

5/5/70

Memorandum 70-49

Subject: Study 36.24 - Condemnation (The Right to Take--"More Necessary"
Public Use)

One part of the right to take aspect of the condemnation study concerns the right of one person to take property already appropriated to a public use by another, whether for the same use or another. This memorandum is concerned with the means available to resolve the conflict when it cannot be resolved by the parties themselves.

Attached hereto as Exhibits III and IV are two law review articles (Matteoni, The California Roadway--"A More Necessary Public Use", 20 Hastings L.J. 551 (1969); Note, Reconciling Competing Public Claims on Land, 68 Colum. L. Rev. 155 (1968)) providing background for this topic. We emphasize, however, the following:

First, "appropriation to a public use" is not synonymous with public ownership. Property may be appropriated to a public use even though it is owned by a private individual or corporation. Conversely, property may be owned by a public entity but not "appropriated" to a public use and therefore subject to condemnation without a showing of a "more necessary" public use. "Appropriation" requires that property either be in actual use for a public purpose or held in reasonable anticipation of a future public need, with a bona fide intention of using it for such need or purpose within a reasonable time. A comprehensive statute dealing with "more necessary" use should make the meaning of "appropriation" clear.

Second, "more necessary" public use is not an issue of necessity at all, but instead, involves competing public uses or users where theoretically the

property is "necessary" for both the preexisting use or user and the displacing ones. Nevertheless, the term is so widely used that it should be retained.

Finally, California already has probably the most extensive statutory treatment of this relatively obscure subject of any state in the country. In addition to Sections 1240(3) and 1241(3) of the Code of Civil Procedure, there are a great number of both codified and uncoded sections, establishing priorities, either directly or indirectly, and repeating the directive that property already appropriated to a public use may only be taken for a "more necessary" use. The staff suggests that the Commission recommend repeal of Sections 1240(3) and 1241(3) and those provisions that merely repeat the general rule, adoption of sections that retain the substance of these sections, and retention of those sections that state existing, legislatively declared priorities.

Sections 1240(3) and 1241(3) are not identical--see attached Exhibit I (pink)--but, in general, they provide: (1) a statement of the general rule that property appropriated to a public use may be taken only for a "more necessary" use; (2) a preference for public ownership over private ownership; and (3) a list of certain local public entities from which property may not be taken by local public entities of the same type. To replace these sections, the staff has prepared Sections 450 to 455 of the Comprehensive Statute (see attached Exhibit II (yellow)).

Section 450 merely defines "appropriation to a public use" in accordance with the existing California judicial interpretation. Section 451 restates the general rule that property appropriated to a public use may only be taken for a "more necessary" public use. Section 452 provides a preference for public over private ownership. It is similar to Sections 1240(3) and 1241(3);

however, it goes farther than those sections by including all public entities, while the former state a preference only in favor of the state, a county, city and county, incorporated city or town, joint highway district, irrigation district, or municipal water district (Section 1240(3)), transit district, rapid transit district, public utility district, or water district (Section 1241(3)). It should be noted that the preference is not merely one of public ownership over private ownership for the same use, but for any use. Thus, for example, an entity may condemn a utility easement not merely to perpetuate the utility use in public ownership but to provide some separate and distinct use. Section 453 states a priority for state uses over all other uses except as otherwise specifically provided. Section 1240(3) presently provides state priority over private ownership and the Property Acquisition Law (Government Code Section 15856) provides an absolute priority for acquisitions under that statute. The change that would be effected by Section 453 seems relatively minor and appears justified on the probability that more people will benefit from the state use than from the use chosen by the lower governmental authority. Section 454 is not strictly speaking a "more necessary" use provision. It does not authorize displacement of either existing uses or users, but merely makes clear the ability of every condemnor to take property to provide consistent uses, for example, the sharing of utility easements, and seems to be a sound policy statement. One question remaining with regard to this section is whether it should specifically provide that the condemnor has the burden of showing that his use is consistent and will not substantially interfere with the preexisting use. Section 455 is substantially identical to the last paragraph of Section 1241(3). Both sections protect only property in actual use and

owned by specific condemnees from specific condemnors. Perhaps the only significant type of local public entity not listed is a school district. Accordingly, school districts may both take from those listed and their property may be taken by those listed, subject, of course, to the general "more necessary" use rule. It should be noted that the inclusion of so many local public entities here (the only significant ones that seem to be missing are school districts) together with application of the rules stated in Sections 452 and 453, perhaps largely eclipse the general rule stated in Section 451.

As indicated above, there are a relatively large number of statutes in California dealing with the issue of "more necessary" use. There are minor differences within the following categories, but these seem to be the major types.

Type I statutes--declaring that certain uses are "more necessary."

The statutes listed below provide specifically that certain public uses are "more necessary" than either certain uses or all other uses. The staff recommends that no change in these legislatively declared priorities be attempted.

Agri. Code § 4054 (Use of its property by district agricultural association "more necessary" than use by any grantee, lessee, or licensee of association.)

