

Condemnation of Agricultural Property in California

Even an experienced eminent domain attorney may find an agricultural case difficult. This article outlines the special problems which may occur in agricultural condemnation to assist urban lawyers in effective case presentation. It suggests ways to achieve ultimate compensation under current law and changes that the legislature should implement to achieve truly just compensation in agricultural takings.

Property owners believe they have the right to do with their property as they wish.¹ In fact, however, all private property is held subject to the inherent right of the sovereign to acquire it for a public use.² The clash of the property owners' beliefs with the power of eminent domain may have as great an impact on the owners as the taking has on the land. The effect is all the greater when agricultural land is taken, because the farmers stand to lose both their homes and their livelihoods.³ Moreover, farmers may not get the help they need with these problems from an urban attorney with little expertise in the practical farming problems which result from total or partial takings of agricultural land.

This article examines current agricultural condemnation in California, in light of the new Eminent Domain Law.⁴ It discusses problems

1. F. BOSSELMAN, D. CALLIES & J. BANTA, *THE TAKING ISSUE* 1 (1973).

2. *HFH, Ltd. v. Superior Ct.*, 15 Cal. 3d 508, 515, 542 P.2d 237, 242, 125 Cal. Rptr. 365, 370 (1975), *cert. denied*, 425 U.S. 904 (1976).

3. "Nationwide, nine of every 10 farms are family-sized units using family labor and occasional hired help." U.S. DEP'T OF AGRIC., *THE FACE OF RURAL AMERICA* 40 (1976). The article assumes the farmers own the entire farm. The rights of lessees and owners of less than fee interests are dealt with in the new law, CAL. CODE CIV. PROC. §§ 1265.010-1265.420 (West Cum. Supp. 1978), but are not considered herein.

4. CAL. CODE CIV. PROC. §§ 1230.010-1273.050 (West Cum. Supp. 1978). Under CAL. CODE CIV. PROC. § 1230.010 (West Cum. Supp. 1978), the entire act is to be cited as the "Eminent Domain Law." The law was enacted in 1975, following a ten-year study and recommendation to the legislature by the California Law Revision Commission. The legislature followed most of the recommendations to make the law apply uniformly to all condemnors and to clarify language. 13 CAL. L. REVISION COMM'N REPORTS 1009-11 (1975). The legislature made many conforming changes in other codes. For a list of these conforming changes, see 13 CAL. L. REVISION COMM'N REPORTS 1254-359 (1975). The new law became operative on July 1, 1976, although it does not apply to cases filed before January 1, 1976. CAL. CODE CIV. PROC. § 1230.065 (West Cum. Supp. 1978). It

that arise during the two distinct phases of an eminent domain proceeding, taking and compensation. With respect to the taking phase,⁵ the article shows that present law, although designed to preserve agricultural land, in fact has no effect on the most destructive takings. The article also makes suggestions for possible changes in the law to aid farmers. In its discussion of compensation, the article discusses the special facts and problems that occur in a rural taking context. It surveys the kinds of damage and compensation issues likely to arise from the most prevalent takings, which are takings for highways, for utility easements, and for airport approach easements. The article's purpose is both to provide the eminent domain attorney with the necessary information to secure just compensation, and to suggest certain legislative changes when necessary to achieve this end.

I. THE TAKING PHASE

California's natural resources and open spaces have been known to be in serious danger of depletion for many years.⁶ Unfortunately, once the smallest piece of farmland is taken, the pieces left behind often become unusable. A time-lapse photograph would show that the taking of farmland has had a ripple effect. Despite some legislative attempts at reform, the situation remains essentially unchanged.

A. *The New Eminent Domain Law*

In 1975, the California legislature passed the new Eminent Domain Law. The new law codifies many case holdings, makes the law apply uniformly to condemnors, and adds an important statutory mandate requiring compensation for loss of business goodwill. The new law also expands the power of the condemning entity by making its determination of the need for the taking presumptive of many taking issues. This expansion is balanced by limitations on who may take property. Previously, Civil Code section 1001 allowed anyone to condemn for a public use.⁷ Now, only authorized persons can condemn property and only for

does not affect prior judgments. *Id.* § 1230.070. Courts have refused to apply the law retroactively. *See, e.g.,* Community Redev. Agency v. Abrams, 15 Cal. 3d 813, 817, 543 P.2d 905, 908, 126 Cal. Rptr. 473, 476 (1975), *cert. denied*, 429 U.S. 869 (1976).

5. For an excellent summary of the history of the taking issue and its roots in American and English law, *see* F. BOSSELMAN, D. CALLIES & J. BANTA, *supra* note 1, at chs. 5-8.

6. Land, *Unraveling the Rurban Fringe: A Proposal for the Implementation of Proposition Three*, 19 HASTINGS L.J. 421 (1968).

7. Former CAL. CIV. CODE § 1001 allowed any person to condemn for a public use. *City of Pasadena v. Stimson*, 91 Cal. 238, 248, 27 P. 604, 606 (1891); CAL. CODE CIV. PROC. § 1240.020, Law Revision Comm'n Comment (West Cum. Supp. 1978). It was repealed as part of the conforming changes of the new Eminent Domain Law. 1975 Cal. Stats. 3156.

an authorized purpose.⁸ While the major governmental condemnor is the State Department of Public Works, other specifically empowered state agencies may exercise the power of eminent domain.⁹ Cities, counties and other political subdivisions may also condemn property within their territorial jurisdiction.¹⁰

The taking phase is the first part of the eminent domain proceeding, since the right to take is preliminary to the obligation to pay compensation. Under the new law, there is a presumption of the necessity of any taking for public use, following the passage of a "resolution of necessity"¹¹ by the condemnor. Only certain takings got the benefit of this presumption under prior law. The law now requires passage of the resolution before the government undertakes to exercise its power of eminent domain.¹² The presumption of necessity is conclusive, blocking many potential taking issues at the outset.¹³ It is conclusive as to the public necessity of the project, the need for the specific property taken, and the accomplishment of the greatest public good and the least private injury.¹⁴

