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In the Supreme Court of the State of California

Case No. S217738

PROPERTY RESERVE, INC., **Defendant and Respondent,** **v.** **STATE OF CALIFORNIA, BY AND THROUGH DEPARTMENT OF WATER RESOURCES,** **Plaintiff and Appellant.**	**Court of Appeal** **Case No. C067758** **San Joaquin County** **Case No. JCCP4594**
THE CAROLYN NICHOLS REVOCABLE LIVING TRUST, etc., et al., **Defendant and Respondent,** **v.** **DEPARTMENT OF WATER RESOURCES,** **Plaintiff and Appellant.**	**Court of Appeal** **Case No. C067765** **San Joaquin County** **Case No. JCCP4594**
COORDINATED PROCEEDINGS SPECIAL TITLE (RULE 3.550) **DEPARTMENT OF WATER RESOURCES**	**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. JCCP 4594, Honorable John P. Farrell, Judge

SUPREME COURT
FILED
SEP 26 2014
Frank A. McGuire Clerk
Deputy

OPENING BRIEF ON THE MERITS

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 the Department of Water Resources

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ISSUES PRESENTED

Pursuant to this Court's Order of June 25, 2014, the issues to be briefed and argued are:

(1) Do the geological testing activities proposed by the State of California, by and through the Department of Water Resources, constitute a taking?

(2) Do the environmental testing activities set forth in the February 22, 2011, entry order constitute a taking?

(3) If so, do the precondemnation entry statutes (Code Civ. Proc., §§ 1245.010-1245.060) provide a constitutionally valid eminent domain proceeding for the taking?

INTRODUCTION

In the decision below, a divided panel of the Court of Appeal incorrectly concluded that a vital part of the Eminent Domain Law, the precondemnation entry statutes (§§ 1245.010 –1245.060),[1] fails to meet the requirements of the just compensation clause of the state Constitution (Cal. Const., art. I, § 19, subd. (a)). The entry statutes permit public entities with the power of eminent domain to petition a court for temporary entry onto property to conduct surveys, tests, and soil borings to determine suitability of land for a contemplated public project. The entry statutes provide for a summary petition procedure in which the trial court determines the nature and scope of the permitted activities after notice and hearing, and establishes the probable amount of compensation to be paid to the owner for any actual damage or interference with the possession or use of the property, which amount is required to be deposited prior to the entry.

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

Disregarding the logical structure and legislative intent behind the entry statutes, the Court of Appeal held that the permitted activities, unless completely innocuous, constitute a taking of private property, and may be accomplished only by filing a formal complaint in eminent domain. If allowed to stand, the decision would substantially increase the time and expense required for an agency to evaluate and potentially proceed with a public project. It also would require landowners to defend against two eminent domain actions, including one before it is even determined whether the property will be needed and acquired for a public project. This would be inconsistent with the purpose and legislative history behind the entry statutes.

In this case, the State of California, by and through the Department of Water Resources ("State"), sought entry to conduct environmental studies and geological studies in order to investigate the feasibility of adding water conveyance facilities in the Sacramento-San Joaquin Delta, and to determine the suitability of the alternative routes for the proposed project, which would be part of the State Water Project (SWP).[2] The Department of Water Resources (DWR) operates and maintains the SWP which supplies water to two-thirds of California's population. The purpose of the new facilities, which are a part of the Bay Delta Conservation Plan, is to improve water supply reliability and to restore the Delta ecosystem and native fish populations.

[2] The SWP is a water storage and delivery system of reservoirs, aqueducts, power plants and pumping plants. Its main purpose is to store water and distribute it to 29 urban and agricultural water suppliers in Northern California, the San Francisco Bay Area, the San Joaquin Valley, the Central Coast, and Southern California. Of the contracted water supply, approximately 70 percent goes to urban users and 30 percent goes to agricultural users. (http://www.water.ca.gov/about/swp.cfm)

The activities proposed by the State do not constitute takings under the multi-factor balancing test set forth in *Penn Central Transp. Co. v. New York City* (1978) 438 U.S. 104, 130-131, and *Arkansas Game and Fish Commission v. United States* (2012) __ U.S. __, 133 S.Ct. 511, 522. This balancing test looks to factors such as economic impact; interference with investment-backed expectations; character of the activity; duration; severity; and intent to damage or interfere with the property.

The State's proposed environmental testing activities consist of temporary, noticed, intermittent entries totaling 25 to 66 days (depending on parcel size) over the course of a year to conduct surveys, make visual observations, take photographs, and sample soil. The entries are not expected to cause any economic harm or to interfere with owners' possession or use of their properties, particularly in light of the large size and nature and uses of the parcels involved. They would be relatively short in duration, and would be made subject to a court order imposing numerous conditions designed to minimize, if not eliminate, any impact. Such limited activities are not takings under *Penn Central* and *Arkansas Game*.

The proposed geological testing activities likewise would not be takings. They would involve temporary entries to conduct soil tests and borings, including drilling holes up to 8 inches in diameter and 205 feet deep. The drill holes would be filled with a bentonite grout that is similar in texture and function to the native soils. The bentonite material can be cut with a knife and breaks apart if contacted by farming equipment. The top 2 to 5 feet of the boring hole would be replaced with native soil to restore the properties as closely as possible to their pre-testing condition. These activities are not expected to cause any significant economic impact or interference with the possession or use of the properties. They would affect only small portions of the properties; be timed and located in

consultation with property owners to minimize any disruption (e.g., avoiding harvest or hunting seasons); and last only 3 to 14 days.

The Court of Appeal declined to analyze the proposed geological activities using the *Penn Central* and *Arkansas Game* factors, on the theory that using bentonite grout to fill drill holes would effect a "permanent physical occupation" of the properties and thus be a per se taking under *Loretto v. Teleprompter Manhattan CATV Corp.* (1982) 458 U.S. 419. That is not correct. The grout is not a permanent structure, but a functionally equivalent replacement for soil displaced by the one-time drilling. The fill would not disrupt owners' rights or ability to possess, use, and dispose of their properties, and the State would have no continuing interest in or control over the properties or the filled space.

Even if the proposed entries would constitute takings, the entry statutes provide constitutionally valid eminent domain procedures. California's just compensation clause gives the Legislature broad discretion to fashion eminent domain proceedings, subject to tender to the court of the probable amount of compensation and a jury trial on the issue of just compensation. (Cal. Const., art. I, § 19, subd. (a).) These constitutional requirements are satisfied by the entry statutes. Moreover, the statutes are entitled to a strong presumption of constitutionality, particularly because the Legislature adopted them based on a specific judgment that the procedures they provide would satisfy the just compensation clause. That constitutional judgment by a coordinate Branch is entitled to respect.

As a practical matter, the Court of Appeal's decision would require public agencies contemplating large-scale public works (freeways, major pipelines, utilities) that might require actual takings to conduct two sets of condemnation proceedings with their attendant costs and delays: one for the preliminary studies necessary to determine whether a project is even

feasible and, if so, what property interests would need to be taken to build it, and if the decision is made to proceed with a project which impacts that particular property, a second condemnation action for that acquisition. This is not what the Legislature intended or what the California Constitution requires.

The entry statutes permit agencies to assess the suitability of a property for a public project before it is determined whether the property will be taken (or, indeed, whether the project will proceed at all), while fully protecting owners against any resulting loss or damage. Moreover, they allow agencies to gather information and data to make the required determination that the project is planned or located in the manner that will be most compatible with the greatest public good and the least private injury – a finding which cannot be made in a vacuum. (§ 1245.230, subd. (c)(2).) That is all the Constitution requires. This Court should reverse the Court of Appeal's decision and remand this case with instructions to permit the requested environmental and geological testing to proceed, in accordance with the safeguards provided by the entry statutes and appropriate supervision by the trial court.

CONSTITUTIONAL AND STATUTORY PROVISIONS

A. The Just Compensation Clause

California's just compensation clause provides:

> Private property may be taken or damaged for a public use and only when just compensation, ascertained by a jury unless waived, has first been paid to, or into court for, the owner. The Legislature may provide for possession by the condemnor following commencement of eminent domain proceedings upon deposit in court and prompt release to the owner of money determined by the court to be the probable amount of just compensation.

(Cal. Const., art. I, § 19, subd. (a).)

B. The Precondemnation Entry Statutes

The entry statutes are included in the Code of Civil Procedure under the Eminent Domain Law (Part 3, Title 7), Chapter 4 (Precondemnation Activities), Article 1 (Preliminary Location, Survey, and Tests). Section 1245.010 provides:

> Subject to requirements of this article, any person authorized to acquire property for a particular use by eminent domain may enter upon property to make photographs, studies, surveys, examinations, tests, soundings, borings, samplings, or appraisals or to engage in similar activities reasonably related to acquisition or use of the property for that use.

The agency seeking such entry must obtain either the owner's consent or a court order. (§ 1245.020.) An owner is entitled to a hearing on all issues pertinent to the petition, including the purpose of the entry, the nature and scope of the activities reasonably necessary to accomplish that purpose, and the probable amount of compensation to be paid to the owner for the actual damage to the property and interference with its possession or use.[3] (§§ 1245.030, subd. (b), 1245.040, subd. (a).) The entry statutes also require a deposit of the "probable amount of compensation," which is determined by the court and may be adjusted on the request of any party. (§§ 1245.030, subd. (c), 1245.040, 1245.050.)