Code Civ. Proc. § 1241.7 (Establishes rebuttable presumption that prior park use is more necessary than any other use, with limited exception where conflict with state highway.)(*Should perhaps be relocated in Public Resources Code or elsewhere.)

Govt. Code § 15856 (Property Acquisition Law--uses (state purposes) for which property acquired pursuant to this Act more necessary than any other.)

Sts. & Hwys. Code § 30402 (Use by Toll Bridge Authority a more necessary use than any other use except railroad uses.) See also § 30401.

Sts. & Hwys. Code § 31001 (Use by Folsom Lake Bridge Authority a more necessary use than any other use.)

Sts. & Hwys. Code § 31201 (Use by El Dorado County Toll Tunnel Authority a more necessary use than any other use.)

Water Code § 11585 (Water appropriated to public use by state agency prior to 7/1/33 is a more necessary use than use by Department of Water Resources for Central Valley Project.)

Cal. Stats. 1945, Ch. 1040, § 4.8, p. 2011-2012 (Use of property within territorial limits of Mount San Jacinto Winter Park by the authority is a more necessary use than any other, except use by the state or use by public utility available to the authority.)

Type II statutes--implying that certain uses are "more necessary."

The statutes listed below authorize the taking of specific property by a specific condemnor for a specific purpose, thereby implying that the latter is a "more necessary" use. The staff recommends no change in these priorities.

Code Civ. Proc. § 1248a (Authorizes removal or relocation of railroad and streetcar tracks to accomodate streets and highways and public utilities maintained by city, county, or municipal water district.)

Fish & Game Code § 10685 (State consent to federal condemnation in Death Valley for migratory bird reservation.)

Govt. Code § 39731 (City may take existing ferry system.)

Sts. & Hwys. Code § 103.5 (Department of Public Works may take park property for state highway purposes.) But cf. Sts. & Hwys Code § 210.1. (Department should attempt to avoid such takings.)

Sts. & Hwys. Code §§ 10101, 10102 (Municipal Improvement Act of 1913--municipality may condemn existing public utility facilities.)

Water Code § 252 (Department of Water Resources may take property dedicated to park purposes for state water and dam purposes.)

Water Code § 22427 (Irrigation district may take any property devoted to public use that will become subject to flooding by district project.)

Water Code § 43500(b) (Water District may take property of private owners devoted to a public use.)

Water Code App. § 98-61(7)(Antelope Valley-East Kern Water Agency "may condemn any existing waterworks or system, . . . or any water or water rights owned by any person, firm or private corporation.")

Water Code App. § 112-15(9)(Bighorn Mountains Water Agency "may condemn any existing waterworks or system, . . . or any water or water rights owned by any person, firm or private corporation.")

Water Code App. § 104-11(9)(Crestline-Lake Arrowhead Water Agency "may condemn any existing waterworks or system . . . or any waters or water rights owned by any person, firm or private corporation.")

Water Code App. § 100-15(9)(Desert Water Agency "may condemn any existing waterworks or system . . . or any waters or water rights owned by any person, firm or private corporation.")

Water Code App. § 21-5 (Knight's Landing Ridge Drainage District may take from private or public owners property necessary for levee or drainage purposes.)

Water Code App. § 28-16 (Los Angeles County Flood Control District may take property for its purposes "from private persons, corporations, reclamation districts, swamp land districts, levee districts, protection districts, drainage districts, irrigation districts, or other public corporations or agencies or districts.")

Water Code App. § 36-16 (Orange County Flood Control District may take property for its purposes "from private persons, corporations, reclamation districts, swampland districts, levee districts, protection districts, drainage districts, irrigation districts, or other public corporations or agencies or districts.") See also Water Code App. § 36-2(6).

Water Code App. § 33-10 (Palo Verde Irrigation District specifically authorized to acquire, by condemnation if necessary, the Palo Verde Mutual Water Company.)

Water Code App. § 43-2(8) (San Bernardino County Flood Control District may condemn any property, whether publicly or privately owned, subject to flooding by District improvements.)

Water Code App. § 46-29 (Ventura County Flood Control District may condemn any property, whether publicly or privately owned, subject to flooding by District improvements.)

Type III statutes--prohibiting taking by condemnor from particular condemnee. The statutes listed below prohibit a specific condemnor from condemning specific property for a specific purpose, thereby implying that the former is a "more necessary" use. The staff recommends no change in these priorities.

Fish & Game Code § 1349 (No farm lands may be taken for access to fishing areas of Pacific Ocean without specific legislative authorization.)

Cf. Govt. Code § 26301 (County may not take privately owned golf course for use as golf course.)

Cf. Govt. Code § 37353 (City may not take privately owned golf course for use as golf course.)

Water Code § 43530 (One water storage district may not take property of another water storage district nor of an irrigation district, city or county.)

Water Code § 60230(8) (Water replenishment district may not take property of any agency having powers to provide for the replenishment of ground water.)

Water Code § 74554 (Water Conservation District may not take property devoted to cemetery purposes.)

Water Code App. § 55-5(13) (Alameda County Flood Control and Water Conservation District may not condemn property appropriated to public use by any "city and county or municipal utility district.")

