#36.21 3/9/70

Memorandum 70-14

Subject: Study 36.21 - Condemnation (The Right to Take--The Right to Take a Fee or any Lesser Interest)

Attached is a background research study on the right to take a fee or any lesser interest. You should read the study for an understanding of this problem.

Section 1239 of the Code of Civil Procedure undertakes to provide an exhaustive "classification of the estates and rights in land subject to be taken for public use." When enacted in 1872, this section was intended to state the entire law on this matter. There was no other legislation on this aspect of eminent domain.

As originally enacted, Section 1239 permitted the taking of a fee simple when property was taken "for public buildings or grounds, or for permanent buildings for use in connection with a right of way, or for an outlet for the flow or a place for the deposit of trailings from a mine." In all other cases, the taking only of an easement was authorized.

Since 1872, Section 1239 has itself been amended to provide in effect that any local public entity may resolve to acquire a fee--whatever the purpose of the acquisition--and that such resolution is conclusive on the necessity for taking the fee. Apparently, a mutual water company, which is not necessarily a public utility, also has the benefit of the conclusive resolution provision.

In addition, over the years since 1872, literally hundreds of special statutes have been enacted. Although not judicially interpreted, these statutes may give particular entities the right to acquire a fee interest--as distinguished from an easement--and thus also represent a departure from the original scheme of Section 1239.

In any comprehensive revision of the California condemnation statute, the extent of the interest that may be taken by eminent domain should be

made clear. Generally speaking, the existing law should be codified and clarified without significant substantial changes. It makes good sense to treat the extent of the interest that may be taken as merely a subsidiary question of public necessity. Nevertheless, although the substance of the existing law is generally satisfactory, the overlapping, conflicting, and obsolete provisions found in the existing California statutes should be replaced by clear statutory statements.

Specifically, the following general approach to statutory revision of this aspect of condemnation law is recommended:

1. A general provision should be included in the eminent domain title in the Code of Civil Procedure to state in substance: "Except as otherwise limited by statute, a local public entity may take the fee or any lesser interest in any real or personal property that is necessary for public use." "Interest" should be broadly defined to include such matters as airspace, water rights, the right to develop land, and the like. In the case of a public entity, the resolution to condemn the property should have the same effect insofar as the "property interest" to be acquired is concerned as it has on the need to take any interest in the property at all. In other words, if the resolution of necessity is conclusive, it would be conclusive on the issue of the necessity for the taking of the fee interest rather than merely an easement.

2. For all practical purposes, the statutes relating to the exercise of eminent domain for state purposes authorize the taking of a fee or any lesser interest as determined by the agency. However, a few of

the statutes relating to state takings are not clear and should be clarified. The simple solution to the problem presented by the statutes governing takings for state purposes would appear to be to make the general provision recommended in 1 above applicable to state takings.

3. The taking authority of individual public entities necessarily must be examined in the course of preparing a comprehensive statute to determine whether the entity now has the right to exercise the power of eminent domain. In the course of this examination, consideration also should be given to the question whether specific provisions are needed to limit the right to take an interest less than a fee in certain cases.

4. Privately owned public utilities should be authorized to take whatever interest is necessary to carry out the regulated activities of the utility. Normally this will be an easement. The issue of necessity to take an interest greater than an easement should be subject to determination in utility cases in the same manner as is the need to take any interest in the property at all.

5. Private persons and institutions, to the very limited extent they are authorized to exercise the right of eminent domain, should be permitted to take only such interest in the property as is necessary. In other words, the court would determine the interest authorized to be taken as a part of the question of necessity. Possibly the statute granting a private person or institution the power to exercise the right of eminent domain might limit the interest taken to an easement. For example, if statutory right is given private persons to take property for sewer purposes, the authority could be so stated that it authorizes only the taking of an easement.

Attached as Exhibit I are statute sections recommended to effectuate some of the above recommendations. Provisions to deal with the interest that may be taken by private persons (including mutual water companies) will be considered at a later time.

The recommended statutory provisions (which would be included in the general condemnation statute) define "property" in the broadest possible sense and, subject to any limitations otherwise provided by statute, permit a public entity to condemn the fee or any lesser interest in property that is necessary for the project for which the property is taken. It is assumed that the question of the necessity to take a particular property interest would be determined on the same basis as is the question of whether it is necessary to take any property at all.

If the recommended statutory provisions are adopted, it would be desirable to review the condemnation authority of each public entity and to substitute the word "property" for more detailed phrases describing the property or interests in property that can be taken so that the general statutory provisions will be applicable. In cases where it is desired to limit the interests that may be acquired or to require a taking of an easement instead of a fee, the particular statute granting condemnation authority should be so phrased and would then constitute an exception to the general rule to be provided in the comprehensive statute. We are preparing a table that will indicate the diverse language used in the various statutes to describe the property interest that may be acquired under the condemnation authority granted by that statute. It is apparent that the language used in the various statutes has not been selected with any care and the great

majority of the statutes probably do not reflect any considered decision on this particular aspect of the right to take.

Respectfully submitted,

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Executive Secretary

Memorandum 70-14

EXHIBIT I

COMPREHENSIVE STATUTE § 101

Staff recommendation

Words and Phrases Defined

§ 101. Property

101. "Property" includes real and personal property and any right or interest therein and, by way of illustration and not by way of limitation, includes rights of any nature in water, airspace rights, flowage or flooding easements, aircraft noise or operation easements, rights to limit the use or development of property, public utility franchises, and franchises to collect tolls on a bridge or highway.

Comment. Section 101 is intended to provide the broadest possible definition of property and to include any type of interest in property that may be required for public use. It is expected that this definition will be improved as the Commission's work on condemnation law progresses.

COMPREHENSIVE STATUTE § 102

Staff recommendation

Words and Phrases Defined

§ 102. Nonprofit college

102. "Nonprofit college" means an educational institution that is authorized to exercise the power of eminent domain under Section 30051 of the Education Code.

Comment. Section 30051 is a new section to be added to the Education Code in the legislation relating to the right to take.

The Right to Take

§ 350. Right to acquire a fee or any lesser interest

350. Except to the extent specifically limited by statute, a public entity, public utility, or nonprofit college that is authorized to acquire property for a particular use by eminent domain may exercise the power of eminent domain to acquire the fee or any other right or interest in property that is necessary for that use.

Comment. Section 350 supersedes Section 1239 of the Code of Civil Procedure insofar as that section specified the type of interest--whether a fee or lesser interest--that might be acquired by eminent domain.

Section 350 generally codifies the former law that permitted a public entity to take whatever interest it determined to be necessary. See Code Civ. Proc. § 1239(4)(local public entities). However, under former law, most privately owned public utilities were permitted to acquire only an easement unless the taking was for "permanent buildings." See Code Civ. Proc. § 1239(1).

"Property" is broadly defined in Section 101 of the Comprehensive Statute to include the fee or any interest or right in property.

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THE RIGHT TO TAKE--THE RIGHT TO TAKE THE FEE OR ANY LESSER INTEREST*

*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.

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BACKGROUND STUDY

THE RIGHT TO TAKE--THE RIGHT

TO TAKE THE FEE OR ANY LESSER INTEREST

BACKGROUND

In the 19th century, it was generally thought that a significant and appropriate limitation upon the power of eminent domain could be expressed in terms of the quantum of the estate or interest acquired for public use. The marked preference was for the taking of an "easement" or "base" or "qualified" fee, as opposed to the taking of a fee simple. As the Supreme Court of the United States expressed the matter in an early case:[1]

> By the common law the fee in the soil remains in the original owner, where a public road is established over it; but the use of the road is in the public. The owner parts with the use only, for if the road shall be vacated by the public, he resumes the exclusive possession of the ground; and while it is used as the highway, he is entitled to the timber and grass which may grow upon the surface, and to all minerals which may be found below it.

