COPY

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;** **STATE OF CALIFORNIA, BY AND THROUGH DEPARTMENT OF WATER RESOURCES,** **Real Party in Interest.**	**C067758** **San Joaquin County** **No. JCCP4594**
THE CAROLYN 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.**	**C067765** **San Joaquin County** **No. JCCP4594**
COORDINATED PROCEEDINGS SPECIAL TITLE (RULE 3.550) **DEPARTMENT OF WATER RESOURCES**	**C068469** **San Joaquin County** **No. JCCP4594**

SUPERIOR COURT FOR THE COUNTY OF SAN JOAQUIN
HONORABLE JOHN P. FARRELL, JUDGE

REPLY TO ANSWERS TO PETITION FOR REVIEW

KAMALA D. HARRIS
Attorney General of California
KRISTIN G. HOGUE
Senior Assistant Attorney General
ALBERTO L. GONZÁLEZ
Supervising Deputy Attorney General
JAMES C. PHILLIPS, SBN 121848
MICHAEL P. CAYABAN, SBN 179252
NELI N. PALMA, SBN 203374
Deputy Attorneys General
1300 I Street, Sacramento, CA 95814
Telephone: (916) 445-2482
Email: Neli.Palma@doj.ca.gov
Attorneys for Appellant and Cross-Respondent State, by and through DWR

TABLE OF CONTENTS

Page

REPLY TO ANSWERS TO PETITION FOR REVIEW 1

INTRODUCTION 1

ARGUMENT 2

I. REVIEW IS WARRANTED BECAUSE THIS CASE PRESENTS CONSTITUTIONAL QUESTIONS OF EXCEPTIONAL IMPORTANCE 2

II. THE LANDOWNERS' RELIANCE ON *JACOBSEN* FAILS TO TAKE INTO ACCOUNT THE EVOLUTION OF THE ENTRY STATUTES AND DECADES OF TAKINGS JURISPRUDENCE 4

A. The Landowners' "Face of the Petition" Position Is the Worst-Case-Scenario 4

B. *Jacobsen's* Holding Concerning the Predecessor Entry Statutes Has No Bearing on the Current Statutory Scheme 5

C. The "On The Face" Approach Is Contrary to Takings Jurisprudence 6

III. THE DECISION EFFECTIVELY RENDERS THE ENTRY STATUTES UNCONSTITUTIONAL 8

IV. THE ENVIRONMENTAL ORDER DID NOT GRANT A BLANKET EASEMENT 10

V. BORINGS ARE EXPLICITLY ALLOWED BY THE ENTRY STATUTES, AND THE STATE IS NOT PERMANENTLY OCCUPYING THE PROPERTIES 12

VI. ADDITIONAL BRIEFING IS NOT WARRANTED ON THE ISSUES PROPOSED BY THE LANDOWNERS 14

CONCLUSION 15

TABLE OF AUTHORITIES

Page

CASES

Arkansas Game & Fish Commission v. United States
(2012) ___ US ___, 133 S.Ct. 511 ..... 1, 6, 7

Burlington Northern and Santa Fe Railway Co. v. Chaulk
(2001) 262 Neb. 235 ..... 13, 14

County of Kane v. Elmhurst National Bank
(1982) 111 Ill.App.3d 292 13

County of San Luis Obispo v. Ranchita Cattle Co.
(1971) 16 Cal.App.3d 383 ..... 3, 4

Hendler v. U.S.
(1991) 952 F.2d 1364 12

Jacobsen v. Superior Court of Sonoma County
(1923) 192 Cal. 319 ..... *passim*

Loretto v. Teleprompter Manhattan CATV Corp.
(1982) 458 U.S. 419 ..... 12, 13

Missouri Highway and Transportation Commission v. Eilers
(1987) 729 SW.2d 471 13

Penn Central Transp. Co. v. New York City
(1978) 438 U.S. 104 ..... 1, 6

People ex rel. Department of Public Works v. Ayon
(1960) 54 Cal. 2d 217 10

People v. Superior Court (Romero)
(1996) 13 Cal.App.4th 497 10

TABLE OF AUTHORITIES
(continued)

