiff.

(b) A person from whom property is sought to be taken by eminent domain shall be known as the defendant.

Comment. Although an eminent domain proceeding is a special proceeding, the terms "plaintiff" and "defendant" are utilized throughout the Eminent Domain Law. This usage is consistent with the generally judicial nature of eminent domain proceedings in California as well as with past practice and custom. See former Code Civ. Proc. § 1244(1), (2)(parties styled "plaintiff" and "defendant").

Generally, the parties to an action can only be those having an interest in the property described in the complaint. San Joaquin etc. Irr. Co. v. Stevinson, 164 Cal. 221, 128 P. 924 (1912); cf. former Code Civ. Proc. §§ 1245.3, 1246, 1247.2.

The plaintiff must be a person authorized by statute to exercise the power of eminent domain to acquire the property sought for the purpose listed in the complaint. See Section 1240.020. A proceeding may not be maintained in the name of any other person. See People v. Superior Court, 10 Cal.2d 288, 73 P.2d 1221 (1937); City of Sierra Madre v. Superior Court, 191 Cal.

App.2d 587, 12 Cal. Rptr. 836 (1961); Black Rock etc. Dist. v. Summit etc. Co., 56 Cal. App.2d 513, 133 P.2d 58 (1943). As to joinder of the owner of "necessary property" in a proceeding to acquire "substitute property," see Section 1243.340.

§ 1260.420. Named defendants

1260.420. (a) The plaintiff shall name as defendants those persons who appear of record or are known to it to have or claim a right or interest in the property described in the complaint.

(b) If a person described in subdivision (a) is dead or is believed by the plaintiff to be dead, the plaintiff shall name as defendant the duly qualified and acting administrator of the estate of the claimant; if the plaintiff knows of no duly qualified and acting administrator and avers this fact in an affidavit filed with the complaint, the plaintiff may name as defendants the claimant, the heirs and devisees of the claimant, and all other persons claiming by, through, or under him.

(c) The plaintiff may name as defendants all persons unknown claiming any right or interest in the property described in the complaint.

Comment. Section 1260.420 lists the persons who may or must be named as defendants in the complaint. A defendant is a person from whom property is sought to be acquired. Section 1260.410. "Person" includes business associations and public entities as well as individuals. See Section 1230.060. The naming of defendants is basically within the control of the plaintiff. People v. Shasta Pipe etc. Co., 264 Cal. App.2d 520, 537, 70 Cal. Rptr. 618, (1964). However, the naming of defendants controls their service which in turn controls the jursidiction of the court over persons. See Section 1260.520

and Comment thereto. Failure to join a proper party to the proceeding leaves his interest unimpaired. Wilson v. Beville, 47 Cal.2d 852, 306 P.2d 789 (1957). A person not named as defendant who claims an interest in the property sought to be acquired may participate in the proceeding. Section 1260.430.

Subdivision (a). Subdivision (a) is an elaboration of the requirement formerly found in subdivision (2) of Section 1244 of the Code of Civil Procedure that the names of all owners and claimants of the property must be listed in the complaint. The language of subdivision (a) has been adapted from former Code of Civil Procedure Section 1245.3.

Under subdivision (a), occupants of the property sought to be acquired who claim a possessory interest in the property must be named as defendants.

A plaintiff may also use the device provided in Code of Civil Procedure Section 474 of fictitiously naming defendants who claim an interest but whose names are not known. See Bayle-Lacoste & Co. v. Superior Court, 46 Cal. App.2d 636, 116 P.2d 458 (1941). When the fictitiously named party's true name is discovered, the pleading must be amended accordingly. Alameda County v. Crocker, 125 Cal. 101, 57 P. 766 (1899). For a related provision, see subdivision (c) of this section, permitting the plaintiff to name persons unknown.

Subdivision (b). Subdivision (b) specifies the requirements for naming defendants where one of the claimants to or owners of the property is deceased. The basic rule is that the personal representative of the decedent or his estate must be named as defendant in the decedent's place. This was

formerly the rule under Probate Code Section 573. See Monterey County v. Cushing, 83 Cal. 507, 23 P. 700 (1890)(decided under former Code of Civil Procedure Section 1582, predecessor of Probate Code Section 573). Subdivision (b) once more codifies this rule.

Where there is no personal representative duly qualified and acting known to the plaintiff, it need not await the appointment and qualification of one, but may proceed with the suit naming the claimant believed to be dead and his heirs and devisees. It is sufficient to name them in the following manner: "the heirs and devisees of ..... (naming the deceased claimant), deceased, and all persons claiming by, through, or under said decedent." Subdivision (b) is a condensation of language formerly found in Section 1245.3 of the Code of Civil Procedure.

Subdivision (c). Subdivision (c) continues provisions formerly found in Code of Civil Procedure Sections 1244(2) and 1245.3, enabling the plaintiff to name unknown holders of interests in the property. It is sufficient to name them in the following manner: "all persons unknown, claiming any right or interest in the property." By following this procedure and by following the methods of service provided in Section 1260.530, the plaintiff can assure that the eminent domain judgment will be conclusive against all persons. Cf. Section 1261.120.

§ 1260.430. Third parties

1260.430. Any person who claims a legal or equitable right or interest in the property described in the complaint may appear in the proceeding as if named as a defendant in the complaint.

Comment. Section 1260.430 supersedes portions of former Code of Civil Procedure Sections 1245.3 and 1246 relating to the right of interested persons to participate in an eminent domain proceeding. Section 1260.430 is intended to provide a simple method for admission of an interested person. Cf. San Bernardino etc. Water Dist. v. Gage Canal Co., 226 Cal. App.2d 206, 37 Cal. Rptr. 856 (1964). See also Section 1260.730 (time to respond).

Persons required to participate. An eminent domain judgment is generally binding only on persons named in the complaint and adequately served. See Section 1261.120. A person who has an interest in the property but who is not named and served may, but need not, participate. However, if his interest arose after the plaintiff filed a lis pendens, the judgment will bind him. See Drinkhouse v. Spring Valley Water Works, 87 Cal. 253, 25 P. 420 (1890).

Persons permitted to participate. Generally, persons not named in the complaint who claim an interest in the property may enter and participate. See Stratford Irr. Dist. v. Empire Water Co., 44 Cal. App.2d 61, 111 P.2d 957 (1957)(persons not defendants who claim any interest may appear and defend). See also Harrington v. Superior Court, 194 Cal. 185, 228 P. 15 (1924)(right

of interested persons to participate in eminent domain proceeding is characteristic of action in rem). A person who seeks to acquire the same property does not necessarily have an interest in it and hence may not participate. His proper remedy, if he has commenced another proceeding, is to move to consolidate the proceedings. See Section 1261.040.

Section 1260.430 does not authorize the admission of a person who does not show that he has some interest in the property. San Joaquin Irr. Co. v. Stevinson, 164 Cal. 221, 128 P. 924 (1912). An answer filed by such a person, if it shows on its face no interest in the property, is properly demurred to by the plaintiff. Burlingame v. San Mateo County, 103 Cal. App.2d 885, 230 P.2d 375 (1951).

In order to participate, a person must have or claim a legal or equitable interest in the property described in the complaint. Examples of a legal interest that would permit participation include the fee (e.g., Harrington v. Superior Court, supra), a leasehold (e.g., Bayle-Lacoste & Co. v. Superior Court, 46 Cal. App.2d 636, 116 P.2d 458 (1941)), or other possessory interest under claim of right (lawful occupancy). Likewise, a successor in interest to the owner of a legal interest may properly participate (e.g., San Benito Co. v. Copper Mtn. Min. Co., 7 Cal. App.2d 82, 45 P.2d 428 (1935)).

Examples of an equitable interest that would permit participation include an executory contract of sale or some other expectancy (contrast Hidden v. Davisson, 51 Cal. 138 (1875)), beneficiary of a deed of trust

(e.g., Vallejo v. Superior Court, 199 Cal. 408, 249 P. 1048 (1926)), assignee of eminent domain proceeds (e.g., City of Los Angeles v. Dawson, 139 Cal. App. 480, P. (1934)), and shareholder in owner of property sought to be acquired (contrast Riverside v. Malloch, 226 Cal. App.2d 204, 37 Cal. Rptr. 862 (1964)).

Examples of interests that are not legal or equitable interests in the property described in the complaint include those of third parties who will be affected neither by the title nor the compensation adjudicated in the eminent domain proceeding. These may include upstream riparian owners (e.g., San Joaquin etc. Irr. Co. v. Stevinson, 164 Cal. 221, 128 P. 924 (1912)), owners of abutting property who may suffer consequential damages from the project for which the property is being acquired (e.g., Alhambra v. Jacob Bean Realty Co., 138 Cal. App. 251, 31 P.2d 1052 (1934)), and other persons opposed to or affected by the public use for which the property is being acquired.

Consequences of participation. Although no person entitled to participate in an eminent domain proceeding is obligated to do so, participation confers personal jurisdiction on the court. The court may then render a valid judgment with regard to the interest of that person in the property that is the subject of the proceeding. See Harrington v. Superior Court, supra, and Bayle-Lacoste & Co. v. Superior Court, supra.

Article 5. Summons

§ 1260.510. Contents of summons

1260.510. (a) Except as provided in subdivision (b), the form and contents of the summons shall be as [in civil actions generally][prescribed by Sections 412.20 and 412.30 of the Code of Civil Procedure].

(b) Where process is served by publication, the summons shall describe the property sought to be taken in a manner reasonably calculated to give persons with an interest in the property actual notice of the pending proceeding.

Comment. Section 1260.510 prescribes the contents of the summons.

Subdivision (a). Subdivision (a) supersedes former Section 1245 of the Code of Civil Procedure. Code of Civil Procedure Sections 412.20 and 412.30 specify the matters to be included in the summons.

Subdivision (b). Since under subdivision (a) the summons no longer contains a description of the property, defendants must refer to the complaint. However, where service of the summons is by publication, a copy of the complaint is not published. To assure that the persons served by publication will be able to determine if they have an interest in the property, subdivision (b) requires the summons to contain a description adequate for this purpose. Cf. Section 413.10 (service required in a manner "reasonably calculated to give actual notice").

§ 1260.520. Persons served

1260.520. A summons shall be served on the following persons:

(a) Every person named as a defendant in the complaint.

(b) Where the state is a defendant, the Governor, the Attorney General, the Director of General Services, and the State Lands Commission.

Comment. Section 1260.520 indicates the persons upon whom summons is to be served. While filing of a complaint vests the court with subject matter jurisdiction in the eminent domain proceeding, service of summons is essential to confer upon the court jurisdiction over the person of the defendants. Dresser v. Superior Court, 231 Cal. App.2d 68, 41 Cal. Rptr. 473 (1964). Failure to serve summons upon a person who has an interest in the property acquired renders any eminent domain judgment void as against his interest. Absent service of summons, personal jurisdiction may only be acquired by general appearance or by waiver. See Section 410.50 (general appearance). See also Harrington v. Superior Court, 194 Cal. 185, 228 P. 15 (1924)(waiver); Kimball v. Alameda Co., 46 Cal. 19 (1873); Dresser v. Superior Court, supra; Bayle-Lacoste & Co. v. Superior Court, 46 Cal. App.2d 636, 116 P.2d 458 (1941).

Subdivision (a). Every person named in the complaint should be served with summons. The manner of service is prescribed in Section 1260.530. For provisions governing service upon various types of persons, see Sections 416.10-416.90.

Subdivision (b). When property belonging to the state is sought to be taken, in addition to serving the Governor as provided in Code of Civil Procedure Section 416.50, subdivision (b) requires the plaintiff to serve the Attorney General, the Director of General Services, and the State Lands Commission. This continues a requirement formerly found in subdivision (8) of Section 1240 of the Code of Civil Procedure, with the addition of the Director of General Services. See California & N. R.R. v. State, 1 Cal. App. 142, 81 P. 971 (1905). See also former Code Civ. Proc. § 1245.4.

§ 1260.530. Manner of service

1260.530. (a) Except as provided in subdivision (b), all persons shall be served in the manner specified in Chapter 4 (commencing with Section 413.10) of Title 5 of Part II of the Code of Civil Procedure.

(b) Where the court orders service by publication, it shall also order the plaintiff to post within 10 days a copy of the summons and complaint on the property sought to be taken.

Comment. Due process requires that the rights of a person may be adjudicated only if that person is served with process in a manner reasonably calculated to give him actual notice and an opportunity to be heard. See, e.g., Milliken v. Meyer, 311 U.S. 457 (1940); Title & Document Restoration Co. v. Kerrigan, 150 Cal. 289, 88 P. 356 (1906). Cf. Section 413.30.

Section 1260.530 provides the manner of service of process in eminent domain proceedings and is designed to satisfy due process requirements. Persons properly served under this section are bound by the judgment of the eminent domain court. See Section 1261.120.

Subdivision (a). Subdivision (a) incorporates the service provisions of the Code of Civil Procedure. This continues the rule formerly found in Code of Civil Procedure Section 1245.

Subdivision (b). Under subdivision (a), a person must be served by mail, personal delivery, or substituted service. If he cannot, after reasonable diligence, be served by those methods, the court may order service by publication. See Section 415.50. This may occur either because the whereabouts of the named defendant are unknown or because the identity of the defendant is unknown (as where heirs and devisees) or all persons unknown are named defendants pursuant to Section 1260.420.

Where service by publication is ordered pursuant to Section 415.50, subdivision (b) requires that the court also order the plaintiff to post a copy of the summons and complaint on the property within 10 days after the making of the order. This provision is designed to maximize the possibility of reaching interested parties. Cf. Title & Document Restoration Co. v. Kerrigan, supra.

Subdivision (b) supersedes a portion of former Code of Civil Procedure Section 1245.3 relating to service of heirs and devisees, persons unknown, and others. Subdivision (b) extends the posting requirement to the case where any defendant is served by publication.

Although generally service statutes are liberally construed (cf. Sections 4 and 187), the due process considerations involved in service by publication demand strict compliance with the statute. See Stanford v. Worn, 27 Cal. 171 (1865). See also City of Los Angeles v. Glassell, 203 Cal. 44, ___ P. ___ (1928).

Article 6. Pleadings

§ 1260.610. Contents of complaint

1260.610. The complaint shall contain all of the following:

(a) The names of all plaintiffs and defendants.

(b) A description of the property sought to be taken. The description shall indicate the nature and extent of any interest in the property claimed by the plaintiff. The description may, but is not required to, indicate the nature or extent of the interests of the defendant in the property.

