In the Supreme Court of the State of California

Case No. S217738

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

After a Decision of the Court of Appeal, Third Appellate District
San Joaquin County Superior Court, Honorable John P. Farrell, Judge

ANSWER BRIEF ON THE MERITS

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ANSWER BRIEF ON THE MERITS

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PETITIONERS' ANSWER BRIEF ON THE MERITS

I. INTRODUCTION.

In eminent domain matters, California law strikes a balance between government's need to acquire private property for public use and landowners' constitutionally protected rights and interests. A public entity that seeks to take a compensable property interest may lawfully do so if it complies with the safeguards afforded landowners under California law.

For example, under our Constitution the government must pay just compensation for the property interests to be acquired, whether they be fee estates or lesser interests, such as easements and leaseholds. California's Eminent Domain Law allows an agency to take compensable interests in private property and even take legal possession of the property prior to judgment (the so-called "quick take" procedure), but also affords landowners myriad protections against governmental overreaching.

Public entities occasionally need to acquire something less than a property interest – an "entry" – to conduct pre-condemnation investigations. Recognizing that need, California law provides an "entry" procedure (the "Entry Statute") by which government may acquire a pre-condemnation "entry" in the nature of a privileged trespass.

Because an entry obtained under the Entry Statute is not a direct and intentional taking of a compensable property interest, the Entry Statute does not provide many of the protections afforded landowners in an eminent domain action. For example, the Entry Statute requires no deposit of probable compensation for a compensable interest in property. Rather, it requires a deposit of probable compensation only for "actual damage" or "substantial interference" that might, or might not occur as an incident to the entry. That deposit is not available to the landowner unless the landowner advances a claim and proves his or her entitlement to it; i.e., the landowner must prove the existence of "actual damage" or "substantial interference" incidental to the entry and the extent of the damages.

In this case, the State of California, by and through the Department of Water Resources ("DWR") petitioned under the Entry Statute to obtain two types of entries to conduct investigations for a proposed project. First, DWR sought a two-year permit to conduct myriad entries for "environmental activities" consisting of recreational, botanical, hydrologic, archaeological and other investigations. Second, DWR sought entries for "geological activities," including multiple drillings over 200 feet in depth, removal of landowners' soil and replacement and

sealing of the borings with cement/bentonite grout. Because it proceeded under the Entry Statute, DWR deposited "probable compensation" only for incidental "actual damage" or "substantial interference."

Over landowners' objections, the trial court granted DWR a one-year Entry Order allowing DWR to proceed with its proposed "environmental" investigations. The court denied the "geological"entry, ruling that DWR's request, if granted, would result in an unconstitutional taking.

The Court of Appeal affirmed the order denying DWR's requested "geological" entry, holding that DWR's request was for a "taking." It reversed the Entry Order, concluding that the Entry Order granted DWR more than a mere entry; it conveyed to DWR a temporary easement. As a matter of law, a temporary easement is a compensable property interest. The Court of Appeal also held that the Entry Order effected a "taking" under the U.S. Supreme Court's "temporary takings" jurisprudence.

Finally, the court held that the Entry Statute does not satisfy the constitutional requirements for exercise of eminent domain. That is, although public agencies may properly invoke the Entry Statute to obtain entry rights that do not rise to the level of takings, the Entry Statute does not provide a constitutional procedure by which an agency may directly

and intentionally take a compensable interest in property. Applying the presumption of constitutionality, the court recognized that an interpretation of the Entry Statute as radical and expansive as that urged by DWR would render the statute unconstitutional. The Court of Appeal reaffirmed and preserved the constitutionality of the Entry Statute by resisting such an interpretation.

Before this Court, DWR again argues for an interpretation of the Entry Statute that, if accepted, would render the statute unconstitutional. If adopted, DWR's position would allow government to directly and intentionally take compensable interests in private property without satisfying constitutional requirements. Such an interpretation would also enable public agencies to circumvent the many protections afforded landowners in eminent domain. No existing authority supports such an expansion of government's powers. To the contrary, existing precedent, including a landmark decision of this Court, squarely comports with the result reached in the Court of Appeal.

Further, as explained below, the Court of Appeal properly rejected DWR's overwrought "public policy" rationale for adopting its proffered interpretation of the Entry Statute. Sensitive to both the legitimate needs of government and the legitimate and constitutionally protected interests

of landowners, the Court of Appeal recognized the balance struck by existing law. It rejected DWR's invitation to scrap that balance in favor of a new legal regime under which landowners' constitutional rights and protected interests could be sacrificed on the alter of governmental "efficiency."

This Court, too, should decline DWR's invitation and affirm the Court of Appeal's Opinion in its entirety.

II. BACKGROUND.

A. Coordination of DWR's Temporary Entry Permit Petitions.

DWR filed petitions under the Entry Statute (Code of Civil Procedure ["C.C.P."] § 1245.010 et seq.) targeting Delta landowners, including Petitioners herein (hereinafter, "Landowners").[1] In each petition, DWR sought a Temporary Entry Permit ("TEP") for the purpose of conducting investigations for a proposed project.

DWR petitioned for coordination on the ground that:

> All of the Entry Petitions . . . . state identical factual allegations, concern studies and investigations of the same potential public project, involve many common legal

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[1] The Landowners have been designated as "Petitioners" in this proceeding. While some of the Landowners were "Petitioners" in the underlying mandamus proceeding, others were "Respondents" and "Cross-Appellants" in DWR's consolidated appeal. The term "Landowners" is used herein to avoid confusion.

> theories, and seek orders permitting temporary entry to conduct the same nature, scope and duration of precondemnation activities.

(1 Petitioners' [Nichols, et al.] Appendix of Exhibits in Support of Petition for Writ of Mandate, Prohibition or Other Appropriate Relief ["PA"], p. 71.)

Coordination was granted. As the Court of Appeal stated, "[t]he coordinated proceedings affect[ed] more than 150 owners of more than 240 parcels in San Joaquin, Contra Costa, Solano, Yolo, and Sacramento Counties." (Opinion[2] at p. 5.)

DWR filed a "Master Amended Petition" (2 PA, pp. 271-296), requesting entries for "Environmental Activities" consisting of "Recreational," "Botanical," "Hydrologic," "General," "Vernal Pool," "Environmental Site," and "Habitat and species-specific" "surveys" (2 PA, pp. 278-284), as well as "Archaeological Survey Activities" and "Utility Inventory Activities." (2 PA, pp. 284-285.)

DWR also requested entries for "Geological Activities," including multiple drillings up to 205 feet in depth, removal of Landowners' soil and replacement and sealing of the borings with "cement/bentonite

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[2] DWR's OB cites to the Court of Appeal's "Opinion" rather than to the decision at 224 Cal.App.4th 828. This brief adopts DWR's citation convention.

grout," and cone penetrometer testing ("CPT"). (2 PA, p. 294.) DWR stated:

> Petitioner requires sixty (60) intermittent twenty-four (24)-hour days for a period of twenty four (24) months on each parcel . . . to accomplish the purpose for the entries.

(2 PA, p. 274.)

Regarding deposits of probable compensation, DWR stated:

> The nature and scope of the activities . . . may result in actual damage to or substantial interference with the possession and use of the Subject Properties. The probable amounts of such actual damage or substantial interference are: Three Hundred Dollars ($300) per parcel for the Environmental Activities and an additional Two Hundred Dollars ($200) per parcel for the Geological Activities.

(2 PA, p. 275; see 1 Appellant's [DWR's] Appendix in Appellate Case No. C068469 ["AA"], pp. 20-22, for the basis of its proposed deposits.)

B. The Trial Court's Rulings.

1. Preliminary Rulings.

The trial court requested briefing on two issues: "whether [DWR's] Amended Petition institutes a summary proceeding or an eminent domain action and whether, in either event, [Landowners] are entitled to law and motion proceedings and discovery as to the nature and scope of [DWR's] pre-condemnation activities prior to trial." (1 Respondents' and Cross-Appellants' [Landowners'] Appendix ["RCA"],

p. 1.) DWR responded:

> The Amended Petition . . . does not institute an eminent domain action. Eminent domain procedures do not apply to [the Entry Statutes] because under the Eminent Domain Law . . ., precondemnation entry and eminent domain are procedurally distinct and substantively incomparable. The Entry Statutes have no meaning or effect if eminent domain procedures are construed to apply.
>
> Discovery is precluded and is not contemplated, appropriate or necessary under the Entry Statutes. . . . .

(1 RCA, p. 2; see pp. 3-9; 2 PA, p. 331:14-20.)

Landowners agreed that the Entry Statute does not commence an eminent domain action but argued that if DWR sought compensable property interests, and if DWR were allowed to acquire those interests under the Entry Statute, the Landowners should be entitled to discovery. (2 PA, p. 345:8-22.)

a. **Rulings on the Nature of a Proceeding under the Entry Statute.**

The court ruled: "[t]his is not an eminent domain action but a special proceeding preliminary to an eminent domain action." (2 PA, p. 452; see p. 456; see, also, 2 PA, p. 338:7-9.) The court also ruled that in an Entry Statute proceeding there is no need for an answer or other particular responsive pleading, nor is there any requirement for a trial. (2 PA, pp. 453-454.)

b. Ruling Re: Indispensable Parties.

Landowners argued that if DWR were allowed to use the Entry Statute to obtain compensable property interests, lessees and owners of easements must be treated as indispensable parties. (1 RCA, pp. 24-28.)

DWR disagreed, arguing:

> In stark contrast to the statutes governing eminent domain actions, the Entry Statutes explicitly apply only to property *owners*, and they do not apply to persons having or claiming an interest in the property described in the entry petition. [¶] Only property *owners* are necessary parties to a precondemnation entry petition. Under the Entry Statutes, petitioner is required to give notice of its petition only to the *owner* of the property. . . . Only the *owner* of the property is entitled to a determination of the probable compensation for precondemnation entry.