Page

STATUTES

Code of Civil Procedure
§ 1242 5
§ 1242.5 3
§ 1245.010 ..... 2, 8, 9, 14
§§ 1245.010 – 1245.060 1
§ 1245.030 14
§ 1245.040 11

COURT RULES

Cal. Rules of Court, Rule 8.500(b)(1) 3

OTHER AUTHORITIES

6 Miller & Starr, Cal. Real Estate (3d ed. 2001, Supp. 2013), § 1550 ... 11

REPLY TO ANSWERS TO PETITION FOR REVIEW

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

The State of California, by and through the Department of Water Resources ("State"), respectfully submits this reply to the answers to the petition for review.[1]

INTRODUCTION

The Answers demonstrate why this Court should grant review. This case presents questions of exceptional importance to public agencies, landowners, and taxpayers concerning the constitutionality of the Eminent Domain Law's entry statutes (Code Civ. Proc., §§1245.010 – 1245.060).[2] Specifically, this Court should grant review to address the continuing applicability, if any, of its 1923 decision in *Jacobsen v. Superior Court of Sonoma County* (1923) 192 Cal. 319, on which the Court of Appeal relied, but which has been called into question both by the evolution of the entry statutes—which the Legislature amended specifically to comply with *Jacobsen*—and by the evolution of takings jurisprudence since *Jacobsen* was decided 91 years ago. As Justice Blease's dissent correctly notes, "takings law has evolved since *Jacobsen* was decided in 1923. It is now understood that a takings analysis requires a situation-specific factual inquiry involving a weighing of several factors." (Dissent at p. 12; *Penn Central Transp. Co. v. New York City* (1978) 438 U.S. 104 and *Arkansas Game & Fish Commission v. United States* (2012) ___ US ___, 133 S.Ct.

---

[1] The State responds to the Answers filed by the landowners in Court of Appeal Case No. C067758 ("PRI Answer"), and in Case Nos. C067765 and C068469 ("Nichols Answer") (collectively, "landowners").

[2] All references are to the Code of Civil Procedure unless otherwise stated.

511.) Such inquiry was not performed here for the 138 parcels subject to the environmental order reversed by the Court of Appeal, nor for the geotechnical activities, which affected 35 parcels. Instead, the majority changed the test for determining what constitutes a taking when it relied on *Jacobsen* to find that the proposed activities constitute a taking irrespective of whether or not such activities burden ownership interests, result in substantial interference with the landowner's use of the property, or impact the landowner's investment-backed expectations.

While the Answers speak of a "permissible entry" under the statutes, the Court of Appeal categorically disapproved virtually all the activities permitted by section 1245.010, including borings, photographs, studies, surveys, examinations, tests, and samplings. Under the decision, these activities are no longer constitutionally permitted absent the filing of a complaint in eminent domain. By holding that these statutorily-prescribed activities amount to a taking, the decision has effectively rendered the entry statutes a nullity. The amicus letters filed in support of review (on behalf of public entities and associations that represent them) speak to the widespread confusion generated by the decision with respect to what activities are now constitutionally permissible under the entry statutes. Public entities, landowners, trial judges, and practitioners require guidance from this Court on these issues.

For the reasons discussed in the Petition and below, review should be granted.

ARGUMENT

I. REVIEW IS WARRANTED BECAUSE THIS CASE PRESENTS CONSTITUTIONAL QUESTIONS OF EXCEPTIONAL IMPORTANCE

The landowners do not dispute that the Petition presents an "important question of law." (PRI Answer at p. 6.) Nonetheless, they urge this Court

to deny review because there is purportedly no split of authority or decisional conflict. (*Id.*) However, such split or conflict is unnecessary for this Court to grant review. (Cal. Rules of Court, rule 8.500(b)(l) [review is appropriate to "secure uniformity of decision ***or*** settle an important question of law" (emphasis added)].) The constitutional issues presented by this Petition are exceptionally important and warrant this Court's review on that basis alone.