(c) A statement of the right of the plaintiff to take by eminent domain the property described in the complaint. The statement shall include:

(1) A description of the purpose for which the property is sought to be taken.

(2) An allegation of the necessity for the taking as required by Section 1240.030.

(3) A reference to the specific statutes, resolutions, and declarations authorizing the plaintiff to exercise the power of eminent domain for the purpose alleged. Such authority may be in the alternative and may be inconsistent.

(d) A map indicating generally the property described in the complaint and its relation to the project for which it is sought to be taken.

Comment. Section 1260.610 prescribes the necessary contents of a complaint in an eminent domain proceeding. A complaint that does not contain the elements

specified in this section is subject to demurrer. See Section 1260.630. Section 1260.610 is an exclusive listing of the substantive allegations required to be made by the plaintiff. Other substantive allegations may, but need not, be made. See, e.g., California S. R. R. v. Southern Pac. R. R., 67 Cal. 59, 7 P. 123 (1885)(averment of value not required and is surplusage); County of San Luis Obispo v. Simas, 1 Cal. App. 175, 81 P. 972 (1905)(averment of manner of construction of proposed improvement not required).

Other necessary procedural elements not specified in this section should be incorporated in the complaint, however. These include a caption (Sections 422.30 and 422.40), a request for relief (Section 425.10), and a subscription (Section 446). It should be noted that, when a public entity is the plaintiff, the complaint need not be verified but requires a verified answer. Section 446.

Subdivision (a). The rules for designating parties to an eminent domain proceeding are prescribed in Sections 1260.410 and 1260.420. Persons who have an interest in the property described in the complaint but who are not named and served generally are not bound by the judgment in the proceeding. See Section 1261.120 and Comment thereto.

Subdivision (b). Subdivision (b), which requires a description of the property sought to be taken, supersedes subdivision 5 of former Code of Civil Procedure Section 1244. The property described in the complaint may consist of anything from a fee interest in land to water rights to noise easements to franchises. See Section 1230.070 ("property" defined).

The description of the property should be sufficiently certain to enable the parties, and any ministerial officer who may be called upon to enforce the judgment, to know precisely what land is to be taken and paid for. See California Cent. R. R. v. Hooper, 76 Cal. 404, 18 P. 599 (1888). See also Section 1260.630 (grounds for demurrer).

Like the former provision, subdivision (b) does not require the complaint to identify the nature of the interests the various parties may have in the property sought to be taken. An allegation that each defendant has or claims some interest in the property is sufficient for purposes of the complaint. Specification of the precise interest held by the defendnat is left to the defendant. See Section 1260.640. However, where the plaintiff has or claims a pre-existing interest in the property sought to be taken, this interest must be indicated in the complaint. Cf. City of Los Angeles v. Pomeroy, 124 Cal. 597, 57 P. 585 (1899); People v. Witlow, 243 Cal. App.2d 490, 52 Cal. Rptr. 336 (1966); People v. Vallejos, 251 Cal. App.2d 414, 59 Cal. Rptr. 450 (1967). Compare Gion v. City of Santa Cruz, 2 Cal.3d 29, ___ P.2d ___, 84 Cal. Rptr. 162 (1970).

Unlike former Section 1244, subdivision (b) does not require that the complaint indicate whether the property taken is a part of a larger parcel but requires only a description of the property taken. Contrast Inglewood v. Johnson (O.T.) Corp., 113 Cal. App.2d 587, 248 P.2d 536 (1952). The "larger

parcel" issue is an issue to be determined at a later time. See Section 1261.020. et seq. However, the judgment in eminent domain affects only the interests of the parties named in the property described. See Section 1261.120; see also People v. Shasta Pipe Etc. Co., 264 Cal. App.2d 520, 70 Cal. Rptr. 618 (1968).

The plaintiff may join up to 10 tracts in a complaint. Section 1260.620. The defendants involved in each tract must be clearly indicated. See Section 1260.630 (grounds for demurrer).

Subdivision (c). Subdivision (c) supersedes subdivision (3) of former Code of Civil Procedure Section 1244 requiring a statement of the right of the plaintiff. Subdivision (c) is intended to provide the owner of the property sought to be taken with an understanding of why his property is being taken and the authority on which the taking is based. The items required to be alleged in subdivision (c) constitute the basis of the plaintiff's right to take and must be proved if the taking is objected to by the defendant. See Section 1260.820 et seq.

The requirements of subdivision (c) may be satisfied in any way convenient to the plaintiff so long as they are indicated in the complaint. This might include setting out the descriptions in full, summarizing the resolution of necessity, or attaching the resolution to the complaint and incorporating it by reference.

Paragraph (i) requires a description of the public purpose or public use for which the property is being taken. Property may not be taken by eminent domain except for a public use. Cal. Const., Art. I, § 14; Section 1240.010.

The public use must appear on the face of the complaint. See, e.g., Aliso Water Co. v. Baker, 95 Cal. 268, 30 P. 537 (1892).

Paragraph (2) requires a description of the public necessity for the taking. The items of public necessity are listed in Section 1240.030 and include public necessity for the project, plan, or location of the project compatible with the greatest public good and least private injury and necessity of the particular property for the project. This extensive description of the necessity for the taking supplants the general allegation permitted under prior law. See, e.g., Linggi v. Garovotti, 45 Cal.2d 20, 286 P.2d 15 (1955).

It should be noted that, while subdivision (2) requires an extensive statement of the necessity for the acquisition, this statement may be satisfied by incorporation of a resolution of necessity containing appropriate findings and declarations, and these declarations may, under certain conditions, be given conclusive effect in the proceeding. See Section 1260.250.

Paragraph (3) requires specific references to the authority of the condemnor. The power of eminent domain may be exercised only by persons expressly authorized by statute for purposes expressly designated by statute. Section 1240.020. In addition, some condemnors must first adopt an appropriate resolution before they may proceed. See, e.g., Section 1260.220. The requirement of a specific reference to all authorizing statutes and resolutions supplants the general allegation of right to condemn permitted under prior law. See, e.g.,

Kern Co. High School Dist. v. McDonald, 180 Cal. 7, 179 P. 180 (1919), and Los Altos School Dist. v. Watson, 133 Cal.App.2d 447, 284 P.2d 513 (1955). Where the plaintiff may be authorized to take the property on differing and inconsistent grounds, the plaintiff may allege such authority in the alternative.

Subdivision (d). Subdivision (d) broadens the requirement formerly found in subdivision (4) of Code of Civil Procedure Section 1244 that the complaint be accompanied by a map where the taking was for a right of way. Subdivision (d) requires a map to be attached to the complaint in all cases. The map should be sufficiently detailed and accurate to enable the parties to identify the property and its relation to the project. Where the taking is for a right of way, the map should show its location, general route, and termini with respect to the property sought to be taken. The map need not indicate whether the property sought is a part of a larger parcel.

§ 1260.620. Joinder of property

1260.620. (a) As used in this section, "tract" means land owned in fee by one person, or by several persons, in concurrent and undivided ownership, without physical interruption by any other fee ownership, and includes any right or interest in such land or other property situated thereon.

(b) The plaintiff may join up to 10 tracts in a complaint if:

(1) Each tract is located in whole or in part within the same county; and

(2) Each tract is sought to be acquired for the same purpose.

(c) Except as provided in Code of Civil Procedure Section 1048, the taking of each tract joined pursuant to subdivision (b) shall be separately tried.

Comment. Section 1260.620, prescribing the rules for joinder of property in a complaint, supersedes the second sentence of subdivision 5 of former Section 1244 of the Code of Civil Procedure.

Subdivision (a). Subdivision (a) is intended to give content to the common sense notion of a "parcel," "tract," or like division of property. Compare former Code Civ. Proc. §§ 1242 ("piece or article of property") and 1244(5)("parcels of land"). The term "tract" is intended as a neutral term to convey the notion of property that is owned in fee by a single person or by several persons holding undivided interests in the same property at the same time and that extends continuously until physically interrupted by property not owned by that person or those persons. A tract may be composed

of smaller portions designated as lots, parcels, and the like so long as they are all contiguous and owned by the same people. The term parallels, but is not to be interpreted synonymously with, "parcel" as used in former subdivision 2 of Section 1248 of the Code of Civil Procedure (property part of a "larger parcel").

Subdivision (b). Subdivision (b) provides the basic rule that the plaintiff has the option to join up to 10 tracts in the complaint. The condemnor is free to include only one tract per complaint, but may join any number up to 10 as it deems appropriate. Former law permitted unlimited joinder of different parcels belonging to different defendants in the same action. Cf. County of Sacramento v. Glann, 14 Cal. App. 780, 113 P. 360 (1910). The contents of the complaint must, of course, be complete as to any of the tracts joined. See Section 1260.610 and Comment thereto. And which defendants have interests in which tracts must be clearly indicated. See Section 1260.630.

Under subdivision (b), as under prior law, property may be joined in a complaint only if it lies wholly or partially in the same county (see Section 1260.320) and only if it is to be put to the same public purpose or public use.

Subdivision (c). Subdivision (c) provides for separate trial of each tract joined in a complaint unless the court has ordered consolidation pursuant to Code of Civil Procedure Section 1048. This provision marks a change from prior law under which all parcels joined in a complaint would be tried together absent a motion to separate. See California Condemnation Practice

§§ 10.5-10.6 (Cal. Cont. Ed. Bar 1960). Subdivision (c) in effect recognizes that the damage to each tract will not depend upon the damage to the others, nor will any party be interested in any damages except his own. See Weiler v. Superior Court, 188 Cal. 729, 207 P. 247 (1922).

It should also be noted that, although the condemnation of each tract is to be tried separately, a tract may be composed of distinct "parcels" or "lots." Separation of these portions for trial may be appropriate. See Section 1048.

§ 1260.630. Grounds for demurrer to complaint

1260.630. The following grounds for objection to the complaint shall be taken by demurrer:

(a) The court has no jurisdiction of the proceeding.

(b) The complaint does not contain the information required by Section 1260.610.

(c) The complaint is uncertain. As used in this subdivision, "uncertain" includes ambiguous and unintelligible.

(d) The complaint joins more tracts than is permitted by Section 1260.620.

Comment. Section 1260.630 provides the rules governing the demurrer to a complaint in an eminent domain proceeding. The rules governing demurrer to an answer or to a cross-complaint are the same as for civil actions generally. See Section 1260.110. See also Sections 430.10 and 430.20.

The demurrer is the responsive pleading normally filed by a defendant who believes the proceedings have been defectively instituted. The grounds for demurrer are indicated in subdivisions (a) through (d). It should be noted that all grounds are ones that would normally appear on the face of the complaint.

Failure to object to defects in the complaint by demurrer waives any objections to those defects, including subject matter jurisdiction. County of Los Angeles v. Darms, 92 Cal. App. 501, 268 P. 487 (1928). Contrast Section 430.80. It should be noted that, where the person filing a demurrer

is not a named defendant, the filing of such demurrer subjects the person to the jurisdiction of the court. Section 1014. In order for such a person to appear, he must claim an interest in the property. Section 1260.430.

Subdivision (a). An eminent domain proceeding may generally be commenced only in the superior court of the county in which the property is located. See Sections 1260.310 and 1260.320.

Subdivision (b). The required contents of the complaint are listed in Section 1260.610.

Subdivision (c). The contents of the complaint should be clear. If the description of the property sought to be acquired is not clear, or if the public use for which it is to be taken is not specifically indicated, the complaint is defective. See, e.g., Southern Pac. Co. v. Raymond, 53 Cal. 223 (1878); Aliso Water Co. v. Baker, 95 Cal. 268, 30 P. 537 (1892).

Subdivision (d). A plaintiff may join up to 10 tracts. See Section 1260.620.

The grounds contained in Section 1260.630 are the only grounds for demurrer to the complaint. Pendency of another proceeding, for example, is not a demurrable defect. Cf. Section 1261.040 (consolidation of proceedings). Contrast Section 430.10(c).

And the traditional ground for demurrer in eminent domain, lack of a public use or right to take, can no longer be raised by demurrer. A demurrer is the pleading by which defects on the face of the complaint are raised. Challenges to the right to take must be raised by an answer. See Section 1260.640.

§ 1260.640. Contents of answer

1260.640. The answer shall contain all of the following:

(a) A statement of the right or interest the defendant claims in the property described in the complaint.

(b) A statement of the defendant's objections, if any, to the right to take. The statement shall include (1) the grounds as authorized by Section 1260.650 or Section 1260.660 and (2) the specific facts upon which each objection is based. The grounds stated may be inconsistent.

[(c) The name and address of the defendant or the person designated as agent for service of notices of all proceedings affecting the defendant's property.]

Comment. Section 1260.640 prescribes the contents of the answer to the complaint. The rules governing answers to cross-complaints are the same as for civil actions generally. See Section 1260.110.

The answer is the basic responsive pleading to the complaint. As under prior law, it contains a statement of the defendant's claimed interest in the property as well as any objections he may raise to the right of the plaintiff to take. However, unlike former Code of Civil Procedure Section 1246, which Section 1260.640 supersedes, Section 1260.640 does not require a defendant to specify items of damages that he claims for the proposed taking. Allegations as to valuation are made at a later stage in the proceedings.

The possible grounds for objection are set out in Sections 1260.650 and 1260.660. It should be noted that objections to the complaint, as contrasted with objections to the right to take, are raised by demurrer. See Section 1260.630. The grounds for objection to the right to take may be inconsistent, but each should be specifically stated. This requirement is generally consistent with decisional law that, for example, required the defendant to affirmatively allege how, or in what manner, a proposed use would not be public. See, e.g., People v. Chevalier, 52 Cal.2d 299, 340 P.2d 598 (1959); People v. Olsen, 109 Cal. App. 523, 293 P. 645 (1930).

The facts supporting each objection must be specifically stated. This requirement is generally consistent with former law that, for example, required the defendant to allege specific facts indicating an abuse of discretion such as an intention not to use the property as resolved. See, e.g., County of San Mateo v. Bartole, 184 Cal. App.2d 422, 433, 7 Cal. Rptr. 569, ___ (1960):

> Facts constituting abuse of discretion, fraud on the landowners' rights, or arbitrary action, must be specifically alleged to attack the resolution of public interest and necessity. (People v. Lagiss, 160 Cal. App.2d 28, 33 [324 P.2d 926]; People ex rel. Department of Public Works v. Schultz Co., 123 Cal. App.2d 925, 941 [268 P.2d 117]; People v. Thomas, 108 Cal. App.2d 832, 836 [239 P.2d 914].) Similar allegations should be pleaded where property owners seek to raise the issue of "public use" in a case where the condemning body has specified the use as one which has been declared proper for eminent domain proceedings by the state. It is also true that the courts will not interfere unless the facts pleaded show that the use is clearly and manifestly of a private character. (Stratford Irrigation District v. Empire Water Co., 44 Cal. App.2d 61, 67 [111 P.2d 957].)

