

#36.20(1)

7/20/71

Memorandum 71-54

Subject: Study 36.20(1) - The Right to Take (Legislatively Declared "Public Uses")

This memorandum presents for repeal the balance of Code of Civil Procedure Sections 1238-1238.7, declaring that the right of eminent domain might be exercised for certain public uses. The general scheme of the Commission's Eminent Domain Code is to avoid a listing of public uses and simply to state that, where a person has been authorized to condemn for a particular purpose, that purpose is a public use. Eminent Domain Code Section 300.

Many of the provisions presented in this memorandum have not been previously considered by the Commission. However, the Comments to the various repealed sections should be sufficiently explanatory and able to speak for themselves. Minor editorial changes have been made in some of the previously approved Comments. These changes are technical only and need not be reviewed. New material is listed below:

Section 1238. The Comment at the beginning is new.

Subdivision 3. (numerous uses) new.

Subdivision 4. (numerous uses) new.

Subdivision 7. (communications) new.

Subdivision 11. (quarrying, logging) new.

Subdivision 12. (electricity) new.

Subdivision 13. (electricity) new.

Subdivision 17. (gas, heat, refrigeration) new.

Subdivision 18. (protective) Comment is new.

Subdivision 20. (airports) see Memorandum 71-45.

Section 1238.4. (Public assembly facilities) new.

Section 1238.5. (Irrigation) new.

Section 1238.6. (Flood control) new.

Conforming adjustments. In addition to the repeal of the public use sections listed above, adjustments must be made in two related sections:

Public Utilities Code Section 7526 (amended). The repeal of Section 1238(4) and the adoption of Public Utilities Code Section 611 renders the eminent domain authority expressed in Section 7526 (railroads) useless. It should be revised accordingly.

Water Code Section 22425 (amended). The repeal of subdivision 3 of Section 1238, relating to public buildings and grounds, necessitates the addition of condemnation authority for public buildings and grounds in Section 22425 (irrigation districts).

The staff does not believe the repeal of the sections listed above involves any policy determinations that have not already been made. As a consequence, we do not intend to discuss them in detail at the next meeting. Please note any matters you believe should be discussed by the Commission. Two copies of the affected sections, with Comments, are attached to this memorandum. Please make any editorial changes you have, and return them to the staff at the meeting.

Respectfully submitted,

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Code of Civil Procedure § 1238 (repealed)

Sec. . Section 1238 of the Code of Civil Procedure is repealed.

~~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 12, 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~~

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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.

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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-posses-
sors-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-con-
nection-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-lumber-
ing-purposes.

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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.

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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-incuring-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,-how-
ever,-that-the-right-of-eminent-domain-in-behalf-of-the-public-uses-men-
tioned-in-this-subdivision-may-be-exercised-only-for-the-purposes-of
restoring-or-replacing,-in-whole-or-in-part,-public-records,-or-the-sub-
stance-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,

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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

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~~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 Eminent Domain Code. The motivation behind this section was the constitutional requirement that property be taken by eminent domain only for a public use. See Cal. Const., Art. I, § 14. The legislative listing of public uses was intended to satisfy this requirement by providing a definitive schedule. 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 in the eyes of the constitution. See Comment to Section 300 of the Eminent Domain Code.

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The scheme of the Eminent Domain Code renders this listing unnecessary. Basically, the power of eminent domain may be exercised to acquire property only by a person authorized by statute to exercise the power for a particular use. Eminent Domain Code Section 301. The authorization to acquire property for a particular use amounts to a legislative declaration that that use is a public use. Eminent Domain Code Section 300. Therefore, there is no need to maintain a separate listing of public uses.