In any event, the landowners' argument that there is no conflict among the courts of appeal is incorrect. The landowners contend that the decision does not result in a radical change in California's long-accepted practice and law, arguing that no support or precedent permits public agencies to seek the types of entries sought here to gather information before commencing a full condemnation case. (PRI Answer at p. 2.)

In fact, however, similar pre-condemnation activities under the entry statutes were upheld by the second appellate district in *County of San Luis Obispo v. Ranchita Cattle Co.* (1971) 16 Cal.App.3d 383. In *Ranchita*, the court held that the adoption of section 1242.5 after *Jacobsen* eliminated the requirement that an eminent domain action be filed before statutory entry. (16 Cal.App.3d at p. 389.) The court also found the predecessor entry statutes afforded the owner sufficient redress for any damages resulting from the entry, should it seriously impinge upon or impair the owner's use and enjoyment of the land. (*Id.* at p. 390.) In that case, a flood district obtained an entry agreement to conduct "surveys and geological investigations." (*Id.* at p. 385.) Months later, the district dug three wells to depths of 33-80 feet, one of which was left open for over two years. (*Id.* at pp. 385-386.) After the district filed a condemnation action and obtained prejudgment possession, the owner sought interest from the date the wells were installed rather than the date of prejudgment possession. (*Id.* at 386.)

The second appellate district denied the request for pre-possession interest, stating:

> [W]e are of the opinion that the adoption of section 1242.5 of the Code of Civil Procedure in 1959 grants permission to a public entity which has the power to condemn land for reservoir purposes, **to conduct surveys and explorations upon land to determine its suitability** upon compliance with the provisions of such statute, whether or not an action to condemn the land has first been filed. . . On the other hand, if the statute is construed in such manner as to compel the public agency to first file an action in eminent domain to condemn the land as a condition precedent to the exercise of the rights conferred under sections 1242 and 1242.5 of the Code of Civil Procedure, **and then abandon the action upon discovery, after survey, that the land was unsuitable, such construction would require the agency to perform a useless act.**

(16 Cal.App.3d at p. 389; emphases added.)

The Court of Appeal decision effectively bars all precondemnation entries and accordingly is at odds with *Ranchita*.

II. THE LANDOWNERS' RELIANCE ON *JACOBSEN* FAILS TO TAKE INTO ACCOUNT THE EVOLUTION OF THE ENTRY STATUTES AND DECADES OF TAKINGS JURISPRUDENCE

A. The Landowners' "Face of the Petition" Position Is the Worst-Case-Scenario

The landowners cite *Jacobsen, supra,* 192 Cal. 319, 328-329, as established law on the scope of entries permitted under the current entry statutes. The landowners posit that "*Jacobsen* remains good law" cited in California and other jurisdictions. (Nichols Answer at p. 8.) They add, "[t]his 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." (PRI Answer at p. 17; emphasis added.) The landowners offer that to fully analyze the entries it is necessary to combine the environmental order with the requested geotechnical activities. (PRI Answer at p. 5.) This position

overlooks the fact that the State sought geotechnical entries on only 35 parcels, not all 138 parcels subject to the environmental order. It is also illogical for the landowners to suggest that the takings analysis should rest on the face of the State's petition, and not on the order actually issued, together with all its limitations and conditions. This would present a worst-case-scenario not justified in the record.

B. *Jacobsen's* Holding Concerning the Predecessor Entry Statutes Has No Bearing on the Current Statutory Scheme

The landowners' reliance on *Jacobsen* is misplaced, as the current entry statutes were drafted by the Legislature to comply with *Jacobsen*. In *Jacobsen*, the water district sought entry in order to drill test holes and pits under the former section 1242 which permitted entries for "examinations, surveys, and maps." (*Jacobsen, supra*, 192 Cal. at pp. 328-329.) This Court did not interpret this provision to allow more extensive subsurface examinations. (*Id.* at p. 329.) This Court held that, by the terms of section 1242 as it then existed, the entries allowed were limited to innocuous entries and superficial examinations. (*Id.*) Because *Jacobsen* turned on the Court's interpretation of the entry statute in existence in 1923, its holding permitting only "innocuous" entries has no bearing on the current entry statutes that expressly permit the activities, including borings, that are at issue in this case.