See also People v. Chevalier, supra; People v. Nahabedian, 171 Cal. App.2d 302, 340 P.2d 1053 (1959); People v. Olsen, supra.

The answer must also include [the name and address of the defendant or a person designated as his agent for service of notice of all proceedings affecting his property and] a verification where the plaintiff is a public entity or where the complaint is verified. See Section 446 (verification).

The answer need only be filed and served on the plaintiff. There is no requirement that a defendant serve copies of his answer on other defendants even if the defendant is a person unknown to the other defendants and claiming interests adverse to theirs. See Redevelopment Agency v. Penzner, 8 Cal. App.3d 417, 87 Cal. Rptr. 183 (1970); County of Santa Cruz. v. MacGregor, 178 Cal. App.2d 45, 12 Cal. Rptr. 727 (1960). Cf. Section 465 (pleadings served on "adverse" parties).

Amendments to the answer are made as in civil actions generally. See Sections 472 and 473.

The allegations of the answer are deemed denied as in civil actions generally. See Section 431.20(b). Similarly, the plaintiff may demur to the answer as he would in a civil action. See Sections 430.20 and 430.40 through 430.70.

§ 1260.650. Grounds for objection to right to take where resolution conclusive

1260.650. Grounds for objection to the right to take, regardless whether the plaintiff has duly adopted a resolution of necessity that satisfies the requirements of Article 2 (commencing with Section 1260.210) of this chapter, include:

(a) The plaintiff is not authorized by statute to exercise the power of eminent domain for the purpose stated in the complaint.

(b) The stated purpose is not a public use.

(c) The plaintiff does not intend to devote the property described in the complaint to the stated purpose.

(d) There is no reasonable probability that the plaintiff will devote the described property to the stated purpose within seven years or such longer period as is reasonable.

(e) The described property is not subject to acquisition by the power of eminent domain for the stated purpose.

(f) The described property is sought pursuant to Sections 1240.220, 1240.340, 1240.410, 1240.510, or 1240.610, but the acquisition does not satisfy the requirements of those provisions.

(g) Any other ground provided by law.

Comment. Section 1260.650 prescribes the grounds for objection to the right to take that may be raised in any eminent domain proceeding regardless whether the plaintiff has adopted a resolution of necessity that is given conclusive effect on other issues. See Section 1260.660 for a listing of

grounds for objection that may be raised only where there is no conclusive resolution of necessity.

Subdivision (a). The power of eminent domain may be exercised to acquire property for a public use only by a person authorized by statute to exercise the power of eminent domain to acquire such property for that use. Section 1240.020.

Subdivision (b). The power of eminent domain may be exercised only to acquire property for a public use. Section 1240.010. Cal. Const., Art. I, § 14. U.S. Const., Amend. XIV.

Subdivision (c). This subdivision codifies the classic test for lack of public use: whether the plaintiff intends to apply the property to the proposed use. See People v. Chevalier, 52 Cal.2d 299, 340 P.2d 598 (1959). Once the acquisition has been found initially proper, the plaintiff may thereafter devote the property to any other use, public or private. See Arechiga v. Housing Authority, 159 Cal. App.2d 657, 324 P.2d 973 (1958). It should be noted, however, that, where the condemnation judgment is procured by fraud or bad faith, the judgment may be subject to attack in a separate proceeding. See Section 1260.110; Capron v. State, 247 Cal. App.2d 212, 55 Cal. Rptr. 330 (1966). The statute of limitations for collateral attack on the basis of fraud in acquisition is three years from discovery of the fraud. See Section 338(4).

Subdivision (d). This subdivision adds a test for public use new to California law. If the defendant is able to demonstrate that there is no reasonable probability that the plaintiff will apply the property to the

proposed use within seven years or within a reasonable period of time, the plaintiff may not take the property. Cf. Section 1240.220 (future use).

Subdivision (e). Certain property may not be subject to condemnation for specified purposes. For example, a city may not acquire by eminent domain an existing golf course for golf course purposes. Govt. Code § 37353(c). Property appropriated to a public use may not be taken except for more necessary or compatible uses. Sections 1240.510 and 1240.610. Cemetery land may not be taken for rights of way. Health & Saf. Code §§ 8134, 8560, 8560.5. Certain land in the public domain may not be taken at all. Pub. Res. Code § 7994. An industrial farm may not be established by a county on land outside the county. Penal Code § 4106. The Department of Commerce may not condemn for World Trade Centers. Govt. Code § 8324. The Department of Aeronautics may not take an existing airport owned by local entity. Pub. Util. Code § 21632. See also Section 1240.010 and Comment thereto (eminent domain only for purposes authorized by statute); cf. subdivision (f) infra (more necessary public use).

Subdivision (f). Property may be taken for future use only if there is a reasonable probability that its date of use will be within seven years from the date the complaint is filed or within such longer period as is reasonable. Section 1240.220.

Property may be taken for substitute purposes only if: (1) the owner of the property needed for the public use has agreed in writing to the exchange and, under the circumstances of the particular case, justice requires that he be compensated in whole or in part by substitute property rather than by money;

(2) the property to be exchanged is in the vicinity of the public improvement for which the property needed is taken; and (3) taking into account the relative hardship to the owners, it is not unjust to the owner of the property to be exchanged that his property be taken so that the owner of the needed property may be compensated by such property rather than by money. Section 1240.340.

Property excess to the needs of the proposed project may be taken if it would be left as a remainder in such size, shape, or condition as to be of little market value. Section 1240.410.

Property appropriated to a public use may be taken by eminent domain if the proposed use is compatible with or more necessary than the existing use. See Sections 1240.510 (compatible use), 1240.610 (more necessary use).

Subdivision (g). While the provisions of Section 1260.650 catalog the objections to the right to take available under the Eminent Domain Law, there may be other grounds for objection not included there. Instances where subdivision (g) might allow objection are where there exist federal or constitutional grounds for objection or where prerequisites to condemnation are located in other codes.

§ 1260.660. Grounds for objection to right to take where resolution not conclusive

1260.660. Grounds for objection to the right to take where the plaintiff has not duly adopted a resolution of necessity that satisfies the requirements of Article 2 (commencing with Section 1260.210) of this chapter include:

(a) The plaintiff is a public entity and has not duly adopted a resolution of necessity that satisfies the requirements of Article 2 (commencing with Section 1260.210) of this chapter.

(b) The public interest and necessity do not require the proposed project.

(c) The proposed project is not planned or located in the manner that will be most compatible with the greatest public good and the least private injury.

(d) The property described in the complaint, or right or interest therein, is not necessary for the proposed project.

Comment. Section 1260.660 lists the grounds for objection to the right to take that may be raised only where there is not a conclusive resolution of necessity. Thus, they may be raised against a nonpublic-entity plaintiff in all cases, and against a public-entity plaintiff in cases where it has not duly adopted a resolution or where the resolution is not conclusive. See Section 1260.250 for the effect of the resolution.

Subdivision (a). This subdivision applies only to public entities. A public entity may not commence an eminent domain proceeding until after it

has passed a resolution of necessity that meets the requirements of Article 2 of this chapter. Section 1260.220. A duly adopted resolution must contain all the information required in Section 1260.230 and must be adopted by a vote of a majority of all the members of the governing body of the local public entity. Section 1260.240.

Subdivision (b). The power of eminent domain may be exercised to acquire property for a proposed project only if the public interest and necessity require the proposed project. Section 1240.030(a).

Subdivision (c). The power of eminent domain may be exercised to acquire property for a proposed project only if the proposed project is planned or located in the manner that will be most compatible with the greatest public good and the least private injury. Section 1240.030(b).

Subdivision (d). The power of eminent domain may be exercised to acquire property for a proposed project only if the property and particular interest sought to be acquired are necessary for the proposed project. Section 1240.030(c). See also Section 1235.010.

§ 1260.670. Cross-complaints

1260.670. A party to an eminent domain proceeding may by cross-complaint assert any cause of action that he has against any other person affecting property described in the complaint.

Comment. Section 1260.670 makes clear that a cross-complaint is available in certain circumstances in an eminent domain proceeding. Cf. Section 428.10. That is, Section 1260.670 permits only claims affecting property described in the complaint to be asserted by cross-complaint. This continues prior law. See People v. Buellton Dev. Co., 58 Cal. App.2d 178, 136 P.2d 793 (1943); People v. Clausen, 248 Cal. App.2d 770, 57 Cal. Rptr. 227 (1967); People v. Los Angeles County Flood etc. Dist., 254 Cal. App.2d 470, 62 Cal. Rptr. 287 (1967).

The issue of just compensation is not raised by cross-complaint. Cf. Bayle-Lacoste & Co. v. Superior Court, 46 Cal. App.2d 636, 116 P.2d 458 (1941); California Pac. R.R. v. Central Pac. R.R., 47 Cal. 549 (1874).

A cross-complaint is available to allege damages to the property caused by a trespasser. People v. Clausen, supra. And a claim against actions of third parties that affect the use or value of the property would be appropriate. Contrast El Monte School Dist. v. Wilkings, 177 Cal. App.2d 47, 1 Cal. Rptr. 715 (1960).

Article 7. Commencement of Proceeding

§ 1260.710. Complaint commences proceeding

1260.710. An eminent domain proceeding is commenced by filing a complaint with the court.

Comment. Section 1260.710 supersedes a portion of former Code of Civil Procedure Section 1243, which provided that eminent domain proceedings were commenced by filing a complaint and issuing summons. Section 1260.710 makes clear that the filing of a complaint alone is sufficient to commence an eminent domain proceeding and confers subject matter jurisdiction on the court. See Harrington v. Superior Court, 194 Cal. 185, 228 P. 15 (1924); Bayle-Lacoste & Co. v. Superior Court, 46 Cal. App.2d 636, 116 P.2d 458 (1941). See also Section 1261.120 (effect of judgment in eminent domain).

Section 1260.710 is comparable to Code of Civil Procedure Section 411.10 which provides that "a civil action is commenced by filing a complaint with the court."

§ 1260.720. Lis pendens

1260.720. The plaintiff, at the time of the commencement of an eminent domain proceeding, or at any time thereafter, may record a notice of the pendency of the proceeding in the office of the county recorder of any county in which property described in the complaint is located.

Comment. Section 1260.720 makes clear that the plaintiff in an eminent domain proceeding may file a lis pendens after the proceeding is commenced. This provision supersedes a portion of former Code of Civil Procedure Section 1243 that required the plaintiff to file a lis pendens after service of summons.

Failure to file such a notice of pendency of the eminent domain proceeding does not deprive the court of subject matter jurisdiction, but relieves innocent third parties from the operation of a judgment affecting the property in dispute. See Bensley v. Mountain Lake Water Co., 13 Cal. 306 (1859); Housing Authority v. Forbes, 51 Cal. App.2d 1, 124 P.2d 194 (1942).

Section 1260.720 is analogous to Section 409 (obligation to file lis pendens and consequences of failure to do so). See also Roach v. Riverside Water Co., 74 Cal. 263, 15 P. 776 (1887)(Section 409 applicable to condemnation proceedings prior to adoption of former Code of Civil Procedure Section 1243).

§ 1260.730. Defendant's time to respond

1260.730. (a) Except as provided in subdivision (b), a defendant shall respond to the complaint within 30 days after he is served with process.

(b) A person not named as a defendant or served with process may appear in the proceeding by responding to the complaint within 30 days after the last named defendant is served or at such later time as may be allowed by the court upon a finding of no substantial prejudice to any party.

Comment. Section 1260.730 provides the basic time limit for responding to the complaint. The 30-day provision is consistent with the requirement for civil actions generally. See Sections 412.20(2) and 430.40.

Although the normal responsive pleading is the answer (Section 1260.640), such other responsive pleadings as demurrers or motions to strike may satisfy the requirements of this section. Failure to file a responsive pleading within the specified time may lead to entry of default. See Sections 585 and 586.

Subdivision (a). In most cases, the defendant has 30 days after he is served to respond. If the defendant is named as a "person unknown" in the complaint or is served by publication for some other reason, he must respond within 30 days of the final day of publication. Cf. Section 415.50(c)(service complete on last day of publication).

Subdivision (b). In rare cases, where a claimant has not been served by any means, he may appear within the time allowed for the other defendants or

such greater time as granted by the court upon application. Failure to appear within the required time causes the right to appear to lapse. However, unless such a person is the successor in interest of another defendant and has actual or constructive notice of the proceeding, the judgment will not bind him. See Section 1261.120.

Article 8. Contesting Right to Take

§ 1260.810. Hearing

1260.810. (a) Objections to the right to take shall be heard on motion and notice by either party to the adverse party.

(b) The hearing provided for by subdivision (a) shall precede the determination of compensation except where all parties stipulate in writing to a different order of trial.

Comment. Section 1260.810 makes provision for bringing to trial the objections, if any, that have been raised against the plaintiff's right to take the property it seeks. Either party may set the issues for hearing. It should be noted that no specific time limits are provided in this section for such hearing. However, failure to hold the hearing within the time specified in Code of Civil Procedure Section 583 is ground for dismissal of the proceeding. See Section 1260.110. Disposition of the right to take is generally a prerequisite to trial of the issue of just compensation. However, this does not preclude such activities as depositions and discovery, and the parties may stipulate to a different order of trial. Compare Section 598 (trial on issue of liability before other issues).

§ 1260.820. Evidentiary burdens

1260.820. Except as otherwise provided by statute, the plaintiff has the burden of proof on all issues of fact raised by an objection to the right to take. This burden is one of proof by a preponderance of the evidence.

Comment. Section 1260.820 specifies the allocation of the burden of proof in hearings on right to take issues. The burden to plead or raise such issues is on the defendant, and the issues must be raised specifically and factual allegations stated. Section 1260.640. The issues thus raised are of two general types, legal and factual. Legal issues--such as whether the use alleged is a public use, whether the plaintiff is authorized by law to condemn the particular property for the particular purpose alleged, and what the requisite formalities are for proper adoption of the resolution of necessity--have no specific burdens assigned other than those that may be applicable in civil actions generally.