The property owner who objects is not wholly without recourse, however. Recent additions to the law require property owners to receive notice of the hearing on the passage of the resolution of necessity.¹⁵ In fact, if notice of the necessity hearing is not given to property owners, treating the resolution of necessity as conclusive in court may be challenged as a denial of due process.¹⁶ Unfortunately, at present, the right to be heard at the public hearing is little used by property owners. Most of the objections raised have related to project design defects or environmental

8. CAL. CODE CIV. PROC. § 1240.020 (West Cum. Supp. 1978).

9. The California Department of Public Works is authorized to condemn property. CAL. GOV'T CODE § 15855(a) (West Cum. Supp. 1978). These other agencies can condemn: Department of Transportation, Department of Water Resources, State Lands Commission, State Reclamation Board, Regents of the University of California, Department of Fish and Game, and Hastings College of the Law. *Id.* § 15855(b).

10. CAL. CODE CIV. PROC. § 1235.190 (political subdivisions) (West Cum. Supp. 1978); CAL. GOV'T CODE §§ 25350.5 (counties), and 37350.5 (cities) (West Cum. Supp. 1978).

11. CAL. CODE CIV. PROC. § 1240.040 (West Cum. Supp. 1978). The resolution must contain a statement of the public use the property will be condemned for, a reference to the statute permitting the public entity to acquire property, a description of the property and a declaration of necessity. Other sections may impose additional requirements. *Id.* § 1245.230.

12. CAL. CODE CIV. PROC. § 1240.040 (West Cum. Supp. 1978).

13. See Wahlstedt, *The New Eminent Domain Law or There Must Be a Pony in There Somewhere*, 3 ORANGE COUNTY B.J. 327, 328 (1976).

14. CAL. CODE CIV. PROC. § 1245.250(a) (West Cum. Supp. 1978) states that the resolution conclusively establishes necessity. The elements of public necessity are set out at *id.* § 1240.030.

15. CAL. CODE CIV. PROC. § 1245.235 (West Cum. Supp. 1978).

16. *Id.* subsection (a).

complaints.¹⁷ Yet, this hearing may be the only real opportunity for the property owners or their attorneys to try to dissuade the condemning entity from exercising its power to condemn or to have any input into the actual property taken. Thus, the property owners should seek legal advice as soon as possible after receiving notice of the hearing and the potential condemnees' attorney should attend this hearing.

Another problem for the property owners arising out of the taking phase is the fact that the condemnor can take possession of the property to be condemned before judgment.¹⁸ Once the condemnor has deposited probable compensation with the court, the court must grant the condemnor's request for an order for immediate possession (OIP).¹⁹ The condemnor must serve the order on the record owners of the property and any occupants ninety days before it may actually take possession of the farm,²⁰ although the court may waive regular notice requirements if the condemnor urgently needs the property.²¹ Even if the court grants the OIP, however, the property owners may still contest the right to take or appeal the order.²²

The OIP is of special interest to farmers, because the taking may disrupt the planting or harvesting seasons. The farmer may be able to prevent the OIP from taking effect until after harvest. If necessary, a court might enjoin the construction of a public improvement, if the condemnor refused to wait a short time to allow the crop to be harvested.²³ In most cases, the condemnor would not be adversely affected by a short delay.²⁴ If destruction of the crop prevents the farmer from receiving adequate compensation, the farmer may be able to show the irreparable harm necessary for such an injunction.

The major impact which the Eminent Domain Law has on agricultural condemnation is the opportunity to lessen the impact of the taking afforded by the necessity hearing. With the large acreage which is inher-

17. Interview with John B. Matheny, Assistant Chief Counsel of the California Department of Transportation, Legal Division, in Sacramento, Cal. (July 25, 1977).

18. CAL. CODE CIV. PROC. § 1255.410 (West Cum. Supp. 1978).

19. If the deposit is made and the condemnor has the right to take, the *ex parte* order must issue. *Id.*

20. The ninety-day notice requirement for farms and businesses is greater than the normal thirty-day period for urban residential property. *Id.* § 1255.450(b).

21. *Id.* § 1255.410(c). Notice cannot be less than three days, and hardship on the defendant is a defense to waiver of regular notice requirements.

22. The OIP is appealable following entry of judgment. *Id.* § 1255.410, Assembly Comm. Comment (West Cum. Supp. 1978). Note however that a withdrawal by the farmers of any funds paid into court operates as a waiver of all defenses to the eminent domain proceeding except the right to greater compensation. *Id.* § 1255.260 (West Cum. Supp. 1978).

23. Interview with J. Thomas Crowe, Crowe, Mitchell & Crowe, in Visalia, Cal. (July 19, 1977).

24. *Id.* Note the long lead time required for many public improvements. *Smith v. State*, 50 Cal. App. 3d 529, 536, 123 Cal. Rptr. 745, 749 (2d Dist. 1975) (*e.g.* highways).

ent in farmland, condemners can be more flexible in lessening property damage in agricultural takings than in urban takings. Yet the new law fails to examine and provide for the unique impact of condemnation upon agricultural lands. There are more crucial distinctions between agricultural and urban condemnation under the California Land Conservation Act.

B. The California Land Conservation Act

In an attempt to deal with the tax ramifications of ownership of large acreage, the legislature enacted the California Land Conservation Act in 1965.²⁵ This statute, also known as the Williamson Act, reduces taxes on agricultural land by allowing cities and counties to declare certain property to be within an agricultural preserve.²⁶ Once the preserve is established, farmers can enter into a contract with the local entity to restrict their land to agricultural uses for up to twenty years.²⁷ This encumbrance reduces the value of the property, thereby reducing its assessment value and the taxes payable on the property.²⁸

The general purpose of the Act as a whole is to encourage the conservation of prime agricultural land.²⁹ The express policy of the portion of the Act dealing with eminent domain is to attempt to avoid the condemnation of agricultural lands.³⁰ In an effort to implement this policy, the Act requires a special justification for takings of agricultural property under contract.³¹ Thus, the condemner must take a "second look" at the need for such property before taking it.³²

Several factors diminish the effectiveness of the Williamson Act, however. The inapplicability of the Act to those takings which are most devastating to farmland dilutes the Act's impact. For example, the eminent domain provisions of the Act do not apply to takings for easements,³³ public utilities,³⁴ or state highways.³⁵ Unless the legislature

25. 1965 Cal. Stats. 3377.

