

Memorandum 72-49

Subject: Study 36.400 - Comprehensive Eminent Domain Statute (Appendix)

Form of recommendation. The staff believes that the Commission's recommendation for a comprehensive eminent domain statute should take substantially the following form:

(1) Recommendation (summary of recommendations and reasons for significant proposals as in other Commission recommendations). The staff plans to begin writing the right to take portion of the recommendation this summer.

(2) Proposed legislation with Comments.

(3) Appendix (consisting of the text of Title 7 of Part 3 of the Code of Civil Procedure--existing general condemnation statute--with Comments indicating the disposition of each section).

Appendix to report. We have used printing money encumbered during a previous fiscal year to have a substantial portion of the Appendix set in type. We have had the latest version of each section of Title 7 fed into the computer. This will prove useful, we believe, in having readily available the text of the existing law for comparison with the text of the new statute. We have also had fed into the computer the Comments explaining the disposition of some of the sections of Title 7, but only those Comments approved by the Commission have been sent to the printer. These Comments are found following the text of the section in the Appendix.

We are sending you a copy of the Appendix to file in your comprehensive statute binder and are attaching another copy to this memorandum. If you are so inclined, you may wish to review the Comments in the Appendix and advise the staff of any changes you believe are necessary. We do not plan to send

the material in the Appendix back to the printer for some time; we want to get the comments of the State Bar Committee and others before we do so. Nevertheless, you no doubt will want to review these Comments before we print our report and now is perhaps as good a time as any to do so. When you review the Comments, please mark your suggested changes on the copy attached to this memorandum and return it to the staff.

Introduction of bill for referral to interim study. The staff has tentatively concluded that it will probably be best to publish a tentative recommendation covering the entire statute rather than publishing a separate tentative recommendation on the right to take and on each of the other areas of condemnation law. No decision is required on this matter at this time. However, it is the hope of the staff that we will be able to have the entire statute in a form for introduction and referral for interim study for the 1973 or 1974 session. If this is possible, we would probably want to defer publishing the tentative recommendation until after the bill is printed since we can save several thousand dollars of printing costs if we do so and also would have a copy of the tentatively approved statute available in a convenient printed bill form. If this seems to be a sound approach, the staff will proceed accordingly.

Respectfully submitted,

John H. DeMouilly
Executive Secretary

APPENDIX
DISPOSITION OF EXISTING GENERAL
CONDEMNATION STATUTE

Title 7 (commencing with Section 1237) of Part 3 of the Code of Civil Procedure is the existing general condemnation statute. This entire title, being superseded by the Eminent Domain Law, will be repealed when the Eminent Domain Law takes effect.

The text of each section of Title 7 is set out below. The disposition of the provisions of these sections is indicated in the Comments that follow the text of the sections.

TITLE 7. OF EMINENT DOMAIN
Chapter 1. Eminent Domain Generally

§ 1237 (repealed). Eminent domain defined

1237. Eminent domain is the right of the people or Government to take private property for public use. This right may be exercised in the manner provided in this Title.

§ 1238 (repealed). Exercise of right; uses

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

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

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

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

village or town; raising the banks of streams, removing obstructions therefrom, and widening and deepening or straightening their channels; roads, highways, boulevards, streets and alleys; public mooring places for watercraft; public parks, including parks and other places covered by water, and all other public uses for the benefit of any county, incorporated city, or city and county, village or town, or the inhabitants thereof, which may be authorized by the Legislature; but the mode of apportioning and collecting the costs of such improvements shall be such as may be provided in the statutes by which the same may be authorized.

4. Wharves, docks, piers, warehouses, chutes, booms, ferries, bridges, toll roads, byroads, plank and turnpike roads; paths and roads either on the surface, elevated, or depressed, for the use of bicycles, tricycles, motorcycles and other horseless vehicles, steam, electric, and horse railroads, canals, ditches, dams, poundings, flumes, aqueducts and pipes for irrigation, public transportation, supplying mines and farming neighborhoods with water, and draining and reclaiming lands, and for floating logs and lumber on streams not navigable, and water, water rights, canals, ditches, dams, poundings, flumes, aqueducts and pipes for irrigation of lands furnished with water by corporations supplying water to the lands of the stockholders thereof only, and lands with all wells and water therein adjacent to the lands of any municipality or of any corporation, or person supplying water to the public or to any neighborhood or community for domestic use or irrigation.

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

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

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

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

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

10. Oil pipelines.

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

12. Canals, reservoirs, dams, ditches, flumes, aqueducts, and pipes

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

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

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

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

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

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

for the purpose of generating, transmitting and distributing the same, or necessary for the proper development and control of such use of such gas, heat, refrigeration, or power, either at the time of the taking of said property, or for the future proper development and control thereof.

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

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

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

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

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

Comment. Section 1238 of the Code of Civil Procedure, which listed public uses in behalf of which the right of eminent domain might be exercised, is not continued in the new Eminent Domain Law. This legislative listing of public uses was intended to satisfy the constitutional requirement that property be taken by eminent domain only for a public use. See CAL. CONST., Art. I, § 14. It attempted to do so by providing a definitive schedule of such uses. However, many recognized public uses were not included in the schedule, and the inclusion of a use in the schedule was no guarantee that the use was in fact a public use under the Constitution. See Comment to CODE CIV. PROC. § 1240.010. Moreover, to a considerable extent, the listing of uses in Section 1238 was surplusage since specific authorizations to condemn for particular uses were provided in other codes.

The scheme of the Eminent Domain Law renders a listing of public uses in the general condemnation statute unnecessary. The power of eminent domain may be exercised to acquire property only by a person expressly authorized by statute to exercise the power for a particular use. CODE CIV. PROC. § 1240.020. However, a statutory authorization to condemn property for a particular use is a legislative declaration that that use is a public use. CODE CIV. PROC. § 1240.010. Accordingly, there is no need to maintain a separate listing of public uses.

Under the scheme of the Eminent Domain Law, every public entity that would be authorized to condemn for a use listed in Section 1238 may still condemn for that use. The state (GOVT. CODE § 15853), cities (GOVT. CODE § 37350.5), counties (GOVT. CODE § 25350.5), and school districts (EDUC. CODE § 1047) may exercise the power of eminent domain to acquire property necessary for any of their powers or functions. These general authorizations to condemn for proper state, city, county, and school district functions often overlap more specific authorizations to condemn or simply to acquire property for particular public uses. On occasion, a statute authorizes a public entity to undertake a public use but specifically denies the right of eminent domain for that use. See, *e.g.*, GOVT. CODE § 37353(c) (existing golf course may not be acquired by city by eminent domain). In such a case, the specific provision controls over the general authorization. Special districts may condemn only for those specific public uses for which they have expressly been granted the power of eminent domain. The great majority of special districts have, by virtue of their enabling statutes, general authority to condemn all property necessary to carry out any powers of the district. A few districts, such as soil conservation districts (PUB. RES. CODE §§ 9074-9953) and the City of Marysville Levee District (Cal. Stats. 1875-76, Ch. 134), have limited condemnation authority or none at all.

The repeal of Section 1238, together with the repeal of Civil Code Section 1001, deprives private persons of condemnation rights previously recognized by the courts. See *Linggi v. Garovotti*, 45 Cal.2d 20, 286 P.2d 15 (1955). Separately enacted provisions in other codes, however, continue the right of some types of private persons to condemn for certain public uses. Privately owned public utilities may condemn for utility purposes. PUB. UTIL. CODE §§ 610-624. Mutual water companies may condemn to irrigate lands that they service. PUB. UTIL. CODE § 2729. Land chest corporations (HEALTH & SAF. CODE § 35167) and limited dividend housing corporations (HEALTH & SAF. CODE § 34874)

may condemn property for their projects. Nonprofit hospitals may condemn property for their purposes. HEALTH & SAF. CODE § 1427. Nonprofit educational institutions of collegiate grade may condemn to carry out their functions. EDUC. CODE § 30051. Although private persons may no longer condemn for sewers or byroads, they may request the appropriate public authority to undertake such condemnation on their behalf. HEALTH & SAF. CODE § 4967 (sewers); STS. & HWYS. CODE § 4120.1 (byroads).

The particular private persons authorized to condemn are quasi-public, and the purposes for which they are authorized to condemn are public in nature. Whether it would be constitutional to authorize a private person to condemn for what appear to be predominately private purposes is doubtful. *Cf. Lorenz v. Jacob*, 63 Cal. 73 (1883) (supplying mines with water); *Lindsay Irr. Co. v. Mehrtens*, 97 Cal. 676, 32 P. 802 (1893) (supplying farming neighborhoods with water); *People v. Elk River M. & L. Co.*, 107 Cal. 221, 40 P. 531 (1895) (floating logs on nonnavigable streams); *General Petroleum Corp. v. Hobson*, 23 F.2d 349 (S.D. Cal. 1927) (byroad to prospect for oil).

There follows below an indication where, in other codes, the authorization to condemn for specific public uses formerly listed in Section 1238 can be found. It should be noted that, although Section 1238 purported to list only public uses in behalf of which the right of eminent domain might be exercised, it in fact on occasion also indicated what types of property or interests may be taken. In general, under the Eminent Domain Law, this type of particularization is not continued. The authority to condemn property for a public use includes the authority to condemn any property right or interest necessary for that use. See CODE CIV. PROC. §§ 1230.070 ("property" defined), 1240.040, and 1240.050 (right to take property or interest necessary for project). Section 1238 also in some instances indicated which persons were authorized to condemn property for specific uses. The persons authorized to condemn for particular uses are indicated in the Comments to particular subdivisions below.

Subdivision 1

Subdivision 1, which was intended to authorize taking for federal purposes, is not continued since it no longer serves any useful purpose. The 1872 Code Commissioners' Note to subdivision 1 cites two California cases expressing doubt that the federal government had an independent right of eminent domain. It is now clear, however, that federal eminent domain power is

not dependent on state authority and cannot be limited by the state. *Kohl v. United States*, 91 U.S. 367 (1875); *C. M. Patten & Co. v. United States*, 61 F.2d 970 (9th Cir. 1932).

Subdivision 2

Insofar as subdivision 2 authorized takings for state purposes, it is unnecessary because it has been superseded by the much broader condemnation powers conferred upon the State Public Works Board. See GOVT. CODE §§ 15853-15855. Insofar as the subdivision might have authorized condemnation on behalf of a state other than California, it is not continued. Takings under the eminent domain power of one state for the benefit of another state raise serious problems under the public use doctrine. See 1 P. NICHOLS, EMINENT DOMAIN § 2.112 (3d ed. 1964). If property is to be condemned by or for another state for a particular purpose, the takings should be authorized by a specific statute dealing with the specific situation. *E.g.*, WATER CODE § 5901, Art. VI, § A (Klamath River Basin Compact). The authorization in subdivision 2 for acquisitions for nonprofit colleges and universities ("institution . . . which is exempt from taxation under the provisions of Section 1a, of Article XIII of the Constitution of the State of California") is continued in Section 30051 of the Education Code. The reference in subdivision 2 to "all other public uses authorized by the Legislature of the State of California" was superfluous and had no substantive effect.

Subdivision 3

Any public utility. The authority to condemn "any public utility . . . for the use of any county, incorporated city, or city and county, village, town, school district, or irrigation district" was ambiguous in that it may have authorized condemnation of property owned by a public utility or may have authorized condemnation of property to be used for public utility purposes whether or not already devoted to public utility purposes. *Cf. Breeze, Limitations on the Right of a Municipality in California to Condemn a Public Utility*, 16 CAL. L. REV. 105, 106 (1927). As evidenced by other statutes enacted the same year relating to condemnation of public utility property, the apparent original intent of the provision was to authorize only the taking of property owned by public utilities. *Compare* Cal. Stats. 1913, Ch. 291, § 1, *with* Cal. Stats. 1913, Ch. 339, § 1. See also Cal. Stats. 1913, Chs. 158, 159, 160, 200, 292, 293, 298.

To the extent this provision authorized the acquisition of property belonging to a public utility, it was superfluous. A

municipal corporation may acquire utility property. See PUB. UTIL. CODE § 10002; former CODE CIV. PROC. §§ 1240(3), (4), (5), and 1241(3). See also PUB. UTIL. CODE §§ 1401-1421 (just compensation where utility property acquired by a political subdivision) and former CODE CIV. PROC. §§ 1264.1-1264.9. Cf. Comment, *Eminent Domain Powers Exercisable Over California Property by Oil and Gas Corporations*, 7 UCLA L. REV. 327 (1960).

It is not clear whether the provision concerning any public utility "for the use of" the local public entities in subdivision 3 restricted the exercise of condemnation to the named entities or permitted condemnation by private public utilities providing service within the territorial limits of the named entities. Whichever is the proper construction of the provision, it is unnecessary. The authority of private corporations to condemn for particular public utility purposes is continued in Public Utilities Code Sections 611-624; the authority of local entities to condemn for particular public utility purposes is continued in specific grants of authority in other codes. See, e.g., the Comments to other repealed provisions of subdivisions 3, 4, 12, 13, and 17 *infra*.

Public buildings and grounds. The authority granted in subdivision 3 to condemn for "public buildings and grounds, for the use of any county, incorporated city, or city and county, village, town, school district, or irrigation district" is continued in other sections. E.g., GOVT. CODE §§ 25351 (county), 37353 (city); EDUC. CODE § 1047 (school district); WATER CODE § 22425 (irrigation districts). See also GOVT. CODE §§ 50333, 50531 (local agencies may acquire property for public buildings and grounds on public squares or to grant to the state). Villages and towns, as unincorporated territory, may not condemn. In addition to the general authority to condemn for public buildings and grounds, entities also have specific authority to condemn for particular types of buildings and works. For a compilation of statutes authorizing condemnation for certain types of public assembly facilities, see Comment to former CODE CIV. PROC. § 1238.4.

It should be noted that an entity authorized to acquire property for a building may acquire grounds necessary to protect or preserve the attractiveness, safety, or usefulness of the building. See CODE CIV. PROC. § 1240.050. See also *University of So. Cal. v. Robbins*, 1 Cal. App.2d 523, 37 P.2d 163 (1934).

Water supply. The portion of subdivision 3 relating to condemnation of property necessary for conducting, storing, or

distributing water is superseded by other sections. Where other sections authorize the acquisition of "property," the authorization subsumes particular types of property, such as those mentioned in subdivision 3: ponds, lakes, canals, aqueducts, reservoirs, tunnels, flumes, ditches, or pipes, lands, water system plants, buildings, rights of any nature in water, and any other "character of property." See CODE CIV. PROC. §§ 1230.070, 1240.040. The authority to condemn for a particular purpose includes the authority to condemn all property necessary for the proper control and development of that purpose at the time of the taking of the property as well as in the future. CODE CIV. PROC. §§ 1240.050, 1240.210. See also CODE CIV. PROC. § 1240.220 for limitations on acquisition for future use.

Insofar as this portion of subdivision 3 may have been intended to grant any county, incorporated city, city and county, municipal water district, or state institution authority to condemn property necessary to conduct, store, or distribute water, such authority is continued in the following sections: STS. & HWYS. CODE §§ 5101(h), 5102, 10010, 10100(a), 10101-10102 (cities and counties); GOVT. CODE §§ 54309(a), 54340-54341 ("local agencies," including cities and counties), 38730 (city), 25353, 25662, 25691 (county), 15853 (state institutions); WATER CODE § 71694 (municipal water districts). An unincorporated town or village, not being a public entity, may not condemn; however, water supplies can be condemned on their behalf. See below.

The authority granted by subdivision 3 to condemn property necessary to conduct, store, or distribute water for the use of any county, incorporated city, city and county, town or village, municipal water district, or state institution, or the inhabitants thereof, is continued in other sections. There are numerous special water districts servicing various areas of the state. See, e.g., GOVT. CODE §§ 61600, 61610 (community services districts); WATER CODE §§ 35600 (California water districts), 31040-31044 (county water districts), 55370 (county waterworks districts), 22424, 22455 (irrigation districts). Water corporations, which are public utilities, may also condemn for these purposes. PUB. UTIL. CODE § 618. Private corporations may not condemn for other than public utility purposes. See *Burr v. MacLay Rancho Water Co.*, 160 Cal. 268, 280, 116 P. 715, 721 (1911) (a leading case adopting a strict view of public use where it was held that water used to fulfill a contract obligation was a private use because "it is not offered to the public generally, or to all who may want it within a certain territory"); *Thayer v. California Dev. Co.*, 164 Cal. 117, 128 P. 21 (1912). Cf. CIVIL CODE §§ 548-

552.

Drainage. The authority provided by subdivision 3 to condemn for draining named local entities is continued in other sections. Where other sections authorize the acquisition of "property" for drainage purposes, the authorization includes property and interests of all types, including the types listed in subdivision 3: ponds, lakes, canals, aqueducts, reservoirs, tunnels, flumes, ditches, pipes, lands, buildings, rights of any nature in water, and any other "character of property." See CODE CIV. PROC. §§ 1230.070, 1240.040, 1240.050.

The authority of the state to condemn for drainage is expressed in Government Code Section 15853. See also WATER CODE § 8304. The authority granted to cities and counties to condemn for drainage is continued in the following sections: GOVT. CODE §§ 39040, 40404(b), and STS. & HWYS. CODE §§ 5101(d), 5102 (cities only); WATER CODE APP. § 42-5 (CAL. GEN. LAWS ANN., Act 2208, § 5 (Deering 1971)) (counties). See also HEALTH & SAF. CODE §§ 4602.4, 4627 (community facilities); WATER CODE § 8010(b) (cities). Drainage for villages, towns, and other areas can be provided by some of the numerous special districts authorized to provide drainage. See, e.g., GOVT. CODE §§ 61600, 61610 (community service districts); PUB. UTIL. CODE § 16404 (public utilities districts); WATER CODE §§ 22425, 22455 (irrigation districts), 31040-31044 (county water districts), 35600 (California water districts), 43500 (California water storage districts).

Although drainage is an established public use (e.g., *Bauer v. County of Ventura*, 45 Cal.2d 276, 289 P.2d 1 (1955)), private persons may not condemn to supply drainage. Sewer system corporations may provide drainage (PUB. UTIL. CODE § 230.5) and may condemn for that purpose (PUB. UTIL. CODE § 624) because they are public utilities (PUB. UTIL. CODE § 216).

Generally, the authority to provide for drainage overlaps the authority to provide for sewerage, reclamation, and flood control. For a compilation of statutes authorizing condemnation for sewerage, see Comment to subdivision 8 *infra*. For statutes relating to reclamation, see Comment to subdivision 4 *infra*. For flood control, see Comment to former CODE CIV. PROC. § 1238.6. See also stream improvements, immediately below.