Under the scheme of the Eminent Domain Code, the state (Government Code Section 15853) and cities (Government Code Section 37350.5), counties (Government Code Section 25350.5), and school districts (Education Code Section 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 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 overwhelming majority of special districts have, by virtue of their enabling statutes, general authority to condemn

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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 City of Marysville Levee District (Cal. Stats. 1875-1876, 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 the right to condemn. However, separately enacted provisions in other codes continue the right of some types of private persons to condemn for certain public uses. Privately-owned public utilities may condemn for utility purposes. Public Utilities Code Sections 610-624. Mutual water companies may condemn for irrigation of lands that they furnish with water. Public Utilities Code Section 2729. Land chest corporations (Health and Safety Code Section 35167) and limited dividend housing corporations (Health and Safety Code Section 34874) may condemn property for their projects. Nonprofit hospitals may acquire property for their purposes. Health and Safety Code Section 1427. Nonprofit educational institutions of collegiate grade may condemn to carry out their functions. Education Code Section 30051. Although private persons may no longer condemn for sewers or byroads, they may request the appropriate authority to undertake such condemnation on their behalf. Health & Saf. Code § 4967 (sewers); Sts. & Hwys. Code § 4120.1 (byroads).

There follows below an indication where, in other codes, the authorization to condemn for specific public uses formerly listed in Section 1238 can

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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 Code, 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 Eminent Domain Code Sections 101 ("property" defined), 303, and 304 (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 Commissioner's 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 authorizes takings for state purposes, it is unnecessary because it has been superseded by the much broader condemnation

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powers conferred upon the Director of the Department of General Services and the State Public Works Board. See Govt. Code §§ 14660-14662. See also Govt. Code §§ 15853-15858. Insofar as the subdivision might authorize 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 taking 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

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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). The apparent original intent of the provision was to authorize only the taking of property owned by public utilities, as evidenced by other statutes enacted the same year relating to condemnation of public utility property. Compare Cal. Stats. 1913, Ch. 291, § 1, p. 544 with Cal. Stats. 1913, Ch. 339, § 1, p. 683. See also Cal. Stats. 1913: Ch. 292, § 1, p. 547; Ch. 293, § 1, p. 549; Ch. 200, § 1, p. 349; Ch. 298, § 1, p. 555; Ch. 158, § 1, p. 239; Ch. 159, § 1, p. 240; Ch. 160, §1, p. 241.

To the extent this provision authorized the acquisition of property belonging to a public utility, it was superfluous. See Pub. Util. Code § 10002; former Code Civ. Proc. §§ 1240(3), (4), (5), and 1241(3). See also Pub. Util. Code §§ 1401-1421 and former Code Civ. Proc. §§ 1264.1-1264.9. Cf. Comment, Eminent Domain Powers Exercisable Over California Property by Oil and Gas Corporations, 7 U.C.L.A. 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

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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 Section 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 Eminent Domain Code Section 304; 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

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"property," the authorization subsumes particular types of property, such as those mentioned in subdivision 13: ponds, lakes, canals, aqueducts, reservoirs, tunnels, flumes, ditches, or pipes, lands, water system plants, buildings, rights of any nature in water, any other "character or property." See Eminent Domain Code Section 101 ("property" defined). 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. Eminent Domain Code Sections 304 and 400. See also Section 401 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 or 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: Streets and Highways Code Sections 5101(h), 5102, 100010, 10100(a), 10101-10102 (cities and counties); Government Code Sections 54309(a), 54340-54341 ("local agencies," including cities and counties), 38730 (city), 25353, 25662, 25691 (county), 15853 (state institutions); Water Code Section 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

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city, city or 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 the people 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 Development 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."

The authority of the state to condemn for drainage is expressed in Government Code Section 15853. See also Water Code Section 8304. The authority

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granted to cities and counties to condemn for drainage is continued in the following sections: Streets and Highways Code Sections 5101(d), 5102; Government Code Sections 39040, 40404(b)(cities only); Water Code Appendix Sections 42-45 (Uncodified Water Acts 2208 Section 5) (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 water districts authorized to provide drainage. See, e.g., Govt. Code §§ 61610, 61600 (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. Ventura Co., 45 Cal.2d 276, 289 P.2d 1 (1955)), private persons may not condemn to supply drainage. Sewer system corporations may provide drainage (Public Utilities Code Section 230.5) and may condemn for that purpose (Section 624). being public utilities (Section 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 Section 1238.6. See also stream improvements, immediately below.

