IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

Case No. S217738

PROPERTY RESERVE, INC., Petitioner, v. THE SUPERIOR COURT OF SAN JOAQUIN COUNTY, Respondent; DEPARTMENT OF WATER RESOURCES, Real Party in Interest.	Court of Appeal Case No. C067758 San Joaquin County Case No. JCCP4594
THE CAROLYN A. NICHOLS REVOCABLE LIVING TRUST, etc., et al., Petitioners, v. THE SUPERIOR COURT OF SAN JOAQUIN COUNTY, Respondent; DEPARTMENT OF WATER RESOURCES, Real Party in Interest.	Court of Appeal Case No. C067765 San Joaquin County Case No. JCCP4594
COORDINATED PROCEEDINGS SPECIAL TITLE (RULE 3.550) DEPARTMENT OF WATER RESOURCES CASES.	Court of Appeal Case No. C068469 San Joaquin County Case No. JCCP4594

After a Decision of the Court of Appeal, Third Appellate District
San Joaquin Superior Court Case No. JCCP4594, Honorable John P. Farrell

PROPERTY RESERVE, INC.'S ANSWER TO PETITION FOR REVIEW

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TO THE HONORABLE TANI CANTIL-SAKAUYE, CHIEF JUSTICE, AND TO THE HONORABLE ASSOCIATE JUSTICES OF THE CALIFORNIA SUPREME COURT:

Petitioner and Respondent Property Reserve, Inc. ("PRI") answers Real Party in Interest and Appellant the State of California, by and through the Department of Water Resources ("DWR") Petition for Review ("Petition") of the Third Appellate District's published decision in *Property Reserve, Inc. v. Superior Court* (2014) 224 Cal. App. 4th 828 filed March 13, 2014 ("Decision").

I. INTRODUCTION

Pursuant to California rules of Court 8.500(b)(1) review is unnecessary in the present case. First there is no lack of uniformity of decision among the appellate courts. Second the Decision conforms to the existing legal precedent of this Court—*Jacobsen v. Superior Court* (1923) 192 Cal.319—and applies it to a similar fact pattern. Finally, the Decision is well reasoned and provides clarification to guide public agencies and trial courts.

DWR contends that the Decision "effected a radical change" in the eminent domain law. (Petition at p. 4.) While the decision provides clarity as to what constitutes a permissible entry, the Decision does not radically change the law in California.

The radical change would have resulted if the Decision had adopted DWR's position that the Legislature implicitly intended to create an alternative proceeding to condemn property when it adopted Section 1242.5 in 1959. (Petition at p. 14.) The fact that no other public agency has advanced the "alternative eminent domain proceeding" argument since 1959 is powerful evidence of just how "out-there" DWR's position is. While DWR's argument is creative, it is without support in the law and mere creativity does not merit review.

DWR's position requires this Court to ignore existing California case law, adopt a novel interpretation of Article 1, Section 19(a), and rewrite the entry statutes based on a strained application of an ambiguous legislative history. Accordingly DWR (not the Decision) is attempting to "overturn decades of law and practice." (Petition at p. 2).

II. BACKGROUND

On September 2, 2010, the Department of Water Resources ("DWR") filed a Master Amended Petition ("MAP"), pursuant to the entry statute, seeking a right of entry to 150-plus owners' parcels. Ten of thousands of acres are directly affected. The properties lie within the Sacramento-San Joaquin Delta ("Delta"), one of the largest freshwater estuaries in the west.

Petitioner PRI owns approximately 3,500 acres of property in Contra Costa County. Approximately 2,600 of those acres are subject to the MAP

(the "Property"). The Property comprises thirteen (13) contiguous Assessor's Tax parcels and DWR seeks access to conduct multiple investigations on ten (10) of those parcels

Most of the Property is planted and farmed as alfalfa, hay, and corn crops. A significant portion of the Property is irrigated pasture and a smaller portion is unirrigated pasture. The pastureland is used for raising approximately 200 heads of cattle. Permanent irrigated pasture is required on the Property to feed the cattle. A crop of hay is also harvested from this pasture. There is fencing and signage on and around the Property.