Should "actual damage to or substantial interference with the possession or use of the property occur as a result of the entry," section 1245.060 allows the owner to recover full compensation by filing an

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[3] The appellate court found the entry statutes do not provide for a hearing. Although an entry petition is not subject to the minimum notice requirements of section 1005 (§ 1245.030, subd. (a)), it does not follow that a hearing on the petition is not required. Like any request for an order to the court, a notice of hearing is required as part of the request. (Cal. Rules of Court, rules 3.1103(a)(1), 3.1112(a)(1).)

application with the court, or by filing a separate civil action (which can provide for a jury trial to determine the amount of damage), or by invoking any other available remedy. (§ 1245.060, subd. (d).) Section 1245.060, subdivision (b), further requires the court to award costs to a prevailing claimant, and to order the payment of litigation expenses under the Eminent Domain Law if the agency entered unlawfully, abused the right of lawful entry, or violated the terms of an order permitting entry. (§ 1245.060, subd. (b).) Under section 1235.140, "litigation expenses" include the fees of attorneys and experts.

STATEMENT OF FACTS AND PROCEDURAL HISTORY

A. The Bay Delta Conservation Plan

The State is proposing to construct new water conveyance facilities in the Delta. The proposed project would include construction of new intake facilities in the North Delta with connecting pipelines and tunnels to convey water to the existing SWP pumping facilities in the South Delta, where the water can be supplied to a majority of the state's population and farming through the existing aqueducts. (Attachments to Motion to Augment Record on Appeal (MA) at pp. 28:9-34:13, 109:23-110:20.) New and improved facilities would increase the State's ability to deliver water, enhance reliability, and bolster the operational flexibility of state and federal water projects—improvements that are also expected to improve ecosystem conditions for endangered species in the Delta. (2 Petitioners' (Nichols, et al.) Appendix of Exhibits in Support of Petition for Writ of Mandate, Prohibition or Other Appropriate Relief in Appellate Case No. C067765 (PA) at pp. 273, 299, 310.) The various proposed locations for the project cross or lie beneath privately owned lands, and the State seeks to enter these properties to gather preliminary environmental and soil information about them. (*Id.* at pp. 272-274.) The entries would enable the State to: (1) investigate potential effects on biological, water,

environmental, geological, and archeological resources to ensure compliance with state and federal environmental laws, including the California Environmental Quality Act, the National Environmental Policy Act, the California Endangered Species Act, the Federal Endangered Species Act, the Federal Clean Water Act, and the Porter-Cologne Water Quality Act; (2) investigate the feasibility of alternative potential conveyance systems (surface level canals, surface level pipelines, or buried tunnels); (3) investigate the best potential location for each alternative conveyance system; and (4) determine whether a water conveyance system is infeasible for any number of reasons, including geological conditions in the Delta. (*Id.* at pp. 273, 298-305.)

B. The State's Entry Petitions

Between 2008 and 2009, the State filed more than 150 petitions pursuant to section 1245.010 seeking orders permitting entry onto properties in five counties (San Joaquin, Contra Costa, Solano, Yolo, and Sacramento) to conduct environmental and geological testing for the proposed project.[4] (2PA at pp. 272-296.) In June 2009, the State filed a request to coordinate the entry petitions. (1PA at pp. 66-98, 106-143.) On March 9, 2010, the superior court granted the request, coordinating more than 150 petitions and setting venue in San Joaquin County. (*Id.* at pp. 154-155, 247.) As the court's order noted, most respondents opposed coordination by asserting unique, "parcel-specific" issues concerning the potential effects of the State's entry and alleged potential damages on each parcel. (*Id.* at p. 154.)

[4] The State initially sought entry onto more than 150 properties. Settlements were reached with several owners, leaving 138 properties currently at issue.

On September 3, 2010, the court granted the State leave to file a Master Amended Petition. (2PA at pp. 269-270, 271-322; 1Appellant's (State's) Appendix in Appellate Case No. C068469 (AA) at pp. 35-42.) In its Master Amended Petition, the State sought entry for "environmental activities" in all cases, and entry for "geological activities" in some cases. (2PA at pp. 278-292, 294-296.) The environmental studies generally consist of surveys for sensitive plant and animal species, critical habitat, soil conditions, hydrology, cultural resources, utilities, and recreational uses. (*Id.* at pp. 278-285.) The geological entries involve borings up to eight inches in diameter at depths of up to 205 feet. (*Id.* at p. 294; 1AA at pp. 179-184.)

At a case management conference in October 2010 (2PA at pp. 323-451), the trial court invited any owner to present further evidence by way of declaration to substantiate any parcel-specific issues with respect to the proposed entries. (2PA at pp. 346:21-347:7, 376:4-381:18, 391:18-392:13, 405:11-18.) The court ordered the State to produce witnesses for examination on the scope of the proposed entries. (*Id.* at pp. 365:8-369:26.)

The trial court bifurcated the proceedings, setting hearings first for matters relating to the proposed environmental activities and then for those relating to the proposed geological activities. (2PA at pp. 452-465.)

C. Order Granting Entry for Environmental Activities

1. Evidence considered by the trial court

On November 19, 2010, the court conducted a hearing regarding preliminary legal matters raised by the owners, including Fourth Amendment issues and alleged indispensable parties. (1 Reporter's Transcript on Appeal (RT) at pp. 4-74.) On November 22, 2010, the court rejected the owners' preliminary challenges. (2PA at pp. 541-545.) The court also welcomed comments or opposition from any person claiming an

interest in the parcels, "so that the Order will be properly tailored if and when issued." (*Id.* at p. 544.)

On December 16-17, 2010, the court conducted evidentiary hearings on the environmental activities. (1RT at p. 75-2RT at p. 348.) The State produced three witnesses for examination: a Senior State Surveyor (1RT at pp. 149-200), a Supervising Land Agent (1RT at pp. 202-278), and the Environmental Program Manager (1RT at pp. 279-316).

The State's land surveyor described the proposed mapping activities, including how those activities—up to four brief visits over a 20-30 day period total—would not affect farming activities. (1RT at pp. 150:20-152:25, 177:2-14, 187:18-190:15, 195:18-196:19.) The State's supervising land agent testified that the purpose of the entries was to conduct preliminary environmental studies; no decision to acquire any of the parcels had been made. (*Id.* at pp. 213:2-217:26.) He also testified about efforts to minimize any impacts on the parcels. (*Id.* at pp. 248:3-18, 261:18-264:22.) The State's environmental program manager testified that trapping activities for sensitive species would occur on a case-by-case basis depending on whether the parcel had habitat suitable for the species. (*Id.* at pp. 285:2-287:11.) He also testified that any boats needed for surveys would launch from a public marina and would not go onto private property. (*Ibid.*)

In opposition, the property owners submitted declarations concerning potential effects of the entries on only four of the 138 properties at issue in the case.[5] The declarations suggested that the activities might adversely

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[5] Thomas M. Zuckerman on behalf of Rindge Tract Partners, Inc. (3PA at pp. 597-599); Clint Womack and James A. Barrett on behalf of Mandeville Island (Tuscany Research Institute and CCRC Farms) (*Id.* at pp. 615-629); Daniel McCay on behalf of Property Reserve, Inc. (1Petitioner's (Property Reserve's) Appendix of Documents Supporting

(continued...)

affect recreational and agricultural uses on the parcels during harvest and hunting seasons. (3PA at pp. 597-599, 615-616.) One parcel owner also requested 48-hours notice prior to entry. (*Id.* at pp. 617, 618-619.) Another identified further potential effects of the environmental and geological entries on its parcel, including potential damage to crops. (1PRA at pp. 279-287.) In addition, 22 landowners submitted declarations that did not allege any impacts from the proposed activities, but merely set forth parcel numbers, acreage, and uses (mostly agricultural). (1Respondents' and Cross-Appellants' (Scribner, et al.) Appendix in Appellate Case No. C068469 (RCA) at pp. 60-108.)

2. Issuance of the order and findings per the entry statutes

Following hearings on December 16-17, 2010, January 21, 2011, and February 19, 2011 (4PA at pp. 1078-1082; 3RT at pp. 349-574), the court issued an order on February 22, 2011, finding that the environmental activities fell squarely within the scope of those permitted under the entry statutes, and granting the State restricted intermittent entry onto all 138 parcels. (6PA at pp. 1525-1569.)[6] In accordance with section 1245.050 subdivision (b), the court required the State to submit deposits of $1,000 to $6,000 for each parcel, based on property size, as probable compensation for any actual damage or substantial interference with the owners' use or possession that might result from the entries. (*Id.* at pp. 1514, 1528-1529.)

(...continued)
Petition for Writ of Prohibition, Mandate, or Other Appropriate Relief in Appellate Case No. C067758 (PRA) at pp. 279-287); and Hal Huffsmith on behalf of Delta Ranch and Sutter Home Winery, Inc. (referenced in briefing, but declaration not included as part of the record on appeal). (3PA at pp. 634-636.)

[6]Prior to issuing the entry order, the trial court issued tentative rulings on the proposed conditions to any entry order seeking any comment and opposition. (4PA at pp. 1078-1082; 5PA at pp. 1291-1292.)

3. The nature and scope of the permitted activities

The authorized environmental activities consist of various surveys conducted by walking and visual observation, minor soil sampling for botanical and archeological surveys, and trapping and photography of small animals. (6PA at pp. 1531-1538.) The equipment to be used would include small handheld tools to assist with visual observations, data collecting, photographing, and sampling. (*Ibid.*) Except for small traps left in riparian habitat and small cloth flags for mapping activities, no equipment would be left behind during the entries. (*Ibid.*) Apart from small vegetation samples, nothing would be collected or removed from the properties. (*Ibid.*) The entries would be accomplished on foot where practicable, or by vehicle or small boat if necessary for large parcels or particular areas. (*Ibid.*) All vehicles would be restricted to existing roads. (*Id.* at p. 1551.)