(1 RCA, pp. 131-132.)

The trial court agreed with DWR. (2 PA, p. 543-544.)

c. Ruling Denying a Right to Discovery.

The trial court denied Landowners' request for discovery into the basis for DWR's Master Amended Petition, reasoning, in part, that "the limited intrusion or interference allowed under the entry provisions and the need for swift resolution supports exemption from the standard rules of civil practice." (2 PA, p. 455.)

2. The Entry Order.

The trial court's Entry Order of February 22, 2011 allowed DWR a one-year "entry" for the purpose of conducting its requested activities. (6 PA, pp. 1525-1538.) Under the Entry Order, the number of days and personnel permitted on the properties within the one-year period varies between 25 and 66 days and 4 and 8 people per entry, as determined by parcel size. (6 PA, p. 1556.)

3. Order Denying DWR's Requested "Geological" Investigations.

By order dated April 8, 2011 (the "April 8 Order"), the trial court denied DWR's request for a TEP to conduct geological activities. (3 AA, pp. 793-800.) The court observed that DWR had conceded that its request, if granted, would constitute a taking for constitutional purposes. (*Id.*, pp. 796-797.) The trial court concluded that a such taking cannot be had under the Entry Statute. (*Id.*, pp. 798-800.)

C. Landowners' Petition for Writ of Mandamus and DWR's Appeal.

Landowners challenged the Entry Order by way of a Petition for Writ, which the Court of Appeal denied. This Court granted Landowners' Petition for Review, directing the Court of Appeal to vacate its previous order. (Opinion, p. 8.)

DWR appealed directly from the April 8 Order. (3 AA, p. 801.) Landowners cross-appealed. (2 RCA, p. 492-493.)

D. The Court of Appeal's Opinion.

1. Reversal of the Entry Order.

The Court of Appeal held that the Entry Order conveyed to DWR a year-long non-exclusive blanket easement. (Opinion, pp. 30, 41, 42.) A temporary easement is a compensable property interest. (*Id.* at pp. 30, 41.) The interests and rights conveyed by the Entry Order also constitute a "taking" under "temporary takings" jurisprudence. (*Id.* at p. 42.) Any procedure by which government takes a compensable property interest must satisfy the constitutional requirements for exercise of eminent domain. (*Id.* at pp. 14, 22-29.) The court held that the Entry Statute does not meet that standard. (*Id.* at pp. 9, 25-29, 43.)

2. Affirmance of the April 8 Order.

The Court of Appeal summarized DWR's requested geological entries, describing not only DWR's proposed borings, removal of Landowners' soil and replacement of that soil in each case with "a column of near equal volume of permanent cement/bentonite grout" up to 205 feet deep with a diameter of up to 6 inches, but also the equipment, personnel, 10,000 square-feet staging area, and time period required for each boring,

as well as the equipment, personnel and time required for each CPT. (Opinion, pp. 7, 10-11.)

The Court of Appeal held that on its face DWR's requested geological entry was for a "taking" under *Loretto v. Teleprompter Manhattan CATV Corp.* (1982) 458 U.S. 419, and other decisions. (Opinion, pp. 12-15.)

III. ARGUMENT.

A. The Entry Order Conveyed Compensable Interests in Private Property.

Landowners' objections to the Entry Order turn on questions of law. Does the Entry Order, on its face, convey a temporary easement? Is a temporary easement a compensable property interest? The answer to both questions is "yes."

1. The Entry Order Conveyed Temporary Easements in the Landowners' Properties.

An "entry" is no more than a legal trespass, innocuous and limited in duration. In a landmark decision applying an earlier version of the Entry Statute, this Court held:

> . . . it is clear that whatever entry upon or examination of private lands is permitted by the terms of this section cannot amount to other than such innocuous entry and superficial examination as would suffice for the making of surveys or maps and as would not in the nature of things seriously impinge upon or impair the rights of the owner to the use

and enjoyment of his property.

(*Jacobsen v. Superior Court* (1923) 192 Cal. 319, 329 ["*Jacobsen*"].)

Jacobsen remains good law and has been cited, with approval, in such cases as *City of Needles v. Griswold* (1992) 6 Cal.App.4th 1881, 1895 and *County of San Luis Obispo v. Ranchita Cattle Co.* (1971) 16 Cal.App.3d 383, 388-389. Other courts agree: "A taking may not be allowed under the guise of a preliminary survey . . . ." (*County of Kane v. Elmhurst National Bank* (1982) 111 Ill.App.3d 292, 298, citing *Jacobsen.*)

The Entry Order granted rights and interests exceeding anything that could be allowed as an "entry." The Court of Appeal concluded:

> In effect, the State seeks to acquire a temporary blanket easement for one year to access the landowners' properties for a total of two months or more by as many as eight people at a time, and to conduct its studies wherever may be appropriate on the lands subject to reasonable restrictions set by the trial court. Even though it is temporary and regulated, the occupancy nonetheless intentionally acquires an interest in real property without paying for it.

(Opinion, p. 41; see, also, pp. 30, 42.)

"An easement is an interest in the land of another, which entitles the owner of the easement to a limited use or enjoyment of the other's land." (12 Witkin, Summary Cal. Law (10th ed. 1987) Real Property § 382, p. 446.) An easement is "an interest in land created by grant or

agreement, express or implied, which confers on its owners a right to some profit or benefit, dominion, or lawful use out of or over the estate of another." (*Costa Mesa Union School District of Orange County v. Security First National Bank* (1967) 254 Cal.App.2d 4, 11.)

Easements may be exclusive or non-exclusive. (*Grey v. McCormick* (2008) 167 Cal.App.4th 1019, 1023-1024.) "[A]n 'exclusive easement' is an unusual interest in land; it has been said to amount almost to a conveyance of the fee." (*Id.* at p. 1025.) For this reason, most easements are non-exclusive. (*Ibid.*)

The existence of an easement does not depend on talismanic formulae or formal requirements. (*Maywood Mut. Water Co. No. 2 v. City of Maywood* (1972) 23 Cal.App.3d 266, 270; *Golden West Baseball Co. v. City of Anaheim* (1994) 25 Cal.App.4th 11, 35.) In other words, an easement is as an easement does; its character does not change merely by avoiding the word "easement."

The Court of Appeal recognized that the Entry Order went far beyond allowing a mere "entry" and, on its face, granted a temporary easement. (Opinion, pp. 30, 41, 42.) This point lies at the heart of the dispute. Tellingly, DWR never argued that the interests in Landowners' properties conveyed by the Entry Order were *not* temporary easements.

DWR never addressed the easement issue at all.

Instead, DWR focused on the types of "activities" that are allowed under the Entry Statute, arguing that the Entry Order was lawful because the "activities" allowed under the Entry Order are among the types allowed by the Entry Statute. In its OB, DWR again argues in terms of whether the governmental "activities" allowed by the Entry Order would effectuate a taking.

DWR's focus on the "activities" allowed under the Entry Statute misses the point and leads DWR to an erroneous characterization of the Opinion. DWR states:

> 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*.

(OB, p. 2, emphasis added.)

DWR's characterization is misleading. In objecting to the Entry Order, Landowners did not argue that the proposed "activities" constitute a taking. Landowners argued that the Entry Order grants a temporary easement and that – without regard to the nature of DWR's requested "activities" – a temporary easement is a compensable interest in property. The "taking" occurred in the granting of the easement.

The Court of Appeal's holding did not turn solely on the

"activities" but, rather, on the fact that the Entry Order conveyed a temporary easement. (Opinion at pp. 41-42.)

2. A Temporary Easement Is a Compensable Interest in Real Property.

Easements are "unquestionably compensable 'property.'" (*Southern California Edison Co. v. Bourgerie* (1970) 9 Cal.3d 169, 172-173, citing 2 Nichols on Eminent Domain 173 (3d ed. 1970).) As compensable property interests, temporary easements are routinely included among the property interests appraised and condemned in eminent domain proceedings. (See, *e.g.*, *City of Corona v. Liston Brick Co. of Corona* (2012) 208 Cal.App.4th 536, 539-540 [eminent domain action to acquire, among other interests, "temporary construction easements"]; *City of Santa Clarita v. NTS Technical Systems* (2006) 137 Cal.App.4th 264, 269 [eminent domain action to acquire interests in private property, including a "temporary construction easement"]; *City of Carlsbad v. Rudvalis* (2003) 109 Cal.App.4th 667, 673 [the city condemned "temporary construction easements"]; *People ex Rel. Dept. of Transportation v. Leslie* (1997) 55 Cal.App.4th 918, 920 [condemnation of interests in real property, including a "temporary construction easement"]; *San Diego Metropolitan Transit Dev. Bd. v. Cushman* (1997) 53 Cal.App.4th 918, 923 [condemnation of interests in real property,

including a "temporary construction easement"]; *San Diego Metropolitan Transit Dev. Bd. v. Price Co.* (1995) 37 Cal.App.4th 1541, 1543-1544 [condemnation of "a temporary construction easement over a 12-foot-wide strip"]; see, also, 1 Matteoni, CEB Condemnation Practice in California (CEB, Third Ed.) §4.81 ("Temporary Construction Easement") [discussing compensation for temporary construction easements in eminent domain].)

In its discussion of "temporary takings," DWR cites one case that it claims holds that "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." (OB, p. 23, citing *Metropolitan Water Dist. of Southern Cal. v. Campus Crusade for Christ, Inc.* (2007) 41 Cal.4th 954, 975 ["*Metropolitan Water*"].)

