

36.201

2/20/70

Memorandum 70-13

Subject: Study 36.201 - Condemnation (Right to Take--The Right to Condemn
for Utility Purposes)

A relatively simple part of the right to take aspect of condemnation is the right to condemn for utility purposes. It is covered by the attached staff prepared background study. In this memorandum, we assume that you have read the background study.

This memorandum is concerned only with the statement of the right to condemn for privately owned public utilities and mutual water companies. It is not concerned with matters such as joint use, establishment of crossings or connections, or relocation of utility facilities. These are matters that will be considered separately later.

The statutory provisions (attached pink sheets) recommended by the staff are designed (1) to supersede condemnation authority granted by Section 1238 of the Code of Civil Procedure (which we must repeal) and a few other sections and (2) to provide a clear statement of the condemnation authority of privately owned public utilities and mutual water companies so that disputes may be avoided as to whether such authority exists in particular cases. The provisions do not deal with condemnation authority of public entities for utility purposes. This matter will be considered separately later when we consider the condemnation authority of public entities. For the text of Section 1238, see pages 25-26 (yellow).

Section 610 (page 2 of pink sheets)

Section 610 defines "property" in the broadest possible sense. See the Comment to the section.

Sections 611-618 (pages 3-11)

These sections do not appear to present any significant policy problems. See the Comments to the sections.

Section 619 (page 12)

Should there be a right of condemnation by a public utility for the purposes described in Section 619? The section appears to state existing law. See the Comment to the section.

Sections 620-622 (pages 13-15)

These sections appear to state existing law. See the Comments to the sections. Are they desirable?

Section 623 (page 16)

This section appears to state existing law, but the staff questions whether warehousemen should be granted the right of condemnation. We are, of course, concerned only with regulated public utilities.

Section 624 (page 17)

This section appears to state existing law. However, the staff recommends against including the section in the statute. We do not believe that nongovernmental entities should be encouraged to build toll bridges.

Sections 625-626 (pages 18-19)

These sections provide that no property may be taken by a privately owned public utility for utility purposes unless the Public Utilities Commission has adopted a resolution that the taking of the particular property, and the interest therein sought to be acquired, is necessary. The resolution would be conclusive evidence of necessity under Code of Civil Procedure Section 1241.

The effect of these sections is to change the existing law to substitute the Public Utilities Commission for the court in determining necessity for a public utility project. Is this a desirable change? Should there be a requirement that a hearing be held by the Public Utilities Commission before such a resolution is adopted?

If the staff suggestion appears to have any merit, the Commission will want to obtain the views of the Public Utilities Commission and regulated public utilities before any decision is made on whether to tentatively recommend provisions along the lines of Sections 625 and 626. Possibly, the Commission will wish to defer giving any further consideration to this aspect of the problem until a background study on "necessity" has been prepared.

Section 627 (page 20)

This section restricts the grants of condemnation authority to regulated public utilities. There is no condemnation grant for private individuals or corporations other than the section relating to mutual water companies.

Mutual Water Companies (page 21)

Section 2729 restates existing law.

Code of Civil Procedure (pages 22-24)

The portions of Section 1238 that are superseded by the provisions recommended by the staff are indicated. The extent to which these superseded provisions constitute authority for public entities to condemn for utility purposes remains to be considered.

Respectfully submitted,

John H. DeMouilly
Executive Secretary

PRIVATELY OWNED PUBLIC UTILITIES

To add a new article to the chapter of the Public Utilities Code which states the rights and obligations of public utilities.

DIVISION 1. REGULATION OF PUBLIC UTILITIES

PART 1. PUBLIC UTILITIES ACT

CHAPTER 3. RIGHTS AND OBLIGATIONS OF PUBLIC UTILITIES

Article 7. Eminent Domain

- § 610. "Property" defined
- § 611. Railroad corporations
- § 612. Electrical corporations
- § 613. Gas Corporations
- § 614. Heat corporations
- § 615. Pipeline corporations
- § 616. Telephone corporations
- § 617. Telegraph corporations
- § 618. Water corporations
- § 619. Wharfingers
- § 620. Ferries
- § 621. Street railroad corporations
- § 622. Motor carriers
- § 623. Warehousemen
- § 624. Toll bridge corporations
- § 625. Resolution of Public Utilities Commission
- § 626. Effect of resolution
- § 627. Article applies to "public utilities" only

Sec. . Article 7 (commencing with Section 610) is added to Chapter 3 of Part 1 of Division 1 of the Public Utilities Code, to read:

Article 7. Eminent Domain

§ 610. "Property" defined

610. As used in this article, "property" means a fee simple or any interest in real or personal property.

Comment. Section 610 defines property in the broadest possible sense. It would include, for example, the condemnation of air space or water rights where it is necessary to acquire such an interest in order to carry out the regulated activities of the public utility.

Formerly, most privately owned public utilities were permitted to acquire only an easement unless the taking was "for permanent buildings for use in connection with a right of way." See Section 1239 of the Code of Civil Procedure. The "necessity" doctrine, of course, limits the interest that may be taken to that which is necessary to carry on the regulated activities of the public utility. See subdivision 2 of Section 1241 of the Code of Civil Procedure.

§ 611. Railroad corporations

611. A railroad corporation may condemn any property necessary for the construction and maintenance of its railroad.

Comment. Section 611 grants "railroad corporations" (defined in Section 230) the right of eminent domain to acquire property necessary for the construction and maintenance of its "railroad." "Railroad" is defined in Section 229 to mean in substance all railroad property devoted to public use in the transportation of persons or property. Thus, Section 611 authorizes condemnation of any property necessary to carry out the regulated activities of the railroad. It retains and possibly broadens the authority formerly found in subdivision (g) of Section 7526 of the Public Utilities Code and in Section 1238 of the Code of Civil Procedure. See, e.g., Southern Pac. Co. v. Los Angeles Mill Co., 177 Cal. 395, P. (1918)(spur tracks); Vallejo & N. R. Co. v. Reed Orchard Co., 169 Cal. 545, 147 P. 238 (1915)(land for wharves for transfer of freight between railroad cars and boats where reasonably necessary for railroad corporation's future business); Central Pacific Ry. Co. v. Feldman, 152 Cal. 303, 92 P. 849 (1907)(land adjacent to station grounds required for a freight house); Southern Pacific R. R. Co. v. Raymond, 53 Cal. 223, P. () (workshop); Madera R. Co. v. Raymond Granite Co., 3 Cal. App. 688, 87 P. 27 (1906)(spur tracks). Cf. City of Los Angeles v. Los Angeles Pac. Co., 31 Cal. App. 100, 159 P. 992 (1916)(land for pole line for transmission of power to public railway). Section 611 would not, however, permit condemnation by a railroad corporation of land to be used, for example, as an industrial park.

§ 611

Section 611 supersedes provisions formerly contained in the Public Utilities Code and Code of Civil Procedure insofar as those provisions related to privately owned public utilities. See subdivision (g) of Section 7526 of the Public Utilities Code (right to condemn lands "to be used in the construction and maintenance of its roads, and all necessary appendages and adjuncts"); Section 1238 of the Code of Civil Procedure, subdivision 4 ("steam, electric and horse railroads"), subdivision 11 (railroads "for quarrying, logging or lumbering purposes"). See also Section 1238, subdivision 9 ("roads for transportation by traction engines or road locomotives").

Section 611 has no effect on various specific grants of the power to railroads to condemn private property. See Public Utilities Code Sections 7533 (additional tracks), 7535 (railroad intersections), 7536 (railroad crossings). See also Public Utilities Code Section 7508 (right of eminent domain in transferee of railroad corporation).

§ 612. Electrical corporations

612. An electrical corporation may condemn any property necessary for the construction and maintenance of its electric plant.

Comment. Section 612 grants "electrical corporations" (defined in Section 218) the right of eminent domain to acquire property necessary for the construction and maintenance of its "electric plant." "Electric plant" is defined in Section 217 to mean in substance all property devoted to public use in the production, generation, transmission, delivery, or furnishing of electricity for light, heat, or power. Thus, Section 612 authorizes condemnation of any property necessary to carry out the regulated activities of the electrical corporation. It retains and possibly broadens the authority formerly found in subdivisions 12 and 13 of Section 1238 of the Code of Civil Procedure and supersedes those subdivisions insofar as they apply to privately owned public utilities. See also the Comment to Section 613.

§ 613. Gas corporations

613. A gas corporation may condemn any property necessary for the construction and maintenance of its gas plant.

Comment. Section 613 grants "gas corporations" (defined in Section 222) the right of eminent domain to acquire property necessary for the construction and maintenance of its "gas plant." "Gas plant" is defined in Section 221 to include all property used in connection with or to facilitate the production, generation, transmission, delivery, or furnishing of gas, natural or manufactured, for light, heat, or power. Thus, Section 613 authorizes condemnation of any property necessary to carry out the regulated activities of the gas corporation.

Sections 612, 613, and 614 largely supersede subdivision 17 of Section 1238 of the Code of Civil Procedure. Insofar as subdivision 17 permits acquisition of property for future use, it is anticipated that that authority will be given privately owned public utilities by a general provision to be included in the comprehensive condemnation statute.

§ 614. Heat corporations

614. Any heat corporation may condemn any property necessary for the construction and maintenance of its heating plant.

Comment. Section 614 grants "heat corporations" (defined in Section 224) the right of eminent domain to acquire property necessary for the construction and maintenance of its "heating plant." "Heating plant" is defined in Section 223 to include all property used in connection with or to facilitate the production, generation, transmission, delivery, or furnishing of heat for domestic, business, industrial, or public use. Thus, Section 614 authorizes condemnation of any property necessary to carry out the regulated activities of the heat corporations. See the Comment to Section 613.

§ 615. Pipeline corporations

615. A pipeline corporation may condemn any property necessary for the construction and maintenance of its pipeline.

Comment. Section 615 grants "pipeline corporations" (defined in Section 228) the right of eminent domain to acquire property necessary for the construction and maintenance of its "pipeline." "Pipeline" is defined in Section 227 to include all property used in connection with or to facilitate the transmission, storage, distribution, or delivery of crude oil or other fluid substances except water through pipelines.. Thus, Section 615 authorizes condemnation of any property necessary to carry out the regulated activities of the pipeline corporation.

Section 615 supersedes subdivision 10 of Section 1238 of the Code of Civil Procedure (authorizing condemnation for "oil pipelines") insofar as that subdivision relates to privately owned public utilities.

§ 616. Telephone corporations

616. A telephone corporation may condemn any property necessary for the construction and maintenance of its telephone line.

Comment. Section 616 grants "telephone corporations" (defined in Section 234) the right of eminent domain to acquire property necessary for the construction and maintenance of its "telephone line." "Telephone line" is defined in Section 233 to include all property used in connection with or to facilitate communication by telephone, whether such communication is had with or without the use of transmission wires. Thus, Section 616 authorizes condemnation of any property necessary to carry out the regulated activities of the telephone corporation.

Section 616 supersedes a portion of subdivision 7 of Section 1238 of the Code of Civil Procedure (authorizing condemnation for "telephone . . . lines, systems and plants") insofar as that subdivision relates to privately owned public utilities.

§ 617. Telegraph corporations

617. A telegraph corporation may condemn any property necessary for the construction and maintenance of its telegraph line.

Comment. Section 617 grants "telegraph corporations" (defined in Section 236) the right of eminent domain to acquire property necessary for the construction and maintenance of its "telegraph line." "Telegraph line" is defined in Section 235 to include all property used in connection with or to facilitate communication by telegraph, whether such communication is had with or without the use of transmission wires. Thus, Section 617 authorizes condemnation of any property necessary to carry out the regulated activities of the telegraph corporation.

Section 617 supersedes a portion of subdivision 7 of Section 1238 of the Code of Civil Procedure (authorizing condemnation for "telegraph . . . lines, systems and plants") insofar as that subdivision relates to privately owned public utilities.

§ 618. Water corporations

618. A water corporation may condemn any property necessary for the construction and maintenance of its water system.

Comment. Section 618 grants "water corporations" (as defined in Section 241) the right of eminent domain to acquire property necessary for the construction and maintenance of its "water system." "Water system" is defined in Section 240 to include all property used in connection with or to facilitate the diversion, development, storage, supply, distribution, sale, furnishing, carriage, apportionment, or measurement of water for power, irrigation, reclamation, or manufacturing, or for municipal, domestic, or other beneficial use. Thus, Section 618 authorizes condemnation of any property necessary to carry out the regulated activities of the water corporation.

Section 618 supersedes portions of subdivisions 3 and 4 of Section 1238 of the Code of Civil Procedure insofar as those portions relate to condemnation by privately owned public utilities.

§ 619. Wharfingers

619. A wharfinger may condemn any property necessary for the construction and maintenance of facilities for the receipt or discharge of freight or passengers.

Comment. Section 619 grants a "wharfinger" the right of eminent domain to acquire property necessary for facilities for the receipt or discharge of freight or passengers. "Wharfinger" is defined in Section 242 to include "every corporation or person owning, controlling, operating, or managing any dock, wharf, or structure used by vessels in connection with or to facilitate the receipt or discharge of freight, other than bulk liquid commodities, or passengers for compensation within this State."

Section 619 supersedes portions of subdivisions 3 ("public mooring places for watercraft") and 4 ("wharves, docks, piers, . . . chutes, booms") of Section 1238 of the Code of Civil Procedure insofar as those portions relate to privately owned public utilities.

§ 620. Ferries

620. Common carriers, as defined in subdivision (b) of Section 211, may condemn any property necessary for the construction and maintenance of facilities for their transportation of persons or property.

Comment. Section 620 grants the power of eminent domain to acquire property necessary for ferry facilities. The reference to subdivision (b) of Section 211 incorporates a definition of those public utilities that transport persons or property for compensation by vessel upon inland waters or upon the high seas between points within this state. Section 620 supersedes the grant of condemnation for "ferries" in subdivision 4 of Section 1238 of the Code of Civil Procedure insofar as that subdivision relates to the privately owned public utilities. See Streets and Highways Code Sections 30802, 30866 (regulation of amount of ferry tolls).

§ 621. Street railroad corporations

621. A street railroad corporation may condemn any property necessary for the construction and maintenance of terminal facilities for the receipt, transfer, or delivery of the passengers or property it carries.