Factual questions--such as whether the plaintiff intends to use the property as alleged or whether the property is necessary for the proposed project--must be proved by the plaintiff by a preponderance of the evidence. Under prior law, the plaintiff bore the burden of demonstrating necessity issues generally by a "preponderance" of the evidence. See, e.g., Linggi v. Garovotti, 45 Cal.2d 20, 286 P.2d 15 (1955). But the issues whether the plaintiff intended to use the property for the purpose alleged and whether the project was located in a manner most compatible with the greatest public

good and least private injury were required to be proved by the defendant. People v. Lagiss, 160 Cal. App.2d 28, 324 P.2d 926 (1958); City of Pasadena v. Stimson, 91 Cal. 238, 27 P. 604 (1891). Section 1260.820 places on the plaintiff a uniform burden of proving all factual right to take issues by a preponderance of the evidence.

The plaintiff may be aided in satisfying this burden by presumptions if the plaintiff is a public entity. A public entity must enact a resolution of necessity before it may condemn. Section 1240.040. But once it has enacted such a resolution, the resolution may be conclusive on many of the issues of necessity. Section 1260.250. Of course, the resolution must have been properly adopted if it is to be given any effect at all. Id. In addition, it is presumed that official duty has been regularly performed. Evid. Code § 664. Plaintiffs that are not public entities do not have the advantage of any such presumptions but must prove the right to take issues on the basis of the evidence they present.

The burden specified in Section 1260.820 is applicable generally to right to take issues, absent express statutory provisions indicating other burdens or other quanta of proof required. Other express statutory provisions include: Sections 1240.230 (future use), 1240.420 (remnants), 1240.520 (compatible public use), 1240.620 (more necessary public use).

§ 1260.830. Disposition of defendant's objections to right to take

1260.830. (a) The court shall hear and determine all objections to the right to take brought before it pursuant to Section 1260.810.

(b) If the court determines that the plaintiff does not have the right to acquire by eminent domain any property described in the complaint, it shall dismiss the proceeding as to that property. An appeal may be taken from such dismissal.

(c) If the court determines that the plaintiff has the right to acquire by eminent domain the property described in the complaint, the court shall so order. An appeal may not be taken from such order.

(d) Notwithstanding subdivisions (b) and (c), the court may make such order as is appropriate to dispose of an objection in a just manner including but not limited to an order directing the plaintiff to take such corrective and remedial action as may be prescribed by the court. Such order may impose such limitations and conditions as the court determines to be just under the circumstances of the particular case including the requirement that the plaintiff pay to the defendant all or part of the reasonable litigation expenses necessarily incurred by the defendant because of the plaintiff's failure or omission which constituted the basis of the objection.

Comment. Subdivision (a) of Section 1260.830 provides for a court determination of right to take issues. This is consistent with the California Constitution and with prior law. Cal. Const., Art. I, § 14 (jury determination of compensation) and People v. Ricciardi, 23 Cal.2d 390, 144 P.2d 799 (1943).

A determination that the plaintiff has no right to condemn the defendant's property generally requires an order of dismissal. Subdivision (b). In case the complaint alleges alternative grounds for condemnation, a dismissal as to one ground does not preclude a finding of right to take on another ground. An order of dismissal is a final judgment as to the property affected and is appealable. See Section 904.1. Contrast People v. Rodoni, 243 Cal. App.2d 771, 52 Cal. Rptr. 857 (1966). Such order also entitles the defendant to recoverable costs and fees. See Section 1261.240.

A determination that the plaintiff may condemn the defendant's property is not a final judgment. Subdivision (c). An appeal must await the conclusion of the litigation. See Section 904.1. However, review by writ may be available in an appropriate case. See, e.g., Harden v. Superior Court, 44 Cal.2d 630, 284 P.2d 9 (1955).

Subdivision (d) is designed to ameliorate the all or nothing effect of subdivisions (b) and (c). The court is authorized in its discretion to dispose of an objection in a "just and equitable" manner. This authority does not permit the court to create a right to acquire where none exists, but it does authorize the court to grant leave to the plaintiff to amend pleadings or take other corrective action where "just" in light of all of the circumstances of the case. The court may condition such order in whatever manner may be desirable, and subdivision (d) makes clear that this includes the awarding of attorney's fees to the defendant.

Article 9. Exchange of Valuation Data

§ 1260.910. Exchange of lists of expert witnesses and statements of valuation data

1260.910. (a) Not later than 50 days prior to the day set for the trial, any party to an eminent domain proceeding may serve upon any adverse party and file a demand to exchange lists of expert witnesses and statements of valuation data.

(b) A party on whom a demand is served may, not later than 40 days prior to the day set for the trial, serve upon any adverse party and file a cross-demand to exchange lists of expert witnesses and statements of valuation data relating to the parcel of property described in the demand.

(c) The demand or cross-demand shall:

(1) Describe the parcel of property to which the demand or cross-demand relates, which description may be made by reference to the complaint.

(2) Include a statement in substantially the following form: "You are required to serve and deposit with the clerk of court a list of expert witnesses and statements of valuation data in compliance with Article 9 (commencing with Section 1260.910) of Chapter 8 of Title 7 of Part 3 of the Code of Civil Procedure not later than 20 days prior to the day set for trial. Except as otherwise provided in that article, your failure to do so will constitute a waiver of your right to call unlisted expert witnesses during your case in chief and of your right to introduce on direct examination during your case in chief any matter that is required to be, but is not, set forth in your statements of valuation data."

(d) Not later than 20 days prior to the day set for trial, each party who served a demand or cross-demand and each party upon whom a demand or cross-demand was served shall serve and deposit with the clerk of the court a list of expert witnesses and statements of valuation data. A party who served a demand or cross-demand shall serve his list and statements upon each party on whom he served his demand or cross-demand. Each party on whom a demand or cross-demand was served shall serve his list and statements upon the party who served the demand or cross-demand.

(e) The clerk of the court shall make an entry in the register of actions for each list of expert witnesses and statement of valuation data deposited with him pursuant to this article. The lists and statements shall not be filed in the proceeding,

but the clerk shall make them available to the court at the commencement of the trial for the limited purpose of enabling the court to apply the provisions of this **article.** Unless the court otherwise orders, the clerk shall, at the conclusion of the trial, return all lists and statements to the attorneys for the parties who deposited them. Lists or statements ordered by the court to be retained may thereafter be destroyed or otherwise disposed of in accordance with the provisions of law governing the destruction or disposition of exhibits introduced in the trial.

Comment. Section 1260.910 reenacts without substantive change former Section 1272.01 of the Code of Civil Procedure. The following legislative committee comment adopted in conjunction with Section 1272.01 indicates the purpose and effect of this section:

[article] This provides a simplified procedure for exchanging valuation information in eminent domain cases. The procedure is not mandatory; it applies only if it is invoked by a party to the proceeding. . . . [The procedure is not applicable in Los Angeles County and may be varied elsewhere by court rule. See Section 1260.970.]

Existence of the procedure provided by this [article] does not prevent the use of depositions, interrogatories, or other discovery procedures in eminent domain proceedings. See Section [1260.980] and the *Comment* to that section.

In requiring that demands be served not later than 50 days before the date set for trial, subdivision (a) does not presuppose that, in all cases, a trial date will be set more than 50 days in advance of the trial. Although this usually will be the case, to assure timely service the party must anticipate the trial date that may be set (at a pretrial or trial setting conference or otherwise) and serve his demand at least 50 days before the date that is fixed for the trial. The 50-day period is necessary to allow time for the service of cross-demands, the preparation of lists and statements, and the service of such lists and statements 20 days before trial.

Subdivision (b) permits a party upon whom a demand has been served to serve another demand—a cross-demand—on any other party to the proceeding. Such a cross-demand may be used, for example, by a party who wishes to protect himself from being required to reveal his expert witnesses and valuation data to a party who has only a nominal interest in the proceeding while receiving no significant information in return. Under these circumstances, the party upon whom the demand was served may

wish to serve a cross-demand on the party who has a substantial interest in the proceeding. Absent such cross-demand, he would obtain no valuation information from this party since the exchange takes place only between the party who served the demand and the party upon whom the demand was served. The cross-demand, however, may relate only to the parcel or parcels of property described in the demand. This limitation takes into account the fact that several parcels may be included in a single proceeding even though the parcels have entirely different owners or sets of owners. See Code of Civil Procedure Section [1260.620].

If a party serves a demand to exchange valuation information on another party to the proceeding, both the party serving the demand and the party upon whom the demand has been served are required to exchange such information not later than 20 days before the day set for trial. Under subdivision (d) the party who serves a demand must, as a matter of course, serve his list and statements upon each party upon whom he served the demand. The parties required to make an exchange may stipulate or agree to the precise time when the exchange will take place in order to insure that it is complete and simultaneous. Absent such agreement, the exchange nevertheless will be substantially simultaneous because both parties normally will serve, and deposit with the clerk, the required lists and statements approximately 20 days prior to the day set for trial.

Subdivision (e) requires that deposits with the clerk of lists and statements be entered in the register of actions. With respect to maintenance of the register, see Government Code Section 69845. Such entries will permit the court to determine whether a list and statements have been deposited in compliance with the chapter. However, the statements or appraisal reports used as statements (see subdivision (f) of Section ____) will [1260.920] not necessarily be in the form prescribed by court rules for papers to be filed. Also, the copies deposited with the clerk serve the limited purpose of enabling the trial court to rule upon the admissibility of opinions not supporting data under Section [1260.950]. Hence, the subdivision does not require or permit the filing of lists and statements, but requires the clerk to maintain custody of them and make them available to the trial court at the commencement of the trial. In the usual case, the copies furnished to the court will have served their only purpose at the conclusion of evidence. The subdivision therefore permits them to be returned to the attorneys. For those instances in which the copies might be of significance in connection with an appeal or post-trial motion, the subdivision permits the court, on its own initiative or on request of a party, to order them retained. In this event, the copies retained may thereafter be disposed of in the manner of exhibits introduced in the trial. The disposition of exhibits is governed by Sections 1952 through 1952.3 of the Code of Civil Procedure.

§ 1260.920. Statement of valuation data; persons from whom exchanged; contents

1260.920.

(a) A statement of valuation data shall be exchanged for each person intended to be called as a witness by the party to testify to his opinion as to any of the following matters:

(1) The value of the property or property interest being valued.

(2) The amount of the damage, if any, to the remainder of the larger parcel from which such property is taken.

(3) The amount of the benefit, if any, to the remainder of the larger parcel from which such property is taken.

(4) The amount of any other compensation required to be paid by Chapter 5 (commencing with Section 1245.010) of this title.

(b) The statement of valuation data shall give the name and business or residence address of the witness and shall include a statement whether the witness will testify to an opinion as to any of the matters listed in subdivision (a) and, as to each such matter upon which he will give an opinion, what that opinion is and the following items to the extent that the opinion on such matter is based thereon:

(1) The estate or interest being valued.

(2) The date of valuation used by the witness.

(3) The highest and best use of the property.

(4) The applicable zoning and the opinion of the witness as to the probability of any change in such zoning.

(5) The sales, contracts to sell and purchase, and leases supporting the opinion.

(6) The cost of reproduction or replacement of the existing improvements on the property, the depreciation or obsolescence the improvements have suffered, and the method of calculation used to determine depreciation.

(7) The gross income from the property, the deductions from gross income, and the resulting net income; the reasonable net rental value attributable to the land and existing improvements thereon, and the estimated gross rental income and deductions therefrom upon which such reasonable net rental value is computed; the rate of capitalization used; and the value indicated by such capitalization.

(8) If the property is a portion of a larger parcel, a description of the larger parcel and its value.

(c) With respect to each sale, contract, or lease listed under paragraph (5) of subdivision (b):

(1) The names and business or residence addresses, if known, of the parties to the transaction.

(2) The location of the property subject to the transaction.

(3) The date of the transaction.

(4) If recorded, the date of recording and the volume and page or other identification of the record of the transaction.

(5) The price and other terms and circumstances of the transaction. In lieu of stating the terms contained in any contract, lease, or other document, the statement may, if the document is available for inspection by the adverse party, state the place where and the times when it is available for inspection.

(d) If any opinion referred to in subdivision (a) is based in whole or in substantial part upon the opinion of another person, the statement of valuation data shall include the name and business or residence address of such other person, his business, occupation, or profession, and a statement as to the subject matter to which his opinion relates.

(e) Except when an appraisal report is used as a statement of valuation data as permitted by subdivision (f), the statement of valuation data shall include a statement, signed by the witness, that the witness has read the statement of valuation data and that it fairly and correctly states his opinions and knowledge as to the matters therein stated.

(f) An appraisal report that has been prepared by the witness which includes the information required to be included in a statement of valuation data may be used as a statement of valuation data under this article.

Comment. Section 1260.920 reenacts without substantive change former Section 1272.02 of the Code of Civil Procedure. The following legislative committee comment adopted in conjunction with Section 1272.02 indicates the purpose and effect of this section:

[1260.920] Section provides for "statements of valuation data" and specifically required content of a statement whether it is specially prepared for purposes of this or is an appraisal report prepared by the expert witness. [article]

[1260.920]

Subdivision (*a*). Section requires that a statement of valuation data be provided for each person who is to testify to his opinion as to value, damages, or benefits, whether or not that person is to qualify as an expert. For example, a statement must be provided for the owner of the property if he is to testify concerning value, damages, or benefits. See Evidence Code § 813(a) (2) (owner may testify concerning value).

Subdivisions (*b*) *and* (*c*). These subdivisions require that each statement of valuation data recite whether the witness has an opinion as to value, damages, or benefits and, if he does, what that opinion is. These subdivisions also require the setting forth of specified basic data to the extent that any opinion is based thereon. Cf. Evidence Code §§ 814-821. The subdivisions do not require that the specified data be set forth if the witness' opinion is not based thereon even though such data may have been compiled or ascertained by the witness. For example, if an appraiser does not support his opinion as to value by reference to reproduction costs or a capitalization of income, the information specified by paragraphs (6) and (7) of subdivision (b) need not be given in his statement or appraisal report. Also, the supporting data required by subdivision (b) commonly will pertain to the witness' opinion as to value, and the same data will be considered by the witness to support his opinion as to damages and benefits. In this case, the statement or appraisal report may simply recite that the opinion as to damages or benefits is supported by the same data as the opinion as to value. The required information, however, may not be identical with respect to all opinions of the witness. For example, the witness' opinion as to the "highest and best use" of the remainder of a larger parcel may not be the same use he contemplated in forming his opinion as to the value of the portion being taken. In such a case, subdivision (b) requires that the item of supporting data be stated separately with respect to each opinion of the witness.