While that quaint phrasing hardly accords with modern conditions, it does indicate the three types of expectancies that were sought to be reserved to property owners through the taking of easements, as opposed to the taking of fees simple. First, the owner retains any rights or interests that can be exercised simultaneously with the public use. Even in the case of a totally oppressive use on the surface, such as a railroad or highway, the owner may have a significant interest in minerals or air space. Second, the very nature of an easement or easement-like interest assures a continuation of the public use as

originally proposed. Third, the owner retains at least the expectancy that, upon termination of the public use, he will regain the property free of that use. As Nichols notes, "It is well settled that when an easement has been taken by eminent domain for the public use . . ., if the public use is subsequently discontinued or abandoned, the public easement is extinguished, and the possession of the land reverts to the owner of the fee free from any rights in the public."[2] And, in California, the general proposition is that an easement acquired for public purpose is terminated by abandonment of that purpose.[3]

This early preference for easement taking leaves "the general rule . . . that only such an estate in the property sought to be acquired by eminent domain may be taken as is reasonably necessary for the accomplishment of the purpose in aid of which the proceeding is brought."[4] Even more generally, it is said that:[5]

> It necessarily follows from the principle that property cannot constitutionally be taken by eminent domain except for the public use, that no more property can be taken by eminent domain than the public use requires, since all that might be appropriated in excess of the public needs would not be taken for the public use. While considerable latitude is allowed in providing for the anticipated expansion of the requirements of the public, the rule itself is well established, and applies both to the amount of property to be acquired for public use and to the estate or interest acquired in such property. If an easement will satisfy the public needs, to take the fee would be unjust to the owner, who is entitled to retain whatever the public needs do not require, and to the public, which should not be obliged to pay for more than it needs.

As Nichols also notes, however, with respect to a fee taking that arguably might be reduced to an easement taking:[5a]

> There is an apparent conflict of authority as to whether or not such a taking involves a violation of the constitutional rights of the owner and of the taxpayer, thereby rendering the matter subject or not subject to judicial review.

The Supreme Court of the United States once decided that the question of the nature of the interest to be taken does not rise to constitutional heights:[6]

> ". . . On the whole, therefore, the plan of compelling the city to take the land in fee simple, and the owner to part with his whole title for a just compensation, would seem to be the most simple and equitable that could be adopted; unless there is some objection on the ground that a fee simple is more sacred than an estate for life or years, or than an easement of greater or less duration. We can see no ground for regarding one of these titles as more sacred than another, or for regarding land as more sacred than personal property."

This view of the matter, of course, is based on the premise that compensation is the "full and perfect equivalent" of that which is taken and that the property owner has no justifiable concern with the nature of the interest taken. As Justice Holmes once dismissed the problem, "As, practically, the landowners get the full value of their land in such cases, if there is any injustice it is not they who suffer it."[7] Thus, to this day, one finds observations in state court decisions such as the following:[8]

> [T]he legislature has full power to determine the nature of the title to be acquired by the condemner, since the constitution of this state places no limitation or restriction on the nature of the title to lands which may be acquired by the process of eminent domain.

Nor do state constitutions typically place a limitation or restriction on the interest taken unless that limitation is deemed to inhere in the "public use" clause.

In California, there is no constitutional provision pertinent to the matter unless the phrase "public use" in Section 14 of Article I is deemed to imply such a limitation. In any event, California appellate courts have never perceived a constitutional question or problem in this regard

and have repeatedly sustained fee takings where such a taking accorded with the applicable legislation.[9]

Thus, as Nichols states:[10]

> Unless there is a constitutional inhibition upon the power of the legislature in this respect [and none has been perceived or implied in California], the latter has the sole power to determine what shall be acquired both as to quantum and quality of estate. Accordingly, it follows that the legislature has power to authorize the acquisition of a fee or of any lesser estate or interest.

CODE OF CIVIL PROCEDURE SECTION 1239

Section 1239 of the Code of Civil Procedure undertakes to provide an exhaustive "classification of the estates and rights in lands subject to be taken for public use." In considering the section, it is important to note that the section was one of the original ones contained in the codification of 1872. In that codification, the treatment of eminent domain in the Code of Civil Procedure was not intended to provide merely a condemnation procedure statute. Rather, the codification was of the entire law of eminent domain, including the "substantive law" or the right to take property. Quite literally, the taking powers of all condemnors were intended to be set forth in the eminent domain title of the Code of Civil Procedure; there was no other legislation on the subject, and the Legislature took care to assure that there was not.[11]

This effort to codify the entire law of eminent domain explains the reason for the initial inclusion of Section 1239: But for that section, there would have been no statutory direction with respect to the question of the interest that might be taken. This is an unusual phenomenon in statutory patterns throughout the United States because most usually the nature of the interest that can be taken is a matter specified in the enabling legislation or condemnation authorization statute applicable to particular condemnors and to particular public programs.[12]

Even though the effort at codification undertaken in 1872 has broken down--there are several hundred sections of the California codes that bear, or that arguably may bear, upon the question of the interest in property that may be taken--Section 1239 remains the basic statutory provision.

To decipher the existing jumbled content of the section, it is easiest to go back to the beginning and trace the evolution of the language.

As enacted in 1872, the section read:

> 1239. The following is a classification of the interests, estates, and rights in lands subject to be taken for public use:
>
> 1. A fee simple, when taken for public buildings or grounds, or for permanent buildings for use in connection with a right of way, or for an outlet for the flow or a place for the deposit of tailings from a mine;
>
> 2. An easement when taken for any other use;
>
> 3. Right of entry upon and occupation of lands, and the right to take therefrom such earth, gravel, stones, trees, and timber as may be necessary for some public use.

Before tracing the growth of Section 1239, it may be helpful to mention certain effects that have flowed from the section as originally enacted. First, ignoring the rather peculiar profit a prendre recognized in subdivision 3, the codifiers saw the choice in taking property as lying between the taking of a "fee simple" and an "easement." Those terms were used calculatedly in the sense in which they are used in private law,[13] and thus California has never had some of the more fanciful divisions of interest in property--for example, "base," "qualified," or "terminable" fees--that are effected by condemnation practice in other states. Admittedly, voluntary conveyancing and conveyancing in lieu of condemnation proceedings have created a range of such interests, but that result has never stemmed from condemnation proceedings themselves. Hence, in California, unless the taking is of an easement, the property owner has no further expectancy as to the property or as to the use of the

property. As stated in Beistline v. San Diego:[14]

> Because a sovereign body plans to acquire private property for a lawful purpose . . . , does acquire the property with such purpose, and thereafter changes its corporate mind and uses the property for a different purpose, or even trades or sells the property to another, and at an increased price, does not thereby establish a taking for private use, nor fraud, nor any fraudulent or false or untrue representations. Need for taking the particular land, like the issue of compensation for the taking, is judged solely by the conditions existing at the time of the taking.