Comment. Section 621 grants "street railroad corporations" (as defined in Section 232) the right of eminent domain to acquire property necessary for its terminal facilities. The section supersedes subdivision 22 of Section 1238 of the Code of Civil Procedure insofar as that subdivision applied to privately owned street railroad corporations.

§ 622. Motor carriers

622. (a) As used in this section, "motor carrier" means:

- (1) A highway common carrier as defined in Section 213.
- (2) A passenger stage corporation as defined in Section 226.

(b) A motor carrier may condemn any property necessary for the construction and maintenance of terminal facilities for the receipt, transfer, or delivery of the passengers or property it carries.

Comment. Section 622 grants certain motor carriers the right of eminent domain to acquire property necessary for terminal facilities. Sections 621 and 622 supersede subdivision 22 of Section 1238 of the Code of Civil Procedure which granted condemnation authority for "terminal facilities, lands or structures for the receipt, transfer or delivery of passengers or property by any common carrier operating upon any public highway in this state between fixed termini or over a regular route, or for other terminal facilities of any such carrier."

§ 623. Warehousemen

623. A warehouseman may condemn any property necessary for the construction and maintenance of its facilities for storing property.

Comment. Section 623 grants a "warehouseman" (defined in Section 239) the right of eminent domain to acquire property necessary for storing property. Section 623 supersedes a portion of subdivision 4 of Section 1238 of the Code of Civil Procedure (granting authority to condemn for "warehouses") insofar as that portion relates to privately owned public utilities.

§ 624. Toll bridge corporations

624. A toll bridge corporation may condemn any property necessary for the construction and maintenance of its bridge or appurtenances thereto.

Comment. Section 624 grants "toll bridge corporations" (defined in Section 237) the right of eminent domain to acquire property necessary for its bridge and appurtenances thereto. Section 624 supersedes a portion of subdivision 4 of Section 1238 of the Code of Civil Procedure (granting authority to condemn for "bridges, toll roads . . .") insofar as that portion relates to privately owned public utilities. See Streets and Highways Code Sections 30802, 30866 (regulation of amount of bridge tolls).

§ 625. Resolution of Public Utilities Commission

625. No condemnation proceeding shall be commenced under the authority granted by this article unless the Public Utilities Commission first adopts a resolution declaring that the public interest and necessity require the acquisition, construction, or completion by the public utility of the project for which the property is required and that the fee or such interest in the property as is described in the resolution is necessary for the project.

Comment. Sections 625 and 626 impose a requirement not found in prior law. The sections, which are based on Streets and Highways Code Sections 102 and 103, make the question of necessity one for determination by the Public Utilities Commission rather than by the court as under former law.

§ 626. Effect of resolution

626. The resolution of the commission is conclusive evidence:

(a) Of the public necessity of such proposed project.

(b) That such fee or interest in the property is necessary therefor.

(c) That such proposed project is planned or located in a manner which will be most compatible with the greatest public good and the least private injury.

Comment. See the Comment to Section 625.

§ 627. Article applies to "public utilities" only

627. This article applies only to a corporation or person that is a public utility.

Comment. Section 627 is included to make clear that this article extends the right of eminent domain only to "public utilities" as defined in Section 216 ("services is performed for or the commodity delivered to the public or any portion thereof") and not to persons or corporations that are not subject to regulation and rate control. It has been held that the exercise of the right of eminent domain conclusively evidences an intention to devote the property so acquired to a public use, thereby rendering the condemnor a public utility. Producers Transportation Co. v. Railroad Comm'n, 176 Cal. 499, 505, 169 P. 59, (1917). Compare McCullagh v. Railroad Comm'n, 190 Cal. 13, 210 P. 264 (1922). This section is consistent with the holding in the Producers Transportation Co. case.

MUTUAL WATER COMPANIES

Sec. . Section 2729 is added to the Public Utilities Code, to read:

2729. A mutual water company may exercise the power of eminent domain for water, water rights, canals, ditches, dams, poundings, flumes, aqueducts and pipes for irrigation of lands furnished with water by such company.

Comment. Section 2729 specifies the condemnation authority of a mutual water company (defined in Section 2725). The section continues without substantive change the authority to condemn formerly conferred by Code of Civil Procedure Section 1238(4)(condemnation authorized for "water, water rights, canals, ditches, dams, poundings, flumes, aqueducts and pipes for irrigation of lands furnished with water by corporations supplying water to the lands of the stockholders thereof only").

Mutual water companies are not generally subject to the jurisdiction of the Public Utilities Commission. See Pub. Util. Code § 2705. However, it is possible that exercise of the power of eminent domain by a mutual water company may demonstrate an intention to devote the property so acquired to public use and thereby render the company subject to regulation as a public utility. See Corona City Water Co. v. Public Utilities Comm'n, 54 Cal.2d 834, 357 P.2d 301, 9 Cal. Rptr. 245 (1960); Lamb v. California Water & Tel. Co., 21 Cal.2d 33, 129 P.2d 371 (1942).

CODE OF CIVIL PROCEDURE

SECTION 1238

This section will be repealed when the comprehensive statute is enacted. The following indicates very generally the disposition of the provisions of Section 1238 that relate to utility functions. Section 1238 is set out on pages 25-26 (yellow).

Subdivision 3

The following words are superseded: "Any public utility, . . . ponds, lakes, canals, aqueducts, reservoirs, tunnels, flumes, ditches, or pipes, lands, water system plants, buildings, rights of any nature in water, and any other character of property necessary for conducting or storing or distributing water for the use of any county, incorporated city, or city and county, village or town or municipal water district, or the inhabitants thereof, or any state institution, or necessary for the proper development and control of such use of said water, either at the time of the taking of said property, or for the future proper development and control thereof, . . . ; public mooring places for watercraft;"

Comment. Insofar as the provisions quoted above related to privately owned public utilities, they are superseded by provisions to be added to the Public Utilities Code. Insofar as such provisions related to utilities of private persons and corporations that are not public utilities, they are not continued. Insofar as such provisions related to public entities, they are unnecessary because all public entities that have authority to operate public utilities have the power of eminent domain for that purpose under other statutes.

Subdivision 4

The following words are superseded: "Wharves, docks, piers, warehouses, chutes, booms, ferries, . . . toll roads, . . . plank and turnpike roads; . . . steam, electric, and horse railroads, canals, ditches, dams, poundings, flumes, aqueducts and pipes for irrigation, public transportation, supplying mines and farming neighborhoods with water, . . . water, water rights, canals, ditches, dams, poundings, flumes, aqueducts and pipes for irrigation of lands furnished with water by corporations supplying water to the lands of the stockholders thereof only, and lands with all wells and water therein adjacent to the lands of any municipality or of any corporation, or person supplying water to the public or to any neighborhood or community for domestic use or irrigation."

Comment. See the Comment to subdivision 3. The provision relating to mutual water companies is continued by a provision added to the Public Utilities Code.

Subdivision 7

This subdivision is superseded. See the Comment to subdivision 3.

Subdivision 9

This subdivision is not continued because it is obsolete.

Subdivision 10

This subdivision is superseded. See the Comment to subdivision 3.

Subdivisions 11 and 12

These subdivisions are superseded. See the Comment to subdivision 3.

Subdivision 17

This subdivision is superseded. See the Comment to subdivision 3.

Subdivision 22

This subdivision is superseded. See the Comment to subdivision 3.

§1238. Public Uses for Which Property May Be Condemned.—Subject to the provisions of this title, the right of eminent domain may be exercised in behalf of the following public uses:

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

2. Public buildings and grounds for use of a state, or any state institution, or any institution within the State of California which is exempt from taxation under the provisions of Section 1a, of Article XIII of the Constitution of the State of California, and all other public uses authorized by the Legislature of the State of California.

3. Any public utility, and public buildings and grounds, for the use of any county, incorporated city, or city and county, village, town, school district, or irrigation district, ponds, lakes, canals, aqueducts, reservoirs, tunnels, flumes, ditches, or pipes, lands, water system plants, buildings, rights of any nature in water, and any other character of property necessary for conducting or storing or distributing water for the use of any county, incorporated city, or city and county, village or town or municipal water district, or the inhabitants thereof, or any state institution, or necessary for the proper development and control of such use of said water, either at the time of the taking of said property, or for the future proper development and control thereof, or for draining any county, incorporated city, or city and county, village or town; raising the banks of streams, removing obstructions therefrom, and widening and deepening or straightening their channels; roads, highways, boulevards, streets and alleys; public mooring places for watercraft; public parks, including parks and other places covered by water and all other public uses for the benefit of any county, incorporated city, or city and county, village or town, or the inhabitants thereof, which may be authorized by the Legislature; but the mode of apportioning and collecting the costs of such improvements shall be such as may be provided in the statutes by which the same may be authorized.

4. Wharves, docks, piers, warehouses, chutes, booms, ferries, bridges, toll roads, byroads, plank and turnpike roads; paths and roads either on the surface, elevated, or depressed, for the use of bicycles, tricycles, motorcycles and other horseless vehicles, steam, electric, and horse railroads, canals, ditches, dams, poundings, flumes, aqueducts and pipes for irrigation, public transportation, supplying mines and farming neighborhoods with water, and draining and reclaiming lands, and for floating logs and lumber on streams not navigable, and water, water

rights, canals, ditches, dams, poundings, flumes, aqueducts and pipes for irrigation of lands furnished with water by corporations supplying water to the lands of the stockholders thereof only, and lands with all wells and water therein adjacent to the lands of any municipality or of any corporation, or person supplying water to the public or to any neighborhood or community for domestic use or irrigation.

5. Roads, tunnels, ditches, flumes, pipes, aerial and surface tramways and dumping places for working mines; also outlets, natural or otherwise, for the flow, deposit or conduct of tailings or refuse matter from mines; also an occupancy in common by the owners or possessors of different mines of any place for the flow, deposit, or conduct of tailings or refuse matter from their several mines.

6. Byroads leading from highways to residences, farms, mines, mills, factories and buildings for operating machinery, or necessary to reach any property used for public purposes.

7. Telegraph, telephone, radio and wireless lines, systems and plants.

8. Sewerage of any incorporated city, city and county, or of any village or town, whether incorporated or unincorporated, or of any settlement consisting of not less than 10 families, or of any buildings belonging to the State, or to any college or university, also the connection of private residences and other buildings, through other property, with the mains of an established sewer system in any such city, city and county, town or village.

9. Roads for transportation by traction engines or road locomotives.

10. Oil pipe lines.

11. Railroads, roads and flumes for quarrying, logging or lumbering purposes.

12. Canals, reservoirs, dams, ditches, flumes, aqueducts, and pipes and outlets natural or otherwise for supplying, storing, and discharging water for the operation of machinery for the purpose of generating and transmitting electricity for the supply of mines, quarries, railroads, tramways, mills, and factories with electric power; and also for the applying of electricity to light or heat mines, quarries, mills, factories, incorporated cities and counties, villages, towns, or irrigation districts; and also for furnishing electricity for lighting, heating or power purposes to individuals or corporations; together with lands, buildings and all other improvements in or upon which to erect, install, place, use or operate machinery for the purpose of generating and transmitting electricity for any of the purposes or uses above set forth.

13. Electric power lines, electric near-lines, electric light lines, electric light, heat and power lines, and works or plants, lands, buildings or rights of any character in water, or any other character of property necessary for generation, transmission or distribution of electricity for the purpose of furnishing or supplying electric light, heat or power to any county, city and county or incorporated city or town, or irrigation district, or the inhabitants thereof, or necessary for the [1] proper development and control of such use of such electricity, either at the time of the taking of said property, or for the future proper development and control thereof.

14. Cemeteries for the burial of the dead, and enlarging and adding to the same and the grounds thereof.

15. The plants, or any part thereof, or any record therein of all persons, firms or corporations heretofore, now or hereafter engaged in the business of searching public records, or publishing public records or insuring or guaranteeing titles to real property, including all copies of, and all abstracts or memoranda taken from, public records, which are owned by, or in the possession of, such persons, firms or corporations or which are used by them in their respective businesses; provided, however, that the right of eminent domain in behalf of the public uses mentioned in this subdivision may be exercised only for the purposes of restoring or replacing, in whole or in part, public records, or the substance of public records, of any city, city and county, county or other municipality, which records have been, or may hereafter be, lost or destroyed by conflagration or other public calamity; and provided further, that such right shall be exercised only by the city, city and county, county or municipality whose records, or part of whose records, have been, or may be, so lost or destroyed.

16. Expositions or fairs in aid of which the granting of public moneys or other things of value has been authorized by the Constitution.

17. Works or plants for supplying gas, heat, refrigeration or power to any county, city and county, or incorporated city or town, or irrigation district, or the inhabitants thereof, together with lands, buildings, and all other improvements in or upon which to erect, install, place, maintain, use or operate machinery, appliances, works and plants for the purpose of generating, transmitting and distributing the same and rights of any nature in water, or property of any character necessary for the purpose of generating, transmitting and distributing the same, or necessary for the proper development and control of such use of such gas, heat, refrigeration, or power, either at the time of the taking of said property, or for the future proper development and control thereof.

18. Standing trees and ground necessary for the support and maintenance thereof, along the course of any highway, within a maximum distance of 300 feet on each side of the center thereof; and ground for the culture and growth of trees along the course of any highway, within the maximum distance of 300 feet on each side of the center thereof.

19. Propagation, rearing, planting, distribution, protection or conservation of fish.

20. Airports for the landing and taking off of aircraft, and for the construction and maintenance of hangars, mooring masts, flying fields, signal lights and radio equipment.

21. Any work or undertaking of a city, county, or city and county, housing authority or commission, or other political subdivision or public body of the State: (a) to demolish, clear or remove buildings from any area which is detrimental to the safety, health and morals of the people by reason of the dilapidation, overcrowding, faulty arrangement or design, lack of ventilation or sanitary facilities of the dwellings predominating in such areas; or (b) to provide dwellings, apartments or other living accommodations for persons or families who lack the amount of income which is necessary (as determined by the body engaging in said work or undertaking) to enable them to live in decent, safe and sanitary dwellings without overcrowding.

