In the Supreme Court of the State of California

Case No. S217738

PROPERTY RESERVE, INC., **Defendant and Respondent,** **v.** **STATE OF CALIFORNIA, BY AND THROUGH DEPARTMENT OF WATER RESOURCES,** **Plaintiff and Appellant.**	**Court of Appeal** **Case No. C067758** **San Joaquin County** **Case No. JCCP4594**
THE CAROLYN NICHOLS REVOCABLE LIVING TRUST, etc., et al., **Defendant and Respondent,** **v.** **DEPARTMENT OF WATER RESOURCES,** **Plaintiff and Appellant.**	**Court of Appeal** **Case No. C067765** **San Joaquin County** **Case No. JCCP4594**
COORDINATED PROCEEDINGS SPECIAL TITLE (RULE 3.550) **DEPARTMENT OF WATER RESOURCES**	**Court of Appeal** **Case No. C068469** **San Joaquin County** **Case No. JCCP4594**

After a Decision of the Court of Appeal, Third Appellate District, San Joaquin Superior Court Case No. JCCP 4594, Honorable John P. Farrell, Judge

REPLY TO ANSWERS TO OPENING BRIEF

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INTRODUCTION AND SUMMARY OF ARGUMENT[1]

For 40 years, the precondemnation entry statutes (Code Civ. Proc., §§ 1245.010 – 1245.060),[2] part of the State's Eminent Domain Law, have served an essential purpose, permitting California agencies temporary entry to assess the suitability of property for a wide variety of contemplated public projects, such as highways, schools, hospitals, and infrastructure. These early assessments allow the State to determine whether to condemn any particular parcel and, in many instances, whether the project can proceed at all. At the same time, by the Legislature's design, the entry statutes have fully protected property owners, as well as compensated them against any resulting damage or interference with possession or use.

In this case, the State invoked the entry statutes for their intended purpose—to gain temporary entry to determine the environmental and geological suitability of parcels for construction of potential improvements to the State Water Project. The State followed the prescribed procedure by seeking a court order, and stands ready to comply with the conditions imposed by the trial court for the environmental entries and any additional and reasonable conditions that should be imposed for the geological entries, and to deposit the probable amount necessary to compensate the landowners for any actual damage or substantial interference with possession or use that its activities may cause. Just as the entry statutes are entitled to a presumption of constitutionality (*Mt. San Jacinto Community College Dist. v. Superior Court* (2007) 40 Cal.4th 648, 656), so too are

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

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

these entries—which are squarely of the type contemplated by the Legislature.

The Court of Appeal failed to apply this presumption of constitutionality, holding that both the environmental and geological entries sought by the State would constitute takings. It held, in addition, that the entry statutes do not provide constitutionally valid eminent domain proceedings to accomplish such "intentional takings." (Opinion 17-28.) The implication of this holding is that the proposed entries may be achieved only through a full condemnation action. The court erred on all counts.

As explained in the State's opening brief, the entries to conduct environmental surveys were authorized and limited by the trial court's order; whether those activities constitute a taking is determined by a multi-factor balancing test. (*Arkansas Game & Fish Com. v. United States* (2012) __ U.S. __, 133 S.Ct. 511, 522; *Penn Central Transp. Co. v. New York City* (1978) 438 U.S. 104, 124.) The trial court's order authorized only temporary entries for non-invasive surveys of environmental conditions, and placed specific limits on the number of days and personnel allowed. It did not permit any structures or other physical changes to the properties. And as the Court of Appeal noted, the landowners "do not cite evidence of any actual damage or interference . . . to their properties." (Opinion 34.) Under these circumstances, there is no taking.

The landowners attempt to avoid this result by arguing that the environmental entries automatically constitute a taking without need to engage in any balancing. (PRI Answer 26-32; Nichols Answer 12-37.) They advance two theories: first, that the environmental entries should be relabeled as "temporary easements" (the theory employed by the Court of Appeal), and that a temporary easement necessarily is a taking; and second, that any physical entry that permits more than an innocuous and superficial examination is in every instance a taking, citing *Jacobsen v. Superior Court*

of Sonoma County (1923) 192 Cal. 319. (Nichols Answer 12-14.) The landowners offer only one specific example of the type of activity purportedly authorized by the entry statutes: a "truck driver parking on someone's vacant land to eat lunch." (Nichols Answer 44.)

Neither theory is correct. Modern takings doctrine, as set out in *Penn Central* and *Arkansas Game*, generally holds that only two types of invasions of property interests are "categorical" takings: the permanent physical occupation of the owner's property and the regulatory denial of all economically beneficial or productive use of the property. (*Arkansas Game*, *supra*, 133 S.Ct. at p. 518.) The entries for environmental surveys fit neither per se category, and the balancing test required by law tips decisively against a taking.

Applying the same balancing test to the entries for geological surveys, the State in its opening brief explained that the entries would be temporary, and, after testing is complete, the borings would be closed, sealed with bentonite clay grout to prevent any environmental harm, and covered over with native soil, returning the land to its substantially original condition. (Motion to Augment Record on Appeal (MA) 94:26-96:6; 122:7-26; 123:8-124:18; Appellant's Appendix in Case No. C068469 (AA) 182, 377.) There is no evidence that the entries and the backfilled borings would affect the value or use of the properties, and thus no taking would result from such tests.

