

#36.20(1)

12/9/70

Memorandum 70-124

Subject: Study 36.20(1) - Condemnation (The Declared Public Uses--Disposition of Section 1238--Fish Conservation)

Summary

This memorandum presents for repeal subdivision 19 of Section 1238 of the Code of Civil Procedure which declares fish conservation to be a public use.

Analysis

Attached is a study on subdivision 19 of Section 1238 of the Code of Civil Procedure. The subdivision declares as a public use, "Propagation, rearing, planting, distribution, protection or conservation of fish."

The study reveals that, if subdivision 19 were deleted from the Code of Civil Procedure, all currently authorized condemners for fish conservation purposes would retain their authorization under independent grants of authority.

There appear to be three state condemners--the Department of Water Resources, the Fish and Game Commission, and the Wildlife Conservation Board (which may accomplish its acquisitions through the Department of Fish and Game and the Public Works Board). Both the Department of Water Resources and the Wildlife Conservation Board have specific enabling statutes which give them eminent domain power for fish conservation. The Fish and Game Commission has no specific grant of eminent domain authority but, being a state agency, will be able to make its acquisitions through the Property Acquisition Law.

Counties are authorized to engage in fish conservation activities. Since the Commission has approved a section to allow the county to condemn for any proper county function, the county will retain its condemnation authority if subdivision 19 is repealed.

Special districts may, in certain instances, conduct fish conservation projects. Whether they may utilize the power of eminent domain for their purposes depends upon their specific authorizing legislative grants.

Private persons apparently may not now condemn for fish conservation purposes. The repeal of subdivision 19 will not affect this absence of condemnation power.

Exhibit I (attached) is a staff draft of the repeal of subdivision 19 with a Comment indicating the alternate condemnation authority of the various condemnors.

Respectfully submitted,

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Legal Assistant

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EXHIBIT I

CODE OF CIVIL PROCEDURE § 1238

Staff recommendation December 1970

Subdivision 19

~~19.--Prepagation,-rearing,-planting,-distribution,-protection  
or-conservation-of-fish.~~

Comment. Subdivision 19 is not continued because it duplicates authority found elsewhere in the codes to condemn for fish conservation purposes. The power of state agencies to condemn is found in the general authorization of Government Code Section 15853 and the more specific grants to specific agencies. E.g., Water Code Sections 253 and 11900, and Fish and Game Code Sections 1120, 1301, 1345, 1348. See State v. Natomas Co., 239 Cal. App.2d 547, 49 Cal. Rptr. 64 (1966). The authority of counties to condemn is found in Government Code Section 25350.5; see also Fish and Game Code Sections 1150 and 13100. The authority of special districts, if any, is to be found in their particular authorizing grants. Private persons do not have the right to condemn for fish conservation purposes.

#36.20(1)

## THE DECLARED PUBLIC USES

### Fish Conservation

Subdivision 19 was added to Section 1238 of the Code of Civil Procedure in 1935<sup>1</sup> to declare as a public use, "Propagation, rearing, planting, distribution, protection or conservation of fish." The subdivision appears never to have been the subject of judicial comment, and there is no legislative context from which its precise purpose or application can be derived. Thus, it is difficult to ascertain with certainty what persons or entities might be entitled to condemn under the general authority of subdivision 19 and Civil Code Section 1001.

### Individuals

There is little judicial authority in the United States on the general question whether fish culture by individuals or private efforts in furtherance of fish and game resources constitutes a "public use." The California Legislature does regulate private development of fish resources to a certain extent,<sup>2</sup> but the regulatory provisions would not seem to support a conclusion that private registrants or licensees are persons in charge of a public use of raising fish within the meaning of Civil Code Section 1001.

On the other hand, it is remotely possible that a taking by an individual could be justified if the property taken fell within subdivision 19 and was also needed to comply with certain provisions and requirements of the Fish and Game Code.<sup>3</sup> A public use in the constitutional sense would probably be present although the implication of legislative authorization to condemn would be strained.

The Law Revision Commission has previously determined that private condemnation for fish conservation, whether by profit-seeking or nonprofit organizations, should not be allowed.<sup>4</sup>

### Special Districts

Special districts may have the power to condemn for fish conservation purposes if their statutory grants of authority authorize them to condemn, and if fish conservation is within the scope of their statutory functions. For example, any special district<sup>5</sup> which undertakes construction of a water project is authorized to make fish conservation one of the project functions:<sup>6</sup>

A public agency may include recreation and enhancement of fish and wildlife, or either of them, as functions of a project which the public agency is empowered by law to construct and operate, and may construct and operate the project for such recreation and enhancement of fish and wildlife functions, or either of them, in accordance with the provisions of a grant contract entered into with the department, including provisions for public use of the project facilities for fishing and other recreational activities.