Also, because *Jacobsen* concerned subsurface activities, it has no application to the surface activities authorized by the environmental order. Nonetheless, the landowners argue that *Jacobsen* is of continued validity to the environmental studies. *Jacobsen* made no finding that such non-invasive surveys were unconstitutional.

C. The "On The Face" Approach Is Contrary to Takings Jurisprudence

Under takings jurisprudence, not every use, possession, or control of private property by a public entity constitutes a taking. Except in the instances where there is "categorical" taking caused by a permanent physical occupation or the regulatory denial of all economically productive use of a property, "most takings claims turn on situation-specific factual inquiries." (*Arkansas Game, supra*, __ U.S. __, 133 S.Ct. 511.) Absent such extremes, courts engage in an ad hoc balancing test to determine whether a taking has occurred, weighing the following factors: (1) the economic impact of the regulation, (2) the extent to which the regulation has interfered with distinct investment backed-expectations, and (3) the character of the governmental action. (*Penn Central, supra*, 438 U.S. at p. 124.) In *Arkansas Game*, the Supreme Court affirmed this balancing test and included two other factors courts should consider in the analysis: (1) duration, and (2) the degree to which the invasion is intended or is foreseeable. (*Arkansas Game, supra*, 133 S.Ct. at p. 522.) In the present case, however, the Court of Appeal altered the test both when it overemphasized the "intentional" factor (Opinion at pp. 37-38), and also when it found that an assessment of the landowners' reasonable investment-backed expectation is less relevant where an "intentional" taking is at issue. (*Id.* at p. 41.) Thus, the Court of Appeal has not just created a new test, but an unworkable one that is tilted heavily against public entities in the precondemnation context because the government will always intend to conduct its investigations under the statutes. However, whether an entry is intentional is only *one* of several factors a court must consider, without greater emphasis being placed on any one of the requisite factors. (*Arkansas Game, supra*, 133 S.Ct. at p. 522.)

The Court of Appeal's decision further conflicts with *Arkansas Game* and *Penn Central*'s requirements for a fact-specific takings analysis because the court found an across-the-board taking as to more than 100 properties on the basis of information about a handful of properties. (Dissent at pp. 18-19.) It disregarded the fact that the extent, nature, and impact, if any, of the entries onto each parcel would be unique based on the particular circumstances of that parcel. By way of example, under the State's proposed entry, recreational surveys would not be conducted on agricultural lands. (Petitioners' Appendix of Exhibits in Case No. C067765 ("PA") at p. 1531.) Similarly, parcels without wetlands would not be subject to the additional one to four days of botanical surveys to determine the status of rare, threatened, and endangered plants prevalent only in that terrain. (*Id.*) On dry lands the State would not conduct riparian species surveys or hydrological surveys to identify and/or delineate streams and wetlands.[3] (PA at pp. 1531-1537.) Simply put, the numbers of days and activities varied greatly per parcel.

The landowners assert that they were precluded from offering witnesses to testify as to the interference with the use of their properties. (PRI Answer at p. 14.) However, the trial court permitted the landowners to submit declarations and documentary evidence, which PRI and a few other landowners submitted, and the landowners have not shown that there was any need for the presentation of live testimony from the landowners. Furthermore, the landowners' evidence was properly considered by the trial court, which placed conditions on the State's activities in the environmental order in direct response to concerns expressed by the landowners. (Dissent at pp. 10, 18-19; PA at pp. 1554-1558.)

---

[3] The petition involved properties in five counties, each with a varying prevalence of wetlands.