DWR is mistaken. In *Metropolitan Water*, the Metropolitan Water District of Southern California ("MWD") sued in eminent domain to acquire interests in land owned by Campus Crusade for Christ in order to construct a water pipeline. (41 Cal.4th at p. 961.) MWD sought "10.4 acres in fee, 18.7 acres of permanent easements, 27.4 acres of temporary construction easements for a period of seven years, and two permanent tunnel easements." (*Id.* at p. 963.) MWD made a deposit for these

property interests, on which Campus Crusade's appraisers placed a higher valuation. (*Id.* at pp. 962-963.) In addition, Campus Crusade sought over $12 million in severance damages. (*Id.*)[3]

Campus Crusade's claim for severance damages was based on the alleged effect of MWD's taking of the property interests, specifically the permanent and temporary easements. (*Id.* at p. 963.) For example, the temporary easements required the cutting of "a row of mature trees that served as a natural entryway for the historic hotel" on the property. (*Ibid.*) MWD offered no compensation for "severance or temporary severance damages." (*Ibid.*)

The Supreme Court addressed Campus Crusade's "attempt to recover temporary severance damages for the allegedly adverse impact of the project on its ability to use, develop, and market its property during the seven-year period of construction." (*Id.* at p. 974.) In this context, the court distinguished *Placer County Water Agency v. Hofman* (1985)

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[3] "Severance damages" are separate and distinct from easements and other interests in real property: "When the property taken is part of a larger parcel, the owner is compensated not merely for the injury to the part taken but also for the injury, if any, to the remainder. (*§ 1263.410, subd. (a).*) Compensation for injury to the remainder is the amount of the damage to the remainder caused by the taking, reduced by the amount of the benefit to the remainder caused by the taking. (*§ 1263.410, subd. (b).*) Such compensation is commonly called 'severance damages.'" (*Metropolitan Water, supra*, 41 Cal.4th at p. 965, citation omitted.)

165 Cal.App.3d 890, a case Campus Crusade had relied on "[i]n support of its claim of temporary severance damages." (*Id.* at 975.) The court explained:

> In *Hofman*, the owner alleged that the agency's temporary easement for the construction of a pipeline across the owner's property "substantially prevented use of the property for cattle and sheep ranching" and sought damages in the form of the cost to rent comparable ranching facilities. . . . . In other words, the taking interfered with the owner's *actual* intended use of the property. Here, by contrast, Campus Crusade has not identified any intended use of the property during the relevant period, nor has it identified any specific loss attributable to the delay in construction. . . .
>
> . . . [¶] . . .
>
> *If* Campus Crusade had sold the property during the construction period and *if* the ongoing construction had temporarily lowered the sales price of the property, it would appear that Campus Crusade would be entitled to recover that loss from MWD. . . . But the mere fact of a delay associated with construction of the pipeline did not, without more, entitle Campus Crusade to temporary severance damages relating to the financing or marketing of the property in this eminent domain action.

(*Ibid.*, citations omitted.)

This, is the passage in *Metropolitan Water* cited by DWR for the proposition that "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." (OB, p. 23.) Yet, as shown, the case had nothing to do with obtaining compensation for, or valuing, a

temporary easement. The issue was a claim for temporary severance damages based, in part, on the alleged detrimental *effect* of a temporary easement on the value of the property.

A temporary easement is a compensable property interest, without regard to "interference" or "actual use" that may not occur during the exercise of the easement. For that matter, an easement is no less a compensable property interest if for some reason the easement holder never exercises the easement at all.

B. Temporary Takings Analysis under the *Penn Central* Line of Decisions Is Irrelevant to the Question of Whether the Entry Order Conveys a Temporary Easement.

DWR's position turns largely on the "temporary takings" cases, especially *Penn Central Transportation Co. v. New York City* (1978) 438 U.S. 104, 98 S.Ct. 2646 ["*Penn Central*"], and *Arkansas Game and Fish Commission v. United States* (2012) __ U.S. __; 133 S.Ct. 511 ["*Arkansas Game and Fish*"]. (OB, pp. 19-25.)

Penn Central was a regulatory taking case commenced by the owners of Grand Central Terminal, which had been designated as a "landmark" under New York City's Landmarks Preservation Law ("Landmark Law"). (438 U.S. at pp. 115-16.) Such a designation imposes certain use restrictions on the property. (*Id.* at p. 11-112.) The

owners, who had planned to construct a massive office building on the site, sought approval from the city's Landmarks Preservation Commission. The Commission denied a permit for the proposed project. (*Id.* at p. 116-118.)

The owners sued, claiming that application of the Landmarks Law had "taken" their property without just compensation. They sought declaratory and injunctive relief, as well as damages for the "temporary taking" that occurred between the date the site was designated as a "landmark" and the date upon which restrictions imposed by the Landmarks Law would be lifted. (*Id.* at p. 119.) The matter was adjudicated in the New York state courts, with the New York Court of Appeals finally rejecting the owners' regulatory taking claim. (*Id.* at pp. 120-121.)

The U.S. Supreme Court addressed a single issue: did the Landmark Law effect a taking as applied to the Grand Central Terminal's owners? (*Id.* at p. 122.) The court identified factors that had been used in prior regulatory takings decisions to determine whether a land use restriction effected a taking. Such factors include, for example, the "economic impact of the regulation on the claimant and, particularly, the extent to which the regulation has interfered with distinct investment-

backed expectations" and "the character of the governmental action." (438 U.S. at 124-128.) Applying these factors, the court concluded: "This [the Landmark Law] is no more an appropriation of property by government for its own uses than is a zoning law prohibiting for 'aesthetic' reasons, two or more adult theaters within a specified area." (*Id.* at p. 135.)

Having affirmed the validity of the Landmark Law, the court turned to the question of "whether the interference with appellants' property is of such a magnitude that 'there must be an exercise of eminent domain and compensation to sustain [it].'" (*Ibid.*) Concluding that the Landmark Law did not interfere with the owners' current profitable uses of the Terminal, the court held that there had been no "taking." (*Id.* at p. 136-138.)

Unlike this case, *Penn Central* was a regulatory taking case and, as such, turned on the regulation's effect on the value of the property and on the owners' use of that property. Had the City elected to take an easement in the property, it would have been a very different case indeed -- an easement is a compensable interest in real property as a matter of law.

Simply stated, *Penn Central* cannot support an intentional taking of

a compensable property interest – such as an easement – without paying just compensation for that property interest. As this Court has observed, the *Penn Central* analysis applies in regulatory taking cases (*Kavanaugh v. Santa Monica Rent Control Bd.* (1997) 16 Cal.4th 761, 775; see *Hensler v. City of Glendale* (1994) 8 Cal.4th 1, 9-10 [distinguishing regulatory takings from other types of takings].) DWR cites no authority under which the *Penn Central* factors have been applied in a case such as this.

DWR's reliance on *Arkansas Game and Fish Commission* is equally misplaced. That case arose from activities of the U. S. Army Corps of Engineers ("Corps"), which authorized releases from a dam, resulting in flooding of property owned by the Arkansas Game and Fish Commission ("Commission"). The Commission operated its downstream property ("Management Area") as a wildlife and hunting preserve, as well as for harvesting timber. (133 S.Ct. at pp. 515-516.)

The rates at which water was to be released from the dam were established by a plan known as the Water Control Manual. (*Id.* at p. 516.) Between 1993 and 2000, the Corps (responding to requests from farmers) approved deviations in the Manual's water release schedule. (*Ibid.*) This extended the period in which a high amount of water would be released, and that extension resulted in flooding in the Management

Area. (*Ibid.*)

The Commission opposed a proposal to make the temporary deviations part of a permanent policy change. (*Ibid.*) After testing the effect of the deviations on the Management Area, the Corps abandoned the proposal. In 2001, the Corps ceased its temporary deviations. (*Ibid.*)

The Commission sued the United States, claiming that the temporary deviations constituted a temporary taking. (*Id.* at pp. 516-517.) Following a trial, the Court of Federal Claims ruled in favor of the Commission, concluding that the Corps' deviations caused years of substantially increased flooding, which amounted to a temporary appropriation of the Commission's property. (*Id.* at p. 517.)

The Federal Circuit reversed, holding that "Government-induced flooding can give rise to a taking claim, . . . only if the flooding is 'permanent or inevitably recurring.'" (*Id.* at pp. 517-518.)

The U.S. Supreme Court granted certiorari on a single question: "to resolve the question whether government actions that cause repeated floodings must be permanent or inevitably recurring to constitute a taking of property." (*Id.* at p. 518.)

After reviewing earlier decisions to the effect that government-induced flooding can constitute a taking, the court held:

> Because government-induced flooding can constitute a taking of property, and because a taking need not be permanent to be compensable, our precedent indicates that government-induced flooding of limited duration may be compensable. No decision of this Court authorizes a blanket temporary-flooding exception to our *Takings Clause* jurisprudence, and we decline to create such an exception in this case.

(*Id.* at p. 519.)

The Supreme Court then addressed the Corps' advocacy of a "temporary-flooding exception," ruling as follows:

> We rule today, simply and only, that government-induced flooding temporary in duration gains no automatic exemption from *Takings Clause* inspection. When regulation or temporary physical invasion by government interferes with private property, our decisions recognize, time is indeed a factor in determining the existence *vel non* of a compensable taking.

(*Id.* at p. 522.)

The Supreme Court then briefly referred to some of the factors considered in *Penn Central* and other takings cases arising from "regulation or temporary physical invasion." (*Ibid.*)

In contrast, the Entry Order directly and intentionally conveys to DWR an interest in Landowners' properties which is compensable as a matter of law. In such a case, there is no reason to conduct a property-specific factual inquiry to determine whether a regulation or flooding has effected a taking. Nothing in *Arkansas Game and Fish* would render

temporary easements something less than compensable interests in real property or relieve agencies of the requirement that they invoke eminent domain in order to directly and intentionally acquire compensable interests in property.