Stream improvements. Raising the banks of streams, removing obstructions therefrom, and widening and deepening or straightening their channels is in itself a public use. See, e.g., *Reclamation District No. 551 v. Superior Court*, 151 Cal. 263, 90 P. 545 (1907) ("levee" is a public use although not specifically

mentioned). Nonetheless, the authority to condemn for stream improvements is not normally a "use" or end in itself but rather a means to some other end such as flood control, navigation, irrigation, drainage, reclamation, water supply, and the like. These uses may, and often do, involve stream improvements. See Comments to subdivisions 3 (water supply, drainage) and 4 (water supply, water transport, drainage, reclamation, irrigation). See also Comments to former CODE CIV. PROC. §§ 1238.5 (irrigation) and 1238.6 (reclamation, flood control). See also WATER CODE §§ 7040-7045 (maintenance of flow in streams for various purposes).

In addition to the general public uses described above under authority of which stream improvements might be undertaken, there is specific authority granted in various codes for entities to engage in stream improvement. Some statutes authorizing public entities to condemn for stream improvements, including raising its bank (levees and dikes) and altering its channel (widening, deepening, straightening), are: GOVT. CODE §§ 39901, 40404(c) (cities may alter channels), 25680-25684 (county control of streams and floodwaters), 54152 ("local agency" action for flood relief); HEALTH & SAF. CODE § 2270(d) (mosquito abatement district may raise banks); STS. & HWYS. CODE § 965 (county stream improvements for highway protection); WATER CODE §§ 12934(3) (state water development projects), 8110, 8126 (county stream improvements), 8590(a), 8631 (Sacramento-San Joaquin Drainage District), 50930, 50932 (reclamation district).

Roads, highways, boulevards, streets, alleys. The authority to condemn for roads, highways, boulevards, streets, and alleys duplicates authority contained in other sections. *E.g.*, for highways: STS. & HWYS. CODE §§ 104 (state for state highway), 941-943 (county for county highway), 25050 (joint highway district), and GOVT. CODE § 38304 (city for extraurban highways); for boulevards: PUB. RES. CODE §§ 5157 (county for boulevards), 5301 (city for boulevards), 5541-5542 (regional park districts for boulevards), and STS. & HWYS. CODE § 26113 (boulevard districts); for streets: STS. & HWYS. CODE § 4090 (city and county for streets), and GOVT. CODE §§ 37353, 39934, 40404(a) (county for streets). For a discussion of the right to condemn for byroads, see Comment to subdivision 6 *infra*.

Public mooring places for watercraft. The authority to condemn for public mooring places for watercraft is continued in other sections. See discussion under subdivision 4 *infra*, relating to the authority to condemn for wharves, docks, and piers. See

also, *e.g.*, GOVT. CODE §§ 39961(b) (authority of city to acquire property for public mooring places for watercraft), 26301(b) (authority of county to acquire property for public small boat harbors), 50701 (authority of "local agencies" to acquire property for marinas and small craft harbors).

Public parks. The authority to condemn for public parks, including parks and other places covered by water, is continued in other sections. Where other sections authorize the condemnation of land for parks, that authorization includes submerged lands and water rights for parks of all types including aquatic parks. See CODE CIV. PROC. §§ 1230.070, 1240.040, 1240.050. *Cf.* GOVT. CODE § 61600(e) ("park" includes "aquatic park").

The State Department of Parks and Recreation is authorized to condemn property for the state park system. PUB. RES. CODE § 5006. Cities may condemn for public parks. GOVT. CODE §§ 38002, 38010, 39732, 40401(b). Counties may acquire property interests for public parks. GOVT. CODE § 25353; PUB. RES. CODE § 5157 (this section authorizes only "purchase," "lease," and "gift" acquisitions; however, the authority to acquire, combined with the general power of the county to condemn for its proper functions—GOVT. CODE § 25350.5—enables the county to make use of the power of eminent domain for park purposes). In addition, cities and counties may acquire land for state parks (PUB. RES. CODE § 5150), and counties may acquire land for federal parks (PUB. RES. CODE § 8402).

Special districts having the power to condemn for public parks include community facilities districts (GOVT. CODE §§ 61600(e), 61610), public utilities districts (PUB. UTIL. CODE §§ 16404, 16463), recreation and park districts (PUB. RES. CODE §§ 5782.2, 5782.5; *but see* §§ 4700–4791—districts with powers not including eminent domain), and regional park districts (PUB. RES. CODE §§ 5541–5542).

All other public uses. The authority to condemn for all uses authorized by the Legislature is superseded by Section 1240.010 of the Code of Civil Procedure, which provides that a legislative authorization of condemnation on behalf of a particular purpose constitutes a declaration that that purpose is a public use. This rule is applicable to legislative authorizations to any condemnor—not merely to counties, incorporated cities, cities and counties, villages, towns, and their inhabitants, as previously provided in subdivision 3.

Costs of public improvements. The provision formerly found in subdivision 3 that the mode of apportioning and collecting the costs of public improvements was to be in the man-

ner provided in their authorizing statutes is not continued. With the repeal of Section 1238, the only public use declarations that exist are in particular statutory authorizations which carry with them any applicable financial limitations on the construction of improvements.

Subdivision 4

Wharves, docks, piers, chutes, booms. The authority to condemn for wharves, docks, piers, chutes, and booms is continued in other sections. Cities, counties, and cities and counties may provide harbors and construct any structures necessary or convenient to promote commerce and navigation. GOVT. CODE §§ 39901(a), 39962, 54309(g), 54309.1(e), 54340, 54341; STS. & HWYS. CODE §§ 5101(m) and 5102. These entities may also condemn for authorized uses. GOVT. CODE §§ 25350.5 and 37350.5. See also GOVT. CODE § 40404(d)-(f). The authority of special districts to condemn for wharves, docks, piers, chutes, and booms is expressed in their enabling legislation. Public utilities may condemn for wharves, docks, piers, chutes, and booms. HARB. & NAV. CODE § 4009; PUB. UTIL. CODE § 619. Private persons that are not public utilities may not condemn property for these purposes.

Warehouses. The authority to condemn for warehouses is continued in other sections. Cities and counties have general authority to condemn for any proper function. GOVT. CODE §§ 25350.5(county), 37350.5(city). As to warehouses operated in connection with a harbor, see the sections cited above in connection with wharves, docks, piers, chutes, and booms. See also *Clark v. City of Los Angeles*, 160 Cal. 317, 323, 116 P. 966, 968 (1911). Since cities and counties have general authority to condemn for proper city or county functions, they may condemn for a warehouse if they have general authority to construct and operate such a warehouse. Contrast *City of Los Angeles v. Koyer*, 48 Cal. App. 720, 192 P. 301 (1920) (city may not condemn for warehouses apart from wharves absent express authority); the rule in this case is not being continued.

The authority of special districts to condemn for warehouses is expressed in their enabling legislation. See, e.g., HARB. & NAV. CODE §§ 6075, 6076, 6077.3 (harbor districts), 6295, 6296, 6307 (port districts), 6895, 6896 (river port districts), 7147, 7149(b), (c) (small craft harbor districts). Privately operated public warehouses that are public utilities may condemn property. PUB. UTIL. CODE § 623. Private persons that are not public utilities may not condemn property for this purpose.

Ferries. The authority to condemn for ferries is continued in other sections. Cities, counties, and cities and counties are authorized to acquire and maintain public ferries. See, *e.g.*, GOVT. CODE §§ 39731, 39963, 54301, 54309(e), 54340, 54341; STS. & HWYS. CODE §§ 1750-1757. These entities may condemn to carry out their functions. GOVT. CODE §§ 25350.5, 37350.5. A privately owned public ferry system is a common carrier. (PUB. UTIL. CODE § 211(b)) and may not operate unless granted a franchise by the Department of Public Works or by the city within which it provides service. STS. & HWYS. CODE §§ 30800-30902. See also CIVIL CODE §§ 528-531. As common carriers, the ferries are also public utilities (PUB. UTIL. CODE § 216) and may condemn property. PUB. UTIL. CODE § 620.

Bridges. The authority to condemn for bridges was enacted in 1872, based on Sections 9 and 10 of an act concerning toll bridges. Cal. Stats. 1855, Ch. 147, amended Cal. Stats. 1864, Ch. 196. For legislative intent, see 2 CAL. CODE CIV. PROC. ANN. § 1238, at 102 n.5 (Haymond & Burch 1872). The word "toll" was deleted at the time the authorization for bridges was inserted in subdivision 4. As it relates to bridges generally, this authorization is superfluous, for under Streets and Highways Code Section 23, "highway" includes bridges; hence any authorization to condemn for highways includes authorization to condemn for bridges. See Comment to subdivision 3 *supra*. See also STS. & HWYS. CODE §§ 1300-1404 (county bridges).

As it relates to toll bridges, the authority of public entities to condemn is continued in other sections. See STS. & HWYS. CODE §§ 30400-30413 (California Toll Bridge Authority), 27163 (county bridge and highway districts), 31000-31010 (Gold Rush Parkway). Private toll bridge corporations (defined in PUB. UTIL. CODE § 237) are public utilities. PUB. UTIL. CODE § 216(a). They may not operate without a franchise granted by the Department of Public Works. STS. & HWYS. CODE §§ 30800-30873; see also CIVIL CODE §§ 528-531. Their authority to condemn is not continued since it is state policy to acquire and own all toll bridges and, ultimately, to eliminate all toll charges thereon. STS. & HWYS. CODE § 30001. See also Comment to former CODE CIV. PROC. §§ 1264.1-1264.9 (condemnation of toll bridge franchises). If the power to condemn property for a privately owned toll bridge is to be granted, it should be granted by a specific statute.

Toll roads. If the power of public entities to condemn property for toll roads is to be provided, it should be expressly stated by statute.

The authority of private corporations to condemn for toll roads is not continued. A private toll road must be granted a franchise by the Department of Public Works (STS. & HWYS. CODE § 30800) unless the franchise was granted prior to August 14, 1929 (STS. & HWYS. CODE § 30811). Under Streets and Highways Code Section 902, at the expiration of a franchise to run a toll road, the road becomes public with no need for compensation. See *People v. Davidson*, 79 Cal. 166, 21 P. 538 (1889); *People v. O'Keefe*, 79 Cal. 171, 21 P. 539 (1889). No evidence has been found that the Department of Public Works has granted franchises for toll roads; under modern conditions, there is no need to continue the authority of private persons to condemn for such roads. See also Comment to former CODE CIV. PROC. §§ 1264.1-1264.9 (condemnation of toll road franchises).

Byroads. The authority to condemn for byroads is superseded by other sections. See the Comment to subdivision 6 *infra*.

Plank and turnpike roads. The authority to condemn for plank and turnpike roads is discontinued as obsolete. This provision was enacted in 1872, based on Section 15 of an act authorizing the formation of private corporations for the construction of plank or turnpike roads. See Cal. Stats. 1853, Ch. 121. See also the discussion in 2 CAL. CODE CIV. PROC. ANN. § 1238, at 102 n.5 (Haymond & Burch 1872). This act was repealed years ago. Moreover, any plank or turnpike roads that existed at the time of repeal would have since become free public roads upon the expiration of the private franchise to collect tolls. See *People v. Auburn & Yankee Jim's Turnpike Co.*, 122 Cal. 335, 55 P. 10 (1898).

Paths or roads for bicycles, tricycles, motorcycles, or other horseless vehicles. The authority to condemn for paths or roads either on the surface, elevated, or depressed for the use of bicycles, tricycles, motorcycles, and other horseless vehicles duplicates other provisions and is not continued. This provision was added to Section 1238 in 1897 to provide an express grant of authority to condemn for public ways for driver-propelled and self-propelled vehicles. The apparent reasoning behind this addition was that the authority to condemn for roads contained in subdivision 3, having been enacted in 1872, applied only to horse-drawn vehicles. This reasoning is not sound, however, for the authority to condemn for "roads" includes the authority to condemn for public ways for all types of vehicles and nonvehicles. See *Muscolino v. Superior Court*, 172 Cal. App.2d 525, 341 P.2d 773 (1959) (pedestrian and equestrian trails). Thus, the authority to condemn for paths and roads for bicycles and the

like duplicates general authority to condemn for roads found in other sections and is repealed as unnecessary. See Comment to subdivision 3 *supra*.

In addition to the general authority found in other sections to condemn for roads, there is added special authority to condemn for bicycle and other paths separate from automotive thoroughfares. See, e.g., PUB. RES. CODE § 5078.5 (city, county, or local agency may condemn property to establish bicycle paths or routes); STS. & HWYS. CODE §§ 104(j) (Department of Public Works may condemn property for bicycle lanes and paths), 951 (county may construct "sidepaths" along highways), 5101(b), 5102 (city and county construction of sidewalks and parkways). See also VEH. CODE § 21207 (bicycle regulations not to be construed to deny right to construct bicycle lanes); STS. & HWYS. CODE §§ 100.12 (incorporation of pedestrian and bicycle facilities in design of freeways), 105.5, and 105.7 (facilities for pedestrian, bicycle, and other nonmotorized traffic).

Steam, electric, and horse railroads. The authority contained in subdivision 4 to condemn for "steam, electric, and horse railroads" is discontinued. (These words are not to be read in series with any other uses or qualifications—e.g., "public transportation"—contained in subdivision 4. *San Francisco & S.J.V. Ry. v. Leviston*, 134 Cal. 412, 66 P. 473 (1901); *Central Pac. Ry. v. Feldman*, 152 Cal. 303, 92 P. 849 (1907).) The grant is obsolete because such railroads have largely been replaced by railroads using diesel-powered locomotives. Further, railroad corporations are given the power of eminent domain by Section 611 of the Public Utilities Code. See also PUB. UTIL. CODE §§ 7533 (additional tracks), 7535 (railroad intersections), 7536 (railroad crossings). Cf. PUB. UTIL. CODE § 7508 (right of eminent domain in transferee of railroad corporation). Cities may condemn for facilities in aid of railroads and other public utilities. GOVT. CODE §§ 39790-39794.

Irrigation. The authority to condemn for irrigation is continued in other sections. Where other sections authorize the acquisition of "property" for irrigation, the authorization subsumes particular types of property, such as those mentioned in subdivision 4: canals, ditches, dams, poundings, flumes, aqueducts, and pipes. See CODE CIV. PROC. §§ 1238.070, 1240.040, 1240.050. See also *Stratford Irr. Dist. v. Empire Water Co.*, 44 Cal. App.2d 61, 111 P. 2d 957 (1941) (property an irrigation district may condemn).

The power of any local agency authorized to supply irrigation to condemn property is continued generally in Government

Code Sections 54309(a), 54340-54341 (local agency includes city, county, city and county, municipal or public corporation or district). In addition, numerous special districts are specifically authorized to condemn for irrigation. See, *e.g.*, GOVT. CODE §§ 61600, 61610 (community services districts); WATER CODE §§ 35600 (California water districts), 31040-31044 (county water districts), 55370 (county waterworks districts), 22425, 22455 (irrigation districts), and 50903 (reclamation districts).

In addition, a water corporation, as a public utility (PUB. UTIL. CODE § 216; see also CIVIL CODE §§ 548-552), may condemn (PUB. UTIL. CODE § 618) for irrigation purposes (PUB. UTIL. CODE § 240). This is a valid public use. See *Gravelly Ford Canal Co. v. Pope & Talbot Land Co.*, 36 Cal. App. 556, 178 P. 150 (1918); compare former CODE CIV. PROC. § 1238.5 (eminent domain for irrigation).

Public transportation by water. The authority granted by subdivision 4 to condemn canals, ditches, poundings, flumes, dams, aqueducts, and pipes for public transportation is not continued. This grant of authority was enacted in 1872 primarily for the benefit of private canal transport companies and is obsolete.

Condemnation authority for public transportation by water is provided by other statutes. Any water carrier may condemn for terminal facilities. PUB. UTIL. CODE § 622. See also PUB. UTIL. CODE § 620 (certain common carriers by water may condemn property necessary for transportation purposes). See also HARB. & NAV. CODE §§ 4150-4153 (county may acquire towpath easement along navigable streams); GOVT. CODE § 39900 (city may construct deep water canal, waterway, or water facilities for transportation purposes).

Supplying mines with water. The authority of private persons to condemn for canals, ditches, dams, poundings, flumes, aqueducts, and pipes for supplying mines with water is of doubtful constitutionality and is not continued. See *Lorenz v. Jacob*, 63 Cal. 73 (1883); see also former subdivision 5 *infra*. Public entities and public utilities have adequate condemnation authority. See discussion of their authority in other portions of the Comment to this section.

Supplying farming neighborhoods with water. The authority granted in subdivision 4 to condemn canals, ditches, dams, poundings, flumes, aqueducts, and pipes for supplying farming neighborhoods with water is not continued since it is superfluous. This grant of authority has been construed to be a grant of authority for irrigation purposes. See *Lux v. Haggin*, 69 Cal. 253, 4 P. 919, 10 P. 674 (1886). As such, it merely duplicated the

authority of those public entities already authorized to supply irrigation (see discussion above).

This grant of authority could also be interpreted as bestowing an added power upon owners of private farms to condemn for their own use. As such, it amounts to an unconstitutional private use; in order for a private person to condemn to supply irrigation to farming neighborhoods, he must become in essence a public utility, offering to supply every person in the farming neighborhood he services. *Lindsay Irr. Co. v. Mehrrens*, 97 Cal. 676, 32 P. 802 (1893); *Lux v. Haggin*, 69 Cal. 255, 4 P. 919, 10 P. 674 (1886). Furthermore, water corporations, which are public utilities (see discussion above), have adequate authorization to supply farming neighborhoods with water. In addition, farming neighborhoods may obtain their irrigation through the mechanism of mutual water companies (see discussion below) which have the power of eminent domain. PUB. UTIL. CODE § 2729. Also, many special water districts have condemnation authority. Compare former CODE CIV. PROC. § 1238.5 (eminent domain for irrigation).

Drainage. The authority provided by subdivision 4 to condemn for draining lands is continued in other sections. Where other sections authorize the acquisition of "property" for drainage purposes, the authorization includes property and interests of all types, including the types listed in subdivision 4: canals, ditches, dams, poundings, flumes, aqueducts, and pipes. CODE CIV. PROC. §§ 1230.070, 1240.040, 1240.050. The authority of various entities and utilities to condemn for drainage is set out in the Comment to subdivision 3 *supra*. Generally, the authority to provide for drainage overlaps the authority to provide for sewerage, reclamation, and flood control. For a compilation of statutes authorizing condemnation for sewerage, see Comment to subdivision 8 *infra*. For statutes relating to reclamation, see Comment immediately below. For flood control, see Comment to former CODE CIV. PROC. § 1238.6. See also stream improvements, subdivision 3 *supra*.

Reclamation. The authority granted by subdivision 4 to condemn for reclaiming lands is continued in other sections. Where other sections authorize the acquisition of "property" for reclamation of land, the authorization extends to all types of and interests in property, including but not limited to the types mentioned in subdivision 4: canals, ditches, dams, poundings, flumes, aqueducts, and pipes. CODE CIV. PROC. §§ 1230.070, 1240.040, 1240.050.