In response, the landowners again rely on the superseded *Jacobsen*, case. They also cite *Loretto v. Teleprompter Manhattan CATV Corp.* (1982) 458 U.S. 419, comparing closed geological test borings to the permanently-attached cable equipment held to be a taking in that case. The cable equipment, intended to be used for public purposes on an ongoing basis, is fundamentally different from the backfilled borings, however. Once the geological testing is complete, the State will have no residual rights to

reenter the land or to monitor and maintain the backfilled borings. There were no facts before the Court of Appeal establishing that the subsurface clay grout—which can be shaved with a pen knife and is not dissimilar in texture from native soil—would inhibit any use of any particular property. (MA 94:26-96:6; 97:6-11; 210:25-212:24.) On balance, the only reasonable conclusion is that no taking will occur.

The Court of Appeal also erred in holding that if the entries would constitute a taking—a result the State believes cannot occur if the entries are undertaken consistent with the entry statutes—the State is barred from utilizing the precondemnation entry procedures and must instead proceed by initiating a full condemnation action. As the dissent cogently explains, even if a precondemnation entry effects a taking, the entry statutes satisfy Article I, Section 19 of the California Constitution. The landowners compare at length the differences between the procedures provided in the entry statutes and those in the statutes governing eminent domain actions for condemnation. This comparison is irrelevant, as the Legislature is not limited to enacting only one type of eminent domain proceeding. The inquiry is not whether the pleadings and procedures are the same, but whether the entry statutes are consistent with the Constitution. They are, since they (1) qualify as an eminent domain proceeding; (2) provide for deposit and prompt release of the probable amount of compensation; and (3) provide a means for the landowners to obtain a jury trial to determine the amount of compensation. No more is required.

This Court should reverse the Court of Appeal's decision and remand this case with instructions to permit the environmental and geological testing to proceed, in accordance with the entry statutes.

ARGUMENT

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

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

As the State set out in its opening brief (AOB 20-25), the environmental activities authorized by the entry order do not constitute a taking under the multi-factor test set forth in *Penn Central* and *Arkansas Game*. The landowners' attempts to avoid the natural result of this balancing must be rejected.

1. Under the test set forth in *Penn Central* and *Arkansas Game*, the entries are not a taking

Application of the factors in *Penn Central* and *Arkansas Game* establish that the environmental entries do not amount to a taking.

The landowners downplay the significance of the first two critical factors: economic impact and investment-backed expectations. (PRI Answer 41-42; Nichols Answer 38-39.) Instead, the landowners argue that these factors are irrelevant in a "physical invasion case," or, alternatively, that the relevant inquiry should not be *investment-backed* expectations, but rather interference with *any* expectations for the use of the property, including an expectation that the property "will be free of the . . . entries that [the State] seeks." (PRI Answer 41-42.)[3] That is incorrect. The "economic impact" and "investment-backed expectations" factors are especially significant because the purpose of the just compensation clause

[3] The landowners also claim that the State fails to analyze California law on investment-backed expectations found in *County of San Luis Obispo v. Ranchita Cattle Co.* (1971) 16 Cal.App.3d 383 and *Jacobsen, supra*, 192 Cal. 319. (PRI Answer 41-42.) These cases do not address this factor. Also, both cases predate *Penn Central*. *Jacobsen* does not reflect 92 years of takings jurisprudence.

is not to guarantee a property owner's right to be free from any governmental inference, "'but rather to secure *compensation* in the event of otherwise proper interference amounting to a taking.'" (*Lockaway Storage v. County of Alameda* (2013) 216 Cal.App.4th 161, 183, quoting *Lingle v. Chevron U.S.A. Inc.* (2005) 544 U.S. 528, 536-537, emphasis in original.) Where there are no economic damages, there is typically nothing to compensate, and thus the physical entry is less likely to result in a taking.

With respect to the nature of the governmental action, the landowners argue that the fact that this is a physical entry onto private land is dispositive. (PRI Answer 42; Nichols Answer 36-67.) But "not every physical invasion is a taking," and temporary invasions are subject to a "complex balancing process." (*Loretto, supra*, 458 U.S. at p. 436, fn. 12.) Here, the entries allowed under the entry order would be minimally intrusive, particularly given the rural and undeveloped nature of the properties, and the entry order places numerous restrictions on the entries to minimize any possible impact. (5 Petitioners' Appendix in Case No. C067765 (PA) 1353-1355; 6PA 1548-1558.) Under such circumstances, the mere fact of physical entry does not weigh in favor of a taking.

As to duration, the landowners misstate the time period permitted for the environmental entries, claiming that the entry order permits up to either 235 or 250 days of "occupancy" during a one year period. (PRI Answer 11, 40.) But the entry order permits a maximum of 66 days of entry on the three largest properties, and maximums of between 25 and 55 days on the others. (5PA 1353-1355; 6PA 1531-1538, 1556.) The vast majority of the parcels are less than 1,000 acres, and are therefore subject to maximum entries of only 25 to 32 days. (5 PA 1353-1355; 6PA 1556.) The State would not be permitted to exceed its "budget of days" without being subject to penalties reflecting litigation expenses. (§§ 1245.060, subd. (b), 1235.140.) The landowners inflate their figure of 235 or 250 days by

including the days small traps would remain on the properties, separately counting the days for traps for each species, and also including the days that survey markers would remain on the property after installation. (PRI Answer 40.) The trial court properly found that the "mere presence of a trap" and temporary "targets and alignment staking" do not constitute days of entry. (6PA 1556.) Alternatively, the landowners assert that intermittent entries of 25 to 66 days over the course of a year are of "sufficient duration" to be a taking. (PRI Answer 39.) But this misstates the issue, as the duration of an entry is not determinative and the limited nature of the environmental entries is but one of many factors indicating that, on balance, these entries are not a taking.