Water Code App. § 102-7 (Alpine County Water Agency may not condemn "publicly owned property held . . . for the development, storage or distribution of water for public use.")

Water Code App. § 80-10 (Contra Costa County Water Agency may not condemn "publicly owned property held . . . for the development, storage or distribution of water for public use.")

Water Code App. § 63-5(13) (Contra Costa County Flood Control and Water Conservation District may not take property appropriated to public use by any city and county or municipal utility district.)

Water Code App. § 69-7 (Contra Costa County Storm Drainage District may not take property appropriated to public use by any county, city or municipal utility district.)

Water Code App. § 100-15(9) (Desert Water Agency may not take from county water district larger than 50,000 acres.)

Water Code App. § 96-8 (El Dorado County Water Agency may not take "publicly owned property held . . . for the development, storage or distribution of water for public use.")

Water Code App. § 59-26(12) (Kings River Conservation District may not take "any property held or used for the development, storage or distribution of water for public use.")

Water Code App. § 68-5(13) (Marin County Flood Control and Water Conservation District may not take any property "appropriated to public use by any existing city and county or public district.")

Water Code App. § 85-3.4 (Mariposa County Water Agency may not condemn "publicly owned property held or used for the development, storage or distribution of water for public use.")

Water Code App. § 97-14 (Mojave Water Agency may not condemn "publicly owned water rights or property held or used for development, storage or distribution of water for public use.") See also Water Code App. § 97-13(3).

Water Code App. § 90-7 (Nevada County Water Agency may not condemn "publicly owned property held or used for the development, storage, or distribution of water for public use.")

Water Code App. § 36-16 (Orange County Flood Control District may not condemn any property situated more than 15 miles outside the boundaries of the district--absolute prohibition.)

Water Code App. § 40-2(8) (Orange County Water District may not condemn any of the water of the Mojave River or any property in the Santa Ana River watershed already devoted to public water purposes or any property maintained "for the scientific propagation and study of plant life.")

Water Code App. § 81-3.4 (Placer County Water Agency may not condemn "publicly owned property held or used for the development, storage or distribution of water for public use.")

Water Code App. § 48-9 (Riverside County Flood Control and Water Conservation District may not condemn any property in Orange County devoted to "beneficial" use.)

Water Code App. § 66-3.4 (Sacramento County Water Agency may not condemn "publicly owned property held or used for development, storage or distribution of water for public use, or publicly owned property held or used by any flood or reclamation district.")

Water Code App. § 70-8 (San Benito County Water Conservation and Flood Control District may not condemn any property of the Pacheco Pass Water District.)

Water Code App. § 105-6(12) (San Diego County Flood Control District may not condemn any water rights appropriated to public use by any existing municipal corporation, water district, or other public agency.) See also Water Code App. § 105-6(4).

Water Code App. § 79-5(13) (San Joaquin County Flood Control and Water Conservation District may not condemn "any property . . . appropriated to public use by any existing city and county or municipal utility district.")

Water Code App. § 74-5(12) (Santa Barbara County Flood Control and Water Conservation District may not condemn "any property . . . appropriated to public use by any existing city and county or municipal utility district.")

Water Code App. § 51-3.4 (Santa Barbara County Water Agency may not condemn "publicly owned property held or used for the development, storage or distribution of water for public use.")

Water Code App. § 60-6 (Santa Clara County Flood Control and Water District may not condemn property of any water conservation district within the district.)

Water Code App. § 83-65 (Shasta County Water Agency may not condemn "property held or used for the development, storage or distribution of water for public use or property held or used by a public agency for the development or distribution of electric power.")

Water Code App. § 64-3.4 (Solano County Flood Control and Water Conservation District may not condemn "publicly owned property held or used for the development, storage or distribution of water for public use.")

Water Code App. § 111-5 (Tulare County Flood Control District may not condemn "any property appropriated to public use by any existing county or municipal utility district.")

Water Code App. § 113-8 (Tuolumne County Water Agency may not condemn "publicly owned property held or used for the development, storage or distribution of water for public use.")

Water Code App. § 93-8 (Yuba-Bear River Basin Authority may not condemn "publicly owned property held or used for the development, storage or distribution of water for public use.")

Type IV statutes--requiring consent of condemnee. The statutes listed below are similar to the Type III statutes in that they prohibit a specific condemnor from condemning specific property for a specific purpose without the consent of the condemnee, thereby implying again that the former is a "more necessary" use. The staff recommends no change in these priorities. (Note: No attempt has been made to list the great number of entities that may not condemn property outside its boundaries without consent of the affected entity.)

Fish & Game Code § 1348 (No condemnation of access for fishing Pacific Ocean without consent of affected county.)

Govt. Code § 54341 (Revenue Bond Law of 1941--local agency (city, county, etc.) may not condemn state land without consent of affected state agency.)

Harb. & Nav. Code § 6075 (Harbor district may not condemn land within port district, chartered port, harbor improvement district, incorporated city or recreational harbor district without consent of affected entity.)