The authority of the state to condemn for reclamation is con-

tinued in Government Code Section 15853. See also WATER CODE § 8593 (Reclamation Board). The authority of cities and counties to condemn for reclamation is continued in Government Code Sections 25681.1 (counties) and 38901 (cities). See also *City of Redwood City v. Moore*, 231 Cal. App.2d 563, 42 Cal. Rptr. 72 (1965). The authority of special districts, if any, to condemn for reclamation is contained in their grants of power. See, e.g., WATER CODE §§ 31040-31044 (county water districts), 35600 (California water districts), 43500 (California water storage districts), 50930 (reclamation districts).

Private persons do not have authority to condemn for reclamation. Although reclamation of land is a public use (*cf. Reclamation Dist. No. 511 v. Superior Court*, 151 Cal. 263, 90 P. 545 (1907)), reclamation by private persons of land for their own benefit remains a private use. While a water corporation may condemn for "reclamation," it is clear that reclamation of water only—rather than land reclamation—is authorized. See PUB. UTIL. CODE § 240.

Generally, the authority to provide for reclamation of land overlaps the authority to provide for drainage. See discussion of the authority to condemn for drainage immediately above and under subdivision 3 *supra*. See also former CODE CIV. PROC. § 1238.6 (eminent domain for protection, preservation, reclamation of land, flood control).

Floating logs on nonnavigable streams. The authority to condemn for canals, ditches, dams, poundings, flumes, aqueducts, and pipes for floating lumber on nonnavigable streams is of doubtful constitutionality and is not continued. See Annot., 51 A.L.R. 1199 (1927); *cf. People v. Elk River M. & L. Co.*, 107 Cal. 221, 40 P. 531 (1895). See also former subdivision 11 *infra*.

Mutual water company. The authority of a mutual water company to condemn for water, water rights, canals, ditches, dams, poundings, flumes, aqueducts, and pipes for irrigation of lands serviced by the company is continued in Public Utilities Code Section 2729. See the Comment to that section.

Extraterritorial condemnation for domestic and irrigation water. The grant of authority for any municipality, corporation, or person that supplies water to the public or to any neighborhood or community for domestic use or irrigation to condemn land with wells and water adjacent to it is not continued because it is unduly restrictive.

A municipality, or any local public entity, may condemn property beyond its territorial limits—regardless of whether that property is adjacent or whether it consists of lands with

wells and water—if the right to condemn is expressly granted by statute or is necessarily implied as an incident to one of its other statutory powers. CODE CIV. PROC. § 1240.710. Municipalities are expressly granted the right to condemn property beyond their jurisdictional limits in aid of supplying water for domestic use and irrigation. See GOVT. CODE § 54341. In addition, absent such a provision, the power of extraterritorial condemnation would be necessarily implied as an incident of the power to supply water. See *City of North Sacramento v. Citizens Util. Co.*, 192 Cal. App.2d 482, 13 Cal. Rptr. 538 (1961). See also CODE CIV. PROC. § 1240.710.

The limitations on the extraterritorial condemnation rights of special districts, if any, are expressed in their particular authorizing statutes. See, e.g., WATER CODE §§ 35628 (California water districts), 71694 (municipal water districts).

A corporation or person that supplies water to the public for domestic use or irrigation may, of course, no longer condemn at all unless it is a water corporation—a public utility—or a mutual water company. See discussion above. There are no restrictions upon the locations in which a water corporation or any public utility may condemn; the only limitation is that the property condemned must be “necessary” for the water system. PUB. UTIL. CODE § 618.

Subdivision 5

Subdivision 5 is not continued. It is clear from the language of the subdivision itself, and from the statute that it superseded (Cal. Stats. 1869–70, Ch. 404), that the Legislature intended to authorize takings by individual mine owners to facilitate the working of their mines. However, the California courts have refused to give the subdivision its intended application or any effect whatsoever. *County of Sutter v. Nichols*, 152 Cal. 688, 93 P. 872 (1908); *Amador Queen Min. Co. v. Dewitt*, 73 Cal. 482, 15 P. 74 (1887); *Lorenz v. Jacob*, 63 Cal. 73 (1883); *Consolidated Channel Co. v. Central Pac. R.R.*, 51 Cal. 269 (1876). Although the courts have not held the subdivision unconstitutional, they have invoked the constitutional doctrine of public use to prevent any takings under the subdivision. The only possible application of the subdivision might have been under the former Placer Mining District Act (PUB. RES. CODE §§ 2401–2512, repealed Cal. Stats. 1953, Ch. 1365). See *Black Rock Placer Mining Dist. v. Summit Water & Irr. Co.*, 56 Cal. App.2d 513, 133 P.2d 58 (1943). Although the repeal of that act did not affect the existence or powers of any district previously organized pursuant

to the repealed act, there are no such districts presently reporting financial transactions to the State Controller. See CAL. STATE CONTROLLER, FINANCIAL TRANSACTIONS CONCERNING SPECIAL DISTRICTS IN CALIFORNIA (1965-66). The repeal of subdivision 5 does not, of course, affect in any way the power of the appropriate public entity to provide a byroad where necessary or desirable under the Street Opening Act of 1903. See STS. & HWYS. CODE §§ 4008, 4008.1, 4090.

Subdivision 6

Subdivision 6 is superseded by Sections 4008, 4008.1, and 4120.1 of the Streets and Highways Code. These sections provide a procedure for the establishment of byroads—roads, open to public use, that furnish access to an existing public road from or primarily from otherwise isolated property—under the Street Opening Act of 1903. Private persons have no right to condemn property for byroads. The former law was unclear because there was no case precisely on point. See *General Petroleum Corp. v. Hobson*, 23 F.2d 349 (1927) (prospecting for oil not a use listed in Section 1238); *City of Sierra Madre v. Superior Court*, 191 Cal. App.2d 587, 12 Cal. Rptr. 836 (1961) (land developer not authorized to bring condemnation action in name of city). Cf. *Linggi v. Garovotti*, 45 Cal.2d 20, 286 P.2d 15 (1955) (private individual may condemn sewer easement over property adjoining his). See also *Sherman v. Buick*, 32 Cal. 241 (1867) (“byroad” a public use for which county could acquire property). A private person may request the appropriate public authority to condemn for a byroad on his behalf. See STS. & HWYS. CODE § 4120.1.

Subdivision 7

The authority granted in subdivision 7 to condemn for telegraph, telephone, radio, and wireless (and by implication other forms of communication) lines, systems, and plants to a considerable extent duplicated other provisions. (“Wireless” duplicated “radio,” the former being the word preferred in British usage. See WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 1872, 2624 (1961).)

The state has a teletype system (GOVT. CODE §§ 14710, 14711) and the Department of Justice maintains a statewide telecommunication system for the use of law enforcement agencies (GOVT. CODE § 15152). In addition, the Department of General Services is authorized to acquire, construct, and maintain communications systems and facilities available to all public agen-

cies in the state. GOVT. CODE § 14931. The state may exercise the power of eminent domain on behalf of these uses and any other communication purposes for which appropriations are made. GOVT. CODE § 15853.

Cities, counties, and cities and counties, as municipal corporations, may establish and operate public works to provide their inhabitants with telephone service or other means of communication. PUB. UTIL. CODE §§ 10001-10004, 10101; GOVT. CODE §§ 25350.5, 37350.5, 39732, 39790, 39792; STS. & HWYS. CODE §§ 5101(e), 5102. Moreover, municipal utility districts may be formed to provide their members with telephone service or other means of communication. PUB. UTIL. CODE § 12801. These districts are empowered to exercise eminent domain to provide and maintain the facilities necessary to afford their members the requisite means of communication. PUB. UTIL. CODE §§ 12703, 12771.

Private communications companies may continue to condemn only if they are public utilities. Telephone and telegraph companies are public utilities that are strictly regulated by the Public Utilities Commission. PUB. UTIL. CODE §§ 216, 1001. These companies may exercise the power of eminent domain to take land for almost any purpose that would facilitate communication by telephone and telegraph. See PUB. UTIL. CODE §§ 233-236, 616, 617. Such exercise is a public use. *San Diego Gas & Elec. Co. v. Lux Land Co.*, 194 Cal. App.2d 472, 14 Cal. Rptr. 899 (1961). It should be noted that these utilities may use the public highways for the creation and maintenance of telephone and telegraph lines and the fixtures necessary thereto. PUB. UTIL. CODE § 7901. See also *Pacific Tel. & Tel. Co. v. City & County of San Francisco*, 51 Cal.2d 766, 336 P.2d 514 (1959) (construction by utilities amounts to state franchise); STS. & HWYS. CODE §§ 117, 5101(e) (location of structures of fixtures in public rights of way); federal "Post Roads Act" (discussion in 1 P. NICHOLS, EMINENT DOMAIN § 2.15 (1964)).

Subdivision 8

Insofar as subdivision 8 authorized condemnation by public entities, it was unnecessary. Cities have general condemnation authority for connection to sewer systems. *E.g.*, GOVT. CODE §§ 37350.5, 38900, 40404. See also GOVT. CODE §§ 39040, 54340, 55003; HEALTH & SAF. CODE §§ 5001, 5008. Counties also have general condemnation authority for connection to sewer systems. *E.g.*, GOVT. CODE §§ 25350.5, 25825. See also HEALTH & SAF. CODE §§ 4740, 4760 (county sanitation districts). The au-

thority of an incorporated village or town to condemn for sewer purposes is the same as that of a city. See GOVT. CODE § 20 ("city" includes "incorporated town").

Unincorporated towns, villages, and small settlements have no authority to condemn, but there are a number of methods by which sewer service can be provided in these areas. For example, the county may condemn for a sewer system on their behalf. GOVT. CODE § 25825. The county may form a county sanitation district on their behalf. HEALTH & SAF. CODE § 4711. A city may form an improvement district on their behalf. HEALTH & SAF. CODE § 4614.4. A sewer maintenance district may be formed. HEALTH & SAF. CODE § 4870. In addition, 25 persons in any county may form a sanitary district with the power to condemn for sewage. HEALTH & SAF. CODE § 6514. A municipal utility district may be formed. PUB. UTIL. CODE §§ 12703, 12771.

The authority of the state and of any college or university to condemn for sewage from its buildings is continued elsewhere. The state may condemn for any state purpose. GOVT. CODE § 15853. The University of California, the state college system, and nonprofit higher education institutions may condemn property necessary to carry out any of their functions. EDUC. CODE §§ 23151, 23619, 30051. See also the Comment to subdivision 2 *supra*.

Under prior law, private persons were authorized to condemn for the connection of buildings with city or county sewer mains. See *Linggi v. Garovotti*, 45 Cal.2d 20, 286 P.2d 15 (1955). This authority is not continued. Instead, a private person may request the public entity that operates the sewer system in his vicinity to make the connection for him and to condemn an easement or other property if needed for that purpose. See HEALTH & SAF. CODE § 4967. A sewer system corporation, as a public utility, is authorized to condemn property. See PUB. UTIL. CODE § 624.

Subdivision 9

Subdivision 9, which was enacted in 1891, is obsolete. Traction engines and road locomotives—essentially steam-powered locomotives which ran on wheels rather than tracks—have long been considered collector's items. See J. CLYMER, ALBUM OF HISTORICAL STEAM TRACTION ENGINES (1949); Fisher, *Road Locomotives* in AMERICAN INSTITUTE OF NEW YORK CITY, 31ST ANNUAL REPORT at 877 (1870-71); F. GILLFORD, THE TRACTION ENGINE 1843-1936 (1952).

Subdivision 10

Subdivision 10 is superseded by Section 615 of the Public Utilities Code which grants the power of eminent domain to pipeline corporations. See the Comment to Section 615.

Subdivision 11

Subdivision 11 is repealed as unnecessary.

The authority of public entities to condemn for quarrying is not affected by the repeal of subdivision 11 and is continued in other provisions. *E.g.*, GOVT. CODE § 39793; STS. & HWYS. CODE § 104(c).

The authority of logging railroads to condemn is valid only to the extent that the railroads are common carriers. See *Great Northern Ry. v. Superior Court*, 126 Cal. App. 575, 14 P.2d 899 (1932); *cf.* CAL. CONST., Art. I, § 14 (last sentence). This authority is continued in Public Utilities Code Section 611.

Byroads servicing private lumbering or quarrying property may no longer be condemned by private persons. See former subdivision 6 *supra*. *Cf.* STS. & HWYS. CODE §§ 4008.1, 4120.1.

Insofar as quarrying, logging, and lumbering are businesses carried on by private persons for private profit, the attempt to grant the right to condemn for rights of way servicing those businesses is of doubtful constitutionality and is not continued. See former subdivision 4 *supra* (logging). *Cf.* former subdivision 5 and Comment thereto *supra* (mining).

Subdivision 12

Subdivision 12 is superseded in whole by other provisions. Where other sections authorize the acquisition of "property," the authorization subsumes particular types of property, such as those mentioned in subdivision 12: canals, reservoirs, dams, ditches, flumes, aqueducts, pipes, outlets, buildings, and "all other improvements." See CODE CIV. PROC. §§ 1230.070, 1240.040, 1240.050.

Subdivision 12 authorized condemnation for generating and transmitting electricity to supply power, light, and heat to individuals and corporations, both public and private. This grant of authority duplicated, and was broader than, that found in subdivision 13.

The power of local public entities to condemn for these purposes is continued in other sections. *E.g.*, STS. & HWYS. CODE §§ 5101(e), 5102, 10010, 10100(b), 10101-10102 (cities and counties); GOVT. CODE §§ 39732, 39790-39792 (cities); PUB. UTIL. CODE § 10002 (municipal corporation).

The power of special districts to condemn for the purposes listed above also is continued in other sections. *E.g.*, PUB. UTIL. CODE §§ 12703, 12801 (municipal utility district), 16404, 16461 (public utility district); WATER CODE §§ 22115, 22456 (irrigation districts). See also PUB. UTIL. CODE §§ 8101-8134 (joint operation by irrigation district and public utility); GOVT. CODE §§ 55300-55367 (joint city, county, sanitation district project for electric lines).

The power of private persons generally to condemn is not continued. However, a public utility may condemn to generate and transmit electricity for the purposes listed above. See PUB. UTIL. CODE § 612.

In addition, insofar as railroads and "tramways" are common carriers, their authority to condemn in aid of their operations is continued in Public Utilities Code Sections 611 and 621.

Subdivision 13

Subdivision 13 is superseded in whole by provisions of other sections. Where other sections authorize the acquisition of "property," the authorization subsumes particular types of property, such as those mentioned in subdivision 13: electric lines, works or plants, lands, buildings, rights of any character in water, or "any other character of property." See CODE CIV. PROC. §§ 1230.070, 1240.040, 1240.050.

Insofar as subdivision 13 specifically authorized takings for future use, it is continued in the Eminent Domain Law; the authority to condemn for a particular purpose includes authority to condemn for the proper development and control of that purpose at the time of the taking of the property as well as in the future. CODE CIV. PROC. § 1240.210. See also Code Civ. Proc. § 1240.220 for limitations on acquisition for future use.

Subdivision 13 authorized condemnation for generating, transmitting, and distributing electricity to supply power, light, and heat to local public entities or their inhabitants. This grant of authority duplicated, and was narrower than, that found in subdivision 12. For a listing of statutes authorizing condemnation for these purposes, see Comment to subdivision 12 *supra*.

Subdivision 14

Subdivision 14 is unnecessary because all public entities that operate cemeteries have specific authority to condemn for cemetery purposes. The state's authority appears in Government Code Section 15853. The cities' authority appears in Government Code Section 37350.5. See also HEALTH & SAF. CODE

§ 37681. The authority of public cemetery districts is in Health and Safety Code Section 8961. Private cemeteries are not authorized to condemn property. See HEALTH & SAF. CODE § 8500.

Subdivision 15

Subdivision 15 is superseded by Sections 14770 and 53030 of the Government Code.

Subdivision 16

Subdivision 16 is obsolete and merely duplicates other specific grants of condemnation authority.

All public entities that might utilize the power of eminent domain for fair or exposition purposes are specifically granted the power of eminent domain. Specific grants are made to the state (GOVT. CODE § 15853), cities (GOVT. CODE § 37350.5; see also GOVT. CODE § 50331), counties (GOVT. CODE § 25350.5; see also GOVT. CODE §§ 25900-25908), district agricultural associations (GOVT. CODE § 15853; see also AGRI. CODE § 4051), and citrus fruit fairs (GOVT. CODE § 15853; see also AGRI. CODE § 4701). Private fair corporations (*e.g.*, CIVIL CODE § 620) do not have the power of eminent domain.

With the repeal in 1949 of all special constitutional grants in aid of private expositions, subdivision 16 became obsolete. (The subdivision was enacted in 1911, apparently as a grant of eminent domain power to the Panama-Pacific International Exposition Company. See former CAL. CONST., Art. XI, § 8a.) *But see County of Alameda v. Meadowlark Dairy Corp.*, 227 Cal. App.2d 80, 38 Cal. Rptr. 474 (1964) (subdivision 16 relied upon to authorize condemnation by a county for fair purposes on the theory that the Constitution grants to counties a tax-exempt status which is a "thing of value . . . authorized by the Constitution" within the meaning of subdivision 16). However, subdivision 16 is no longer necessary because counties now have a specific grant of condemnation authority. GOVT. CODE § 25350.5. See also GOVT. CODE §§ 25900-25908.

Subdivision 17

Subdivision 17 is in part discontinued and in part superseded by provisions of other sections. Where other sections authorize the acquisition of "property," the authorization subsumes particular types of property, such as those mentioned in subdivision 17: works or plants, lands, buildings, and all other improvements, rights of any nature in water, or property "of any charac-

ter necessary for the purpose." See CODE CIV. PROC. §§ 1230.070, 1240.040, 1240.050. The authority to condemn for a particular purpose includes the authority to condemn all property necessary for the proper development and control of that purpose at the time of the taking of the property, as well as in the future. CODE CIV. PROC. §§ 1240.210, 1240.220.

The authority granted by subdivision 17 to condemn property necessary for generating, transmitting, distributing, and supplying refrigeration to any county, city and county, incorporated city or town, or irrigation district, or the inhabitants thereof is not continued. The provision has no apparent present application. There is no statute regulating the incorporation or operation of "refrigeration" companies. Hence, there is no need to continue a general condemnation authority for refrigeration. Insofar as a railroad company, for example, supplies "refrigeration" in connection with the transportation of property (see PUB. UTIL. CODE §§ 209, 210), it can condemn necessary property under Public Utilities Code Section 611.

The authority granted by subdivision 17 to public entities to condemn property necessary for generating, transmitting, distributing, and supplying gas, heat, and power is continued in other sections. *E.g.*, STS. & HWYS. CODE §§ 5101(i), 5102 (Improvement Act of 1911—gas), 10010, 10100(c), 10101-10102 (Municipal Improvement Act of 1913—gas, heat, power); GOVT. CODE § 39732 (cities—gas, heat, power); PUB. UTIL. CODE §§ 10002 (municipal corporation—heat, power), 12703, 12801 (municipal utility districts), 16404, 16461 (public utility districts). See also Comments to subdivisions 12 and 13 *supra*, relating to electrical power. For the authority of irrigation districts to condemn for electrical power, see Comments to subdivisions 12 and 13 *supra*.