With respect to the severity of the interference, Property Reserve asserts that the physical invasion by itself warrants the finding of a taking because it interferes with the right to exclude others. (PRI Answer 42.) However, the mere interference with that right, without more, is not determinative of whether there is a taking. (*PruneYard Shopping Ctr. v. Robins* (1980) 447 U.S. 74, 82-84.) In *PruneYard*, the United States Supreme Court rejected the claim that allowing protestors to demonstrate at a privately-owned mall was a taking because it violated the "right to exclude others." (*Ibid.*) While recognizing that the right to exclude is one of the "essential sticks in the bundle of property rights," the Court stated that "it is well established" that not every destruction or injury to property by government action is a taking. (*Id.* at p. 82; see also *Andrus v. Allard* (1979) 444 U.S. 51, 65-66 ["where an owner possesses a full 'bundle' of property rights, the destruction of one 'strand' of the bundle is not a taking"].) The Court in *PruneYard* concluded that where "there is nothing to suggest" that the protection of free speech and petition rights "unreasonably impair[s] the value or use of [the mall's] property," the fact

that there is a physical invasion of property "cannot be viewed as determinative." (447 U.S. at pp. 82-84.)

The cases cited by the landowners (PRI Answer 30-34; Nichols Answer 36-37) on the right to exclude others are distinguishable because they involved permanent physical occupations. (See *Pacific Tel. & Tel. Co. v. Eshelman* (1913) 166 Cal. 640, 646-647 [requirement that telephone company permit a permanent physical connection between its telephone lines and the lines of its competitors]; *Kaiser Aetna v. United States* (1979) 444 U.S. 164,180 [permanent conversion of private pond into a public aquatic park]; *Hendler v. United States* (Fed. Cir. 1991) 952 F.2d 1364, 1374 [permanent installation and maintenance of groundwater monitoring wells]; *Loretto*, *supra*, 458 U.S. at p. 438 [permanent installation of cable equipment]; *Cwynar v. San Francisco* (2001) 90 Cal.App.4th 637, 653-654 [rent control move-in restriction amounting to "potentially endless leasehold"].) Unlike these cases, the entry order here authorizes only temporary entries that are strictly limited as to time, scope, and nature.

Concerning the final factor—intent—the landowners incorrectly respond that this factor is focused solely on intent to physically enter the property. (PRI Answer 44.) The landowners' reliance on *Albers v. County of Los Angeles* (1965) 62 Cal.2d 250 to support their proposition is misplaced. There, the owners sued in inverse condemnation after they suffered unforeseen "actual damage" resulting from a landslide caused by a road construction project. (*Id.* at pp. 254-255.) *Albers* in fact supports the State's position that unforeseen actual damages caused by the State's entry onto private land are generally compensable *after the fact* through tort or inverse condemnation, and that the mere possibility that unforeseen damages might occur in the future does not turn every intentional entry into a taking *before the fact*. Indeed, any actual damages caused by the entries in this case are directly redressable under section 1245.060.

2. The landowners incorrectly argue that the environmental activities constitute categorical takings

The landowners contend that the environmental entries constitute a categorical or "per se" taking, and thus that the multi-factor test under *Penn Central* and *Arkansas Game* does not apply. (PRI Answer 21-22; Nichols Answer 20-28.) The landowners advance two distinct categorical taking theories—first, that these entries are a categorical taking because they are akin to a temporary easement, which the landowners contend is a "compensable property interest" (PRI Answer 24-30; Nichols Answer 12-20); and second, that any physical invasion beyond the innocuous and superficial examinations allowed under *Jacobsen* is a categorical taking (PRI Answer 24; Nichols Answer 12-13). Neither theory is supported.

a. The characterization of the environmental entries as "temporary easements" does not make them categorical takings

The landowners contend that the entry order conveyed a temporary easement, that an easement is a compensable property interest, and that the entries permitted under the order are a categorical taking. (PRI Answer 24-30; Nichols Answer 12-20.) The landowners attempt to short-circuit that inquiry by ignoring relevant legal distinctions and simply labeling entries as easements is flawed and must be rejected.

At issue in this case is whether the environmental entries constitute takings. An "entry" is an activity performed by a prospective condemnor *preliminary* to any acquisition. (Code Civ. Proc., § 1245.010.) An "entry" is:

> [a] duty or authority imposed or created by legislative enactment which carries with it the privilege to enter land in the possession of another for the purpose of performing or exercising such duty or authority in so far as the entry is reasonably necessary to such

> performance or exercise, if, but only if, all the requirements of the enactment are fulfilled.

(Rest. 2d of Torts, § 211.) The question of whether an entry may result in a taking thus cannot be answered simply by relabeling the entry as a "temporary easement." Rather, the entry's attributes must be examined.