In short, in California, a "return to owner" feature in connection with the taking of property for public use has never been recognized.[15] Similarly, with respect to fee takings, the parties may not have had in mind such subsidiary interests as oil and gas rights, but they are included in the fee simple and are of no further concern to the former owner.[16]

Secondly, the codifiers did not see the estate to be acquired as a matter of "public necessity" to be determined by the condemnor or the court. In Section 1241, the codifiers specified that, "Before property can be taken, it must appear . . . that the taking is necessary to such [public] use," but it is quite clear from the context that this language was intended to refer to the question of any taking at all and that the matter of the estate to be acquired was intended to be governed by Section 1239. Hence, although a great deal of subsequent legislation has expressly made the nature of the interest to be acquired a matter of necessity to be determined either conclusively or prima facie by the condemning agency, it is not strictly correct, apart from such legislation, to refer to the interest to be acquired as a matter covered by the doctrine of public necessity. In this respect, many of the statutes relating to

the effect of the condemnor's resolution to condemn are imprecise in their references to the necessity of taking "such property or interest therein." (Emphasis added.)[17]

Thirdly, the codifiers took care to assure that Section 1239 was addressed solely to the interest to be acquired by the condemnor rather than to any division of interests that might exist in the property before the taking. As enacted in 1872, the introductory paragraph of the section referred to "the interests, estates, and rights in lands subject to be taken." In the Code Amendments of 1873-74, the word "interests" was deleted to preclude any confusion in this respect.[17a] In the original code, it was quite clear whenever the reference was to preexisting "interests" in the property rather than to the estate to be acquired by the condemnor. For example, in connection with the complaint in eminent domain proceedings, Section 1244 specified (and still specifies) that the complaint must contain:

> A description of each piece of land, or other property or interest in or to property, sought to be taken, and whether the same includes the whole or only a part of an entire parcel or tract or piece of property, or interest in or to property, but the nature or extent of the interests of the defendants in such land need not be set forth. . . .

Similarly, Section 1248, relating to valuation, requires the court to determine:

> The value of the property sought to be condemned . . . and of each and every separate estate or interest therein . . . .

Notwithstanding the clarity in the original code, this distinction has generally not been borne in mind in the mass of enabling or condemnation authorization legislation that has grown up over the years. Hence, in

literally hundreds of statutes, one finds authority, for example, to "acquire property, real or personal, or any interest therein." This language, and many variations of it, appears never to have been construed as to whether it authorizes the taking of a fee simple or lesser interest at the option of the condemnor. The effect of these references to "any interest" in property is unclear. On the one hand, they may be intended to override the guidelines established by Section 1239. On the other hand, they may be intended to make clear (1) that an existing limited interest in property may be acquired independently of other outstanding interests in the property or (2) that a given estate in property may be acquired by the condemnor notwithstanding a division of interests in the property. If they are intended to have the latter meaning, they are unnecessary. As a general proposition, a California condemnor may proceed separately against an outstanding interest in property. Moreover, an outstanding division of interests in property is no impediment to the acquisition of a fee simple or other interest by the condemnor.[18] Section 1239 obviously is not addressed to any preexisting division of interests in the property. Preexisting division of interests may cause problems as to the naming of parties defendant, the notice to such parties, and the assessment and payment of compensation; but, as the California condemnation proceeding has always been considered to be "in rem," it raises no problems as to the power to condemn.

This same problem permeates a great deal of California condemnation enabling legislation in another respect: The authorization is couched in terms of a power to take "lands," "rights of way," "easements," or other species of property without being specific as to whether that is the

interest to be acquired by the condemnor or whether the authorization is to require preexisting rights of way, easements, or other interests. For example, in connection with the Central Valley Project, Section 11575 of the Water Code authorizes the Department of Water Resources to "acquire for and in the name of the State, by gift, exchange, purchase, or eminent domain proceedings any and all water, water rights, rights of way, easements, land, electric power, public power resources and facilities, and property or appurtenances thereto of every kind and description . . . as the department determines to be required and necessary . . . ." Under that language, may the department take land in fee simple to obtain the dredger tailings thereon for the construction of a dam? Or, is the matter governed by Code of Civil Procedure Section 1239 and, specifically, by subdivision 3 which permits only the taking of a right of entry for such purposes?[19] In State v. Natomas Co.,[20] it was held that, taking into account the additional consideration that the fee interest might be useful for fish and wild life enhancement, Water Code Section 11580 authorizes the taking of fee simple in such cases.

To summarize, in connection with Section 1239 as with many other basic sections of the eminent domain title, there is a pervasive problem of reconciling those sections with the mass of enabling legislation that has grown up over the years. In particular, statutory provisions conferring the power to condemn are uncertain or noncommittal as to the estate that may be acquired, and those provisions which state the effect of the condemning agency's resolution to condemn are not susceptible to any certain interpretation insofar as the resolution might relate to the interest to be acquired.

THE EVOLUTION OF SECTION 1239

The growth of Section 1239 can be arrayed most easily by comparing the original section with its existing content. The section now reads as follows:

> 1239. The following is a classification of the estates and rights in lands subject to be taken for public use:
>
> 1. A fee simple, when taken for public buildings or grounds, or for permanent buildings, for reservoirs and dams, and permanent flooding occasioned thereby, or for an outlet for a flow, or a place for the deposit of debris or tailings of a mine, or for the protection of water bearing lands from drought therefrom of any character whatsoever from any adjacent lands.
>
> 2. Except as provided in subsections 3 and 4, or specifically in any other statute, an easement, when taken for any other use; provided, however, that when the taking is by a municipal corporation, and is for the purpose of constructing, equipping, using, maintaining or operating any works, road, railroad, tramway, power plant, telephone line, or other necessary works or structures, for the preparation, manufacture, handling or transporting of any material or supplies required in the construction or completion by such municipal corporation of any public work, improvement, or utility, a fee simple may be taken if the legislative body of such municipal corporation shall, by resolution, determine the taking thereof to be necessary; and provided, further, that, when any land is taken for the use of a bypass, or drainage way, or overflow channel, or a levee, or an embankment, or a cut required by the plans of the California Debris Commission referred to in that certain act of the Legislature, entitled "An act approving the report of the California Debris Commission transmitted to the Speaker of the House of Representatives by the Secretary of War on June 27, 1911, directing the approval of plans of reclamation along the Sacramento River or its tributaries or upon the swamp lands adjacent to said river, directing the State Engineer to procure data and make surveys and examinations for the purpose of perfecting the plans contained in said report of the California Debris Commission, and to make reports thereof, making an appropriation to pay the expenses of such examinations and surveys, and creating a Reclamation Board and defining its power," approved December 24, 1911, or any modifications or amendments that may be adopted to the same, either a fee simple or easement may be taken as a reclamation board shall by resolution determine may be necessary. Such resolution shall be conclusive evidence that a taking of the fee simple or easement, as the case may be, is necessary.

3. The right of entry upon and occupation of lands, and the right to take therefrom such earth, gravel, stones, trees, and timber as may be necessary for some public use.

4. When the property is taken by any mutual water system, county, city and county, or incorporated city or town, or a municipal water district, or other political subdivision, regardless of the use, a fee simple may be taken if the legislative or other governing body of such mutual water system, county, city and county, or incorporated city or town, or municipal water district, or other political subdivision, shall, by resolution, determine the taking thereof in fee to be necessary. Such resolution shall be conclusive evidence of the necessity for the taking of the fee simple. Where the fee is taken, the decree of condemnation shall specifically provide for the taking of a fee simple estate.

The provisions of this subsection shall not be applicable where the property is taken under the authority conferred by subsection 1 hereof.

Subdivision 1

The original text authorized the taking of a fee simple: (a) "for public buildings or grounds"; (b) "for permanent buildings for use in connection with a right of way"; and (c) "for an outlet for the flow or a place for the deposit of tailings from a mine."