Unlike the instant case, *Shaw v. County of Santa Cruz* (2008) 170 Cal.App.4th 229 was also a regulatory taking case. DWR cites *Shaw* for its recital of the *Penn Central* "factors." (OB, p. 19.) It was in the context of considering the effect of a regulatory action by a county (denial of a permit needed for development of undeveloped property) that the Court of Appeal invoked and applied the *Penn Central* factors. (170 Cal.App.4th at p. 272.) Such an analysis has no relevance here. Whether a temporary easement is compensable has nothing to do with what might or might not happen during the exercise of the easement. The temporary easement is a compensable property interest regardless of whether DWR exercises the easement at all.

In *Lockaway Storage v. County of Alameda* (2013) 216 Cal.App.4th 161, an inverse condemnation case cited by DWR (OB 23-24), the court was confronted with a temporary regulatory taking claim arising from a county's suspension of a construction project based on its improper application of a county growth control ordinance. In concluding

that the county effected a "temporary taking," the trial court applied the *Penn Central* factors. (216 Cal.App.4th at p. 173.)

The Court of Appeal observed:

> "The paradigmatic taking requiring just compensation is a direct government appropriation or physical invasion of private property." . . . . However, courts have long recognized that "government regulation of private property may, in some instances, be so onerous that its effect is tantamount to a direct appropriation or ouster--and that such 'regulatory takings' may be compensable under the *Fifth Amendment.*" . . . .

(216 Cal.App.4th at p. 183-184, citations omitted.) The court then applied the *Penn Central* factors in affirming the judgment. (*Id.* at pp. 184-185.)

Lockaway was, again, a regulatory takings case. As the *Lockaway* court noted, "[t]he paradigmatic taking requiring just compensation is a direct government appropriation or physical invasion of private property." Where a taking of that sort is at issue, there is no occasion to ask whether a particular regulation or proposed government application of a regulation is "tantamount to a direct appropriation or ouster." In such direct and intentional appropriation cases, the very premise of the "regulatory takings" decisions is altogether missing.

So it is here. The Entry Order is an intentional and "direct government appropriation" of a temporary easement. As a matter of law,

a temporary easement is a compensable property interest. That is true without regard to any "ad hoc factual inquiry that weighs several [*Penn Central*] factors for evaluating a regulatory takings claim." (*Id.* at p. 185.)

The other decisions cited by DWR are also easily distinguished. *Ridge Line, Inc. v. United States* (Fed. Cir. 2003) 346 F.3d 1346 (cited at OB, p. 23) was an inverse condemnation case brought by Ridge Line, Inc., which owned commercial property. The U.S. Postal Service constructed a post office on nearby property at a higher elevation. As a result of increase discharges of water from the post office property, Ridge Line was forced to construct storm water management facilities that it allegedly would not have built at the time. After the United States refused to share in the expense of those facilities, Ridge Line sued in inverse condemnation, claiming that the additional water flow caused by the post office facility constituted the taking by the government of a flowage easement without just compensation. (346 F.3d at p. 1351.)

The trial court found that the affected portion of Ridge Line's land was not destroyed, nor had it suffered a permanent and exclusive occupation by the increased water runoff. (*Id.* at pp. 1351-1352.)

The Federal Circuit reversed, primarily because the trial court did

not address the flowage easement allegation, even though the law is clear that "government actions may not impose upon a private landowner a flowage easement without just compensation." (*Id.* at pp. 1352, 1355, citation omitted.) It remanded for "analysis of the evidence in accordance with the taking of a flowage easement by inverse condemnation." (*Id.* at p. 1355.)

It was in that context that the Federal Circuit explained that the plaintiff must establish that treatment under takings law, as distinguished from tort law, is appropriate. (*Ibid.*) This is the point on which DWR cited *Ridge Line*. (OB, p. 23.)

However, in this case no party has alleged tort damages. No party has alleged that DWR's activities have resulted in any actual damage or that its actions on the ground constitute the taking of a flowage easement or any kind of easement by implication or prescription. The basis of this case is different: the Entry Order, on its face, conveys a temporary easement to DWR. Other than reiterating the rule that "government may not take an easement without just compensation" (346 U.S. at p. 1352), *Ridge Line* sheds no light on this case.

DWR's reliance on *Lucas v. South Carolina Coastal Council* (1992) 505 U.S. 1003 (cited at OB p. 19) is also misplaced. That was a

regulatory taking case arising out of application of South Carolina land-use regulations imposing land use restrictions on certain "critical area" coastal-zone lands. At no point did the court in *Lucas* suggest that government may intentionally take a temporary easement without paying just compensation.

City of Fremont v. Fisher (2008) 160 Cal.App.4th 666 (cited at OB 22, fn. 8) actually cuts against DWR's position. In that case, the City of Fremont sued the landowners in eminent domain to acquire interests in the subject property. The jury award included compensation for: (1) the fair market value of a temporary construction easement (TCE) ($84,352); (2) the value of a permanent slope easement (15,500); (3) permanent severance damages resulting from the permanent slope easement $108,248), and (4) temporary severance damages from the TCE ($195,413). (*Id.* at p. 674.)

The City appealed the award of temporary ***severance*** damages. It did ***not*** appeal the award of compensation for the temporary easement. (*Id.* at pp. 670, 676-687.)

In reviewing the award of temporary ***severance*** damages, the Court of Appeal said:

> Temporary severance damages resulting from the construction of a public project are also compensable. . . .

> A property owner "generally should be able 'to present evidence to show whether and to what extent the delay disrupted its use of the remaining property.'" . . . . However, "the mere fact of a delay associated with construction" does not, without more, entitle the property owner to temporary severance damages. . . . . The temporary easement or taking must interfere with the owner's *actual* intended use of the property.

(*Id.* at p. 676-677, quoting *Metropolitan Water*, *supra*, 41 Cal.4th at 975, and *County Water Agency v. Hofman, supra*, 165 Cal.App.3d at p. 894.) For reasons not relevant here, the Court of Appeal reversed the judgment with respect to the award to temporary severance damages. (*Id.* at pp. 686-687.)

City of Fremont reaffirms that because a temporary easement is a compensable interest in real property it is among the property interests appraised in eminent domain actions and for which just compensation is paid. Second, the decision nowhere suggests that the compensability of a temporary easement depends upon the owner's use of the property, "actual damage" to the property, or interference with the owner's actual or intended use of the property. To the contrary, the city appraised the value of the temporary easement without any reference to those considerations. (*Id.* at pp. 669-671.) Neither its appraisal of the temporary easement nor the award of just compensation for the temporary easement was the subject of the appeal.

As reflected in the landowner's appraisal testimony, valuation of the temporary easement and valuation of temporary severance damages allegedly caused by the temporary easement are separate and distinct. (*Id.* at pp. 672-673.) What the city appealed was the award of temporary severance damages ($195,413) allegedly caused by the temporary easement – *not* the award of just compensation for the temporary easement itself ($84,352).

In this case, severance damages are not an issue.

C. DWR's Suggestion that a Parcel-by-Parcel Inquiry is Required Misapprehends the Nature of the Takings Effectuated by the Entry Order.

Under *Penn Central* and *Arkansas Game and Fish*, determining whether a taking has occurred may entail property-specific factual inquiry with respect to certain "factors." DWR argues that Landowners' position fails because of a lack of such evidence. (OB, p. 20 ["there is no evidence that the environmental activities will have any economic impact on the value or use of the properties"], p. 21 ["there is no evidence that the environmental activities would interfere with any distinct investment backed expectations"].)

DWR's argument is ironic and misplaced.

It is ironic because in the trial court, DWR argued vigorously that

this is *not* a regular eminent domain proceeding and that Landowners are therefore *not* entitled to discovery. DWR even argued that the court could not even weigh evidence:

> The Entry Statutes do not require or allow the court to weigh evidence in making its determinations under section 1245.030, subdivision (b). Nor do they contemplate respondents' desire to conduct discovery of evidence to be presented at a "trial" regarding the legitimacy of petitioner's stated purpose for the entries and necessary activities.

(1 RCA, p. 9.)

DWR's argument is also misplaced. The taking has little to do with anything specific to a given property. The taking consists primarily of government's direct and intentional taking of an interest in land – a temporary easement.

DWR's arguments about specific proposed activities and a case-by-case examination of actual interference with use would make sense in many regulatory takings cases, but it makes no sense where government intentionally and directly takes a compensable property interest. (See *Hensler v. City of Glendale*, *supra*, 8 Cal.4th at pp. 9-10 [Distinguishing between regulatory takings and other types of takings, this Court observed: "An individualized assessment of the impact of the regulation on a particular parcel of property and its relation to a legitimate state interest is necessary in determining whether a regulatory restriction on

property use constitutes a compensable taking."].)

D. The Entry Order Would Constitute a Taking Under the Rationale of the "Temporary Takings" Decisions.

The Court of Appeal recognized that the Entry Order effectively conveyed a temporary easement to DWR. (Opinion, pp. 30, 41, 42.) It recognized, too, that a temporary easement is a compensable interest in property. (Opinion, pp. 30, 41.) It could have stopped there, as DWR had cited no authority for the extraordinary proposition that government may directly and intentionally appropriate a compensable interest in private property without paying just compensation.

However, the court did proceed to examine the Entry Order in light of the "temporary takings" decisions. In considering whether the temporary physical invasion contemplated by the Entry Order amounted to a taking – as distinguished from an authorized trespass – the Court of Appeal examined the *Penn Central* factors. With respect to all but one of the *Penn Central* factors, the court was able to proceed without a parcel-specific evidentiary record because the pertinent facts were set forth on the face of the Entry Order itself.