III. THE DECISION EFFECTIVELY RENDERS THE ENTRY STATUTES UNCONSTITUTIONAL

The landowners contend that the Court of Appeal did not in fact hold the entry statutes unconstitutional. (PRI Answer at p. 8.) To support their position, they assert that "[t]he entry statutes are still valid and permit short, temporary entries to do a land survey, make visual inspections of utilities, flora and fauna." (*Id.*) Yet the Court of Appeal wholesale precluded the very activities that the landowners claim are still valid under the entry statutes.

The majority's holding is in conflict with section 1245.010. That section provides entries for "studies, surveys, examinations, tests, soundings, borings [and] samplings . . . ." Yet, the majority ruled that the studies, surveys, examinations, tests, borings and samplings sought by the State are constitutionally impermissible. The fact remains that the decision results in a radical change of existing law. As the dissent recognized, the majority's decision invalidates a statutory scheme that has been in place for 38 years. (Dissent at p. 1.) Thus, the constitutionality of such a critically important statute is a matter worthy of review.

Further, while the Court of Appeal states that its decision allows "innocuous entries" and "superficial examinations" (Opinion at p. 20), the actual effect of the decision, as applied by the Court of Appeal to the facts of this case, is to preclude all entries, even those that would seem to be innocuous under any definition. For example, one of the authorized activities under the environmental order—which the Court of Appeal invalidated in its entirety—involved nothing more than bird-watching:

> Activities will consist of surveys for sensitive bird species, and/or species habitat components required by sensitive species. Access [by 1-2 personnel] will be by motor vehicle[4] or, where possible, [primarily] by walking the properties to reach habitats. . . . Equipment to be utilized will include motor vehicle, binocular/spotting scope, photography equipment, maps, GPS unit, and laptop computer.

(PA at p. 1532.)

The environmental order also authorized the "visual inspections of utilities," which the landowners contend are still permitted under the decision. (PRI Answer at p. 8.) The environmental order authorized surveys of overhead utilities, including walking surveys and geodetic mapping, although the majority of such activities would be "accomplished by review of public records." (PA at p. 1538.)

Although explicitly authorized by section 1245.010, the Court of Appeal effectively ruled even these minimally invasive activities to be a taking. Because the activities barred by the decision are so extensive, it is difficult to fathom what activities, if any, are now constitutionally permissible under the entry statutes. The activities highlighted above (bird-watching and utility surveys) would certainly seem to qualify as "innocuous entries" under the holding in *Jacobsen*, yet the Court of Appeal's decision does not permit them, creating tremendous uncertainty as to how "innocuous entries" and "superficial examination" should be defined.[5]

---

[4] Some of the parcels are as large as 8,500 acres. (PA at p. 1556.) The use of "vehicles and large equipment [is limited] to existing roadways; no vehicles or large equipment will be allowed in planted fields or orchards." (PA at p. 1551.)

[5] The landowners also argue that the entries violate their right to exclude others. (PRI Answer at p. 12.) Taken to its logical conclusion, this would necessarily preclude ***all*** entry activities, notwithstanding their belief that "innocuous" entries survive the rather broadly worded opinion.

By categorically precluding all ostensibly innocuous statutorily-authorized activities on 138 properties (in addition to the borings), the Court of Appeal essentially rendered the entry statutes unconstitutional in their entirety, as it is unclear what, if any, entries are permissible. In so doing, the Court of Appeal failed to follow this Court's directive that courts adopt the construction which, without doing violence to a statute, will render it "valid in its entirety, or free from doubt as to its constitutionality, even though other [potential] construction is equally reasonable." (*People v. Superior Court (Romero)* (1996) 13 Cal.App.4th 497, 509.)

Finally, the landowners mischaracterize the State's position concerning the burden the decision will place on public entities, landowners, and even the courts. (PRI Answer at pp. 22-23.) The amicus letters succinctly speak to those burdens. It is not the State's position that government convenience trumps constitutional restraints. Rather, it is the State's position that in drafting the current entry statutes, the State Legislature attempted to and succeeded in forging a balance with respect to both sides. Eminent domain cases, including *Jacobsen*, also address this balancing. (*Jacobsen, supra,* 192 Cal. at p. 325, *People ex rel. Department of Public Works v. Ayon* (1960) 54 Cal. 2d 217, 228-229.)