The authority granted by subdivision 17 to private persons to condemn property necessary for generating, transmitting, distributing, and supplying gas, heat, and power is continued to the extent the private person is a public utility. See Comments to subdivisions 12 and 13 *supra* for power of electrical corporations to supply electrical power. A gas corporation (see PUB. UTIL. CODE § 222) may condemn property (PUB. UTIL. CODE § 613) for its gas plant (PUB. UTIL. CODE § 221). See also 15 U.S.C. § 717(f)-(h) (1964) (Natural Gas Act—condemnation by public utility in interstate commerce). A heat corporation (see PUB. UTIL. CODE § 224) may condemn property (PUB. UTIL. CODE § 614) for its heating plant (PUB. UTIL. CODE § 223).

Subdivision 18

Subdivision 18 is superseded by Code of Civil Procedure Section 1240.050, providing general authority to condemn property necessary for protective purposes. This general authority permits condemnation to provide for the culture and growth of trees along highways without the 300-foot limitation formerly found in subdivision 18. Under Code of Civil Procedure Section 1240.050, a condemnor may take any property "necessary" for protective purposes. See also STS. & HWYS. CODE § 104(f) (authorizing the taking of property by the Department of Public Works).

Subdivision 19

Subdivision 19 duplicated 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 §§ 253, 11900; FISH & GAME CODE §§ 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 & GAME CODE §§ 1150 and 13100. The authority of special districts, if any, is to be found in their particular authorizing grants. See, *e.g.*, *Monterey County Flood Control & 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. Private persons do not have the right to condemn for fish conservation purposes.

Subdivision 20

Subdivision 20 is superseded by provisions conferring adequate condemnation authority on all public entities authorized to operate airports. See GOVT. CODE §§ 26020 (counties), 50470 (cities, counties, cities and counties); PUB. UTIL. CODE §§ 21633 (state), 22553 (airport districts); HARB. & NAV. CODE APP. 1, §§ 4, 5, 27 (West Supp. 1967) (San Diego Unified Port District). Insofar as subdivision 20 may have authorized condemnation for airport purposes by private persons (see 9 OPS. CAL. ATTY. GEN. 187 (1947)), it is not continued.

Subdivision 21

Subdivision 21 was unnecessary because it merely duplicated express grants of the power of eminent domain given the agencies engaged in slum clearance and low-rent housing by other statutes. Thus, housing authorities, which may be activated within any city or county, may condemn property for slum clearance, construction of low-cost housing, or construction of farm labor camps. HEALTH & SAF. CODE §§ 34240, 34325, 36059(i). See also HEALTH & SAF. CODE §§ 34874, 34875, 34879 (limited dividend housing corporations). The addition of Sections 35167-35171 to the Health and Safety Code to grant condemnation authority to community land chest corporations (nonprofit corporations formed under Health and Safety Code Sections 35100-35237 to provide "housing in rural and suburban areas for families of low income") provides all of the agencies covered by subdivision 21 with adequate condemnation authority.

Subdivision 22

Subdivision 22 is superseded by Section 622 of the Public Utilities Code.

§ 1238.1 (repealed). Offstreet parking

1238.1. Subject to the provisions of this title, the right of eminent domain may be exercised in behalf of the following public uses:

1. Off-street parking. Off-street motor vehicle parking places, including property necessary or convenient for ingress thereto or egress therefrom, established by any city or county for public use.

Comment. Section 1238.1, which applied only to cities and to the City and County of San Francisco, has been repealed as unnecessary. Cities are authorized to acquire property for parking facilities by numerous other statutes. Some of these authorizations contain express powers of condemnation. *E.g.*, GOVT. CODE §§ 54031, 54341 (offstreet revenue-producing parking); STS. & HWYS. CODE §§ 4090(a), (b) (offstreet parking authorizations), 31506(d) (offstreet vehicle parking districts), 35108(j) (offstreet parking districts), 32802(b) (offstreet parking authorities). Other statutes merely provide for acquisition of the necessary property. *E.g.*, GOVT. CODE §§ 37353(a) (offstreet parking), 54061 (offstreet stadium-coliseum parking); STS. & HWYS. CODE § 36000(a) (offstreet business area parking facilities). However, these latter statutes are both augmented and supplemented by Government Code Section 37350.5 (general grant of condemnation authority). *Cf. City of Anaheim v.*

Michel, 259 Cal. App.2d 835, 66 Cal. Rptr. 543 (1968). Thus, retention of Section 1238.1 would add nothing to the condemnation authority given cities by other statutes.

§ 1238.2 (repealed). Farmers' free market

1238.2. Subject to the provisions of this title, the right of eminent domain may be exercised in behalf of the following public uses:

1. Farmers' Free Market. Contiguous property at one site necessary for the establishment of a farmers' free market solely for the vending of fresh fruits and vegetables, including property necessary or convenient for ingress thereto or egress therefrom may be acquired under this title for a public use by a county or city and county whose average population per square mile is more than ten thousand persons.

Comment. Section 1238.2, which applied only to the City and County of San Francisco, has been repealed as unnecessary. The section obviously was intended to facilitate a particular acquisition. See GOVT. CODE §§ 25350.5, 37350.5 (general grant of condemnation authority).

§ 1238.3 (repealed). Nonprofit hospitals

1238.3. Subject to the provisions of this title, the right of eminent domain may be exercised in behalf of the following public uses:

1. Property immediately adjacent to and necessary for the operation or expansion of a nonprofit hospital then in existence and engaged in scientific research or an educational activity and the acquisition of which has been certified as necessary by the Director of the State Department of Public Health, except that property devoted to use for the relief, care, or treatment of the spiritual, mental, or physical illness or ailment of humans shall not be taken under this section.

2. As used in this section, "nonprofit hospital" means any health center or general, tuberculosis, mental, chronic disease, or other type of hospital holding a license in good standing issued under the provisions of Chapter 2 of Division 2 of the Health and Safety Code and owned and operated by a fund, foundation or corporation, no part of the net earnings of which inures, or may lawfully inure, to the benefit of any private shareholder or individual.

Comment. Section 1238.3 is superseded by Section 1427 of the Health and Safety Code.

§ 1238.4 (repealed). Public assembly facilities

1238.4. Subject to the provisions of this title, the right of eminent domain may be exercised in behalf of the following public uses:

Public Assembly Facilities.

Public buildings and grounds for convention and exhibition halls, trade and industrial centers, auditoriums, opera houses, music halls

and centers, and related facilities for public assembly including off-street motor vehicle parking places and property necessary or convenient for ingress thereto or egress therefrom.

Comment. Section 1238.4 was added to the Code of Civil Procedure in 1955, apparently to authorize counties to condemn for the purposes listed. Compare Government Code Section 25351.3(a), enacted simultaneously with Section 1238.4, granting counties the authority to construct and acquire land for such public assembly facilities. For this purpose, Section 1238.4 is repealed as no longer necessary, for a county may condemn for any proper county function. GOVT. CODE § 25350.5.

To the extent that Section 1238.4 may incidentally have authorized other entities to condemn for the purposes listed, it is superseded by other sections. Generally, the state may condemn for public buildings and grounds for any of its activities. See Comment to subdivision 2 of former CODE CIV. PROC. § 1238. It should be noted, however, that the Department of Commerce may not exercise the power of eminent domain on behalf of California World Trade Centers. GOVT. CODE § 8324.

Cities may condemn land for public assembly and convention halls as well as for public buildings and grounds generally. GOVT. CODE § 37501. See Comment to subdivision 3 of former CODE CIV. PROC. § 1238. In addition, cities (and counties) may construct exhibition halls, historical museums, and art galleries. GOVT. CODE § 50331. The power of eminent domain is available for these purposes. GOVT. CODE § 37350.5.

District agricultural associations and citrus fruit fairs (and counties) may construct recreational and cultural facilities of general public interest. BUS. & PROF. CODE § 19630.5. For a compilation of statutes authorizing the power of eminent domain for fair and exposition purposes, see Comment to subdivision 16 of former CODE CIV. PROC. § 1238.

Although public assembly facilities are a public use (see, e.g., *County of Los Angeles v. Anthony*, 224 Cal. App.2d 103, 36 Cal. Rptr. 308, cert. denied, 376 U.S. 963 (1964)), private persons may not condemn for that use. See former CIVIL CODE § 1001 and Comment thereto.

The authority contained in former Section 1238.4 to condemn for offstreet parking that services public assembly facilities is repealed because it duplicates broader and more general authority to condemn for offstreet parking. See Comment to former CODE CIV. PROC. § 1238.1.

The authority contained in former Section 1238.4 to condemn

for access to public assembly facilities is repealed as necessary. The right to condemn for public assembly facilities has inherent in it the right to provide for ingress to and egress from the facilities. See CODE CIV. PROC. § 1240.050.

§ 1238.5 (repealed). Irrigation

1238.5. Irrigation is a public use in behalf of which the right of eminent domain may be exercised pursuant to this title.

Comment. Section 1238.5, declaring irrigation to be a public use, is repealed as unnecessary. All public entities authorized to supply irrigation to the public have adequate independent authority to condemn for that purpose. See Comment to former CODE CIV. PROC. § 1238, subdivision 4 (irrigation generally, and for various specific purposes, declared to be a public use). Irrigation is a public use only so long as it is offered to the public. See *Gravelly Ford Canal Co. v. Pope & Talbot Land Co.*, 36 Cal. App. 556, 178 P. 150 (1918). Private persons may not condemn for this purpose. See former CIVIL CODE § 1001 and Comment to that section. However, a mutual water company does have the power of eminent domain for irrigation purposes. See PUB. UTIL. CODE § 2729 and the Comment to that section.

§ 1238.6 (repealed). Protection, preservation or reclamation of land against overflow or incursion of water

1238.6. Subject to the provisions of this title, the right of eminent domain may be exercised in behalf of the following public uses:

1. 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.

Comment. Former Section 1238.6 was enacted in 1957 to declare as a public use the protection, preservation, and reclamation of lands subject to flooding or subsidence. This declaration is no longer necessary because the scheme of the Eminent Domain Law is to eliminate a listing of general public uses and to rely instead on specific legislative authorizations to condemn. See the introductory portion of the Comment to former CODE CIV. PROC. § 1238. Generally speaking, the state (GOVT. CODE § 15853), cities (GOVT. CODE § 37350.5), and counties (GOVT. CODE § 25350.5) may condemn for any of their functions. Special districts may condemn if expressly authorized to do so.

Private persons may not condemn for this purpose.

Specific authority for the above-named entities to preserve, protect, and reclaim lands subject to flooding or subsidence can be found in numerous sections. See, *e.g.*, WATER CODE §§ 12579, 12861 (flood control policy declaration), 8300-8304 (flood control by Department of Water Resources), 8590-8596, 8619 (flood control by Reclamation Board), 8000-8061 (flood control by cities), 8100 (flood control by counties), 8110 (flood control by county-formed districts), 50930 (flood control by reclamation districts), 70150 (flood control by protection districts). See also HEALTH & SAF. CODE §§ 4602.4(e), 4627 (flood control by municipal utilities); GOVT. CODE §§ 25680-25684 (flood control by counties); PUB. RES. CODE §§ 3315-3347 (land subsidence in oil and gas pool areas), 6303 (flood control policy declaration).

The authority granted in former Section 1238.6 overlaps the authority of governmental entities to condemn for drainage, land reclamation, stream improvements, and sewerage. For compilations of these statutes, see Comments to subdivisions 3, 4, and 8 of former CODE CIV. PROC. § 1238.

§ 1238.7 (repealed). Earth fill source

1238.7. Subject to the provisions of this title, the right of eminent domain may be exercised in behalf of the following public uses:

1. Property as a source of earth fill material for use in the development of a school site by a school district which is situated wholly or partly within a city or city and county having in excess of 750,000 population and an average population per square mile of more than 4,500 persons.

Comment. Section 1238.7 is repealed as unnecessary since Section 1047, which is added to the Education Code, permits condemnation of any property necessary to carry out the functions of the district and, therefore, would permit condemnation of an earth fill source. See also CODE CIV. PROC. §§ 1230.070, 1240.040, 1240.050.

§ 1239 (repealed). Classification of estates and rights subject to be taken

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 by-pass, 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.

Comment. Section 1239 is superseded by Section 1240.040 of

the Code of Civil Procedure. A background study, prepared for the Law Revision Commission, on Section 1239 is published as Taylor, *The Right to Take—The Right to Take the Fee or Any Lesser Interest*, 1 PAC. L.J. 555 (1970).

§ 1239.2 (repealed). Airspace or air easement

1239.2. Airspace above the surface of property or an air easement in such airspace may be acquired under this title by a county, city or airport district if such taking is necessary to protect the approaches of any airport from the encroachment of structures or vegetable life of such height or character as to interfere with or be hazardous to the use of such airport.

Comment. The substance of former Section 1239.2 of the Code of Civil Procedure is continued in Public Utilities Code Section 21652.

§ 1239.3 (repealed). Airspace or air easement; taking near airport to provide interference-free area

1239.3. Airspace above the surface of property or an air easement in such airspace may be acquired under this title by a county, city, port district, or airport district if such 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 an 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.

Comment. The substance of former Code of Civil Procedure Section 1239.3 is continued in Public Utilities Code Section 21652.

§ 1239.4 (repealed). Airspace or air easement; uses reserved to property owner; acquisition in fee

1239.4. Where necessary to protect the approaches of any airport from the encroachment of structures or vegetable life of such a height or character as to interfere with or be hazardous to the use of such airport, land adjacent to, or in the vicinity of, such airport may be acquired under this title by a county, city or airport district 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 or may be acquired by a county, city or airport district in fee.

Comment. The substance of former Section 1239.4 of the Code of Civil Procedure is continued in Public Utilities Code Section

21652. The right under former Section 1239.4 to take a fee interest or a fee with an "irrevocable free license" reserved to the original owner is continued under Section 21652 of the Public Utilities Code which permits the taking of a fee or any lesser interest. See also CODE CIV. PROC. §§ 1240.040, 1240.050.

§ 1240 (repealed). Property subject to be taken

1240. The private property which may be taken under this title includes:

1. All real property belonging to any person;
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; 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. 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. 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. 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. All classes of private property not enumerated may be taken for public use, when such taking is authorized by law.

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.

Comment. Section 1240 is superseded by the provisions listed below. Unless otherwise indicated, the references are to the Code of Civil Procedure.

| <i>Section 1240</i> | <i>New Provisions</i> |
|---------------------|--|
| Subdivision 1 | See §§ 1230.070, 1240.040 |
| Subdivision 2 | See PUB. RES. CODE § 8030 |
| Subdivision 3 | See §§ 1240.510 <i>et seq.</i> , 1240.610 <i>et seq.</i> ; see also § 1230.080 |
| Subdivision 4 | See § 1240.510 <i>et seq.</i> ; see also § 1230.080 |
| Subdivision 5 | See § 1240.610 <i>et seq.</i> ; see also §§ 1230.070, 1240.040 |
| Subdivision 6 | See § 1240.510 <i>et seq.</i> ; see also §§ 1230.070, 1240.040 |
| Subdivision 7 | See §§ 1230.070, 1240.040 |
| Subdivision 8 | [to be determined later] |

§ 1241 (repealed). Prerequisites

1241. 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 irri-

gation 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.

Comment. Section 1241 is superseded by the provisions of the Code of Civil Procedure indicated below.

| <i>Section 1241</i> | <i>New Provisions</i> |
|----------------------|---|
| Subdivision 1 | §§ 1240.010, 1240.020 |
| Subdivision 2 | §§ 1240.020, 1240.110 <i>et seq.</i> |
| Sub division 3 | § 1240.610 <i>et seq.</i> ; see also § 1230.080 |

§ 1241.7 (repealed). Park property; presumption as to best public use; declaratory relief against highway use

1241.7. (a) Except as provided in subdivision (b), notwithstanding any other provision of law to the contrary, the fact that property is appropriated for public use as a state, regional, county, or city park or recreation area, or wildlife or waterfowl management area as presently established by the Department of Fish and Game pursuant to Section 1525 of the Fish and Game Code, or historic site included in the National Register of Historic Places or state-registered landmarks, or as an ecological reserve as provided for in Article 4 (commencing with Section 1580) of Chapter 5 of Division 2 of the Fish and Game Code, establishes a rebuttable presumption of its having been appropriated for the best and most necessary public use. The presumption established by this section is a presumption affecting the burden of proof.

(b) When property appropriated for a public use as a state, regional, county, or city park or recreation area, or wildlife or waterfowl management area as presently established by the Department of Fish and Game pursuant to Section 1525 of the Fish and Game Code, or historic site included in the National Register of Historic Places or state-registered landmarks, or as an ecological reserve as provided for in Article 4 (commencing with Section 1580) of Chapter 5 of Division 2 of the Fish and Game Code, is sought to be acquired for state highway purposes, or for public utility route or structure purposes, and such park or recreational area, or wildlife or waterfowl management area, or historic site, or ecological reserve was dedicated to or established for park or recreational purposes, or as a wildlife or waterfowl management area, or as an historic site included in the National Register of Historic Places or state-registered landmarks, or as an ecological reserve as provided for in Article 4 (commencing with Section 1580)

of Chapter 5 of Division 2 of the Fish and Game Code, prior to the initiation of highway route location studies, or public utility route or structure location studies, an action for declaratory relief may be brought only by the public agency owning such park, or recreational area, or wildlife or waterfowl management area, or historic site, or ecological reserve in the superior court to determine the question of which public use is the best and most necessary public use for such property. Such action for declaratory relief shall be filed and served within 120 days after publication by the California Highway Commission or the public utility in a newspaper of general circulation pursuant to Section 6061 of the Government Code, and delivery of a written notice to the public agency owning such park or recreational area, or wildlife or waterfowl management area, or historic site, or ecological reserve by the California Highway Commission or public utility that a proposed route or site or an adopted route includes park land or recreational area, or a wildlife or waterfowl management area, or an historic site, or an ecological reserve owned by that agency. In such declaratory relief action, the resolution of the California Highway Commission shall not be conclusive evidence of the matters set forth in Section 103 of the Streets and Highways Code. Such action for declaratory relief shall have preference over all other civil actions in the matter of setting the same for hearing or trial to the end that any such action shall be quickly heard and determined. If an action for declaratory relief is not filed and served within such 120-day period, the right to bring such action is waived and the provisions of subdivision (a) shall not apply. When a declaratory relief action, with respect to such property being sought for highway purposes, or for public utility route or structure purposes, may not be brought pursuant to this subdivision, the provisions of subdivision (a) of this section shall not apply.

Comment. Section 1241.7 is superseded by Section 1240.680 of the Code of Civil Procedure and Section 103.5 of the Streets and Highways Code. The provision for public utility lines and structures is not continued since property appropriated to a public use by a public entity is for a more necessary public use than any use by any person that is not a public entity. CODE CIV. PROC. § 1240.650.