1. DWR's Proposed Entries Constitute Intended and Foreseeable Invasions of Private Property.

As the Court of Appeal observed:

> A primary factor that distinguishes a taking from a tort or a taking recoverable in inverse condemnation is the degree to which the physical invasions are intended or occur as authorized. A condemner's intent to commit an act that is or results in a taking is a significant factor in determining the existence of a temporary taking, and that factor weighs heavily in determining the environmental activities here constitute a taking. "[A] property loss compensable as a taking only results when the government intends to invade a protected property interest or the asserted invasion is the 'direct, natural, or probable result of an authorized activity and not the incidental or consequential injury inflicted by the action.' [Citations.]" . . . . In contrast, "[a]ccidental, unintended injuries inflicted by governmental actors are treated as torts, not takings." . . . .

(Opinion, p. 37, citations omitted.)

Not only is it "foreseeable" that the proposed government activity will result in a taking - *that taking is the express objective of the government activity.* DWR here invoked the Entry Statute to accomplish an intentional invasion of private property. (Opinion, p. 38.) There is no dispute in this case as to causation.

Standing alone, the intentional nature of DWR's effort distinguishes this case from those takings cases in which acquisition of or damage to property was not intended, however foreseeable it might have been.

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2. DWR's Proposed Entries Would Deprive Landowners of Significant Legally Protected Property Rights, Including the Right to Exclude Others.

As the Court of Appeal recognized, the Entry Order authorized activities constituting a "physical invasion" of Landowners' properties, albeit not a permanent invasion such as that contemplated by the requested geological entries. (See Opinion, pp. 38-40.) Rather, the invasion allowed under the Entry Order was in the nature of a temporary easement that, for the duration of the easement, "defeats the landowner's right to exclude others." (Opinion, p. 39.) By definition, government appropriation of an easement takes from the Landowners a critical right of property ownership, the right to exclude others.

> In the bundle of rights we call property, one of the most valued is the right to sole and exclusive possession--the right to *exclude* strangers, or for that matter friends, but especially the Government.
>
> . . . [¶] . . .
>
> The intruder who enters clothed in the robes of authority in broad daylight commits no less an invasion of these rights than if he sneaks in in the night wearing a burglar's mask. In some ways, entry by the authorities is more to be feared, since the citizen's right to defend against the intrusion may seem less clear. Courts should leave no doubt as to whose side the law stands upon.

(*Hendler v. United States* (Fed. Cir. 1991) 952 F.2d 1364, 1374-1375,

citations omitted.)

A landowner's "quiet use and enjoyment" depends on core attributes of property ownership: the right to occupy one's property and the corollary right to exclude others. (*E.g.*, *Kaiser Aetna, et al. v. United States* (1979) 444 U.S. 164, 176, 179-180, 100 S.Ct. 383 ["In this case, we hold that the 'right to exclude,' so universally held to be a fundamental element of the property right, falls within this category of interests that the Government cannot take without compensation."]; *Cwynar v. City of San Francisco* (2001) 90 Cal.App.4th 637, 664-665 ["'Under the traditional conception of property the most important of the various rights of an owner is the right of possession which includes the right to exclude others from occupying the same space.'" (Citation omitted.)].)

The Court of Appeal correctly concluded that the intentional physical invasion authorized by the Entry Order amounted to "an appropriation of a valuable property right--an 'intrusion of an unusually serious character' [*Loretto, supra, 458 U.S. at p. 433*] - even though the invasion is temporary." (Opinion, p. 40.)

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3. The Duration of the Entries Allowed under the Entry Order Further Supports the Conclusion that the Entry Order Effected a Taking.

The duration of the intended invasion of private property is important in determining whether a taking has occurred. (*Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency* (2002) 535 U.S. 302, 342.) The Entry Order conveyed to DWR a temporary blanket easement a full year in duration. The court correctly concluded:

> Because the right to exclude the government from obtaining and possessing an interest in private property is one of a property owner's most cherished rights, a private property owner should not be required to lease portions of his land rent free to the government. Under the facts and circumstances here, a blanket temporary easement for one year that authorizes from 25 to 66 days of entry by four to eight people is a significant length of time for an intentional, physical invasion of private property.

(Opinion, p. 41.)

4. Other Factors Applied in Regulatory Takings Cases are of Little or No Significance in Cases Involving Intentional Physical Invasions and Intentional Takings of Property Interests.

The *Penn Central* factors discussed above – whether the invasions are intended and the character and duration of the intended invasions – are discernable on the face of the Entry Order. The same cannot be said as readily about another of the *Penn Central* factors, the economic impact of the interference with the Landowners' investment-backed expectations.

However, this factor is of little or no importance in a case such as this, which involves an intentional physical invasion and an intentional taking of a compensable property interest. The Court of Appeal observed:

> This factor, however, unlike in the context of a regulatory taking where it is routinely utilized, is less significant in an intentional physical invasion that acquires a property right. The more similar a government's action is to a direct taking, the less significant the invasion's economic impact must be in our weighing. This is because if the government intentionally and physically invades private property to the extent it requires a permanent or temporary interest in that property to accomplish its public purposes, it must pay for that interest, no matter how small the interest may be.

(Opinion, pp. 41-42.)

E. DWR's Geological Entry Would Have Effected a Taking.

The trial court found that DWR's requested geological entry would result in the physical removal of soil from Landowners' properties and replacement of that soil with physical columns of permanent bentonite grout. Reviewing the trial court's findings of fact, the Court of Appeal agreed. (Opinion, p. 9 ["We conclude, as the State earlier conceded, the geological activities will work a taking per se, as they will result in a permanent occupancy of private property."].) Both the trial court and the Court of Appeal recognized that DWR's request was for a "taking" under *Loretto v. Teleprompter Manhattan CATV Corp.* (1982) 458 U.S. 419 ("*Loretto*"), and similar decisions.

The Court of Appeal's summary of the proposed geological activities encompassed not only DWR's proposed borings, removal of Landowners' soil and replacement of that soil in each case with "a column of near equal volume of permanent cement/bentonite grout" up to 205 feet deep with a diameter of up to 6 inches, but also the equipment, personnel, 10,000 square-feet staging area, and up to 10-day period of time required for each boring, as well as the equipment, personnel and time required for each CPT. (Opinion, pp. 7, 10, 11.) Furthermore, DWR sought multiple drillings and CPTs on Landowners' properties. (Opinion, p. 11.)

DWR conceded that its proposed geological entries would constitute takings. Backtracking on that admission, DWR now disputes the trial court's factual finding 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*]." (OB, p. 4.)

Whereas the parties' argument about the Entry Order turns on questions of law, DWR's argument about the proposed geological entries turns on a factual question (whether the bentonite grout "is a permanent structure"). On this point, the trial court took evidence and rendered findings. (See, also, *Juliano v. Montgomery-Otsego-Schoharie Solid Waste Management Authority* (N.D.N.Y. 1997) 983 F.Supp. 319, 328

[In finding a "permanent physical taking entitling Plaintiffs to just compensation," the court ruled: "Based on Defendants' description of its activities on Plaintiffs' property, the Court must conclude as a matter of law that the pressure injection of cement bentonite grout is 'intended to exist or function for a long definite period without regard to unforeseeable conditions' . . . and is thus permanent."].)

DWR characterizes the trial court's factual finding as a "theory" (OB, p. 4), apparently hoping to avoid the deference accorded trial courts' findings of fact. The Court of Appeal did not treat the permanency of the bentonite structures to be left on Landowners' properties as a "theory"; it recognized that this was a factual finding on the part of trial court. While DWR has pointed to testimony from its own agents that might, in isolation, support a different finding, DWR has not addressed the evidence before the trial court which would support the trial court's finding of fact. (See, e.g., AA, p. 428.)

F. The Entry Statute Does Not Provide a Constitutionally Valid Eminent Domain Proceeding for an Intentional Taking of Interests in Private Property.

1. The Power of Eminent Domain is Construed Narrowly Against the Condemnor.

Generally, "[s]tatutory language defining eminent domain powers is strictly construed and any reasonable doubt concerning the existence of

the power is resolved against the entity." (*Kenneth Mebane Ranches v. Superior Court (Fresno Metropolitan Flood District)* (1992) 10 Cal.App.4th 276, 282-283.) "It is a settled principle that a statutory grant of the power of eminent domain must be indicated by express terms or by clear implication. . . . It is also a recognized principle that the statutory language defining the eminent domain powers of a governmental entity is to be strictly construed and any reasonable doubt concerning the existence of the power should be resolved against the entity." (*Skreden v. Superior Court (San Mateo Co. Mosquito Abatement Dist.)* (1975) 54 Cal.App.3d 114, 117, citations omitted.) Accordingly, any reasonable doubts about DWR's authority to take private property under the Entry Statute must be resolved against DWR.

2. A Compensable Interest in Private Property May Be Taken by Government Without Landowner Consent Only If Government Complies with Constitutional Requirements.

DWR states in the first sentence of its OB that the Court of Appeal "incorrectly concluded that a vital part of the Eminent Domain Law, the precondemnation entry statutes . . . fails to meet the requirements of the just compensation clause of the state Constitution . . . ." (OB, p.1.) This statement is misleading insofar as it implies that, *prior* to the Court of Appeal's Decision, there existed authority for the proposition that the

Entry Statute ***does*** authorize an intentional taking of a compensable property interest and that, in that context, it ***does*** meet the requirements of just compensation.

In fact, no decision of any California court has ever adopted the radical interpretation of the Entry Statute DWR now asks this Court to adopt.