It is well settled that not every interference with a property interest rises to the level of a taking. (*Loretto, supra*, 458 U.S. at p. 436, fn. 12.) Modern takings doctrine generally recognizes only two types of intrusions upon property interests as "categorical" takings: (1) the permanent physical occupation of an owner's property, and (2) the regulatory denial of all economically beneficial or productive use of the property. (*Arkansas Game, supra*, 133 S.Ct. at p. 518; *Lucas v. South Carolina Coastal Council* (1992) 505 U.S. 1003, 1015.) These categories are limited, and thus "most takings claims turn on situation-specific factual inquiries" that balance multiple factors. (*Arkansas Game, supra*, 133 S.Ct. at p. 518; *Loretto, supra*, 458 U.S. at p. 436, fn. 12.) There is nothing magic about labeling something a "temporary easement" that, without more, would render it a categorical taking and exclude it from the balancing test under *Penn Central* and *Arkansas Game*.[4]

The landowners cite a series of cases demonstrating that public entities commonly condemn easements. (Nichols Answer 16-17; PRI Answer 26.) However, these cases do not concern precondemnation entries. Rather, they involve acquisitions for an approved project as part of a condemnation action, and most involve the condemnation of a temporary

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[4] The labeling of the entries as a "temporary easement" does not automatically warrant compensation. (*City of Los Angeles v. Ricards* (1973) 10 Cal.3d 385, 390, fn 4.) The measure of compensation for a temporary easement, if any, will depend upon the level of interference with the owner's rights. (*City of Gilroy v. Filice* (1963) 221 Cal.App.2d 259, 266.)

construction easement for project construction. Under those circumstances, the public entity has already determined project feasibility and what property interests are needed, and thus has no need for precondemnation entry. The line of cases is irrelevant.

The conclusion that the environmental entries are not per se takings is also consistent with California precedent. It has long been established that precondemnation entries are not a taking of private property.[5] (See, e.g., *Fox v. Western Pacific Railroad Co.* (1867) 31 Cal. 538, 555 [holding that precondemnation entry not taking and cannot be "said in any legal sense that the land has been taken until the act has transpired which divests the title or subjects the land to the servitude"]; *Robinson v. Southern California Railway Co.* (1900) 129 Cal. 8, 10-11 [drawing distinction between entry on land for conducting precondemnation surveys (not a taking) and entry on land for the purpose of constructing a railroad track (a compensable taking)]; *Jacobsen, supra*, 192 Cal. 319, 328-329 [under prior statute, State may conduct surveys that do not seriously impinge upon or impair the owner's rights to the use of the property]; *Southern California Gas Co. v. Wolfskill Co.* (1963) 212 Cal.App.2d 882, 888 [entry upon land for survey "did not constitute a taking of property"]; *Ranchita Cattle, supra,* 16 Cal.App.3d 383, 388-389 [public entity has statutory authority to conduct suitability surveys on land without filing a condemnation action].) For this reason, the California Law Revision Commission Recommendations to the 1969 amendments referred to precondemnation entries as "privileged

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[5] Although the landowners cite cases from some states finding that a public entity must condemn a temporary easement to conduct certain precondemnation entries (Nichols Answer 66-67), other states have expressly rejected this position. (See, e.g., *State by Waste Management Bd. v. Bruesehoff* (Minn. App. 1984) 343 N.W.2d 292, 294-296.)

official entries." (3AA 719.) Such privileged entries do not result in a taking.

b. The landowners' argument that all non-innocuous physical invasions are per se takings is incorrect

The landowners contend that all temporary physical invasions beyond the undefined "innocuous entries" and "superficial examinations" permitted under *Jacobsen* constitute a categorical taking. (PRI Answer 24-44.) These contentions are unsupported by precedent.

To the extent that *Jacobsen* can be read to support a categorical rule, it is no longer good law because takings jurisprudence has evolved since 1923 to require a balancing test for temporary physical invasions; any other surviving principles from that case must be construed in that modern context. (*Loretto*, *supra*, 458 U.S. at p. 435, fn. 12; *Arkansas Game*, *supra*, 133 S.Ct. at p. 518.) Further, even if *Jacobsen* were controlling, the environmental activities permitted under the entry order—environmental surveys and mapping, strictly limited in time, scope, and manner by the trial court (6PA 1531-1538)—are precisely the type of "innocuous entr[ies] and superficial examination[s] as would suffice for the making of surveys or maps" that are permissible under *Jacobsen*. (See 192 Cal. at p. 329.)

Neither California nor federal law supports a categorical rule for temporary physical invasions. The landowners cite *Kavanau v. Santa Monica Rent Control Bd.* (1997) 16 Cal.4th 761. (PRI Answer 22.) In *Kavanau,* however, this Court observed that only two types of interference are generally considered categorical takings—"permanent physical invasions" and regulations that deprive an owner of "all economically beneficial or productive use of the land." (*Santa Monica, supra*, 16 Cal.4th at p. 774.) *Kavanau* neither states nor implies that a categorical rule applies to temporary physical invasions. (*Id.* at pp. 774-775.) The landowners

quote the Supreme Court's statement in *Tahoe-Sierra Preservation Council v. Tahoe Regional Planning Agency* (2002) 535 U.S. 302, 322, that "[w]hen the government physically takes possession of an interest in property for some public purpose, it has a categorical duty to compensate the former owner." (PRI Answer 27.) But *Tahoe-Sierra*'s discussion of "physically tak[ing] possession" refers to the complete government *occupation* of private property that deprives the owners of all use of their property, and not a mere temporary entry, as highlighted by the cases *Tahoe-Sierra* cites to support this statement. (See *United States v. Pewee Coal* (1951) 341 U.S. 114, 116 [government took over mine and required mine officials to "conduct operations as agents for the Government"]; *United States v. General Motors* (1945) 323 U.S. 373, 375 [government completely ousted company from its warehouse]; *United States v. Petty Motor* (1946) 327 U.S. 372, 378 [government acquired tenant's entire remaining leasehold].)