The trial court bifurcated DWR's request into two broad categories: Environmental Activities and Geotechnical Activities. On February 22, 2011, after several hearings, the court issued its order permitting entry for investigating real property other than geotechnical and drilling ("Environmental Order"). On April 8, 2011, the trial court denied DWR's requested entry for geotechnical activities ("Geotechnical Order").

The Environmental Order granted DWR the right to conduct suitability studies on all ten (10) of PRI's parcels. The court's Environmental Order granted entries that were geographically indeterminate. In other words, DWR received access to every square foot of the property, other than structures, to conduct its studies. Based on the size of PRI's property, the Environmental Order authorized DWR to have fifty-five (55) days over the course of one full year to conduct its

investigations with an entry of up to eight persons per day. A day is defined as 7:00 a.m. to 7:00 p.m. The Environmental Order permits many specific types of studies and examinations.[1]

In addition to the numerous studies the Environmental Order permitted DWR to leave survey stakes or pipes, targets and target related materials on the property for thirty-two (32) days followed by an additional twenty-three (23) days for wood staking depicting potential alignments of proposed canals and improvements to remain on the land. Mechanical animal traps may be left on the ground for fourteen-day intervals and these days do not count as a day of entry.

Finally, the Environmental Order determined the estimated amount of probable damages caused by DWR's year long activities on the 2,650 plus acre PRI property to be $4,000.00. The $4000.00 was for potential damages that PRI would have to subsequently prove up to the court and does not represent probable compensation due to PRI for DWR's "use" or taking occupancy of the property.

Besides the entries permitted by the Environmental Order, DWR sought an additional 10 days to enter some of PRI's parcels to conduct geotechnical activities which consisted of multiple types of drillings. The geotechnical entries would require the use of 10,000 square feet for 10 days

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[1] The array of studies and activities are for mammals, reptiles, amphibians, vernal pools, botanical, hydrological, general surveys, archeological resources, utility inventory and mapping activities.

and would be accomplished by utilizing drill rigs and support vehicles. DWR sought to permanently remove the drilled soil and thereafter replace it with a column of 95% cement and 5% bentonite reaching 100 to 205 feet below the surface. This request was denied by the trial court.

To fully analyze the impact of DWR's suitability studies it is necessary to combine the Environmental Order with DWR's requested Geotechnical activities. The combination would permit DWR to use or enter PRI's land (by up to 8 persons) for up to 246 days in one year:

10 days geotechnical investigation

55 days environmental investigation

32 days to leave pipes and targets related to surveying on property

23 days to leave wood stakes on the property

126 days to place traps related to 9 species[2]

The Court of Appeals, by its Decision, determined (rightly) that the trial court erred in authorizing the entries directed under the Environmental Order, determining that the same constituted a taking without compliance with the provisions of the eminent domain statutes. The Court of Appeals also affirmed the trial court's Environmental Order denying the requested geotechnical activities.

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[2] This number is based on the assumption that there will be no concurrent trapping of species. The Order states that leaving of the traps in place does not constitute an entry. PRI disputes the constitutionality of that determination.

III. ARGUMENT

A. Why Supreme Court Review is Unnecessary

1. Review is Not Warranted Because there is no Split of Authority or Decisional Conflict and the Decision is in Accord with the Existing Precedent of this Court.

PRI concedes that the right to exercise the power of eminent domain is a matter of statewide concern. (*Alexander v. Mitchell* (1953) 119 Cal. App. 2d 816, 821.) But that does not mean that every eminent domain decision raises issues that necessitate review by this Court. Review is not warranted in a case such as this where the Decision provides useful clarification and reaffirms the existing precedent of this Court's decision in *Jacobsen v. Superior Court* (1923) 192 Cal. 319.

2. *Jacobsen* is Still Applicable.