A petition under C.C.P. §1245.010 allows government to seek brief access to property for the purpose of conducting innocuous preliminary "pre-condemnation" studies. Where an agency's activities rise to a higher level of intrusion, a taking occurs, which is beyond the scope of a right of entry. (*Jacobsen v. Superior Court*, *supra*, 192 Cal. at 329 [holding that "[a]ny other interpretation would . . . render the section void as violative of the [operative] provisions of the both the state and the federal constitution."]; accord, *County of San Luis Obispo v. Ranchita Cattle Co.*, *supra*, 16 Cal.App.3d at pp. 388-389 ("*Ranchita Cattle*") [citing *Jacobsen*].) Citing *Jacobsen*, one non-California court summed it up as follows: "A taking may not be allowed under the guise of a preliminary survey . . . ." (*County of Kane v. Elmhurst National Bank*, *supra*, 111 Ill.App.3d at p. 298; *see also*, 111 Ill.App. at pp.297-298 [Citing *Ranchita Cattle*, *supra*, the court stated: "[C]ourts have

recognized a basic conceptual difference between a preliminary entry and a constitutionally compensable taking or damaging of property and have held that because the former is not a variety of the latter, it does not require adherence to condemnation procedures or constitutional provisions for just compensation."].)[4]

As other courts have recognized, for government intrusion not to become a taking, it must be the type of occupancy that is "transient and relatively inconsequential, and thus properly can be viewed as no more than a common law trespass . . . . [A] truck driver parking on someone's vacant land to eat lunch is an example." (*Hendler v. United States* (Fed. Cir. 1991) 952 F.2d 1364, 1377.)

3. The Entry Statute's Requirement of a Deposit to Cover Potential "Actual Damage" and "Substantial Interference" Incidental to an Entry is Wholly Distinct from the Compensation Awarded in an Eminent Domain Action.

DWR contends that the deposit of "probable" compensation required under C.C.P. §1245.030, subd. (b) is the equivalent of the "just

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[4] The leading eminent domain law treatise confirms these limits to pre-condemnation entry and activities, noting that exceeding those limits may result in a temporary taking. (2A Julius L. Sackman, *Nichols on Eminent Domain*, 3rd Ed., section 6.01[16][a].) If intrusive acts are to be performed while on the land, the condemnor entering upon the land should exercise its powers of eminent domain to seek a temporary easement. (*Id.*, Vol. 9 at section 32.06.)

compensation" requirement for a taking by eminent domain. (See, e.g., OB, pp. 6-7,13.) Not true.

The deposit required under Section 1245.030, subd. (b) is only for "actual damage to or substantial interference with its possession and use of the property." (C.C.P. § 1245.060, subd. (a).) It is not compensation for the entry itself. (See Opinion, p. 24 [discussing the Entry Statute's deposit provisions].)

The reason the Entry Statute does not provide for a deposit of probable compensation for the intentional taking of a compensable property interest, as *distinguished* from compensation for "actual damage" or "substantial interference" which might occur incidental to an entry, is self-evident. The Entry Statute provides a mechanism by which government can obtain an "entry," not a compensable property interest:

> [T]he entry statutes do not provide for the acquisition and transfer of a property interest when the entry is an intentional, direct taking. The trial court hearing a petition for an entry order is authorized to determine only the probable amount of just compensation owed a landowner if the entry will inflict actual damage to the property or will substantially interfere with the landowner's use or possession of his property. (*§ 1245.060, subd. (a).*) A direct, intentional taking, by contrast, requires a determination of the fair market value of the property interest sought to be acquired. This is a value separate from damage subsequently caused to the property or later suffered due to a substantial interference with its possession or use where an interest in property was not intentionally taken.

(Opinion, pp. 25-26.)

Underscoring this point, the deposit made under the statute is available to the landowner only if the landowner makes a claim and proves actual damage or substantial interference resulting from the entry. (C.C.P., §1245.060.) This is wholly unlike the landowner's right to payment of just compensation for a taking, which does not require any claim by the landowner. Rather, in eminent domain, the governmental agency is required to pay just compensation without regard to what the landowner may claim, or whether the landowner makes any claim at all.

At no point does DWR suggest that a landowner who does ***not*** make a claim for "actual damage" or "interference" incidental to the entry has an adequate remedy at law for the taking or, for that matter, any remedy at all.

As if to highlight this aspect of the Entry Statute, DWR's deposit in this case did not include any amount for acquisition of a temporary easement. Said DWR:

> The nature and scope of the activities . . ., may result in actual damage to or substantial interference . . . . The probable amounts of such actual damage or substantial interference are: Three Hundred Dollars ($300) per parcel for the Environmental Activities and an additional Two Hundred Dollars ($200) per parcel for the Geological Activities.

(2 PA, p. 275.)

The trial court ruled as follows:

> The court finds that the probable amount of compensation is not based on the rental value . . . . Instead it is based on probable damages or interference to use of property.

(5 PA, p. 1291, emphasis added.) Consistent with that ruling, the Entry Order sets the "probable amount of compensation" without any appraisal and without reference to the particulars of any given parcel other than its size, as follows:

100 acres or fewer	$1000 per property
101-1000 acres	$1500 per property
1001-2000 acres	$2500 per property
2001-3500 acres	$4000 per property
3501-8500 acres	$6000 per property

(6 PA, p. 1568, see p. 1514.)

California's Constitution, Art. I, § 19, subd. (a) is clear on this point:

> Private property may be taken or damaged for public use 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 to be the probable amount of just compensation.

The first sentence of Section 19 requires that just compensation be ascertained by a jury and be paid to the owner *prior* to the taking or

damaging of property. The Entry Statute does not provide these constitutional protections.

The second sentence of Section 19 -- which allows for the so-called "quick take" procedure -- does not apply here because an eminent domain action has not been commenced. The statutory procedure for acquiring pre-judgment possession applies only in the context of a filed eminent domain action. (See C.C.P. §1255.410, et seq.)

4. DWR's Argument that the Entry Statute was Intended as an Eminent Domain Alternative by which Government Could Intentionally Take Private Property Is Not Supported by the Legislative History.

DWR correctly notes that the current Entry Statement was intended to comply with *Jacobsen*. However, nothing in the Entry Statute or its legislative history supports a conclusion that the Legislature intended to allow for an intentional taking under the Entry Statute. Rather, the legislative history shows only that the Legislature established a streamlined procedure for recovery of actual tort-like damages that were incidental to a constitutionally permitted entry. (See, *e.g.*, Law Revision Commission Comment to C.C.P. §1245.060, subd. (a).)

DWR's argument also ignores the California Law Revision Commission's explanation that the new section (1245.210's addition of

"borings" to the permitted activities) "continues without substantive change the provisions of subdivision (b) of former Section 1242."

In an article cited by DWR before the Court of Appeal, Professor Van Alstyne observed that entry statutes are held to be facially valid because "the courts feel constrained to assume that the contemplated interference with private property rights ordinarily will be slight in extent, temporary in duration, and *de minimis* in amount." (Van Alstyne, *Inverse Condemnation: Unintended Physical Damages*, 20 Hastings L.J. 431, 484 (1969).) Discussing *Jacobsen*, Van Alstyne focused on that aspect of the decision addressing the fact that there would be no compensation for any actual damage *incidental* to the entry, since government officials were immune to liability for a privileged trespass (i.e., an "entry"). (*Id.* at p. 485.) The specific holding in *Jacobsen* concerning potential damages for trespass has been "obviated" because the procedure enacted in 1959 requires a deposit to cover any incidental damage. (*Id.*)

Nothing in Professor Van Alstyne's article or in the legislative history suggests that *Jacobsen*'s constitutional analysis is unsound or has been superseded by amendments to the Entry Statute. What has changed since *Jacobsen* was decided is that the Entry Statute now provides

expressly for compensation for any "actual damage" or "substantial interference" with use *incidental* to an entry. (See the Opinion's discussion of *Jacobsen* and the Entry Statute's deposit and compensation provisions, at pp. 26-27.)

DWR notes that the 1959 amendment to the Entry Statute added a requirement that the public entity obtain a court order for the entries if the property owner does not consent. DWR argues:

> 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.

(OB, p. 32, citing *Ranchita Cattle, supra*, 16 Cal.App.3d at p. 389.)

DWR misapprehends *Ranchita Cattle.* The *Ranchita Cattle* court refused to "construe[] [the statute] 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 [the Entry Statutes]." (16 Cal.App.3d at p. 389.) Instead, it construed the statute as conferring "no more than a right to make an innocuous entry and superficial examination sufficient for the making of surveys and maps." (*Ibid.*) In this way, the *Ranchita Cattle* court avoided an interpretation that would have rendered the Entry Statute unconstitutional, and it avoided the requirement of a "useless act." The "useless act"

referred to in *Ranchita Cattle* was not commencement of eminent domain to effectuate a taking; rather, the "useless act" referenced in *Ranchita Cattle* was the commencement of eminent domain to acquire a mere "entry" that is not a taking, i.e., an "innocuous entry and superficial examination sufficient for the making of surveys and maps."

DWR's reading of *Ranchita Cattle* thus turns the decision on its head. (See Opinion, pp. 21-22, fn. 7.)

5. Key Protections Afforded Landowners under California Eminent Domain Law Are Not Provided under the Entry Statute.

a. Exclusion of Leasehold Owners and Others with Legally Recognized Interests in the Affected Properties Undermines DWR's Position That the Entry Statute Functions as an Eminent Domain Shortcut.

The Eminent Domain Law protects *all* owners of compensable interests in the affected properties – not merely the fee owners:

> The plaintiff shall name as defendants, by their real names, those persons who appear of record or are known by the plaintiff to have or claim an interest in the property described in the complaint.