26. CAL. GOV'T CODE § 51230 (West Cum. Supp. 1978). *See also* 53 CAL. OP. ATT'Y GEN. 305 (1970).

27. The contract cannot be for less than 10 years. CAL. GOV'T CODE § 51244 (West Cum. Supp. 1978). However, the first period can be 20 years or more. *Id.* § 51244.5.

28. *See Kelsey v. Colwell*, 30 Cal. App. 3d 590, 594, 106 Cal. Rptr. 420, 422 (5th Dist. 1973).

29. CAL. GOV'T CODE § 51220 (West Cum. Supp. 1978).

30. *Id.* § 51290 (West 1966).

31. *Id.* § 51291 (West Cum. Supp. 1978).

32. Curtis D. Lynn deserves credit for the "second look" concept. Interview with Curtis D. Lynn, Director of the University of California Agricultural Extension, County of Tulare, in Visalia, Cal. (June 28, 1977). The condemner must use other land if this is reasonably feasible. CAL. GOV'T CODE §§ 51290(b), 51292(b) (West 1966 & Cum. Supp. 1978).

33. CAL. GOV'T CODE § 51293(b) (West Cum. Supp. 1978).

34. *Id.* subsection (c).

35. *Id.* subsection (f).

eliminates these exceptions which swallow the rule requiring special justification for agricultural taking, the Williamson Act will never have the impact for which it was designed.

In addition, the enforcement structure of the Act creates loopholes which defeat the purpose of the Act and deny a remedy to property owners. The Act is enforceable only by the Director of Agriculture or the local governing body.³⁶ Moreover, the local body which decides whether to place agricultural land in a Williamson Act preserve may be the same entity which condemns property. A local planner can set up agricultural zones with the intent of future development in areas not placed in preserves, and effectively deprive farmers of the benefits of these preserves. Since the decisions of these bodies can be attacked only by administrative mandamus, and only by the Agricultural Director and that same local body, the property owner in an eminent domain proceeding has no standing to challenge the uneven impact of the law itself.³⁷

The California Land Conservation Act could achieve its lofty goals and have a significant impact on agricultural takings if the legislature enacted certain changes. First, standing to sue for failure to comply with the Act's provisions should be expressly extended to property owners in eminent domain suits. Second, all agricultural takings should fall under the "second look" doctrine, whether the land is under contract or not. This "second look" is especially important considering the potential conflict of interest present when the entity establishing the preserve may also be the condemning entity. Above all, the state must recognize that the power of eminent domain is awesome,³⁸ and requires care and thought for both the land and the individuals affected by the power. The law should provide for the preservation of agricultural land before it is too late. One of the best ways of accomplishing this preservation is to provide effective disincentives for governmental takings.

II. THE COMPENSATION PHASE

The main issue in the California eminent domain proceeding is the amount of compensation.³⁹ The property owners have a Constitutional right to compensation when the state takes private property.⁴⁰ This enti-

36. *Id.* § 51294.

37. *Id.*

38. Courts have recently noted that the power of eminent domain is a "tremendous" one. *City of Los Angeles v. Decker*, 18 Cal. 3d 860, 871, 558 P.2d 545, 551, 135 Cal. Rptr. 647, 653 (1977).

39. *Parker v. City of Los Angeles*, 44 Cal. App. 3d 556, 567, 118 Cal. Rptr. 687, 694 (2d Dist. 1974).

40. U.S. CONST. amends. V & XIV, § 1; CAL. CONST. art. I, § 19. Note that the taking clause of the California Constitution was recently renumbered.

ties the owner to receive the fair market value of the property, which is the highest price willing and leisurely buyers and sellers would agree to if they knew all potential uses of the property.⁴¹ Courts award compensation on the basis of the highest and best use of the property.⁴²

These are basic concepts familiar to all eminent domain attorneys. The agricultural setting, however, presents several special problems. For example, the Williamson Act can have an impact on valuation because of its land use restrictions. Also, crops are difficult to value, since they do not fit within traditional concepts of realty or personalty. The law makes an effort to deal with these problems, however. On the other hand, severance damage, much more common in agricultural takings than in other eminent domain cases, is a serious problem that requires knowledge of the special damages a severed farm may suffer. After a general description of the Williamson Act, crop, and severance valuation problems, this section will clarify and discuss different possible types of severance damage.

The Williamson Act permits land to be placed under contract, reducing the value of the property artificially by proclaiming agriculture to be its highest and best use.⁴³ The contract thus allows lower tax assessments by giving farmers a lower tax base.⁴⁴ Often the land without restriction could have a much higher use and bring higher compensation in an eminent domain suit. To meet this problem, the Williamson Act calls for the termination of the contract if an eminent domain suit is brought.⁴⁵ Unencumbered, the highest potential use of the property determines the measure of just compensation.

Compensation for crops cut down before harvest is another potential problem that the law addresses. When the state takes possession of the property, the taking may interfere with unripened crops. The initial difficulty is one of classification. Crops are not usually considered part of the realty;⁴⁶ but they are not like personalty either, since they cannot be easily moved to a new location.⁴⁷ The value of crops grows geometrically as the season progresses, and crops must be allowed to ripen until harvest to achieve their greatest valuation.

The law recognizes that crops are a special type of improvement de-

41. CAL. CODE CIV. PROC. § 1263.310 (West Cum. Supp. 1978).

42. *City of Los Angeles v. Decker*, 18 Cal. 3d 860, 867, 558 P.2d 545, 549, 135 Cal. Rptr. 647, 651 (1977).