DWR'S position is premised on the belief that the Legislature modified the entry statutes in response to *Jacobsen* to list additional tests including borings. Therefore, argues DWR, *Jacobsen* is no longer controlling and the entries for these enumerated purposes are now constitutionally permissible. (Petition at pp. 12-14.)

DWR ignores the inconvenient obstacle that the Legislature lacks the authority to redefine certain activities as not constituting takings after *Jacobsen* determined such to be a taking. It is the judiciary, not the Legislature, which determines constitutionality. Determining whether a taking has occurred is a judicial function. (*Hensler v. City of Glendale*

(1994) 8 Cal. 4th 1, 16.) It is "elementary that the Legislature by statutory enactment may not abrogate or deny a right granted by the Constitution." (*Rose v. State* (1942) 19 Cal.713, 725.) Accordingly, the statutory revisions undertaken since *Jacobsen* do not affect the correctness of *Jacobsen's* constitutional analysis which is still controlling.

In *Jacobsen* a water district sought an injunction to preclude the owners from interfering with the water district's proposal to go upon the land with "well boring outfits, tools, machinery, and appliances for the purpose of boring holes and making excavations for the avowed object of ascertaining whether or not there was underneath the surface of [owners'] said lands rock strata or other formation suitable or necessary for the construction of dams and building of reservoirs...." (*Id.* at p. 322.)

The Water District's tests involved the installation of a boring rig at various points on the owners land operated by gasoline or steam engines for the purpose of sinking test holes from three to eight inches in diameter to a depth of 150 feet. (*Id.* at 322.) The district sought entry for four men upon the premises for 60 days with occasional visits from the water district's officials for inspection. (*Id.* at 322-323.) The District proposed to restore the land of the owners to the original condition by filling in the test holes and excavations and by removing all appliances from the land when the testing was completed.

This Court balanced the competing principles of legislative intent and constitutional restraints in analyzing whether under the former entry statute (former section 1242), an entry on private land could be made in advance of any condemnation proceeding, to take measurements and test rock and soil formations by boring and excavation. *Jacobsen* found that:

> . . . it is clear that whatever entry upon or examination of private lands is permitted by the terms of this section cannot amount to other than such innocuous entry and superficial examination as would suffice for the making of surveys or maps and as would not in the nature of things seriously impinge upon or impair the rights of the owner to the use and enjoyment of his property. Any other interpretation would... render the section void as violative of the [operative] provisions of the both the state and the federal constitution. (*Jacobsen v. Superior Court* (1923) 192 Cal. 319, 329; emphasis added.)

3. The Decision Does Not Declare the Entry Statutes Unconstitutional.

Review is also unnecessary because the Decision does not rule the entry statutes unconstitutional.[3] The Decision does not strike the entry statutes. The entry statutes are still valid and permit short, temporary entries to do a land survey, make visual inspections of utilities, flora and fauna.

The Decision determines that the geotechnical activities would be a per se taking, reviews the scope and duration of the entries permitted under

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[3] The owners never brought a facial challenge to the entry statutes. It was DWR that contended the entry statutes could be read to authorize an intentional taking of property. It is DWR's facial challenge that the Decision addresses.

the Environmental Order, and determines that DWR's activities pursuant thereto constitute an easement which is a compensable interest in property. The Decision then addresses whether or not the entry statutes can be interpreted to be a proceeding to condemn an interest in property that comports with the California Constitution, Article 1, Section 19.

It is at this point that the issue of constitutionality arises. What the Decision determines to be unconstitutional is DWR's interpretation that the entry statutes are an additional or "short-cut" method of condemning property. "We conclude the entry statute's proceeding does not facially satisfy the demands of Section 19 (a) as it applies to an intentional taking." (*Property Reserve*, *supra*, 224 Cal. App. 4th at 846.) The Decision reaffirms *Jacobsen* and rules "A condemnor may not engage in precondemnation activity that will work a taking or damaging unless it first files a condemnation suit that provides the effected landowner all Constitutional rights against the state's exercise of eminent domain. (*Id.)* "The entry statutes do not provide a constitutionally adequate eminent domain proceeding for the government to directly acquire an interest in private property." (*Id.* at pp. 854-855.) The Decision determines DWR's interpretation of the entry statutes is unconstitutional, not that the entry statutes themselves are unconstitutional. This Court in *Jacobsen* similarly refused to interpret the entry statutes in a matter that would render them unconstitutional. (*Jacobsen*, *supra*, 192 Cal. at p. 329.)