Further, citing this same passage from *Tahoe-Sierra*, the United States Supreme Court subsequently clarified that "no magic formula enables a court to judge, in every case, whether a given government interference with property is a taking." (*Arkansas Game*, *supra*, 133 S.Ct. at p. 518.) The "categorical" takings rule generally applies only to permanent physical occupations and regulations that permanently require sacrifice of all economically beneficial uses. (*Ibid.*) Virtually all other claims turn on the fact-specific analysis set forth in *Penn Central*. (*Ibid.*) Moreover, in *Loretto*, the Supreme Court cited its decision in *PruneYard, supra,* 447 U.S. 74, to "underscore[ ] the constitutional distinction between a permanent occupation and a temporary physical invasion." (*Loretto*, *supra*, 458 U.S. at p. 434; see also *Allegretti & Co. v. County of Imperial* (2006) 138 Cal.App.4th 1261, 1272 [noting that "*Loretto* carefully distinguished permanent physical takings from both temporary physical invasions and regulations merely restricting the use of private property"].) "The rationale

[for this distinction] is evident: [temporary physical invasions] do not absolutely dispossess the owner of his right to use, and exclude others, from his property." (458 U.S. at p. 435, fn. 12.)

The landowners' reliance on the Federal Circuit Court of Appeal's decision in *Hendler, supra,* 952 F.2d 1364, is also misplaced. (PRI Answer 21, 28.) *Hendler* concerned the *permanent* installation of groundwater monitoring wells. (952 F.2d at pp. 1376-1377.) Despite its broad dicta, as the Federal Circuit noted in a later case, *Hendler*'s

> holding was unremarkable and quite narrow: it merely held that when the government enters private land, sinks 100-foot deep steel reinforced wells surrounded by gravel and concrete, and thereafter proceeds to regularly enter the land to maintain and monitor the wells over a period of years, a per se taking under *Loretto* has occurred. The facts of *Hendler* were well within the limited parameters of the per se rule delineated by the *Loretto* Court for, as we stated in *Hendler*, the "wells are at least as 'permanent' . . . as the CATV equipment in *Loretto*." *Hendler*, 952 F.3d at 1376.

(*Boise Cascade Corp. v. United States.* (Fed. Cir. 2002) 296 F.3d 1339, 1356 [rejecting claim "that *Hendler* compels us to turn a transient invasion by owl surveyors into a per se taking under *Loretto*"].)[6]

In the present case, none of the environmental activities results in a permanent occupation or a complete denial of all use of the property. Rather, the activities involve merely transitory, intermittent entries to conduct surveys, make visual observations, take photographs, and sample

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[6] The Federal Circuit cited *Juliano v. Montgomery-OtsegoSchoharie Solid Waste Management Authority* (N.D.N.Y. 1997) 983 F.Supp. 319 as an example of a case that "misunderstood and criticized" *Hendler* as "abrogating" *Loretto's* permanency requirement. (296 F.3d at p. 1355, fn. 12.) (See also *Juliano, supra*, 983 F.Supp. at p. 326-327 [criticizing *Hendler*'s dicta on meaning of "permanent."]) *Juliano* is further discussed at I.B.1.

soil with handheld equipment. Thus, cases such as *Tahoe-Sierra* and *Hendler* are readily distinguishable.

The landowners claim that the holding in *Arkansas Game* is extremely limited, dealing solely with an asserted takings exemption for government induced temporary flooding resulting from a government policy to release water from a dam. (PRI Answer 38.) The language of the case does not support the landowners' restrictive interpretation. Citing *Loretto*, *Arkansas Game* itself expressly rejected the existence of a "flooding-is-different" rule. (*Arkansas Game*, *supra*, 133 S.Ct. at p. 521.) "Flooding cases, like other takings cases, should be assessed with reference to the 'particular circumstances of the case." (*Ibid.*) The Court's broad discussion of temporary takings jurisprudence, including temporary physical takings, further highlights that its analysis was not limited merely to flooding cases. (*Id.* at pp. 518-522.)

The landowners further argue that temporary entries should be treated the same as permanent occupations. (PRI Answer 35-37.) But "the constitutional distinction between a permanent occupation and temporary physical invasion" is well settled. (*Loretto*, *supra*, 458 U.S. at p. 434 [citing *PruneYard, supra*, 447 U.S. 74 (discussed *infra*) where the Court rejected a takings claim involving temporary and limited physical invasions].) The landowners cite a number of cases for the proposition that a temporary entry *may* under some circumstances constitute a taking (PRI Answer 35-37), but that is not in dispute. While a temporary invasion in its particular factual circumstances may constitute a taking under the balancing test set forth in *Penn Central* and *Arkansas Game*, application of that test to the facts of this case establish conclusively that the environmental activities, as limited by the trial court's order, do not constitute a taking.