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Stream improvements. The authority to condemn for 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 Sections 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: Government Code Sections 39901, 40404(c) (cities may alter channels), 25680-25684 (county control of streams and floodwaters), 54152 ("local agency" action for flood relief); Health and Safety Code Section 2270(d) (mosquito abatement district may raise banks); Streets and Highways Code Section 965 (county stream improvements for highway

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protection); Water Code Sections 12934(3)(state water development projects), 8110, 8126 (county stream improvements), 8631, 8590(a)(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., Sts. & Hwys. Code §§ 104 (state for state highway), 941-943 (county for county highway), 25050 (joint highway district); Govt. Code § 38304 (city for extra-urban highways); Sts. & Hwys. Code § 4090 (county for streets); Govt. Code §§ 37353, 39934, 40404(a); Sts. & Hwys. Code § 4090 (city for streets); Pub. Res. Code §§ 5157 (county for boulevards), 5301 (city for boulevards), 5541-5542 (regional park districts for boulevards); Sts. & Hwys. Code § 26113 (boulevard districts). 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).

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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 Eminent Domain Code § 101 ("property" defined). 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--Government Code Section 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 (Public Resources Code Section 5150), and counties may acquire land for federal parks (Public Resources Code Section 8402).

Special districts having the power to condemn for public parks include community facilities districts (Government Code Sections 61600(e), 61610), public utility districts (Public Utilities Code Sections 16404, 16463), recreation and park districts (Public Resources Code Sections 5782.2, 5782.5;

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but see Sections 4700-4791--districts with powers not including eminent domain), and regional park districts (Public Resources Code Sections 5541-5542).

All other public uses. The authority to condemn for all uses authorized by the Legislature is superseded by Section 300 of the Eminent Domain Code, 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 person, 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 manner provided in their authorizing statutes is not continued. With the repeal of Section 1238 of the Code of Civil Procedure, 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.

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. Los Angeles, 160 Cal. 317, 323, P. , (1911). Since cities and counties have general authority to condemn for proper city or county functions, Los Angeles v. Koyer, 48 Cal. App. 720, 192 P. 301 (1920) does not deprive a city or county of the power to condemn for a warehouse apart from a wharf if the city or county has authority to construct and operate such warehouse.

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); Harb. & Nav. Code §§ 6295, 6296, 6307 (Port Districts); Harb. & Nav. Code §§ 6895, 6896 (River Port Districts); Harb. & Nav. Code §§ 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.

Ferries. The authority to condemn for ferries is continued in other sections. Cities, counties, and cities and counties are fully 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. Privately owned public ferry systems are a common carrier (Public Utilities Code Section 211(b)) and may not operate unless granted a franchise by the Department of Public Works or by the city within which they provide service. Sts. & Hwys. Code §§ 30800-30902. See also Civil Code §§ 528-531. As common carriers, the ferries are also public utilities (Public Utilities Code Section 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, p. 183, amended Cal. Stats. 1864, Ch. 196, p. 192. For legislative intent, see 2 Cal. Code Civ. Proc. Ann. § 1238 at 102, n. 5 (Haymond & Burch 1872). 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); Sts. & Hwys. Code § 27165 (County Bridge and Highway Districts); Sts. & Hwys. Code §§ 31000-31010 (Gold Rush Parkway). Private toll bridge corporations (defined in Public Utilities Code Section 237) are a public utility. 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 Cal. Code Civ. Proc. §§ 1264.1-1264.9 (condemnation of toll bridge franchises). If the power to condemn property for a specific privately owned toll bridge is to be granted, it should be granted in the statute authorizing the particular bridge.

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 (Streets and Highways Code Section 30800) unless the franchise was granted prior to August 14, 1929 (Section 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 appears to be 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, p. 169. 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, 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 non-vehicles. 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 bicycle, and the like, paths, and roads 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., Sts. & Hwys. Code §§ 951 (county may construct "sidepaths" along highways), 5101(b), 5102 (city and county construction of sidewalks and parkways). See also Vehicle Code § 21207 (bicycle regulations not to be construed to deny right to construct bicycle lanes). But see Sts. & Hwys. Code § 105.5 (state may construct pedestrian and bicycle paths but the right of eminent domain not available).

[NOTE: In the 1971 Legislature there are pending several bills to grant other express authority for bicycle paths and lanes. See Senate Bills 90, 265, 1100; Assembly Bill 1377.]