§ 1241.9. (repealed). Preservation of certain property in its natural condition; presumption as to best public use; declaratory relief against highway use

1241.9. (a) Except as provided in subdivision (b), notwithstanding any other provision of law to the contrary, the fact that property is owned by a nonprofit organization contributions to which are deductible for state and federal income tax purposes under the law of

this state and of the United States and having the primary purpose of preserving areas in their natural condition, and that such property is open to the public subject to reasonable restrictions and is appropriate, and used exclusively, for the preservation of native plants, or native animals, including, but not limited to, mammals, birds, and marine life, or biotic communities, or geological or geographical formations of scientific or educational interest; and further that such property is irrevocably dedicated to such uses so that upon liquidation, dissolution, or abandonment of or by the owner, such property will be distributed only to a fund, foundation, or corporation whose property is likewise irrevocably dedicated to such uses, or to a governmental agency holding land for such uses; establishes a rebuttable presumption of its having been appropriated for the best and most necessary public use. The presumption established by this section is a presumption affecting the burden of proof.

(b) When property described in subdivision (a) is sought to be acquired for state highway purposes, and such property was exclusively devoted to a use or uses described in subdivision (a) prior to the initiation of highway route location studies, an action for declaratory relief may be brought only by such nonprofit organization owning such property in the superior court to determine the question of which public use is the best and most necessary public use for such property. Such action for declaratory relief shall be filed and served within 120 days after written notice to the nonprofit organization owning such property by the California Highway Commission that a proposed route or an adopted route includes such property owned by that organization; provided that such written notice need only be given to nonprofit organizations that are on file with the Registrar of Charitable Trusts of this state. In such declaratory relief action, the resolution of the commission shall not be conclusive evidence of the matters set forth in Section 103 of the Streets and Highways Code. Such action for declaratory relief shall have preference over all other civil actions in the matter of setting the action for hearing or trial to the end that any such action shall be quickly heard and determined. If an action for declaratory relief is not filed and served within such 120-day period, the right to bring such action is waived and the provisions of subdivision (a) shall not apply. When a declaratory relief action, with respect to such property being sought for highway purposes, may not be brought pursuant to this subdivision, the provisions of subdivision (a) of this section shall not apply.

Comment. Section 1241.9 is superseded by Section 1240.670 of the Code of Civil Procedure and Section 103.5 of the Streets and Highways Code.

§ 1242 (repealed). Location; examinations; surveys; maps; entry upon land

1242. (a) In all cases where land is required for public use, such use must be located in the manner which will be most compatible with the greatest public good and the least private injury.

(b) Subject to Section 1242.5, a person having the power of eminent domain may enter upon property to make studies, surveys, examinations, tests, soundings, or appraisals or to engage in similar activities reasonably related to the purpose for which the power may be exercised.

(c) The liability, if any, of a public entity for damages to property that arise from the entry and activities mentioned in subdivision (b) is determined by Section 816 of the Government Code.

(d) Any person that has the power of eminent domain, other than a public entity, is liable for damages to property that arise from the entry and activities mentioned in subdivision (b) to the same extent that a public entity is liable for such damages under Section 816 of the Government Code.

(e) As used in this section, "public entity" means a public entity as defined in Section 811.2 of the Government Code.

Comment. Section 1242 is superseded by the provisions of the Code of Civil Procedure indicated below.

| <i>Section 1242</i> | <i>New Provisions</i> |
|-----------------------------|--------------------------------|
| Subdivision (a) | § 1240.030(b) |
| Subdivision (b) | § 1240.810 |
| Subdivisions (c), (d) | § 1240.820 |
| Subdivision (e) | unnecessary, see § 1230.090 |

§ 1242.5 (repealed). Survey and exploration of land for reservoir purposes

1242.5. (a) In any case in which the entry and activities mentioned in subdivision (b) of Section 1242 will subject the person having the power of eminent domain to liability under Section 816 of the Government Code, before making such entry and undertaking such activities, the person shall secure:

(1) The written consent of the owner to enter upon his property and to undertake such activities; or

(2) An order for entry from the superior court in accordance with subdivision (b).

(b) The person seeking to enter upon the property shall petition the court for an order permitting the entry and shall give such prior notice to the owner of the property as the court determines is appropriate under the circumstances of the particular case. Upon such petition and after such notice has been given, the court shall determine

the purpose for the entry, the nature and scope of the activities reasonably necessary to accomplish such purpose, and the probable amount of compensation to be paid to the owner of the property for the actual damage to the property and interference with its possession and use. After such determination, the court may issue its order permitting the entry. The order shall prescribe the purpose for the entry and the nature and scope of the activities to be undertaken and shall require the person seeking to enter to deposit the probable amount of compensation in the manner provided in Section 1243.6.

(c) At any time after an order has been made pursuant to subdivision (b), either party may, upon noticed motion, request the court to determine whether the nature and scope of the activities reasonably necessary to accomplish the purpose of the entry should be modified or whether the amount deposited is the probable amount of compensation that will be awarded. If the court determines that the nature and scope of the activities to be undertaken or the amount of the deposit should be modified, the court shall make its order prescribing the necessary changes.

(d) The court shall retain the amount deposited under this section for a period of six months following the termination of the entry. Such amount shall be held, invested, deposited, and disbursed in accordance with Section 1254.

(e) The owner is entitled to recover from the person who entered his property the amount necessary to compensate the owner for any damage which arises out of the entry and for his court costs, and reasonable attorney fees to be fixed by the court, in the proceeding under this section. Where a deposit has been made pursuant to this section, the owner may, upon noticed motion made within six months following the termination of the entry, request the court to determine the amount he is entitled to recover under this subdivision. Thereupon, the court shall determine such amount and award it to the owner and the money on deposit shall be available for the payment of such amount. Nothing in this subdivision affects the availability of any other remedy the owner may have for the damaging of his property.

Comment. Section 1242.5 is superseded by the provisions of the Code of Civil Procedure indicated below.

| <i>Section 1242.5</i> | <i>New Provisions</i> |
|-----------------------|-----------------------|
| Subdivision (a) | § 1240.830 |
| Subdivision (b) | § 1240.840 |
| Subdivision (c) | § 1240.850 |
| Subdivision (d) | § 1240.860 |
| Subdivision (e) | § 1240.870 |

§ 1243 (repealed). Jurisdiction; venue; method of commencing proceedings; change of venue; lis pendens

1243. All proceedings under this title must be commenced in the superior court of the county in which the property sought to be taken is situated; provided, that where, of any one piece or article of property, or of any one interest in or to property, sought to be taken, a portion thereof is situated in one county and another portion thereof is situated in another county, the plaintiff may commence such proceedings in any of the counties where any portion of such piece or article of property, or interest in or to property, is situated, and the county so selected is the proper county for the trial of such proceedings; and provided, further, that when the plaintiff is a county, city and county, incorporated city or town, or a municipal water district, and the property sought to be taken is situated in more than one county, then the proceeding may be brought, at the option of the plaintiff, in any county wherein is situated any of the property sought to be taken, and said proceeding may be tried in said county, with reference to any property situated in the state; provided, however, that the right in this section granted to any plaintiff to commence and try an action in any county other than the county in which may be located any property in said action sought to be taken, shall be limited to property which is owned by the defendant, or by the defendant in common with the other defendants, or some of them. All such proceedings must be commenced by filing a complaint and issuing a summons. The provisions of this code for the change of place of trial of actions shall apply to proceedings under this title except as in this section otherwise provided. Nothing herein contained shall be construed to repeal any law of this state giving jurisdiction to the Public Utilities Commission to ascertain the just compensation which must be paid in eminent domain proceedings. A lis pendens shall be recorded in the office of the county recorder at the time of the commencement of the action in every county in which any of the property to be affected shall be located.

§ 1243.1 (repealed). Inverse condemnation proceeding against public entity; grounds; effect on powers of public entity

1243.1. In any case in which a public entity, as defined in Section 811.2 of the Government Code, which possesses the power of eminent domain establishes by resolution or ordinance the necessity to acquire a particular parcel or parcels of real property by eminent domain, and such public entity does not thereafter initiate, within six months, an action in eminent domain to take such parcel, the owner of the parcel may bring an action in inverse condemnation requiring the taking of such parcel and a determination of the fair market value payable as just compensation for such taking. In such inverse condemnation action, the court may, in addition, or in the alternative, if it finds that

the rights of the owner have been interfered with, award damages for any such interference by the public entity. This section shall not affect a public entity's authority to do any of the following:

- (1) Institute a condemnation action.
- (2) Take immediate possession of the particular parcel of property sought to be condemned.
- (3) Rescind a resolution or ordinance which established the necessity to acquire a particular parcel of real property and abandon the condemnation action.

§ 1243.4 (repealed). Immediate possession and use of right of way or lands for reservoir purposes

1243.4. In any proceeding in eminent domain brought by the State, or a county, or a municipal corporation, or metropolitan water district, municipal utility district, municipal water district, drainage, irrigation, levee, reclamation or water conservation district, or similar public corporation, the plaintiff may take immediate possession and use of any right-of-way, or lands to be used for reservoir purposes, required for a public use whether the fee thereof or an easement therefor be sought, in the manner and subject to the conditions prescribed by law.

Comment. Section 1243.4 is superseded by Section 1255.210 of the Code of Civil Procedure.

§ 1243.5 (repealed). Immediate possession and use of property; security

1243.5. (a) In any proceeding in eminent domain, if the plaintiff is authorized by law to take immediate possession of the property sought to be condemned, the plaintiff may, at any time after the issuance of summons and prior to the entry of judgment, apply ex parte to the court for an order determining the amount to be deposited as security for the payment of the just compensation which will be made for the taking of the property and any damage incident thereto. Such security shall be in the amount the court determines to be the probable just compensation which will be made for the taking of the property and any damage incident thereto. After depositing the security, the plaintiff may, at any time prior to the entry of judgment, apply ex parte to the court for an order authorizing it to take immediate possession of and to use the property sought to be condemned.

(b) If the court determines that the plaintiff is entitled to take the property by eminent domain and to take immediate possession thereof, and if the court determines that the plaintiff has deposited the security, the court shall by order authorize the plaintiff to take immediate possession of and to use the property sought to be condemned. The order authorizing immediate possession shall:

- (1) Describe the property and the estate or interest therein sought to be condemned, which description may be made by reference to the

complaint.

(2) State the purposes of the condemnation.

(3) State the amount of the deposit.

(4) State the date after which the plaintiff is authorized to take possession of the property which date, unless the plaintiff requests a later date, shall be the earliest date on which the plaintiff would be entitled to take possession of the property if service were made under subdivision (c) of this section on the day the order is made.

(c) At least 20 days prior to the time possession is taken, the plaintiff shall serve a copy of the order on the record owner or owners of the property and on the occupants, if any. Service of the order shall be made by personal service unless the person on whom service is to be made has previously appeared in the proceeding or has previously been served with a copy of the summons and complaint in the manner prescribed by law, in which case service of the order may be made by mail upon such person and his attorney of record, if any. If a person upon whom a copy of the order authorizing immediate possession is required to be personally served under this section resides out of the State, or has departed from the State or cannot after due diligence be found within the State, the plaintiff may in lieu of such personal service send a copy of the order by registered or certified mail addressed to such person at his last known address. If a copy of the order is sent by registered or certified mail in lieu of personal service, the plaintiff shall file an affidavit in the proceeding setting forth the facts showing the reason personal service could not have been made. The court may, for good cause shown by affidavit, authorize the plaintiff to take possession of the property without serving a copy of the order of immediate possession upon a record owner not occupying the property. A single service upon or mailing to those at the same address shall be sufficient. The court may, for good cause shown by affidavit, shorten the time specified in this subdivision to a period of not less than three days.

As used in this subdivision, "record owner or owners of the property" means both the person or persons in whose name the legal title to the fee appears by deeds or other instruments duly recorded in the recorder's office of the county in which the property is located and the person or persons, if any, in possession of the property under a written and duly recorded lease or agreement of purchase.

(d) At any time after the court has made an order authorizing immediate possession, the court may, upon motion of any party to the eminent domain proceeding, order an increase or a decrease in the security that the plaintiff is required to deposit pursuant to this section if the court determines that the security which should be deposited for the taking of the property and any damage incident thereto is different from the amount of the security theretofore deposited. Prior to judgment, such security may not be reduced to an amount less than that already withdrawn pursuant to Section 1243.7.

(e) The amount required to be deposited by the plaintiff and the

amount of such deposit withdrawn by the defendant may not be given in evidence or referred to in the trial of the issue of compensation.

(f) The plaintiff shall not be held to have abandoned or waived the right to appeal from the judgment by taking possession of the property pursuant to this section.

Comment. Section 1243.5 is superseded by Article 1 (commencing with Section 1255.010) and Article 2 (commencing with Section 1255.210) of Chapter 7 of Title 7 of Part 3 of the Code of Civil Procedure. The provisions relating to the deposit are superseded by provisions contained in Article 1; the provisions relating to an order for possession prior to judgment are superseded by provisions contained in Article 2.

The various provisions of Section 1243.5 are replaced by the provisions of the Code of Civil Procedure indicated below.

| <i>Section 1243.5</i> | <i>New Provisions</i> |
|-----------------------|-----------------------|
| Subdivision (a) | §§ 1255.010, 1255.210 |
| Subdivision (b) | § 1255.210 |
| Subdivision (c) | § 1255.250 |
| Subdivision (d) | § 1255.030 |
| Subdivision (e) | § 1255.100 |
| Subdivision (f) | § 1255.280 |

§ 1243.6 (repealed). Deposit of security in state treasury; investment; disbursement of interest

1243.6. When money is required to be deposited as provided by Section 1243.5, the court shall order the money to be deposited in the State Treasury, unless the plaintiff requests the court to order deposit in the county treasury, in which case the court shall order deposit in the county treasury. If money is deposited in the State Treasury pursuant to this section it shall be held, invested, deposited, and disbursed in the manner specified in Section 1254, and interest earned or other increment derived from its investment shall be apportioned and disbursed in the manner specified in that section.

Comment. Section 1243.6 is superseded by Section 1255.110 of the Code of Civil Procedure.

§ 1243.7 (repealed). Withdrawal of deposit

1243.7. (a) At any time after money has been deposited as provided in Section 1243.5, the party whose property or interest in property is being taken may apply to the court, in the manner hereinafter provided, for the withdrawal of all or any portion of the amount deposited for his property or property interest. Upon such application, the court shall order that portion of the amount applied for, which the applicant is entitled to withdraw under the provisions of this section,

to be paid to such applicant from the money deposited in connection with such property or property interest.

(b) If the total amount sought to be withdrawn prior to judgment exceeds the amount of the original deposit, each applicant, before any of such excess is withdrawn, shall file an undertaking executed by two or more sufficient sureties approved by the court to the effect that they are bound to the plaintiff in double the amount of such excess for the return of any amount withdrawn by the applicant that exceeds the amount to which the applicant is entitled as finally determined in the eminent domain proceeding, together with legal interest from the date of its withdrawal.

If there is more than one applicant and the total amount sought to be withdrawn exceeds the amount of the original deposit, the applicants, in lieu of filing separate undertakings, may jointly file an undertaking executed by two or more sufficient sureties approved by the court to the effect that they are bound to the plaintiff in double the amount of such excess for the return of any amount withdrawn by the applicants that exceeds the amount to which the applicants are entitled as finally determined in the eminent domain proceeding together with legal interest from the date of its withdrawal.

If the undertaking required by this subdivision is executed by an admitted surety insurer, the undertaking is sufficient in amount if the surety is bound only to the extent that the amount sought to be withdrawn exceeds the amount originally deposited.

The plaintiff may consent to an undertaking that is less than the amount required under this subdivision.

If the undertaking is executed by an admitted surety insurer, the applicant filing the undertaking is entitled to recover the premium paid for the undertaking, but not to exceed 2 percent of the face value of the undertaking, as a part of the recoverable costs in the eminent domain proceeding.

(c) The application shall be made by affidavit wherein the applicant shall set forth his interest in the property and request withdrawal of a stated amount. The applicant shall serve a copy of the application on the plaintiff and no withdrawal shall be made until at least 20 days after such service of the application, or until the time for all objections has expired, whichever is later.

(d) Within the 20-day period, the plaintiff may object to such withdrawal by filing an objection thereto in court on the ground that an undertaking should be filed or that the amount of, or the sureties upon, such an undertaking are insufficient.

(e) Within the 20-day period, the plaintiff may object to such withdrawal by filing an objection thereto in court on the grounds that other persons are known or believed to have interests in the property. In this event the plaintiff shall attempt to personally serve on such other persons a notice to such persons that they may appear within 10 days after such service and object to such withdrawal, and that failure to appear will result in the waiver of any right to such amount with-

drawn or further rights against the plaintiff to the extent of the sum withdrawn. The plaintiff shall state in such objection the names and last known addresses of other persons known or believed to have an interest in the property, whether or not it has been able to serve them with such notice and the date of such service. If the plaintiff in its objection reports to the court that it is unable to personally serve persons known or believed to have interests in the property within the 20-day period, said money shall not be withdrawn until the applicant causes such personal service to be made.

(f) If the persons so served appear and object to the withdrawal, or if the plaintiff so requests, the court shall thereupon hold a hearing after notice thereof to all parties and shall determine the amounts to be withdrawn, if any, and by whom. If the court determines that a party is entitled to withdraw any portion of a deposit which another person claims, the court may require such party, before withdrawing such portion, to file an undertaking executed by two or more sufficient sureties approved by the court to the effect that they are bound to the adverse claimant in such amount as is fixed by the court, but not to exceed double the portion claimed by the adverse claimant, for the payment to the person entitled thereto of any amount withdrawn that exceeds the amount to which such party is entitled as finally determined in the eminent domain proceeding, together with legal interest from the date of its withdrawal. No persons so served shall have any claim against the plaintiff for compensation for the value of the property taken or severance damages thereto, or otherwise, to the extent of the amount withdrawn by all parties; provided, the plaintiff shall remain liable for said compensation to persons having an interest of record who are not so served.

(g) If withdrawn, the receipt of any such money shall constitute a waiver by operation of law of all defenses in favor of the person receiving such payment except his claim for greater compensation. Any amount so paid to any party shall be credited upon the judgment in the eminent domain proceeding.

(h) Any amount withdrawn by any party in excess of the amount to which he is entitled as finally determined in the eminent domain proceeding shall be paid to the party entitled thereto together with legal interest thereon from the date of its withdrawal, and the court in which the eminent domain proceeding is pending shall enter judgment therefor against the defendant. If the defendant does not pay the judgment within 30 days after the judgment is entered, the court may, on motion, enter judgment against the sureties for such amount together with the interest that may be due thereon.

