

## Department of Water Resources Must File Condemnation Case Before Undertaking Geological and Environmental Testing on Private Property

In *Property Reserve, Inc. v. Super. Ct. of San Joaquin County*, the Third District Court of Appeal ruled that if the State intends to acquire an interest in private property directly, "no matter how small an interest, the California Constitution requires it to initiate a condemnation suit that provides the affected landowner with all of his constitutional protections against eminent domain in that action." In this case of first impression, the court ruled that the "entry statutes" -- the California Eminent Domain Law's precondemnation entry provisions -- failed to pass constitutional muster where a state agency proposed to undertake extensive geological and environmental studies on private property without first filing an eminent domain complaint.

The State Department of Water Resources sought to study the geological and environmental suitability of hundreds of properties upon which it proposed to build a freshwater transport canal or tunnels to divert water from Northern California to Southern California to implement its Bay Delta Conservation Plan. The court of appeal held the State's request to enter onto private property to perform geological and environmental testing -- prior to filing a complaint under the Eminent Domain Law -- would effect a taking.

In compliance with the statutory procedure for precondemnation entry for testing purposes, the State filed a "master petition" seeking a court order granting it rights of entry from more than 150 owners of more than 240 land parcels totaling tens of thousands of acres. For all of the properties, the State proposed conducting environmental studies including mapping the properties and surveying botany, hydrology, plant and animal species, cultural resources, utilities, and recreational uses. The geological studies proposed for a portion of the parcels involved tests penetrating soil with rods one and one-half-inches in diameter in depths up to 200 feet, along with soil borings to depths of 205 feet which would leave bore holes six inches in diameter. At the conclusion of testing, the holes would be filled with "permanent columns of cement."

The superior court ruled the geological activities would constitute a taking only authorized in a *direct* condemnation action, not a *precondemnation* action. However, the superior court granted, subject to certain limitations, the State's request to enter private property to conduct environmental studies for up to 66 days during a yearlong term, with up to eight personnel during each entry. The State deposited \$1,000 to \$6,000 as "probable compensation" for "actual damages or substantial interference" with each property owners' use of their properties. But on appeal, the court of appeal found *both* types of precondemnation testing activities would effect takings of compensable property interests.

First, the court of appeal found the proposed geological testing would result in a "permanent physical occupation" constituting a taking per se, regardless of the "public interests" served.

Second, while acknowledging there is "no bright-line rule" for determining whether a temporary physical invasion constitutes a taking, the court found the proposed environmental study activities would work a taking because they "intentionally acquire a temporary property interest of sufficient character and duration to require being compensated." After weighing factors including whether the invasions were intended, the character of the invasions, the duration of the invasions, and the invasions' economic impact, the court determined the State had

sought a "blanket temporary easement" that had to be acquired in a condemnation suit rather than through the precondemnation entry statutes.

Resolving a question of first impression, the court held the State's precondemnation entry statutes do not provide an "eminent domain proceeding" sufficient to comply with the constitutional limits on the State's exercise of the power to condemn property. If a public agency "intentionally seeks to take property or perform activities that will result in a taking," the California Constitution requires that it "directly condemn" the affected property interest in an authorized condemnation suit in which the landowner receives "all of his constitutional protections against eminent domain." The State's "acquisition of a property interest, permanent or temporary, large or small" requires direct condemnation of the property interest and payment of the property owner in a condemnation suit that gives the landowner "all of his constitutional protections against the state's authority."

The court concluded that the State's precondemnation entry statutes violate the California constitution because they do not provide the fully panoply of protections provided to a landowner in a condemnation suit.

The majority opinion was followed by a lengthy dissent in which one justice argued that the entry rights sought for geological testing did not effect takings and the entry statutes were constitutional, both facially and as applied. Invalidating the statutes would "force a public entity that initiates a large-scale public project. . . either to put up the money for the entire property before determining its suitability" or "engage in two complete condemnation proceedings with their attendant costs."

Not surprisingly, given the importance of the issues involved, on April 22 the State Department of Water Resources filed a petition seeking review by the California Supreme Court.

Property Reserve, Inc. v. Superior Court of San Joaquin County, No. C067758 (3rd Dist. March 13, 2013)

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