IV. THE ENVIRONMENTAL ORDER DID NOT GRANT A BLANKET EASEMENT

The landowners argue that the Court of Appeal's decision is correct because the entry order can be characterized as a "year-long temporary blanket easement." (Nichols Answer at p. 3.) Such characterization is inapt, however, as it overstates the scope of the entries. The entries (both environmental and geological) were not of unlimited duration and location, occurring 24-hours a day, 365 days a year on any or all portions of a parcel (i.e., a "blanket easement"). Rather, the entries were limited to a maximum of 66 days on three of the 168 parcels, and the remaining parcels varying

from 25 to 55 days. The entries were also subject to other conditions, including number of personnel, location, and seasonal limitations, among other restrictions. (PA at pp. 1554-1558.) The order is also subject to modification, and presumably recession. (Code Civ. Proc., §1245.040.)

A floating or "blanket" easement, on the other hand, generally allows the holder to place its structures or activities anywhere on the property burdened by the easement, as the terms of the easement do not identify specific location. (6 Miller & Starr, Cal. Real Estate (3d ed. 2001, Supp. 2013), §1550.) The environmental order contained extensive limitations as to the location and duration of the surveys, as well as access to and location of traps, survey stakes, and targets. (PA at pp. 1554-1558.) The order did not give the State access to "every square foot of the property." (PRI Answer, p. 3.)

The landowners cite a series of cases demonstrating that public entities "commonly acquire easements by way of eminent domain." (Nichols Answer at pp. 23-24.) But none of the cases cited concern entries in the precondemnation context. Rather, each involves acquisitions for an approved project as part of an eminent domain action, and most involve the condemnation of a temporary construction easement along with other acquisitions for construction of the project. Under those circumstances, the public entity has already determined the feasibility of the project and what interests are needed for that project, and thus the public entity has no need to seek precondemnation entry. The fact that public agencies often condemn temporary construction easements and other easements for approved public projects under those particular circumstances is irrelevant to the issues at hand.

V. BORINGS ARE EXPLICITLY ALLOWED BY THE ENTRY STATUTES, AND THE STATE IS NOT PERMANENTLY OCCUPYING THE PROPERTIES

The landowners' claim that the geotechnical activities result in a permanent occupancy of property, and thus constitute a taking per se, is both factually and legally incorrect. The backfilled holes do not infringe upon the landowners' right to possess, use, or exclude others. The landowners rely on *Hendler v. U.S.* (1991) 952 F.2d 1364, 1377, for the proposition that a physical occupation need not be exclusive, continuous, or uninterrupted. (PRI Answer at p. 18.) However, both *Hendler* and *Loretto v. Teleprompter Manhattan CATV Corp.* (1982) 458 U.S. 419, are inapposite because they concern a continuous use of property.

In *Loretto*, the cable equipment was permanently affixed to the building and the cable company made permanent use of the property, depriving the owner of the use and possession of that portion of property on a permanent basis. (*Loretto*, *supra*, 458 U.S. at p. 438.)

In *Hendler*, the Environmental Protection Agency ("EPA") installed groundwater monitoring wells on the property. There was "nothing temporary" about the wells in *Hendler*. Those wells were significant structures that remained operational and required regular maintenance and monitoring at any time by the EPA. (*Hendler*, *supra*, 952 F.2d at p. 1377.)

In both cases, the entity in question placed equipment or structures on the property, occupying that space on a permanent basis. Here, after the initial drilling is done, the holes are backfilled and the State departs the property. The State cannot return at will, or at all, to "monitor" the holes or make any further use of them. The entirety of the backfilled area would remain under the owner's exclusive possession. Absent further court-ordered entries, the State would have no right of possession, nor any interest in the space.