Health & Saf. Code § 4741 (County Sanitation District may take land within city or unincorporated area of county only with consent of respective body.) See also § 4770.

Health & Saf. Code § 8560 (No railroad, streets, or utility lines may be laid across dedicated cemetery without consent of cemetery authority or plot owners.)

Health & Saf. Code § 33395 (Redevelopment Agency may take property devoted to a public use only with consent of affected "public body.")

Health & Saf. Code § 34325 (Housing Authority may take property devoted to a public use but property belonging to a public entity may be taken only with its consent.)

Pub. Res. Code § 5542 (Regional Park District may not take property of municipal utility district without consent of district.)

Pub. Util. Code § 30503 (Southern California Rapid Transit District may relocate railroad only with permission of PUC.)

Pub. Util. Code § 40162 (Orange County Transit District may relocate railroad only with permission of PUC.)

Pub. Util. Code § 50162 (Stockton Metropolitan Transit District may not take property within county or city without consent of respective entity.) See also § 50180.

Pub. Util. Code § 70180 (Installations by transit district in Marin County in highways, streets, or parks subject to approval of state or city.)

Pub. Util. Code § 90402 (San Diego County Transit District may relocate railroad only with permission of PUC.)

Pub. Util. Code § 96002 (Santa Barbara Metropolitan Transit District may not take property of county or city without consent of respective body; district may relocate railroad only with permission of PUC.)

Pub. Util. Code §§ 98213, 98214, 98240 (Santa Cruz Metropolitan Transit District may not take property of county or city without consent of respective body; district may relocate railroad only with permission of PUC.)

Pub. Util. Code App. §§ 6.3, 6.20, 6.22 (Fresno Metropolitan Transit District may not take land outside city of Fresno or interfere with other entities without consent of affected entity.)

Sts. & Hwys. Code § 155 (Department of Public Works may not condemn land for scenic or historical memorials without consent of affected county.)

Sts. & Hwys. Code § 32802 (Parking Authority (1949 Act) may not take state property without consent of affected state agency.)

Water Code § 11131 (Department of Water Resources may not take state property for Central Valley Project without consent of affected state agency.)

Welf. & Inst. Code § 4104 (No public street or railway may be opened through property of any state hospital unless Legislature by special enactment consents.)

Type V statutes--substitute facilities required. The statutes listed below permit condemnation by certain condemnors only if substitute facilities are provided. In one sense, this implies that the former use is "more necessary"; in another sense, it indicates that the property is not perhaps "necessary" to the condemnee. In any event, the staff recommends that no change be made in these statutes.

Water Code § 11590 (Department of Water Resources may not take public utility or state property for Central Valley Project unless it provides substitute facilities.)

Water Code App. § 95-3.4 (Amador County Water Agency may not take publicly owned property held for development of water for public use without consent of owner unless substitute facilities are provided. But cf. § 3.4 also requires finding of "more necessary" use.)

Water Code App. § 99-3.4 (Kern County Water Agency--same as Amador County Water Agency.)

Water Code App. § 86-3.4 (Sutter County Water Agency--substantially same as Amador County Water Agency--also prohibits taking from privately owned irrigation company.)

Water Code App. § 84-3.4 (Yuba County Water Agency--same as Sutter County Water Agency.)

Type VI statutes--court finding that "more necessary required." The statutes listed below provide in part that a specific condemnor can condemn property already devoted to a public use but only upon a finding of court of

competent jurisdiction that the taking is for a "more necessary" public use.
These provisions are redundant and the staff recommends that they be repealed.

Pub. Util. Code § 21635 (Department of Aeronautics--to remove airport hazards)

Pub. Util. Code § 28953 (San Francisco Bay Area Rapid Transit District)

Pub. Util. Code § 40162 (Orange County Transit District)

Pub. Util. Code § 70162 (Transit district in Marin County)

Pub. Util. Code § 100131 (Santa Clara County Rapid Transit District) .

Pub. Util. Code App. 3, § 6.6 (West Bay Rapid Transit District) :

Water Code § 251.1 (Department of Water Resources for state water and dam purposes)

Water Code § 11583 (Department of Water Resources for Central Valley Project) `

See also § 11584.

Water Code § 60230(8)(Water Replenishment District)

Water Code App. § 55-5(13)(Alameda County Flood Control and Water Conservation District)

Water Code App. § 102-7 (Alpine County Water Agency)

Water Code App. § 95-3.4 (Amador County Water Agency)

Water Code App. § 63-5(13)(Contra Costa County Flood Control and Water Conservation District)

Water Code App. § 69-7 (Contra Costa County Storm Drainage District)

Water Code App. § 72-7 (Del Norte County Flood Control District) .

Water Code App. § 96-8 (El Dorado County Water Agency)

Water Code App. § 47-7 (Humboldt County Flood Control District)

Water Code App. § 99-3.4 (Kern County Water Agency)

Water Code App. § 62-5(12)(Lake County Flood Control and Water Conservation District)

Water Code App. § 92-3(f)(Lassen-Modoc County Flood Control and Water Conservation District) .