The expression "public buildings and grounds" is something of a term of art in California condemnation legislation.[21] Even though the phrase does not quite cover all of the takings intended to be both permanent and exclusive of any outstanding interest in the property, the authorization is still a viable one.[22]

The original provision respecting "permanent buildings for use in connection with a right of way" apparently was intended to pertain to taking for railroad purposes; but, in any event, in the Code Amendments of 1873-74, the qualifying expression "for use in connection with a right of way" was deleted to leave only the existing authorization for "permanent buildings."[23]

The existing language respecting "reservoirs and dams, and permanent flooding occasioned thereby" was added in 1873 and seems self-explanatory; the reference to permanent flooding would be troublesome except for the fact that condemnation authorization provisions relating to takings for such purposes, rather than Section 1239, commonly govern the matter of the estate that may be taken.[24]

The original and still existing language respecting the debris or tailings of a mine has been rendered obsolete by the long line of California decisions holding that mining is not a "public use" for which property may be taken.[25]

The final reference in subdivision 1 to the "protection of water bearing lands from drought" was added in 1913, but remains unexplained and uninterpreted. In Los Angeles v. Pomeroy,[26] the city condemned lands for a water system, and its plan was to build a "subsurface dam" across the outlet to a valley whose subsoil was saturated with water and to draw off the water by means of tunnels. This sort of taking was held to be a taking for a "reservoir" and thus to permit the taking of a fee. Apparently, the language added in 1913 was intended to both codify and extend that interpretation.

Subdivision 2

The effect of the original text of subdivision 2 was clear: Only an easement could be taken when the taking was for any purpose other than those specified in subdivision 1 as warranting the taking of a fee. That limitation is still of considerable consequence. It governs the great range of public utility takings for rights of way and lines of all kinds.[27] The limitation once had a considerable importance in connection with takings for various

purposes by public entities,[28] and it probably still has at least a guiding influence even though under the literal terms of subsequent legislation virtually any public entity may resolve to acquire a fee, whatever the purpose of the acquisition. The two elaborate "provisos" in the existing text of subdivision 2 are both obsolete. The first, authorizing fee takings by municipal corporations for certain purposes "if the legislative body of such municipal corporation shall, by resolution, determine the taking thereof to be necessary" was added in 1911[28a] and was an operative provision until it was made obsolete by the much broader authorization contained in subdivision 4 as added in 1949.[28b] The proviso is of at least historic interest in connection with the evolution of California condemnation law generally because it was the first instance in California legislation in which the resolution of the condemning agency or entity was made determinative of an issue of "public necessity."[29] The second proviso, relative to takings "required by the plans of the California Debris Commission," was added in 1913[29a] and appears to have been completely supplanted by legislation prescribing the powers of the State Reclamation Board.[30] The taking powers of that board are set forth specifically in the Water Code and, in general, encompass the taking of a fee interest whenever the requisite determination is made by the Board.[31] A minor ambiguity in the proviso may be created by the reference to "a reclamation board." If that reference encompasses the board of trustees of reclamation districts created either pursuant to general statutory provisions (see Water Code Sections 50000-53805) or special legislation, the provision might still be an operative one. In any event, however, the authorization is limited by its terms to takings and implementation of the mentioned plans of 1911 or of any "modifications or amendments" of that plan.

The other change made in subdivision 2--the addition at the beginning of the subdivision of the phrase "except as provided in subsections 3 and 4, or specifically in any other statute"--was made in 1949 in connection with the addition of subdivision 4.[31a] It seem unlikely that the draftsmen of the legislation enacted in 1949 perceived the possible meanings of the phrase "except as provided . . . specifically in any other statute." There were, and are, several hundred sections of the California codes that do bear, or that arguably may bear, upon the question of the interest that may be taken by various condemnors for various purposes. It seems unlikely that it was the legislative purpose to require that, in order to avoid the easement-taking limitation imposed by subdivision 2, the enabling legislation be "specific." Rather, the qualifying phrase appears to be an acknowledgment that the other statutory provisions exist and that, where they pertain, they override subdivision 2.

Subdivision 3

Subdivision 3 has not been changed since its adoption in 1872. In evaluating the current force, if any, of the subdivision, it is important to bear in mind that Section 1239 as a whole pertains only to the "estates and rights in lands subject to be taken." The section of itself does not authorize condemnation of any kind; that was, and to some extent still is, the function of Section 1238. Further, the section does not specify or itemize the private property that may be taken by eminent domain; that was, and to some extent still is, the function of Section 1240. Notwithstanding its awkward phrasing, subdivision 3 seems to have

been intended to provide for a public profit a prendre, recognized from the earliest times in this country in connection with the building of roads and similar improvements in remote or open territory. In early condemnation practice, when all rights of way were limited to easement or easement-like interests, the law generally recognized that a privilege to take necessary building materials from the countryside could be acquired in addition to the right of way. In that early period, and indeed in comparatively recent times, the privilege to obtain fill or other building materials was considered to be simply an adjunct of the easement obtained for the right of way itself.[32] Although one can no longer be certain, that seems to have been the intended thrust of subdivision 3. Such agencies as the Department of Public Works[33] and the Department of Water Resources[34] are given an authorization somewhat similar to subdivision 3 except that those authorizations are not in terms of the "estate" to be acquired. They are expressed as authorizations to condemn and, in the context in which they appear, explicitly authorize the taking of a fee or any lesser estate as determined by the condemnor.[35] On occasion, the California Legislature also has authorized the acquisition of property for such purposes as a source of earth fill in connection with particular projects.[36]

Subdivision 4

Section 1239 was last changed in 1949 by the addition of subdivision 4.[36a] The effect of subdivision 4 is to treat the matter of fee-versus-easement taking in the same manner as the general question of "public necessity" insofar as takings by local governments are concerned.

In the era from 1913 to 1949, subdivision 1 had seemingly authorized the taking of a fee simple "when the property is taken by any mutual water system, county, city and county, or incorporated city or town or a municipal water district, or other political subdivision."[37] Notably, that provision made no reference to the adoption of a resolution by the public entity as to the taking of a fee simple, nor did it specify the effect of any such resolution. The legislation of 1949 deleted that provision and added the existing language of subdivision 4 to require that, if a fee is to be acquired by a local public entity, its governing body must adopt a resolution to that effect. The subdivision specifies that, "Such resolution shall be conclusive evidence of the necessity for the taking of the fee simple."

The entities specified in subdivision 4 are: (1) any mutual water system, (2) county, (3) city and county, (4) incorporated city or town, (5) municipal water district, or (6) other political subdivision. Presumably the reference to "any mutual water system" refers to so-called mutual water companies, whether their status be public utility or non-public utility.[38]

The reference to "a municipal water district" apparently refers to districts created under the Municipal Water District Law of 1911, now codified as Sections 71000-73001 of the Water Code. The inclusion of such districts might be an operative provision except for the fact that, by the terms of Water Code Section 71693, "in proceedings relative to the exercise of such right [eminent domain], the district shall have all of the rights, powers, and privileges of a city."

The reference to any "other political subdivision" seems to have been intended to include, quite literally, any local public entity that has a condemnation power. If so, this reference would pertain to about 200 types of local entities, mostly special districts created pursuant to general laws or by specific legislation, that have a power of condemnation. The peculiarity here is that a resolution adopted under subdivision 4 is "conclusive evidence of the necessity for the taking of the fee simple" while the general resolution to condemn of many of these local public entities is specifically given the effect of being only prima facie evidence of "public necessity." In other cases, the resolution has no stated effect, thereby leaving the issue of public necessity to be determined by the court. Thus, in such a case as Monterey County Flood Control & Water Conservation Dist. v. Hughes,[39] the local public entity's resolution to condemn is given only a prima facie effect.[40] Therefore, with respect to the taking generally, the court must try the issue of public necessity while, if a resolution as to the taking of a fee simple were adopted under subdivision 4, presumably no such issue could be presented to the court. With respect to those local public entities whose resolution to condemn is given no stated effect on the general issue of public necessity, subdivision 4 operates even more strangely. The general issue of the need or necessity for the taking is determined by the court whereas, if a resolution were adopted under subdivision 4, the need to take a fee simple would be conclusively established by the entity itself. These statutory anomalies seem bizarre if one focuses upon a particular problem, but they are merely examples of many idiosyncracies

that can be found throughout California condemnation legislation and should therefore probably not be taken too seriously. Courts[41] and legal writers[42] are therefore probably correct in ignoring the discrepancy between subdivision 4 and related legislation and treating the need to take a fee simple as simply one aspect of public necessity.