As to the landowners' claim of an "occupation" of a parcel while the borings are being drilled, such a transitory event does not support a finding of a taking per se. As noted in *Loretto,* "temporary limitations are subject to a more complex balancing process to determine whether they are a taking." (458 U.S. at p. 436, fn. 12.)

The cases from other jurisdictions also fail to support the landowners' position. In *County of Kane v. Elmhurst National Bank* (1982) 111 Ill.App.3d 292, the county sought entry to conduct surveys, appraisals, and subsoil tests. (111 Ill.App.3d at pp. 293-294.) That case turned on the particular statutes at issue, which did not authorize subsurface soil studies, or they required the owner's consent. (*Id.* at p. 296.) As the court stated, "[t]he legislature evidently did not believe that the power to make 'preliminary surveys' embraced the power to make subsurface soil studies . . .". (*Id.*) However, the court also rejected the owner's argument that "not even preliminary surveys or appraisals may be undertaken without the landlord's consent unless a condemnation proceeding has first been instituted." (*Id.* at p. 297.)

Missouri Highway and Transportation Commission v. Eilers (1987) 729 SW.2d 471, 472-473 and *Burlington Northern and Santa Fe Railway Co. v. Chaulk* (2001) 262 Neb. 235, similarly involved statutes that disallowed subsurface studies. In *Eilers*, the court noted "[n]either § 227.120(13) nor § 388.210(1) specifically mention a soil survey and thus the statutes on their face do not support the Commission's position." (729 SW.2d at p. 473.) In *Chaulk* , the statute allowed entry for "examining and surveying" land. (262 Neb. at p. 242.) The court explained that the Legislature explicitly allowed other condemnors authority to enter upon land for more extensive activities. (*Id.* at p. 244.) "It is presumed that the Legislature knowingly limited the precondemnation activities a condemnor may conduct upon property pursuant to § 76-702, and, even if this

limitation is by legislative oversight, it is not the office of the courts to legislate into existence greater authority. . . ." (*Id.*)

In each of these cases, subsurface activities were rejected based on the express language of the statute involved. Here, however, section 1245.010 expressly permits borings.

VI. ADDITIONAL BRIEFING IS NOT WARRANTED ON THE ISSUES PROPOSED BY THE LANDOWNERS

The landowners ask this Court to allow briefing on three additional issues should review be granted: indispensable parties in an entry petition, the right to conduct discovery under the entry statutes, and impact on reclamation districts (assuming the landowners have standing to raise this issue, which the State does not concede). (Nichols Answer at p. 28.) The trial court ruled in favor of the State with respect to each issue. (*Id.*)

The landowners concede that if the entries are not a taking, then the indispensable party and discovery issues would not arise. (Nichols Answer at pp. 29-31.) Thus, there would be no need for briefing these issues if the opinion is reversed. Conversely, if this Court upholds the decision and finds that the entries amount to a taking, then these additional issues are moot because all procedures under the eminent domain law and the Code of Civil Procedure generally would apply to the condemnation action filed for obtaining entry. In either scenario, these issues require no further briefing before this Court.

As to the impact on the reclamation districts, the entry statutes do not require public entities to also name other public agencies unless they are owners. (Code Civ. Proc., §1245.030 [requiring only notice to the "owner of the property"].) Also, the environmental order prohibited any digging, hand auguring, or drilling within 100 feet of the base of any levee and required compliance with any reclamation district general rules or

regulations. (PA at p. 1557.) Accordingly, the State does not believe this issue warrants briefing should this Court grant review.

CONCLUSION

Because the Petition presents constitutional issues of widespread importance to California public entities and landowners, the State respectfully requests that this Court grant the Petition for Review.

Dated: May 22, 2014

Respectfully submitted,
KAMALA D. HARRIS
Attorney General of California
KRISTIN G. HOGUE
Senior Assistant Attorney General
ALBERTO L. GONZÁLEZ
Supervising Deputy Attorney General
JAMES C. PHILLIPS
MICHAEL P. CAYABAN
Deputy Attorneys General

NELI N. PALMA
Deputy Attorney General
Attorneys for Petitioner California Department of Water Resources

CERTIFICATE OF COMPLIANCE

I certify that the attached **PETITION FOR REVIEW** uses a 13 point Times New Roman font and contains 4157 words.

