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### California Supreme Court Reforms Precondemnation Entry and Testing Statutes to Allow for Jury Determination of Damages

In [Property Reserve v. Superior Court, S217738](#) (Cal. Supreme Court, July 21, 2016) the Supreme Court of California held that the precondemnation entry and testing statutes are constitutional when reformed to permit affected property owners the right to have a jury determine damages.

The California Department of Water Resources sought a court order allowing it to conduct environmental and geological testing on more than 150 privately owned parcels to investigate the feasibility of adding water conveyance facilities to the Sacramento-San Joaquin Delta to deliver water from Northern California to Central and Southern California. The proposed environmental activities consisted of mapping and surveys while the proposed geological activities consisted of drilling deep holes or borings.

The trial court authorized the Department to conduct the environmental testing subject to detailed limitations in its order. The court, however, denied the Department's request to conduct geological testing under the precondemnation entry and testing statutes, ruling that such activities would constitute a taking, and the Department would therefore need to initiate an ordinary condemnation proceeding.

The court of appeal upheld the trial court's denial of the Department's request to conduct geological testing, but reversed the trial court's grant of authority to conduct environmental testing. The court of appeal held that the precondemnation entry and testing statutes are limited to "innocuous or superficial" activities, and determined that because the Department's proposed activities were not, they would constitute a taking, which would require that the Department file a condemnation case.

The California Supreme Court reversed. First, the court examined the legislative history of the precondemnation statutes and determined that the statutes were not limited to activities that were "innocuous or superficial." The court held "that the current precondemnation entry and testing statutes are properly interpreted to encompass the type and degree of precondemnation environmental and geological testing" proposed by the Department.

The court then examined the procedure under the precondemnation statutes. As written, the statutes require that a public entity obtain a court order authorizing precondemnation entry and testing and deposit an amount of probable compensation for potential losses resulting from those activities. The court found the statutes "constitutionally deficient" because they do not give a property owner the right to a jury trial on the amount of damages for precondemnation activities, while the takings clause in the California Constitution guarantees an affected property owner the right to have the amount of just compensation determined by a jury. Rather than invalidating the precondemnation entry and testing statutes on this ground, however, the court determined that the appropriate remedy "is to reform the precondemnation entry statutes so as to afford the property owner the option of obtaining a jury trial on damages . . . ." Accordingly, the court held that the precondemnation statutes are constitutional when the procedure is reformed to allow for a jury determination of damages.

The court's decision is significant as it allows public agencies to avoid a classic condemnation proceeding for certain precondemnation activities, while providing property owners the option of having a jury determine the measure of their damages for such activities.