Inclusion of cities and of counties in subdivision 4 is unremarkable, largely because the resolutions of those entities are made generally conclusive of the issue of public necessity by subdivision 2 of Section 1241. However, it should be noted that under Section 1241 the resolution must be adopted by a two-thirds majority of the governing board and must pertain to takings of property within the boundaries of the public entity. Those limitations do not, in terms, apply to a resolution under subdivision 4 although the discrepancy seems difficult to justify. It should also be noted that, under the last sentence of subdivision 4, there is no need to adopt any resolution at all if the taking is for one of the purposes specified in subdivision 1 ("public buildings or grounds" and the like); presumably the effect of subdivision 1 is to permit the taking of a fee simple for those purposes.

The last command of subdivision 4 is that, "Where the fee is taken, the decree of condemnation shall specifically provide for the taking of a fee simple estate." That is odd phrasing because, in California condemnation practice, there is no such document as a "decree of condemnation." There is a so-called interlocutory judgment as well as a final judgment and a final order of condemnation. Section 1253 requires the final order of condemnation to "describe" the "estate or interest acquired"; in the

absence of extraordinary considerations, the nature of the interest or title acquired is governed by the recital in the final order of condemnation.

SUMMARY OF EXISTING LAW

It is obviously difficult to relate the force of Section 1239 to takings (1) by all of California's 300-odd categories of recognized condemnors and (2) to all of the purposes for which eminent domain may be invoked. As an extreme example, eminent domain may be exercised by an unspecified, and therefore indefinite, range of persons, entities, or agencies for the[44]

> protection, preservation, or reclamation of land, whether covered or uncovered by water, against the overflow or incursion of water or the threat thereof, or against the effects of subsidence of the surface of said land, as by constructing levees or by filling, diking, draining or other appropriate remedial method.

May a fee or only an easement be taken for these purposes? It is impossible to determine, of course, and perhaps the question will never arise. The example does indicate, however, that there is at least a modicum of force in the general preference for easement taking stated in Section 1239.

In terms of the categories of condemnors, the picture is a great deal more clear. Roughly speaking, any problem as to the nature of the interest to be acquired is treated in the same manner as the particular condemnor's general resolution to condemn. Such agencies as the Department of Public Works and the Department of Water Resources may invoke statutes that explicitly confide the matter of the interest to be acquired to the condemnation resolution adopted by those agencies.[45] The effect is to make applicable the "Chevalier doctrine"[46] that no question of "public necessity," as opposed to a question of "public use," can be made justiciable even by allegations of "fraud, bad faith, or abuse of discretion." The same disposition apparently prevails as to all "political

subdivisions."[47] Again, however, with respect to local public entities whose resolutions to condemn are made only prima facie evidence of public necessity or are given no effect at all in this respect, the literal import of subdivision 4 of Section 1239 should probably be taken with at least a degree of skepticism.

In terms of the categories of California condemnors, this leaves takings by public utility corporations,[48] takings by certain public service enterprises that have a condemnation power but are not public utilities,[49] and takings by private individuals in those very exceptional cases in which such individuals may take property.[50] All of these takings are covered, after a fashion, by the generalities set forth in Section 1239.

Sections 1239.2, 1239.3, and 1239.4

Mention should be made of these sections, as well as of the Airport Approaches Zoning Law (Government Code Sections 50485-50485.14), all of which pertain to the taking of various interests in property in connection with airports.

Section 1239.2 was added in 1945 to authorize the acquisition of "airspace" or an "air easement" by cities, counties, and airport districts if such taking is necessary to protect the approaches of any airport.[51] A somewhat similar authority is conferred by the Airport Approaches Zoning Law.[52] Section 1239.2 probably should be considered to be an authorization to condemn rather than as a mere specification of the nature of the interest that may be taken. Thus, the section is miscast as an adjunct to Section 1239. The point, however, apparently is moot

because public entities authorized to establish and maintain airports are, by other legislation, given an ample authority to condemn "for airport purposes."[53]

Section 1239.4 was also added in 1945 to authorize the taking of land for similar purposes, "reserving to the former owner thereof an irrevocable free license to use and occupy such land for all purposes except the erection or maintenance of structures or the growth or maintenance of vegetable life above a certain prescribed height."[54] This section should also probably be considered an authorization to condemn rather than a specification of the interest that may be acquired. In 1961, the section was amended to authorize acquisitions "in fee" for such purposes, in addition to the practice of reserving to the former owner an "irrevocable free license."[55]

In 1965, Section 1239.3 was added to authorize the acquisition of "airspace" or "an air easement" if such a taking is "necessary to provide an area in which excessive noise, vibration, discomfort, inconvenience or interference with the use and enjoyment of real property located adjacent to or in the vicinity of the airport and any reduction in the market value of real property by reason thereof will occur through the operation of aircraft to and from the airport."[56] Again, this section should be considered to be an authorization to condemn rather than a specification of the interest that may be taken although,for these more remote purposes for which the property may be taken, it appears that the section does limit the interest that may be taken to airspace or an air easement.

It may be that all of these sections were either necessary or convenient in overcoming the limitations seemingly imposed by Section 1239. It should be noted, however, that insofar as they authorize the acquisition of fee interests, they add nothing to the authority conferred by subdivision 4 of Section 1239.[57]

There are, of course, large problems associated with the general import of these sections. Section 1239.3, for example, can be read as implying that airspace not only may, but should, be taken to abate the problem of excessive noise, vibration, and the like.

In any event, in an overall revision of the California condemnation statutes, these sections should be transferred to the authorizations to condemn applicable to those entities that are authorized to operate airport facilities. However worthy they may be, their import is not appropriate for inclusion in the Code of Civil Procedure or in a comprehensive condemnation procedure statute.

POLICY CONSIDERATIONS

The basic policy of generally permitting only the taking of an easement--as distinguished from a fee--was sound when Section 1239 was enacted in 1872. At that time, all the public uses for which property could be taken by eminent domain were stated in Section 1238 of the Code of Civil Procedure. Generally speaking, the uses then specified were limited to public buildings and grounds, roads, and such utility type uses as railroads, canals, water supply, wharves, irrigation, and the like. The uses listed in Section 1238 were ones that ordinarily would be regarded either as relatively temporary uses or as ones for which an easement would be sufficient (such as railroads). With respect to those uses which contemplated construction of relatively permanent improvements--public buildings and grounds and permanent buildings for use in connection with a right of way (such as a railroad station)--the original version of Section 1239 permitted the taking of a fee simple.