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 & San Joaquin Valley Ry. v. Leviston, 134 Cal. 412, 66 P. 473 (1901); Central Pac. Ry. v. Feldman, 152 Cal. 303, 92 P. 849 (1907)). 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. § 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 Eminent Domain Code Section 101 ("property" defined). 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), 50903 (reclamation districts).

In addition, a water corporation, as a public utility (Public Utilities Code Section 216; see also Civil Code Sections 548-552) may condemn (Section 618) for irrigation purposes (Section 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, dams, poundings, flumes, 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 as superfluous. Although this grant of authority has been held to be a public use, it has also been construed to be a grant of authority for irrigation purposes. See Lux v. Haggin, 69 Cal. 255, 304, 4 P. 919, ___, 10 P. 647, ___ (1886). As a consequence, those public entities authorized to supply irrigation (see discussion above) are likewise authorized to supply farming neighborhoods with water.

This grant of authority could be interpreted as bestowing an added power upon private farms to condemn for their own use. As such, it has been held to be a 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. Mehrtens, 97 Cal. 676, 32 P. 802 (1893); Lux v. Haggin, 69 Cal. 255, 4 P. 919, 10 P. 647 (1886). As a consequence, 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. 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 Section 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.

The authority of the state to condemn for reclamation is continued 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 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

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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 is authorized rather than land reclamation. See Pub. Util. Code § 240.

Generally, the authority to provide for reclamation of land overlaps with 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 Section 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 51 A.L.R. 1199 (1927); Cf. People v. Elk River M. & L. Co., 107 Cal. 221 (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 Pub. Util. Code § 2729.

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 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. Eminent Domain Code § 490. With regard to the right of a municipality to condemn property beyond its jurisdictional limits in aid of supplying water for domestic use and irrigation, municipalities are expressly granted the right by statute. 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 No. Sacramento v. Citizens Util. Co., 192 Cal. App.2d 482, 13 Cal. Rptr. 538 (1961). See also Eminent Domain Code § 490.

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, of course, may no longer condemn at all unless it is a water corporation--a public utility. 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. 1870, Ch. CCCCIV, p. 569), 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. Sutter County 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. Co., 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, § 1, p. 2935). See Black Rock Placer Mining Dist. v. Summit Water & Irrigation 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

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Controller. See Financial Transactions Concerning Special Districts in California (Cal. State Controller 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, there being no case precisely in 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 his adjoining property). 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.

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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," being the word preferred in British usage. See Webster's Third New International Dictionary (1961) at 1872, 2624.)

The state has a teletype system (Government Code Sections 14710, 14711) and the Department of Justice maintains a statewide telecommunication system for the use of law enforcement agencies (Government Code Section 15152). In addition, the Department of General Services is authorized to acquire, construct, and maintain communications systems and facilities available to all public agencies 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. Public Utilities Code Sections 10001-10004, 10101; Government Code Sections 39732, 39790, 39792, 25350.5, 37350.5; Streets and Highways Code Sections 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 §§ 616, 617, 233-236. 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, however, 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. 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 Nichols, Eminent Domain § 2.15 (1964)).

Subdivision 8

Insofar as subdivision 8 authorizes condemnation by public entities, it is unnecessary. Cities have general condemnation authority for connection to sewer systems. E.g., Govt. Code §§ 37350.5, 38900, 40404. See also Govt. Code §§ 39040, 55003, 54340; 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 authority 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.

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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 purpose specified in legislation making funds available for a project. 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 Clymer, Album of Historical Steam Traction Engines (1949);

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

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. See Sts. & Hwys. Code § 104(c) and Govt. Code § 39793.

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 Eminent Domain Code § 101 ("property" defined).

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 duplicates, and is broader than, that found in subdivision 13.

The power of local public entities to condemn for the purposes listed above 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).

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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 Eminent Domain Code § 101 ("property" defined).

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Insofar as subdivision 13, specifically authorized takings for future use, it is continued in the Eminent Domain Code; 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. Eminent Domain Code § 400. See also § 401 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 duplicates, and is narrower than, that found in subdivision 12.