4. Conditions in the entry order to address landowner concerns

In order to minimize any effect on use of the properties, the trial court placed several conditions on the entries. These included, among others, the number of days on properties (25 to 66 days over a one-year period depending on parcel size),[7] the time of day (7 a.m. to 7 p.m.), the number of persons per entry (4-8 people), a 72-hour advance notice requirement before each entry, and seasonal exclusions (entries not permitted during harvest on agricultural land, nor during hunting season on hunting lands). (6PA at pp. 1515, 1554-1558.) The order required most activities to occur concurrently, to reduce the total number of days of entry. (*Id.* at p. 1531.) The court observed that it had given "due consideration [to] constitutional limitations and statutory procedures required for a taking of property" and

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[7] See 6PA at p. 1556 [budget of days in order], 1PA at pp. 31-41 [corrected list of subject properties], 5PA at pp. 1353-1355 [acreage of parcels subject to the entry order].

had "provided suitable limitations to strike the best possible balance between the needs of [the State] and the interests of the property owners." (*Id.* at p. 1527.)

D. Order Denying Entry for Geological Activities

1. Evidence considered by the trial court

On February 24-25, 2011, the superior court held a hearing on the geological activities proposed for 35 parcels. (MA at pp. 1-163.) The State offered the testimony of two Engineering Geologists. (MA at pp. 24:12-160:16, 174:16-223:12) In its Supplemental Description of Geological Activities (3AA at pp. 608-614) and in the testimony of one state witness (MA at pp. 28:9-34:13, 109:23-110:20), the State explained that these activities were needed to identify the suitability of geological conditions along alternative alignments for project components such as surface canals and underground water conveyance tunnels. The State's witness also testified about efforts to address the concerns of owners, including scheduling the timing of the testing to avoid conflicts with farming activities. (MA at pp. 51:13-52:25, 115:26-118:10, 153:2-27, 159:10-160:14.)

The owners submitted little in the way of evidentiary support in opposition to the geological activities. The testimony of a civil engineer focused on levee safety and integrity. (MA at pp. 230:6-272:20; RCA at pp. 119-125.) The declaration of one owner described the use of his particular property and the presence of farming and irrigation activity, but failed to allege any parcel-specific impact that might result from the geological activities. (1AA at pp. 60-62.) Property Reserve, Inc., submitted a declaration averring that one proposed test—which, as described below, would involve drilling a single 1.5-inch-diameter hole up

to 205 feet deep, and could be completed by up to four individuals working for a single day—might hinder harvesting activities on its 2,680-acre parcel. (2PRA at pp. 279-287; 3AA at p. 612; 5PA at p. 1355.)

2. The nature and scope of the proposed activities

a. Preliminary identification of sites

In order to conduct the geological tests, the State proposed to first access the parcels for up to two days to determine locations for activities along the potential alignments. (3AA at p. 610; MA at pp. 28:23-34:13, 50:18-57:1, 75:1-8, 109:28-110:20.) This would include consultation with the owners, both to determine the least intrusive means of access and location and to check for any underground utilities. (3AA at p. 610; MA at pp. 50:2-56:4.) The sites of the geological activities could be adjusted from east to west by as much as 200 feet, after consultation with owners, so as to minimize any potential interference with existing uses. (MA at pp. 51:13-53:12, 103:13-104:2.) The State geologist testified that the goal would be to find locations for the surveys along roads and turnouts in order to limit any damage or interference. (*Id.* at pp. 103:13-104:2, 115:28-118:2.)

b. CPT activities

Once sites were identified, the State would conduct "cone penetrometer testing" (CPT) on each of the parcels, to determine soil properties relevant to other tests or potential project activities. (AA at p. 611; MA at pp. 43:18-24, 49:27-50:1, 58:15-59:18.) CPT involves pushing into the ground a long rod that emits electrical signals to determine subsurface composition. (MA at pp. 39:5-15; 42:12-43:24.) It creates a hole 1.5 inches in diameter and up to 205 feet in depth. (3AA at pp. 611-614; MA at p. 134:17-21.) CPT testing would be completed within a single day, and would involve up to four vehicles and four personnel during the course of the day. (3AA at p. 611; MA at pp. 43:25-50:1, 74:5-75:8.) The

State proposed to conduct CPT testing on all 35 parcels slated for geological activities, with soil borings (also called drill holes) conducted on 28 of the 35. (MA at pp. 78:14-22, 121:19-24; 3AA at pp. 612-614.) Where the State proposed to conduct only CPT testing and not borings, the geological activities would be completed within a combined total of three days or less, including preliminary identification of sites. (3AA at pp. 610-611.)

c. Soil boring tests

For the 28 parcels on which the State proposed boring activities, the drill hole locations would generally be located within five feet of the CPT hole. (MA at p. 58:3-6.) The area needed to conduct the borings would be approximately 100 feet by 100 feet (*id.* at p. 69:12-26), although the worksite could be stretched alongside a roadway to avoid drilling in fields. (*Id.* at pp. 103:3-104:2.) The boring teams would drill holes into the ground, ranging from 3.7 to 8 inches in diameter and reaching depths of 5 to 205 feet. (1AA at pp. 16-18; 3AA at pp. 611-614; MA at pp. 108:8-109:4, 139:14-20.) Actual boring would take approximately five days for each hole with a five-person crew. (MA. at p. 37:19-23; 3AA at pp. 611-14.) The total boring process, including set-up and take-down, would be completed within 11 days on each site. (3AA at p. 611.) Accordingly, boring activities would be completed within a combined total of 14 days or less, including the time for preliminary investigation and CPT activities. (1AA at pp. 16-18; 3AA at pp. 610-611; MA at pp. 37:8-18, 76:22-77:17, 193:24-194:8.)

d. Backfill of the test holes

The CPT and boring test holes would be re-filled with native top soil for the upper 2 to 5 feet. (MA at pp. 94:26-96:6, 123:8-25.) This would help restore the surface area as closely as possible to its original

condition. (2AA at p. 377.) In accordance with California regulations, soil removed from lower depths would be replaced with a bentonite grout. (AA at p. 377; MA at pp. 94:26-96:6, 122:7-26.) This grout forms into a type of cement, but lacks the aggregate materials (sand and gravel) needed to create concrete, which is much harder. (MA at pp. 94:7-16, 217:8-12.) It is soft enough to be shaved with a pen knife and similar in texture to native subsurface materials, and would not affect the use of filled land for agricultural or other purposes. (MA at pp. 94:26-96:6, 97:6-11, 210:25-212:24.) At the same time, use of the grout material at depths below about five feet would provide stability and avoid ground water well contamination—again ensuring that the borings would not affect agricultural or other uses. (1AA at pp. 179-184; 2AA at p. 377; MA at pp. 122:7-26, 123:8-124:18, 210:25-212:24.)

Once the surveys were completed, the State would not return to any of the entered properties, except possibly once to check on the safety of the backfill. (MA at pp. 107:4-13, 123:26-124:18.)

3. Denial of the petition for geological activities

Following the February 2011 hearings and additional hearings in March and April 2011 (3RT at pp. 575-682), the court issued a final order on April 8, 2011, denying the petition for entry for geological activities on the ground that the backfilling of the drill holes with bentonite grout would constitute a "permanent occupancy" amounting to a per se taking under *Loretto*, *supra*, 458 U.S. 419. (3AA at pp. 793-800.)

E. Disposition at the Court of Appeal

On April 1, 2011, owners in 11 of the cases filed two petitions for writs of mandate, prohibition or other appropriate relief seeking reversal of the order permitting entry for environmental activities. The Court of Appeal initially denied the petitions, but this Court granted review and directed the appellate court to issue an order to the State to show cause why

the writs should not issue. The petitions were consolidated, and on August 18, 2011, the appellate court stayed the entry order pending further ruling.

On June 6, 2011, the State filed a notice of appeal of the order denying the petition for entry for geological activities. (3AA at pp. 801-803.)

The Court of Appeal consolidated the State's appeal and the property owners' petitions. On March 13, 2014, a divided panel affirmed the trial court's denial of the petition for entry to conduct geological activities and reversed its order authorizing entries for environmental testing. Also relying on *Loretto*, the court held that the proposed geological activities would constitute a per se taking because of the bentonite grout's permanent physical presence on the properties. (Opinion. at pp. 11-14.) The Court of Appeal also held that the environmental activities would constitute takings because the temporary entries would be akin to a compensable easement interest. (*Id.* at pp. 34-43.)

Relying on *Jacobsen v. Superior Court of Sonoma County* (1923) 192 Cal. 319, the court further held that the entry statutes could not be used to authorize these "intentional takings." (Opinion at pp. 17-28.) The California Constitution, it held, requires an agency proposing to conduct such activities to acquire the right to do so in a full condemnation action, providing the landowner with specific constitutional protections. (*Id.* at pp. 25-28.) The court held that the entry statutes are constitutionally inadequate for the takings it found here in two respects: (a) they authorize compensation only for damages and interference with possession or use, which the court held does not adequately cover the fair market value of the property interest necessary to permit the proposed activities, and (b) they do not directly provide for a jury determination of just compensation, but instead require a property owner to file a cross-complaint or separate action to obtain a jury. (*Ibid.*)

In dissent, Justice Blease would have held that neither the environmental nor the geological activities would constitute takings under the multi-factor analysis prescribed by *Penn Central* and *Arkansas Game*. (Dissent at pp. 15-24.) He would also have concluded that, even if the proposed activities amounted to takings, the entry statutes are eminent domain proceedings specifically enacted by the Legislature in accordance with Constitutional provisions and protections. (*Id.* at pp. 24-46.)