Subdivision (*d*). Subdivision (d) requires that each valuation statement give the name, address and profession of any person who will not be called as a witness but upon whose opinion the testimony of the valuation witness will be based in whole or substantial part. For example, a real estate appraiser's opinion as to an element of severance damages will often be based on the opinion or estimate of an engineer or contractor as to the costs of repairs, fencing, or the like. The additional information is needed by the adverse party not only for the general purpose of properly preparing for trial but also to enable him to utilize his right under Section 804 of the Evidence Code to call the other

expert and examine him as if under cross-examination concerning his opinion. The subdivision also requires a statement of the subject matter of the supporting opinion. As to this requirement, and the parallel requirement under Section ___, see the *Comment* to Section [1260.930]. [1260.930]

Subdivision (e). Subdivision (e) requires that each valuation statement include a recitation, signed by the witness, that he has read the statement and that it accurately reflects his opinions and informations. The purpose of the requirement is to guard against misinterpretation or misstatement of the witness' opinions or supporting data in preparation of the statement.

Subdivision (f). Ordinarily an appraisal report prepared by an expert witness will contain all of the information required by subdivisions (b), (c), and (d) to be set forth for such witness. To the extent that the report does so, this subdivision permits use of the report in lieu of a statement of valuation data for such witness.

§ 1260.930. List of expert witnesses; contents

1260.930.

The list of expert witnesses shall include the name, business or residence address, and business, occupation, or profession of each person intended to be called as an expert witness by the party and a statement as to the subject matter to which his testimony relates.

Comment. Section 1260.930 reenacts without change former Section 1272.03 of the Code of Civil Procedure. The following legislative committee comment adopted in conjunction with Section 1272.03 indicates the purpose and effect of this section:

[1260.930] Section requires the list of expert witnesses to include all persons to be called as experts. The list therefore must include not only the valuation experts for whom statements of valuation data or appraisal reports are required by Section [1260.920] but also any experts who will testify concerning other matters that may be presented to the trier of fact to facilitate understanding and weighing of the valuation testimony. See Evidence Code §§ 813(b), 814. For example, in a case involving a partial taking, if a party intends to present expert testimony concerning the character of the improvement to be constructed by the plaintiff (see Evidence Code § 813(b)), the proposed witness must be listed. Similarly, a party is required to list a structural engineer who is to testify concerning the structural soundness of an existing building or a geologist who is to testify concerning the existence of valuable minerals on the property.

In addition to naming each proposed expert witness, the list must give his address, indicate his profession or calling, and identify the subject matter of his testimony. For example, the subject matter may be identified as "valuation testimony," "character of proposed improvement," "structural soundness of building on subject property," "existence of oil on subject property," and the like. This further information is necessary to apprise the adverse party of the range and general nature of the expert testimony to be presented at the trial. Unlike Section [1260.920], this section does not require that the particulars of the expert opinion be stated or that the supporting factual data be set forth.

§ 1260.940. Notice to persons upon whom list and statements served of additional witnesses or data; form

1260.940.

(a) A party who is required to exchange lists of expert witnesses and statements of valuatfon data shall diligently give notice to the parties upon whom his list and statements were served if, after service of his list and statements, he:

(1) Determines to call an expert witness not included in his list of expert witnesses to testify on direct examination during his case in chief;

(2) Determines to have a witness called by him testify on direct examination during his case in chief to any opinion or data required to be listed in the statement of valuation data for that witness but which was not so listed; or

(3) Discovers any data required to be listed in a statement of valuation data but which was not so listed.

1260.920 (b) The notice required by subdivision (a) shall include the information specified in Sections , and and shall be in writing; but such notice is not required to be in writing if it is given after the commencement of the trial. 1260.930

Comment. Section 1260.940 reenacts without substantive change former Section 1272.04 of the Code of Civil Procedure. The following legislative committee comment adopted in conjunction with Section 1272.04 indicates the purpose and effect of this section:

[1260.940] Section requires that a party promptly advise the other party if he intends to call an expert witness required to be but not included in his list of expert witnesses or to have a witness called by him to testify to an opinion or data required to be but not listed in a statement of valuation data. Compliance with the section does not, however, insure that the party will be permitted to call the witness or have a witness testify as to the opinion or data. See Section [1260.960].

§ 1260.950. Limitations upon calling witnesses and testimony by witnesses

1260.950. Except as provided in Section 1260.960, upon objection of any party who has served his list of expert witnesses and statements of valuation data in compliance with Section 1260.910:

(a) No party required to serve a list of expert witnesses may call an expert witness to testify on direct examination during the case in chief of the party calling him unless the information required by Section 1260.930 for such witness is included in the list served by the party who calls the witness.

(b) No party required to serve statements of valuation data may call a witness to testify on direct examination during the case in chief of the party calling him to his opinion of the value of the property described in the demand or cross-demand or the amount of the damage or benefit, if any, to the remainder of the larger parcel from which such property is taken unless a statement of valuation data for the witness was served by the party who calls the witness.

(c) No witness called by any party required to serve statements of valuation data may testify on direct examination during the case in chief of the party who called him to any opinion or data required to be listed in the statement of valuation data for such witness unless such opinion or data is listed in the statement served, except that testimony that is merely an explanation or elaboration of data so listed is not inadmissible under this section.

Comment. Section 1260.950 reenacts without substantive change former Section 1272.05 of the Code of Civil Procedure. The following legislative committee comment adopted in conjunction with Section 1272.05 indicates the purpose and effect of this section:

[1260.950] Section 1260.950 provides a sanction calculated to insure that the parties make a good faith exchange of lists of expert witnesses and essential valuation data. For applications of the same sanction to other required pretrial disclosures, see Code of Civil Procedure Sections 454 (copies of accounts) and 2032 (physicians' statements). Although the furnishing of a list of expert witnesses and statements of valuation data is analogous to responding to interrogatories or a request for admissions, the consequences specified by Code of Civil Procedure Section 2034 for failure or refusal to make discovery are not made applicable to a failure to comply with the requirements of this article. Existence of the sanction provided by Section 1260.950 does not, of

course, prevent those consequences from attaching to a failure to make discovery when regular discovery techniques are invoked in the proceeding.

Under exceptional circumstances, the court is authorized to permit the use of a witness or of valuation data not included in the list or statements. See Section and the *Comment* to that section. [1260.960]

[1260.950]

Section limits only the calling of a witness, or the presentation of testimony, during the case in chief of the party calling the witness or presenting the testimony. The section does not preclude a party from calling a witness in rebuttal or having a witness give rebuttal testimony that is otherwise proper. See San Francisco v. Tillman Estate Co., 205 Cal. 651, 272 Pac. 585 (1928); State v. Loop, 127 Cal.App.2d 786, 274 P.2d 885 (1954). The section also does not preclude a party from bringing out additional data on redirect examination where it is necessary to meet matters brought out on the cross-examination of his witness. However, the court should take care to confine a party's rebuttal case and his redirect examination of his witnesses to their purpose of meeting matters brought out during the adverse party's case or cross-examination of his witnesses. A party should not be permitted to defeat the purpose of this by reserving witnesses and valuation data for use in rebuttal where such witnesses could and should have been used during the case in chief and such valuation data presented during the direct examination. [article]

Application of the concept of "case in chief" to the presentation of evidence by the plaintiff requires particular attention. As the burden of proof on the issues of value and damages is upon the defendants (see San Francisco v. Tillman Estate Co., supra), those parties ordinarily are permitted to present their case in chief first in the order of the trial. Therefore, the following presentation by the plaintiff may include evidence of two kinds; i. e., evidence comprising the case in chief of the plaintiff and evidence in rebuttal of evidence previously presented by the defendants. If the evidence offered in rebuttal is proper as such, this section does not prevent its presentation at that time.

§ 1260.960. Grounds for court authority to call witness or permit testimony by witness

1260.960.

(a) The court may, upon such terms as may be just, permit a party to call a witness, or permit a witness called by a party to testify to an opinion or data on direct examination, during the party's case in chief where such witness, opinion, or data is required to be, but is not, included in such party's list of expert witnesses or statements of valuation data if the court finds that such party has made a good faith effort to comply with Sections 1260.910 to 1260.930, inclusive, that he has complied with Section 1260.940, and that, by the date of the service of his list and statements, he:

(1) Would not in the exercise of reasonable diligence have determined to call such witness or discovered or listed such opinion or data; or

(2) Failed to determine to call such witness or to discover or list such opinion or data through mistake, inadvertence, surprise, or excusable neglect.

(b) In making a determination under this section, the court shall take into account the extent to which the opposing party has relied upon the list of expert witnesses and statements of valuation data and will be prejudiced if the witness is called or the testimony concerning such opinion or data is given.

Comment. Section 1260.960 reenacts without substantive change former Section 1272.06 of the Code of Civil Procedure. The following legislative committee comment adopted in conjunction with Section 1272.06 indicates the purpose and effect of this section:

[1260.960] Section allows the court to permit a party who has made a good faith effort to comply with Sections [1260.910-1260.940] to call a witness or use valuation data that was not included in his list of expert witnesses or statements of valuation data. The standards set out in the section are similar to those applied under Code of Civil Procedure Section 657 (for granting a new trial upon newly discovered evidence) and under Code of Civil Procedure Section 473 (for relieving a party from default). The

court should apply the same standards in making determinations under this section. The consideration listed in subdivision (b) is important but is not necessarily the only consideration to be taken into account in making determinations under this section.

The court, in permitting a party to call a witness or use valuation data under this section, may impose such limitations and conditions as the court determines to be just under the circumstances of the particular case.

§ 1260.970. Applicability of article

1260.970. (a) This article does not apply in any eminent domain proceeding in any county having a population in excess of 4,000,000 in which a pretrial conference is held.

(b) The superior court in any county may provide by court rule a procedure for the exchange of valuation data which shall be used in lieu of the procedure provided by this article if the Judicial Council finds that such procedure serves the same purpose and is an adequate substitute for the procedure provided by this article.

Comment. Subdivision (a) of Section 1260.970 reenacts without substantive change former Section 1272.06. Subdivision (b) extends the policy behind former Section 1272.07 to all counties in the state. This general policy is explained in the following legislative committee comment adopted in conjunction with Section 1272.07:

[1260.970] Section makes this inapplicable in an eminent domain proceeding in Los Angeles County if a pretrial conference is held in the proceeding. In that county, the volume of eminent domain cases has required creation of a special department for the disposition of various matters before trial in such cases. That volume and experience with the special department have also given rise to special procedures that are not followed and are not available in any other county. Among these procedures is a well established system for disclosing valuation data under judicial supervision. This system and other procedures before trial are provided for by a policy memorandum. See Policy Memorandum, Eminent Domain (Including Inverse Condemnation), Superior Court, County of Los Angeles (dated June 15, 1966; effective July 1, 1966); McCoy, Pretrial in Eminent Domain Actions, 38 L.A. Bar Bull. 439 (1963), reprinted in 1 Modern Practice Commentator 514 (1961). Under the memorandum, an initial pretrial order requires that all appraisal reports be furnished to the court at the time of a final pretrial conference. At the final conference the reports are exchanged [article]

among the parties if the court determines the reports to be "comparable" and an exchange to be appropriate in the particular case. Valuation opinions and data that are not disclosed under this procedure may not be introduced at the trial. The power of that court to require such an exchange in connection with pretrial conferences was recognized in Swartzman v. Superior Court, 231 Cal.App.2d 195, 200-204, 41 Cal.Rptr. 721, 726 to 728 (1964).

[1260.970] Accordingly, Section [ ] makes this [ ], and the [article] simplified procedure it provides, inapplicable in Los Angeles proceedings in which one or more pretrial conferences are held. In such proceedings, the procedure for exchange information [article] provided by this [ ] would be superfluous. In cases in which no conference is held, however, the procedure provided by this [article] should be available to the parties. The exclusion therefore is limited to cases in which a pretrial conference is held.

§ 1260.980. Use of discovery procedures

1260.980. The procedure provided in this article does not prevent the use of discovery procedures or limit the matters that are discoverable in eminent domain proceedings. Neither the existence of the procedure provided by this article, nor the fact that it has or has not been invoked by a party to the proceeding, affects the time for completion of discovery in the proceeding.

Comment. Section 1260.980 reenacts without substantive change former Section 1272.08 of the Code of Civil Procedure. The following legislative committee comment adopted in conjunction with Section 1272.06 indicates the purpose and effect of this section:

[article] This has no effect on the use of discovery procedures, on the matters that may be discovered, or on the time for completion of discovery. It should be noted, however, that a party may be entitled to a protective order if no good cause is shown for the taking of a deposition of his expert prior to the exchange of valuation data. See Swartzman v. Superior Court, 231 Cal.App.2d 195, 41 Cal.Rptr. 721 (1964).

§ 1260.990. Admissibility of evidence

1260.990.

article Nothing in this makes admissible any evidence that is not otherwise admissible or permits a witness to base an opinion on any matter that is not a proper basis for such an opinion.

Comment. Section 1260.990 reenacts without substantive change former Section 1272.09 of the Code of Civil Procedure. The following legislative committee comment adopted in conjunction with Section 1272.06 indicates the purpose and effect of this section:

> The admission of evidence in eminent domain proceedings is governed by Evidence Code Sections 810 to 822 and other provisions of the Evidence Code. The exchange of information pursuant to this [article] has no effect on the rules set out in the Evidence Code.

Article 10. Trial Practice

§ 1261.010. Trial preference

1261.010. Proceedings under this chapter shall take precedence over all other civil actions in the matter of setting the same for hearing or trial in order that such proceedings shall be quickly heard and determined.

Comment. Section 1261.010 reenacts the substance of former Section 1264 of the Code of Civil Procedure.

§ 1261.020. Bifurcation of preliminary issues

1261.020. The court in its discretion may, upon motion of either party or upon its own motion, at any time prior to the date set for trial of the issue of compensation, order the prior separate trial of severable nonjury issues related to compensation.

Comment. Section 1261.020 makes clear that the court has authority to sever nonjury issues related to compensation for trial prior to the trial of compensation. Under prior law, the court was authorized generally to sever such issues for trial although not explicitly in an eminent domain proceeding. See Section 1048(b)(authority of court to sever issues); City of Los Angeles v. City of Huntington Park, 32 Cal. App.2d 253, 89 P.2d 702 (1939)(Section 1048 applicable to eminent domain). See also Sections 597-598 (motion for bifurcated trial); County of San Mateo v. Bartole, 184 Cal. App.2d 422, 7 Cal. Rptr. 569 (1960)(separate trial on public use issue--compare Section 1260.810). Cf. Evid. Code § 320 (authority of court to control order of proof) and Cal. Const., Art. I, § 14 (just compensation a jury issue).