(C.C.P. § 1250.220, subd. (a).)

The term "interest" in this context "includes any right, title, or estate in property." (C.C.P. § 1235.125.) The Law Revision Comment to that section explains that under this section the term "interest" "is

broadly defined to include all interests in property of whatever character or extent."

In this case, the Landowners' lessees hold interests in the affected properties and are entitled to compensation when government takes or impairs those interests. "In an eminent domain action, the lessee is entitled to the fair market value of his leasehold interest in the part taken." (*Costa Mesa Union School District of Orange County v. Security First National Bank* (1967) 254 Cal.App.2d 4, 10-11, citations omitted.) Accordingly, holders of leasehold interests must be named. (*Ibid.*; *City of Pasadena v. Porter* (1927) 201 Cal. 381, 386 [lease for a commercial establishment]; *Orton v. Daigler* (1933) 133 Cal.App. 112, 113 [sublessee, a tenant in possession]; see, C.C.P. § 1265.110 et seq. [addressing the treatment of leasehold interests in eminent domain proceedings].)

Owners of easements have property interests in the affected properties that must be protected. (See, e.g., *Hemmerling v. Tomlev, Inc.* (1967) 67 Cal.2d 572, 575 [condemnation action involving valuation of irrigation easement]; *Redevelopment Agency v. Tobriner* (1989) 215 Cal.App.3d 1087, 1091 [eminent domain action involving valuation of parking and ingress and egress easement]; *People ex rel. Dept. of Public*

Works v. Logan (1961) 198 Cal.App.2d 581, 586 [condemnation action involving ingress and egress easement].)

Lienholders' rights, too, are entitled to protection. (*Thibodo v. United States* (9th Cir. 1951) 187 F.2d 249, 256; accord, *Wilson v. Beville* (1957) 47 Cal.2d 852, 855.)

The Entry Statute affords lessees, easement holders, and lienholders no rights or protections at all. In the trial court, DWR argued successfully that in a proceeding under the Entry Statute only the fee owners need be named and served.

In urging upon this Court a radically expanded role for the Entry Statute – as a vehicle for government's direct and intentional taking of compensable interests in private property – DWR is also urging this Court to put its imprimatur on a new eminent domain regime that effectively excludes many holders of interests in property who, as a matter of law, are entitled to constitutional protections.

If the Legislature had intended such a radical departure from existing law, it would have said so. Yet, it did not. Nor has DWR cited any authority for the proposition that where a compensable interest in real property is taken by way of the Entry Statute, government may ignore the rights and interests of lessees, easement holders, and lien holders.

b. Denial of Discovery Rights in Entry Statute Proceedings Undermines DWR's Position that the Entry Statute Is Intended as an Eminent Domain Shortcut.

The trial court denied Landowners' request for discovery into the basis for DWR's Master Amended Petition and the declarations filed in support of the petition. (2 PA, p. 455.) DWR vigorously opposed Landowners' request based on DWR's position that a proceeding under the Entry Order is not an action in eminent domain under which government may take a compensable interest in property. (1 RCA, pp. 2, 3-9.)

In an eminent domain action, the rules of practice that govern civil actions, including discovery, apply. (C.C.P. § 1230.040.) The trial court denied Landowners' discovery request, as follows:

> [T]he special entry proceeding is excluded from the general adoption of the rules of practice that govern civil actions generally. Furthermore, the limited intrusion or interference allowed under the entry provisions and the need for swift resolution supports exemption from the standard rules of civil practice.

(2 PA, p. 455.)

If accepted, DWR's position that the Entry Statute is an alternative procedure by which government may directly and intentionally take compensable interests in private property would effectively deprive

landowners of the right to discovery. Discovery into the nature of the proposed project and into the government's compliance with myriad requirements under California law (e.g., CEQA) is essential to landowners' right-to-take objections. If the Legislature had intended for the Entry Statute to allow government to avoid discovery on such issues, it would have said so. It did not.

c. The Entry Statute Does Not Provide Key Safeguards.

California law balances government's awesome power of eminent domain against landowners' constitutionally protected property rights by affording landowners certain basic protections, many of which are not available under the Entry Statute.

Fundamental prerequisites are stated in C.C.P. § 1240.030:

> The power of eminent domain may be exercised to acquire property for a proposed project only if all of the following are established:
>
> (a) The public interest and necessity require the project.
>
> (b) The project is planned or located in the manner that will be most compatible with the greatest public good and the least private injury.
>
> (c) The property sought to be acquired is necessary for the project.

These findings are required components of the Resolution of Necessity. (C.C.P. §§ 1245.220, 1245.230.) C.C.P. § 1240.040

provides: "A public entity may exercise the power of eminent domain only if it has adopted a resolution of necessity that meets the requirements of Article 2 (commencing with Section 1245.210) of Chapter 4."

Landowners may challenge a proposed condemnation on any of the Section 1240.030 grounds at the required public hearing on the proposed Resolution of Necessity. (C.C.P. § 1245.235, subd. (b)(2).) If the public entity proceeds to condemnation, the landowner may challenge the entity's right to condemn in a "right to take" trial. (C.C.P. § 1260.110.)

However, no Resolution of Necessity or public hearing is required at all under the Entry Statute. Landowners have no opportunity to be heard at a public hearing on the proposed taking prior to commencement of legal proceedings. Nor does the Entry Statute afford landowners an opportunity to litigate government's right to take. A hearing under C.C.P. § 1245.030 does not include the Section 1240.030 right-to-take objections.

Under the Entry Statute, commercial tenants affected by the take are apparently not entitled to compensation for lost business goodwill, as they are under C.C.P. § 1263.510. As noted, they are not parties to an Entry Statute proceeding at all.

In eminent domain, landowners are entitled to a summary of

appraisal which explains the government's valuation of the property interests being condemned (C.C.P. § 1255.410), and the public entity must offer to pay the landowner's reasonable costs, up to $5,000, of the landowner's independent appraisal. (C.C.P. § 1263.025). In contrast, an entity proceeding under the Entry Statute is under no obligation to provide an appraisal summary. The Entry Statute does not require the government to pay any portion of the landowner's independent appraisal.

Nor, under the Entry Statute, is the landowner afforded an opportunity to withdrew the deposit of probable compensation prior to judgment, a critical right in eminent domain. (C.C.P. § 1255.210.) Under the Entry Statute, the landowner must first make a claim and prove her entitlement to compensation. (C.C.P. § 1245.060.)

Nor does the Entry Statute allow the landowner to recover her litigation expenses if she prevails on right-to-take issues, if the proceeding is dismissed prior to completion, or if she prevails in the valuation trial and her final demand was reasonable in comparison to the government's final offer. Such recovery is available in eminent domain. (C.C.P. §§ 1250.410, 1268.610.) The Entry Statute allows recovery of litigation expenses only in a proceeding with respect to "actual damage" or "substantial interference." (C.C.P. § 1245.060, subd. (b).)

The absence of these and other landowner protections under the Entry Statute underscores the fact that it was never intended as a means by which government may directly and intentionally take compensable interests in private property.

6. Landowners' Right to Commence a Civil Action Does Not Transform the Entry Statute into an Eminent Domain Shortcut.

DWR argues:

> 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. . . . . This satisfies the constitutional requirement that a jury trial must be available if requested to determine the amount of the award.

(OB, pp. 39-40.)

Again, however, DWR's focus is limited to "actual damages" and "substantial interference" that might, or might not, occur as an incident to an "entry." The meaning of those terms is further explained by the Law Revision Commission's Comment:

> The terms "actual damages" and "substantial inference" under subdivision (a) require a common sense interpretation. [Citations] 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 and use of the property. See *Jacobsen v. Superior Court*, 192 Cal.319 . . . (1923).

(Law Revision Commission Comment to Code Civ. Proc. §1245.060, subd. (a).) The trial court was well aware of this Comment and of the fact that the "probable amount of compensation" required under the Entry Statute is not for an intentional "taking" of a property interest but, rather, for any actual damage or substantial interference that may occur *incidental* to the entry. (See, 2 PA, p. 455.)

The question is ***not*** whether the statute provides landowners with an opportunity to commence a civil action for unintended "actual damages" or "substantial interference" caused by activities allowed under an entry order. The question is whether, under the Entry Statute, a court may authorize an intentional taking of a compensable property interest. The unequivocal answer is "No":

> If any interest in real property is to be acquired by exercise of the power of eminent domain, the public entity shall institute formal condemnation proceedings. No public entity shall intentionally make it necessary for an owner to institute legal proceedings to prove the fact of the taking of his real property.

(Gov. Code, §7267.6; *City of Needles v. Griswold* (1992) 6 Cal.App.4th 1881, 1895 ["The only legal procedure provided by the constitution and statutes of this state for the taking of private property for a public use is

that of a condemnation suit which the constitution expressly provides must *first* be brought before private property can be taken or damaged for a public use."].)

DWR dismisses Gov. Code §7267.6, arguing that it requires only that no agency shall intentionally make it necessary for an owner to commence legal proceedings to prove *the fact of the taking*. (OB, p. 40.) Says DWR:

> 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.

(OB, pp. 40-41.)

DWR is mistaken. In this very case, almost six (6) years have been spent in litigation and large sums in litigation expenses have been incurred on behalf of Landowners in proving *the fact of the taking*, both with respect to the Entry Order and DWR's proposed entry for geological investigations. The reason: first, as DWR conceded in the trial court, the Entry Statute does not allow a governmental agency to intentionally take private property. (1 RCA, p. 6; see also, 1 RCA, pp. 2 and 3-9.)