22. Terminal facilities, lands, or structures for the receipt, transfer or delivery of passengers or property by any common carrier operating upon any public highway in this State between fixed termini or over a regular route, or for other terminal facilities of any such carrier. Leg.H. 1872, 1874, p. 353, 1891 p. 48, 1893 p. 146, 1895 p. 85, 1897 p. 70, 1901 p. 72, 1905 p. 637, 1906 p. 68, 1907 p. 742, 1909 p. 1032, 1911 p. 431, 1911 p. 1206, 1913 p. 544, 1915 p. 38, 1917 p. 39, 1921 p. 140, 1923 p. 129, 1925 p. 170, 1929 p. 478, 1935 ch. 569, 1937 ch. 193, 1938 ch. 3; enacted as an urgency measure, effective March 21, 1938, 1945 ch. 251, 1957 ch. 43.

THE POWER TO CONDEMN FOR PUBLIC UTILITY PURPOSES*

*This study was prepared for the California Law Revision Commission by Mr. Clarence B. Taylor of the Commission's legal staff. No part of this study may be published without prior written consent of the Commission.

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

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

THE POWER TO CONDEMN FOR PUBLIC UTILITY PURPOSES

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BACKGROUND STUDY

THE POWER TO CONDEMN FOR PUBLIC UTILITY PURPOSES

INTRODUCTION

California condemnmors who might seek to acquire property for utility purposes can conveniently be divided into three groups: (1) the state and local public entities, (2) nongovernmental public utilities, and (3) purely private (i.e., non-public-utility) individuals and corporations acquiring property under Civil Code Section 1001.

The general condemnation statute (Title 7 of Part 3 of the Code of Civil Procedure) applies to takings for utility purposes. Some special procedures are provided in the Public Utilities Code and apply in some cases where property already devoted to a public utility use is sought to be taken. These special procedures are discussed in more detail later in this study.

Section 1238 of the Code of Civil Procedure, operating in conjunction with Civil Code Section 1001, is the general authority for most takings by privately owned public utilities and for such takings by private individuals and non-public-utility corporations as are authorized. A few special grants of condemnation authority for privately owned public utility purposes, such as takings for railroad purposes, are found in other codes. The authority of public entities to take for utility purposes is based not only on Section 1238 but also on a great number of other statutes, many of which are codified or uncodified special district statutes. Similarly, some of the code sections conferring or effecting the authority of cities and counties to take property for utility purposes are found in codes other than the Code of Civil Procedure. This study is concerned, however, only with takings by

privately owned public utilities and private individuals and corporations for utility purposes.

Takings by privately owned public utilities are excluded from the immediate possession provisions of Section 14 of Article I of the Constitution. The Law Revision Commission has tentatively determined, however, that the Constitution and statutes should be amended to permit immediate¹ possession in takings by privately owned public utilities.

Privately owned public utilities also are omitted from the conclusive effect given the resolution of taking (as to public necessity, necessity for taking the particular property, and proper location) under Code of Civil Procedure Section 1241. Such utilities commonly show their authority and the public necessity for a taking by exhibiting the certificate of convenience and necessity obtained under Public Utilities Code Sections 1001, et seq. In fact, the existence of such a certificate appears to be a² practical requirement in condemnation proceedings.

PROBLEMS THAT MUST BE RESOLVED IN REVISION OF LAW

There are a series of problems, some admittedly technical, that must be resolved to treat takings for utility purposes adequately in a comprehensive revision of eminent domain law. The major problem is the one presented by Section 1238 of the Code of Civil Procedure, which specifies the public uses for which property may be taken. This section will need

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1. See Tentative Recommendation and A Study Relating to Condemnation Law and Procedure: Number 1--Possession Prior to Final Judgment and Related Problems, 8 Cal. L. Revision Comm'n Reports 1101 (1967).
 2. See *San Diego Gas & Elec. Co. v. Lux Land Co.*, 194 Cal. App.2d 472, 14 Cal. Rptr. 899 (1961).

to be repealed when a comprehensive statute is enacted and those portions of the section which are to be retained codified in appropriate codes. This will require the examination of the various provisions of Section 1238 that relate to utilities and determination as to what disposition should be made of each provision. To a considerable extent, this study is devoted to a consideration of the problems presented by the disposition of these provisions.

Other problems include the following:

1. The respective applications of the eminent domain title and the provisions of the Public Utilities Code relating to takings of utility property should be clarified. Each set of provisions now states, in effect, that it has no bearing or effect on proceedings under the other set. This is not an altogether satisfactory solution. There are other similar problems. For example, the date of valuation specified in Code of Civil Procedure Section 1249 cannot be applied in takings of public utility property even though the proceedings are in the superior court pursuant to the Code of Civil Procedure.³

2. Does the elaborate proviso added to Code of Civil Procedure Section 1257 in 1878, dealing with the erection of fences and cattle guards, apply only to takings for railroad purposes? If so, should not the provision be eliminated or moved to the Public Utilities Code?

3. Similarly, should not the second paragraph of Code of Civil Procedure Section 1251, dealing with bonds for the erection of fences and cattle guards in connection with railroads, be eliminated or moved to the Public Utilities Code?

3. As to these problems, and the options as to the course of procedure, see *Citizens Util. Co. v. Superior Court*, 59 Cal.2d 805, 31 Cal. Rptr. 316 (1963).

4. In the same connection, should not the third paragraph of Code of Civil Procedure Section 1251, dealing with a deposit in court to assure the erection of fences in connection with highway takings, be eliminated or moved to the Streets and Highways Code?

5. Should not those provisions of Code of Civil Procedure Section 1240 (which deals with the taking of property already appropriated to a public use) that are uniquely applicable to public utilities be removed to the Public Utilities Code? This same problem exists with respect to Code of Civil Procedure Section 1241(3) which deals specifically with the determination of "more necessary public use." As a much broader question of policy, should not all questions of "more necessary public use"--insofar as the competition is between uses for public utilities--be assigned to the determination of the Public Utilities Commission and provided for in the Public Utilities Code?

6. Should the certificate of convenience and necessity obtained by a privately owned public utility under Public Utilities Code Section 1001 et seq. be added to Code of Civil Procedure Section 1241 as one of the instruments conclusively demonstrating the public necessity for the taking in question? Should every taking by privately owned public utilities necessitate a certificate or resolution of the Public Utilities Commission, which certificate or resolution would then constitute conclusive evidence of necessity under Code of Civil Procedure Section 1241?

7. What clarification or revision, if any, is needed with respect to Code of Civil Procedure Section 1239, which specifies the interest or estate that may be acquired by the condemnor? Generally, that section

and related judicial decisions permit political subdivisions to determine the estate or interest to be acquired. Usually the question lies simply between a fee or an easement. There is, of course, much learning largely emanating from the courts as to the interest that was, or may be, acquired through takings by railroads and other privately owned public utilities.

8. Lastly, should not Sections 1264.1-1264.9 of the Code of Civil Procedure (dealing with the condemnation of "a franchise of limited duration to collect tolls on any bridge or highway") be eliminated? Those provisions were added to the eminent domain title in 1937. Are there any such franchises still in existence? If so, the provision should at least be moved to the Streets and Highways Code. It would be necessary to retain Section 1264.7. Even though that section mistakenly defined "judgment" and "final judgment" for the entire eminent domain title as enacted in 1937, it should be retained because those terms are used throughout the title of eminent domain.

Some but not all of these questions will be considered in this study.

For example, the question whether a privately owned public utility can condemn the fee or only an easement is the subject of a separate study.

DISPOSITION OF PERTINENT PROVISIONS OF SECTION 1238

Section 1238 of the Code of Civil Procedure is the primary grant to privately owned public utilities and private individuals and corporations of condemnation authority. Subdivision 3 of Section 1238 enumerates as a public use "any public utility" and other subdivisions of Section 1238 list as public-uses various aspects of such specific utility activities as water, gas, electricity, communications, railroads, oil pipelines,

water transportation, air transportation, motor carrier terminal facilities, warehouses, and wharves. Most--but not all--of these provisions will be discussed in this study. Provisions in other statutes also will be considered where pertinent.

"Any public utility" as a public use

Subdivision 3 of Section 1238 enumerates as a public use:

Any public utility . . . for the use of any county, incorporated city, or city and county, village, town, school district, or irrigation district

The meaning of the phrase "any public utility" is unclear. The phrase may have been inserted to specify a use for which property can be taken (any "public utility" use) or to describe the nature of the property interest being taken (property of a public utility corporation) or both. This uncertainty is the result of the failure to recognize that Section 1238 was originally intended to specify only uses, not the property interest that may be taken. As has been pointed out:⁴

This section, as originally enacted, specified, as declared by its title and its opening paragraph, only the uses or purposes for which, or the objects for the construction of which the right might be exercised. It did not purport to specify the nature or character of the property which might be taken, that being specified in section 1240. But since its original enactment it has been repeatedly amended by the insertion of many phrases with the apparent purpose of attempting to specify the character of property which may be taken. These amendments have been ineptly made, through a failure to appreciate that the section refers only to uses. They should have been added to section 1240, if in fact it was necessary to add to that section to

4. Breeze, Limitations on the Right of a Municipality in California to Condemn a Public Utility, 16 Cal. L. Rev. 105, 106 (1927)(emphasis in original; footnote omitted).

give the right to condemn such property. In its present form this section in parts is difficult, if not impossible to construe, as witness the following:

" . . . the right of eminent domain may be exercised on behalf of the following public uses: . . .

"13. . . . lands, buildings or rights of any character in water or any other character of property necessary for generation, transmission or distribution of electricity."

It is apparent that lands, water rights and property are neither uses nor purposes, nor objects for the construction of which the right of eminent domain may be invoked. They are intended to be descriptive of the things, which may be taken by the exercise of that right.

The phrase "any public utility" probably was inserted in subdivision 3 of Section 1238 to grant the right to a city or county to condemn the property of a public utility company.⁵ The inclusion of the phrase was unnecessary to grant this right. Section 1240 of the Code of Civil Procedure specifies the nature of the property that may be taken for public use and provides generally that property appropriated to a public use by a private corporation may be taken.⁶ Section 1241 provides that, before property appropriated to a public use can be taken, it must appear that

5. The phrase "any public utility" was added by a 1913 amendment. Cal. Stats. 1913, Ch. 291, § 1, p. 544. Also in 1913, legislation was enacted providing for the condemnation by a public entity of the property of a public utility company by a procedure wherein the value of the property was to be fixed by the Railroad Commission. Cal. Stats. 1913, Ch. 339, § 1, p. 683. Other legislation enacted in 1913 also dealt with matters that might be involved when property of a public utility corporation is taken. E.g., Cal. Stats. 1913, Ch. 292, § 1, p. 547 (property interest subject to being taken); Cal. Stats. 1913, Ch. 293, § 1, p. 549 (more necessary public use); Cal. Stats. 1913, Ch. 200, § 1, p. 349 (venue); Cal. Stats. 1913, Ch. 298, § 1, p. 555 (complaint--description of property); Cal. Stats. 1913, Ch. 158, § 1, p. 239 (damages--encumbrances); Cal. Stats. 1913, Ch. 159, § 1, p. 240 (relocation of railroad tracks); Cal. Stats. 1913, Ch. 160, § 1, p. 241 (time for payment of judgment).

6. Code Civ. Proc. § 1240(3), (4), (5). See also Code Civ. Proc. § 1241(3).

the use to which it is to be applied is "a more necessary public use."⁷

Assuming that the taking is for a public use, Sections 1240 and 1241 determine when a taking of the property of a private corporation by a governmental entity is permitted. Thus, the inclusion of "any public utility" in subdivision 3 of Section 1238 contributes nothing to the solution of this problem.⁸

The inclusion of "any public utility" in subdivision 3 of Section 1238 may be of significance insofar as the right to take property for public utility "uses" is concerned. The subdivision apparently grants the power of eminent domain for "any public utility" use, but this grant may be limited by the phrase "for the use of any county, incorporated city, or city and county, village, town, school district, or irrigation district" It is unclear whether this limiting phrase means that the service must be provided within the territorial limits of the governmental entities listed or that the power is limited to exercise by the governmental entities listed.⁹ It is apparent that the effect of including "any public utility" in subdivision 3 is difficult, if not impossible, to determine. As previously mentioned, however, there are a great number of specific public utility uses specified in Section 1238 and other sections and there would be a need to rely upon the general "any public utility" use authorization found in subdivision 3 only where the specific uses otherwise specified are not sufficiently broad to cover the particular case.

7. Code Civ. Proc. § 1241(3). See also Code Civ. Proc. § 1240(3), (5).

8. For a discussion of the problem, see Comment, Eminent Domain Powers Exercisable Over California Property by Oil and Gas Corporations, 7 U.C.L.A. L. Rev. 327 (1960).

9. It has been assumed by at least one writer that the grant is not limited to exercise by the governmental entities listed; see Comment, Eminent Domain Powers Exercisable Over California Property by Oil and Gas Corporations, 7 U.C.L.A. L. Rev. 327, 331 (1960).

Insofar as subdivision 3 is the source of condemnation authority for privately owned public utilities and private persons, the subdivision should be superseded by specific statutory provisions to be compiled in the Public Utilities Code. Insofar as the provision gives public entities condemnation authority, it probably merely duplicates authority provided in other statutes and can be eliminated as unnecessary. However, if an examination of the statutes authorizing public entities to engage in public utility activities discloses that the provision has any current effect, it should be superseded by specific statutory provisions compiled in the statutes authorizing public entities to engage in the particular utility activities. Consideration of condemnation by public entities is beyond the scope of this study, however, and will be considered in a subsequent study.

Railroads

Railroads generally. Subdivision 4 of Section 1238 of the Code of Civil Procedure authorizes condemnation for "steam, electric, and horse ¹ railroads." This grant is obsolete because it fails to recognize that such railroads have been largely replaced by railroads using diesel powered locomotives. Moreover, railroad corporations are given the power of eminent domain for railroad purposes by provisions of the Public Utilities Code,² the most important of which is subdivision (g) of

1. These words are not to be read in series with any other uses or qualifications--such as "public transportation"--contained in subdivision 4. San Francisco & San Joaquin Valley Ry. v. Leviston, 134 Cal. 412, 66 P. 473 (1901); Central Pac. Ry. v. Feldman, 152 Cal. 303, 92 P. 849 (1907).
2. Pub. Util. Code §§ 7526 (general condemnation authority), 7533 (additional tracks), 7535 (railroad intersections), 7536 (railroad crossings). See also Pub. Util. Code § 7508 (right of eminent domain in transferee of railroad corporation). Cf. Govt. Code §§ 39370-39372 (cities).