The purpose of Section 1261.020 is to provide an expeditious means to determine preliminary and foundational issues in the eminent domain proceeding. An order for severance will most likely come following the determination of any right to take issues but must be timely made.

Examples of types of issues that may be tried in advance of compensation are whether there is a severance of property involved in the proposed take, whether there exists a substantial impairment of access, and other matters subject to a court determination before the basic issue of compensation is submitted to the jury. Cf. Vallejo etc. R.R. v. Reed Orchard Co., 169 Cal. 545, 547 P. 238 (1913).

§ 1261.030. Resolution of issues

1261.030. The court shall hear and determine all issues bifurcated pursuant to Section 1261.020 and make any order necessary to effectuate such determinations. An appeal may not be taken from such order.

Comment. Issues bifurcated pursuant to Section 1261.020 are to be resolved by court hearing and determination. Only just compensation is a matter for jury determination. See Cal. Const., Art. I, § 14. See also Vallejo etc. R.R. v. Reed Orchard Co., 169 Cal. 545, 547 P. 238 (1913); City of Oakland v. Pacific Coast Lumber etc. Co., 171 Cal. 392, 153 P. 705 (1915).

Any court order or determination of a bifurcated issue is interlocutory only and, hence, is not appealable. See Section 904.1. The decision of the court on the preliminary issues governs the trial of the just compensation issue and merges with the issue for the purpose of judgment and any necessary appeals. In some circumstances, it may be possible for the litigants to obtain speedy review of preliminary issues by stipulating to a judgment based on their determination and then prosecuting an appeal. See, e.g., People v. Lynbar, Inc., 253 Cal. App.2d 870, 62 Cal. Rptr. 320 (1967); People v. Vallejos, 251 Cal. App.2d 414, 59 Cal. Rptr. 450 (1967).

§ 1261.040. Consolidation of proceedings

1261.040. (a) If more than one person has commenced an eminent domain proceeding to acquire the same property, the court, upon its own motion or upon motion of any party, shall consolidate the proceedings.

(b) In such consolidated proceedings, the court shall first determine whether the purposes for which the property is sought are compatible within the meaning of Article 6 (commencing with Section 1240.510) of Chapter 4 of this title. If the court determines that the purposes are compatible, it shall permit the proceeding to continue with the plaintiffs acting jointly. The court shall apportion the obligation to pay any award in the proceeding in proportion to the use, damage, and benefits engendered by each plaintiff.

(c) If the court determines pursuant to subdivision (b) that the purposes are not all compatible, it shall further determine which of the purposes is most necessary within the meaning of Article 7 (commencing with Section 1240.610) of Chapter 4 of this title. The court shall permit the plaintiff alleging the most necessary purpose, along with any other plaintiffs alleging compatible purposes under subdivision (b), to continue the proceeding. The court shall dismiss the proceeding as to the other plaintiffs. Such dismissal shall be treated as a partial dismissal for the purpose of assessing costs and damages pursuant to Sections 1261.240 and 1261.250.

Comment. Section 1261.040 provides the basic procedure for "intervention" by plaintiffs. Cf. Lake Merced Water Co. v. Cowles, 31 Cal. 215 (1866)

(condemnor seeking to acquire same property in another proceeding may intervene). Rather than direct intervention by one person in the proceeding of another, however, Section 1261.040 provides for consolidation of the disparate proceedings. Cf. Section 1048.

Subdivision (a). Subdivision (a) specifies the basic rule that consolidation is the proper procedure where there are two or more actions pending to acquire the same property. A person who seeks to acquire the property, whether or not he has filed a complaint, may not intervene directly in the other proceeding. Compare Section 1260.430 (defendant intervenors). Likewise, a defendant who has had several complaints filed against him may not demur on the basis that there is another proceeding pending but may move to consolidate. Compare Section 1260.630 (grounds for demurrer). A motion to consolidate may be made at any time prior to entry of final judgment.

Where the proceedings to acquire the property have been commenced in different jurisdictions (for example, because the property straddles a county line (Section 1260.320)), there must first be a change of venue (Section 1260.340) before the proceedings may be consolidated by one court.

Subdivision (b). The test for whether purposes are compatible is whether they would unreasonably interfere with or impair such uses as may reasonably be anticipated for each. See Section 1240.510.

Subdivision (c). For costs and damages on dismissal, see Sections 1261.240 and 1261.250.

§ 1261.050. Expert witnesses; limitations

1261.050.

(a) Notwithstanding any other provision of law, only two experts shall be permitted to testify for any party as to each parcel in an eminent domain proceeding; but for good cause shown, the court may permit one or more additional experts to testify for any party. If one or more experts are regularly employed and paid as such by the plaintiff, at least one of the experts who is called as a witness by the plaintiff may be such an employee.

(b) Nothing in this section shall be construed as limiting the number of witnesses, other than experts, which a party may call in such proceeding, including a person who is qualified to testify pursuant to paragraph (2) of subdivision (a) of Section 813 of the Evidence Code.

(c) As used in this section, "expert" means a person who is qualified to testify pursuant to paragraph (1) of subdivision (a) of Section 813 of the Evidence Code.

Comment. Section 1261.050 is identical to former Section 1267 of the Code of Civil Procedure.

§ 1261.060. Compensation or fee for appraisers, referees, commissioners, and other such persons

1261.060.

In any action or proceeding for the purpose of condemning property where the court may appoint appraisers, referees, commissioners, or other persons for the purpose of determining the value of such property and fixing the compensation thereof, and may fix their fees or compensation, the court may set such fees or compensation in an amount as determined by the court to be reasonable, but such fees shall not exceed similar fees for similar services in the community where such services are rendered.

Comment. Section 1261.060 is identical to former Section 1266.2 of the Code of Civil Procedure.

§ 1261.070. Order of proof and argument

1261.070. The defendant shall present his evidence on the issue of compensation first and shall commence and conclude the argument.

Comment. Section 1261.070 reenacts the substance of former Section 1256.1 of the Code of Civil Procedure and also makes clear that the defendant must present his evidence on the issue of compensation first.

Article 11. Posttrial Proceedings

§ 1261.110. "Judgment" defined

1261.110. As used in this title, the term "judgment" means the judgment determining the right to take and fixing the amount of compensation to be paid by the plaintiff [and the terms and conditions for the performance of any work deemed to be a part of the acquisition cost of the property taken].

Comment. Section 1261.110 reenacts the substance of the first sentence of former Section 1264.7 of the Code of Civil Procedure. [The material in brackets serves as a reminder that appropriate provisions must be included to deal with the situation where the condemnor is to perform work in lieu of payment with money.]

§ 1261.120. Effect of judgment

1261.120. The judgment rendered in an eminent domain proceeding is binding upon all persons over whom the court has acquired personal jurisdiction and upon their successors in interest having actual or constructive notice of the proceeding.

Comment. Section 1261.120 makes clear that an eminent domain proceeding is basically a proceeding quasi in rem, affecting the interests of named persons in specified property. Section 1261.120 supersedes the final sentence of former Code of Civil Procedure Section 1245.3.

The court in an eminent domain proceeding obtains subject matter jurisdiction over the property by the filing of a complaint in the proper county. See Sections 1260.320 and 1260.710 and Comments thereto. However, it may adjudicate the rights and interests of persons in that property only if the persons are brought before the court. See, e.g., Dresser v. Superior Court, 231 Cal. App.2d 68, 41 Cal. Rptr. 573 (1964).

The court may acquire personal jurisdiction over the claimants to the property in several ways. The basic mode is service of process. In addition, a defendant or claimant to the property may confer jurisdiction by a general appearance or by waiver of jurisdictional defects as to himself. Harrington v. Superior Court, 194 Cal. 185, 228 P. 15 (1924); Bayle-Lacoste & Co. v. Superior Court, 46 Cal. App.2d 636, 116 P.2d 458 (1941). See

Section 1260.430. A successor in interest who is not served but who has actual or constructive notice (e.g., a purchaser after the filing of lis pendens) may appear, but whether or not he does so is concluded by the judgment in the proceeding. Cf. Harrington v. Superior Court, supra.

However, persons not named and served, and who have no actual or constructive knowledge of the proceeding, are not bound by the judgment, and their interest in the property is not affected. See Section 1260.720; Wilson v. Beville, 47 Cal.2d 852, 306 P.2d 789 (1957). It should be noted, though, that "all persons unknown" may be named and served as defendants in the proceeding. Sections 1260.420 and 1260.520. Service by publication and posting in this case, where reasonably diligent inquiry fails to reveal the names or locations of persons claiming an interest in the property, satisfies due process requirements. See Section 1260.520 and Comment thereto. A judgment rendered against such defendants is binding upon them and thus has the force and effect of a judgment in rem. See Title etc. Restoration Co. v. Kerrigan, 150 Cal. 289, 88 P. 356 (1906), and former Code Civ. Proc. § 1245.3. Cf. Sections 749-751 (quiet title) and 751.01 et seq. (reestablishing destroyed land records).

In case title acquired by the plaintiff in the proceeding is defective, the plaintiff may, of course, bring a subsequent action to rectify the defect. However, it is unnecessary to specifically so provide. But cf. former Code Civ. Proc. § 1250.

§ 1261.130. Payment of judgment

1261.130. (a) Not later than 30 days after the time for appeal from the judgment has expired, or if an appeal is filed, after such appeal is finally determined, the plaintiff shall pay the full amount required by the judgment.

(b) Payment shall be made by one, or more, of the following methods:

(1) Payment of money directly to the defendant [or his legal representative]. [Any amount which the defendant has previously withdrawn pursuant to (the provisions relating to possession prior to judgment) shall be credited as payment to the defendant.]

(2) Deposit of money with the court for the defendant [or his legal representative].

[(3) Filing with the court an approved bond or depositing money with the court to guarantee performance of any work required by the judgment.]

Comment. Section 1261.130 supersedes former Section 1251 and a portion of former Section 1252 of the Code of Civil Procedure. Subdivision (a) makes clear when the plaintiff must pay the judgment. Former law required payment within 30 days after final judgment, i.e., "when all possibility of direct attack [upon the judgment] by way of appeal, motion for a new trial, or motion to vacate the judgment [had] been exhausted." See former Code Civ. Proc. §§ 1251, 1264.7. Subdivision (a) is substantially the same except it eliminates the references to a motion to vacate and motion for a new trial. The latter is unnecessary because the time limits for an appeal eclipse those for a new trial. The former is undesirable because of the lack of any certainty as to when such motion might be made. See generally

5 B. Witkin, California Procedure Attack on Judgment in Trial Court §§ 179-198 at 3749-3770 (2d ed. 1971). Former Section 1251 also extended the 30-day time by one year where necessary to permit bonds to be issued and sold. This extension has been eliminated. The defendant is entitled to be paid within the time limits stated in Section 1261.130, and the plaintiff should be required to meet such schedule.

Subdivision (b) merely specifies the manner in which payment may be made. In some cases, it can be done directly; in others, an order apportioning the award to multiple defendants will not have been made, and the plaintiff will simply pay the money into court. [In a few instances, the judgment will require the performance of certain work as a part of the cost of acquisition. In such circumstances, the plaintiff is required to file a bond or make a deposit guaranteeing the performance of such work. Compare former Code Civ. Proc. § 1251.]

§ 1261.140. Order of condemnation

1261.140. (a) Upon satisfactory proof to the court that payment has been made in the manner provided by Section 1261.140, the court shall make an order of condemnation which shall describe the property taken and identify the judgment authorizing the taking. [If the plaintiff has not previously taken possession, the order shall state the date upon which possession may be taken.]

(b) The plaintiff shall promptly record a certified copy of the order in the office of the recorder of the county in which the property is located, and title to such property shall vest in the plaintiff upon the date of such recordation.

Comment. Section 1261.140 supersedes former Section 1253 of the Code of Civil Procedure.

Article 12. Dismissal

§ 1261.210. Grounds for dismissal: abandonment

1261.210. (a) The plaintiff may totally or partially abandon the proceeding by serving on the defendant and filing in court a written notice of such abandonment at any time after the filing of the complaint and before the expiration of the period within which the plaintiff is required to pay the judgment.

(b) The court may, upon motion made within 30 days after the filing of such notice, set the abandonment aside if it determines that the position of the moving party has been substantially changed to his detriment in justifiable reliance upon the proceeding and such party cannot be restored to substantially the same position as if the proceeding had not been commenced.

(c) Upon denial of a motion to set aside such abandonment, or upon expiration of the time for filing such a motion, if none is filed, the court shall, on motion of any party, enter judgment totally or partially dismissing the proceeding.

Comment. Section 1261.210 is the same in substance as a portion of former Code of Civil Procedure Section 1255a.

Subdivision (a) is substantively identical to the first sentence of subdivision (a) of former Section 1255a.

Subdivision (b) is substantively identical to subdivision (b) of former Section 1255a.

Subdivision (c) is substantially the same as the first sentence of subdivision (c) of former Section 1255a.

The right to abandonment and dismissal of a proceeding granted by this section is not subject to limitation by the other dismissal provisions of the Code of Civil Procedure. Thus, for example, the plaintiff may abandon the proceeding even though the defendant has filed a cross-complaint. Contrast Section 581. See People v. Buellton Dev. Co., 58 Cal. App.2d 178, 136 P.2d 793 (1943).

§ 1261.220. Grounds for dismissal: amended complaint

1261.220. After amendment of a complaint, the court shall, upon motion of any party, dismiss the original proceeding as to the superseded portion of the complaint.

Comment. Section 1261.220 is new. The plaintiff in an eminent domain proceeding may amend the complaint just as in any other civil action. See Section 1261.110; Kern County Union High School Dist. v. McDonald, 180 Cal. 7, 179 P. 180 (1919); Yolo Water etc. Co. v. Edmands, 50 Cal. App. 444, 195 P. 463 (1920); see also Sections 432, 472, 473, 1261.830.

Upon amendment of the complaint, either party may move to dismiss the superseded portion of the original proceeding. See County of Kern v. Galatas, 200 Cal. App.2d 353, 19 Cal. Rptr. 348 (1962); cf. County of Los Angeles v. Hale, 165 Cal. App.2d 22, 331 P.2d 166 (1958). Under Section 1261.220, the court must enter an order of dismissal.

A dismissal entitles the defendant to his recoverable costs and disbursements pursuant to Section 1261.240; however, such recovery is limited to those costs and disbursements that are attributable only to the superseded portion of the complaint. See subdivision (d) of Section 1261.240 and Comment thereto.