For a listing of statutes authorizing condemnation for the purposes specified in subdivision 13, 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 and Safety Code Section 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 and Safety Code Section 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 (Government Code Section 15853), cities (Government Code Section 37350.5; see also Government Code Section 50331), counties (Government Code Section 25350.5; see also Government Code Sections 25900-25908), district agricultural associations (Government Code Section 15853; see also Agricultural Code Section 4051), and citrus fruit fairs (Government Code Section 15853; see also Agricultural Code Section 4701). Private fair corporations (e.g., Civil Code Section 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,

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§ 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 character necessary for the purpose." See Eminent Domain Code § 101 ("property" defined). 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. Eminent Domain Code § 400; see also § 401, for limitations on acquisition for future use.

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The authority granted by subdivision 17 to condemn property necessary for the 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 justification for continuing a general condemnation authority for refrigeration. Insofar as a railroad company, for example, supplies "refrigeration" in connection with the transportation of property (see Public Utilities Code Sections 209, 210), such company 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., Streets and Highways Code Sections 5101(i), 5102 (Improvement Act of 1911--gas), 10010, 10100(c), 10101-10102 (Municipal Improvement Act of 1913--gas, heat, power); Government Code Section 39732 (cities--gas, heat, power); Public Utilities Code Sections 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.

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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 Public Utilities Code Section 222) may condemn property (Section 613) for its gas plant (Section 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 Public Utilities Code Section 224) may condemn property (Section 614) for its heating plant (Section 223).

Subdivision 18

Subdivision 18 is unnecessary because Section 304 of the Eminent Domain Code provides general authority to condemn property necessary for protective purposes, and this general authority permits condemnation to provide for the culture and growth of trees along highways. See also Streets and Highways Code Section 104(f), which authorizes the taking of property by the Department of Public Works.

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Subdivision 19

Subdivision 19 duplicates authority found elsewhere in the codes to condemn for fish conservation purposes. The power of state agencies to condemn is found in the general authorization of Government Code Section 15853 and the more specific grants to specific agencies. E.g., Water Code §§ 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 and Game Code Sections 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 and Water Conservation Dist. v. Hughes, 201 Cal. App.2d 197, 20 Cal. Rptr. 252 (1962), in which the district's power to condemn for recreational purposes was upheld based upon a general condemnation power in its authorizing statute plus policy statements in the Water Code that fish and wildlife values, both economic and recreational, were to be given consideration in any flood control or water conservation program. 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);

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Pub. Util. Code §§ 21633 (State Department of Aeronautics), 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 is unnecessary because it merely duplicates 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.

Code of Civil Procedure § 1238.4 (repealed)

Sec. . Section 1238.4 of the Code of Civil Procedure is repealed.

~~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-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 Section 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 Section 1238 of the Code of Civil Procedure. 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 Section 1238 of the Code of Civil Procedure.

Although public assembly facilities are a public use (see, e.g., Los Angeles County 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 Section 1001 of the Civil Code and Comment thereto.

The authority contained in former Section 1238.4 to condemn for off-street parking servicing public assembly facilities is repealed because it duplicates broader and more general authority to condemn for off-street parking. See Comment to former Section 1238.1 of the Code of Civil Procedure.

The authority contained in former Section 1238.4 to condemn for access to public assembly facilities is repealed as unnecessary. 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 Eminent Domain Code Section 304.

Code of Civil Procedure § 1238.5 (repealed)

Sec. . Section 1238.5 of the Code of Civil Procedure is repealed.

~~1238.5.--Irrigation-is-a-public-use-in-behalf-of-which-the-right
of-eminant-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 Section 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. See former Civil Code § 1001 and Comment thereto. 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.

Code of Civil Procedure § 1238.6 (repealed)

Sec. . Section 1238.6 of the Code of Civil Procedure is repealed.

~~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 Code is to eliminate a listing of general public uses and to rely instead on specific legislative authorizations to condemn. Generally speaking, the state (Government Code Section 15853), cities (Government Code Section 37350.5), and counties (Government Code Section 25350.5) may condemn for any of their functions. Special districts may condemn if expressly authorized to do so. Private persons may not condemn.

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,

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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 Pub. Res. Code §§ 3315-3347 (land subsidence in oil and gas pool areas), 6303 (flood control policy declaration); Health & Saf. Code §§ 4602.4(e), 4627 (flood control by municipal utilities); Govt. Code §§ 25680-25684 (flood control by counties).