43. *Flanders v. United States*, 347 F. Supp. 95, 99 (N.D. Cal. 1972).

44. *See Kelsey v. Colwell*, 30 Cal. App. 3d 590, 594, 106 Cal. Rptr. 420, 422 (5th Dist. 1973).

45. CAL. GOV'T CODE § 51295 (West Cum. Supp. 1978).

46. If they were, the value of the crops would be included in the fair market value of the property. CAL. CODE CIV. PROC. § 1263.210(a) (West Cum. Supp. 1978).

47. *See Community Redev. Agency v. Abrams*, 15 Cal. 3d 813, 834, 543 P.2d 905, 920, 126 Cal. Rptr. 473, 488 (1975), *cert. denied*, 429 U.S. 869 (1976).

serving special treatment.⁴⁸ Farmers whose land faces condemnation may still plant crops for the coming season.⁴⁹ If the condemnor takes possession before harvest, the court includes the fair market value of the crops in its compensation.⁵⁰ The condemnor can sometimes get a court order to prevent the farmer from planting after service of summons,⁵¹ but this use restriction creates an additional item of damage to compensate.⁵²

Severance damage presents a more complicated set of issues than do the Williamson Act or crop valuation problems. In agricultural takings, the property taken is often less than the entire acreage of the farm.⁵³ The taking has a double impact if only part of the farm is taken. Not only is the farm deprived of the property actually taken, but the value of the remaining land diminishes.

Damage to the remaining property caused by the actual taking can give rise to the largest element of compensation in an agricultural condemnation.⁵⁴ The law requires that the property owners be compensated for severance damage in a partial taking.⁵⁵ This damage can be from the severance per se or from the construction and use of the development on the portion taken.⁵⁶ Property owners must show that all the property they claim as one parcel is contiguous.⁵⁷ The state may not show that the parcel, however large, could be operated as separate farms.⁵⁸

Severance damage in an agricultural setting is likely to be caused by takings for highways, for utility easements, and for airport approach easements. Highway takings are among the most intrusive agricultural

48. Compare CAL. CODE CIV. PROC. § 1263.240 with § 1263.250 (West Cum. Supp. 1978).

49. The trial may not be for months. However, there is a trial preference for eminent domain cases. *Id.* § 1260.010.

50. *Id.* § 1263.250(a).

51. *Id.* § 1263.250(b) (West Cum. Supp. 1978).

52. *Id.*

53. SELECT SUBCOMMITTEE ON REAL PROPERTY ACQUISITIONS, HOUSE COMMITTEE ON PUBLIC WORKS, UNITED STATES CONGRESS, STUDY OF COMPENSATION AND ASSISTANCE FOR PERSONS AFFECTED BY REAL PROPERTY ACQUISITION IN FEDERAL AND FEDERALLY-ASSISTED PROGRAMS 16, 33 (1965).

54. *E.g.*, *People ex rel. Dep't Pub. Works v. Thompson*, 43 Cal. 2d 13, 16, 271 P.2d 507, 508 (1954) (jury awarded \$12,000 for the parcel taken, and \$17,500 for severance damage).

55. CAL. CODE CIV. PROC. § 1263.410(a) (West Cum. Supp. 1978).

56. CAL. CODE CIV. PROC. § 1263.420 (West Cum. Supp. 1978).

57. *City of Los Angeles v. Wolfe*, 6 Cal. 3d 326, 333, 491 P.2d 813, 817, 99 Cal. Rptr. 21, 25 (1971). The property is still one unit for severance damage purposes even if the property is subject to a subdivision map, *City of Stockton v. Marengo*, 137 Cal. App. 760, 765-66, 31 P.2d 467, 469-70 (3d Dist. 1934), or is separated by a road, *M. MICKELSEN, CALIFORNIA AGRICULTURAL LAW* 147 (1969). This is a special problem in rural areas, since county roads often divide the area into square mile plots.

58. *People ex rel. Dep't Pub. Works v. Cozza*, 143 Cal. App. 2d 661, 666, 300 P.2d 19, 22 (4th Dist. 1956).

takings.⁵⁹ They have many severance damage elements which are inherent in the taking of a small strip of land as well as the problems created by the traffic they make possible. The taking of an airport approach easement can cause many of the same traffic problems highway takings involve, since the airspace will be used for air traffic. These problems are especially acute when the airspace taken is close to the ground, which is often the case with approach easements. The seemingly unobtrusive taking of a ground easement for utility installation can cause damage to people, animals, and property. The large number of public utilities which have the power to condemn compounds this problem,⁶⁰ though all utilities are encouraged to use the same easement.⁶¹ These three most common takings can cause many different types of damage which call for compensation.

A. Division of the Parcel

The most efficient, inexpensive way to run a modern farm is to have the largest possible parcel of land.⁶² Farmers prefer these parcels to be rectangular, contending that odd-shaped fields are harder to farm.⁶³ Odd angles create barriers to normal farming, making cultivation difficult because the furrows are all different lengths.⁶⁴

In highway takings, the most obvious damage is the actual severance of the property. Most freeways in California run northwest-southeast.⁶⁵ Most farmland is divided into square plots which are cut diagonally

59. Interview with Curtis D. Lynn, Director of the University of California Agricultural Extension, County of Tulare, in Visalia, Cal. (June 28, 1977). Highway takings often disrupt the farm for many years, since federal funding and long lead times mean delays in actual construction. The new law expressly permits the government to condemn property for future use. CAL. CODE CIV. PROC. §§ 1240.210-1240.250 (West Cum. Supp. 1978). Future use must be reasonably probable within 7 years, or 10 years if Federal Highway Act funds are involved. *Id.* §§ 1240.220(a), 1240.250(a).

60. CAL. PUB. UTIL. CODE §§ 611-624 (West 1975) authorize the use of eminent domain to provide these utilities: electricity, gas, heat, water, railroads, pipelines, telephone and telegraph services, wharves, common carriers, street railways, and sewers. The Public Utilities Commission still has much jurisdiction over eminent domain for utility purposes. CAL. CODE CIV. PROC. § 1230.060 (West Cum. Supp. 1978).