On June 25, 2014, this Court granted the State's petition for review.

STATEMENT OF APPEALABILITY

This appeal is from final orders in a special proceeding which are appealable orders. (§§ 1064, 904.1, subd. (a)(1); Cal. Rule of Court, rule 8.204(a)(2)(B).)

ARGUMENT

I. THE STATE'S PROPOSED TEMPORARY ENTRIES TO CONDUCT PRECONDEMNATION TESTING ACTIVITIES ARE NOT TAKINGS

A. The Question Whether the Entries Constitute Takings Is Governed by a Multi-Factor Test Set Forth in *Penn Central* and *Arkansas Game*

Article I, section 19, subdivision (a) of the California Constitution provides, in part, that "[p]rivate property may be taken or damaged for a public use and only when just compensation, ascertained by a jury unless waived, has first been paid to, or into court for, the owner." In determining whether a taking has occurred, this Court looks to the relevant decisions of both this Court and the United States Supreme Court. (*San Remo Hotel L.P. v. City and County of San Francisco* (2002) 27 Cal.4th 643, 664; *Hensler v. City of Glendale* (1994) 8 Cal.4th 1, 9, fn. 4 [while article I, section 19, protects a somewhat broader range of property values than does the Fifth Amendment takings clause, the protections provided by both are largely equivalent].)

In analyzing taking claims, courts have recognized "that no magic formula enables a court to judge, in every case, whether a given government interference with property is a taking." (*Arkansas Game, supra,* 133 S.Ct. at p. 518.) Courts eschew any "set formula," and instead "engage in . . . essentially ad hoc, factual inquiries." (*Lucas v. South Carolina Coastal Council* (1992) 505 U.S. 1003, 1015, citing *Penn Central, supra*, 438 U.S. at p. 124.) The only exceptions are a few "bright line" cases where there is a "categorical" taking, involving either a "permanent physical occupation" or "a regulation that permanently requires a property owner to sacrifice all economically beneficial uses of his or her land." (*Arkansas Game, supra*, 133 S.Ct. at p. 518.)

In particular, the United States Supreme Court recognized in *Loretto, supra,* 458 U.S. 419, 436, fn 12, that even intentional physical incursions on private land may not result in compensable takings. Rather, courts are required to examine the character of the action and the nature and extent of the interference with rights in the parcel as a whole. (*Penn Central, supra*, 438 U.S. at pp. 130-131.) *Penn Central* sets forth a number of factors to guide that examination. These include: "(1) the economic impact of the regulation on the claimant; (2) the extent to which the regulation has interfered with distinct, investment-backed expectations; and (3) the character of the government action, i.e., did it involve a physical invasion or merely a regulation adjusting societal burdens and benefits to promote the public good." (*Shaw v. County of Santa Cruz* (2008) 170 Cal.App.4th 229, 272, citing *Penn Central, supra*, 438 U.S. at p. 124.)

In *Arkansas Game,* the United States Supreme Court reaffirmed the *Penn Central* approach and identified additional factors that courts must consider in determining whether temporary physical invasions of property result in a compensable taking: (1) the duration of the invasion, (2) the severity of the invasion, and (3) the degree to which the invasion is

intended or is foreseeable. (*Arkansas Game, supra*, 133 S.Ct. at p. 522.) Citing *Loretto*, the Court confirmed that "temporary physical invasions should be assessed by case-specific factual inquiry." (*Ibid.*) "The rationale is evident: [temporary physical invasions] do not absolutely dispossess the owner of his rights to use, and exclude others from, his property." (*Loretto, supra,* 458 U.S. at p. 435, fn. 12.)

B. The Environmental Activities Authorized by the Entry Order Are Not a Taking

The environmental activities authorized under the entry order do not constitute takings under *Penn Central* and *Arkansas Game*.

With respect to the first *Penn Central* factor, there is no evidence that the environmental activities will have any economic impact on the value or use of the properties. The vast majority of owners here did not submit any evidence of adverse economic impact. The few owner declarations submitted referred only to general uses of the property for agricultural and recreational purposes and potential adverse effects on those uses during certain seasons. (3PA at pp. 597-599, 615-629.) Concerns included possible disruption of irrigation and fertilization schedules, crop damage due to survey stakes and traps, and damage to farming equipment caused by traps. (PRA at pp. 283-285.) To address these concerns the owners made various requests, including 48-hours notice of any entry, coordination around harvesting, and strict controls on the entries. (*Ibid.*; 3PA at p. 617.)

The final entry order contains limitations specifically designed to minimize, if not eliminate, any potential economic effect. The order includes seasonal restrictions on entry on agricultural and hunting lands, as well as safety measures for lands where pesticides are used. (6PA at pp. 1554-1558.) It requires 72 hours minimum notice before each entry. (*Id.* at p. 1555.) Should any actual damage occur, the order requires payment of damages and necessary repairs. (*Id.* at p. 1551.) The order also requires

the State to avoid unreasonably interfering with any operation on the property, and includes provisions to protect livestock. (*Id.* at pp. 1548, 1551.) Vehicles and large equipment are restricted to existing roadways and those routes reasonably identified by the owner, and no vehicle or equipment is permitted on fields or orchards. (*Ibid.*) The economic impact of the environmental activities, if any, will be negligible.

With respect to the second *Penn Central* factor, there is no evidence that the environmental activities would interfere with any distinct investment backed expectations. While some owners generally referred to potential damage and the value to be obtained from the property (3PA at pp. 597-599, 615-629), a "'reasonable investment-backed expectation' must be more than a 'unilateral expectation or an abstract need.'" (*Ruckelshaus v. Monsanto Co.* (1984) 467 U.S. 986, 105-106.) The owners' reasonable expectations concerning the use and value of their properties would not change as a result of the entries.

The third *Penn Central* factor is the nature of the governmental action. Here, while the State would physically enter the land, "not every physical invasion is a taking," and temporary invasions are subject to a "complex balancing process." (*Loretto*, *supra*, 458 U.S. at p. 436, fn. 12.) The entries in this case would be temporary and non-exclusive; the parcels are large in size and are generally used for agricultural and recreational purposes; and the activities would involve only minimally intrusive actions such as walking, observing, soil sampling, trapping, and taking photographs. (6PA at pp. 1531-1538.) The entry order places numerous restrictions on the entries to minimize any possible impact, including limiting the timing and duration of the entries (6PA at pp. 1548-1552, 1554-1558) and requiring that no heavy equipment be used except for access vehicles that would remain on existing dirt roads and small boats that would dock at a public marina (*id.* at p. 1551; 1RT at pp. 285:2-

287:11). Given the nature and scope of the entries, the nature and size of the properties, and the conditions of entry imposed by the superior court to protect property owners, the entries would be minimally intrusive.

The additional factors articulated in *Arkansas Game* also support a finding that no taking would result. (*Arkansas Game, supra,* 133 S.Ct. at p. 522.) As to the first (duration), the activities here would involve only intermittent entries for 25 to 66 days over the course of a year, depending on parcel size and activities to be conducted. (6AA at p. 1556.) Once the authorized testing was completed, the State would have no right of re-entry.[8] (*Ibid.*)

The second *Arkansas Game* factor concerns the severity of interference. Here, the order authorized only non-invasive activities such as observation, soil sampling, trapping, and photography. (6PA at pp. 1531-1538.) The activities would be limited in duration and restricted to reduce, if not eliminate, any impact. As the appellate court acknowledged, "[t]he landowners in their briefing do not cite to evidence of any actual damage or interference the environmental activities will cause to their properties." (Opinion at p. 34.) This factor does not support a taking claim.

The final factor is whether an invasion of property rights is "intended." While the proposed entries here would be intentional as

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[8] The appellate court reasoned that the cumulative duration of the entries amounted to the taking of a "floating" or "blanket" easement. (Opinion at pp. 40-41.) Such an easement generally allows the holder to place structures or conduct activities anywhere within the easement area. (6 Miller & Starr, Cal. Real Estate (3d ed. 2011), § 1550.) Here, the entries would be strictly limited in both substance and duration, and the judicial authorization for them would be subject to modification or rescission. (§ 1245.040.) Moreover, the authorized entries and activities would not "interfere with the owner's actual intended use of the property." (*City of Fremont v. Fisher* (2008) 160 Cal.App.4th 666, 676–677.)

opposed to accidental, this factor is not primarily concerned with whether an *entry itself* is intentional—as the vast majority of government entries will be. Instead, it is best understood to address whether any *damage* an entry may cause is intended or reasonably foreseeable. The cases that developed the "intent" factor sought to distinguish between damages due to negligence or wrongful acts, which are typically compensable in tort, and damages to property that are the intended or likely result of a government intrusion on private land, which may be compensable as takings. (See *Arkansas Game*, *supra*, 133 S.Ct. at p. 522 ["no takings liability when damage caused by government action could not have been foreseen"], citing *John Horstmann Co. v. United States* (1921) 257 U.S. 138, 146; see also *Ridge Line, Inc. v. United States* (Fed.Cir. 2003) 346 F.3d 1346, 1355 [discussing "the line distinguishing potential physical takings from possible torts"].)