B. The Proposed Geological Activities Are Not a Taking

1. The geological activities are not a categorical taking

As the State set out in its opening brief, the geological activities, like the environmental activities, are not categorical takings but instead must be analyzed under the *Penn Central* and *Arkansas Game* factors. (AOB 27-29.) In response, the landowners first contend the geological activities are takings under *Jacobsen* because the Court in that case, under the law as it existed in 1923, held that the borings and other subsurface precondemnation activities contemplated in that case were takings. (PRI Answer 15, 18.) But, as noted above, takings law has evolved since *Jacobsen*, and these questions are now analyzed under a balancing test that yields a different result in this case. (See *Penn Central, supra*, 438 U.S. at pp. 130-131; *Arkansas Game, supra*, 133 S.Ct. at pp. 518-522.)

The landowners incorrectly assert that *Jacobsen* remains good law because it has been cited with approval in other California cases (Nichols Answer 13). *City of Needles v. Griswold* (1992) 6 Cal.App.4th 1881 does not cite *Jacobsen* for the test to determine what constitutes a taking, but rather for the rule that a taking cannot be accomplished through a preliminary injunction issued outside an eminent domain proceeding. (*Id.* at p. 1895.) And *Ranchita Cattle,* 16 Cal.App.3d 383, was decided prior to *Penn Central* and *Arkansas Game*, and thus does not reflect modern takings doctrine. Further, *Ranchita Cattle* concerned the interpretation of an access agreement between the government and the landowner, and did not address the test for determining what constitutes a taking. (*Id.* at pp. 385, 389.)

The landowners also contend that the geological activities are a categorical taking under several federal authorities. (PRI Answer 21, 28-29.) The cases are distinguishable. *Loretto* and *Hendler* concern the occupation and continued use of property by structures and equipment that

were found to be "permanent." (*Loretto*, *supra*, 458 U.S. at pp. at 428-434 [permanent installation of cable equipment for ongoing public use]; *Hendler*, *supra*, 952 F.2d at p. 1377 [permanent installation and maintenance, and monitoring of groundwater monitoring wells]; see also *Boise Cascade, supra*, 296 F.3d at 1356 [clarifying that *Hendler* involved permanent occupation].) A permanent physical occupation is different from a temporary entry because it effectively destroys the landowners' right "to possess, use and dispose of" the occupied portion of the property. (*Loretto*, *supra*, 458 U.S. at p. 435.) Here, there is no such physical occupation. The bentonite clay will be functionally equivalent to the native soil, and will not impact the owners' use of the land, or their ability to alter the backfilled space or sell their property. (MA 94:26-96:6; 97:6-11; 122:7-26; 123:8-124:18; 210:25-212:24; 1AA 182; 3AA 377.) Further, once the testing is complete, the State's entries and use of the borings will conclusively end; there is no right of reentry and maintenance, as in the cited cases. The geological activities thus do not constitute a permanent physical occupation.

The landowners contend that this result is contrary to "federal precedent," citing *Juliano, supra,* 983 F.Supp. 319. (PRI Answer 20-21; Nichols Answer 40-41.) That case held that certain monitoring wells and instruments amounted to a permanent physical taking. The *Juliano* case is not binding on this Court, and is not helpful in answering the questions presented.

As a threshold matter, *Juliano* is distinguishable on its facts.[7] In that case, a waste management authority began suitability testing for a landfill

[7] As a group, sister-state and lower federal appellate cases are of limited assistance because the factual circumstances of soil borings and geological investigations vary greatly, making generalization impossible.

on the plaintiffs' property in 1992. (983 F.Supp. at p. 322.) Testing included installation of monitoring wells and pieziometers (devices measuring pressure). Five years later, 24 monitoring wells and eight piezometers remained. (*Id.* at pp. 323, 328.) The authority was obligated to remove the well and meter casings, which were four inches in diameter and extended two to three feet above the ground, if it did not acquire the property. (*Id.* at pp. 325, 328.) The authority would then fill the holes left by the well casing with a "pressure injection of cement bentonite grout." (*Ibid.*) The district court found that the injection material, described only as "cement bentonite grout," was "'intended to exist or function for a long, indefinite time period'[,]"and, quoting the dictionary definition of "permanent," held that the authority's actions would "constitute a permanent physical taking." (*Ibid.*)

In contrast, in this case, the State proposed to complete its soil borings within 14 days. (3AA 610-614 [borings are designated as "DH" or drill holes in table at 612-614].) Further, the *Juliano* court did not identify the evidence that was admitted concerning the attributes of the grout compound. However, in this matter, the evidence showed that the bentonite clay used to seal the borings would function like the original soil, sustain plant life, and could be plowed by farm equipment or even removed. (MA 94:26-96:6; 97:6-11; 122:7-26; 123:8-124:18; 210:25-212:24.) On this evidence, the proposed geological testing cannot reasonably be characterized as a permanent physical occupation.

More fundamentally, *Juliano* misconstrued the nature of the permanent physical occupation that results in a per se taking, making deference to its reasoning inappropriate. (See *Thunderburk v. United Food & Com. Workers' Union* (2001) 92 Cal.App.4th 1332, 1340 [non-binding, but well-reasoned federal decision on issue of federal law entitled to deference].) The question is not whether there remain physical traces after

a temporary governmental invasion has ended—for example, debris after receded flooding or a filled hole. Rather, the question is whether "the government permanently occupies physical property[,]" effectively destroying the property owner's right to possess, use, and dispose of property. (*Loretto, supra*, 458 U.S. at p. 435.) In *Loretto*, that destruction occurred because the building owner was required to accept the cable equipment's ongoing presence and use for the public's benefit. (*Id.* at 434-435; see also *id.* at p. 440, fn. 19 [noting there might be a different result if law required building owner to provide cable installation and owner had power to "repair, demolish, or construct" within the area].) Here, in contrast, once the State completes its temporary geological testing, the landowners may possess, use, and dispose of their properties—including the backfilled space. There is no per se taking under these circumstances.