61. See CAL. CODE CIV. PROC. § 1240.510, Law Revision Comm'n Comment (West Cum. Supp. 1978).

62. *People ex rel. Dep't Pub. Works v. Cozza*, 143 Cal. App. 2d 661, 666, 300 P.2d 19, 22 (4th Dist. 1956).

63. Interview with Robert L. Wall, Director of Tulare County Planning Department, in Visalia, Cal. (June 22, 1977).

64. *City of Los Angeles v. Frew*, 139 Cal. App. 2d 859, 862, 294 P.2d 1073, 1076 (4th Dist. 1956). For example grapes and citrus trees are most costly to cultivate when the rows are less than 300 feet long. Interview with Curtis D. Lynn, Director of the University of California Agricultural Extension, County of Tulare, in Visalia, Cal. (June 28, 1977).

65. CONDEMNATION PRACTICE IN CALIFORNIA, (Cal. Cont. Ed. Bar 1973) 115.

when these highways run through the property.⁶⁶ This division causes severe damage by creating many triangular parcels, making remnants quite common in agricultural condemnation.

The condemnor can purchase these remnants in a variety of ways. First, the condemnor can negotiate with the property owners to acquire the remainder.⁶⁷ Second, under federal law some entities must offer to buy eminent domain remnants which qualify as uneconomic units, if the owners consent.⁶⁸ As a third alternative, the condemnor may choose to exercise its power of excess condemnation.⁶⁹ The government may take an uneconomic remnant as well as the property which is its primary goal.⁷⁰ Although there is no consent requirement in excess condemnation, the property owners can defend against the excess taking by showing that the condemnor could prevent the parcel from becoming a remnant.⁷¹

In addition to general cultivation problems, division of the farm parcel causes other difficulties. Crop dusting, for example, becomes more expensive and more difficult after a highway or utility taking.⁷² With odd-shaped lots, a crop duster must make new calculations for each line dusted, because the points of reference are constantly changing.⁷³ Power lines also interfere with the safe, efficient use of crop dusting, because of the extra time involved in making calculations to avoid the lines and because of the increased danger for the pilot.

The location of water sources is crucial in determining severance damage.⁷⁴ Many farms have underground water systems to allow the farmers to water the crops evenly. Such systems can be disrupted by dredging for a freeway.⁷⁵ If the water source is on one side of the highway, the preliminary excavation may go deep enough to sever pipes and cut off the other side of the highway from this water.⁷⁶ This severance

66. *Id.*

67. CAL. CODE CIV. PROC. § 1240.150 (West Cum. Supp. 1978).

68. The Comment to UNIFORM EMINENT DOMAIN CODE § 208 (West 1975) states that this power is implied in the federal act. UNIFORM CODE § 208 is similar to CAL. GOV'T CODE § 7267.7 (West Cum. Supp. 1978).

69. CAL. CODE CIV. PROC. §§ 1240.410-1240.430 (West Cum. Supp. 1978).

70. *Id.* § 1240.410(b). The state may take a financial or physical remnant. *Id.* § 1240.410, Law Revision Comm'n Comment. A financial remnant is one with a very low market value. A physical remnant is a parcel so small or landlocked that it is of little use to the farmers.

71. *Id.* § 1240.410(c).

72. *City of Los Angeles v. Frew*, 139 Cal. App. 2d 859, 865, 294 P.2d 1073, 1078 (4th Dist. 1956).

73. Interview with Robert L. Wall, Director of Tulare County Planning Department, in Visalia, Cal. (June 22, 1977).

74. CAL. CONT'G EDUC. OF THE BAR, *supra* note 65, at 23.

75. *Id.* at 115.

76. *People ex rel. Dep't Pub. Works v. Cozza*, 143 Cal. App. 2d 661, 663, 300 P.2d 19, 20 (4th Dist. 1956).

eliminates the possibility of retrieving and reusing that same water. Thus, the cost of irrigating after highway construction can be twice as much as it was before the taking.⁷⁷

Underground irrigation systems can also be ruined by dredging to install underground power lines.⁷⁸ If installation of the underground system of power lines precedes installation of the irrigation system, the cost of the system may be unusually expensive.⁷⁹ In addition, overhead power lines which fall into irrigated fields can cause damage to persons or property.⁸⁰ Many irrigation systems require long pipes which are carried around the irrigated fields from time to time. If the power lines touch the wet pipes, they will endanger human life.⁸¹ Sprinkler systems coming into contact with power lines can also cause damage.⁸² This danger of electrocution may also make it hard for the farmer to find workers.

Severance of the parcel also requires additional fencing to enclose and protect the farm. The condemnor in a highway taking must provide fencing for the roadside as a mitigation of damages to the property owners.⁸³ If the condemnor does not provide it, the farmers can construct the fence and be compensated for the expense.⁸⁴ The new code makes provision for possible agreement between condemnor and condemnee on fencing, if the work would likely reduce the compensation the condemnor must pay.⁸⁵

B. Loss of Access

Another problem with severing farmland is that machinery can be stranded on one side of the condemned strip.⁸⁶ This is primarily a highway taking problem. The farmers have two parcels of land with no access between them and only one set of equipment. The constant

77. *See* *City of Los Angeles v. Frew*, 139 Cal. App. 2d 859, 864, 294 P.2d 1073, 1077 (4th Dist. 1956).

78. CAL. CONT'G EDUC. OF THE BAR, *supra* note 65, at 115.

79. *City of Los Angeles v. Frew*, 139 Cal. App. 2d 859, 863, 294 P.2d 1073, 1077 (4th Dist. 1956).

80. *Pacific Gas & Elec. Co. v. W.H. Hunt Estate Co.*, 49 Cal. 2d 565, 572-73, 319 P.2d 1044, 1048 (1957).

81. *Id.*

82. *Pacific Gas & Elec. Co. v. Hufford*, 49 Cal. 2d 545, 559, 319 P.2d 1033, 1041 (1957).