Section 1239 now reflects a general shift in legislative policy from the 19th century preference for easement taking to the current preference for fee taking. This shift in policy is the result of legislative recognition that it is no longer possible to prescribe by statutes the circumstances under which it is desirable that a public entity acquire the property in fee simple. Taking of the entire fee interest may be desirable in a particular case because (1) it permits an absolute and unfettered control of the property during the continuation of the public use, (2) it provides a property interest of unlimited duration, or (3) it permits the condemnor to dispose of the property on termination of the public use or to devote the property to another public use. With respect

to the matter of control, the public entity or agency finds, in most cases, that it is desirable to take the fee. For example, the question of easement-versus-fee taking has arisen quite commonly in connection with water projects. Even if the purpose of the taking is merely to obtain watershed or to provide an area of "protection" around a dam or reservoir or other water improvement, the taking of a fee has been considered justified. Here, one can easily see the distinction between easement taking and fee taking with respect to the matter of control. Suppose the property is merely grazing land and the property owner's indicated desire is to continue to use the property for that purpose. It would be possible, of course, to define an easement-like interest in the water agency that would entertain this desire. It may even be that the public entity or agency intends to lease or otherwise permit the use of the property, possibly by someone other than the former owner, for grazing purposes. Yet, one can see the enhanced control made possible by the taking of the fee even though, for the foreseeable future, the utilization of the property would be exactly the same whether a fee or easement were taken. This difference, as asserted and emphasized by condemnors, generally has been considered to warrant the taking of the entire fee interest.[58]

As has been indicated with respect to the matter of the duration of the interest taken, one of the principal reasons for the early preference for easement taking was to assure that, upon termination of the public use, the property would return to private ownership and, specifically, to the owner or successor to the owner from whom the property was taken. With respect to such "exclusive" or "totally oppressive" easements as

railroad rights of way, which have always been considered to be easement-like rather than fee-like interests, the purpose and effect of the easement-taking limitation is to provide for the termination of the interest.[59] It may well be that this matter of the termination of an easement or easement-like interest and the consequent forfeiture of the condemnor's financial investment has been a principal reason for the general shift to fee taking. In the case of the taking of easements that permit little, if any, simultaneous use of the property, the compensation required to be paid to the owner is virtually the same as in a fee taking. As Nichols observes:[60]

> When land is taken for such purpose as a highway or a railroad, which requires a permanent and substantially exclusive occupation of the surface, the distinction between the taking of the fee and of the easement has no practical application in the determination of the compensation to be assessed for the land actually taken. While the damages to the owner's remaining land may be less if the use of the land taken is limited by the nature of the easement, the interest remaining in the owner of the fee in the land taken is in such case of nominal value, and he is awarded the same measure of compensation for the land actually taken as if the fee was acquired by the condemning party, namely, the full market value of the land.

Thus, in one view, condemnors are justified in the taking of fees simple to avoid the payment for a fee while receiving only an easement.

Other valuation rules may tend to discourage easement taking. In general, in easement taking-cases, compensation is determined by valuing the fee simple of the strip before and after the imposition of the easement, the difference in these values being the acquisition cost of the easement. In making this computation, the so-called bundle of sticks approach is used. In other words, all of the rights in the property to be subjected to the easement constitute a bundle of rights or sticks.

The condemnor takes certain of these rights both by the acquisition of the easement and by the imposition of restrictions upon other uses of the property by the fee owner. The rights taken and their importance are then equated to a percentage of the fee value, and this percentage reflects the value of the easement. In theory, this value can range from one to ninety-nine percent of the value of the fee depending, of course, upon the nature of the easement, the remaining uses permitted to the owner, and the highest and best use of the land.[61] Under the peculiar valuation formula afforded as to all takings by Code of Civil Procedure Section 1248, the property owner may also be entitled to severance damages computed independently of the easement taken. In other words, if the easement is imposed upon only a portion of a parcel of property, the mentioned valuation technique is used in valuing the easement but, in addition, severance damages are also computed by comparing the "before" and "after" value of the remaining portion of the parcel.[62] Still another valuation rule operates to the benefit of the property owner in easement cases. To the extent that the easement and all of the rights that the easement entails are not defined with specificity, there is a presumption that the taker will make the most extensive and damaging use of all privileges encompassed within the easement.[63] The taking agency may, of course, provide evidence as to the nature of the public improvement and the way it will be constructed, operated, and maintained; and the property owner may not contradict this evidence.[64] Thus, by specifying the details of the improvement, the taking agency may limit damages to those which flow from the improvement as detailed.[65]

However, if the easement taken is thus prescribed and limited, the taking agency will be required to pay additional compensation if, in the future, it modifies or extends its privileges or activities.[66] It is likely that, in debatable cases, condemnors may prefer fee takings because of (1) the difficulty of describing an appropriate easement or easement-like interest; (2) the valuation rules applicable in easement-taking cases; and (3) the need for future condemnation proceedings and the making of additional compensation in cases of a substantial change in utilization of the easement.

The unfettered power of disposition inherent in fee simple taking is assuredly one of the principal ends sought to be obtained by condemnors. The federal courts have always been certain that this power of disposition on termination of a public use justifies the taking of a fee simple. For example, in Southern Pac. Land Co. v. United States,[67] the United States condemned 17,750 acres of land, including mineral interests, to construct the naval air station at Lemoore, California. To the contention that the mineral interests should not be taken, the court replied:[68]

> As noted, the uncontradicted testimony of the Assistant Secretary was that he based his decision in part upon the fact that the existence of outstanding mineral interests, conflicting with possible service uses, would reduce the marketability of the property in the event of sale. Advantageous liquidation of the Government's investment is a legitimate consideration in determining the estate to be taken. Here the Government was not engaging in "an outside land speculation," and "we must regard appropriate liquidation of an investment for a public purpose as itself such a public aim."
>
> This is but an application of the general principle that "The cost of public projects is a relevant element in all of them, and the government, just as anyone else, is not required to proceed oblivious to elements of cost."
>
> A decision to take, based in substantial part upon this consideration is not arbitrary or capricious.

Among the decisions relied upon by the Court of Appeals was one of the most remarkable "public use" decisions by the Supreme Court of the United States. In Brown v. United States,[69] the government held a temporally limited interest in land, but it had made substantial improvements upon that land. The United States Supreme Court upheld the condemnation of the fee interest in the land to protect this investment even though the government's express purpose was to dispose immediately of the entire fee interest in the property and thereby recoup its investment in the improvements.

California decisions have never manifested this certainty that facilitation of ultimate disposal of the property justifies the taking of a fee simple. The question seems not to have arisen explicitly simply because the major ranges of takings are covered by "conclusive" resolutions to condemn that preclude challenges by property owners on this score. The entire matter is obviated to some extent, of course, by the matter of compensation. In State v. Westover Co.,[70] for example, there apparently was an extended trial on the issue of the state's power to take mineral interests in connection with a taking for a wildlife refuge. On the valuation phase of the case, however, the property owner apparently was able to prove that minerals raised the value of the property to several million dollars, instead of the few hundred thousand dollars thought to be the value of the property by the condemnor. Following that result of the valuation proceedings, the entire taking was abandoned with a payment of $155,000 as "fees on abandonment." This general phenomenon can also be seen in other California decisions.[71] The difficulty lies

in determining, in discrete cases, when government or one of government's auxilliaries is engaging in "sound business practice" and when it is engaging in "land speculation"; and the judgmental factors of legislatures, courts, administrators, and property owners have, of course, differed considerably. Suffice it to say here that the law in this respect would be considerably improved by (1) clarity and (2) the making of the decision, where possible, by a legislative body (rather than other decision makers) capable of reconciling the conflicting values and factors involved.

Since it is obviously impossible for general legislation to provide a litmus that will automatically determine whether a fee simple or a limited interest should be taken, perhaps the most important policy question to be resolved should not be phrased in terms of the substance of the matter, but rather in terms of who should make the determination as to the need for the taking of a fee simple. The choice lies between the condemnor's determination of its own needs and the assessment of those needs and the interests of private property by the courts. This is the policy issue presented by the question whether there is a public necessity for the taking. As indicated earlier, the fee-versus-easement problem is now dealt with generally in the same manner as the "public necessity" for the taking. In general, condemnors that may adopt resolutions of public necessity that are conclusive may also adopt a resolution that is conclusive of the need to take a fee simple. Those whose resolutions are only prima facie evidence of the need for the taking have that same effect as to the quantum of the estate to be acquired. In public utility and other takings where the court determines public necessity as a matter of fact, the contentions of the property owner as to the interest to be taken are also consistent.

RECOMMENDATIONS

In any comprehensive revision of the California condemnation statute, the extent of the interest that may be taken by eminent domain should be made clear. Generally speaking, the existing law should be codified without significant substantial changes. It makes good sense to treat the extent of the interest that may be taken as merely a subsidiary question of public necessity. Nevertheless, although the substance of the existing law is generally satisfactory, the overlapping, conflicting,and obsolete provisions found in the existing California statutes should be replaced by clear statutory statements.