That this factor is best understood as looking to the intent to cause damage, rather than the intent to enter, is further supported by the fact that the just compensation clause "'is designed not to limit the governmental interference with property rights per se, but rather to secure *compensation* in the event of otherwise proper interference amounting to a taking.'" (*Lockaway Storage v. County of Alameda* (2013) 216 Cal.App.4th 161, 183, quoting *Lingle v. Chevron U.S.A. Inc.* (2005) 544 U.S. 528, 536-537; see also *Metropolitan Water Dist. of Southern Cal. v. Campus Crusade for Christ, Inc.* (2007) 41 Cal.4th 954, 975 [to obtain compensation for a temporary easement or severance, property owner must show damage caused by interference with the actual intended use of the property].) Here, the conditions of entry are specifically designed to mitigate, if not eliminate, any potential damage or interference with the properties. (6PA at pp. 1554-1558.) Because the entries are neither intended nor likely to cause

any significant damage to or interference with the properties, the intent factor weighs against a determination that these entries would be takings.

The Court of Appeal erred by overemphasizing "intent" in relation to the intentional nature of the entry itself to the exclusion of other, more significant factors. (Opinion at pp. 37-40, 41-42.) The court reasoned that "intent" was a "primary factor," and that the invasions' economic impact and interference with distinct investment-backed expectations were "less significant" when an intentional physical invasion was at issue. (*Id.* at pp. 41-42.) That is incorrect.

Again, the just compensation clause is concerned not with prohibiting or limiting takings per se, but with ensuring just compensation for property owners when takings occur. (*Lockaway Storage*, *supra*, 216 Cal.App.4th at p. 183, citing *Lingle*, *supra*, 544 U.S. at pp. 536-537.) *Penn Central*'s "economic impact" and "investment-backed expectations" factors are therefore always central to the analysis, because they provide the principal basis for determining whether there is any harm or interference withffun a property interest that rises to the level of a taking for which compensation is required. Where an entry or regulation does not rise to the level of a taking, there is nothing to compensate and the constitutional requirement for just compensation is not implicated.

Conversely, the "intent" factor, as construed by the Court of Appeal—i.e., to focus on intent to enter the property, rather than intent to cause damage (Opinion at pp. 37-40, 41-42.)—should typically be a less significant factor, to the extent it has any significance at all. The vast majority of government entries and regulations are intentional. Indeed, all entries sought under the entry statutes are by definition intentional, since the agency must obtain a court order in advance of the entry. The Court of Appeals' holding that intent to enter is the "primary factor" would instead turn essentially all activities under the entry statutes into per se takings.

That result cannot be reconciled with the case-by-case balancing test established by *Penn Central* and *Arkansas Game*.

C. The Proposed Geological Activities Are Not a Taking

1. The proposed geological activities do not constitute a taking per se

Relying on *Loretto*, *supra*, 458 U.S. 419, the Court of Appeal held that all of the geological activities proposed here would constitute takings per se because the bentonite grout used to backfill the holes resulting from CPT testing or soil boring would result in a "permanent occupancy of private property." (Opinion at pp. 13-14.) That holding was in error.

In *Loretto*, the United States Supreme Court concluded that the permanent installation of cable boxes, directional taps, cable lines, and other equipment installed by bolts "completely occupying space above and upon the roof of the [appellant's] building" amounted to a taking. (*Loretto*, *supra*, 458 U.S. at p. 438.) In announcing a per se taking rule, the Court distinguished between government actions that result in a permanent physical occupation and those that result in a temporary invasion. (458 U.S. at pp. 428-434.) Permanent physical occupations are characterized by their "permanence and absolute exclusivity." (*Id.* at p. 435, fn. 12.) They effectively destroy the "bundle of rights" typically used to define "property," including the rights "to possess, use and dispose of it." (*Id.* at p. 435.) The Court explained that:

> First, the owner has no right to possess the occupied space himself, and also has no power to exclude the occupier from possession and use of the space . . . Second, the permanent physical occupation of property forever denies the owner any power to control the use of the property; he not only cannot exclude others, but can make no nonpossessory use of the property . . . Finally, even though the owner may retain the bare legal right to dispose of the occupied space by transfer or sale, the permanent occupation of that space by a stranger will ordinarily empty the right of any value, since the purchaser will also be unable to make any use of the property.

(*Id.* at pp. 435-436.) In contrast, temporary physical invasions "do not absolutely dispossess the owner of his rights to use, and exclude others from, his property." (*Id.* at p. 435, fn. 12.)

Here, the bentonite backfill would not be "permanent" in the same sense as the structures—boxes, cables, and other equipment—described by the Supreme Court in *Loretto*. (MA at pp. 210:21-212:8.) The residual grout has virtually the same consistency and function as the hardened dirt that naturally occurs at greater depths, and would break apart if plowed by agricultural equipment. (MA at pp. 95:1-16, 97:6-11, 210:21-212:8.) The backfill would be no more permanent than the natural material it is designed to mimic and replace. Any perceived "permanency" would derive from the fact that most owners will have no need or desire to remove the backfill—not from any requirement that it be kept in place. The owner is free to dig up or otherwise use the area.

Second, the backfill would not affect the owners' rights "to possess, use and dispose" of the properties. After the proposed entries are completed, the backfilled areas would remain under the owners' exclusive possession, use, and control. The State would have no further interest in or control over the backfilled space, nor would the State have any right to return absent owner consent or further court order. (MA at pp. 107:4-13, 123:26-124:18.) In contrast, the cable company in *Loretto* had ongoing exclusive privileges and returned to the property multiple times over an extended period of time to install additional equipment. (458 U.S. at pp. 422-423.)

Nor would the backfill impair the owners' use of the land or their rights to dispose of the backfilled space. The properties are primarily used for agriculture, and to the extent feasible the State would conduct soil testing along dirt access roads, not within fields. (MA at pp. 103:18-104:2.) Even if some tests took place within fields, the grout material would not be

harmful to plants or farming equipment and would be functionally the same as native materials. (MA at pp. 95:1-16; 97:6-11, 210:21-212:8.) The State is not aware of, and the owners have not identified, any potential use of the property that this grout would preclude or even impair. (MA at pp. 210:21-212:8.) There is no evidence that the backfill would diminish the value of the properties, nor that it would place any burden upon future purchasers or affect future transfers of the properties in any way.

Under these circumstances, the State's proposed geological testing does not constitute a per se taking. Whether the testing would amount to a taking at all must thus be determined by considering the factors articulated in *Penn Central* and *Arkansas Game*.

2. The geological activities do not constitute a taking under *Penn Central* and *Arkansas Game*

With respect to the first *Penn Central* factor, the evidence shows that the economic impact of the activities on the parcels would be minimal. Out of 35 properties subject to geological testing, only four parcels submitted evidence of potential economic impact—and the State proposed to take steps to mitigate, if not eliminate, any feared economic effect. For example, the civil engineer retained by the owners raised concerns regarding levee safety. (MA at pp. 230:6–272:20.) The State's geologist testified, however, that the State would not conduct geological activities on or near levees. (MA at pp. 96:7-97:3, 97:12-14.) The owners also raised concerns regarding interference with agricultural activities. (1AA at pp. 60-62; 2PRA at pp. 279-287.) But the State proposed to mitigate those concerns by testing along dirt roads (MA at pp. 103:13-104:2); accommodating the owners' preference for location of the activities, which could be adjusted by as much as 200 feet (MA at pp. 50:2-56:4); providing reasonable advance notice of entry (3AA at p. 610; MA at pp. 52:2-16); and cooperating with the owners to work around the harvest season (*Ibid*).

These accommodations could be imposed by the trial court as formal conditions of entry (§ 1245.030), and would ensure that the activities would have minimal, if any, economic impact.

Similarly, the geological activities would not interfere with the owners' reasonable, investment-backed expectations for the use of their properties. The State's flexibility as to timing (e.g., avoiding harvest season) and location (e.g., conducting the testing along roads, rather than planted fields, where possible) would ensure that these activities cause minimal, if any, interference with current agricultural or recreational operations. Further, the use of a backfill that consists of native top soil for the first 2 to 5 feet, and a widely accepted soil substitute below, would ensure that agricultural operations could continue exactly as before once the geological activities are completed (within 3 to 14 days). (1AA at pp. 179-184; 2AA at p. 377; MA at pp. 122:7-26, 123:8-124:18.)

Finally, the entries would be brief (3 to 14 days), would use a small portion of the properties (approximately 100 feet by 100 feet on largely multi-acre parcels), would be timed and located in consultation with the owners to minimize any interference with the use of the properties, and would restore the properties as closely as possible to their pre-entry conditions upon completion. (MA at pp. 51:13-52:25, 115:26-118:10, 153:2-27, 159:10-160:14; 2AA at p. 377.) The owners would also be compensated for any damage actually caused by the entries. (§ 1245.060.) Under these circumstances, the "character" factor of the *Penn Central* analysis also supports a determination that the geological activities are not a taking.

The additional factors set forth in *Arkansas Game* also support a finding that no taking would result. First, the activity would be of short duration: one-time entries to conduct testing that would be completed

within 14 days, and in seven of the 35 cases within only 3 days. (3AA at pp. 610-614.)