Finally, the landowners' citation to selected cases from sister states is similarly unhelpful. (PRI Answer 22-24.) The landowners highlight that some state courts, in the facts and circumstances of individual cases, and under their own state eminent domain laws and constitutions, have held that subsurface testing activities constitute takings. (*County of Kane v. Elmhurst National Bank* (1982) 111 Ill.App.3d 292, 299; *Missouri Highway Transportation Commission v. Eilers* (1987) 729 S.W.2d 471, 4743-474; *Burlington Northern and Santa Fe Ry. v. Chaulk* (2001) 262 Neb. 235, 244-245.) Decisions of sister state courts are persuasive only to the extent their reasoning is relevant and sound. See *Acco Contractors, Inc. v. McNamara & Peepe Lumber Co.* (1976) 63 Cal.App.3d 292, 296, citing *People ex rel. Galvin v. Dorsey* (1867) 32 Cal. 296.) These decisions add nothing to the analysis, as they rest in part on determinations that the proposed activities are in violation of state statutes (see *Eilers, supra*, 729 S.W.2d at pp. 473-474; *Burlington Northern, supra*, 262 Neb. at pp. 244-245), and fail to address modern takings law (see *Kane, supra*, 111 Ill.App.3d at pp. 298-

299 [relying on *Jacobson*]; *Eilers*, *supra*, 729 S.W.2d at p. 473-474 [relying on *Kane* and *Jacobson*].)

Moreover, the State notes that a number of other jurisdictions have held that these types of activities are not takings, particularly where, as in California, they are authorized by statute. (See, e.g., *Orange Water & Sewer Authority v. Estate of Armstrong* (1977) 34 N.C.App. 162, 163; *Melvindale v. Trenton Warehouse Co.* (1993) 201 Mich.App. 497, 499; *Northglenn v. Grynberg* (Colo. 1993) 846 P.2d 175, 182; *Puryear v. Red River Authority of Texas* (Tex. 1964) 383 S.W.2d 818, 820-821; see also Eminent Domain: Right to Enter Land for Preliminary Survey or Examination, 29 A.L.R.3d 1104, 1115–1117.) No binding or persuasive authority leads to the conclusion that geological surveys authorized under California's entry statutes are takings per se. Accordingly, where a landowner contends that the proposed surveys will effect a taking, a court must apply the constitutional balancing test.

2. The geological activities are not takings under *Penn Central* and *Arkansas Game*

The landowners have not attempted to analyze the *Penn Central* or *Arkansas Game* factors, relying instead on their per se takings arguments. (PRI Answer 21-22; Nichols Answer 20-28.) As the State argued in its opening brief, the proposed geological tests are not takings under *Penn Central* and *Arkansas Game* because there is no evidence that they will impact the value or use of the properties; they will be limited in nature, duration, and location to minimize, if not eliminate, any risk of damage or interference with the use of the properties; and the clay grout will mimic the native soil and will not affect the owners' ability to use their properties. (AOB 27-29.)

II. THE ENTRY STATUTES PROVIDE CONSTITUTIONALLY VALID EMINENT DOMAIN PROCEEDINGS TO ACCOMPLISH THE PROPOSED ACTIVITIES EVEN IF THEY INVOLVE TAKINGS

Even assuming for the sake of argument that the State's proposed entries constitute a taking, the procedures within the entry statutes satisfy the constitutional requirements of article I, section 19 of the California Constitution.[8]

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

The Constitution delegates to the Legislature the power to define what constitutes "eminent domain" proceedings. (Cal. Const., art. I, § 19.) The Legislature created procedures for precondemnation activities that are distinct from the procedures for condemnation (which will occur only if the property is deemed suitable after investigation). As set out in the State's opening brief and in the dissent, the Legislature enacted the entry statutes specifically to comply with the just compensation clause. (AOB 32-34; Dis. Opn. 30-36.) Indeed, the Legislature enacted former section 1245.5 to include "special statutory procedure[s]" to provide for an expedited means for recovery for any damage or interference, to expressly "overcome" the procedural constitutional concerns raised in *Jacobsen*. (3AA 710-728.) Since nothing in the Constitution prohibits the Legislature from dividing eminent domain proceedings into precondemnation and condemnation phases, the entry statues are entitled to a presumption of constitutionality.

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[8] "Private property may be taken or damaged for a public use and only when just compensation, ascertained by a jury unless waived, has first been paid to, or into court for, the owner. The Legislature may provide for possession by the condemnor following commencement of eminent domain proceedings upon deposit in court and prompt release to the owner of money determined by the court to be the probable amount of just compensation." (Cal. Const., art. I, § 19, subd. (a).)

(See *Mt. San Jacinto, supra,* 40 Cal.4th 648, 656 [upholding the constitutionality of the "quick take" proceedings, including associated deposit and withdrawal provisions.)

The landowners respond that the ordinary presumption in favor of the constitutionality of statutes does not apply "when just compensation is sought under the takings clause." (PRI Answer 56; Nichols Answer 41-42.) None of the cases they cite is on point.