83. *Olson v. County of Shasta*, 5 Cal. App. 3d 336, 342, 85 Cal. Rptr. 77, 80 (3d Dist. 1970); CAL. CODE CIV. PROC. § 1263.450 (West Cum. Supp. 1978).

84. CAL. CODE CIV. PROC. § 1263.610 (West Cum. Supp. 1978). It may be to the farmers' advantage to do the fencing, since it will be done to the farmers' specifications. M. MICKELSEN, CALIFORNIA AGRICULTURAL LAW 147 (1969).

85. *See* CAL. CODE CIV. PROC. § 1263.610(b) (West Cum. Supp. 1978).

86. *See Sacramento & San Joaquin Drainage Dist. ex rel. State Reclamation Bd. v. Reed*, 215 Cal. App. 2d 60, 63, 29 Cal. Rptr. 847, 849-50 (3d Dist. 1963).

movement of labor and equipment is necessary to the farm's existence.⁸⁷ Yet, it is dangerous to cross a busy freeway with expensive machinery. Even if alternative access is provided, it may be inadequate for use by farm machinery. The access may be too narrow to allow bulky machinery to pass.⁸⁸ The machinery itself may harm or be harmed by the roadbed if the equipment is not designed to travel on paved surfaces. These pieces of equipment often must be lifted onto trucks and transported.⁸⁹ To ease this burden, the condemnor should provide new access for the condemnees' property.⁹⁰

Permanent deprivation of access is a compensable element of severance damage.⁹¹ Temporary impairments are non-compensable unless there is an unnecessary and substantial interference with the property.⁹² This standard is the same for city and country property.⁹³ The court must hear all evidence on substantial impairment before ruling on this issue.⁹⁴

C. *Damage to Crops and Livestock*

The prime consideration of farmers in agricultural takings is the impact the development will have upon the crops nearby. Only recently, however, have farmers developed a serious concern about the dangers of air pollution to their crops.⁹⁵ This consideration is an important element of severance damage. Various polluting sources, such as highway and airport traffic exhaust, can increase the toxins in the air and thereby harm all kinds of growing crops.⁹⁶ Direct damage to crops annually is

87. *See* *Podesta v. Linden Irrig. Dist.*, 141 Cal. App. 2d 38, 41, 296 P.2d 401, 403 (3d Dist. 1956).

88. *Sacramento & San Joaquin Drainage Dist. ex rel. State Reclamation Bd. v. Reed*, 215 Cal. App. 2d 60, 63, 29 Cal. Rptr. 847, 849-50 (3d Dist. 1963).

89. CAL. CONT'G EDUC. OF THE BAR, *supra* note 65, at 115.

90. CAL. CODE CIV. PROC. § 1263.450 (West Cum. Supp. 1978) indicates that such provision must be taken into account when determining severance damage.

91. *People v. Ricciardi*, 23 Cal. 2d 390, 399, 144 P.2d 799, 804 (1943).

92. *Heimann v. City of Los Angeles*, 30 Cal. 2d 746, 754-56, 185 P.2d 597, 602-03 (1947).

93. *Valenta v. County of Los Angeles*, 61 Cal. 2d 669, 671-72, 394 P.2d 725, 727, 39 Cal. Rptr. 909, 911 (1964).

94. *See City of Los Angeles v. Lainer*, 230 Cal. App. 2d 146, 150, 40 Cal. Rptr. 819, 822 (2d Dist. 1964).

95. Interview with Curtis D. Lynn, Director of the University of California Agricultural Extension, County of Tulare, in Visalia, Cal. (June 28, 1977).

96. Cotton, vegetables, vineyards, citrus and other fruits can be damaged by toxins in the air. *Neff v. Imperial Irrig. Dist.*, 142 Cal. App. 2d 755, 756, 299 P.2d 359, 360 (4th Dist. 1956); UNIVERSITY OF CALIFORNIA, DIVISION OF AGRICULTURAL SCIENCES, AIR POLLUTION (April 1973). Mitigation of crop damage may also create problems. Farmers, expecting an eminent domain suit, may replace their usual crops with less profitable ones which are more tolerant of toxins or which have a shorter growth season, thus allowing possession by the condemnor earlier without crop destruction. The farmers must show that the change to a less-profitable crop was motivated by the impending taking. *See*

estimated at \$25 million. Indirect farm losses, such as changes in crops, could be ten times that amount.⁹⁷

Cattle are adversely affected by the installation of utility lines. The humming from the power lines disturbs their nervous systems until they adjust to it. They eat poorly, they do not sleep, and they are nervous for several weeks.⁹⁸ As a result, they do not gain weight as fast and cannot be sold as soon as the cattlemaster had planned. Testimony of this phenomenon is admissible in court, since prospective purchasers of the property would take this into account before buying the property.⁹⁹

D. Proximity Damages

There is always the risk that the location of the condemnor's project near the farmers' home will discourage potential buyers of the home and surrounding land. One of the most controversial eminent domain questions today is whether compensation should be allowed for disruption of the home and farm caused by noise. Evidence of noise level increases from construction of a freeway is admissible to the extent that the noise renders the property uninhabitable and unusable for its highest and best use.¹⁰⁰ However, noise is still regarded as a general damage to all property owners in the area and generally noncompensable.¹⁰¹ If noise is considered compensable, it must be from the improvement as completed, and not from its construction.¹⁰² The proper measure of damages is the diminution in market value of the property, the basic standard for all severance damage.¹⁰³

The cases which have given us most of the law on noise and vibration are airport taking cases. Noise from airports can cause such diminution in the value of the property as to constitute a taking in inverse condemnation.¹⁰⁴ In a direct condemnation, when the state admits taking the

generally Riverside County Flood Control & Water Conservation Dist. v. Halman, 262 Cal. App. 2d 510, 514, 69 Cal. Rptr. 1, 4 (4th Dist. 1968).

97. UNIVERSITY OF CALIFORNIA, DIVISION OF AGRICULTURAL SCIENCES, *supra* note 96. These estimates are for 1971, from the California Department of Agriculture.