Second, the activities here would not interfere significantly with the owners' property interests. They would be limited in duration, and their location and timing would be set in consultation with owners to diminish the possibility of any effect on current uses of any parcel. The parcels involved are large and the geological testing would be conducted on very limited portions of the properties. (MA at p. 69:12-26.) Upon completion, the land would be restored as closely as possible to its pre-testing condition, and there would be no foreseeable impact on any current or future use of the property. (2AA at p. 377.) And if the testing did cause any damage, property owners would be fully compensated. (§ 1245.060.)

Finally, while the proposed entries would be "intentional," the State's proposed accommodations to mitigate, if not eliminate, the risk of damage would render foreseeable damages minimal or nonexistent. (2AA at p. 377.) Any damage that did occur would be incidental and not reasonably foreseen—but still would give rise to compensation. (§ 1245.060.)

Accordingly, the factors articulated in *Penn Central* and *Arkansas Game* support a finding that no taking would result from the proposed geological activities at issue here.

II. EVEN IF THE PROPOSED ENTRIES INVOLVE TAKINGS, COURTS MAY CONSTITUTIONALLY AUTHORIZE THEM USING THE ENTRY STATUTE'S PROCEDURES

Even if some or all of the activities proposed by the State are found to involve takings, the entry statutes provide a constitutionally valid eminent

domain procedure under which the State may obtain authorization to conduct them without commencing condemnation proceedings[9].

A. The Entry Statutes Are Entitled to a Presumption of Constitutionality

The entry statutes, like all acts of the Legislature, "come before us clothed with a presumption of constitutionality." (*In re Dennis M.* (1969) 70 Cal.2d 444, 453.) "'All presumptions and intendments favor the validity of a statute and mere doubt does not afford sufficient reason for a judicial declaration of invalidity. Statutes must be upheld unless their unconstitutionality clearly, positively, and unmistakably appears.'" (*Ibid.*, citations omitted.)

> If a statute is susceptible of two constructions, one of which will render it constitutional and the other unconstitutional in whole or in part, or raise serious and doubtful constitutional questions, the court will adopt the construction which, without doing violence to the reasonable meaning of the language used, will render it valid in its entirety, or free from doubt as to its constitutionality, even though the other construction is equally reasonable.

(*People v. Superior Court (Romero)* (1996) 13 Cal.4th 497, 509, citations omitted.) "'The basis of this rule is the presumption that the Legislature intended, not to violate the Constitution, but to enact a valid statute within

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[9] The Court of Appeal understood the State to have conceded at oral argument that, if the entry orders here authorized activities that amounted to takings, the entry statutes could not constitutionally authorize those orders because the State's initiation of an entry proceeding was not a "commencement of eminent domain proceedings" within the meaning of Article I, Section 19. (Opinion at p. 15-16.) In granting review, this Court ordered the parties to address that question on the merits. For the reasons set out in the text, the entry statutes are a constitutionally valid method of authorizing the entries proposed here, even if those entries are held to involve takings. Whether or not the State proffered any concession on the point in prior proceedings, this Court has made clear that its "duty [is] to declare the law as it is, and not as either appellant or respondent may assume it to be." (*Bradley v. Clarke* (1901) 133 Cal. 196, 210; see also *People v. Sanders* (2012) 55 Cal.4th 731, 740, fn. 9.)

the scope of its constitutional powers.'" (*Ibid.*) Indeed, a court may even "reform—i.e., 'rewrite'—a statute in order to preserve it against invalidation under the Constitution," if it can "say with confidence that (i) it is possible to reform the statute in a manner that closely effectuates policy judgments clearly articulated by the enacting body, and (ii) the enacting body would have preferred the reformed construction to invalidation of the statute." (*Kopp v. Fair Pol. Practices Com.* (1995) 11 Cal.4th 607, 660-661.)

Citing *Kenneth Mebane Ranches v. Superior Court* (1992) 10 Cal.App.4th 276, 282–283 and *Burbank-Glendale-Pasadena Airport Authority v. Hensler* (2000) 83 Cal.App.4th 556, 562, the Court of Appeal concluded that eminent domain statutes should not be afforded the presumption of constitutionality. (Opinion at pp. 16-17.) That is incorrect. The cited cases hold only that statutes granting the power of eminent domain must be strictly construed—a different question from the determination whether a statute is presumed constitutional. In any event, the same cases also provide that "a statute granting the power of eminent domain should be construed to effectuate and not defeat the purpose for which it was enacted." (*Kenneth Mebane, supra*, 10 Cal.App.4th at p. 283.)

Furthermore, "[t]here is a 'strong presumption in favor of the Legislature's interpretation of a provision of the Constitution.' 'When the Constitution has a doubtful or obscure meaning or is capable of various interpretations, the construction placed thereon by the Legislature is of very persuasive significance.'" (*Mt. San Jacinto Community College District v. Superior Court* (2007) 40 Cal.4th 648, 656, citation omitted [according presumption of correctness to Legislature's interpretation of article I, section 19 in enacting "quick take" provisions of eminent domain law]; see also *Romero, supra,* 13 Cal.App.4th at p. 509; *Hughes v. Board of Architectural Examiners* (1998) 17 Cal.4th 763, 788.)

B. The Legislature Enacted the Entry Statutes to Comply with the Just Compensation Clause

The Legislature enacted the entry statutes specifically to comply with the just compensation clause.

In 1923, *Jacobsen, supra*, 192 Cal. at p. 329 invalidated the use of the then-existing entry statutes for anything beyond "innocuous entry and superficial examination." Since then, the Legislature has rewritten the entry statutes several times to address the issues raised in *Jacobsen* and to establish valid entry provisions. In 1959, the Legislature enacted section 1242.5 to allow precondemnation entry to determine suitability for reservoir purposes (the public use at issue in *Jacobsen*) upon deposit of "an amount sufficient to compensate the landowner for any damage resulting from the entry, survey, and exploration." (3AA at pp. 660-662, 664, 666.) The 1959 amendment also added a requirement that the condemnor obtain a court order for the entries if the property owner does not consent. (Stats. 1959, ch. 1865, § 1, pp. 4423-4424.) (*Id.* at pp. 661-667.) These procedures were intended to prevent public entities from having to perform the "useless act" of condemning properties that they may later determine, after surveys and testing, are unsuitable for the project.[10] (*County of San Luis Obispo v. Ranchita Cattle Co.* (1971) 16 Cal.App.3d 383, 389.)

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[10] The Court of Appeal's reliance on *Jacobsen* itself was misplaced. Both the just compensation clause and the entry statutes have been amended since *Jacobsen* was decided, and takings doctrine has evolved under the *Penn Central* and *Arkansas Game* line of cases. Notably, the entry statutes at issue in *Jacobsen* did not require a court order for the entries or contain any provision to provide compensation to landowners. (See *Jacobsen, supra*, 192 Cal. at pp. 328-329, quoting former § 1242 (1923).) Thus, to the extent that *Jacobsen* held that anything beyond "innocuous entry and superficial examination" requires a full condemnation proceeding (*Jacobsen, supra*, 192 Cal. at p. 329), that holding cannot be squared with the current text of the just compensation clause, the current (continued...)

A decade later, the California Law Revision Commission[11] stated that the holding in *Jacobsen* had been "partially overcome" as to land condemned for reservoir purposes by the special statutory procedure set forth in then-existing section 1242.5. (Recommendation Relating to Sovereign Immunity (Sept. 1969) 9 Cal. Law Revision Com. Rep. (1969) at pp. 811-812.) (AA at p. 716-717.) Following that report, in 1970 former section 1242.5 was amended to allow the entry procedures to be used not just for reservoirs, but for any projects involving eminent domain proceedings. (Stats. 1970, ch. 662, § 3, pp. 1289-1290.) (*Id.* at pp. 671-672.) In its 1969 Recommendations, the Law Revision Commission stated that these entry procedures were specifically intended to cover entries that are likely to cause "compensable damage." (3AA at p. 719.) Specifically, the Commission noted that the intent was to allow entries where the "necessary exploration may involve activities that present the likelihood of compensable damage, including the digging of excavations, drilling of test holes or borings, cutting of trees, clearing of land areas, moving of earth, use of explosives, or employment of vehicles or mechanized equipment." (*Ibid.*)

In 1970, the Legislature also enacted former Government Code section 816,[12] to permit liability for any damage or interference resulting from a precondemnation entry. (3AA at pp. 674-676, 680-685, 689-691, 694, 699, 704, 706, 728.) The Law Revision Commission Comments to

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(...continued)
entry statutes, or current takings doctrine. (See Parts I.A, *supra*, and II.C, *infra*.)

[11] "[T]he court may consider Law Revision Commission Comments to assist in determining the intent of the Legislature." (*Estate of Reeves* (1991) 233 Cal.App.3d 651, 656.)

[12] Now codified under current law as confirmed in the Law Commission Comments to section 1245.060.

that section referenced *Jacobsen* and stated that the provision was necessary to ensure the right to compensation under former section 14 of Article 1 of the Constitution. (*Id.* at pp. 690-691.) These changes followed recommendations by the Law Revision Commission in 1969 (*id.* at pp. 710-728), which described the inadequacies in the previous statutory scheme and specifically considered the issues raised in *Jacobsen.* (*Id.* at pp. 716-719.)