Water Code App. § 68-5(13)(Marin County Flood Control and Water Conservation District)

Water Code App. § 85-3.4 (Mariposa County Water Agency)

Water Code App. § 97-14 (Mojave Water Agency)

Water Code App. § 52-6 (Monterey County Flood Control and Water Conservation District)

Water Code App. § 61-6 (Napa County Flood Control and Water Conservation District)

Water Code App. § 90-7 (Nevada County Water Agency)

Water Code App. § 81-3.4 (Placer County Water Agency)

Water Code App. § 88-3(f)(Plumas County Flood Control and Water Conservation District)

Water Code App. § 66-3.4 (Sacramento County Water Agency)

Water Code App. § 70-8 (San Benito County Water Conservation and Flood Control District)

Water Code App. § 105-6(12)(San Diego County Flood Control District)

Water Code App. § 101-15(9)(San Geronio Pass Water Agency)

Water Code App. § 79-5(13)(San Joaquin County Flood Control and Water Conservation District)

Water Code App. § 49.6 (San Luis Obispo County Flood Control and Water Conservation District)

Water Code App. § 74-5(12)(Santa Barbara County Flood Control and Water Conservation District)

Water Code App. § 51-3.4 (Santa Barbara County Water Agency)

Water Code App. § 60-6 (Santa Clara County Flood Control and Water District)

Water Code App. § 91-3 (Sierra County Flood Control and Water Conservation District)

Water Code App. § 89-3 (Siskiyou County Flood Control and Water Conservation District)

Water Code App. § 64-3.4 (Solano County Flood Control and Water Conservation District)

Water Code App. § 86-3.4 (Sutter County Water Agency)

Water Code App. § 82-3(f)(Tehama County Flood Control and Water Conservation District)

Water Code App. § 111-5 (Tulare County Flood Control District)

Water Code App. § 93-8 (Yuba-Bear River Basin Authority)

Water Code App. § 84-3.4 (Yuba County Water Agency)

Type VII statutes--authority to condemn property devoted to public use.

The statutes listed below provide specific condemnors with general authority to condemn property for certain purposes "whether that property is already devoted to the same use or otherwise." These statutes do not always specifically mention the "more necessary" use issue but the staff believes that these general provisions are all subject to the "more necessary" use rule. The point is, however, far from clear and the staff recommends that, at a minimum, the Comment to Comprehensive Statute Section 451 indicate that the rule stated there prevails over these general statements of condemnation authority, or alternatively that these provisions be repealed.

Harb. & Nav. Code § 6296 (Port districts)

Harb. & Nav. Code § 6896 (River port districts)

Pub. Res. Code § 5542 (Regional Park District)

Pub. Util. Code § 12703 (Municipal Utility District)

Pub. Util. Code § 16404 (Public Utility District)

Pub. Util. Code § 25703 (Transit district in Alameda or Contra Costa counties)

Pub. Util. Code § 28953 (San Francisco Bay Area Rapid Transit District)

Pub. Util. Code § 30503 (Southern California Rapid Transit District)

Pub. Util. Code § 40162 (Orange County Transit District)

Pub. Util. Code § 50162 (Stockton Metropolitan Transit District)
 Pub. Util. Code § 70162 (Transit district in Marin County)
 Pub. Util. Code § 90402 (San Diego County Transit District)
 Pub. Util. Code § 96002 (Santa Barbara Metropolitan Transit District)
 Pub. Util. Code § 98212 (Santa Cruz Metropolitan Transit District)
 Pub. Util. Code § 100131 (Santa Clara County Rapid Transit District)
 Pub. Util. Code App. 2, § 6.3 (Fresno Metropolitan Transit District)
 Pub. Util. Code App. 3, § 6.6 (West Bay Rapid Transit District)
 Sts. & Hwys. Code § 27166 (Bridge and Highway District)
 Water Code § 71693 (Municipal Water District)
 Cal. Stats. 1941, Ch. 52, § 3(6), pp. 685-686 (Monterey Peninsula Airport District)
 Water Code App. § 55-5(13) (Alameda County Flood Control and Water Conservation District)
 Water Code App. § 98-61(7) (Antelope Valley-East Kern Water Agency)
 Water Code App. § 112-15(9) (Bighorn Mountains Water Agency)
 Water Code App. § 63-5(13) (Contra Costa County Flood Control and Water Conservation District)
 Water Code App. § 69-7 (Contra Costa County Storm Drainage District)
 Water Code App. § 104-11(9) (Crestline-Lake Arrowhead Water Agency)
 Water Code App. § 72-7 (Del Norte County Flood Control District)
 Water Code App. § 58-3 incorporating by reference Pub. Util. Code § 16404 (Donner Summit Public Utility District)
 Water Code App. § 47-7 (Humboldt County Flood Control District)
 Water Code App. § 62-5(12) (Lake County Flood Control and Water Conservation District)
 Water Code App. § 28-2(6) (Los Angeles County Flood Control District)
 Water Code App. § 110-650 (Madera County Flood Control and Water Conservation District)