98. Pacific Gas & Elec. Co. v. Hufford, 49 Cal. 2d 545, 559, 319 P.2d 1033, 1041 (1957).

99. *Id.*

100. People *ex rel.* Dep't Pub. Works v. Volunteers of Am., 21 Cal. App. 3d 111, 128, 98 Cal. Rptr. 423, 435 (1st Dist. 1971). The new code views this case as one of special damage to the condemnee, since the defendant was asked to bear more than his share of the burden of the improvement. CAL. CODE CIV. PROC. § 1263.420, Law Revision Comm'n Comment (West Cum. Supp. 1978).

101. City of Berkeley v. Von Adelung, 214 Cal. App. 2d 791, 793, 29 Cal. Rptr. 802, 803 (1st Dist. 1963).

102. Interview with Robert B. Wilson, Robert B. Wilson & Assocs., appraisers, in Fresno, Cal. (August 10, 1977).

103. CAL. CODE CIV. PROC. § 1263.410 (West Cum. Supp. 1978).

104. City of Oakland v. Nutter, 13 Cal. App. 3d 752, 769-70, 92 Cal. Rptr. 347, 358 (1st Dist. 1970).

property, damage due to noise is an important consideration.¹⁰⁵ Federal law requires physical invasion of the property to constitute a taking,¹⁰⁶ but California's Constitution protects against damage to property as well as physical takings.¹⁰⁷ If a city plans an airport and does not take adequate airport approach property, the city must pay for the property it should have condemned.¹⁰⁸

Noise presents a dual evidentiary problem. First, the judge must rule that the noise level is sufficient to justify compensation.¹⁰⁹ The difficulty lies in recreating for the judge the noise level of the intrusion. Second, the jury must be convinced that the noise is startling enough to justify a sizable award. A view of the property might be permissible, although perhaps not helpful, since the actual noise level is always under the control of the airport authorities. Evidence showing that noise tolerance decreases with repeated intrusions, though difficult to present effectively, is crucial to an adequate understanding of the problem.¹¹⁰ If there are animals on the property which are important to the economics of the farm, the claims made as to the ill effect of noise on people should be applied to these animals. If cattle get nervous and fail to gain weight from the distraction of power lines humming overhead,¹¹¹ certainly the noise of a nearby airport sending flights over their heads many times daily must have an impact on them.¹¹²

There are other issues of nuisance in connection with condemnation that are not as well-developed as the noise issue. Dust and debris from construction and use of a highway are usually treated the same as noise damage.¹¹³ Mere personal annoyance, however, has traditionally been viewed as within the doctrine of *damnum absque injuria*, and thus non-

105. *Id.* at 772, 92 Cal. Rptr. at 360.

106. *See* *Batten v. United States*, 306 F.2d 580, 583 (10th Cir. 1962).

107. CAL. CONST. art. I, § 19. California rejected the physical invasion requirement in *Aaron v. City of Los Angeles*, 40 Cal. App. 3d 471, 484, 115 Cal. Rptr. 162, 171 (2d Dist. 1974).

108. *Aaron v. City of Los Angeles*, 40 Cal. App. 3d 471, 487, 115 Cal. Rptr. 162, 173 (2d Dist. 1974).

109. *Id.* at 486, 115 Cal. Rptr. at 172. *See also* *Hawn v. County of Ventura*, 73 Cal. App. 3d 1009, 1017, 141 Cal. Rptr. 111, 115 (2d Dist. 1977) (appellate court takes judicial notice of the effects of an airport on nearby property owners).

110. Decibel tolerance drops markedly with repeated aircraft blasts. Sherrill, *The Jet Noise is Getting Awful*, N.Y. TIMES MAGAZINE, January 14, 1968, at 77. For an excellent example of a description of the nuisance of airport noise, *see* *Anderson v. Souza*, 38 Cal. 2d 825, 829-30, 243 P.2d 497, 500 (1952).

111. *Pacific Gas & Elec. Co. v. Hufford*, 49 Cal. 2d 545, 559, 319 P.2d 1033, 1041 (1957).

112. The noise can be startling. *See* the descriptions in *United States v. Causby*, 328 U.S. 256 (1946).

113. *See* *City of Berkeley v. Von Adelung*, 214 Cal. App. 2d 791, 793, 29 Cal. Rptr. 802, 803 (2d Dist. 1963).

compensable.¹¹⁴ Although there is damage, the owner is without legal remedy because no legal right has been invaded.¹¹⁵ The theory is that compensation is for the property and its loss in value, not for the owner.¹¹⁶

This theory conflicts with the notion that all things which may reasonably be considered by a potential buyer affect the fair market value of the land.¹¹⁷ Such disturbing factors as the proximity of the home to a highway can cause a potential buyer to reconsider the purchase of the property, or to offer a lower purchase price. Even though these "conjectural matters" are not absolute rights of the property owners, an appraiser should be able to use them to support an opinion on severance damage,¹¹⁸ and to try to impress upon the jury the impact of these subtle inconveniences.

E. Loss of Business Goodwill

A major improvement in the new Eminent Domain Law is the granting of damages to the entrepreneur for the permanent loss of goodwill resulting from the taking of the business.¹¹⁹ The law defines goodwill as those benefits which come to a business from its location, reputation, or any circumstances encouraging patronage.¹²⁰ The goodwill of a business is often a large part of the value of the business, and can be an important part of the actual compensation for the forced move of a business.¹²¹ As long as relocation of the business is required, the provisions apply whether all or part of the business is taken.¹²²

114. *People ex rel. Dep't Pub. Works v. Symons*, 54 Cal. 2d 855, 859, 347 P.2d 451, 453, 9 Cal. Rptr. 363, 365 (1960).

115. *Rose v. State*, 19 Cal. 2d 713, 729, 123 P.2d 505, 515 (1942).

116. *Parking Auth. v. Nicovich*, 32 Cal. App. 3d 420, 429, 108 Cal. Rptr. 137, 142 (3d Dist. 1973).