Finally in 1975, sections 1242 and 1242.5 were repealed and replaced by the current entry statutes in order to permit an agency to enter a property for more extensive testing prior to condemning the property being considered for such condemnation. (3AA at pp. 693-695, 730-733.) The history of the entry statutes demonstrates that the Legislature specifically drafted them to comply with the just compensation clause as well as the holding in *Jacobsen*, and the Legislature's determination that these statutes provide constitutionally valid procedures to accomplish the specific activities that they authorize is entitled to substantial deference. (*Mt. San Jacinto*, *supra*, 40 Cal.4th at p. 656.)[13]

C. The Entry Statutes Satisfy the Requirements of the Just Compensation Clause

The Constitution authorizes the Legislature to provide for prejudgment possession of property being taken through eminent domain proceedings, subject to certain constitutional requirements. The entry

[13] The Legislature has elsewhere authorized entry for investigations without formal condemnation. For instance, the Amador Water Agency has the express statutory authority to enter private property to make "technical and other investigations of all kinds, make measurements, collect data and make analyses, studies and inspections . . .." (Water Code App. §95-4.6.) Identical provisions exist for other water agencies: Water Code App. § 55-5.9, Water Code App. §83-49, Water Code App. §51-4.6, Water Code App. §74-5(7), Water Code §60230(l)), Water Code App. §122-5(7), Water Code App. §99-4.6), and multiple other agencies.

statutes satisfy all of those requirements, and thus provide valid procedures for the specific types of entries they permit.

Article I, section 19, subdivision (a) of the California Constitution provides that "[p]rivate property may be taken or damaged for a public use and only when just compensation, ascertained by a jury unless waived, has first been paid to, or into court for, the owner." The second sentence of subdivision (a) then creates an exception to the general requirement that compensation be ascertained and paid prior to possession: "The Legislature may provide for possession by the condemnor following commencement of eminent domain proceedings upon deposit in court and prompt release to the owner of money determined by the court to be the probable amount of just compensation." (*Ibid.*) These provisions authorize the Legislature to enact procedures for precondemnation possession provided the following requirements are satisfied: (1) the prejudgment possession must follow the "commencement of eminent domain proceedings"; (2) the procedures must allow for the "deposit in court and prompt release" of money determined by the court to be the "probable amount of just compensation"; and (3) the procedures must not preclude the right to a jury trial. The entry statutes satisfy all three of these constitutional requirements.

1. An action under the entry statutes is an eminent domain proceeding

The procedures set forth in the entry statutes qualify as "eminent domain proceedings" within the meaning of article I, section 19, subdivision (a). Although the Constitution does not define "eminent domain proceedings," the Legislature placed the entry statutes in title 7 of part 3 of the Code of Civil Procedure, which is titled "Eminent Domain Law." (§ 1230.010; see also § 1230.020 ["Except as otherwise specifically provided by statute, the power of eminent domain may be exercised only as provided in this title"].)

The Legislature intended that the entry statutes be able to function as a special type of eminent domain proceeding, providing a procedure that allows agencies to conduct limited entries to determine project suitability without the need for a full condemnation action, while also ensuring that property owners received the constitutional protection of just compensation for any damage or loss of use or possession caused by such entries. (§§ 1245.010, 1245.030, 1245.060, 1235.165 [defining as "proceeding" as proceedings under the Eminent Domain Law.) Indeed, the legislative history confirms the Legislature's intent that the entry statutes function as an eminent domain proceeding under limited circumstances – to allow agencies to determine project suitability without need for a full condemnation action. (See also *City of Stockton v. Marina Towers LLC* (2009) 171 Cal.App.4th 93, 104 ["In 1975, following an intensive study by the California Law Revision Commission, the Legislature adopted a comprehensive statutory scheme (§ 1230.010, et seq.) covering virtually every aspect of eminent domain law"].)

The purpose of the Just Compensation Clause is to ensure that property owners are compensated whenever takings occur. (*Lockaway Storage*, *supra*, 216 Cal.App.4th at p. 183, citing *Lingle*, *supra*, 544 U.S. at pp. 536-537.) Thus, the Constitution does not compel any specific type of proceeding relative to eminent domain. It leaves that determination to the Legislature, as long as the selected process protects specific constitutional rights, such as the landowner's entitlement to compensation and the availability of a jury trial, if desired, to determine what amount is just.

The Legislature has indicated its understanding and intention that the entry statutes function in just this way. (AA at pp. 710-728.) They provide a procedure that allows agencies to conduct limited entries to determine project suitability without the need for a full condemnation action, while also ensuring that property owners receive compensation for any damage or

interference with the possession or use of the property caused by such entries, and safeguarding the ultimate right to a jury trial to determine what compensation is due. (§§ 1245.010, 1245.030, 1245.060.) All presumptions run in favor of the validity of these statutes (*In re Dennis M.*, *supra*, 70 Cal.2d at p. 453), and any ambiguity must be resolved to render them free from constitutional doubt. (*Romero*, *supra*, 13 Cal.4th at p. 509.) Accordingly, the entry statutes are eminent domain proceedings within the meaning of the Just Compensation Clause.

2. The entry statutes provide for the deposit and prompt release of an amount determined by the court to be the probable amount of compensation

a. Deposit of probable amount of compensation

The entry statutes provide that the court "shall determine . . . the probable amount of compensation to be paid to the owner of the property for the actual damage to the property and interference with its possession and use," and "shall require the person seeking to enter to deposit with the court the probable amount of compensation." (§ 1245.030, subds. (b), (c).) The Court of Appeal held that this process did not ensure "just compensation" for the entries at issue. (Opinion at p. 17.) That was error.

First, the Legislature specifically determined that such damages and interference constitute appropriate compensation for the entries at issue (§ 1245.060). The Law Revision Commission Comment to section 1245.060 (1975 addition) states the following as to "actual damage" and "substantial interference":

> The terms "actual damages" and "substantial interference" under subdivision (a) require a common sense interpretation. [Citation.] The term "actual damages," for example, is intended to preclude recovery of merely nominal or "constructive" damages not based on physical injury to property. Similarly, the term "substantial interference" excludes liability for minimal annoyance or interference that does not seriously impinge upon

> or impair possession and use of the property. See *Jacobsen v. Superior Court*, 192 Cal. 319, 219 P. 986 (1923).

(Cal. Law Revision Comm. com., 19 West's Ann. § 1245.060; see also *City of San Diego v. Neumann* (1993) 6 Cal.4th 738, 747-748 [just compensation does not extend to damages that are "conjectural or speculative"].) The framing of the provision thus represents a reasonable legislative interpretation of what is constitutionally required. That determination is entitled to deference. (*Mt. San Jacinto*, *supra*, 40 Cal.4th at p. 656.)

In any event, the Legislature's judgment was correct. Compensation for actual damages and interference with possession and use will typically provide complete and appropriate "just compensation" for a temporary entry. (*Campus Crusade for Christ, Inc.*, *supra*, 41 Cal.4th at p. 975 [to obtain compensation for a temporary easement or severance, property owner must show damages caused by interference with the actual intended use of the property]; *United States v. Pewee Coal Co.* (1951) 341 U.S. 114, 117 ["Ordinarily, fair compensation for a temporary possession of a business enterprise is the reasonable value of the property's use"].) Indeed, any additional compensation would be excessive under most, if not all, circumstances. "The just compensation required by the Constitution to be made to the owner is to be measured by the loss caused to him by the appropriation. He is entitled to receive the value of what he has been deprived of, and no more. To award him less would be unjust to him; to award him more would be unjust to the public." (*Mt. San Jacinto*, *supra*, 40 Cal.4th at p. 666.)

Finally, a property owner who deems the probable amount of compensation determined by the court to be insufficient may seek a modification of the amount under section 1245.040, and ultimately may have a jury determine the amount of compensation through a civil action, as

permitted by section 1245.060, subdivisions (a) and (b). These provisions fully protect the owner's rights.

b. Procedures for prompt release

The entry statutes also provide a means for the prompt release of deposited funds to the owner. Should any damage or interference occur as a result of the entry, "upon application of the owner, the court shall determine and award the amount the owner is entitled to recover under this section and shall order such amount paid out of the funds on deposit." (§ 1245.060, subd. (c).) "If the funds on deposit are insufficient to pay the full amount of the award, the court shall enter judgment for the unpaid portion." (*Ibid.*) As the Law Revision Commission Comment to section 1245.060 notes, "[s]ubdivision (c) provides a simple and expeditious method, in lieu of a civil action, for adjudication of a claim for damages and expenses where a deposit has been made and the funds deposited have not been disbursed." The deposit and release provisions of the entry statutes are similar to the quick-take deposit and release provisions that this Court upheld in *Mt. San Jacinto*. (§ 1255.010 ["Prior to entry of judgment, any defendant may apply to the court for the withdrawal of all or any portion of the amount deposited"].) Moreover, the owner is not limited to these application procedures and may pursue other legal remedies, including a civil action without the need to comply with the ordinary provisions of the Government Claims Act. (§ 1245.060, subds. (a), (d).)

3. The entry statutes do not preclude an owner from obtaining a jury determination of compensation

The entry statutes are consistent with the property owner's constitutional right to a jury trial to ascertain the amount of just compensation. Beyond the procedure authorized under section 1245.060, subdivision (c), which provides for a court award of compensation,

subdivision (a) of section 1245.060 also expressly permits the property owner to file a civil action to recover for damage to or interference with the possession or use of the property, and a jury trial is available in such proceedings. (§ 1245.060, subd. (a); see also § 1245.060, subd. (d) ["Nothing in this section affects the availability of any other remedy the owner may have for the damaging of his property."].) This satisfies the constitutional requirement that a jury trial must be available if requested to determine the amount of the award. (Cal. Const., art. I, § 19, subd. (a); *Mt. San Jacinto*, *supra*, 40 Cal.4th at p. 660 [upholding "quick-take" procedures under which the court estimates the probable amount of compensation, noting that under Article I, Section 19, "the owner is guaranteed a jury trial on the award amount if requested"].)