Water Code App. § 68-5(13) (Marin County Flood Control and Water Conservation District)

Water Code App. § 52-6 (Monterey County Flood Control and Water Conservation District)

Water Code App. § 61-6 (Napa County Flood Control and Water Conservation District)

Water Code App. § 56-3 incorporating by reference Pub. Util. Code § 16404 (Olivehurst Public Utility District)

Water Code App. § 48-9 (Riverside County Flood Control and Water Conservation District)

Water Code App. § 70-8 (San Benito County Water Conservation and Flood Control District)

Water Code App. § 43-2(8) (San Bernardino County Flood Control District)

Water Code App. § 105-6(12) (San Diego County Flood Control District)

Water Code App. § 101-15(9) (San Geronio Pass Water Agency)

Water Code App. § 79-5(13) (San Joaquin County Flood Control and Water Conservation District)

Water Code App. § 49-6 (San Luis Obispo County Flood Control and Water Conservation District)

Water Code App. § 87-3(8) (San Mateo County Flood Control District)

Water Code App. § 74-5(12) (Santa Barbara County Flood Control and Water Conservation District)

Water Code App. § 60-6 (Santa Clara County Flood Control and Water District)

Water Code App. § 111-5 (Tulare County Flood Control District)

Water Code App. § 46-7(8) (Ventura County Flood Control District)

At the June 1970 meeting, the Commission should consider the suggested sections relating to "more necessary" use and determine what action should be taken in this area.

Respectfully submitted,

Jack I. Horton
Associate Counsel

§ 1240. Property subject to be taken

The private property which may be taken under this title includes:

1. Private property.

1. All real property belonging to any person;
2. State lands; exclusion.

2. Lands belonging to this state, including tide and submerged lands, not within the corporate limits of any city, or city and county, or to any county, incorporated city, or city and county, village or town, not appropriated to some public use; provided, that all * * * 16th and 36th sections, both surveyed and unsurveyed, owned by the state or the United States, which may now or may hereafter be included within the exterior boundaries of a national reservation, or of a reserve, or within the exterior boundaries of lands withdrawn from public entry, shall be and hereby are withheld from the operation of this title and shall not be condemned as against the state or the United States;

3. Property appropriated to public use.

3. Property appropriated to public use; but such property shall not be taken unless for a more necessary public use than that to which it has already been appropriated; provided, that where any such property has been so appropriated by any individual, firm or private corporation, the use thereof for a state highway or a public street or highway of the state, or a county, city and county, or incorporated city or town, joint highway district, or the use thereof by the state or a county, city and county, incorporated city or town, joint highway district, or irrigation or municipal water district, for the same public purpose to which it has been so appropriated, or for any other public purpose shall be deemed more necessary uses than the public use to which such property has already been appropriated; and provided further, that where property already appropriated to a public use or purpose, by any person, firm or private corporation, is sought to be taken by the state, a county, city and county, incorporated city or town, joint highway district, irrigation or municipal water district, for another public use or purpose, which is consistent with the continuance of the use of such property or some portion thereof for such existing purpose, to the same extent as such property is then used, or to a less or modified extent, then the right to use such property for such proposed public purpose, in common with such other use or purpose, either as then existing, or to a less or modified extent, may be taken by the state, such county, city and county, incorporated city or town, joint highway district, or irrigation or municipal water district, and the court may fix the terms and conditions upon which such property may be so taken, and the manner and extent of the use thereof for each of such public purposes, and may order the removal or relocation of any structures, or improvements therein or thereon, so far as may be required by such common use. But property appropriated to the use of any county, city and county, incorporated city or town, or municipal water district, may not be taken by any other county, city and county, incorporated city or town, or municipal water district, while such property is so appropriated and used for the public purposes for which it has been so appropriated.

4. Irrigation district property.

4. Property appropriated to any public use by any irrigation district, may be taken by another irrigation district for another public use and purpose, which is consistent with the use of such property for such existing purposes to the same extent as such property is then used; provided, that the right to such limited use in common shall include the right to enlarge, change or improve the property so taken; provided further, that such enlargement, change or improvement shall not interfere with the original use or any necessary extension or enlargement of such use.

5. Public utility franchises and property.

5. Franchises for any public utility, and all kinds of property of any nature whatsoever used, either during the existence of or at the termination of said franchise, to supply and furnish the service of such public utility, but such franchise or property shall not be taken except for a more necessary public use.

6. Rights of way.

6. All rights-of-way for any and all the purposes mentioned in Section 1238, and any and all structures and improvements on, over, across or along such rights-of-way, and the lands held or used in connection therewith shall be subject to be connected with, crossed, or intersected by or embraced within any other right-of-way or improvements, or structures thereon. They shall also be subject to a limited use, in common with the owner thereof, when necessary; but such uses, crossings, intersections, and connections shall be made in manner most compatible with the greatest public benefit and least private injury.