§ 1261.230. Grounds for dismissal: failure to pay or deposit award

1261.230. If the plaintiff fails to pay or deposit the sum of money assessed in the eminent domain proceeding within the time specified in Section 1261.130, the court shall, upon motion of the defendant, enter judgment dismissing the proceeding, provided:

(a) The defendant has filed in court and served upon the plaintiff, by registered or certified mail, a written notice of the plaintiff's failure; and

(b) The plaintiff has failed for 20 days after such service to pay or deposit the money.

Comment. Section 1261.230 specifies the procedures by which the defendant in an eminent domain proceeding may have the proceeding dismissed upon plaintiff's failure to pay. This section supersedes a portion of the second sentence of former Code of Civil Procedure Section 1252 providing that the court may "set aside and annul the entire proceedings."

Section 1261.230 dispenses with the option formerly found in the first part of the second sentence of Code of Civil Procedure Section 1252 and the second sentence of subdivision (a) of former Code of Civil Procedure Section 1255a. Those provisions gave the defendant the option either to enforce the judgment as best he might or to treat nonpayment as an implied abandonment. See Southern Pub. Util. Dist. v. Silva, 47 Cal.2d 163, 301 P.2d 841 (1956).

Section 1261.230 makes dismissal the sole remedy for failure to pay or deposit within the time specified in Code of Civil Procedure Section 1251. Section 1261.230 continues the requirement that dismissal may occur after 20 days' notice to the plaintiff. This provision is included to protect the plaintiff in case of an inadvertent failure to pay the judgment within the time specified. See, e.g., County of Los Angeles v. Bartlett, 223 Cal. App.2d 353, 36 Cal. Rptr. 193 (1963).

§ 1261.240. Recoverable costs and disbursements

1261.240. (a) When any eminent domain proceeding is totally or partially dismissed for any reason, the court shall award the defendant his recoverable costs and disbursements.

(b) Recoverable costs and disbursements may be claimed in and by a cost bill to be prepared, served, filed, and taxed as in civil actions. If the judgment is dismissed upon motion of the plaintiff, the cost bill shall be filed within 30 days after notice of entry of such judgment.

(c) Except as provided in subdivision (d), recoverable costs and disbursements include:

(1) All expenses reasonably and necessarily incurred in preparing for the condemnation trial, during trial, and in any subsequent judicial proceedings in the condemnation proceeding; and

(2) Reasonable attorney's fees, appraisal fees, and fees for the services of other experts where such fees were reasonably and necessarily incurred to protect the defendant's interests in preparing for the condemnation trial, and in any subsequent judicial proceedings in the condemnation proceeding, whether such fees were incurred for services rendered before or after the filing of the complaint.

(d) In case of a partial dismissal or a dismissal pursuant to Section 1261.220, recoverable costs and disbursements include only those recoverable costs and disbursements, or portions thereof, that would not have been incurred had the property sought to be acquired following the dismissal been the property originally sought to be acquired.

Comment. Section 1261.240 requires the plaintiff to reimburse the defendant for all expenses reasonably and necessarily incurred in preparing for trial, during trial, and on appeal and retrial of the proceeding if it is dismissed for any reason. This section allows recovery of fees even though they were incurred before the filing of the complaint in the eminent domain proceeding. See La Mesa-Spring Valley School Dist. v. Otsuka, 57 Cal.2d 309, 369 P.2d 7, 19 Cal. Rptr. 479 (1962)(attorney's fees); Port San Luis Harbor Dist. v. Port San Luis Transp. Co., 213 Cal. App.2d 689, 29 Cal. Rptr. 136 (19)(engineer's fees); Decoto School Dist. v. M. & S. Tile Co., 225 Cal. App.2d 310, 37 Cal. Rptr. 225 (1964)(attorney's fees allowed under former Section 1255a for services in connection with an appeal). Section 1261.240 permits recovery of fees and expenses only if a complaint is filed and the proceeding is later dismissed. The subdivision has no application if the efforts or resolution of the plaintiff to acquire the property do not culminate in the filing of a complaint.

Subdivision (a). Subdivision (a) continues the rule previously found in former Code of Civil Procedure Section 1255a that the plaintiff must reimburse the defendant when the plaintiff abandons. See former Section 1255a and the Legislative Committee Comment thereto, printed in the Assembly Journal, March 20, 1968; see also subdivision (a) of former Government Code Section 7265.5.

Subdivision (a) codifies the holding in County of Los Angeles v. Bartlett, 223 Cal. App.2d 353, 36 Cal. Rptr. 193 (1963), that an implied abandonment has the same consequences as an abandonment on motion of plaintiff with regard to reimbursement of expenses and fees. See also former Code of Civil Procedure Section 1255a(a)(second sentence) and Capistrano Union High School Dist. v. Capistrano Beach Acreage Co., 188 Cal. App.2d 612, 10 Cal. Rptr. 750 (1961).

Subdivision (a) codifies the holding of numerous cases that costs and disbursements are recoverable where plaintiff amends the complaint so that the nature of the property or property interest being taken is substantially changed, amounting to a "partial abandonment." See Metropolitan Water Dist. v. Adams, 23 Cal.2d 770, 147 P.2d 6 (1944); People v. Superior Court, 47 Cal. App.2d 393, 118 P.2d 47 (1941); Yolo Water etc. Co. v. Edmands, 50 Cal. App. 444, 196 P. 463 (1920). Under subdivision (a), however, costs and disbursements are recoverable whenever there is any amendment of the complaint, subject to limitations prescribed in subdivision (d).

Subdivision (a) continues the rule that the plaintiff must reimburse the defendant for expenses and fees when the right to take is defeated. See subdivision (a) of former Government Code Section 7265.5; see also federal Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970 (Public Law 91-646) § 304. In addition, where the proceeding is dismissed for lack of right to take pursuant to Section 1260.830, the costs must be awarded.

Subdivision (a) provides that the plaintiff must pay fees and expenses if the action is dismissed pursuant to Code of Civil Procedure Section 583 (dismissal for failure to prosecute action within certain time limits). This provision is new. Contrast Bell v. American States Water Service Co., 10 Cal. App.2d 604, 52 P.2d 503 (1935).

Subdivision (b). Subdivision (b) is the same in substance as the fourth and fifth sentences of former Code of Civil Procedure Section 1255a(c).

Subdivision (c). Subdivision (c) is the same in substance as the second sentence of former Code of Civil Procedure Section 1255a(c).
See Legislative Committee Comment, Assembly Journal, March 20, 1968.

Subdivision (d). Subdivision (d) is the same in substance as the third sentence of former Code of Civil Procedure Section 1255a(c). It codifies the concept of "partial abandonment" so as to cover those cases in which the nature of the property or property interest being taken is substantially

changed by the condemnor after the proceeding is begun. See Metropolitan Water Dist. v. Adams, 23 Cal.2d 770, 147 P.2d 6 (1955); People v. Superior Court, 47 Cal. App.2d 393, 118 P.2d 47 (1941); Yolo Water etc. Co. v. Edmands, 50 Cal. App. 444, 196 P. 463 (1920). Recoverable costs and disbursements do not include any items that would have been incurred notwithstanding the "partial abandonment." County of Kern v. Galatas, 200 Cal. App.2d 353, 19 Cal. Rptr. 348 (1962). See also Merced Irr. Dist. v. Woolstenhulme, 4 Cal.3d 478, P.2d , Cal. Rptr. (1971); Pacific Tel. & Tel. Co. v. Monolith Portland Cement Co., 234 Cal. App.2d 352, 44 Cal. Rptr. 410 (1965).

§ 1261.250. Damages caused by possession

1261.250. If, after the defendant moves from property sought to be condemned in compliance with an order of possession, the proceeding is dismissed with regard to the property for any reason, the court shall:

(a) Order the plaintiff to deliver possession of the property to the persons entitled to it; and

(b) Make such provision as shall be just for the payment of (1) damages arising out of the plaintiff's taking and use of the property and (2) damages for any loss or impairment of value suffered by the land and improvements. Such damages shall be measured from the time the plaintiff took possession of or the defendant moved from the property sought to be condemned in compliance with an order of possession, whichever ~~is earlier~~.

Comment. Section 1261.250 provides damages following dismissal where the plaintiff took possession of property prior to the dismissal.

Subdivision (a). Subdivision (a) supersedes the final portion of the second sentence of former Code of Civil Procedure Section 1252. Whereas the prior provision required possession to be restored to the defendants when the plaintiff failed to deposit the award in a condemnation proceeding, subdivision (a) makes clear that this rule applies as well where the proceeding is dismissed, e.g., because of delay in trial, because the plaintiff abandons the proceeding, or because the right to take is defeated.

Subdivision (b). Subdivision (b) supersedes subdivision (d) of former Code of Civil Procedure Section 1255a. Whereas the prior provision required payment of damages when the plaintiff abandoned or the right to take was defeated, subdivision (b) makes clear that this rule applies as well where the proceeding is dismissed, e.g., because the plaintiff fails to prosecute or because the plaintiff fails to deposit the award in a condemnation proceeding.

Memorandum 73-51

EXHIBIT II

Southern California Edison Company

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LAW DEPARTMENT
572-1931

October 7, 1971

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

Re: Memorandum 71-68
Study 36.80 - Condemnation
(Procedural Aspects)

Dear Mr. DeMoully:

These comments are directed towards the recommendation contained in the above memorandum for changing some of the present presumptions and burdens relating to the right to take issues in a condemnation action. More specifically, they are directed toward a Staff recommendation that present law be changed so that in all cases where such issues may properly be raised, the condemnor shall have the burden of establishing the necessity for a proposed public use facility and the propriety of its location by "clear and convincing proof" (See proposed Section 2101 Evidentiary Burdens).

The reason given by the Staff for the suggested change is a desire to accomplish some kind of uniformity. They suggest in this regard that present law has developed on an "ad hoc basis in a rather haphazard manner" and that "the reasons for the present rules are unclear." While this observation may be true with respect to some of the rules, it is my judgment that it is not true as to others and that to change all rules for the sake of uniformity would be to overlook some very well reasoned decisions of the California courts.

Falling into the latter category are those rules that have developed with respect to the so-called "compatibility of location issues." In this area, present law is just the ~~opposite~~ of the Staff recommendation; i.e., the defendant-property owner, under present law, has the burden of prevailing on the ~~basis of a~~ clear and convincing evidence criterion. The California Supreme Court in the case of City of Pasadena vs. Stimson, 91 Cal. ~~238~~ (1891), explains the reason for this in this way:

> "The state, or its agents in charge of a public use, must necessarily survey and locate the land to be taken, and are by statute expressly authorized to do so. (Code Civ. Proc., sec. 1242). Exercising, as they do, a public function under express statutory authority, it would seem that in this particular their acts should, in the absence of evidence to the contrary, be presumed correct and lawful. The selection of a particular route is committed in the first instance to the person in charge of the use, and unless there is something to show an abuse of the discretion, the propriety of his selection ought not to be questioned; for certainly it must be presumed that the state or its agent has made the best choice for the public, and if this occasions peculiar and unnecessary damage to the owners of the property affected, the proof of such damage should come from them. And we think that when an attempt is made to show that the location made is unnecessarily injurious, the proof ought to be clear and convincing; for otherwise no location could ever be made. If the first selection made on behalf of the public could be set aside on slight or doubtful proof, a second selection would be set aside in the same manner, and so ad infinitum. The improvement could never be secured, because whatever location was proposed, it could be defeated by showing another just as good." (Emphasis added)

The foregoing language or excerpts thereof have been quoted with approval in a myriad of subsequent California decisions on the subject. One of the latest which applied the criteria to a public utility condemnor is San Diego Gas & Electric Company vs. Lux Land Company, 194 Cal.App.2d 472 (1961).

There are some very good practical reasons why this should remain the law. For example, those agencies faced with the problem of prevailing on an issue of location may not go into court in advance of the initiation of a large and sometimes very complicated right of way acquisition program to seek some sort of an advisory opinion about the propriety of the route they have selected. Rather, in most cases they must rely on their own judgment of the best route available. Substantial expenditures in right of way acquisition, engineering and other costs must then be made in reliance on this judgment at a time prior to condemnation actions being filed and the courts finally being presented with the problem (initially filing a condemnation action against all property owners

along a given route and forcing them into early litigation hardly being a satisfactory alternative). Under such circumstances, it seems altogether proper and in the public interest for the property owner who wishes to contest the location of the entire route to have the greater evidentiary burden.

This is particularly true when it is considered that right of way acquisition programs by agencies exposed to this issue extend across county lines. There is no rule that indicates the judge in one county must follow the decision of another judge in a sister county. If a property owner can prevail on the basis of slight or doubtful proof in one county, he could do so in another county with the result possibly being an unconnected right of way and the complete blockage of a much needed public improvement.

One final point--I wonder if the Staff really realizes just what kind of a change they are suggesting when they suggest that a condemning agency should prevail on the basis of "clear and convincing evidence." The California Supreme Court in the early case of Sheehan vs. Sullivan, 126 Cal. 189 (1899), has interpreted clear and convincing evidence as being that kind of evidence that would be "sufficiently strong to command the unhesitating assent of every reasonable mind." To my knowledge, this interpretation remains the law of California today. It doesn't take much familiarity with the greater environmental issues of the day to realize that no matter what the equities may be weighing in favor of one location over another, it will never be possible to secure the unhesitating assent of "every reasonable mind."

It is respectfully requested that these comments be given serious consideration and that if further clarification or amplification of the points made appears desirable that I and perhaps other representatives from other affected agencies be given the opportunity to appear at one of your meetings.

Respectfully submitted,

Tom P. Gilroy
Assistant Counsel

TPG:bjs

Memorandum 73-51

EXHIBIT III

December 1972

RESULTS OF CALIFORNIA LAW REVISION COMMISSION'S FEBRUARY 1972 QUESTIONNAIRE RE DISCOVERY

Note

In February the Law Revision Commission sent a questionnaire on various aspects of condemnation practice to attorneys, judges and appraisers on its mailing list.

The answers to the questions regarding discovery (Questions 17-26) by attorneys have been tabulated and are indicated below. For the purpose of categorizing the answers, the attorneys who authored them were divided into three clasifications: those representing condemnors, those representing condemnees, and those who represent both sides. Regarding the latter classification, if, for example, an attorney stated that more than 50% of his condemnation practice involved representing condemnors while less than 5% is for condemnees, his answer would be placed in the category of a condemnor attorney rather than both, because the mass of his practice is for one side. The authors of the answers are not indicated except in one instance, the Legal Division of California Department of Public Works, first, because its response is a joint reply for 111 trial attorneys, and second, because of the volume of cases in which it is involved.