Section 7526 which authorizes condemnation of "lands, stone, gravel, or other materials to be used in the construction and maintenance of its road, and all necessary appendages and adjuncts." In any event, the number of condemnations for railroad purposes appears to have declined substantially since subdivision 4 was enacted in 1872.

Railroad corporations have a broad authority to condemn property necessary for railroad use. Thus, they have been permitted to condemn land for such uses as spur tracks,³ wharves for transfer of freight from railroad cars and boats where reasonably necessary for future business,⁴ a freight house adjacent to station grounds,⁵ and a workshop.⁶

The "steam, electric, and horse railroads" portion of Section 1238 should be superseded by a provision to be compiled in the Public Utilities Code granting a railroad corporation the right to condemn any property necessary for the construction and maintenance of its railroad. This provision also would supersede subdivision (g) of Section 7526 of the Public Utilities Code insofar as that provision grants condemnation authority.

3. Southern Pac. Co. v. Los Angeles Milling Co., 177 Cal. 395, 170 P. 829 (1918); Madera Ry. v. Raymond Granite Co., 3 Cal. App. 668, 87 P. 27 (1906).

4. Vallejo & N. R.R. v. Reed Orchard Co., 169 Cal. 545, 147 P. 238 (1915).

5. Central Pac. Ry. v. Feldman, 152 Cal. 303, 92 P. 849 (1907).

6. Southern Pac. R. R. v. Raymond, 53 Cal. 223 (1878).

Railroads for "quarrying, logging or lumbering purposes." Subdivision 11 of Section 1238 of the Code of Civil Procedure authorizes condemnation for railroads "for quarrying, logging or lumbering purposes."⁷ It appears to authorize condemnation by individuals and corporations for private railroad purposes. As such, the validity of this authorization under the constitutional public use doctrine is questionable.⁸ A similar statute in another state has been held unconstitutional under the Fourteenth Amendment to the Constitution of the United States.⁹ This provision has not been clarified since it was enacted in 1891.¹⁰ The original language mentioned neither railroads nor quarrying. "Railroads" was added in 1913.¹¹ "Quarrying" was added in 1917.¹²

7. The last sentence of Section 14 of Article 1 of the California Constitution declares that the taking of property for a railroad "run by steam or electric power" for logging or lumbering purposes is a taking for a "public use." The Commission has tentatively recommended that this sentence be repealed because it is obsolete and unnecessary. See Tentative Recommendation and a Study Relating to Condemnation Law and Procedure: Number 1--Possession Prior to Final Judgment and Related Problems, 8 Cal. L. Revision Comm'n Reports 1101, 1167-1170 (1967).

8. See 2 Ops. Cal. Atty. Gen. 415 (1943); Annots., 86 A.L.R. 552 (1933); 51 A.L.R. 1199 (1927).

9. *Paine v. Savage*, 126 Me. 121, 136 Atl. 664 (1927).

10. Cal. Stats. 1891, Ch. 50, § 1, p. 48.

11. Cal. Stats. 1913, Ch. 291, § 1, p. 544.

12. Cal. Stats. 1917, Ch. 57, § 1, p. 59.

In Great Northern Ry. v. Superior Court,¹³ the court dealt with the attempted taking of an easement across an existing railroad track by a "logging railway company" under the Code of Civil Procedure. The court held that the taking could not be maintained without the precedent permission of the Public Utilities Commission. Significantly, the court expressed no opinion as to the validity of the taking and also refrained from expressing any view as to the application of the doctrine of public use to such a taking.

The need for railroads for private quarrying, logging, or lumbering purposes is not sufficiently justified to permit private individuals to exercise the power of eminent domain for this purpose. As far as railroads subject to public regulation--i.e., "public utilities"--are concerned, it is previously recommended that they be given the power of eminent domain to acquire any necessary property, including, for example, the power to condemn property for spur tracks to serve individual businesses. Accordingly, there is no need to continue the grant made by subdivision 11 for railroads for quarrying, logging, or lumbering purposes when Section 1238 is repealed.

13. 126 Cal. App. 575, 14 P.2d 899 (1932).

Traction engines and road locomotives

Section 1238(9) of the Code of Civil Procedure declares:

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

* * * * *

9. Roads for transportation by traction engines or road locomotives.

This subdivision is obsolete since it applies only to takings for traction engines and road locomotive use. Such vehicles--essentially steam powered locomotives which ran on wheels rather than tracks--have long been considered collector's items.¹ Moreover, subdivision 9, enacted in 1891,² has not been implemented or construed by the appellate courts. It therefore appears that subdivision 9 has outlived whatever useful function it may have once had and need not be continued when Section 1238 is repealed.

1. See Clymer, Album of Historical Steam Traction Engines (1949); J. Fisher, Road Locomotives, 31st Annual Rep. of the Amer. Inst. of the City of New York 1870-1871, at 877; Gilford, The Traction Engine 1842-1936 (1952).

2. Cal. Stats. 1891, Ch. 50, § 1, p. 48.

Electric power

Introduction. The provisions in Section 1238 of the Code of Civil Procedure authorizing condemnation for electric power purposes, subdivisions 12 and 13, have a long history of amendments made necessary by their specificity. This legislative history tends to explain the complexity and disorganization of these two subdivisions. As originally drafted, subdivision 12 applied to hydroelectric generation facilities and subdivision 13 applied to transmission and distribution facilities. This is no longer true due to frequent amendments.

Subdivision 12--legislative history. Subdivision 12, as enacted in 1893, provided for the exercise of the power of eminent domain for:¹

Canals, reservoirs, dams, ditches, flumes, aqueducts, and pipes for supplying and storing water for the operating of machinery for the purpose of generating and transmitting electricity for the supplying of mines, quarries, railroads, tramways, mills, and factories with electrical power; and also for supplying electricity to light or heat mines, quarries, mills, and factories, incorporated cities, cities and counties, villages, or towns.

This language provided only for the condemnation of manmade facilities for gathering and storing water for the generation of electricity for certain specified users; it did not provide for condemnation of such necessary items as water rights, natural waterways, facilities needed to discharge the water used, land, and buildings. In 1895, the following language was added at the end of subdivision 12:²

together with lands, buildings, and all other improvements in or upon which to erect, install, place, use, or operate machinery for the purpose of generating and transmitting electricity for any of the purposes or uses above set forth.

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1. Cal. Stats. 1893, Ch. 130, § 1, p. 146.
 2. Cal. Stats. 1895, Ch. 98, § 1, p. 89.

This amendment extended the power of eminent domain to lands and buildings needed for machinery and buildings used in generating electrical power. In 1905, "quarries" was replaced by "cars."³ More importantly, the 1905 amendment expanded the potential users authorization. The following language was inserted between the words "towns" and "together": "and also for furnishing electricity for lighting, heating or power purposes to individuals or corporations." The next year the Legislature reinstated "quarries."⁴

In 1907, the first part of subdivision 12 was amended to read as follows:

Canals, reservoirs, dams, ditches, flumes, aqueducts, pipes and outlets, natural or otherwise, from sources other than a navigable lake, for supplying, storing, and discharging water for or in connection with the operation of machinery for the purposes

This amendment permitted condemnation of natural waterways. It also allowed condemnation of land used for discharging the water used in hydro-electric plants. The 1909 amendment deleted the navigable water limitation and the words "in connection with"⁶; also, "supplying electricity" was changed to "applying electricity." Irrigation districts became authorized potential users in 1923.⁷ Section 1238(12) now reads:

Canals, reservoirs, dams, ditches, flumes, aqueducts, and pipes and outlets natural or otherwise for supplying, storing, and discharging water for the operation of machinery for the purpose of generating

3. Cal. Stats. 1905, Ch. 477, § 1, p. 637.

4. Cal. Stats. 1906, Ex. Sess., Ch. 50, § 1, p. 68.

5. Cal. Stats. 1907, Ch. 399, § 1, p. 742.

6. Cal. Stats. 1909, Ch. 682, § 1, p. 1032.

7. Cal. Stats. 1923, Ch. 64, § 1, p. 129; Cal. Stats. 1925, Ch. 74, § 1, p. 170.

and transmitting electricity for the supply of mines, quarries, railroads, tramways, mills, and factories with electric power; and also for the applying of electricity to light or heat mines, quarries, mills, factories, incorporated cities and counties, villages, towns, or irrigation districts; and also for furnishing electricity for lighting, heating or power purposes to individuals or corporations; together with lands, buildings and all other improvements in or upon which to erect, install, place, use or operate machinery for the purpose of generating and transmitting electricity for any of the purposes or uses above set forth.

Subdivision 13--legislative history. Section 1238(13) also has had a history of frequent amendments. As enacted in 1893, it authorized condemnation for:⁸ "Electric light lines." In 1901 it was amended to make clear that condemnation was permissible no matter what use would be made of the electricity. As amended in 1901, subdivision 13 read:⁹

Electric light lines, electric power lines, electric heat lines; and electric light, heat and power lines.

The first three words, "Electric light lines," were deleted in 1905.¹⁰

The 1911 amendment clarified the types of electric lines which were declared public uses and specified a class of users or beneficiaries of the services different from the class specified in subdivision 12. It also authorized condemnation to provide for "works or plants" needed in the generation or distribution of electricity. Subdivision 13 then provided:¹¹

Electric power lines, electric heat lines, electric light lines, electric light, heat and power lines, and works and plants, for the generation, transmission or distribution of electricity for the purpose of furnishing or supplying electric light, heat or power to any county, city and county or incorporated city or town, or the inhabitants thereof.

8. Cal. Stats. 1893, Ch. 130, § 1, p. 146.

9. Cal. Stats. 1901, Ch. 57, § 1, p. 72.

10. Cal. Stats. 1905, Ch. 477, § 1, p. 637.

11. Cal. Stats. 1911, Ch. 635, § 1, p. 1206.

The 1913 amendment authorized condemnation of lands, buildings, and water rights.¹² It also permitted condemnation for future use.¹³ Irrigation districts were added as authorized users in the 1920's.¹⁴ The subdivision now provides:

13. Electric power lines, electric heat lines, electric light lines, electric light, heat and power lines, and works or plants, lands, buildings or rights of any character in water, or any other character of property necessary for the generation, transmission or distribution of electricity for the purpose of furnishing or supplying electric light, heat or power to any county, city and county or incorporated city or town, OR IRRIGATION DISTRICT, or the inhabitants thereof, or necessary for the proper development and control of such use of such electricity, either at the time of the taking of said property, or for the future proper development and control thereof. [1913 amendments italicized; 1923 amendment capitalized.]

Other sources of condemnation authority. Subdivisions 12 and 13 are not the exclusive legislative grant of the power of eminent domain for purposes of generation and distribution of electric power. Numerous districts and other agencies have been given an express grant of the right of eminent domain for such purposes.¹⁵ In addition, under the Federal Power Act:¹⁶

any licensee . . . [may condemn] lands or property of others necessary to the construction, maintenance, or operation of any dam, reservoir, diversion structure, or the works appurtenant or accessory thereto, in conjunction with an improvement which in the judgment of the commission is desirable and justified in the public interest

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12. Cal. Stats. 1913, Ch. 291, § 1, p. 544. Prior to the 1913 amendment, the courts had found an implied power of eminent domain over water rights. Northern Light & Power Co. v. Stacher, 13 Cal. App. 404, 109 P. 896 (1910).
13. The right of a public utility to acquire property through eminent domain proceedings, although not limited to its present needs, extends only to those future needs that are fairly anticipated. San Diego Gas & Elec. Co. v. Lux Land Co., 194 Cal. App.2d 472, 14 Cal. Rptr. 899 (1961). But see Tuolumne Water Power Co. v. Frederick, 13 Cal. App. 498, 110 P. 134 (1910).
14. Cal. Stats. 1923, Ch. 64, § 1, p. 129; Cal. Stats. 1925, Ch. 74, § 1, p. 170.
15. See, e.g., Pub. Util. Code §§ 10003-10004 (utility owned by municipality), 12703 (municipal utility districts), 16404 (public utility districts).
16. 16 U.S.C. § 814 (1964).

Since the Federal Power Commission is empowered to issue licenses for projects on "any of the streams or other bodies of water over which Congress has jurisdiction under its authority to regulate commerce [and navigable waters] . . . or upon any part of the public lands and reservations of the United States,"¹⁷ it appears that concurrent federal and state powers to condemn will exist with respect to most hydroelectric projects.

Section 1238 provides the only condemnation authorization for private electric corporations. Electrical corporations, as defined in Section 218 of the Public Utilities Code, are public utilities¹⁸ subject to regulation by the Public Utilities Commission.¹⁹ Their property is deemed dedicated to the public use, a status which is not revocable at will;²⁰ such property cannot be conveyed without the consent of the Public Utilities Commission.²¹ It is well established that condemnation by private electrical corporations, with the above characteristics, comports with the public use doctrine.²²

17. 16 U.S.C. § 797 (1964).

18. Pub. Util. Code § 216.

19. Pub. Util. Code § 701. Public utilities operated by cities or other political subdivisions are not regulated by the Public Utilities Commission.

20. See *Beckner v. Otto*, 47 Cal. P.U.C. 480 (1947); *Marin L. & S. Co.*, 30 C.R.C. 496 (1927).

21. Pub. Util. Code § 851; *Crum v. Mt. Shasta Power Corp.*, 220 Cal. 295, 30 P.2d 30 (1934); but see *People v. Fresno*, 254 Cal. App.2d 76, 62 Cal. Rptr. 79 (1967).

22. See, e.g., *Clark v. Los Angeles*, 160 Cal. 30, 116, P. 722 (1911); *Slemons v. Southern Cal. Edison Co.*, 252 Cal. App.2d 1022, 60 Cal. Rptr. 785 (1967); *Tuolumne Water Power Co. v. Frederick*, 13 Cal. App. 498, 110 P. 134 (1910).