7. Private property not enumerated.

7. All classes of private property not enumerated may be taken for public use, when such taking is authorized by law.

8. Condemnation of State property.

8. Proceedings to condemn lands belonging to this state are hereby authorized, and must be maintained and conducted in the same manner as are other condemnation proceedings provided for in this title; except, that in such proceedings the summons and a copy of the complaint must be served on the Governor, Attorney General, and * * * the State Lands Commission of this state.

§ 1241. Prerequisites

Before property can be taken, it must appear:

1. That the use to which it is to be applied is a use authorized by law;

2. That the taking is necessary to such use; provided, when the board of a sanitary district or the board of directors of an irrigation district, of a transit district, of a rapid transit district, of a public utility district, of a county sanitation district, or of a water district or the legislative body of a county, city and county, or an incorporated city or town, or the governing board of a school district, shall, by resolution or ordinance, adopted by vote of two-thirds of all its members, have found and determined that the public interest and necessity require the acquisition, construction or completion, by such county, city and county, or incorporated city or town, or school district, or sanitary, irrigation, transit, rapid transit, public utility, county sanitation, or water district, of any proposed public utility, or any public improvement, and that the property described in such resolution or ordinance is necessary therefor, such resolution or ordinance shall be conclusive evidence; (a) of the public necessity of such proposed public utility or public improvement; (b) that such property is necessary therefor, and (c) that such proposed public utility or public improvement is planned or located in the manner which will be most compatible with the greatest public good, and the least private injury; provided, that said resolution or ordinance shall not be such conclusive evidence in the case of the taking by any county, city and county, or incorporated city or town, or school district, or sanitary, irrigation, transit, rapid transit, public utility, county sanitation, or water district, of property located outside of the territorial limits thereof.

3. If already appropriated to some public use, that the public use of which it is to be applied is a more necessary public use; provided, that where such property has been so appropriated by any individual, firm or private corporation the use thereof for a public street or highway of the State, a county, city and county, or any incorporated city or town, or joint highway district, or the use thereof by the State, a county, city and county, or any incorporated city or town, or joint highway district, or a municipal water district or an irrigation district, a transit district, a rapid transit district, a public utility district, or a water district for the same purposes to which it has been appropriated or for any public purpose, shall be deemed a more necessary use than the public use to which such property has been already appropriated; and provided, further, that property of any character, whether already appropriated to public use or not, including all rights of any nature in water, owned by any person, firm or private corporation may be taken by a

county, city and county, or any incorporated city or town or by a municipal water district, or an irrigation district, a transit district, a rapid transit district, a public utility district, or a water district, for the purpose of supplying water, or electricity for power, lighting or heating purposes to such county, city and county, or incorporated city or town, or municipal water district, or an irrigation district, a transit district, a rapid transit district, a public utility district, or a water district, or the inhabitants thereof, or for the purpose of supplying any other public utility, or for any other public use. And such taking may be made, either to furnish a separate and distinct supply of such water, and such electricity for power, lighting or heating purposes, or to provide for any such separate and distinct other public utility or other public use; to furnish such a supply or provide for any such other public utility or other public use in conjunction with any other supply or with any other public utility or other public use that may have been theretofore provided for or that may thereafter be provided for in so supplying or providing for such county, city and county, or incorporated city or town, or municipal water district or an irrigation district, a transit district, a rapid transit district, a public utility district, or a water district, or the inhabitants thereof; or in conjunction with any other supply or with any other public utility or other public use that may have been theretofore determined upon or that may thereafter be determined upon in accordance with law by the people of any such county, city and county, incorporated city or town or municipal water district or an irrigation district, a transit district, a rapid transit district, a public utility district, or a water district. Nothing herein contained shall be construed as in any way limiting such rights as may be given by any other law of this State to counties, cities and counties, incorporated cities or towns or municipal water districts or irrigation districts, transit districts, rapid transit districts, public utility districts, or water districts.

But private property appropriated to the use of any county, city and county, incorporated city or town, or municipal water district, or irrigation district, or transit district, or rapid transit district, or public utility district, or water district, may not be taken by any other county, city and county, incorporated city or town, or municipal district, or irrigation district, or transit district, or rapid transit district, or public utility district, or water district, while such property is so appropriated and used for the public purposes for which it has been so appropriated.

COMPREHENSIVE STATUTE § 450

Staff recommendation

Division 4 - The Right to Take

Chapter 8 - More Necessary Public Use

CHAPTER 8. MORE NECESSARY PUBLIC USE

§ 450. "Property appropriated to a public use"

450. As used in this chapter, "property appropriated to a public use" means property either already in use for a public purpose or set aside for a specific public purpose with the intention of using it for such purpose within a reasonable time.

Comment. Section 450 defines "property appropriated to a public use" in accordance with prior California decisions. See East Bay Mun. Util. Dist. v. Lodi, 120 Cal. App. 740, 755, 8 P.2d 532, 538 (1932). See also Deseret Water, Oil & Irr. Co. v. State, 167 Cal. 147, 138 P. 981 (1914). It should be noted that property may be appropriated to a public use even though it is owned by a private individual or corporation. Conversely, property may be owned by a public entity but not be so appropriated.