Comment. Section 1243.7 is superseded by Article 1 (commencing with Section 1255.010) of Chapter 7 of Title 7 of Part 3 of the Code of Civil Procedure. The various provisions of Section 1243.7 are replaced by the provisions of the Code of Civil Procedure indicated below.

| <i>Section 1243.7</i> | <i>New Provisions</i> |
|-----------------------|-----------------------|
| Subdivision (a) | §§ 1255.040, 1255.050 |
| Subdivision (b) | § 1255.060 |
| Subdivision (c) | §§ 1255.040, 1255.050 |
| Subdivision (d) | § 1255.050 |
| Subdivision (e) | § 1255.050 |
| Subdivision (f) | § 1255.050 |
| Subdivision (g) | § 1255.080 |
| Subdivision (h) | § 1255.090 |

§ 1244 (repealed). Complaint; parties; statement of right; map; description; parcels in same or separate proceedings; board of supervisors as plaintiff

1244. The complaint must contain:

1. The name of the corporation, association, commission, or person in charge of the public use for which the property is sought, who must be styled the plaintiff;
2. The names of all owners and claimants, of the property, if known, or a statement that they are unknown, who must be styled defendants;
3. A statement of the right of the plaintiff;
4. If a right of way be sought, the complaint must be accompanied by a map showing the location, general route, and termini of said right of way, so far as the same is involved in the action or proceeding;
5. 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. All parcels of land, or other property or interest in or to property, lying in the county, and required for the same public use, may be included in the same or separate proceedings, at the option of the plaintiff, but the court may consolidate or separate them to suit the convenience of the parties. When application for the condemnation of a right of way for the purpose of sewerage is made on behalf of a settlement, or of an incorporated village or town, the board of supervisors of the county may be named as plaintiff.

§ 1245 (repealed). Summons; issuance; contents; form; service

1245. The clerk must issue a summons, which must contain the names of the parties, a general description of the whole property, or specific descriptions of the parcels to be taken, a statement of the public use for which it is sought, and, where a general description is used, a reference to the complaint for descriptions of the respective parcels, and a notice to the defendants to appear and show cause why the property described should not be condemned as prayed for in the complaint. Except as otherwise specified in this title, it must be in the

form of a summons in civil actions, and must be served in like manner.

§ 1245.2 (repealed). Alias summons; issuance and contents; conclusiveness of judgment by default

1245.2. A summons may be issued which contains only the names of the defendants to be served therewith and a description or descriptions of only the property sought to be condemned against the defendants. Judgment based on failure to appear and answer after service of such summons shall be conclusive against such defendants in respect only to the property described in such summons.

§ 1245.3 (repealed). Unknown persons as defendants; heirs and devisees of deceased claimants; publication and posting of summons; protection of interest of claimant believed dead; conclusiveness and effect of judgment

1245.3. In any action brought under this title the plaintiff may name as defendants, in addition to those persons who appear of record or are known to plaintiff to have or claim an interest in the property, "all persons unknown claiming any title or interest in or to the property," naming them in that manner, and if any person who appears of record to have or claim an interest or who is known to plaintiff to have or claim an interest in the property is dead or is believed by plaintiff to be dead, and if no executor or administrator of the estate of said person has been appointed by the superior court of the county in which the property is located who is then duly qualified, and if no certified copy of an order of the superior court of any other county appointing an executor or administrator of the estate of said person who is then duly qualified and acting has been recorded in the county in which the property is located, and if plaintiff knows of no other duly qualified and acting executor or administrator of the estate of said person and said facts are averred in the complaint or in an affidavit by the plaintiff or its attorney filed with the complaint, plaintiff may also name as defendants, "the heirs and devisees of _____ (naming such deceased claimant), deceased and all persons claiming by, through, or under said decedent," naming them in that manner, and if it is alleged that any such person is believed by plaintiff to be dead, such person may also be named as a defendant. If it appears to the satisfaction of the court by affidavit that after due diligence the plaintiff is unable to ascertain the identity and whereabouts of any person or persons sued as the heirs and devisees of a deceased claimant or one believed to be dead or the identity and whereabouts of any person or persons sued as persons claiming by, through or under said deceased claimant or one believed to be dead or the identity and whereabouts of any person or persons sued as persons unknown claiming any title or interest in the property, the court shall make its order directing that process be

served upon such persons by posting a copy of the summons on the property within 10 days after the making of the order and by publication of the same in some newspaper of general circulation published in the county in which the property is located and designated by the court as most likely to give notice to such persons once a week for four successive weeks.

Upon the trial the court shall determine the extent of and the value of the interest or damages thereto of any person whom it is alleged is dead or believed by plaintiff to be dead whose interest or claim appears of record or is known to plaintiff and unless such person or a duly qualified and acting executor or administrator of the estate of said person appears in the action, shall order the amount thereof paid to the county clerk to be held by him for the account of the persons entitled thereto and shall determine the extent of and the value of the interest or damages thereto, if any, of all persons sued as persons unknown, whether or not they are in being, and shall order the amount thereof paid to the county clerk to be held by him for the account of the persons entitled thereto. Any person claiming any title or interest of any character in or to said property, whether legal or equitable, may appear in said action.

Any judgment rendered in such a proceeding shall be binding and conclusive not only upon the persons named as defendants and served with process but upon the heirs and devisees of, and all persons claiming by, through, or under, any decedent sued and served as herein provided and upon all persons unknown claiming any right, title, estate or interest in the property described in the complaint and shall have the force and effect of a judgment in rem.

§ 1245.4 (repealed). Land shown upon map as a square or other open space; parties; authority to sue state; conclusiveness of judgment

1245.4. Whenever in any proceeding brought under this title in which any municipal corporation is the plaintiff it is sought to condemn to public use any land or any remainder, reversion, easement or other estate therein, which land is shown upon any filed or recorded map as a "square" or other open space without any further words specifying the intentions of the owners thereof filing such map with respect thereto or the uses or purposes for which the same may have been abandoned or dedicated, and no deed, offer of dedication or other instrument appears of record in the office of the county recorder showing or indicating the uses or purposes for which the same may have been abandoned or dedicated and such map has been on file or on record for more than 50 years, the plaintiff may in said proceeding seek a judgment against the county in which the land is located and the inhabitants thereof and against the State of California and the people thereof, determining its title thereto, the uses or trusts, if any, under which it holds the same, and the purposes to which it may put

the same. Authority is hereby granted in any such proceeding to sue the State of California and in any such proceeding service of process shall be made upon the Attorney General and the Director of General Services. In any such action the Attorney General shall represent the State of California in its sovereign and in its proprietary capacity and also the people of the State of California as the beneficiaries of any trust under which said land is, or is alleged to be, held. Any judgment rendered in such proceeding shall be conclusive upon the State of California and the people thereof and upon the county in which said land is located and the inhabitants thereof, if said county is made a party to said proceedings.

Comment. Section 1245.4 was evidently intended as narrowly drawn special legislation designed to aid the City of Marysville in condemning property known as Cortez Square and conveying it to the County of Yuba for the purpose of erecting a county courthouse. Cf. GOVT. CODE §§ 50530 and 50533, and *City of Marysville v. Boyd*, 181 Cal. App.2d 755, 5 Cal. Rptr. 598 (1960). As such, it has outlasted any usefulness it may have had. See *City of Marysville v. Boyd*, *supra*. Cf. CODE CIV. PROC. § 1235.030 (effect of enactment of Eminent Domain Law).

The right of a person authorized to condemn property for a public use to name as defendants all persons public and private, known or unknown, is continued in Code of Civil Procedure Section _____.

§ 1246 (repealed). Answer of named defendants; persons who may defend

1246. Each defendant must, by answer, set forth his estate or interest in each parcel of property described in the complaint and the amount, if any, which he claims for each of the several items of damage specified in section 1248.

All persons in occupation of, or having or claiming an interest in any of the property described in the complaint, or in the damages for the taking thereof, though not named, may appear, plead, and defend, each in respect to his own property or interest, or that claimed by him, in like manner as if named in the complaint.

§ 1246.1 (repealed). Determination of amount of award; apportionment of award; costs

1246.1. Where there are two or more estates or divided interests in property sought to be condemned, the plaintiff is entitled to have the amount of the award for said property first determined as between plaintiff and all defendants claiming any interest therein; thereafter in the same proceeding the respective rights of such defendants in and to the award shall be determined by the court, jury, or referee and the

award apportioned accordingly. The costs of determining the apportionment of the award shall be allowed to the defendants and taxed against the plaintiff except that the costs of determining any issue as to title between two or more defendants shall be borne by the defendants in such proportion as the court may direct.

§ 1246.2 (repealed). Award not to include penalty for prepayment of mortgage or deed of trust

1246.2. Where the property acquired for a public use is encumbered by a mortgage or deed of trust, the amount payable to the mortgagee or beneficiary under the deed of trust shall not include any penalty for prepayment.

§ 1246.3 (repealed). Inverse condemnation; judgment for plaintiff; costs, disbursements, and expenses

1246.3. In any inverse condemnation proceeding brought for the taking of any interest in real property, the court rendering judgment for the plaintiff by awarding compensation for such taking, or the attorney representing the public entity who effects a settlement of such proceeding, shall determine and award or allow to such plaintiff, as a part of such judgment or settlement, such sum as will, in the opinion of the court or such attorney, reimburse such plaintiff for his reasonable costs, disbursements, and expenses, including reasonable attorney, appraisal, and engineering fees, actually incurred because of such proceeding.

§ 1246.4 (repealed). Condemnation; judgment against public entity; costs, disbursements, and expenses of owner

1246.4. In any condemnation proceeding in which the final judgment is that the public entity cannot acquire the real property, the owner shall be awarded such an amount, as determined by the court, which will reimburse him for his reasonable costs, disbursements, and expenses, including reasonable attorney, appraisal, and engineering fees, actually incurred because of such proceeding.

§ 1247 (repealed). Powers of court

1247. The court shall have power:

1. To regulate and determine the place and manner of making connections and crossings, or of enjoying the common use mentioned in subdivision 6 of Section 1240;
2. To hear and determine all adverse or conflicting claims to the property sought to be condemned, and to the damages therefor;
3. To determine the respective rights of different parties seeking condemnation of the same property.

§ 1247a (repealed). Powers of court; regulation of removal or relocation of structures

1247a. The court shall also have power to regulate and determine the place and manner of removing or relocating structures or improvements, or of enjoying the common use mentioned in subdivision 3 of Section 1240.

§ 1247b (repealed). Portion of parcel sought to be taken; preparation of map on request of defendant

1247b. Whenever in a condemnation proceeding only a portion of a parcel of property is sought to be taken and upon a request of a defendant to the plaintiff made at least 30 days prior to the time of trial, the plaintiff shall prepare a map showing the boundaries of the entire parcel, indicating thereon the part to be taken, the part remaining, and shall serve an exact copy of such map on the defendant or his attorney at least fifteen (15) days prior to the time of trial.

§ 1248 (repealed). Hearing; items to be ascertained and assessed

1248. The court, jury, or referee must hear such legal testimony as may be offered by any of the parties to the proceeding, and thereupon must ascertain and assess:

1. The value of the property sought to be condemned, and all improvements thereon pertaining to the realty, and of each and every separate estate or interest therein; if it consists of different parcels, the value of each parcel and each estate or interest therein shall be separately assessed;

2. If the property sought to be condemned constitutes only a part of a larger parcel, the damages which will accrue to the portion not sought to be condemned, by reason of its severance from the portion sought to be condemned, and the construction of the improvement in the manner proposed by the plaintiff;

3. Separately, how much the portion not sought to be condemned, and each estate or interest therein, will be benefited, if at all, by the construction of the improvement proposed by the plaintiffs. If the benefit shall be equal to the damages assessed under subdivision 2, the owner of the parcel shall be allowed no compensation except the value of the portion taken. If the benefit shall be less than the damages so assessed, the former shall be deducted from the latter, and the remainder shall be the only damages allowed in addition to the value. If the benefit shall be greater than the damages so assessed, the owner of the parcel shall be allowed no compensation except the value of the portion taken, but the benefit shall in no event be deducted from the value of the portion taken;

4. If the property sought to be condemned be water or the use of

water, belonging to riparian owners, or appurtenant to any lands, how much the lands of the riparian owner, or the lands to which the property sought to be condemned is appurtenant, will be benefited, if at all, by a diversion of water from its natural course, by the construction and maintenance, by the person or corporation in whose favor the right of eminent domain is exercised, of works for the distribution and convenient delivery of water upon said lands; and such benefit, if any, shall be deducted from any damages awarded the owner of such property;

5. If the property sought to be condemned be for a railroad, the cost of good and sufficient fences, along the line of such railroad, and the cost of cattle guards, where fences may cross the line of such railroad; and such court, jury or referee shall also determine the necessity for and designate the number, place and manner of making such farm or private crossings as are reasonably necessary or proper to connect the parcels of land severed by the easement condemned, or for ingress to or egress from the lands remaining after the taking of the part thereof sought to be condemned, and shall ascertain and assess the cost of the construction and maintenance of such crossings;

6. If the removal, alteration or relocation of structures or improvements is sought, the cost of such removal, alteration or relocation and the damages, if any, which will accrue by reason thereof;

7. As far as practicable, compensation must be assessed for each source of damages separately.

8. When the property sought to be taken is encumbered by a mortgage or other lien, and the indebtedness secured thereby is not due at the time of the entry of the judgment, the amount of such indebtedness may be, at the option of the plaintiff, deducted from the judgment, and the lien of the mortgage or other lien shall be continued until such indebtedness is paid; except that the amount for which, as between the plaintiff and the defendant, the plaintiff is liable under Section 1252.1 may not be deducted from the judgment.

9. Where property is encumbered by a mortgage or other lien and only a portion of the encumbered property is sought to be taken, and where the property being taken, or some portion of it, is also encumbered by a mortgage or other lien which is junior to the first-mentioned lien and such junior mortgage or other lien is against only a portion of the property encumbered by the senior mortgage or other lien, it shall be determined whether the award is sufficient in amount so that the amounts owing to the holders of such senior and junior liens may be paid in full from the award.

If it is determined that the award is not sufficient in amount to pay in full such senior and junior liens, the amount of indebtedness which is secured respectively by the senior and junior liens on the property taken, and which will be paid from the award or deducted from the judgment pursuant to subdivision 8, shall be determined as follows:

(a) The total amount of the award which will be available for payment to the senior and junior lienholders shall be determined. Such

amount shall tentatively be allocated first to the senior lien up to the full amount of the indebtedness secured by the senior lien, and the remainder, if any, shall tentatively be allocated to the junior lien.

(b) It shall then be determined whether the payment to the junior lienholder of the amount tentatively allocated to the junior lien together with elimination of the junior lien on the property taken, would cause the junior lienholder's security remaining after the taking, if any, to be of less value in proportion to the indebtedness owing after the taking than was the value of his security prior to the taking in proportion to the indebtedness to him prior to the taking.

(c) If it is determined that the proportionate security of the junior lienholder would be reduced by the taking if only the tentative amount allocated to the junior lien were paid to the junior lienholder, the tentative allocations to the senior and the junior liens shall be adjusted. To make such adjustment there shall be deducted from the amount tentatively allocated to the senior lien, and there shall be added to the amount tentatively allocated to the junior lien, an amount sufficient, considering the junior lienholder's remaining lien on property not taken, to preserve the security of the holder of the junior lien for amounts which will remain owing to him after payment to him from the award. Deduction shall not be made from the amount tentatively allocated to the senior lien to the extent that the remaining amount allocated to the senior lien, if paid to the senior lienholder, would cause the security of the senior lienholder remaining after the taking to be of less value in proportion to the amount remaining owing to him after such payment, than the value of his security prior to the taking, in proportion to the amount secured by his lien before such payment.

(d) No adjustment of the tentative allocations shall be made if it is determined that the security of the junior lienholder which will remain after the taking appears to be sufficient in value to satisfy the indebtedness which will remain owing to the junior lienholder after the taking.

The amounts tentatively allocated to such senior and junior liens, adjusted by such deduction and addition, if any, are the amounts of indebtedness owing to such senior and junior lienholders which are secured by their respective liens on the property taken, and any other indebtedness owing to the senior or junior lienholders shall not be considered as secured by the property to be taken. If the amount of such indebtedness payable to either the senior or to the junior lienholder is not due at the time of entry of the judgment, and the plaintiff makes the election provided in subdivision 8, the indebtedness which shall be deducted from the judgment is the indebtedness in the amount so determined, and the lien shall continue until that amount of indebtedness is paid.

§ 1248a (repealed). Municipal public utilities; removal or relocation of railroad, streetcar, or interurban tracks; complaint; compensation

1248a. In any proceeding taken under the provisions of this title, where any railroad, street or interurban railway tracks are situated on, upon, along or across any lands or rights of way sought to be taken therein, for road, highway, boulevard, street or alley purposes, or for the purposes of a right of way for any public utility to be constructed, completed and maintained by a county, city and county, or any incorporated city or town, or by a municipal water district, the plaintiff shall, if the complaint contains a prayer therefor, and shows the matter hereinafter provided, obtained a final judgment of condemnation ordering, in addition to the condemnation of such lands or right of way for the purposes set forth in the complaint, the relocation or removal of any railroad, street or interurban railway tracks thereon. Where the removal or relocation of such tracks is sought in any such proceedings, the complaint must contain a description of the location and proposed location of such tracks, and must be accompanied by a map showing such location and the proposed location of such tracks. The compensation to be paid for such relocation or removal of tracks shall be ascertained and assessed in the action, as in other cases, and separately from other sources of damage.

§ 1248b (repealed). Manufacturing or industrial equipment installed for use in fixed location as realty

1248b. Equipment designed for manufacturing or industrial purposes and installed for use in a fixed location shall be deemed a part of the realty for the purposes of condemnation, regardless of the method of installation.

§ 1249 (repealed). Compensation and damages; accrual of right; improvements after service of summons

1249. For the purpose of assessing compensation and damages the right thereto shall be deemed to have accrued at the date of the issuance of summons and its actual value at that date shall be the measure of compensation for all property to be actually taken, and the basis of damages to property not actually taken but injuriously affected, in all cases where such damages are allowed as provided in Section 1248; provided, that in any case in which the issue is not tried within one year after the date of the commencement of the action, unless the delay is caused by the defendant, the compensation and damages shall be deemed to have accrued at the date of the trial. No improvements put upon the property subsequent to the date of the service of summons shall be included in the assessment of compensation or damages.

§ 1249.1 (repealed). Compensation and damages; improvements at time of service of summons

1249.1. All improvements pertaining to the realty that are on the property at the time of the service of summons and which affect its value shall be considered in the assessment of compensation, damages and special benefits unless they are removed or destroyed before the earliest of the following times:

- (a) The time the title to the property is taken by the plaintiff.
- (b) The time the possession of the property is taken by the plaintiff.
- (c) The time the defendant moves from the property in compliance with an order of possession.

§ 1249.2 (repealed). Harvesting and marketing of crops

1249.2. The condemning agency may permit the owner of the property sought to be taken to harvest and retain the financial benefit for crops planted before or after the service of summons in any eminent domain proceeding if the owner in writing agrees to assume the responsibility for the completion of the growing process and the harvesting and marketing of the crops.

If the condemning agency takes possession of the property sought to be condemned at a time when such action prevents the property owner from harvesting and marketing crops planted before or after the service of summons in an eminent domain proceeding, then the value of such crops shall be included in the compensation awarded for the property taken.