Cities, cities and counties, and counties conceivably could use the Section 1238 grant of the power of eminent domain if they chose not to operate under one of the many district laws or revenue acts. It is unknown whether such practices exist.

Recommendation. Deletion of the cumbersome provisions in Section 1238 dealing with condemnation for electric power purposes would clarify existing law. However, a provision continuing the right of electrical corporations to exercise the power of eminent domain will be needed when Section 1238 is repealed since that section is the only condemnation authorization for private electric corporations. In addition, although it appears that all public entities that are authorized to engage in electric utility functions have adequate condemnation authority, a careful check should be made of the specific statutes relating to various types of public entities to confirm this impression.

"Works or plants for supplying gas, heat, refrigeration or power"

Subdivision 17 of Section 1238 of the Code of Civil Procedure authorizes condemnation by declaring the following to be a "public use":

17. Works or plants for supplying gas, heat, refrigeration or power to any county, city and county, or incorporated city or town, or irrigation district, or the inhabitants thereof, together with lands, buildings, and all other improvements in or upon which to erect, install, place, maintain, use or operate machinery, appliances, works and plants for the purpose of generating, transmitting and distributing the same and rights of any nature in water, or property of any character necessary for the purpose of generating, transmitting and distributing the same, or necessary for the proper development and control of such use of such gas, heat, refrigeration, or power, either at the time of the taking of said property, or for the future proper development and control thereof.

This subdivision was added to Section 1238 in 1911¹ and was amended in 1913² and in 1923.³ The subdivision is the exclusive condemnation grant for gas corporations and heat corporations.

A gas corporation is defined in Section 222 of the Public Utilities Code to mean in substance a person operating a "gas plant" for compensation. Section 221 of the Public Utilities Code defines "gas plant" to mean in substance all property used "in connection with or to facilitate the production, generation, transmission, delivery, or furnishing of gas, natural or manufactured, for light, heat, or power."

A heat corporation is defined in Section 224 of the Public Utilities Code to mean in substance a person operating a "heating plant" for compensation. Section 223 of the Public Utilities Code defines "heating plant" to mean in substance all property used "in connection with or to facilitate the production, generation, transmission, delivery or furnishing of heat for domestic, business, industrial, or public use."

As to a gas corporation, Section 1001 of the Public Utilities Code requires that any proposed construction or extension of facilities be preceded by a certificate of public convenience and necessity. A heat corporation, on the other hand, is not required to obtain such a certificate,⁴

1. Cal. Stats. 1911, Ch. 635, § 1, p. 1206.

2. Cal. Stats. 1913, Ch. 291, § 1, p. 544. The 1913 amendment added the provision authorizing a taking necessary for proper development and control either at the time of the taking or for the future proper development and control.

3. Cal. Stats. 1923, Ch. 64, § 1, p. 129. The 1923 amendment added the words "or irrigation district."

4. W. N. Moore Corp. 45 C.R.C. 287 (1944)(rates must be filed with Public Utilities Commission).

but is a "public utility"⁵ and thus subject to regulation by the Public Utilities Commission.⁶

The grant of condemnation authority by subdivision 17 of Section 1238 for works or plants for supplying "refrigeration" apparently has no present application and perhaps never had. No statute has been found for the incorporation of "refrigeration companies" and the Public Utilities Code does not contemplate regulation of the furnishing of "refrigeration" for compensation or otherwise. Hence, there is no justification for continuing a general condemnation authority for "refrigeration."

It should be noted that subdivision 17 specifically permits condemnation for future use.⁷

Subdivision 17 is not the exclusive legislative grant of the power of eminent domain for the purpose of the production and distribution of the utility services listed in that section. Various public entities have been given an express grant of the right of eminent domain for the same purposes.⁸ In addition, under the Natural Gas Act,⁹ "any holder of

5. Pub. Util. Code § 216.

6. Pub. Util. Code § 701.

7. The right of a public utility to acquire property through eminent domain proceedings, although not limited to its present needs, extends only to those future needs that are fairly anticipated. See San Diego Gas & Elec. Co. v. Lux Land Co., 194 Cal. App.2d 472, 14 Cal. Rptr. 899 (1961). But see Tuolumne Water Power Co. v. Frederick, 13 Cal. App. 498, 110 P. 134 (1910).

8. See, e.g., Pub. Util. Code §§ 10003-10004 (utility owned by a municipality), 12703 (municipal utility districts), 16404 (public utility districts).

9. 15 U.S.C.A. § 717f (h)(1964).

a certificate of public convenience and necessity . . . [may condemn] the necessary right-of-way to construct, operate, and maintain a pipe line . . . for the transportation of natural gas, and the necessary land . . . for the location of compressor stations, pressure apparatus, or other stations or equipment necessary to the proper operation of such pipe line" Since the Natural Gas Act applies only "to the transportation of natural gas and the sale thereof in interstate and foreign commerce"¹⁰ concurrent authority to condemn will exist only with respect to an interstate pipeline.

Deletion of subdivision 17 of Section 1238 would clarify existing law. However, a provision continuing the right of gas and heat corporations to exercise the power of eminent domain will be needed when Section 1238 is repealed since that section is the only condemnation authorization for these corporations. In addition, although it appears that all public entities that are authorized to engage in the utility services covered by subdivision 17 have adequate condemnation authority, a careful check should be made of the specific statutes relating to various types of public entities to confirm this impression.

10. 15 U.S.C.A. § 717(a) (1964). (Interstate commerce is defined in 15 U.S.C.A. § 717a (7) as "commerce between any point in a State and any point outside thereof, or between points within the same State but through any place outside thereof")

Oil pipelines

Subdivision 10 of the Code of Civil Procedure Section 1238 was added in 1891¹ to authorize the exercise of the power of eminent domain in behalf of "oil pipe-lines."² Section 1238 also provides that "any public utility" has the power of eminent domain, but that power is apparently limited by the phrase "for the use of any county, incorporated city, or city and county, village, town, school district, or irrigation district"³ The California Constitution, in Article XII, Section 23, defines a public utility and includes a reference to pipelines for the conveyance of crude oil. In addition, Section 216 of the Public Utilities Code provides that any "pipeline corporation" is a public utility if its service "is performed for or the commodity delivered to the public or any portion thereof." Section 228 defines a "pipe line corporation" as "every corporation or person owning, controlling, operating, or managing any pipe line for compensation within this State." Section 227 provides that an oil pipeline includes "all real estate, fixtures, and personal property, owned, controlled, operated, or managed in connection with or to facilitate the transmission, storage, distribution, or delivery of crude oil or other fluid substances except water through pipe lines."

1. Cal. Stats. 1891, Ch. 50, § 1, p. 48.
2. Gas pipeline corporations possessing a certificate of public convenience and necessity obtained from the Federal Power Commission also are delegated federal powers of eminent domain under certain conditions. Natural Gas Act, 15 U.S.C. § 717f(h)(1964). The eminent domain provision of the Natural Gas Act was enacted under Congress' power to regulate interstate commerce. Natural Gas Act, 15 U.S.C. § 717(a)(1964); Thatcher v. Tenn. Gas Transmission Co., 180 F.2d 644 (5th Cir.), cert. den., 340 U.S. 829 (1950). See Federal Power Comm'n v. Natural Gas Pipeline Co., 315 U.S. 575, 582-583 (1942).
3. Cal. Code Civ. Proc. § 1238(3).

In Associated Pipe Line Co. v. Railroad Comm'n,⁴ the Supreme Court held--applying a statute very similar to present Section 216--⁵ that not every company owning a pipeline is a public utility. The basis of the decision was that the pipeline was being used only for the transportation of oil from the company's fields to its sales and shipping office and thus had not been dedicated to public use. In Slater v. Shell Oil Co.,⁶ the Court of Appeal construed the statutory provisions involved in Associated Pipe Line to mean that a pipeline company wholly owned by the oil company was a public utility despite the fact that the oil was only transported for the use of that company. However, the fact that the pipeline company threatened the plaintiff with eminent domain proceedings if the grant of an easement were not made and that the company had acquiesced in the Railroad Commission's demands that it seek approval of securities issues, file a schedule of rates and regulations applicable to the transportation of oil, and publically offer to carry oil for the public distinguished this case from Associated Pipe Line. In Producers Transp. Co. v. Railroad Comm'n,⁷ the Supreme Court held that, once a pipeline company

4. 176 Cal. 518, 169 P. 62 (1917).

5. Cal. Stats. 1913, Ch. 327, §§ 1-2, p. 657-658.

6. 39 Cal. App.2d 535, 103 P.2d 1043 (1940).

7. 176 Cal. 499, 169 P. 59 (1917), aff'd, 251 U.S. 228 (1920)(alternatively the court held that the company's stated intention in its articles of incorporation to carry any producer's oil and its subsequent action in conformity with this intention sufficiently evidenced its intention to dedicate its property to public use).

acquires a right of way by means of condemnation, the company has conclusively evidenced its intention to devote its pipeline to public use and, therefore, becomes a public utility. Thus, in California, a company having the power of eminent domain for oil pipelines is necessarily a public utility; a private corporation cannot exercise the power given by subdivision 10 of Section 1238 without transforming itself into a public utility.

The extent of the power of eminent domain possessed by a pipeline company is not clear.⁸ The law may be that a pipeline company can condemn only for the purposes of a pipeline, but it is more likely that the company would be held to have the power to condemn for the other facilities listed in Public Utilities Code Section 227.

It is recommended that subdivision 10 be deleted from Section 1238 and that a provision governing the exercise of the power of eminent domain by pipeline companies be codified in the Public Utilities Code. The provision should codify the present case law that condemnation may be used only when the condemnor is a public utility and is regulated by the Public Utilities Commission and should provide a broad enough authority to cover condemnation for all regulated functions of the pipeline company.

8. For further discussion, see Comment, Eminent Domain Powers Exercisable Over California Property by Oil and Gas Corporations, 7 U.C.L.A. L. Rev. 327 (1960).

Telephone, telegraph, radio and wireless lines and systems

Subdivision 7 was added to Code of Civil Procedure Section 1238 by¹ the Legislature in its 1873-74 session. The subdivision originally provided for takings for telegraph lines--the only modern means of communication then in existence. After the invention of the telephone, the subdivision² was amended to cover both telephone and telegraph lines. Apparently in response to the growth in the use of the telephone, the subdivision was amended again in 1911 to permit takings for telephone and telegraph systems and plants in addition to lines.³ In 1925, the subdivision was amended to⁴ its present form in response to the invention of the radio. The words "radio and wireless" apparently were interjected into the section without considering the incongruity of providing for takings for "wireless lines." There does not appear to be any distinction between the terms "radio" and⁵ "wireless," the latter term being the word preferred in British usage.

There is no federal grant of eminent domain power for the establishment⁶ of telephone and telegraph facilities although Congress could do so. The federal government has enacted the "Post Roads Act" which declares railroads and highways within the several states to be post roads, and as such,⁷ authorizes their use by telegraph companies that accept the act. This act

1. Code Am. 1873-74, Ch. 383, § 160, p. 353.

2. Cal. Stats. 1905, Ch. 477, § 1, p. 637.

3. Cal. Stats. 1911, Ch. 635, § 1, p. 1206.

4. Cal. Stats. 1925, Ch. 74, § 1, p. 170.

5. See definitions of radio, wireless, and wireless telegraphy in Websters Third New International Dictionary (1961) at 1872, 2624, respectively.

6. 1 Nichols, Eminent Domain § 2.15 (1964).

7. Id.

8
prevents states from excluding telephone and telegraph companies, but if
a company makes use of a state road, that state is entitled to receive
9
compensation for the taking of its land to erect telegraph lines.

It is interesting to speculate as to whether the power of eminent domain is available in California for the purpose of providing facilities for television communication. If "radio" as used in the statute includes commercial radio as well as radio communication systems between individuals, there would appear to be no distinction between it and television. Decisions from other states indicate that television transmission usually is accorded
10
the same rights as telegraph and telephone transmission. However, without statutory amendment, subdivision 7 clearly does not authorize the exercise of the right of eminent domain for television communication. The logical approach would seem to be to permit the use of eminent domain to further television, telephotography, and similar scientific achievements that have been developed since 1925.

There are no cases pertaining to the exercise of eminent domain in California for radio and wireless lines or systems and plants. The extent to which eminent domain is exercised for radio and wireless purposes is unclear. Although there undoubtedly are some takings for radio and wireless purposes, empirical observation suggests that Code of Civil Procedure Section 1238(7) is used primarily for takings for telephone and telegraph purposes.

8. Id.

9. 1 Nichols, Eminent Domain § 2.21[4] (1964).

10. See, e.g., Ohio Tel. & Tel. Co. v. Steen, 54 Ohio L. Abs. 111, 54 Ohio L. Abs. 114, 85 N.E.2d 579 (1949); Ball v. American Tel. & Tel. Co., 227 Miss. 218, 86 So.2d 42 (1956).

The most obvious condemnors under subdivision 7 of Code of Civil Procedure Section 1238 are the private telephone and telegraph companies. Their exercise of eminent domain to supply telephone and telegraph facilities is a public use.¹¹ These companies may exercise the power of eminent domain to take land for almost any purpose that would facilitate communication by telephone and telegraph.¹² There is no danger, however, of indiscriminate takings since these companies are public utilities and their activities are strictly regulated by the Public Utilities Commission.¹³

It will not always be necessary for private telephone and telegraph companies to resort to eminent domain to obtain easements for their lines and other facilities. The state has made a continuing offer to telephone and telegraph companies to use the public highways for the creation and maintenance of telephone and telegraph lines and the fixtures necessary thereto.¹⁴ This offer is accepted by actual construction and maintenance of the lines which has the effect of giving a franchise from the state to the telephone and telegraph companies for the stated purposes.¹⁵ Moreover,

11. San Diego Gas & Elec. Co. v. Lux Land Co., 194 Cal. App.2d 472, 14 Cal. Rptr. 899 (1961).

12. See Cal. Pub. Util. Code §§ 233-236.

13. See Cal. Pub. Util. Code §§ 216, 1001.

14. Public Utilities Code Section 7901 provides:

7901. Telegraph or telephone corporations may construct lines of telegraph or telephone lines along and upon any public road or highway, along or across any of the waters or lands within this State, and may erect poles, posts, piers, or abutments for supporting the insulators, wires, and other necessary fixtures of their lines, in such manner and at such points as not to incommode the public use of the road or highway or interrupt the navigation of the waters.