117. *See Pacific Gas & Elec. Co. v. W.H. Hunt Estate Co.*, 49 Cal. 2d 565, 573, 319 P.2d 1044, 1048-49 (1957).

118. Since they have an impact on the fair market value of the property, and thus the price a prospective buyer would offer, they are valid considerations. *Pierpont Inn, Inc. v. State*, 70 Cal. 2d 282, 295, 449 P.2d 737, 746, 74 Cal. Rptr. 521, 530 (1969). *But cf.* CAL. EVID. CODE § 822(e) (West 1966).

119. CAL. CODE CIV. PROC. §§ 1263.510-1263.530 (West Cum. Supp. 1978). The defendants' answer must contain a request for compensation for loss of goodwill, although the amount need not be stated. *Id.* § 1250.320(b) (West Cum. Supp. 1978). Temporary business losses are not covered, being left to continuing case development. *Id.* § 1263.530 & Legislative Comm. Comment thereto (West Cum. Supp. 1978).

120. CAL. CODE CIV. PROC. § 1263.510(b) (West Cum. Supp. 1978).

121. *See Kanner, When Is "Property" Not "Property Itself: A Critical Examination of the Bases of Denial of Compensation for Loss of Goodwill in Eminent Domain*, 6 CAL. W.L. REV. 57, 63 (1969).

122. CAL. CODE CIV. PROC. § 1263.510, Law Revision Comm'n Comment (West Cum. Supp. 1978).

A taking of property in agricultural use disrupts a business as well as a home. If the taking is so extensive that the farm is of no further profitable use, the farmers must go elsewhere to find a livelihood. The climate, the soil and the crops in a new area may mean that the farmer will lose much of the expertise gained on the former farm.

The new law equates farms with businesses under the relocation assistance program.¹²³ Even under the old law, if the business was closely tied to the property's value, business losses could be considered part of the severance damage.¹²⁴ There has been some speculation, however, that farmers are not qualified for inclusion in the compensation provisions for loss of business goodwill.¹²⁵ The basic components of business goodwill are said to be absent from takings of most farms.

If goodwill compensation is not to apply, then there should be a special separate provision to compensate the farmers who are forced to leave home, business and land. Agriculture is the nation's biggest business, giving us the largest group of independent businesspersons in this country.¹²⁶ Farming is also an essential part of the California economy.¹²⁷ Individual farmers should not be forced out of their business-farms for a public improvement without some compensation for their lost business. If the business goodwill provisions do not provide the protection needed for farmers, other laws must be enacted which do. These examples illustrate special condemnation compensation problems which arise in agricultural takings. Compensation, in general, needs a rethinking by California courts to comply with the just compensation mandate. The California Supreme Court has said that just compensation does not necessarily require making the condemnee whole.¹²⁸ The view is contrary to United States law.¹²⁹ More importantly, if making the condemnee whole is not *exactly* what the just compensation clause means, then the compensation is manifestly and patently unjust.

III. CONCLUSION

Changes in the current law should be made both to aid the preservation of agricultural land and to compensate condemnees more fully.

123. *Id.*

124. *People ex rel. Dep't Pub. Works v. Giumarra Vineyards Corp.*, 245 Cal. App. 2d 309, 319-20, 53 Cal. Rptr. 902, 908-09 (5th Dist. 1966).

125. Interview with John B. Matheny, Assistant Chief Counsel of the California Department of Transportation, Legal Division, in Sacramento, Cal. (July 25, 1977); Interview with Robert B. Wilson, Robert B. Wilson & Assocs., appraisers, in Fresno, Cal. (August 10, 1977).

126. U.S. DEP'T OF AGRIC., *THE FACE OF RURAL AMERICA* 137-37 (1976).

127. CAL. GOV'T CODE § 51220(a) (West Cum. Supp. 1978).

128. *Community Redev. Agency v. Abrams*, 15 Cal. 3d 813, 828, 543 P.2d 905, 915-16, 126 Cal. Rptr. 473, 483-84 (1975), *cert. denied*, 429 U.S. 869 (1976).

129. *Olson v. United States*, 292 U.S. 246, 255 (1934).

These changes would not unfairly burden the public purse. The people should be willing to pay just compensation, since the people of the state are the ultimate beneficiaries of these improvements. Furthermore, the law favors spreading the costs of public projects among those who are best able to pay and those who receive benefits.¹³⁰ Accordingly, if the condemnor cannot afford to pay the actual cost of dispossessing someone from home and business, the condemnor cannot afford to take the property.¹³¹

The Williamson Act should be amended to force the condemnor to make special justification before condemning agricultural land. At present, the most devastating takings of agricultural lands are specifically exempted from the statute.¹³² The exceptions must be eliminated for the law to have any impact on these valuable lands. Also, there must be some provision made to require a special justification for the taking of any agricultural land, whether or not it is under contract. Such a provision is especially important in light of the fact that agricultural preserves are purely permissive and are set up by the same local governing bodies which condemn property.

The new law on compensation for loss of business goodwill has not improved the plight of the working farmer. The purpose of the business goodwill provisions is to compensate businesspeople for losses incurred as a result of the forced move of the business to a new location, away from its present clientele. Some provision should be made to compensate farmers for their business losses just as the new law compensates other businesses for the loss of goodwill.

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130. *Holtz v. Superior Ct.*, 3 Cal. 3d 296, 303, 475 P.2d 441, 445, 90 Cal. Rptr. 345, 349 (1970).

131. Under a cost-benefit analysis, if the true cost of a public improvement is greater than the expected benefit to be gained from it, it is not a proper public expenditure. "(A)ny measure which society is unwilling to finance under conditions of full compensation, society cannot afford at all." Michelman, *Property, Utility & Fairness: Comments on the Ethical Foundation of "Just Compensation" Law*, 80 HARVARD L. REV. 1165, 1181 (1967).

132. See CAL. GOV'T CODE § 51293 (West Cum. Supp. 1978).