COMPREHENSIVE STATUTE § 451

Staff recommendation

§ 451. Property appropriated to a public use may be taken only for more necessary use

451. Property appropriated to a public use may be taken by eminent domain only for a more necessary public use.

Comment. Section 451 retains the general rule formerly set forth in Code of Civil Procedure Section 1240(3) and repeated elsewhere. This rule prevails over the general authority granted elsewhere to particular condemnors to condemn property "whether the property is already devoted to same use or otherwise." See, e.g., Harb. & Nav. Code § 6296. Procedurally, the burden falls on the condemnee to raise the issue and prove that the property sought to be condemned is already appropriated to a public use. Having done so, the burden is then shifted to the prospective condemnor to prove that the use for which the property is sought is "more necessary" than that to which it has already been appropriated.

COMPREHENSIVE STATUTE § 452

Staff recommendation

§ 452. Use by public entity more necessary than use by other persons

452. Except as otherwise provided by statute:

(a) Where property has been appropriated to a public use by any person other than a public entity, the use thereof by a public entity shall be deemed a more necessary use than the use to which such property has already been appropriated.

(b) Where property has been appropriated to a public use by a public entity, the use thereof by the public entity shall be deemed a more necessary use than any use to which such property might be put by any person other than a public entity.

Comment. Section 452 is similar in substance to former Code of Civil Procedure Section 1240(3), except that Section 452 embraces all public entities. Thus, for example, Section 452 includes school districts which formerly were not included.

The preference under Section 452 is not merely one of public ownership over private ownership for the same use but includes any use. Thus, for example, a public entity may condemn the easement of a privately owned public utility not merely to perpetuate the utility use in public ownership but also to provide some separate and distinct use. The introductory clause recognizes that specific exceptions may be legislatively declared elsewhere.

Memorandum 70-49

COMPREHENSIVE STATUTE § 452

Staff recommendation

Cf. Govt. Code §§ 26301 (county may not condemn existing privately owned golf course), and 37353 (city may not condemn existing privately owned golf course).

§ 453. Use by state more necessary than other uses

453. Except as otherwise provided by statute:

(a) Where property has been appropriated to a public use by any person other than the state, the use thereof by the state shall be deemed a more necessary use than the use to which such property has already been appropriated.

(b) Where property has been appropriated to a public use by the state, the use thereof by the state shall be deemed a more necessary use than any use to which such property might be put by any other person.

Comment. Section 453 broadens somewhat the general rule stated under former Code of Civil Procedure Section 1240 and Government Code Section 15856 (Property Acquisition Law). Section 1240 formerly provided a state priority over private ownership and Section 15856 provides an absolute priority for all acquisitions under that statute. Section 453 embraces state acquisitions under other authority, most notably by the Department of Water Resources and the Department of Public Works, Division of Highways. The exception clause recognizes that specific exemptions may be stated elsewhere. E.g., Health and Safety Code Section 8560 (no street may be laid across existing cemetery without consent of cemetery authority or plot owners).

COMPREHENSIVE STATUTE § 454

Staff recommendation

§ 454. Taking for consistent use

454. (a) Property already appropriated to a public use may be taken by eminent domain for a public use that is consistent with the use to which the property is already appropriated.

(b) Except as otherwise provided by statute, when property is taken under this section, the court may do any of the following so far as may be required for such common use:

(1) Fix the terms and conditions upon which the property may be taken and the manner and extent of its use for each of the uses.

(2) Order the removal or relocation of any structures or improvements on the property.

Comment. Section 454 is not strictly speaking a more necessary public use provision since it contemplates joint use without undue interference with the preexisting use.

Section 454 is based on former Code of Civil Procedure Section 1240(3). It differs from Section 1240(3) in two respects. First, it permits a taking by any person while Section 1240(3) applied only to certain designated public entities. Second, it permits only common uses which are consistent with the existing use while Section 1240(3) appeared to permit displacement. However, displacement under Section 1240(3) was permitted only by entities which, by other portions of Section 1240(3), were granted the power to displace completely the condemnee, and this aspect of Section 1240(3) is retained in Section 452.

COMPREHENSIVE STATUTE § 455

Staff recommendation

§ 455. Property appropriated to a public use by cities, counties, or certain special districts

455. Notwithstanding Section 451, property appropriated to the use of any city, county, municipal water district, irrigation district, transit district, rapid transit district, public utility district, or water district may not be taken by eminent domain by any other city, county, municipal water district, irrigation district, transit district, rapid transit district, public utility district, or water district while such property is so appropriated and used for the public purposes for which it has been so appropriated.

Comment. Section 455 is substantively identical to the last paragraph of former Code of Civil Procedure Section 1241(3).

Section 455, like its predecessor, protects the property sought only if it is in actual use. Moreover, it protects property owned by these specific condemnees only from these specific condemnors. Thus, for example, a city may not take from a rapid transit district, but a school district which is not listed may take from those listed and their property may be taken by those listed without regard to these provisions (although the general rule stated in Section 451 would still apply).