15. Pacific Tel. & Tel. Co. v. San Francisco, 51 Cal.2d 766, 336 P.2d 514 (1959).

there are provisions in the Streets and Highways Code that permit the location of structures or fixtures necessary to telegraph and telephone lines in various public rights of way.¹⁶

Cities, counties, and cities and counties, as municipal corporations, may establish and operate public works to provide their inhabitants with telephone service or other means of communication.¹⁷ Consequently, municipal corporations may exercise eminent domain for this purpose.

Moreover, municipal utility districts may be formed to provide their members with telephone service or other means of communication.¹⁸ These districts are empowered to exercise eminent domain to provide and maintain the facilities necessary to afford their members the requisite means of communication.¹⁹

Finally, the state itself apparently would be entitled to exercise eminent domain to provide various communication facilities under subdivision 7. The state has a teletype system²⁰ and the Department of Justice is to maintain a statewide telecommunication system for the use of law enforcement agencies.²¹ In addition, the Department of General Services is empowered to acquire, construct, and maintain communications systems and facilities which are to be available to all public agencies in the state on such terms as are agreed upon between the department and the agencies.²²

16. Cal. Sts. & Hwys. Code §§ 117, 5101(e).

17. Cal. Const., Art. XI, § 19; Cal. Pub. Util. Code § 10101; Cal. Govt. Code §§ 39732, 39790, and 39792.

18. Cal. Pub. Util. Code § 12801.

19. Cal. Pub. Util. Code §§ 12703, 12771.

20. Cal. Govt. Code §§ 14710, 14711.

21. Cal. Govt. Code § 15152.

22. Cal. Govt. Code § 14931.

The substance of the condemnation authorization specified in subdivision 7 of Section 1238 of the Code of Civil Procedure should be retained. However, the authorization should be removed from the Code of Civil Procedure and placed in the Government Code and the Public Utilities Code in the appropriate sections dealing with the powers of the various entities who exercise the power of eminent domain for communication purposes. It may also be advisable to add express authorization for using eminent domain to further television communications and other similar means of communication that have developed since 1925.

Water supply and distribution

Introduction. Section 1 of Article XIV of the California Constitution declares as a public use "the use of all water now appropriated, or that may hereafter be appropriated, for sale, rental, or distribution."

Subdivisions 3 and 4 of Section 1238 of the Code of Civil Procedure grant the right to condemn property for the supplying of water for human consumption and for irrigation, industrial, and other purposes. Subdivision ¹ 3 authorizes the condemnation of property necessary for conducting, storing, or distributing water for the use of any county, city, municipal water district, or state institution, or the inhabitants thereof, including any property necessary for the proper development and control of such water, either at the time of the condemnation or in the future. Subdivision ² 4

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1. The pertinent portion of subdivision 3 provides that the power of eminent domain may be exercised in behalf of the following public uses:

3. Any public utility, . . . ponds, lakes, canals, aqueducts, reservoirs, tunnels, flumes, ditches, or pipes, lands, water system plants, buildings, rights of any nature in water, and any other character of property necessary for conducting or storing or distributing water for the use of any county, incorporated city, or city and county, village or town or municipal water district, or the inhabitants thereof, or any state institution, or necessary for the proper development and control of such use of said water, either at the time of the taking of said property, or for the future proper development and control thereof

2. The pertinent portion of subdivision 4 provides that the power of eminent domain may be exercised in behalf of the following public uses:

4. . . . canals, ditches, dams, poundings, flumes, aqueducts and pipes for irrigation, . . . supplying mines and farming neighborhoods with water, . . . and water, water rights, canals, ditches, dams, poundings, flumes, aqueducts and pipes for irrigation of lands furnished with water by corporations supplying water to the lands of the stockholders thereof only, and lands with all wells and water therein adjacent to the lands of any municipality or of any corporation, or person supplying water to the public or to any neighborhood or community for domestic use or irrigation.

authorizes condemnation for irrigation and for supplying water to mines and farming neighborhoods. In addition, subdivision 4 authorizes a public entity, private corporation, or other person supplying water to the public or to any neighborhood for domestic use or irrigation, to condemn land adjacent to its own land, with all the wells and waters therein, for this purpose.

These constitutional and statutory declarations that water supply and distribution is a "public use" could conceivably provide condemnation authority to public entities, privately owned public utilities, and private individuals and corporations. However, no attempt will be made here to consider the condemnation authority of public entities for the water supply and distribution function;³ this study is concerned only with the authority of private persons and privately owned public utilities to condemn property for water supply and distribution purposes.

Civil Code Sections 548-552 contain provisions applicable to water corporations. Section 548 provides that no corporation may serve a city with water unless authority has been granted by ordinance or by a contract with the city. Section 549 requires that good water be supplied at reasonable rates without discrimination and authorizes the board of supervisors or city governing body to establish regulations governing delivery of water. Section 552 contains provisions designed to assure persons served by a corporation that furnishes water to irrigate lands that the service will be continued. Consideration should be given to the repeal of Sections 548 and 549 as unnecessary in view of the regulation of public utilities by the Public Utilities Commission.

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3. It should be recognized that when Section 1238 is repealed it will be necessary to identify each public entity that has authority to engage in the water supply and distribution function and to make clear in the appropriate statute that the public entity has adequate condemnation authority for this function. This will be considered in a separate study.

Condemnation authority of private persons generally. Both Section 1 of Article XIV of the California Constitution and subdivision 4 of Section 1238 of the Code of Civil Procedure seem to imply that water rights may be condemned for individual use by individuals. These provisions were held valid⁴ in Lux v. Haggin, where the court stated:

It is apparent that in deciding whether a use was public the legislature was not limited by the mere number of persons to be immediately benefited as opposed to those from whom property is to be taken. It must happen that a public use (as of a particular wagon or railroad) will rarely be directly enjoyed by all the denizens of the state

And while the court will hold the use private where it appears that the government or public cannot have any interest in it, the legislature, in determining the expediency of declaring a use public, may no doubt properly take into consideration all the advantages to follow from such action; as the advancement of agriculture, the encouragement of mining and the arts, and the general though indirect benefits derived to the people at large from the dedication.

Despite this language, the California courts generally have not permitted private persons to condemn property for their own private use. For example, subdivision 4 of Section 1238 authorizes condemnation in favor of the means⁵ of transporting water to mines. In Lorenz v. Jacob,⁵ it was held that eminent domain could not be exercised by the owners of mining claims to obtain water principally for their own mines, even though they might also supply water to others for mining and for irrigation. Such would not be a constitutional "public use." Subdivision 4 also authorizes condemnation in favor of the means of transporting water to farming neighborhoods. It has been held,

4. 69 Cal. 255, 304-305, 10 P. 674, 700 (1886)(emphasis in original).

5. 63 Cal. 73 (1883).

however, that, in order to condemn under subdivision 4, a water company must act as a public utility--i.e., water must be made available to any person⁶ capable of enjoying it within a given "farming neighborhood."

Accordingly, with the possible exception of mutual water companies (discussed below), the courts have interpreted the constitutional and statutory provisions discussed above to preclude condemnation by private corporations and individuals for their own water supply and distribution system. This is a proper construction and should be continued in any comprehensive revision of eminent domain law.

Mutual water companies. Subdivision 4 of Code of Civil Procedure Section 1238 provides, in part, that eminent domain may be exercised to take "water, water rights, canals, ditches, dams, poundings, flumes, aqueducts and pipes for irrigation of lands furnished with water by corporations supplying water to the lands of the stockholders thereof only" This^{6a} part of the subdivision was added in 1917⁷ and applies to what are commonly known as mutual water companies.

6. San Joaquin & Kings River Canal & Irr. Co. v. Stevinson, 164 Cal. 221, 128 P. 924 (1912). See also Burr v. Maclay Rancho Water Co., 160 Cal. 268, 280, 116 P. 715, 721 (1911)(a leading case adopting the stricter view of public use where it was held that water used to fulfill a contract obligation (for a vendor of land to deliver water to the lot sold) was a private use, because "it is not offered to the public generally, or to all who may want it within a certain territory"); Thayer v. California Development Co., 164 Cal. 117, 128 P. 21 (1912).

6a. Cal. Code Civ. Proc. § 1238(4).

7. Cal. Stats. 1917, Ch. 57, § 1, p. 59.

Mutual water companies are those corporations organized for the purpose⁸ of supplying water solely to their stockholders. These companies are said to have developed in response to the subdividing of the great ranchos with the resultant division of the irrigation systems previously developed and⁹ maintained on the ranchos.

An examination of the manner in which subdivisions 3 and 4 of Code of Civil Procedure Section 1238 developed in respect to water and water rights indicates perhaps the reason for the 1917 amendment granting eminent domain power to mutual water companies. As enacted in 1872, subdivision 3 of Code of Civil Procedure Section 1238 provided for takings of "canals, aqueducts, flumes, ditches, or pipes for conducting water for the use of the inhabitants of any county, incorporated city, or city and county, village, or¹⁰ town" In addition, subdivision 4 of the section permitted takings of "canals, ditches, flumes, aqueducts, and pipes, for public transportation, supplying mines and farming neighborhoods with water, and draining and¹¹ reclaiming lands, and for floating logs and lumber on streams not navigable."

In 1895, dams and poundings were added to subdivision 4 as permissible¹² takings and irrigation was added as a permissible use. In the same year, subdivision 3 was expanded to include reservoirs and tunnels as permissible

8. See Russell, Mutual Water Companies in California, 12 So. Cal. L. Rev. 155 (1939).

9. Id. at 155-156.

10. Historical Note in Cal. Code Civ. Proc. § 1238 (West 1955).

11. Id.

12. Id.

takings and water storage was added as a permissible purpose.¹³ In 1909,
subdivision 3 was extended to takings of ponds and lakes.¹⁴ This subdivision
was again amended in 1911 to include takings for the entities listed therein
as well as for the inhabitants of these entities.¹⁵

In 1913, the Legislature adopted an act subjecting most water companies
to regulation by the Railroad Commission (now the Public Utilities Commis-
sion),¹⁶ but exempting mutual water companies.¹⁷ In the same year, sub-
divisions 3 and 4 of Code of Civil Procedure Section 1238 were further
broadened, insuring for these regulated water companies the power of eminent
domain for the purposes for which they were organized.¹⁸ However, at this
time, no explicit provision was made for the mutual water companies. Then,
in 1917, subdivision 4 was amended to include the latter.¹⁹ This historical
development of subdivisions 3 and 4 suggests that the amendment to subdivision
4 was intended perhaps to equalize the powers of the two kinds of water com-
panies and to foster further development of water systems in California.
This grant of the power of eminent domain also may have been partially
motivated by the advent of World War I. This is indicated by the passage of
of another act in 1917 that permitted mutual water companies to supply water
to persons and entities other than its stockholders for the duration of the

13. Id.

14. Id.

15. Id.

16. Cal. Stats. 1913, Ch. 80, § 1, p. 84; see also Cal. Pub. Util. Code
§§ 2701-2712.

17. Cal. Stats. 1913, Ch. 80, § 2, p. 85; see also Cal. Pub. Util. Code § 2705.

18. Historical Note in Cal. Code Civ. Proc. § 1238 (West 1955).

19. Cal. Stats. 1917, Ch. 57, § 1, p. 59.

war without being subjected to regulation by the Railroad Commission.

Curiously, there has been some indication in the decisions that the exercise of the power of eminent domain by a "non-public utility" mutual water company signifies an intention to dedicate its property to "public use" (in the public utility sense) and thereby subject the company to public utility

regulation.²¹ Such dedication could make "public" that which had been "private." Whether the explicit grant of eminent domain power to private mutual water companies permits them to retain their exempt status from regulation as a public utility subsequent to exercise of the power is an issue that does not appear to have been resolved.²²

The limited authorization of the exercise of eminent domain by mutual water companies specified in subdivision 4 of Code of Civil Procedure Section 1238 should be retained in a provision compiled in the portion of the Public Utilities Code dealing with mutual water companies.²³

20. Cal. Stats. 1917, Ch. 191, § 1, p. 281; see also Cal. Pub. Util. Code §§ 2727-2728.

21. See, e.g., *Lamb v. California Water & Tel. Co.*, 21 Cal.2d 33, 129 P.2d 371 (1942). Cf. *Yucaipa Water Co. No. 1 v. Public Utilities Comm'n*, 54 Cal.2d 823, 357 P.2d 295, 9 Cal. Rptr. 239 (1960).

22. But see *Corona City Water Co. v. Public Utilities Comm'n*, 54 Cal.2d 834, 357 P.2d 301, 9 Cal. Rptr. 245 (1960).

23. Research has disclosed no other sections in the codes containing such authorization. The power of eminent domain may, in some instances, be set forth in uncodified statutes, see, e.g., Cal. Stats. 1869-70, Ch. 454, p. 660, but the utility and desirability of these provisions are limited at best and certainly in no way negate the recommendation in the text.

Privately owned public utilities. Section 1 of Article XIV of the California Constitution and subdivisions 3 and 4 of Section 1238 of the Code of Civil Procedure provide broad condemnation authority to regulated public utilities engaged in water supply and distribution. In any revision of the law, this authority should be continued but it should be codified in an appropriate provision compiled in the Public Utilities Code granting a "water corporation"²⁴ the right to condemn property for its "water system."²⁵

Property outside territorial limits. Subdivision 4 of Section 1238 provides for the taking of lands, wells, and water supplies adjacent to the lands of municipalities and adjacent to corporations supplying water to the public. In North Sacramento v. Citizens Utilities Co.,²⁶ this provision was interpreted at face value and considered to validate the city's taking of property of a water company which was located outside the city's boundaries and serviced persons both inside and outside the city. Since the power to take property outside the territorial limits of the public entity exists only where expressly granted by statute or fairly implied in or incident to powers granted or essential to declared objects and purposes of the entity,²⁷ there might be some value in continuing the substance of this portion of subdivision 4 when Section 1238 is repealed.