DWR's argument that the Legislature intended the entry statutes as an alternative proceeding to condemn property is contradicted by the eminent domain law. Code of Civil Procedure section 1250.110 states that "[a]n eminent domain proceeding is commenced by filing a complaint with the court." Yet the entry statutes are initiated by a petition. (Section 1245.030.) To imply, as DWR does, that a petition is sufficient to commence an eminent domain proceeding is contrary to the rules of statutory construction. "[W]hen the legislature has carefully employed a term in one place and has excluded it in another, it should not be implied where excluded." *(Grubb & Ellis Co. v. Bello* (1993) 19 Cal.App.4th 231, 240.) Had the legislature intended to permit eminent domain proceedings to be commenced by petition than the Legislature would have included a petition in Section 1250.110.

4. The Decision Does Not Preclude All Precondemnation Entries.

DWR contends that "the opinion of the court of appeal effectively invalidated the entry procedure or rendered them functionally useless except in a vanishingly small number of cases." (Petition at p. 21.) This is hyperbole and review is unwarranted as the entry statutes are still valid and permit short, temporary entries to do a land survey, make visual inspections, observe utilities, flora, fauna, etc. The Decision reaffirms the holding in *Jacobsen* that preliminary activities that are not invasive in

scope and lengthy in duration are still permissible and authorized under the entry statutes.[4] The Decision only precludes a public agency from securing a lengthy, uncompensated property interest akin to an investigatory easement to conduct any and all tests a public agency may wish to conduct. The Decision also precludes geotechnical procedures that permanently remove soil and replace it with a foreign material.

Importantly the Decision does not preclude a public entity from conducting invasive studies but merely requires an easement be acquired through purchase or condemnation. This is not a novel legal concept. A leading treatise on eminent domain acknowledges that where invasive acts are to be performed as part of a precondemnation entry the public agency should exercise its power of eminent domain to condemn a temporary easement. (9G Julius L. Sackman, Nichols on Eminent Domain, 3rd Ed., section 32.06; citing to *Gernand v. Illinois Commerce Commission* (1997) 286 Ill.App.3d pp. 945-946.)

Public agencies in California are accustomed to condemning temporary construction easements as part of a public project. (E.g. *San Bernardino Co. Flood Control Dist. v. Sweet* (1967) 255 Cal.App.2d 889, 893; *City of Carlsbad v. Ruevalis* (2003) 109 Cal.App.4th 667, 673.)

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[4] Our firm continues to see requests for such limited entries by potential condemnors.

5. The Decision Conducted the Proper Constitutional Analysis and there is No Basis for Requiring Parcel by Parcel Analysis

a. The Decision Properly Analyzed the *Arkansas Game* Factors.

DWR contends that the Decision needs review because it is based on improper constitutional analysis that overemphasizes the factor of intent enunciated in *Arkansas Game & Fish Commission v. The United States* (2012) ___ U.S. ___, 133 S.Ct. 511, 184 L.Ed.2d 417 (hereinafter "*Arkansas Game*"). DWR's position (Petition at pp. 17-21) is contradicted by the Decision which explicitly analyzes all four of the *Arkansas Game* factors.[5]

Besides intent, the Decision determines that the character of the invasion, though temporary, violates PRI's right to exclude others. (*Property Reserve, 224 Cal.App.4th at pp. 862-863.*) The right to exclude others is a protected interest that of and by itself can constitute a taking. (*Nollan v. California Coastal Comm'n* (1987) 483 U.S. 825, 831; *Cwynar v. City of San Francisco* (2001) 90 Cal.App.4th 637, 664-665.) DWR never discusses how it entries do not run afoul of a PRI's right to exclude others.