Dated: May 22, 2014

Respectfully submitted,
KAMALA D. HARRIS
Attorney General of California
KRISTIN G. HOGUE
Senior Assistant Attorney General
ALBERTO L. GONZÁLEZ
Supervising Deputy Attorney General
JAMES C. PHILLIPS
MICHAEL P. CAYABAN
Deputy Attorneys General

NELI N. PALMA
Attorneys for Petitioner California Department of Water Resources

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 declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter. I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service with postage thereon fully prepaid that same day in the ordinary course of business.

On **May 22, 2014,**, I served the attached:

REPLY TO ANSWERS TO PETITION FOR REVIEW

by placing a true copy thereof enclosed in a sealed envelope in the internal mail collection system at the Office of the Attorney General at 455 Golden Gate Avenue, Suite 11000, San Francisco, CA 94102-7004, addressed as follows:

SEE ATTACHED LIST

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on **May 22, 2014**, at San Francisco, California.

Sylvia Wu
Declarant

Signature

SA2011302082
POS - Pet for Rehearing.doc

Case Name: California Dept. of Water Resources v. Janice Adams, et al.

Case Nos: C068469
Coordinated Proceedings Special Title (Rule 3.550)
Department of Water Resources
Consolidated Matters: C067758 and C067765

SERVICE LIST

Attorneys for Respondents/Cross-Appellants Thomas H. Keeling, Esq. Freeman, D'Aiuto, Pierce, Gurev, Keeling & Wolf 1818 Grand Canal Boulevard, Suite 4 Stockton, CA 95207-4417	**Attorneys for Respondent Property Reserve** Christopher S. Hill, Esq. Kirton & McConkie P.O. Box 45120 1800 Eagle Gate Tower, 60 E. South Temple Salt Lake City, UT 84145-0120 Telephone: (801) 328-3600 Facsimile: (801) 321-4893 Email: chill@kmclaw.com
Dante J. Nomellini, Jr., Esq. Nomellini, Grilli & McDaniel P.O. Box 1461 235 East Weber Avenue Stockton, CA 95201 Telephone: (209) 465-5883 Facsimile: (209) 465-3956 Email: dantejr@pacbell.net	Gerald Houlihan, Esq. Norman Edward Matteoni, Esq. Matteoni, O'Laughlin & Hechtman 848 The Alameda San Jose, CA 95126 Telephone: (408) 293-4300 Facsimile: (408) 293-4004 Email: Gerry@matteoni.com
Attorneys for Respondents Delta Ranch & Sutter Home Winery Daniel Kelly, Esq. Somach, Simmons & Dunn 500 Capitol Mall, Suite 1000 Sacramento, CA 95814 Telephone: (916) 446-7979 Facsimile: (916) 446-8199 Email: dkelly@somachlaw.com; ydelacruz@somachlaw.com	**Attorneys for Respondents Tuscany Research & CCRC Farms** Scott McElhern, Esq. Downey Brand, LLP 621 Capitol Mall, 18th Floor Sacramento, CA 95814-4731 Telephone: (916) 444-1000 Facsimile: (916) 520-5767 Email: smcelhern@downeybrand.com; mdowd@downeybrand.com
Stephanie D. Hedlund, Esq. Best Best & Krieger 500 Capitol Mall, Suite 1700 Sacramento, CA 95814	

Justicial Council of California Chief Justice c/o Shawn Parsley, Administrative Coordinator Judicial Council of California, AOC 455 Golden Gate Avenue San Francisco, CA 94102-3660	The Honorable John P. Farrell Francine Smith, Civil Supervisor San Joaquin Superior Court 222 E. Weber Avenue, Rm. 303 Stockton, CA 95202