24. "Water corporation" includes every corporation or person owning, controlling, operating, or managing any water system for compensation within this state. Cal. Pub. Util. Code § 241.

25. "Water system" includes all reservoirs, tunnels, shafts, dams, dikes, headgates, pipes, flumes, canals, structures, and appliances, and all other real estate, fixtures, and personal property, owned, controlled, operated, or managed in connection with or to facilitate the diversion, development, storage, supply, distribution, sale, furnishing, carriage, apportionment, or measurement of water for power, irrigation, reclamation, or manufacturing, or for municipal, domestic, or other beneficial use. Cal. Pub. Util. Code § 240.

26. 192 Cal. App.2d 482, 13 Cal. Rptr. 538 (1961).

27. Harden v. Superior Court, 44 Cal.2d 630, 284 P.2d 9 (1955).

Wharves, docks, piers, chutes, and booms

Code of Civil Procedure Section 1238(4) authorizes a taking for "wharves, docks, piers, . . . chutes, [and] booms"

Article XII, Section 23, of the California Constitution provides that, "Every private corporation, and every individual . . . owning, operating, managing, or controlling any . . . plant, or equipment . . . for the furnishing of storage or wharfage facilities, either directly or indirectly, to or for the public . . ." is a public utility subject to control by the Legisla-

¹ture. Public Utilities Code Section 216(a) provides that the term "public utility" includes "every . . . wharfinger." Section 242 of the Public Utilities Code provides that:

"Wharfinger" includes every corporation or person owning, controlling, operating, or managing any dock, wharf, or structure used by vessels in connection with or to facilitate the receipt or discharge of freight, other than bulk liquid commodities, or passengers for compensation within this State.

Although none of these sections uses the terms pier, chute, or boom, they can be included in the language "or structure" in Section 242. In addition, Harbors and Navigation Code Section 23 defines a wharf to include a pier, quay, or landing.

Civil Code Sections 528-531 contain provisions applicable to bridge, ferry, wharf, chute, and pier corporations. Section 528 provides that no corporation may construct any of those structures or take a toll on such a structure unless authority has been granted by the supervisors or other governing body. Section 529 indicates when a dissolution will be allowed. Section 530 provides when the annual reports are due and what is to be included. Section 531 states that the title is likewise applicable to a private person constructing, operating, or owning a bridge, ferry, wharf, chute, or pier.

1. Art. IV, § 33, provides that rates for wharfage are to be regulated.

In addition, Harbors and Navigation Code Sections 4000-4017 regulate the construction of wharves and chutes. In general, those sections state that a franchise is necessary for a person to construct a wharf or chute, and they also provide regulatory rules such as maximum and minimum rate percentages. Section 4009 authorizes the grantee of a franchise allowing the construction of a wharf or chute to procure a right of way or other incidental use of land for the wharf or chute through condemnation proceedings brought pursuant to Part 3 of Title 7 of the Code of Civil Procedure. These sections are to be read in conjunction with the previously mentioned Civil Code sections.²

Supplementing this authorization is the broader power delegated to cities, counties, and cities and counties to provide harbors under the Revenue Bond Law of 1941³ and to construct any structures necessary or convenient to⁴ promote commerce or navigation under the Improvement Act of 1911.

Insofar as wharves and the like are provided by privately owned public utilities, the power of condemnation should be continued. In addition, the authority of public entities to engage in this function to condemn any necessary property should be clear. Private persons that are not public utilities should have no right to condemn for this function.

2. *Oakland v. Hogan*, 41 Cal. App.2d 333, 106 P.2d 987 (1940); *Oakland v. El Dorado Terminal Co.*, 41 Cal. App.2d 320, 106 P.2d 1000 (1940).

3. See Cal. Govt. Code §§ 54309(g), 54340, 54341.

4. See Cal. Sts. & Hwys. Code §§ 5101 (m), 5102. See also Govt. Code § 40404(d), (e) (general authorization to acquire by condemnation property necessary to acquire, improve, and maintain waterfronts or public harbors).

"Public mooring places for watercraft"

Subdivision 3 of Section 1238 of the Code of Civil Procedure authorizes a taking by eminent domain for "public mooring places for watercraft."^{4a} The more general condemnation authorization for "wharves, docks, piers" in subdivision 4 of Section 1238 would appear to be broad enough to cover public mooring places for watercraft.

The condemnation authority granted by subdivision 3 of Section 1238 makes clear the authority of a city to condemn property for public mooring places for watercraft under subdivision (b) of Section 39961 of the Government Code. This condemnation authority should be continued in some form--either a specific or general grant of condemnation authority to cities--when Section 1238 is repealed.

Sections 4000-4017 of the Harbors and Navigation Code provide a system for the granting to private persons a license to construct wharves, chutes, or piers and to take tolls for the use of such facilities. Section 4001 provides that the board of supervisors may, upon approval of the Department of Finance through the Chief of the Division of State Lands, grant authority to a city, county, or person to construct a wharf for "recreational, pleasure or boating purposes" and to take tolls for its use. Section 4009 grants the right to condemn, the right of way, and other necessary incidental uses of land for the "wharf or chute." This grant makes it unnecessary to rely upon Section 1238 for authority to condemn property needed for toll wharves, and the like.

Whether Sections 4000-4017 serve any purpose at the present time is unknown. In any case, these sections provide adequate condemnation authority

4a. This phrase was added to Section 1238 by Cal. Stats. 1901, Ch. 57, § 1, p. 72.

insofar as condemnation by nongovernmental entities for "public mooring places for watercraft" is concerned. As far as public entities are concerned, it will be necessary to make a check of the statutes relating to all public entities to determine whether they have authority to condemn for public mooring places for watercraft when Section 1238 is repealed.

Warehouses

Code of Civil Procedure Section 1238(4) authorizes a taking for "warehouses." In 1913, Section 1238 was amended by inserting in subdivision 4 the word "warehouses" after the words "wharves, docks, piers," and before the words "chutes, booms."⁵ The placement of the word may be significant. Although the authorization may apply to any warehouse, the legislative intent may be that the authorization relates only to warehouses necessary in conjunction with an existing wharf or a wharf about to be constructed. The latter is a possible conclusion because the word was inserted between "wharves" and "chutes" which are words that ordinarily are found together.⁶ In addition, there is some indication that the amendment was made because of litigation in Los Angeles over the right of the City of Los Angeles to condemn a site for a warehouse adjacent to a site on which a wharf was to be built.

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In Los Angeles v. Koyer, the city had brought an action in 1910 to condemn a site for warehouses in order to facilitate the operation of public wharves to be constructed by the city. The judgment of condemnation was

5. Cal. Stats. 1913, Ch. 291, § 1, p. 544.

6. See, e.g., Harb. & Nav. Code §§ 4000-4017.

7. 48 Cal. App. 720, 192 P. 301 (1920).

entered in late 1912. Subsequently, an appeal was taken by the condemnee. The decision rendered in 1920 by the Second Appellate District invalidated the condemnation action on the ground that the authorization in Section 1238 did not include warehouses prior to the amendment in 1913. The court reasoned that a warehouse on a site distinctly different from the wharf was not authorized. The court also ruled that the language of the city charter did not confer the power on the city.⁸

Section 2 of Article XII of the Proposed Constitution provides that persons or corporations which own, operate, control, or manage facilities for the furnishing of storage for the public are public utilities. A similar provision is contained in present Section 23 of Article XII. That "storage" includes warehouses is indicated by the fact that Public Utilities Code Section 216 defines a public utility as including "every . . . warehouseman." A "warehouseman" includes one owning, controlling, operating, or managing a building in which property is regularly stored for compensation, in connection with the transportation of property by a common carrier or vessel, or the loading or unloading of property.⁹ Liquid petroleum commodities in bulk, baled cotton, and docks, wharves, or structures owned or operated by a wharfinger are excluded.¹⁰ Warehousemen also include persons or corporations owning or operating any building or warehouse in which merchandise is regularly stored for the public for compensation.¹¹

8. See also *Donegan v. Los Angeles*, 109 Cal. App. 673, 293 P. 912 (1930).

9. Cal. Pub. Util. Code § 239(a).

10. Id.

11. Cal. Pub. Util. Code § 239(b).

Excepted by this subdivision are secondhand household goods, liquid petroleum commodities in bulk, baled cotton, merchandise sold but retained in the custody of the vendor, warehouses operated by any nonprofit, cooperative association or corporation engaged in handling agricultural products, and warehouses conducted by agents of such corporations or associations.¹² Warehousemen are regulated under the provisions of Public Utilities Code Sections 1051-1054.

It will be necessary to include a provision similar to the warehouse provision of subdivision 4 somewhere in the codes since cities and public utilities otherwise would have no authorization to take for this purpose. The only authorizations for condemnation for warehouses elsewhere in the codes are for Harbor Districts.¹³

Ferries

Code of Civil Procedure Section 1238(4) authorizes a taking for ferries. Ferries are not specifically mentioned in the Public Utilities Code but are clearly common carriers under Section 211(b) of that code and, therefore, are public utilities under Section 216. In addition, if a particular ferry system is not classified as a common carrier for some purpose, it would nevertheless be regulated under Public Utilities Code Sections 4501-4669 dealing with "for-hire vessels" other than common carriers.

Civil Code Sections 528-531 provide for the organization of "bridge, ferry, wharf, chute, and pier corporations." Under Section 528, a corporation to run a ferry and take tolls for transportation cannot be

12. Id.

13. Cal. Harb. & Nav. Code §§ 6075 (by reference to 6012), 6076, 6077.3; Port Districts (Cal. Harb. & Nav. Code §§ 6295, 6296, 6307); River Port Districts (Cal. Harb. & Nav. Code §§ 6895, 6896); and Small Craft Harbor Districts (Cal. Harb. & Nav. Code §§ 7147), 7149(b), (c)).

organized until it has been granted a franchise by the board of supervisors or by another governing body having authority to do so. The right to grant a franchise is curtailed by Streets and Highways Code Section 30800 et seq. Under these sections, the Department of Public Works has exclusive jurisdiction of the granting of franchises (§ 30800) and may regulate the tolls collected (§ 30802). There are special provisions for those holding a franchise granted prior to August 21, 1933 (§§ 30860-30873). Section 30900 gives a city the right to grant a ferry franchise if the ferry system is operated wholly within the limits of the city and other conditions are met.

The authorization in Code of Civil Procedure Section 1238(4) must be continued to allow such private ferry systems (public utilities) to condemn for ferry purposes. The authorization is not necessary for counties, cities, or cities and counties. Under Streets and Highways Code Section 1753, a county can take a ferry landing place. Under Government Code Sections 38731 and 39731.2, a city can take an existing ferry system. Under Government Code Sections 54301, 54309(e), 54340, and 54341, cities and counties can take a ferry system. (Revenue Bond Law of 1941) It is not clear whether the city or county can take for a ferry system. Section 54340 provides that the local agency can acquire "any enterprise" by eminent domain. Whether the term "enterprise" means only an existing system or includes creating a new enterprise is not made clear by Section 54309 or 54310. However, that it apparently is not restricted to an existing system is indicated by the tenor of the act. The acquisition of ferry and wharf facilities is also authorized to cities by Government Code Sections 39901, 39962, and 39963, but those sections do not clearly confer the power of eminent domain on cities for ferry and wharf purposes.

Toll roads and bridges

Generally. Code of Civil Procedure Section 1238(4) provides for the acquisition of "toll roads" by eminent domain. Sections 1264.1 through 1264.9 of the Code of Civil Procedure provide special rules for condemning a toll road franchise as of a future date.

Streets and Highways Code Sections 30800-30847 provide special rules with respect to the granting of franchises to conduct a toll road. The Department of Public Works is in charge of granting all franchises (§ 30800) and counties are specifically excluded from power to grant a toll road franchise (§ 30810). Any person who held a toll road franchise on August 14, 1929, is exempted from the operation of the statute (§ 30811). However, the provisions of this act do not inhibit a county, city, incorporated bridge and highway district, joint highway district, or the state from acquiring or constructing a toll road.

Apparently, the only authorization for condemning for toll roads outside of Section 1238 is Section 27164 of the Streets and Highways Code. The power is not explicitly given by this section but it does provide that a bridge and highway district may "acquire" and construct tollgates, tollhouses, and other property "necessary to construct, maintain, operate or otherwise make use of toll bridges and highways"

Under modern conditions, there appears to be no need to continue the authority of private corporations and persons to condemn for toll roads. If public entities are to operate toll roads, they should have clear authority¹ to condemn for such purpose.

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1. Under Streets and Highways Code Section 902, at the expiration of a franchise to run a toll road, the road becomes public with no need for compensation. See *People v. Davidson*, 79 Cal. 166, 21 P. 538 (1889); *People v. O'Keefe*, 79 Cal. 171, 21 P. 539 (1889).

Plank and turnpike roads. Code of Civil Procedure Section 1238(4) authorizes a taking for "plank and turnpike roads." This was in the original 1872 version of this section and was based on Section 15 of the act authorizing formation of corporations for the construction of plank or turnpike roads.² Basically, they are treated as toll roads and, hence, would come under toll road provisions.³ As such, the turnpike roads are "public highways."⁴ When the franchise to collect tolls expires, they become free public roads. Therefore, it appears that no such "plank or turnpike roads" exist any longer and that this authorization should not be continued when Section 1238 is repealed.

Toll bridges. Code of Civil Procedure Section 1238(4) provides that eminent domain may be exercised to provide "bridges." This provision was contained in the 1872 code and was based on Sections 9 and 10 of an act concerning public ferries and toll bridges.⁵ It is to be noted that the word "toll" was deleted when the authorization for bridges was inserted in Section 1238.

Provisions concerning toll bridges are found in several codes. Civil Code Sections 528-531 provide that no person or corporation shall operate a toll bridge corporation without a franchise from the board of supervisors or other public body with the authority to issue one. However, these sections are limited by Streets and Highways Code Sections 30800-30873.

2. Cal. Stats. 1853, Ch. 121, p. 169. Discussion in 2 Cal. Code Civ. Proc. Ann. § 1238 at 102, n.5 (Haymond & Burch 1872). This act was repealed many years ago.