General Analysis

The replies to the questions on discovery contain no startling revelations. Most attorneys recognize that it is useful (Question 22), but they also note that often appraisal data and opinions are not finalized until very near the trial date. For this reason and because much of the data necessary for the appraisal is equally available to both parties in the market, discovery devices should be keyed to the approaches to value and severance damage employed by the appraiser, as well as information that is exclusively in the hands of the other party.

Those who have experience with the Los Angeles County procedure (Question 17) generally gave it a favorable rating. But some criticized the procedure in two areas: it is a nuisance in smaller cases, and it puts a burden on the property owner. Further, some attorneys supplement the procedure by interrogatories and depositions.

The discovery devices of interrogatories and statutory exchange (Questions 18 and 20) are the most often used, while depositions (Question 19) are employed to a lesser extent.

The point of greatest concern was raised by Question 21, regarding excluding testimony sought to be elicited by the opposing party at trial but which was not made known through discovery. Many noted courts are reluctant to exclude such testimony; and the State Division of Highways attorneys felt that those courts with a stricter approach apply it just to condemnors. Although it was not stated by any of the parties

responding to the questionnaire, this judicial reluctance to exclude reinforces the practice of delaying finalization of the appraisal until time of trial.

There is a great deal of suspicion that the other side is hiding information or not willing to exchange data on an equal basis. The fear of inequality of exchange was particularly noted as a deficiency in the statutory exchange procedure of CCP §§1272.01-1272.09 (Question 26); it was advised that the exchange should be policed by the court.

The responses did not recommend any overhaul of the discovery procedures in eminent domain. Perhaps, this was a product of the manner in which the questions were framed; only Question 26 regarding statutory exchange asked specifically about deficiencies, although Question 22 inquiring about the general usefulness of discovery in eminent domain called for comment by those responding.

There may be other reasons, however. Since condemnation is a specialty field in the law, it is not unusual to find a certain rapport between condemnor attorneys (especially those with the larger public agencies) and their counterparts who have the lion's share of the condemnee cases in a particular area. These attorneys see each other often; and in many instances the private practitioner was once employed by the agency, such as the Division of Highways. This rapport can lead to informal discovery sessions. Those who are not members of the "club" must struggle with discovery tools.

Related to the above is the condemnor's practice of

converting negotiations between counsel into a discovery session. By adopting the posture of "show me why our figure is wrong" or "if we overlooked anything, we'll certainly re-evaluate our offer," the condemnee is pushed into revealing some of its strengths. If there is genuine response by the agency or it has the reputation of honestly re-evaluating its position, the prospect of settlement will begin to outweigh strategy of trial preparation.

The responses indicate that the condemnee is more inclined to discovery. Because the burden of going forward with its case at trial is upon the condemnee and "negotiations" can reveal the outline of the condemnee's case, the condemnor is frequently content to wait and see. If it initiates discovery, there is sure to be retaliation. But if it does not and the condemnee's attorney knows there is no prospect of settlement, the latter may choose to piece together the condemnor's case from the offer and hold revelation of the property owner's case until trial.

It appears that condemnation "club" attorneys have evolved a practical approach to discovery. There is a realization that it is not as beneficial as in other cases, where, for instance, eyewitness accounts of observable facts at the center of a dispute must be secured and analyzed. If there is need for revision of discovery in eminent domain, those who deal with it only on a sometime basis and have the small cases probably have a better perspective.

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DISCOVERY AND EXCHANGE OF VALUATION DATA

Los Angeles County Procedure

17. Have you ever used the Los Angeles County exchange of appraisal information procedure?

	Condemnor Attys	Condemnee Attys	Attys for Both
YES	3*	12	9
NO	9	11	4

If YES, did you also use any other discovery or exchange of valuation procedure?

	Condemnor Attys	Condemnee Attys	Attys for Both
YES	1	6	4
NO	2*	4	6

If YES, what procedures did you use?

Condemnor Attys:

1. Depositions and request for admissions of fact.

Condemnee Attys:

1. Depositions.
2. Occasionally depositions and also interrogatories. (2)
3. Statutory exchange.

Attys for Both:

1. Interrogatories and depositions.
2. On occasion, depositions and interrogatories. (2)
3. Voluntary open appraisal book discussions with opposing counsel.

* The reply of the Legal Division of California Department of Public Works, which is included here and noted in answers to subsequent questions, is a joint reply on behalf of 111 trial attorneys.

What do you think of the Los Angeles County procedure?

Condemnor Attys:

1. I have read the procedure and find that it would be relatively beneficial in most situations.

2. Very good. It is simple and effective.

3. It is probably helpful in large cases, but a nuisance in small ones.

4. The difficulty with the Los Angeles rule coupled with statutory exchange is that the total expense to attorneys and their clients, and to the public by way of extra judicial time expended, is much greater than if the parties were left to the selective application of traditional discovery methods to appropriate cases. This is true because statutory discovery under the Los Angeles system is applied in every case going to pretrial. Further, the value of the use of statutory discovery, even coupled with judicial administration, is very much less than the value of the use of the more probative traditional tools of discovery when measured against the yardsticks of ascertainment of the truth leading to accurate verdicts on just compensation, or, in the alternative, realistic settlements.

   Traditional discovery by interrogatory and deposition takes very little judicial time when compared with statutory discovery administered through a pretrial judge. The latter system is based on the premise that every condemnation case calls for discovery and legal rulings before trial. Not every condemnation case calls for discovery. The majority of condemnation cases do call for discovery or legal rulings before trial. However, this majority is better served by traditional discovery and bifurcated trial than the Los Angeles pretrial system.*

Condemnee Attys:

1. Needs tightening up: pretrial order is loosely worded in some important aspects.

2. It is helpful and necessary, but imposes severe time requirements.

Condemnee Attys: (Cont'd)

3. It is good, if reasoning and means of computing value are fairly disclosed.

4. Good. (4)

5. It works but needs a conference after the exchange in order to promote settlements.

6. It works quite well.

7. Excellent.

8. Leads to widespread cheating by condemnors. No effective control on failure to fairly exchange. But, it is efficient.

9. It does not accomplish very much.

Attys for Both:

1. It is a waste of time; the reports obtained can be obtained with other discovery devices in a much easier fashion. The Los Angeles procedure is a great burden on out-of-county attorneys, since it requires extra and unnecessary court appearances.

2. Satisfactory, depending upon cooperation of opposing counsel.

3. Very good.

4. It forces early and thorough preparation of one's case. It puts greater economic burden on property owners. Generally it helps to settle cases.

5. It is a good procedure but it places a burden on the property owner in small cases. Some provision should be made for reimbursing the property owner for some or part of his appraisal report if the same is required as a court procedure. This could be handled in the same way as other recoverable court costs. The comment is limited to the preparation of the report alone and not to the cost of the appraiser.

6. Excellent. (3)

7. Prefer Code of Civil Procedure exchange.

General Questions Relating to Discovery

(These questions should be answered on the basis of your experience in counties other than Los Angeles.)

18. In what percentage of your condemnation cases do you use interrogatories?

	Condemnor Attys	Condemnee Attys	Attys for Both
0	no replies	no replies	3
less than 5%	2	7	4
5-50%	7*	7	6
more than 50%	no replies	2	no replies
100%	1	6	1

19. In what percentage of your condemnation cases do you use depositions?

	Condemnor Attys	Condemnee Attys	Attys for Both
0	no replies	2	3
less than 5%	3	9	3
5-50%	5*	6	7
more than 50%	1	1	1
100%	1	4	no replies

20. In what percentage of your condemnation cases do you use the statutory exchange procedure?

	Condemnor Attys	Condemnee Attys	Attys for Both
0	2	3	2
less than 5%	2*	3	7
5-50%	4	9	3
more than 50%	1	3	2
100%	1	2	no replies

21. When you have used discovery, have you experienced any difficulty in excluding testimony sought to be elicited by the opposing party at the trial which was available at the time but not made known through discovery?

	Condemnor Attys	Condemnee Attys	Attys for Both
YES	2*	7	7
NO	3	11	4

Comments:

Condemnor Attys:

1. Although not previously faced with the problem, I suspect that it would be difficult to persuade most judges to exclude such evidence if offered by condemnee.

2. Judges are extremely reluctant to exclude relevant evidence.

3. Courts are quite lenient to property owners when they do not fully respond, but not to condemnors, who are held to a much higher standard of performance.*

Condemnee Attys:

1. Courts seems to admit sales and other data which has not been exchanged or revealed in discovery. This is true under the statutory exchange procedure.

2. Judges let it in, revealed or not.

Attys for Both:

1. Judges know to exclude is to invite reversal. Judges are not usually reversed for what they let into evidence.

2. Situation has not come up often. I objected on only one occasion that information had not been disclosed; it was sustained and excluded.

3. Occasionally, you run up against a judge who will permit an adverse party to introduce information into evidence which should have been part of the exchange and which was deliberately withheld.

4. Depends entirely on the individual judge.

22. Is discovery generally useful in eminent domain cases?

	Condemnor Attys	Condemnee Attys	Attys for Both
YES	7*	13	9
NO	2	7	3

Comments:

Condemnor Attys:

1. Seldom.
2. Landowner never has any appraisal data.
3. Discovery is very useful in condemnation cases. It enables the parties to ascertain the theories of the case, which results in quicker and simpler presentation in trial. Anything that simplifies and expedites a condemnation trial should be encouraged.*
4. Helpful to some extent, but to a far less extent than in other types of cases because the appraisers "discover" most essentials.

Condemnee Attys:

1. Appraisers are often instructed to "have notes" but not conclusions. Also, condemning agencies subsequently hire additional appraisers and discard the one(s) previously deposed. Also, appraisers frequently are "not ready" for depositions.
2. More disclosure is needed.
3. Discovery is helpful in every case, both in preparing for trial and effecting settlement.
4. Failure of judges to restrict agency malpractices.
5. "Generally useful," yes. The work product rule (Swartzman and Mack cases), attorney-client privilege re staff report (Glen Arms) radically limits discovery of information which, aside from the "adversary proceeding," property owners should have by right.
6. On rare occasions it can be of help, but for the most part it is not.

Condemnee Attys: (Cont'd)

7. Generally speaking, to get information from a condemning agency is like trying to get blood from a turnip. About the only useful data is engineering information which is usually voluntarily supplied by the condemnor upon request. Even then it is always incomplete. Discovery is generally of very little value unless you have a particularly complicated case or issues involving fraudulent and deceptive conduct by the condemnor. It is costly in time and money and the costs are generally disproportionate to the results. Condemnees in small cases cannot afford it.

Attys for Both:

1. Appraisals must be comparable to be of use.

2. I represent an agency which must prove issue of necessity and, if raised as a defense, issue of proper location. Discovery on these issues is generally more useful than on just compensation issue.

3. Not used often, but should be available, and is useful under some circumstances.

4. It is not useful where it seeks to reach market data generally available to both sides. But, on capitalization of income studies, if property owner unwilling to voluntarily disclose data, discovery would be helpful.

5. The problem of discovery from the property owner's standpoint is that, except in a case involving a lot of money, it frequently places an intolerable financial burden on the defendant without any hope of recovering the cost which is thrust upon him.

6. Yes, in more complicated cases; no, in simple valuation cases.

7. When enforced.

Statutory Exchange of Valuation Data (CCP §§1272.01-1272.09)

If you have ever used statutory exchange of valuation data, please answer Questions 23-26.

23. Who do you find more willing to initiate statutory exchange?

	Condemnor Attys	Condemnee Attys	Attys for Both
Plaintiffs	3	3	3
Defendants	3*	4	3
About equal	no replies	8	4

24. Do you find the exchange used as supplementary to or in place of other discovery devices?

	Condemnor Attys	Condemnee Attys	Attys for Both
Supplementary	2	3	3
In place of	2*	7	4
About equal	2	4	2

25. Have you had to seek sanctions under CCP §1272.05 for failure of opponent to exchange valuation data?

	Condemnor Attys	Condemnee Attys	Attys for Both
Never	4	11	3
Infrequently	2*	4	6
Frequently	no replies	no replies	1

Were you satisfied with the court's action on your request that sanctions be imposed?

	Condemnor Attys	Condemnee Attys	Attys for Both
YES	1	2	1
NO	1*	1	6

26. What deficiencies are there in the statutory exchange of valuation data procedure?

Condemnor Attys:

1. Does not adequately cover cases where primary issue is severance damages. Should require statement of reasons supporting opinion of severance and preclude use of any not disclosed.

2. Often have been dissatisfied with quality of information furnished by condemnee.

3. It is far too cumbersome, especially for cases where the amount of money involved is small. Attorneys for condemnees cannot afford to comply with the provisions where spread is small. Forces premature trial preparation.

4. The courts have a tendency to be more lenient to property owners when they fail to respond, than to the condemnor.*

Condemnee Attys:

1. Should be broadened to equate with Los Angeles County exchange of appraisal information procedure.

2. My experience has been that the condemnors' experts evade the exchange procedure. Experts have stated that reports were oral, that final reports had not been completed, that all comparable sales had not been assembled, that their reports were not formalized and had not been submitted.

3. Provision should be made for motion to require "specification of reasons and/or method of computation" within five (5) days after receipt of other report. Failure to provide such specification within ten (10) days after request, where original report does not fairly disclose reasons or method of compilation would constitute grounds for such sanctions as examination out of presence of jury, continuance to prepare rebuttal and attorneys fees.

4. It is too rigid; discovery procedures should be same as in other cases.

5. There should be a conference with the court ten (10) days after the exchange to clarify areas of difference.

Condemnee Attys: (Cont'd)

6. No effective control on failure to fairly exchange.

7. I have never found a court that was willing to impose sanctions.

Attys for Both:

1. No deficiencies in procedure but in content of exchanged data.

2. It is an exchange too close to trial to prepare for trial or to decide not to go to trial. If the data exchanged is too minimal, it is too late to use other discovery methods. Therefore, most people use other methods earlier and then add the exchange for an attempt to see what else can be obtained.

3. There is need for some basis of determining equality of exchange.

4. The statutory exchange procedure generally favors the plaintiff at the expense of the defense.

5. Enforcement by court.

6. CCP §1272.02(b) should require data as to "gross income multiplied" studies.

7. It is too easy for a judge to find "excusable neglect" on the part of defendant's attorney as not to deprive him of his "just compensation" chances.