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[5] It is important to note that the California Constitution requires compensation for the *damaging* as well as the *taking* of property and thereby protects against a "somewhat broader range" of potential injuries then the federal Constitution. (*Hensler v. City of Glendale* (1994) 8 Cal. 4th 1, 9, fn. 4.)

The Decision also considers the duration of the invasions and concludes DWR is seeking a "blanket easement" that allows DWR to come and go from Owners' properties from 25 to 66 days. *(Property Reserve, supra,* at pp. 863-864.) If anything the Decision underestimates the duration in its analysis by only discussing the days of entries (25 to 66) and not including the additional 38[6] days to store materials on the property. (*Id.* at p. 858.) The Decision properly determines the environmental activities are physical invasions that are recurring and each entry adds force to the taking claim. (*Property Reserve*, *supra*, at pp. 861.)

The Decision also analyzes DWR's proposed activities in terms of the Owners' investment backed expectations pursuant to *Penn Central Transporation Co. v. New York City* (1978) 438 U.S.104. (*Id.* at pp. 864-865.) While DWR would prefer that the Decision turn on this factor, the Decision's determination that this *Penn Central* factor is less important in the physical invasion context is an accurate statement of the law. (*Property Reserve*, *supra*, at pp. 864-865.) As Justice Marshall in *Loretto* put it "[A]n owner suffers a special kind of injury when a stranger directly invades and occupies the owner's property. . . ." (*Loretto v. Teleprompter Manhattan CATV Corp.* (1982) 458 U.S. 419, 436.) "A taking may more readily be

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[6] The Decision discusses 38 days but PRI believes the proper additional days is 55. See Introduction section of this Answer.

found when the interference with property can be characterized as a physical invasion by the government . . . ." (*Id.* at p. 427.)

b. There Was Ample Evidence for the Court to Determine That a Taking Would Occur.

DWR also contends review is needed to resolve whether the Decision "significantly alters the test for what constitutes a taking" because the Decision failed to conduct parcel-specific inquiries of the impact to the owners. (Petition at pp. 2, 20-21.) DWR's argument is simply that the record is devoid of sufficient evidence of the impact on individual owners to determine whether a taking would occur.[7] DWR's position misstates PRI's evidence and ignores all the evidence provided by DWR to support its entry petition and the environmental order itself.

(1) DWR Misstates the Evidence Produced by PRI.

DWR misrepresents Daniel McCay's declaration. (Petition at. p. 20.) While Mr. McCay qualifies some of his concerns with the word "potential," because as noted in the Decision, it is impossible to know the damage that will result from unspecified times and nature of entries, he does not equivocate with the following statements:

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[7] When contending that the Court made its analysis based upon an inadequate record, DWR hides the procedural realities of this case from the court. The trial judge refused to allow each owner to testify. Nonetheless, the record is sufficient to determine the property interest "awarded" to DWR.

- The access requested by DWR will cause significant interruption with the ongoing economic activities on the property. (Petitioner PRI's Appendix of Documents Supporting Petition for Writ of Prohibition, Mandate, or Other Appropriate Relief Immediate Stay of Order Requested ("PA") 1 PA 283:1-3.)
- It will destroy crops. (1 PA 283:4.)
- DWR's requested access, including daily access to check traps, would significantly disrupt fertilization and the use of pesticides. (1 PA 283:17-19.)
- Every pit or bore hole located in a field will necessarily destroy any crops located at and around the test location. (1 PA 283:20-21.)
- Harvesting crops with the presence of such pits and bore holes will require circumnavigating each study location. (1 PA 283:21-22.)
- Installation of survey stakes at one hundred-foot intervals will require traversing through the growing crops and the destruction of some portion of the crops at and between each installed stake. (1 PA 284:3-5.)
- Installation of an unspecified number of animal traps, to be checked on a daily basis over the course of one full year, will damage crops in the vicinity of the traps. (1 PA 284:6-8.)