The Court of Appeal held that the entry statutes are constitutionally deficient because they require the property owner to file a cross-complaint to obtain a jury trial. (Opinion at pp. 27-28.) But the Constitution requires only that a jury trial be available, not that any particular procedural mechanism be provided to obtain it. (Cal. Const., art. I, § 19, subd. (a) [amount of just compensation is to be "ascertained by a jury unless waived"].)

The Court of Appeal's reliance on Government Code section 7267.6 was misplaced. (Opinion at pp. 26-27.) To begin with, section 7267.6 is not a mandatory provision, but part of a series of nonbinding "guidelines" that entities should follow "to the greatest extent practicable." (Gov. Code, § 7267.) In any event, it states only that no agency "shall intentionally make it necessary for an owner to initiate legal proceedings *to prove the fact of the taking* of his real property." (Gov. Code, § 7267.6, emphasis added.) Section 7267.6 is not violated because the matter is already pending before the court on a petition under section 1245.030. Any request for damages under section 1245.060 is filed under the proceeding already

initiated by the agency. The owner is not required to file a separate action, but if he or she elects to do so, it is only to have a jury determine damages, not the fact of any alleged taking.

D. The Court of Appeal's Decision Would Impose Costly and Unnecessary Delays on Public Improvement Projects

The Court of Appeal's decision would impose costly and unnecessary delays on a wide variety of public projects. The condemnation procedures required by the Court of Appeal are not well suited to the types of preliminary entries permitted under the entry statutes. The practical result of the approach adopted by the decision would be to force agencies to adopt resolutions of necessity, file a full condemnation action in order to conduct preliminary suitability studies, obtain a second resolution of necessity and then file a second action to condemn particular parcels deemed suitable for a proposed project. To accomplish even a preliminary survey, the public entity would need to prepare formal property descriptions, prepare appraisals, and make initial offers. (Gov. Code, § 7267.2.) The agency would also be required to pay for a second appraisal for the owner for each entry. (§ 1263.025.) In many cases, the cost of appraising the entries would exceed the likely compensation for any possible damage that they might cause.

The agency would then need to adopt a resolution of necessity, finding that: (a) the public interest and necessity require a project; (b) the project is planned and located in a manner that will be most compatible with the greatest public good and least private injury; (c) the property sought to be acquired is necessary for the project; and (d) the offer required by Government Code section 7267.2 has been made to the owner of record. (§§ 1240.030, 1240.040, 1245.220, 1245.230.) Without the entry statutes, however, an agency might not be able to render these findings, because it

has not yet determined even whether it can or will proceed with the project, nor specifically what land, if any, would be needed to do so. The agency would then file the action (at which point the owner could challenge the right to take), make a deposit of probable compensation (§ 1255.010), file a motion for possession under section 1255.410,[14] conduct discovery, and prosecute a two-phase trial (a bench trial on right to take objections and a jury trial on the issue of compensation). (§ 1260.110.)

All this would occur before an agency could determine project and location suitability. This process could add years to the time for the construction of public works, and increase costs to a point that could be prohibitive for some projects. This Court has recognized that these types of delays in public projects can cause tremendous public harm. "'While the need for public improvements of all kinds has become increasingly clear, the construction of these improvements has often been delayed for excessive periods of time, largely because of the inability of the condemnor to expedite the taking of possession.'" (*Mt. San Jacinto, supra,* 40 Cal.4th at p. 658, quoting Commission Report, *supra,* at p. B–29.) Such delays have "resulted in an increase in the cost of [public improvement] development[s], which in turn [has] led to increased taxes." (*Ibid.*) Moreover, "[b]ecause bond issues finance many public improvements, 'the inability to take immediate possession may cause inability to meet the bonding requirements and, consequently, may not only retard but completely prevent the construction of the improvement.'" (*Ibid.*, quoting Commission Report, *supra*, at p. B–29.) At a minimum, the public may be

[14] If the property is occupied by a business or residence, the notice of motion is at least 90 days prior to the hearing date, and if "unoccupied," the minimum notice period is 60 days. (§ 1255.410, subd. (b).) If granted, the order for possession is effective 30 days after service if the parcel is occupied, and 10 days if unoccupied. (§ 1255.450, subd. (b).)

denied the benefit of timely infrastructure improvements as a result of additional delays.

None of this is necessary, or even helpful, to serve the purpose of the just compensation clause. The Clause ensures the provision of just compensation for owners whose property is taken. (*Mt. San Jacinto, supra,* 40 Cal.4th at p. 664.) "If the property owner can be insured just compensation, there is little, if any, justification for delaying public improvements and, thereby, increasing the tax burden on the public." (*Id.* at p. 658, fn. 5, quoting the California Law Revision Commission Report authorized by the Legislature in 1956.) Here, full condemnation procedures are not necessary to ensure that owners receive just compensation, as the entry statutes already provide that. (§§ 1245.030, 1245.060.) If a public agency finds a project infeasible or unwarranted on the basis of initial surveys, it is to everyone's advantage not to require a full condemnation proceeding to reach that determination. (*Ranchita Cattle Co.*, *supra*, 16 Cal.App.3d at p. 389.)

Accordingly, the approach adopted by the court below imposes substantial public and private costs, while providing no compensating benefit or needed protection for the rights of property owners. Nothing in the Constitution compels or justifies that result.

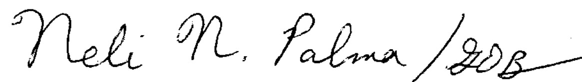
CONCLUSION

The decision of the Court of Appeal should be reversed.

Dated: September 26, 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
NELI N. PALMA
Deputy Attorneys General



NELI N. PALMA
Deputy Attorney General
Attorneys for Appellant State of California, by and through the Department of Water Resources

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CERTIFICATE OF COMPLIANCE

I certify that the attached **OPENING BRIEF ON THE MERITS** uses a 13 point Times New Roman font and contains 13,124 words.

Dated: September 26, 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
NELI N. PALMA
Deputy Attorneys General

Neli N. Palma /20B

NELI N. PALMA
Deputy Attorney General
Attorneys for Appellant State of California, by and through the Department of Water Resources

DECLARATION OF SERVICE BY U.S. MAIL

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 **September 26, 2014**, I served the attached:

OPENING BRIEF ON THE MERITS

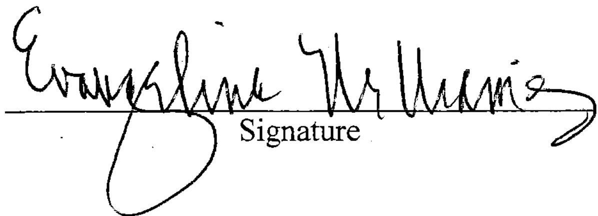
by placing a true copy thereof enclosed in a sealed envelope in the internal mail collection system at the Office of the Attorney General at 455 Golden Gate Avenue, Suite 11000, San Francisco, CA 94102-7004, addressed as follows:

SEE ATTACHED SERVICE 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 **September 26, 2014**, at San Francisco, California.

Evangeline Williams

Declarant



Signature

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Case No. S217738; Court of Appeal Cases C067765, C068469 and C067758
San Joaquin County Superior Court Case No. JCCP 4594
(Coordinated Proceedings Special Title (Rule 3.550) Department of Water Resources Cases)

SERVICE LIST

<table>
<tr>
<td><u>Attorneys for Respondents/Cross-Appellants</u>
Thomas H. Keeling, Esq.
Freeman, D'Aiuto, Pierce, Gurev,
Keeling & Wolf
1818 Grand Canal Boulevard, Suite 4
Stockton, CA 95207-4417</td>
<td><u>Attorneys for Respondent Property Reserve</u>
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</td>
</tr>
<tr>
<td>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</td>
<td>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</td>
</tr>
<tr>
<td><u>Attorneys for Respondents Delta Ranch & Sutter Home Winery</u>
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</td>
<td><u>Attorneys for Respondents Tuscany Research & CCRC Farms</u>
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</td>
</tr>
</table>

Attorneys for Amicus Curiae State Water Contractors Stephanie D. Hedlund, Esq. Best Best & Krieger 500 Capitol Mall, Suite 1700 Sacramento, CA 95814	The Honorable John P. Farrell Francine Smith, Civil Supervisor San Joaquin Superior Court 222 E. Weber Avenue, Rm. 303 Stockton, CA 95202
Judicial 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	**Attorneys for Respondents; Melvin Edward and Lois Arlene Seebeck, Jr.** Kristen Ditlevesen, Esq. Desmond, Nolan, Livaich & Cunningham Attorneys at Law 15th & S Building 1830 15th Street Sacramento, CA 95811
Specially Appeared Attorney for Respondents: Drosoula Tsakopoulos, et al. Matthew S. Keasling, Esq. Kate Wheatley, Esq. Taylor & Wiley 2870 Gateway Oaks Drive, Suite 200 Sacramento, CA 95833	**Attorneys for Amicus Curiae State Water Contractors** Stefanie Morris General Counsel 1121 L Street, Suite 1050 Sacramento, CA 95814
Third District Court of Appeal Hon. George Nicholson Hon. Andrea Lynn Hoch Hon. Cole Blease California Court of Appeal 914 Capitol Mall Sacramento, CA 95814	