§ 1250 (repealed). Defective title; new proceedings

1250. If the title attempted to be acquired is found to be defective from any cause, the plaintiff may again institute proceedings to acquire the same, as in this Title prescribed.

§ 1251 (repealed). Time for paying assessments; bond to build railroad crossings, fences and cattle guards; deposit to build highway fences

1251. The plaintiff must, within thirty days after final judgment, pay the sum of money assessed. In case the plaintiff is the State of California, or is a public corporation, and it appears by affidavit that bonds of said State or of any agency thereof, or of said public corporation must be issued and sold in order to provide the money necessary to pay the sum assessed, then such sum may be paid at any time within one year from the date of such judgment; provided further, that if the sale of any such bonds can not be had by reason of litigation affecting the validity thereof, then the time during which such litigation is pending shall not be considered a part of the one year's time in which such payment must be made.

In case the use is for railroad purposes, the plaintiff may, at the time of or before payment, elect to build the farm or private crossings, fences and cattle guards; and if he so elect, shall execute to the defendant a bond, with sureties to be approved by the court in double the assessed cost of the same, to build such farm or private crossings, fences and cattle guards within eighteen months from the time the railroad is built on the land taken, and if such bond be given, need not pay the cost of such farm or private crossings, fences and cattle guards. In an action on such bond, the plaintiff may recover reasonable attorney's fees.

- In case of property being taken by the State or any county, or city and county, for highway purposes, the State or such county, or city and county, may elect to build the fences for which damages may have been assessed and in such case the amount assessed shall be deposited with the clerk of the court having jurisdiction of the action, and if such fences are not constructed within one year from the date of judgment the said money shall be paid to the defendant or defendants entitled thereto, or to his or their order, who shall immediately build said fences. In case the State, or county, or city and county, builds said fences the moneys deposited shall be returned to said State or county, or city and county, and in case the said moneys are paid to the owner or owners of the lands condemned and are not used for said purposes, within one year from the date of judgment, the same may be recovered by said State or county, or city and county.

§ 1252 (repealed). Compensation and damages; payment or deposit; execution; vacation of proceedings and restoration of possession for nonpayment

1252. Payment may be made to the defendants entitled thereto, or the money may be deposited in Court for the defendants, and be distributed to those entitled thereto. If the money be not so paid or deposited, the defendants may have execution as in civil cases; and if the money cannot be made on execution, the Court, upon a showing to that effect, must set aside and annul the entire proceedings, and restore possession of the property to the defendant, if possession has been taken by the plaintiff.

§ 1252.1 (repealed). Liability of plaintiff for ad valorem taxes, penalties and costs; payments to defendant

1252.1. As between the plaintiff and defendant, the plaintiff is liable for any ad valorem taxes, penalties and costs upon the property sought to be taken by eminent domain that would be subject to cancellation under Chapter 4 (commencing with Section 4986) of Part 9 of Division 1 of the Revenue and Taxation Code if the plaintiff were a

public agency covered by Section 4986 of the Revenue and Taxation Code and if such taxes, penalties and costs had not been paid, whether or not the plaintiff is such a public agency.

If the defendant has paid any amount for which, as between the plaintiff and defendant, the plaintiff is liable under this section, the plaintiff shall pay to the defendant a sum equal to such amount.

If the plaintiff takes possession of the property prior to judgment, the amount the defendant is entitled to be paid under this section shall be claimed at the time and in the manner provided for claiming costs. If the plaintiff does not take possession of the property prior to judgment, the amount the defendant is entitled to be paid under this section shall be claimed not later than 30 days after the title vests in the plaintiff and shall be claimed in the manner provided for claiming costs.

§ 1252.2 (repealed). Separate valuation on assessment roll; application

1252.2. When the property sought to be taken by eminent domain does not have a separate valuation on the assessment roll, any party to the eminent domain proceeding may, at any time after the taxes on such property are subject to cancellation pursuant to Section 4986 of the Revenue and Taxation Code, apply to the tax collector for a separate valuation of such property in accordance with Article 3 (commencing with Section 2821) of Chapter 3 of Part 5 of Division 1 of the Revenue and Taxation Code notwithstanding any provision in such article to the contrary.

§ 1253 (repealed). Final order; contents; recordation; vesting of title

1253. When payments have been made and the bond given, if the plaintiff elects to give one, as required by Sections 1251 and 1252, the court shall make a final order of condemnation, which shall describe the property condemned, the estate or interest acquired therein, the purposes of such condemnation, and if possession is taken pursuant to Section 1243.5 or 1254 prior to the making and entry of the final order of condemnation, the date of such possession. For the purposes of this section, the date of possession shall be the date upon or after which the plaintiff is authorized by order of the court to take possession of the property. A certified copy of the order shall thereupon be recorded in the office of the recorder of the county in which the property is located. The title to the property described in the final order of condemnation vests in the plaintiff for the purposes described therein upon the date that a certified copy of the final order of condemnation is recorded in the office of the recorder of the county.

§ 1254 (repealed). Possession and use of property by plaintiff pending conclusion of litigation

1254. (a) In any case in which the plaintiff is not in possession of the property sought to be condemned, the plaintiff may, at any time after trial and judgment entered or pending an appeal from the judgment and after payment into court for the defendant of the full amount of the judgment and such further sum as may be required by the court as a fund to pay any further damages and costs that may be recovered in the proceeding, apply ex parte for an order authorizing it to take possession of and to use the property sought to be condemned.

(b) If in the judgment the court determined that the plaintiff is entitled to acquire the property by eminent domain and if the court determines that the plaintiff has made the required payment into court, the court shall by order authorize the plaintiff to take possession of and use the property during the pendency of and until the final conclusion of the litigation, and shall, if necessary, stay all actions and proceedings against the plaintiff on account thereof. The order shall state the date after which the plaintiff is authorized to take possession of the property which date, unless the plaintiff requests a later date, shall be 10 days after the date of the order.

(c) At least 10 days prior to the time possession is taken, the plaintiff shall serve upon the defendants and their attorneys, either personally or by mail, a copy of the order of the court authorizing it to take possession of the property. A single service upon or mailing to those at the same address is sufficient.

(d) At any time after the court has made an order authorizing the plaintiff to take possession pursuant to this section, the court may, upon motion of any party to the eminent domain proceeding, order an increase or a decrease in the amount that the plaintiff is required to pay into court as a further sum pursuant to this section.

(e) The plaintiff shall not be held to have abandoned or waived the right to appeal from the judgment by paying into court the amount of the judgment and such further sum as may be required by the court and taking possession of the property pursuant to this section.

(f) The defendant, who is entitled to the money paid into court for him upon any judgment, shall be entitled to demand and receive the full amount of the judgment at any time thereafter upon obtaining an order therefor from the court. The court, or a judge thereof, upon application by such defendant, shall order and direct that the money so paid into court for him be delivered to him upon his filing a satisfaction of the judgment, or upon his filing a receipt therefor, and an abandonment of all defenses to the action or proceeding, except as to the amount of damages that he may be entitled to in the event that a new trial is granted. A payment to a defendant, as aforesaid, shall be held to be an abandonment by such defendant of all defenses interposed by him, excepting his claim for greater compensation.

(g) Any amount withdrawn by any party in excess of the amount to which he is entitled as finally determined in the eminent domain proceeding shall be paid without interest to the party entitled thereto, and the court in which the eminent domain proceeding is pending shall enter judgment therefor against such party.

(h) The payment of the money into court, as hereinbefore provided for, shall not discharge the plaintiff from liability to keep the said fund full and without diminution; but such money shall be and remain, as to all accidents, defalcations, or other contingencies (as between the parties to the proceeding), at the risk of the plaintiff, and shall so remain until the amount of the compensation or damages is finally settled by judicial determination, and until the court awards the money, or such part thereof as shall be determined upon, to the defendant, and until he is authorized or required by rule of court to take it. If, for any reason, the money shall at any time be lost, or otherwise abstracted or withdrawn, through no fault of the defendant, the court shall require the plaintiff to make and keep the sum good at all times until the litigation is finally brought to an end, and until paid over or made payable to the defendant by order of court, as above provided. The court shall order the money to be deposited in the State Treasury, unless the plaintiff requests the court to order deposit in the county treasury, in which case the court shall order deposit in the county treasury. If the court orders deposit in the State Treasury, it shall be the duty of the State Treasurer to receive all such moneys, duly receipt for, and to safely keep the same in the Condemnation Deposits Fund, which fund is hereby created in the State Treasury and for such duty, he shall be liable to the plaintiff upon his official bond. Money in the Condemnation Deposits Fund may be invested and reinvested in any securities described in Section 16430, Government Code, or deposited in banks as provided in Chapter 4 (commencing with Section 16500) of Part 2 of Division 4 of Title 2, Government Code. The Pooled Money Investment Board shall designate at least once a month the amount of money available in the fund for investment in securities or deposit in bank accounts, and the type of investment or deposit and shall so arrange the investment or deposit program that funds will be available for the immediate payment of any court order or decree. Immediately after such designation the Treasurer shall invest or make deposits in bank accounts in accordance with the designations.

(i) For the purposes of this section, a written determination signed by a majority of the members of the Pooled Money Investment Board shall be deemed to be the determination of the board. Members may authorize deputies to act for them for them for the purpose of making determinations under this section.

(j) Interest earned and other increment derived from investments or deposits made pursuant to this section, after deposit of money in the State Treasury, shall be deposited in the Condemnation Deposits Fund. After first deducting therefrom expenses incurred by the Treasurer in taking and making delivery of bonds or other securities under

this section, the State Controller shall apportion as of June 30th and December 31st of each year the remainder of such interest earned or increment derived and deposited in the fund during the six calendar months ending with such dates. There shall be apportioned and paid to each plaintiff having a deposit in the fund during the six-month period for which an apportionment is made, an amount directly proportionate to the total deposits in the fund and the length of time such deposits remained therein. The State Treasurer shall pay out the money deposited by a plaintiff in such manner and at such times as the court or a judge thereof may, by order or decree, direct.

(k) In all cases where a new trial has been granted upon the application of the defendant, and he has failed upon such trial to obtain greater compensation than was allowed him upon the first trial, the costs of such new trial shall be taxed against him.

Comment. The disposition of the provisions of Section 1254 is indicated below; unless otherwise indicated, the new sections are in the Code of Civil Procedure.

| <i>Section 1254</i> | <i>New Provisions</i> |
|-----------------------------|--------------------------------------|
| Subdivision (a) | § 1255.310 |
| Subdivision (b) | § 1255.320 |
| Subdivision (c) | § 1255.330 |
| Subdivision (d) | § 1255.340 |
| Subdivision (e) | § 1255.370 |
| Subdivision (f) | § 1255.350 |
| Subdivision (g) | § 1255.360 |
| Subdivision (h) | §§ 1255.110, 1255.410; GOVT. CODE |
| | §§ 16429.1-16429.3 |
| Subdivisions (i), (j) | GOVT. CODE |
| | §§ 16429.1-16429.3 |
| Subdivision (k) | |

§ 1255 (repealed). Costs; discretion

1255. Costs may be allowed or not, and if allowed, may be apportioned between the parties on the same or adverse sides, in the discretion of the Court.

§ 1255a (repealed). Abandonment

1255a. (a) The plaintiff may abandon the proceeding at any time after the filing of the complaint and before the expiration of 30 days after final judgment, by serving on defendants and filing in court a written notice of such abandonment. Failure to comply with Section 1251 of this code shall constitute an implied abandonment of the proceeding.

(b) The court may, upon motion made within 30 days after such

abandonment, set aside the abandonment if it determines that the position of the moving party has been substantially changed to his detriment in justifiable reliance upon the proceeding and such party cannot be restored to substantially the same position as if the proceeding had not been commenced.

(c) Upon the denial of a motion to set aside such abandonment or, if no such motion is filed, upon the expiration of the time for filing such a motion, on motion of any party, a judgment shall be entered dismissing the proceeding and awarding the defendants their recoverable costs and disbursements. Recoverable costs and disbursements include (1) all expenses reasonably and necessarily incurred in preparing for the condemnation trial, during the trial, and in any subsequent judicial proceedings in the condemnation action and (2) reasonable attorney fees, appraisal fees, and fees for the services of other experts where such fees were reasonably and necessarily incurred to protect the defendant's interests in preparing for the condemnation trial, during the trial, and in any subsequent judicial proceedings in the condemnation action, whether such fees were incurred for services rendered before or after the filing of the complaint. In case of a partial abandonment, recoverable costs and disbursements shall include only those recoverable costs and disbursements, or portions thereof, which would not have been incurred had the property or property interest sought to be taken after the partial abandonment been the property or property interest originally sought to be taken. Recoverable costs and disbursements, including expenses and fees, may be claimed in and by a cost bill, to be prepared, served, filed, and taxed as in civil actions. Upon judgment of dismissal on motion of the plaintiff, the cost bill shall be filed within 30 days after notice of entry of such judgment.

(d) If, after the plaintiff takes possession of or the defendant moves from the property sought to be condemned in compliance with an order of possession, the plaintiff abandons the proceeding as to such property or a portion thereof or it is determined that the plaintiff does not have authority to take such property or a portion thereof by eminent domain, the court shall order the plaintiff to deliver possession of such property or such portion thereof to the parties entitled to the possession thereof and shall make such provision as shall be just for the payment of damages arising out of the plaintiff's taking and use of the property and damages for any loss or impairment of value suffered by the land and improvements after the time the plaintiff took possession of or the defendant moved from the property sought to be condemned in compliance with an order of possession, whichever is the earlier.

§ 1255b (repealed). Compensation and damages; interest

1255b. (a) The compensation and damages awarded in an eminent domain proceeding shall draw legal interest from the earliest of the following dates:

- (1) The date of the entry of judgment.

(2) The date that the possession of the property sought to be condemned is taken or the damage thereto occurs.

(3) The date after which the plaintiff may take possession of the property as stated in an order authorizing the plaintiff to take possession.

(b) If after the date that interest begins to accrue the defendant continues in actual possession of or receives rents, issues and profits from the property, the value of such possession and of such rents, issues and profits shall be offset against the interest that accrues during the period the defendant continues in actual possession or receives such rents, issues or profits.

(c) The compensation and damages awarded in an eminent domain proceeding shall cease to draw interest on the earliest of the following dates:

(1) As to any amount deposited pursuant to Section 1243.5, the date that such amount is withdrawn by the person entitled thereto.

(2) As to any amount paid into court pursuant to Section 1254, the date of such payment.

(3) As to any amount paid to the person entitled thereto, the date of such payment.

(4) If the full amount the defendant is then entitled to receive as finally determined in the eminent domain proceeding together with the full amount of the interest then due thereon is paid into court for the defendant after entry of judgment, the date of such payment.

§ 1256 (repealed). Applicable rules of practice

1256. Except as otherwise provided in this Title, the provisions of Part II of this Code are applicable to and constitute the rules of practice in the proceedings mentioned in this Title.

§ 1256.1 (repealed). Argument; defendant's right to open and close

1256.1. Notwithstanding the provisions of Part 2 of this code, in any action brought under the provisions of this title, the defendant shall commence and conclude the argument.

§ 1257 (repealed). New trials and appeals; applicable provisions; improvements pending new trial or appeal; application of money deposited

1257. The provisions of part II of this code, relative to new trials and appeals, except in so far as they are inconsistent with the provisions of this title, apply to the proceedings mentioned in this title; *provided*, that upon the payment of the sum of money assessed, and upon the execution of the bond to build the fences and cattle-guards, as provided in section twelve hundred and fifty-one, the plaintiff shall be entitled to enter into, improve, and hold possession of the property

sought to be condemned (if not already in possession) as provided in section twelve hundred and fifty-four, and devote the same to the public use in question; and no motion for new trial or appeal shall, after such payment and filing of such bond as aforesaid, in any manner retard the contemplated improvement. Any money which shall have been deposited, as provided in section twelve hundred and fifty-four, may be applied to the payment of the money assessed, and the remainder, if any there be, shall be returned to the plaintiff.

§ 1258 (repealed). Effective date; construction

1258. With relation to the Acts passed at the present session of the Legislature, this Title must be construed in the same manner as if this Code had been passed on the last day of this session, and from and after the time this Code takes effect, all laws of this State in relation to the taking of private property for public uses are abolished, and all proceedings had in the exercise of the powers of eminent domain must conform to the provisions of this Title.

§ 1259 (repealed). Effective date

1259. Title VII of Part III of THE CODE OF CIVIL PROCEDURE of the State of California (this Title) shall be in force and effect from and after the fourth day of April, one thousand eight hundred and seventy-two.

§ 1260 (repealed). Construction

1260. From and after the time this Title takes effect, it must be construed in the same manner as it would be were Sections 4 and 17 of this Code in force and effect.

§ 1261 (repealed). Pending proceedings; effect upon

1261. No proceeding to enforce the right of eminent domain commenced before this Title takes effect, is affected by the provisions of this Title.

§ 1262 (repealed). Rules of practice

1262. Until the first day of January, one thousand eight hundred and seventy-three, at twelve o'clock noon, the provisions of Sections 1256 and 1257 of this Title are suspended, and until then, except as otherwise provided in this Title, the rules of pleading and practice in civil actions now in force in this State are applicable to the proceedings mentioned in this Title, and constitute the rules of pleading and practice therein.

§ 1263 (repealed). Construction; statutes providing for taking for street purposes.

1263. Nothing in this Code must be construed to abrogate or repeal any statute providing for the taking of property in any city or town for street purposes.

§ 1264 (repealed). Preference; setting for trial and hearing

1264. In all actions brought under the provisions of this title, to enforce the right of eminent domain, all courts wherein such actions are or may hereafter be pending, shall give such actions preference over all other civil actions therein, in the matter of setting the same for hearing or trial, and in hearing the same, to the end that all such actions shall be quickly heard and determined.

§ 1264.1 (repealed). Franchise to collect tolls

1264.1. Where the property sought to be condemned is a franchise of limited duration to collect tolls on any bridge or highway, the plaintiff may condemn the right to take such franchise as of a future date, which date shall be specified in the complaint and in the judgment of condemnation.

Comment. Section 1264.1 and its implementing sections (Sections 1264.2–1264.6 and 1264.8), relating to condemnation of toll franchises of limited duration as of a future date, are not continued. These sections were of extremely limited application and are presently of little or no significance, for there appear to be no existing toll bridge or toll road franchises. In addition, these sections largely restated the rules of eminent domain that would be applicable in their absence. See Comment, *Work of the 1937 California Legislature*, 11 SO. CAL. L. REV. 1, 33–39 (1937).

For related provisions, see CODE CIV. PROC. § 1230.070 (“property” defined); STS. & HWYS. CODE §§ 30800 and 20810 (granting franchises); PUB. UTIL. CODE § 1403 (condemnation of utilities); CAL. CONST., Art. XII, § 8 (right of Legislature). See also former CODE CIV. PROC. §§ 1238⁽⁴⁾ and 1240⁽⁵⁾ and Comments thereto (condemnation of toll bridges and roads, and of franchises).