- At a minimum, coordinating harvesting around the locations of an unspecified number of existing traps will significantly increase the time and work associated with harvesting. (1 PA 284:9-11.)

None of these statements are qualified. Therefore, DWR misstates his declaration in stating Daniel McCay only expressed concern about "potential" issues. (Petition at p. 20.)

(2) The Environmental Order Coupled With the Declarations of DWR Filed in Support Thereof Constitutes Substantial Evidence That a Taking Would Occur.

DWR ignores the evidentiary importance of the Environmental Order and DWR's declarations and testimony in support of its Master Amended Petition. The Order, declarations and testimony detailed all of the activities to be conducted, by how many people, utilizing what types of equipment and for how long. The Decision contains lengthy descriptions of the proposed geotechnical activities (*Property Reserve, supra,* 224 Cal, App. 4th at pp 841-842) and the environmental activities. (*Id.* at pp 856-859.) It is clear from analyzing the multiple entries for all manner of studies discussed in Section II of this Answer that the entries taken in toto will not be innocuous or superficial. This record is sufficient for the Court of Appeals to determine that the trial court "awarded" to DWR a property

interest akin to a blanket easement, and that such is a taking, independent of evidence of damages for every individual owner.

This Court need look no further than *Jacobsen* to find that a taking can be determined from the face of the petition for entry and subsequent order. *Jacobsen* did not require the owners to present proof of damage or loss of fair market value before this Court could determine there was a taking. Rather this Court reviewed the municipal water district's complaint and the activities recited by the trial court in its order to determine if a taking would occur. (*Jacobsen, supra,* at pp. 327-328.) This Court rejected the argument that a landowner's only remedy is to wait until a taking has occurred and then seek compensation. "The entry order was more than error; "it was a transgression of a fundamental right guaranteed to every citizen charged with an offense or whose property is sought to be taken, of being heard before he is condemned to suffer injury." (*Jacobsen, supra,* at p. 332.)

6. The Decision's *Loretto* Analysis is Correct

DWR contends review is necessary to correct the Decision's analysis of the geotechnical activities in relation to the decision in *Loretto v. Teleprompter Manhattan CATV Corp.* (1982) 458 U.S. 419. (Petition at pp. 21-24.) DWR attacks the Decision's characterization of the concrete and

bentonite columns left behind by DWR as a permanent improvement.[8] The Decision relies upon DWR's own expert who testified that the geotechnical activities required the permanent physical removal of the soil from the property which would be replaced with permanent physical columns of hardened cement. (*Property Reserve, supra,* 224 Cal, App. 4th at pp 841-842.)

DWR's analysis of *Loretto* also overemphasizes the word "permanent" in trying to distinguish it from the present case. This issue was analyzed by *Hendler v. U.S.* (1991) 952 F.2d 1364. The concept of permanent physical occupation does not require that in every instant, the occupation be exclusive or continuous and uninterrupted. (*Hendler, supra,* at 1377.) *Hendler* noted that "In this context, 'permanent' does not mean forever, or anything like it. A taking can be for a limited term . . . what is 'taken' is, in the language of real property law, an estate for years, that is, a term of finite duration as distinct from the infinite term of an estate in fee simple absolute." While called an estate for years, the term can be for less than a year. (Cites omitted.) (*Hendler* at 1376.)

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[8] DWR's argument does not discuss the fact that the borings would require the use of 10,000 square feet for 10 days which PRI contends is sufficient to constitute a temporary taking of property.

a. The Decision's Geotechnical Analysis is in Accord with Other Authority and Jurisdictions

Other jurisdictions have reached a similar conclusion regarding geotechnical activities. In *County of Kane v. Elmhurst National Bank* (1982) 111 Ill.App.3d 292, the court specifically stated that the part of a right of entry order "authorizing soil borings in a geotechnical study without the landowners' consent or a prior condemnation proceeding would be invalid even if statutorily authorized." (*Id.* at 299, emphasis added.) "Such drilling and excavation, even where a subsequent backfilling has been acquired, has been properly recognized as a substantial interference with the landowners' property rights rather than a minimally invasive preliminary survey causing only incidental damage." (*Id.* citing *Jacobsen v. Superior Court*, *supra*, 192 Cal. 319.) [the right to conduct a precondemnation survey is not authority to dig up private property].)