Second, the deposit of probable compensation under C.C.P. §

1245.030 applies only to potential incidental "actual damages" or "substantial interference." The Entry Statute makes no provision for the direct and intentional taking of a compensable property interest, such as a temporary easement, or for a permanent taking under *Loretto.*

G. The Court of Appeal Properly Construed the Entry Statute with Due Regard to the Presumption of Constitutionality.

DWR asserts that the Court of Appeal failed to accord the Entry Statute the presumption of constitutionality. Not so.

In *Jacobsen*, a governmental agency urged the Supreme Court to construe the entry statute at issue so as to allow the taking of a compensable property interest. Mindful of the rule that, if possible, statutes must be construed in a manner that preserves them as constitutional enactments, the Supreme Court rejected that invitation:

> [I]t is clear that whatever entry upon or examination of private lands is permitted by the terms of this section cannot amount to other than such innocuous entry and superficial examination as would suffice for the making of surveys or maps and as would not in the nature of things seriously impinge upon or impair the rights of the owner to the use and enjoyment of his property. Any other interpretation would, as we have seen, render the section void as violative of the foregoing provisions of both the state and the federal constitution.

(192 Cal. at p. 329, emphasis added.)

Like the governmental agency in *Jacobsen*, DWR in this case urged

a radical expansion of the Entry Statute that would: (1) allow an intentional taking of a compensable property interest, without compensation or the protections afforded landowners in an eminent domain action; and (2) allow a governmental agency to physically invade and take private property in violation of the principles articulated in *Loretto.*

In rejecting DWR's position, the Opinion reflects an acute awareness of the presumption of constitutionality and, in a manner similar to that of the Supreme Court in *Jacobsen*, construes the Entry Statute to preserve, not undermine, its constitutionality. Said the Court:

> Generally, we assume the Legislature intended to adopt a constitutional statute, and where a statute is susceptible to two constructions, one of which will render the statute unconstitutional, we must adopt the meaning that, without doing violence to the statute's language, renders the statute valid. . . . . However, that rule does not apply so broadly to statutes authorizing the use of eminent domain authority. "'Statutory language defining eminent domain powers is strictly construed and any reasonable doubt concerning the existence of the power is resolved against the entity.'" . . . . The exercise of eminent domain authority "is strictly defined and limited by the express terms of the constitution or statute creating it." . . . . In California, *article I, section 19(a)* is the "'the exclusive and comprehensive authority in the California Constitution for the exercise of the power of eminent domain and for the payment of compensation to property owners when private property is taken or damaged by state or local government.'". . . .
>
> Consistent with these rules of review, we conclude the entry

> statutes' proceeding does not facially satisfy the demands of *article I, section 19(a)* as it applies to an intentional taking.

(Opinion, pp. 16-17, citations omitted.)

Had the Court of Appeal adopted DWR's proposed interpretation of the Entry Statute, then the Opinion would have run afoul of the rule that courts must, if possible, reject any construction of a statute that would render the statute unconstitutional. DWR's argument is backward.[5]

The Decision refers to a "facial challenge" (Opinion, 16) but not to a facial challenge to the Entry Statute itself. In context, the "facial challenge" referenced in the Opinion is a challenge to the Entry Statute as "a constitutionally valid means to directly condemn property interests," as distinguished from an "entry." That is, the term "facial challenge" is used to denote a challenge to the Entry Statute as construed by DWR. As stated in the Opinion:

> Having concluded the geological activities will work a taking per se, we must determine whether the State may exercise its eminent domain power and acquire interests in the landowners' properties directly by means of the entry statutes. In other words, we must determine whether the entry statutes provide a constitutionally valid means to

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[5] DWR's argument is odd in light of the fact that Landowners never challenged the constitutionality of the Entry Statute, a point made repeatedly in their appellate briefs. (See, e.g., Landowners' Answer to State Water Contractors' *Amicus Curiae* Brief at p. 10; Landowners' Traverse at pp. 16-17; Petition for Writ of Mandate at pp. 76-77.)

directly condemn property interests.

> To be constitutionally valid, the entry statutes must at least provide the rights granted under *article I, section 19(a)* to affected landowners against the State's exercise of eminent domain power.

(Opinion, p. 14.)

H. DWR's Public Policy Argument Fails.

DWR complains about burdens on governmental agencies that may follow from a ruling that government may not use the Entry Statute to intentionally take compensable interests in private property (as distinguished from mere entries). In the absence of landowner consent, public entities wishing to acquire such interests for pre-condemnation investigations may need to conduct additional planning in order to comply with constitutional mandates. This is hardly an inappropriate or onerous burden for agencies that are already required by law to plan ahead and involve the public in the approval process.

More importantly, the fact that compliance with constitutional requirements may in some instances seem inconvenient or inefficient for government is not a compelling policy argument. "Impairment of constitutional rights . . . will not be suffered in return for efficiency." (*In re Kevin G.* (1985) 40 Cal.3d 644, 648; accord, *Arkansas Game and Fish, supra*, 133 S.Ct. 511, 521["Time and again in *Takings Clause*

cases, the Court has heard the prophecy that recognizing a just compensation claim would unduly impede the government's ability to act in the public interest. [Citations omitted.] We have rejected this argument when deployed to urge blanket exemptions from the *Fifth Amendment*'s instruction."]; *Lavan v. City of Los Angeles* (C.D. Cal. 2011) 797 F.Supp.2d 1005, 1018 ["often efficiency must take a backseat to constitutionally protected interests"].)

The Opinion mirrors existing law and policy to the effect that constitutionally protected interests must not be sacrificed at the alter of alleged government efficiency:

> The State makes much of the inconvenience and cost imposed on it if it cannot enter properties to perform studies of the complexity and length of the environmental and geological studies without having to directly condemn an interest, or if it cannot acquire that interest in private property by means of the entry statutes, particularly for projects of this size. No doubt our ruling imposes more work on condemning agencies and the courts. However, constitutional rights against the exercise of eminent domain authority are not subject to the convenience of the government. As far back as *Jacobsen*, the Supreme Court made clear that if a government entity, even one that has already filed a condemnation action to acquire the property in question, wants to engage in studies and surveys that in themselves work a taking, the entity must file a separate condemnation suit to do so. (*Jacobsen, supra, 192 Cal. at p. 329.*) Our opinion today merely reinforces that fundamental doctrine of California constitutional law.

(Opinion, p. 43, emphasis added.)

DWR's suggestion that the Opinion will *require* eminent domain actions prior to project approval is without merit. Nothing in the Opinion abridges the right of agencies and landowners to enter into consensual entry arrangements. DWR admits that it settled with several landowners in this very case. (OB, p. 8, fn. 4.)

Where landowner consent cannot be obtained, the Opinion in no way abridges an agency's right to seek a proper pre-condemnation entry under the Entry Statute. Only where the government agency seeks to misuse the Entry Statute – using it as an eminent domain shortcut by which to acquire a compensable property interest– does the Opinion limit government's activities.

It is conceivable that in rare instances a public agency, failing to obtain landowner agreement, may have to first condemn property interests needed for preliminary investigations and, later, condemn additional property interests for the project itself. That possibility cannot justify allowing government to circumvent constitutional requirements for the taking of compensable interests in private property. As stated in *Missouri Highway & Transp. Com'n v. Eilers* (Mo. App. 1987) 729 S.W.2d 471:

> While it may be burdensome for the Commission to condemn a temporary easement for a soil survey and then later condemn the entire tract for the highway, the

> constitutional mandate that property not be taken or disturbed without prior compensation, and the landowner's right to freely use his land supersede any efficiency concerns.

(729 S.W.2d at p. 474.)

IV. CONCLUSION.

For the foregoing reasons, the Court of Appeal's Opinion should be affirmed in its entirety.

Dated: December 5, 2014

Respectfully submitted,

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CERTIFICATE OF WORD COUNT

I, Thomas H. Keeling, hereby certify that, according to the word count produced by the computer program used to prepare this RESPONDENTS' AND CROSS-APPELLANTS' ANSWER BRIEF ON THE MERITS, this brief uses a 13-point CG Times font and contains 13,985 words.

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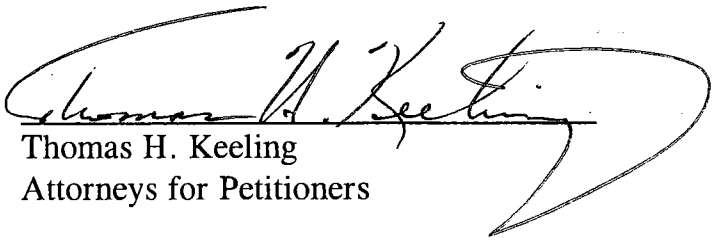

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PROOF OF SERVICE

I hereby certify that I am a citizen of the United States, over the age of eighteen years, and not a party to this action. My business address is 1818 Grand Canal Boulevard, Suite 4, Stockton, California 95207. I served the foregoing document entitled:

ANSWER BRIEF ON THE MERITS

Service by United States Mail:

✓ by placing a true copy thereof enclosed in a sealed envelope or package with postage thereon fully prepaid in a box or receptacle designated by my employer for collection and processing of correspondence for mailing with the United States Postal Service, addressed as set forth below. I am readily familiar with the business practices of my employer, FREEMAN, D'AIUTO, PIERCE, GUREV, KEELING & WOLF, for the collection and processing of correspondence for mailing with the United States Postal Service. Under that practice, the correspondence placed in the designated box or receptacle is deposited with the United States Postal Service at San Joaquin County, California, the same day in the ordinary course of business.

SEE ATTACHED SERVICE LIST

The acts described above were undertaken and completed in San Joaquin County on December 5, 2014.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct, and that this declaration was executed on December 5, 2014, at Stockton, California.

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