3. See *People v. Auburn & Yankee Jim's Turnpike Co.*, 122 Cal. 335, 55 P. 10 (1898).

4. *Id.* at 339, 55 P. at 12.

5. Cal. Stats. 1855, Ch. 147, p. 183, amended Cal. Stats. 1864, Ch. 196, p. 192. For legislative intent, see 2 Cal. Code Civ. Proc. Ann. § 1238, at 102, n.5 (Haymond & Burch 1872).

C Under those sections, the Department of Public Works has exclusive jurisdiction over the granting of franchises (§ 30800) and may regulate the tolls collected (§ 30802). There are special provisions for those holding a franchise prior to August 14, 1929 (§§ 30860-30873). In addition, a toll
6 bridge is a public utility.

There are special provisions in the Code of Civil Procedure for the taking, as of a future date, of a franchise to take tolls for a limited
7 duration. These sections were added to the code in 1937. The California Toll Bridge Authority Act was originally enacted in 1929. In that act,
8 the policy of the state to acquire toll bridges was declared. Thus, it would appear that these Code of Civil Procedure sections were added to the code for one of two reasons: either to explain the relationship between the condemnation provisions in the Toll Bridge Authority Act and the Code of Civil Procedure title on eminent domain, or merely to cure a defect existing in the right to take under the Toll Bridge Authority Act. There is no indication in the legislative history or in the cases construing the California Toll Bridge Authority Act prior to 1937 why the sections were enacted. The only secondary source in which the sections are discussed is
9 The Work of the 1937 California Legislature, in which it is speculated that toll bridges and toll roads were becoming so prevalent that such a scheme was necessary.

6. Cal. Pub. Util. Code § 216(a).

7. Cal. Code Civ. Proc. §§ 1264.1-1264.9.

8. Cal. Stats. 1929, Ch. 763, § 1, p. 1489.

9. 11 So. Cal. L. Rev. 1, 33-39 (1937).

Finally, it might be noted that Section 30001 of the Streets and Highways Code states the policy on toll bridges as follows:

It is the policy of the State to acquire and own all toll bridges situated upon or along any part of the highways of the State, and ultimately to eliminate all toll charges thereon.

Since franchises may still be issued for the construction and operation of toll bridges by privately owned public utilities ("toll bridge corporations"¹⁰), the continuation of condemnation authority for these corporations to take by eminent domain for toll bridges would be a useful power for these corporations. However, in view of the state policy of eliminating toll bridges, it is doubtful that, as a matter of policy, it would be desirable to permit private corporations to exercise the power of eminent domain to establish toll bridges.

10. "Toll-bridge corporation" includes every private corporation or person owning, controlling, operating, or managing any bridge or appurtenance thereto, used for the transportation of persons or property for compensation in this State. Cal. Pub. Util. Code § 237.

Terminal facilities for highway carriers

Subdivision 22 was added to Section 1238 of the Code of Civil Procedure in 1945¹ to authorize condemnation by "any common carrier" operating upon any public highway³ in this State between fixed termini or over a regular route⁴ for "terminal facilities, lands, or structures for the receipt, transfer or delivery of passengers or property" or for "other terminal facilities."⁵

Intrastate highway common carriers are public utilities⁶ subject to the regulation of the California Public Utilities Commission, and, of course, interstate carriers are regulated by the Interstate Commerce Commission.⁷ The broad authority of the California commission includes the power to require the intrastate carriers to erect structures necessary to provide adequate service or facilities and to fix the sites for such structures.⁸ Although the power of the highway carriers to take property

1. Cal. Stats. 1945, Ch. 251, § 1, p. 713.

2. See Cal. Pub. Util. Code § 211 (defining "common carrier").

3. See Cal. Pub. Util. Code § 3509 (defining "public highway").

4. See Cal. Pub. Util. Code § 215 (defining "between fixed termini or over a regular route").

5. The subdivision reads as follows:

22. Terminal facilities, lands, or structures for the receipt, transfer or delivery of passengers or property by any common carrier operating upon any public highway in this State between fixed termini or over a regular route, or for other terminal facilities of any such carrier.

6. Cal. Pub. Util. Code § 216.

7. See 3 Witkin, Summary of California Law Constitutional Law §§ 194-204 (7th ed. 1960).

8. Cal. Pub. Util. Code § 762.

for terminal facilities may not be essential to permit them to comply with the commission's directives, it at least facilitates their doing so.

As subdivision 22 is the only basis for condemnation by highway carriers, its effect must be preserved in any recodification of the eminent domain laws. The substance of the subdivision should, therefore, be compiled in the Public Utilities Code.

TOLL-ROAD FRANCHISES--C.C.P. §§ 1264.1-1264.9

Up to the first decades of this century, local public entities were empowered to grant franchises to private parties for the construction and operation of toll roads and toll bridges. In 1929, the Legislature vested exclusive authority in the Department of Public Works to issue these franchises,¹ at the same time removing county authority to issue or renew a toll road or toll bridge franchise.² Toll roads and bridges existing as of August, 1929, were permitted to remain in existence,³ but the removal of county authority to renew the franchises combined with a provision that, on the expiration of a franchise, a toll road automatically and without compensation becomes a county highway,⁴ to insure that, after the passage of time, county franchises for toll bridges and toll roads would gradually disappear.

1. Cal. Stats. 1929, Ch. 764, § 1, p. 1502; Cal. Stats. 1933, Ch. 7, § 1, p. 14; Cal. Stats. 1947, Ch. 176, § 1, p. 731; now Cal. Sts. & Hwys. Code § 30800.

2. Cal. Stats. 1929, Ch. 764, § 4, p. 1503; Cal. Stats. 1933, Ch. 7, § 4, p. 14; Cal. Stats. 1947, Ch. 176, § 1, p. 732; now Cal. Sts. & Hwys. Code § 30810.

3. Cal. Sts. & Hwys. Code § 30811(a).

4. Pol. Code § 2619, added Cal. Stats. 1883, Ch. 10, § 1, p. 6; Cal. Stats. 1935, Ch. 29, § 902, p. 303; now Cal. Sts. & Hwys. Code § 902.

In 1937, Sections 1264.1 through 1264.9 were added to the Code of Civil Procedure, establishing a procedure for the condemnation of toll bridge and toll road franchises.⁵ A corresponding provision has been present since 1872 in the enactment defining franchises for toll roads and toll bridges as one variety of property subject to be taken under the eminent domain sections of the Code of Civil Procedure. In 1913, the phrasing was changed from franchises for toll roads and bridges, to refer to franchises for public utilities, so presumably the toll franchises are subsumed within the meaning of public utility franchises.⁶ No cases could be found relating to the condemnation of toll roads or bridges under any of the Code of Civil Procedure Sections 1264.1 through 1264.9, with the exception of Section 1264.7, which defines "judgment and final judgment" for purposes of the entire title of the Code.

Unless the Department of Public Works has granted franchises for toll roads and toll bridges, and no evidence was found to indicate this, there appears to be no present application for Code of Civil Procedure Sections 1264.1-1264.6 or 1264.8-1264.9, since almost forty years have passed since the removal of county authority to grant these franchises, and it is highly likely that all franchises so granted will have expired. If franchises for toll roads and bridges are included within the definition of franchises for public utilities in subdivision 5 of Code of Civil Procedure Section 1240, any existing franchises could be condemned even if the Section 1264.1 et seq. series were repealed. While Section 1264.1 provides that these

5. Added Cal. Stats. 1937, Ch. 924, § 1, p. 2543.

6. Cal. Code Civ. Proc. § 1240(5), as amended by Cal. Stats. 1913, Ch. 292 § 1, p. 547.

franchises may be condemned as of a future date, the condemnor might merely delay the condemnation proceeding until such time as it wanted to take immediate "possession." The other procedural provisions of these sections would probably be applicable under normal valuation proceedings, even if they had been repealed.

DETERMINATION OF COMPENSATION BY THE PUBLIC UTILITIES COMMISSION

Existing constitutional and statutory provisions. Section 23a of Article XII of the California Constitution gives the Legislature "plenary" and "unlimited" authority to delegate to the Public Utilities Commission the "power" and "jurisdiction" to "fix the just compensation to be paid for the taking of any property of a public utility in eminent domain proceedings."¹ This section, of course, does not expand or qualify the power of eminent domain. Rather, its purpose and effect is to create the only enclave in the guarantee of jury trial provided as to all other condemnation proceedings by Section 14 of Article I.

1. Section 23a reads in full as follows:

23a. The Railroad Commission (Public Utilities Commission) shall have and exercise such power and jurisdiction as shall be conferred upon it by the Legislature to fix the just compensation to be paid for the taking of any property of a public utility in eminent domain proceedings by the State or any county, city and county, incorporated city or town, municipal water district, irrigation district or other public corporation or district, and the right of the Legislature to confer such powers upon the Railroad Commission is hereby declared to be plenary and to be unlimited by any provision of this Constitution. All acts of the Legislature heretofore adopted which are in accordance herewith are hereby confirmed and declared valid.

The section was added in 1914 to assure the constitutionality of the statutory provisions (now Sections 1401-1421 of the Public Utilities Code) which permit local political subdivisions to have the Public Utilities Commission determine the compensation to be paid in the taking of "the lands, property, and rights of any character whatsoever of any public utility."² The only other statutory application of Section 23a is Sections 1206-1220 of the Public Utilities Code which provide for determination of just compensation by the Public Utilities Commission in the taking of property for the elimination of grade crossings. The Supreme Court of California has held that these statutory provisions and any others that might be based upon Section 23a must be limited to property used as public utility property and can have no application to "private property" (in this sense, to "property not dedicated" to public service).³

Both the procedure for valuation and the procedure for elimination of grade crossings also make allowance for determination by the Commission of just compensation even though the condemnation proceeding is filed in the Superior Court pursuant to the Code of Civil Procedure.⁴

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2. East Bay Muni. Util. Dist. v. Railroad Comm'n, 194 Cal. 603, 229 P. 949 (1924).
 3. S. H. Chase Lumber Co. v. Railroad Comm'n, 212 Cal. 691, 300 P. 12 (1931). See also Breidert v. Southern Pac. Co., 61 Cal.2d 659, 394 P.2d 719, 39 Cal. Rptr. 903 (1964).
 4. For an application, see North Sacramento v. Citizens Util. Co., 218 Cal. App.2d 178, 32 Cal. Rptr. 308 (1963).

Even in those instances in which the property being taken is owned by a public utility and the proceedings are in the Superior Court, certain precepts uniquely applicable to public utility takings are to be followed.⁵

Effect of Constitution Revision Commission's Recommendation.

Section 23a has been considered here principally because a substantial change would be made by adopting the recommendation of the California Constitution Revision Commission. Under that commission's proposal, the now prolix language of Section 23a would be reduced to the following:⁶

The Legislature may provide that on request of condemnor and condemnee the Commission fix just compensation for public utility property taken by eminent domain.

Under existing law, proceedings under the Public Utilities Code are an alternative, at the option of the condemnor, to proceedings under the Code of Civil Procedure.⁷

Over the years, the appellate courts have had much to say in favor of the fixing of just compensation by the Public Utilities Commission.⁸ The proposal of the Constitution Revision Commission, of course, requires that both the condemnor and the condemnee

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5. See *Citizens Util. Co. v. Superior Court*, 59 Cal.2d 805, 382 P.2d 356, 31 Cal. Rptr. 316 (1963) (dealing with date of valuation, subsequent-improvements, valuation method, and other problems).
 6. Cal. Const. Revision Comm'n, Proposed Revision of the California Constitution 90 (1968).
 7. Cal. Pub. Util. Code §§ 1217, 1421. See *Citizens Util. Co. v. Superior Court*, 59 Cal.2d 805, 382 P.2d 356, 31 Cal. Rptr. 316 (1963).
 8. See, e.g., *Pacific Tel. & Tel. Co. v. Eshleman*, 166 Cal. 640, 137 P. 1119 (1913).

agree to the proceeding under the Public Utilities Code; absent such an agreement, the general procedure in the Code of Civil Procedure would apply, including jury determination of compensation.

The only statutory changes made in connection with that commission's proposal would be amendments to Sections 1206 and 1403 of the Public Utilities Code to provide, in effect, that to obtain the Public Utilities Commission's assessment of compensation in takings for either the elimination of grade crossings or the acquisition of public utility property, both the condemnor and condemnee must concur in that action.⁹

RECOMMENDATIONS

The following recommendations are made for dealing with the right to take problems of public utilities:

1. Section 1238 of the Code of Civil Procedure, insofar as it relates to public utilities, should be repealed.
2. Privately owned public utilities should be granted an express right to condemn any property--whether a fee or lesser interest--necessary to carry out their regulated activities. The utilities granted this condemnation authority should include railroad corporations, electrical corporations, gas corporations, heat corporations, pipeline corporations, telephone corporations, telegraph corporations, water corporations, ferries, street railroad corporations (terminal facilities only), motor carriers (terminal facilities only), and--possibly--wharfingers, warehousemen, and toll bridge corporations. This probably would

9. See A. B. No. 918 (1968 Reg. Sess.).

merely clarify existing law, but serious consideration should be given to not giving condemnation authority to wharfingers, warehousemen, and toll bridge corporations.

3. Each statute that authorizes a public entity to engage in a public utility activity should be examined, and any amendments needed to make clear that the public entity may condemn any property necessary for that activity should be made. This probably is the effect of inclusion of "any public utility" in subdivision 3 of Section 1238 and of the various specific grants of condemnation authority for utility purposes in Section 1238.

4. Private individuals and corporations whose activities are not subject to rate regulation by state or federal authorities should not be permitted to exercise the right of eminent domain for utility purposes.

5. The respective applications of the eminent domain title and the provisions of the Public Utilities Code relating to taking of utility property should be clarified.

6. No property should be taken by a privately owned public utility for utility purposes unless the Public Utilities Commission has adopted a resolution that the taking of the particular property, and the interest therein sought to be acquired, is necessary. Such resolution should be conclusive evidence of necessity under Code of Civil Procedure Section 1241.

7. A determination should be made whether Sections 1264.1-1264.9 are needed. The substance of Section 1264.7 ("judgment" and "final judgment" defined) should be retained.