In *Missouri Highway and Transportation Commission v. Eilers* (1987) 729 SW.2d 471, 473, the Highway Commission proposed to enter with a four wheel drive wagon, drill 10-12 holes and remove approximately 5 lbs. of soil from the property. Additionally the Commission was permitted to drill a two inch core of the subsurface rock. The court held that "although the soil survey is not an intrusion of an overwhelming magnitude, it is still an intrusion and interference with [owners' rights] as a private landowner . . . . Accordingly, the soil survey amounts to a "taking"

and the Commission may not conduct the soil survey until it receives [owners'] consent or initiates judicial proceedings and pays the damages for temporary easement before entering the land." (*Id.* at 473–474.)

Finally, in *Burlington Northern and Santa Fe Railway Co. v. Chaulk* (2001) 262 Neb. 235 the court rejected the argument that Nebraska's right of entry statutes permitted geotechnical studies which included core samples two inches in diameter and 50 feet deep scattered at quarter mile intervals. The court determined that such tests constituted temporary takings which required the power of eminent domain be exercised. (*Id.* at 245.)

7. DWR's Public Burden Argument Is Not an Adequate Basis for Review

DWR bases its Petition for Review on the assertion that the Decision "creates onerous burdens" and potentially thwarts public agencies from acting by requiring needless condemnation actions. (Petition at pp. 24-26.) DWR's position ignores reality. Public agencies can and often negotiate with landowners for entries. This is what currently happens in many cases provided the proposed entries are short and noninvasive. Where the entries are invasive the public agency can avoid condemnation actions by purchasing easements from the owners. Thus condemnation actions will be avoided in most precondemnation entry situations. Indeed the Decision affords all parties better information in negotiating rights of entry, knowing

what the legal backdrop to their negotiating positions will be if no agreement is reached and the court must set entry parameters.

The burden on the public entity is not a proper basis for review where the alleged burden affects constitutional rights. The Decision recognized this principle and stated "[N]o doubt our ruling imposes more work on condemning agencies and the courts. However, constitutional rights against the exercise of the eminent domain authority are not subject to the convenience of the government." (*Property Reserve, supra,* 224 Cal.4th at p. 866; see also *In re Kevin G.* (1985) 40 Cal.3d 644, 648 ["Impairment of constitutional rights . . . will not be suffered in return for efficiency"].)

a. DWR's Position is Illogical

DWR's position (Petition at p. 4, fn. 1) is that an owner whose property has been determined to be suitable is entitled to all the statutory protections of the eminent domain law including a formal precondemnation appraisal and initial offer pursuant to Government Code section 7267.2, a resolution of necessity hearing by the governing body of the agency (Code Civ. Proc. §§ 1240.040, 1245.230 subd. (c)), along with a deposit of probable compensation, a formal noticed motion for prejudgment possession (at which point the landowner can attempt to challenge the right to take), discovery, and an eventual two phase trial on any right to take

challenges and the amount of just compensation due, the latter of which is to be determined by a jury (Code Civ. Proc. § 1260.110).

But, DWR does not explain why an owner whose property is taken or damaged before the public agency determines it is suitable for condemnation is not entitled to the same protections as an owner whose property is taken after the condemning entity has decided that the property is suitable. Under DWR's argument the owner's protections depend on where in the process the public agency is and totally disregards whether the activities constitute a taking or damaging of property.

b. DWR's Argument Improperly Shifts the Burden to the Landowner

DWR also predicates review on the argument that the Decision will increase the costs of public works to the point that they may become prohibitive. (Petition at pp. 4, 25.) This Court has stated that the purpose of Article I, Section 19 is to distribute throughout the community the cost of public improvements. (*Holtz v. Superior Court* (1973) 3 Cal.3d 296, 303 ["The decisive consideration is whether the owner of damaged property if uncompensated would contribute more than his proper share to the public undertaking."].)