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 Section 1238.

Public Utilities Code § 7526 (amended)

Sec. . Section 7526 of the Public Utilities Code is amended to read:

7526. Every railroad corporation has all of the following powers:

(a) To make such examination and surveys as are necessary to the selection of the most advantageous route for the railroad. The officers, agents, and employees of the corporation may enter upon the lands or waters of any person, for this purpose, subject to liability for all damages which they do thereto.

(b) To receive, hold, take, and convey, by deed or otherwise, as a natural person, such voluntary grants and donations of real estate and other property as are made to it to aid and encourage the construction, maintenance, and accommodation of the railroad.

(c) To purchase, or by voluntary grants or donations to receive, enter, take possession of, hold, and use all such real estate and other property as is necessary for the construction and maintenance of such railroad, and for all stations, depots, and other purposes necessary to successfully work and conduct the business of the road.

(d) To lay out its road, not exceeding 10 rods wide, and to construct and maintain it, with one or more tracks, and with such appendages and adjuncts as are necessary for the convenient use of the road.

(e) To construct its roads across, along, or upon any stream of water, watercourse, roadstead, bay, navigable stream, street, avenue, or highway, or across any railway, canal, ditch, or flume which the

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route of its road intersects, crosses, or runs along, in such manner as to afford security for life and property. The corporation shall restore the stream or watercourse, road, street, avenue, highway, railroad, canal, ditch, or flume thus intersected to its former state of usefulness as near as may be, or so that the railroad does not necessarily impair its usefulness or injure its franchise.

(f) To cross, intersect, join, or unite its railroad with any other railroad, either before or after construction, at any point upon its route, and upon the grounds of the other railroad corporation, with the necessary turnouts, sidings, and switches, and other conveniences in furtherance of the objects of its connections. Every corporation whose railroad is intersected by any new railroad shall unite with the owners of the new railroad in forming the intersections and connections, and grant facilities therefor. If the two corporations cannot agree upon the amount of compensation to be made therefor, or the points or the manner of the crossings, intersections, and connections, such matters shall be ascertained and determined as is provided in Title 7, Part 3 of the Code of Civil Procedure.

(g) To ~~purchase~~ acquire lands, timber, stone, gravel, or other materials to be used in the construction and maintenance of its road, and all necessary appendages and adjuncts ~~, -or-acquire-them-in-the manner-provided-in-Title-7,-Part-3-of-the-Code-of-Civil-Procedure,-for the-condemnation-of-lands~~ .

(h) To change the line of its road, in whole or in part, whenever a majority of the directors so determine, as provided in Section 7531, but the change shall not vary the general route of the road, as contemplated in its articles of incorporation.

Comment. The authority to condemn for lands, timber, stone, gravel, or other materials used in the construction or maintenance of a railroad is deleted from subdivision (g) of Section 7526 because it duplicates and is more restrictive than the general power of railroad corporations to condemn any property necessary for the construction and maintenance of its railroad provided by Section 611.

IRRIGATION DISTRICTS

Water Code § 22425 (amended)

Sec. . Section 22425 of the Water Code is amended to read:

22425. A district may acquire by any means any property or interest in property to carry out its purposes, including any of the following:

(a) Property for the construction, improvement, and operation of works in this state or in any other state or in a foreign nation.

(b) Works being constructed.

(c) Stock of domestic or foreign corporations owning water, water rights, canals, waterworks, franchises, concessions, or rights.

(d) Works by which land has been or may be supplied with water for irrigation.

(e) Property not otherwise authorized herein that may be required as a condition to obtaining state financial assistance for local projects as set forth in Chapter 5 (commencing with Section 12880), of Part 6, Division 6, of the Water Code.

(f) Public buildings and grounds.

Comment. Subdivision (f) is added to Section 22425 of the Water Code to preserve the authority of irrigation districts to condemn property for public buildings and grounds for their use. This addition was necessitated by the repeal of subdivision 3 of Section 1238 of the Code of Civil Procedure which authorized the exercise of the power of eminent domain for "public buildings and grounds . . . for the use of any . . . irrigation district." See former Section 1238 and Comment thereto.