If the particular special district is also given eminent domain power generally for its authorized functions, then it will be able to condemn for fish conservation.<sup>7</sup>

### Cities and Counties

Counties are the only local government units expressly given condemnation power with regard to fish and game.<sup>8</sup> The Fish and Game Code authorizes counties to "establish and maintain fish hatcheries,"<sup>9</sup> and to expend money for the "propagation and conservation of fish or game, or both."<sup>10</sup> These powers, when taken in connection with subdivision 19, establish the counties' right to take for fish conservation.<sup>11</sup>

The Law Revision Commission's proposed statute, which authorizes a county to take by eminent domain for any county function, would preserve this right as to fish conservation.

#### State

The California Department of Water Resources is authorized to take property in connection with fish conservation. Section 11900 of the Water Code declares the general state policy that preservation of fish and wildlife should be provided for in connection with state water projects, and that:

[T]he acquisition of real property for such purposes be planned and initiated concurrently with and as a part of the land acquisition program for other purposes of state water projects.

The Department of Water Resources, under authority of this policy, has the power to take lands deemed necessary for fish and wildlife purposes.<sup>12</sup>

The California Fish and Game Commission is required by Fish and Game Code Section 1120 to establish "fish hatcheries for stocking the waters of the state with fish." This section, in connection with subdivision 19 of Section 1238 of the Code of Civil Procedure, would authorize the taking of property for fish hatcheries. Absent subdivision 19, the right to condemn would be secure under the Property Acquisition Law.

The California Wildlife Conservation Board is charged with the power to authorize the acquisition of land and water to carry out:<sup>13</sup>

a single and coordinated program for the acquisition of lands and facilities suitable for recreational purposes, and adaptable for conservation, propagation, and utilization of the fish and game resources of the State . . . .

The Board is specifically empowered to authorize acquisitions for the stated purposes<sup>14</sup> to be accomplished by the State Public Works Board through the Property Acquisition Law and, to a more limited extent, by the Department of Fish and Game.<sup>15</sup> However, no farm lands may be acquired by proceedings in eminent domain except by specific authorization of the Legislature.<sup>16</sup> On at least one occasion, the Legislature has given its specific authorization.<sup>17</sup>

It should be noted that the Wildlife Conservation Board may also authorize acquisition for access to public fishing.<sup>18</sup>

THE DECLARED PUBLIC USES  
Fish Conservation

FOOTNOTES

1. Cal. Stats. 1935, Ch. 569, § 1, p. 1662.
2. The Fish and Game Code provides for registration of fish farm ponds (Fish & Game Code §§ 6420-6427) and imposes a licensing requirement upon domesticated fish breeders (Fish & Game Code §§ 6450-6456).
3. For instance, Sections 5930-5948 of the Fish and Game Code require owners of dams to provide fishways. Section 5938 authorizes the Fish and Game Commission to require an owner to provide a fish hatchery in lieu of a fishway, and Section 5942 permits the Commission to require the planting of fish in lieu of the fishway. Similarly, Sections 1600-1602 give the Department of Fish and Game regulatory authority over construction projects in connection with rivers, streams, or lakes, which will adversely affect any fish or game resource.
4. California Law Revision Commission Minutes, April 3 and 4, 1970.
5. This particular example applies to any city, county, or other political subdivision of the state, as well as to districts. See Water Code Section 12881.2(b), defining "public agency."
6. Water Code § 12887.4.
7. See, g.g., Monterey County Flood Control and Water Conservation Dist. v. Hughes, 201 Cal. App.2d 197, 20 Cal. Rptr. 252 (1962), in which the district's power to condemn for recreational purposes was upheld based upon a general condemnation power in its authorizing statute plus policy statements in the Water Code that fish and wildlife values, both economic and recreational, were to be given consideration in any flood control or water conservation program.

8. Cities might have the power to condemn when performing the functions of a special district. See note 5, supra.
9. Fish & Game Code § 1150.
10. Fish & Game Code § 13100.
11. In addition, Sections 25660-25662 of the Government Code authorize the condemnation by counties of "rights of passage" for fishing purposes, but those sections are a self-contained authorization not dependent for their effect upon provisions of the Code of Civil Procedure.
12. See *State v. Natomas Co.*, 239 Cal. App.2d 547, 49 Cal. Rptr. 64 (1966).  
See also Water Code § 253.
13. Fish & Game Code § 1301.
14. The purposes include, more specifically, acquisition of "lands within the state [that] are suitable for game propagation, game refuges, bird refuges, waterfowl refuges, game farms, fish hatcheries, game management areas," and other purposes stated in various sections of the Wildlife Conservation Act of 1947. See Fish & Game Code § 1345.
15. The Department of Fish and Game is limited in Fish and Game Code Section 1348 to acquisitions by eminent domain only for access roads and rights of way to areas for coastal fishing. The intricate relations between the Wildlife Conservation Board as authorizing agency, and the Public Works Board and Department of Fish and Game as acquiring agency, is described in 23 Ops. Cal. Atty. Gen. 156 (1954).
16. Fish & Game Code § 1349.
17. Fish & Game Code § 1354 (added by Cal. Stats. 1957, Ch. 1037, p. 2272).

18. See Fish & Game Code § 1354 (added by Cal. Stats. 1957, Ch. 754, p. 1970); see also Fish & Game Code § 1009, giving to the Department of Fish and Game the power to acquire **rights** of way for the same purpose.