DWR does not explain why a landowner unlucky enough to be located where a public project is being considered must endure months or years of preliminary testing and storage of materials to determine suitability

with no compensation.[9] Such an interpretation fails to properly distribute the burden throughout the community of the cost of the potential public improvement. To the extent the Decision will increase costs of projects these are costs that should be budgeted for in the project in the first place and not borne by a few individual landowners.

8. The Decision Does Not Create Conflicts with the Eminent Domain Law

DWR contends that the Decision requires that a public agency condemn property before it can conduct even minimally invasive information gathering activities. (Petition at p. 24.) This, DWR argues, creates a conflict with the eminent domain statutes because the public entity must adopt a resolution of necessity that makes finding related to the project. (*Id.*) DWR's conflict however is illusory. It is premised on an overly restrictive definition of the "project" that is limited solely to the project ultimately approved and constructed. The public entity could properly define the project to include the investigatory studies and the actual construction of the project itself. Alternatively, a resolution to condemn an investigatory easement could define the project as the preliminary studies to analyze a project. There is no question that the investigatory studies would be a valid public use. Such "public use" is

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[9] Ironically, once a project is commenced public agencies recognize that compensation for a temporary construction easement is required to intermittently use or store materials on a landowner's parcel.

defined as "a use which concerns the whole community or promotes the general interest in relation to any legitimate object of government. (*Bauer v. County of Ventura* (1955) 45 Cal.2d 276, 284.) A suitability study done in anticipation of a potential public project would meet this broad definition of public use. The Decision creates no actual conflicts with the eminent domain law.

V. CONCLUSION

DWR attempted to stretch the entry statutes beyond what the federal and state constitutions permit. The Decision rejects the attempted utilization of the entry statutes by DWR to seek multiple entries, take long physical occupancies of private property, and make temporary and permanent physical invasions of land. This is not the innocuous, please-excuse-the-dust for a day or two entries that *Jacbobsen* determined to be constitutional. DWR cannot claim the Decision is a radical departure from the law when it is DWR's interpretation of the entry statutes that advances the radical change.

Dated: May 12, 2014

MATTEONI, O'LAUGHLIN & HECHTMAN

By: 

Gerald Houlihan
Attorneys for Petitioner
Property Reserve, Inc.

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CERTIFICATE OF COMPLIANCE

I, GERALD HOULIHAN, hereby certify that the attached PROPERTY RESERVE, INC.'S **ANSWER TO PETITION FOR REVIEW** uses a 13 point Times New Roman font and contains 6513 words.

MATTEONI, O'LAUGHLIN & HECHTMAN

Date: May 12, 2014

By: _____

Gerald Houlihan
Attorneys for Petitioner
Property Reserve, Inc.

DECLARATION OF SERVICE BY U.S. MAIL

Case Name: *California Department of Water Resources v. Janice Adams, et al.*
Case No.: C068469

Coordinated Proceedings Special Title (Rule 3.550)
Department of Water Resources

Consolidated Matters: C067758 and C067765

I, Carol Ann Bianco-Webb, declare: I am a citizen of the United States, over 18 years of age, and not a party to the within action. I am employed in the County of Santa Clara; my business address is 848 The Alameda, San Jose, CA 95126.

On May 12, 2014, I served the attached **PROPERTY RESERVE, INC.'S ANSWER TO PETITION FOR REVIEW** on all parties in this action, as addressed below, by causing a true copy thereof to be distributed as follows:

✔ BY MAIL: I am "readily familiar" with the firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with the U.S. Postal Service on that same day with postage thereon fully prepaid in the ordinary course of business.

See Attached Service List

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct and that this Declaration was executed on May 12, 2014 at San Jose, California.

Carol Ann Bianco-Webb

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