Specifically, the following general approach to statutory revision of this aspect of condemnation law is recommended:

1. A general provision should be included in the eminent domain title in the Code of Civil Procedure to state in substance:

> Except as otherwise limited by statute, a local public entity may take the fee or any lesser interest in real or personal property that is necessary for public use.

"Interest" should be broadly defined to include such matters as airspace, water rights, the right to develop land, and the like. In the case of a public entity, the resolution to condemn the property should have the same effect insofar as the property interest to be acquired is concerned as it has on the need to take any interest in the property at all. In other words, if the resolution of necessity in conclusive, it would be conclusive on the issue of the necessity for the taking of the fee interest rather than merely an easement.

2. For all practical purposes, the statutes relating to the exercise of eminent domain for state purposes authorize the taking of a fee or any lesser interest as determined by the agency. However, a few of the statutes relating to state takings are not clear and should be clarified. The simple solution to the problem presented by the statutes governing takings for state purposes would appear to be to make the general provision recommended in 1 above applicable to state takings.

3. The taking authority of individual public entities necessarily must be examined in the course of preparing a comprehensive statute to determine whether the entity now has the right to exercise the power of eminent domain. In the course of this examination, consideration also should be given to the question whether specific provisions are needed to limit the right to take an interest less than a fee in certain cases.

4. Privately owned public utilities should be authorized to take whatever interest is necessary to carry out the regulated activities of the utility. Normally this will be an easement. The issue of necessity in utility cases should be subject to court determination in the same manner as is the need to take any interest in the property at all.

5. Private persons and institutions, to the very limited extent they are authorized to exercise the right of eminent domain, should be permitted to take only such interest in the property as is necessary. In other words, the court would determine the interest authorized to be taken as a part of the question of necessity. Possibly the statute granting a private person or institution the power to exercise the right of eminent domain might limit the interest taken to an easement. For example, if statutory right is given private persons to take property for sewer purposes, the authority could be so stated that it authorizes only the taking of an easement.

FOOTNOTES

THE RIGHT TO TAKE--THE RIGHT

TO TAKE THE FEE OR ANY LESSER INTEREST

1. Barclay v. Howell's Lessee, 10 U.S. 202, 213-214 (6 Pet. 498)(1832).

2. 3 Nichols, Eminent Domain § 9.36 at 327 (3d ed. 1965)(footnotes omitted).

3. See People v. Ocean Shore R.R., 32 Cal.2d 406, 196 P.2d 570, 6 A.L.R.2d 1179 (1948). See also Cal. Civil Code § 811.

4. 3 Nichols, Eminent Domain § 9.2 at 262 (3d ed. 1965)(footnote omitted).

5. Id. § 9.2[2] at 269-270 (footnote omitted).

5a. Id. at 270 (footnote omitted).

6. Sweet v. Rechel, 159 U.S. 380, 395 (1895), quoting Hingham & Quincy Bridge & Turnpike Co. v. County of Norfolk, 6 Allen 353. See also Shoemaker v. United States, 147 U.S. 282 (1893).

7. Holmes, J., in Lincoln v. Commonwealth, 164 Mass. 1, 3, 41 N.E. 112, 114 (1895).

8. Sutton v. Frazier, 183 Kan. 33, 41, 325 P.2d 338, 346 (1958).

9. See Los Angeles v. Law Building Corp., 254 Cal. App.2d 848, 62 Cal. Rptr. 542 (1967); Los Angeles County Flood Control Dist. v. Jan, 154 Cal. App.2d 389, 316 P.2d 25 (1957); People v. Milton, 35 Cal. App.2d 549, 96 P.2d 159 (1939); State v. Natomas Co., 239 Cal. App.2d 547, 49 Cal. Rptr. 64 (1966).

10. 3 Nichols, Eminent Domain § 9.2[1] at 266-268 (3d ed. 1965)(footnotes omitted).

11. See Cal. Code Civ. Proc. § 1258.

12. The statutory provisions governing the interest in property that may be taken by state highway departments, counties, cities, and special highway authorities are arrayed in the Highway Research Board's Special Report 32, entitled Condemnation of Property for Highway Purposes, A Legal Analysis, Part I (1958).

13. See Civil Code Section 762 ("fee simple" defined) and Section 801 ("easement" defined).

14. 256 F.2d 421, 424 (9th Cir. 1958).

See also Capron v. State, 247 Cal. App.2d 212, 55 Cal. Rptr. 330 (1966); Newport v. Los Angeles, 184 Cal. App.2d 229, 7 Cal. Rptr. 497 (1960); Arechiga v. Housing Authority, 159 Cal. App.2d 657, 324 P.2d 973 (1958).

15. Compare Note, Real Property--Eminent Domain--Reversion Upon Misuse or Nonuse of Land by Condemning Authority, 36 Tenn. L. Rev. 72 (1968).

16. See Rio Vista Gas Ass'n v. State, 188 Cal. App.2d 555, 10 Cal. Rptr. 559 (1961).

17. See, e.g., Educ. Code §§ 23151-23152:

> 23151. The Regents of the University of California may condemn any property or interest therein for the public buildings and grounds of the University . . . .
>
> 23152. The resolution of the Regents of the University of California shall be conclusive evidence:
>
> * * * * *
>
> (b) That such property or interest therein is necessary therefor. . . .

Compare Sts. & Hwys. Code §§ 104 and 103:

> 104. The department may acquire, either in fee or in any lesser estate or interest, any real property which it considers necessary for State highway purposes. . . .
>
> 103. The resolution of the commission shall be conclusive evidence:
>
> * * * * *
>
> (b) That such real property or interest therein is necessary therefor.

17a. Code Am. 1873-74, Ch. 383, § 161, p. 355.

18. See, e.g., Costa Mesa Union School Dist. v. Security First Nat'l Bank, 254 Cal. App.2d 4, 62 Cal. Rptr. 113 (1967).

19. Under Water Code Sections 250, 251, relating to activities of the Department of Water Resources other than the Central Valley Project, the authority of the department to acquire a fee simple or lesser interest, as it determines, is quite clear.

20. 239 Cal. App.2d 547, 49 Cal. Rptr. 64 (1966).

21. See subdivisions 2 and 3 of Code of Civil Procedure Section 1238; University of So. Calif. v. Robbins, 1 Cal. App.2d 523, 37 P.2d 163 (1934).

22. For example, a substantial bridge has been held to be a "building" (Crocket Land & Cattle Co. v. American Toll Bridge Co., 211 Cal. 361, 295 P. 328 (1931)) and a county prison farm has been held to be "lands," at least for the purposes of the section (Dunn v. Los Angeles, 155 Cal. App.2d 789, 318 P.2d 795 (1957)).

23. Code Am. 1873-74, Ch. 383, § 161, p. 355.

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

24. See Monterey County Flood Control & Water Conservation Dist. v. Hughes, 201 Cal. App.2d 197, 20 Cal. Rptr. 252 (1962). See also Chapman v. Public Utility Dist. No. 1, 367 F.2d 163 (9th Cir. 1966).

25. See the discussion of mining as a public use in connection with the "declared public uses."

26. 124 Cal. 597, 57 P. 585 (1899).

27. See Highland Realty Co. v. San Rafael, 46 Cal.2d 669, 298 P.2d 15 (1956).

28. See People v. Church, 57 Cal. App.2d 1032, 136 P.2d 139 (1943); People v. Olsen, 109 Cal. App. 523, 293 P. 645 (1930).

28a. Cal. Stats. 1911, Ch. 356, § 1, p. 618.

28b. Cal. Stats. 1949, Ch. 978, § 1, p. 1772.