§ 1264.2 (repealed). Franchise to collect tolls; measure of damages

1264.2. The measure of damages in the case of a proceeding coming under section 1264.1 shall, except as provided in section 1264.3, be the value of the rights granted under said franchise for the period between said date and the expiration of said franchise, due considera-

tion, being had to the burdens as well as the benefits conferred by such franchise.

Comment. See Comment to former CODE CIV. PROC. § 1264.1

§ 1264.3 (repealed). Franchise to collect tolls; provision in franchise for acquisition of road or bridge; amount of compensation

1264.3. If provision was made in the franchise sought to be condemned or in the applicable statutes under which the franchise was granted for the acquisition of said toll bridge or toll road or said franchise by the county granting the franchise or by the counties, jointly acting, in which the toll bridge or toll road is situate, on the payment of the fair cash value of said toll bridge or toll road, without consideration of the value of the franchise, then and in that event, in any proceeding brought for the taking of such franchise, the compensation awarded shall not exceed the fair cash value of such toll bridge or toll road, exclusive of the value of the franchise.

Comment. See Comment to former CODE CIV. PROC. § 1264.1.

§ 1264.4 (repealed). Franchise to collect tolls; amendment of complaint on new trial

1264.4. If a new trial is granted or the judgment is reversed and remanded for a new trial, the plaintiff shall have the right as a matter of course, in cases coming under section 1264.1 to amend the complaint to specify a different date as of which said franchise shall be taken.

Comment. See Comment to former CODE CIV. PROC. § 1264.1.

§ 1264.5 (repealed). Franchise to collect tolls; affirmance on appeal; deduction of net receipts if plaintiff offered to pay judgment; net receipts defined; exception

1264.5. If the defendant appeals from the judgment and the judgment is affirmed in a case coming under Section 1264.1, the plaintiff shall be entitled to have deducted from the principal of the judgment to be paid the net receipts of tolls collected or collectible from the date for the taking as specified in the judgment to the date on which the judgment of the reviewing court becomes final, on showing that prior to the date specified for said taking the plaintiff was able to pay the said judgment and offered to pay the same to the defendant, or into court for his benefit, in return for a waiver of the appeal. The term

"net receipts" means the sum obtained by subtracting from the total amount of tolls collected or collectible the amounts actually and necessarily expended or incurred for operation and maintenance of said toll road or toll bridge during said period.

This section does not apply in those cases in which the plaintiff takes possession pending appeal pursuant to the provisions of Section 1254 or takes possession under the provisions of Section 14 of Article I of the Constitution.

Comment. See Comment to former CODE CIV. PROC. § 1264.1.

§ 1264.6 (repealed). Franchise to collect tolls; determination of deduction of net receipts; motion; jury trial

1264.6. To secure the deduction specified in Section 1264.5 the plaintiff must within 10 days after the remittitur is received from the reviewing court serve on the defendant and file in the superior court his motion to set for hearing the question of the deduction to be made. If, on the hearing of said motion, proof is made to the satisfaction of the court of plaintiff's ability to pay, and offer to pay, the judgment, as specified in Section 1264.5, the court shall grant the motion and shall fix a time for the determination of the amount to be deducted, which amount shall be determined by the court sitting without a jury unless plaintiff or defendant on or before the date of the hearing of said motion to set files with the court a demand in writing for a jury, in which case the said amount shall be determined by a jury.

Comment. See Comment to former CODE CIV. PROC. § 1264.1.

§ 1264.7 (repealed). Franchise to collect tolls; judgment and final judgment defined.

1264.7. The term "judgment" as used in this title means the judgment determining the right to condemn and fixing the amount of compensation to be paid by the plaintiff. The term "final judgment" as used in this title means such judgment when all possibility of direct attack thereon by way of appeal, motion for a new trial, or motion to vacate the judgment has been exhausted.

§ 1264.8 (repealed). Franchise to collect tolls; time for payment of judgment; extension; abandonment

1264.8. In any case brought under section 1264.1, the plaintiff shall have the full period specified in section 1251 in which to pay the judgment, but in case the period specified in that section expires prior to the date specified in the judgment for the taking of said franchise, the period shall be extended to and including the day preceding said specified date.

No abandonment shall be implied under section 1255a unless the judgment is not paid within the time herein specified.

Comment. See Comment to former CODE CIV. PROC. § 1264.1.

§ 1264.9 (repealed). Franchise to collect tolls; toll road or bridge; award to county, city, or public mandatory for taxes, etc.

1264.9. In any action for the acquisition hereunder of a toll road or toll bridge or the franchise for the collection of tolls thereon, the court in which such action is pending shall have jurisdiction to determine the liability of the condemning party to any county, city or other public mandatory for taxes, license fees or franchise payments and to determine the reversionary rights of any such county, city or other public mandatory in or to the franchise or property so sought to be acquired, and if, and in the event, any such liability be so determined against said condemning party, then and in that event an award shall be made to such county, city or other public mandatory, pursuant to the provisions of the law.

Comment. Section 1264.9—relating to the jurisdiction of the court to determine the liability of a condemnor for taxes, license fees, and franchise payments on, as well as reversionary interests of a city, county, or other public mandatory in, a toll bridge or toll road or franchise thereon—is not continued. The section was of little or no current significance, for there appear to be few existing private toll roads or bridges and no existing franchises for their operation. Moreover, the court has general jurisdiction to determine matters incident to the condemnation of property (*cf.* former CODE CIV. PROC. § 1247 (2) and Comment thereto) as well as specific jurisdiction to determine liability for taxes (see REV. & TAX. CODE § 4986; see also former CODE CIV. PROC. §§ 1252.1 and 1252.2 and Comments thereto).

§ 1265 (repealed). Acquisition of realty by public agency; purchase price as public information

1265. Whenever any public agency acquires real property by eminent domain, purchase, or exchange, the purchase price or other consideration paid by such agency shall be public information made available upon request from the agency concerned.

§ 1266 (repealed). Taking whole parcel where award for part would equal value of whole

1266. Whenever land is to be condemned by a county or city for the establishment of any street or highway, including express highways and freeways, and the taking of a part of a parcel of land by such condemning authority would leave the remainder thereof in such size or shape or condition as to require such condemnor to pay in compensation for the taking of such part an amount equal to the fair and reasonable value of the whole parcel, the resolution of the governing body of the city or county may provide for the taking of the whole of such parcel and upon the adoption of any such resolution it shall be deemed necessary for the public use, benefit, safety, economy, and general welfare that such condemning authority acquire the whole of such parcel.

Comment. Section 1266 is superseded by Section 1240.420 of the Code of Civil Procedure.

§ 1266.1 (repealed). Acquisition by gift or purchase; purposes

1266.1. A county or a city may acquire land by gift or purchase from the owner thereof for any of the purposes enumerated in Section 1266 of this code.

Comment. Section 1266.1 is superseded by Section 1240.410 of the Code of Civil Procedure.

§ 1266.2 (repealed). Compensation or fee for appraisers, referees, commissioners, etc.

1266.2. In any action or proceeding for the purpose of condemning property where the court may appoint appraisers, referees, commissioners, or other persons for the purpose of determining the value of such property and fixing the compensation thereof, and may fix their fees or compensation the fee or compensation shall not exceed fifty dollars (\$50) a day.

§ 1267 (repealed). Expert witnesses; limitations

1267. (a) Notwithstanding any other provision of law, only two experts shall be permitted to testify for any party as to each parcel in an eminent domain proceeding; but, for good cause shown, the court may permit one or more additional experts to testify for any party. If one or more experts are regularly employed and paid as such by the plaintiff, at least one of the experts who is called as a witness by the plaintiff may be such an employee.

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

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

Chapter 2. Exchange of Information in Eminent Domain Proceedings

§ 1272.01 (repealed). Exchange of lists of expert witnesses and statements of valuation data

1272.01. (a) Not later than 50 days prior to the day set for the trial, any party to an eminent domain proceeding may serve upon any adverse party and file a demand to exchange lists of expert witnesses and statements of valuation data.

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

(c) The demand or cross-demand shall:

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

(2) Include a statement in substantially the following form: "You are required to serve and deposit with the clerk of court a list of expert witnesses and statements of valuation data in compliance with Chapter 2 (commencing with Section 1272.01) of Title 7 of Part 3 of the Code of Civil Procedure not later than 20 days prior to the day set for trial. Except as otherwise provided in that chapter, your failure to do so will constitute a waiver of your right to call unlisted expert witnesses during your case in chief and of your right to introduce on direct examination during your case in chief any matter that is required to be, but is not, set forth in your statements of valuation data."

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

(e) The clerk of the court shall make an entry in the register of actions for each list of expert witnesses and statement of valuation data deposited with him pursuant to this chapter. The lists and statements shall not be filed in the proceeding, but the clerk shall make them available to the court at the commencement of the trial for the limited purpose of enabling the court to apply the provisions of this chapter.

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

§ 1272.02 (repealed). Statement of valuation data; persons from whom exchanged; contents

1272.02. (a) A statement of valuation data shall be exchanged for each person intended to be called as a witness by the party to testify to his opinion as to any of the following matters:

- (1) The value of the property or property interest being valued.
- (2) The amount of the damage, if any, to the remainder of the larger parcel from which such property is taken.
- (3) The amount of the special benefit, if any, to the remainder of the larger parcel from which such property is taken.

(b) The statement of valuation data shall give the name and business or residence address of the witness and shall include a statement whether the witness will testify to an opinion as to any of the matters listed in subdivision (a) and,

as to each such matter upon which he will give an opinion, what that opinion is and the following items to the extent that the opinion on such matter is based thereon:

- (1) The estate or interest being valued.
- (2) The date of valuation used by the witness.
- (3) The highest and best use of the property.
- (4) The applicable zoning and the opinion of the witness as to the probability of any change in such zoning.
- (5) The sales, contracts to sell and purchase, and leases supporting the opinion.
- (6) The cost of reproduction or replacement of the existing improvements on the property, the depreciation or obsolescence the improvements have suffered, and the method of calculation used to determine depreciation.
- (7) The gross income from the property, the deductions from gross income, and the resulting net income; the reasonable net rental value attributable to the land and existing improvements thereon, and the estimated gross rental income and deductions therefrom upon which such reasonable net rental value is computed; the rate of capitalization used; and the value indicated by such capitalization.
- (8) If the property is a portion of a larger parcel, a description of the larger parcel and its value.

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

- (1) The names and business or residence addresses, if known, of the

parties to the transaction.

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

(3) The date of the transaction.

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

(5) The price and other terms and circumstances of the transaction.

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

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

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

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

§ 1272.03 (repealed). List of expert witnesses; contents

1272.03. The list of expert witnesses shall include the name, business or residence address, and business, occupation, or profession of each person intended to be called as an expert witness by the party and a statement as to the subject matter to which his testimony relates.

§ 1272.04 (repealed). Notice to persons upon whom list and statements served of additional witnesses or data; form

1272.04. (a) A party who is required to exchange lists of expert witnesses and statements of valuation data shall diligently give notice to the parties upon whom his list and statements were served if, after service of his list and statements, he:

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

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

(3) Discovers any data required to be listed in a statement of valua-

tion data but which was not so listed.

(b) The notice required by subdivision (a) shall include the information specified in Sections 1272.02 and 1272.03 and shall be in writing; but such notice is not required to be in writing if it is given after the commencement of the trial.

§ 1272.05 (repealed). Limitations upon calling witnesses and testimony by witnesses

1272.05. Except as provided in Section 1272.06, upon objection of any party who has served his list of expert witnesses and statements of valuation data in compliance with Section 1272.01:

(a) No party required to serve a list of expert witnesses may call an expert witness to testify on direct examination during the case in chief of the party calling him unless the information required by Section 1272.03 for such witness is included in the list served by the party who calls the witness.

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

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

§ 1272.06 (repealed). Grounds for court authority to call witness or permit testimony by witness

1272.06. (a) The court may, upon such terms as may be just, permit a party to call a witness, or permit a witness called by a party to testify to an opinion or data on direct examination, during the party's case in chief where such witness, opinion, or data is required to be, but is not, included in such party's list of expert witnesses or statements of valuation data if the court finds that such party has made a good faith effort to comply with Sections 1272.01 to 1272.03, inclusive, that he has complied with Section 1272.04, and that, by the date of the service of his list and statements, he:

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

(2) Failed to determine to call such witness or to discover or list such opinion or data through mistake, inadvertence, surprise, or ex-

cusable neglect.

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

§ 1272.07 (repealed). Applicability of chapter

1272.07. This chapter does not apply in any eminent domain proceeding in any county having a population in excess of 4,000,000 in which a pretrial conference is held.

§ 1272.08 (repealed). Use of discovery procedures

1272.08. The procedure provided in this chapter does not prevent the use of discovery procedures or limit the matters that are discoverable in eminent domain proceedings. Neither the existence of the procedure provided by this chapter, nor the fact that it has or has not been invoked by a party to the proceeding, affects the time for completion of discovery in the proceeding.

§ 1272.09 (repealed). Admissibility of evidence

1272.09. Nothing in this chapter makes admissible any evidence that is not otherwise admissible or permits a witness to base an opinion on any matter that is not a proper basis for such an opinion.

**Chapter 3. Arbitration of Compensation in
Acquisitions of Property for Public Use**

§ 1273.01 (repealed). Public entity defined

1273.01. As used in this chapter, "public entity" includes the state, the Regents of the University of California, a county, city, district, public authority, public agency, and any other political subdivision or public corporation in the state.

Comment. Section 1273.01 is not continued because it is unnecessary. See CODE CIV. PROC. § 1230.090.

§ 1273.02 (repealed). Person authorized to enter arbitration agreement; "person" defined

1273.02. (a) Any person authorized to acquire property for public use may enter into an agreement to arbitrate any controversy as to the compensation to be made in connection with the acquisition of the property.

(b) Where property is already appropriated to a public use, the person authorized to compromise or settle the claim arising from a

taking or damaging of such property for another public use may enter into an agreement to arbitrate any controversy as to the compensation to be made in connection with such taking or damaging.

(c) For the purposes of this section, in the case of a public entity, "person" refers to the particular department, officer, commission, board, or governing body authorized to acquire property on behalf of the public entity or to compromise or settle a claim arising from the taking or damaging of the entity's property.

Comment. Section 1273.02 is continued without substantive change in Code of Civil Procedure Section 1265.010.

§ 1273.03 (repealed). Expenses and fees payable by party acquiring property; fees of any other party payable by agreement; source of funds

1273.03. (a) Notwithstanding Sections 1283.2 and 1284.2, the party acquiring the property shall pay all of the expenses and fees of the neutral arbitrator and the statutory fees and mileage of all witnesses subpoenaed in the arbitration, together with other expenses of the arbitration incurred or approved by the neutral arbitrator, not including attorney's fees or expert witness fees or other expenses incurred by other parties for their own benefit.

(b) An agreement authorized by this chapter may require that the party acquiring the property pay reasonable attorney's fees, or expert witness fees, or both, to any other party to the arbitration. If the agreement requires the payment of such fees, the amount of the fees is a matter to be determined in the arbitration proceeding unless the agreement prescribes otherwise.

(c) The party acquiring the property may pay the expenses and fees referred to in subdivisions (a) and (b) from funds available for the acquisition of the property or other funds available for the purpose.

Comment. Section 1273.03 is continued without substantive change in Code of Civil Procedure Section 1265.020.

§ 1273.04 (repealed). Applicability of Title 9; exceptions

1273.04. (a) Except as specifically provided in this chapter, agreements authorized by this chapter are subject to Title 9 (commencing with Section 1280) of this part.

(b) An agreement authorized by this chapter may be made whether or not an eminent domain proceeding has been commenced to acquire the property. If an eminent domain proceeding has been commenced or is commenced, any petition or response relating to the arbitration shall be filed and determined in the eminent domain proceeding.

(c) Notwithstanding Section 1281.4, an agreement authorized by this chapter does not waive or restrict the power of any person to

commence and prosecute an eminent domain proceeding, including the taking of possession prior to judgment, except that, upon motion of a party to the eminent domain proceeding, the court shall stay the determination of compensation until any petition for an order to arbitrate is determined and, if arbitration is ordered, until arbitration is had in accordance with the order.

(d) The effect and enforceability of an agreement authorized by this chapter is not defeated or impaired by contention or proof by any party to the agreement that the party acquiring the property pursuant to the agreement lacks the power or capacity to take the property by eminent domain proceedings.

(e) Notwithstanding the rules as to venue provided by Sections 1292 and 1292.2, any petition relating to arbitration authorized by this chapter shall be filed in the superior court in the county in which the property, or any portion of the property, is located.

Comment. Section 1273.04 is continued without substantive change in Code of Civil Procedure Section 1265.030.

§ 1273.05 (repealed). Abandonment of proceedings; time

1273.05. (a) Except as provided in subdivision (b), an agreement authorized by this chapter may specify the terms and conditions under which the party acquiring the property may abandon the acquisition, the arbitration proceeding, and any eminent domain proceeding that may have been, or may be, filed. Unless the agreement provides that the acquisition may not be abandoned, the party acquiring the property may abandon the acquisition, the arbitration proceeding, and any eminent domain proceeding at any time not later than the time for filing and serving a petition or response to vacate an arbitration award under Sections 1288 and 1288.2.

(b) If the proceeding to acquire the property is abandoned after the arbitration agreement is executed, the party from whom the property was to be acquired is entitled to recover (1) all expenses reasonably and necessarily incurred (i) in preparing for the arbitration proceeding and for any judicial proceedings in connection with the acquisition of the property, (ii) during the arbitration proceeding and during any judicial proceedings in connection with the acquisition, and (iii) in any subsequent judicial proceedings in connection with the acquisition and (2) reasonable attorney's fees, appraisal fees, and fees for the services of other experts where such fees were reasonably and necessarily incurred to protect his interests in connection with the acquisition of the property. Unless the agreement otherwise provides, the amount of such expenses and fees shall be determined by arbitration in accordance with the agreement.

Comment. Section 1273.05 is continued without substantive change in Code of Civil Procedure Section 1265.040.

§ 1273.06 (repealed). Agreements acknowledged, recorded, and re-recorded; notice; memorandum

1273.06. (a) An agreement authorized by this chapter may be acknowledged and recorded, and rerecorded, in the same manner and with the same effect as a conveyance of real property except that two years after the date the agreement is recorded, or rerecorded, the record ceases to be notice to any person for any purpose.

(b) In lieu of recording the agreement, there may be recorded a memorandum thereof, executed by the parties to the agreement, containing at least the following information: the names of the parties to the agreement, a description of the property, and a statement that an arbitration agreement affecting such property has been entered into pursuant to this chapter. Such memorandum when acknowledged and recorded, or rerecorded, in the same manner as a conveyance of real property has the same effect as if the agreement itself were recorded or rerecorded.

Comment. Section 1273.06 is continued without substantive change in Code of Civil Procedure Section 1265.050.