29. "Conclusive" or "prima facie" determinations of necessity by the condemnor itself did not commence until the amendments of subdivision 2 of Section 1241 by Chapter 293 of the Statutes of 1913.

29a. Cal. Stats. 1913, Ch. 394, § 1, p. 852.

30. See Cal. Water Code § 8592.

31. See Cal. Water Code §§ 8590, 8590.2, 8593-8595.

31a. Cal. Stats. 1949, Ch. 978, § 1, p. 1772.

32. See People v. Olsen, 109 Cal. App. 523, 293 P. 645 (1930).

33. See Cal. Sts. & Hwys. Code § 104(c).

34. See Cal. Water Code § 253(c).

35. See State v. Natomas Co., 239 Cal. App.2d 547, 49 Cal. Rptr. 64 (1966).

36. See, e.g., Cal. Code Civ. Proc. § 1238.7.

36a. Cal. Stats. 1949, Ch. 978, § 1, p. 1772.

37. See Cal. Stats. 1913, Ch. 394, § 1, p. 852.

38. See Cal. Pub. Util. Code §§ 2701-2712. See also Yucaipa Water Co. No. 1 v. Public Utilities Comm'n, 54 Cal.2d 823, 357 P.2d 295, 9 Cal. Rptr. 239 (1960).

39. 201 Cal. App.2d 197, 20 Cal. Rptr. 252 (1962).

40. Cal. Water Code App. § 52-6.

41. See, e.g., Santa Barbara v. Cloer, 216 Cal. App.2d 127, 30 Cal. Rptr. 743 (1963); Monterey County Flood Control & Water Conservation Dist. v. Hughes, 201 Cal. App.2d 197, 20 Cal. Rptr. 252 (1962).

42. See, e.g. California Condemnation Practice, Sparrow, Public Use and Necessity at 152 (Cal. Cont. Ed. Bar 1960). Lavine, Extent of Judicial Inquiry Into Power of Eminent Domain, 28 So. Cal. L. Rev. 369, 375 (1955).

43. See Newport v. Los Angeles, 184 Cal. App.2d 229, 7 Cal. Rptr. 497 (1960).

44. Cal. Code Civ. Proc. § 1238.6.

45. See Cal. Sts. & Hwys. Code § 104; Cal. Water Code § 253.

46. See People v. Chevalier, 52 Cal.2d 299, 340 P.2d 598 (1959). With specific respect to the matter of the interest to be acquired, see People v. Milton, 35 Cal. App.2d 549, 96 P.2d 159 (1939)(Department of Public Works), and State v. Natomas Co., 239 Cal. App.2d 547, 49 Cal. Rptr. 64 (1966).

47. Los Angeles v. Law Bldg. Corp., 254 Cal. App.2d 848, 62 Cal. Rptr. 542 (1967)(counties); Los Angeles County Flood Control Dist. v. Jan, 154 Cal. App.2d 389, 316 P.2d 25 (1957)(districts).

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

49. See, e.g., University of So. Calif. v. Robbins, 1 Cal. App.2d 523, 37 P.2d 163 (1934).

50. See, e.g., Linggi v. Garovotti, 45 Cal.2d 20, 286 P.2d 15 (1955).

51. Cal. Stats. 1945, Ch. 1242, § 1, p. 2354.

52. Government Code Section 50485.13 provides as follows:

> 50485.13. In any case in which: (a) it is desired to remove, lower, or otherwise terminate a nonconforming structure or use; or (b) the approach protection necessary cannot, because of constitutional limitations, be provided by airport

zoning regulations under this article; or (c) it appears advisable that the necessary approach protection be provided by acquisition of property rights rather than by airport zoning regulations, the city or county within which the property or nonconforming use is located or the city or county owning the airport or served by it may acquire, by purchase, grant, or condemnation in the manner provided by the law under which a city or county is authorized to acquire real property for public purposes, such air right, air navigation easement, or other estate or interest in the property or nonconforming structure or use in question as may be necessary to effectuate the purposes of this article. In the case of the purchase or grant of any property or any easement or estate or interest therein or the acquisition of the same by the power of eminent domain by a city or county making such purchase or exercising such power, there shall be included in the damages for the taking, injury or destruction of property the cost of the removal and relocation of any structure or public utility which is required to be moved to a new location.

53. See the discussion of airports in connection with the declared public uses.

54. Cal. Stats. 1945, Ch. 1242, § 2, p. 2354.

55. Cal. Stats. 1961, Ch. 965, § 1, p. 2606.

56. Cal. Stats. 1965, Ch. 1564, § 1, p. 3653.

57. See Santa Barbara v. Cloer, 216 Cal. App.2d 127, 30 Cal. Rptr. 743 (1963).

58. See Chapman v. Public Utility Dist. No. 1, 367 F.2d 163 (9th Cir. 1966); Monterey County Flood Control & Water Conservation Dist. v. Hughes, 201 Cal. App.2d 197, 20 Cal. Rptr. 252 (1962). See also State v. Natomas Co., 239 Cal. App.2d 547, 49 Cal. Rptr. 64 (1966).

59. See Romero v. Dep't of Public Works, 17 Cal.2d 189, 109 P.2d 662 (1941).

60. 3 Nichols, Eminent Domain § 9.2 at 265 (3d ed. 1965). See also Southern Pac. R.R. v. San Francisco Savings Union, 146 Cal. 290, 292-293, 79 P. 961-962 (1905):

> While it is no doubt true that under the law of this state a railroad company is only entitled to acquire by condemnation proceedings an easement over the land, and that the fee thereof remains in the owner, yet, in most condemnation cases by railroad companies, this distinction, as far as it enters into a determination of the damages to be assessed for the right of way acquired thereby, has no practical application. Usually in such cases there is no substantial difference in value between the easement and the fee of which the law will take notice. Hence, in ordinary cases, where condemnation for a right of way for railroad purposes is sought, evidence is permitted to show, as the damages sustained, the full value of the land taken, upon the theory that the easement will be perpetual; that the right of way acquired, though technically an easement, will be permanent in its nature, and the possibility of abandonment by non-user so remote and improbable as not to be taken into consideration; that the exercise of the right will require practically the exclusive use of the surface, and that any interest which might be reserved to the owner in the fee would only be a nominal one and of no value. Under such circumstances, as there can be no substantial determinative value in the fee apart from the easement, the law will not consider them separately, but will require the condemning corporation to pay the value of the fee as the measure of damages sustained.

See also People v. Schultz Co., 123 Cal. App.2d 925, 268 P.2d 117 (1954).

61. See generally G. Schmutz, Condemnation Appraisal Handbook 204-215 (rev. ed. 1963); California Condemnation Practice, Del Guercio, Severance Damages and Valuation of Easements 61 (Cal. Cont. Ed. Bar 1960); Clarke, Easement and Partial Taking Valuation Problems, 20 Hastings L. J. 517 (1969).

62. See Pacific Gas & Elec. Co. v. Hufford, 49 Cal.2d 545, 319 P.2d 1033 (1957).

63. See People v. Lundy, 238 Cal. App.2d 354, 47 Cal. Rptr. 694 (1965).

64. See Cal. Evidence Code § 813.

65. See People v. Schultz Co., 123 Cal. App.2d 925, 268 P.2d 117 (1954).

66. See People v. Ayon, 54 Cal.2d 217, 352 P.2d 519, 5 Cal. Rptr. 151 (1960).

67. 367 F.2d 161 (9th Cir. 1966).

68. Id. at 163 [citations omitted].

69. 263 U.S. 78 (1923).

70. 140 Cal. App.2d 447, 295 P.2d 96 (1956).

71. See, e.g., Kern v. Galatas, 200 Cal. App.2d 353, 19 Cal. Rptr. 348 (1962).