The landowners cite Justice Baxter's dissent in *Santa Monica Beach, Ltd. v. Superior Court* (1999) 19 Cal.4th 952, 1006, for the proposition that deference should not be accorded to legislative judgments "when a claim for just compensation is sought under the takings clause." (PRI Answer 56.) But the dissenting view was not adopted by the majority, which deferred to the city's determination that its rent control ordinance advanced a legitimate state purpose and thus its dedication requirement was not a taking under the *Nollan/Dolan* line of cases. (*Santa Monica Beach, supra,* 19 Cal.4th at p. 972.) Further, the dissent addressed only whether a legislative body is entitled to deference in determining whether its own actions constitute a taking, which is a different question from whether the Legislature is entitled to deference in determining what *procedures* are constitutionally sufficient for effectuating a taking. In the latter context, this Court has held that the "strong presumption in favor of the Legislature's interpretation of a provision of the Constitution" applies. (*Mt. San Jacinto, supra,* 40 Cal.4th at p. 656.)

The landowners cite several cases for the proposition that statutory language defining eminent domain powers should be construed against the public entity. (Nichols Answer 41-42.) But those cases address only the boundaries of grants of the power to take through eminent domain, not the constitutional propriety of the procedures for accomplishing a taking. (See, e.g., *Kenneth Mebane Ranches v. Superior Court* (1992) 10 Cal.App.4th

276, 283 [flood control district could not exercise eminent domain powers outside its territorial boundaries absent express authority]; *Skreden v. Superior Court* (1975) 54 Cal.App.3d 114, 117 [district could condemn property because its statutory authority was clear].)

Here, the clear purpose of the entry statutes is to provide constitutional procedures for accomplishing precondemnation activities as proposed in this case. The State is entitled to a presumption, improperly rejected by the Court of Appeal, that the aims and means of the statute are constitutional.

B. The Entry Statutes Comply with the Just Compensation Clause

The entry statutes satisfy the requirements of the just compensation clause because they provide an eminent domain proceeding that requires the deposit of the probable amount of compensation as determined by the court, provide for prompt release of such funds to the landowner, and allow the landowner to obtain a jury trial to determine the amount of just compensation. (AOB 34-41; Cal. Const. art I, § 19.)

1. An entry petition is an eminent domain proceeding

The landowners argue, based on section 1250.110, that the entry statutes fail to qualify as an "eminent domain proceeding" because they provide for a petition to be filed, not a complaint. (PRI Answer 51.) But the Constitution does not dictate the type of pleading that must be filed to commence an "eminent domain proceeding." Rather, the Constitution leaves that determination to the Legislature. (*Mt. San Jacinto, supra*, 40 Cal.4th at p. 656.) In enacting the entry statutes, the Legislature fully intended that they function as a special proceeding to enable agencies to conduct suitability investigations preliminary to full condemnation, while

also ensuring that property owners receive the constitutional protection of compensation for any resulting damage to the property or interference with its possession and use. (Cal. Law Revision Comm. com., 19 West's Ann. § 1245.060.) Further, Section 1250.110 was enacted merely to clarify that a complaint alone, without a summons, is sufficient to confer subject matter jurisdiction. (Cal. Law Revision Comm. com., 19 West's Ann. § 1250.110.) The provision does not mean that a proceeding commenced by an entry petition is not an "eminent domain proceeding" under the Constitution.

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

Section 1245.030, subdivision (b) authorizes a trial court to determine the probable amount of compensation to be paid to the owner for actual damage to the property and interference with its possession and use, and to increase the deposit under section 1245.040. Nevertheless, the landowners claim that the entry statutes do not provide sufficient "just compensation" for temporary entries because they do not allow for the recovery of "rental value" that is separate from, and additional to, the value of any actual damage or interference with use. (PRI Answer 52-54; Nichols Answer 44-48.) This argument implies that the landowners would be entitled to a greater recovery in a full condemnation proceeding than in a precondemnation proceeding. This is not correct. In either case, the measure of just compensation is the value of damages to, or interference with the property owners' use or possession of the land. (*Ricards, supra*, 10 Cal.3d at pp. 389-390, fn. 4.) When a temporary easement does not cause an owner any economic injury, the owner "is entitled to recover only nominal damages." (*Id.* at p. 390, fn. 4; see also *Filice, supra,* 221 Cal.App.2d at p. 266; *City of Los Angeles v. Fiske* (1953) 117 Cal.App.2d

167, 173; 1 Matteoni & Veit, Condemnation Practice in Cal. (Cont. Ed. Bar 3rd ed. 2013) §4.80, p. 4-131.) A condemnee "'is entitled to receive the value of what he has been deprived of, and no more. To award him less would be unjust to him; to award him more would be unjust to the public.'" (*Mt. San Jacinto*, *supra*, 40 Cal.4th at p. 666.)

The landowners seek to recover what they call "rental value" without any showing of actual damage or interference with the possession or use. (See Opinion 34 [noting lack of evidence of any actual damage or interference likely to result from the entries].) The cases cited by the landowners (PRI Answer 53) do not suggest that there can be recovery of "rental value" without a showing of interference. In each of those cases, the rental value awarded, if any, was based upon the value of the actual interference with the owner's possession or use of the property—precisely what is covered by the entry statutes. (See *General Motors, supra,* 323 U.S. 373, 375 [government wartime occupation of warehouse]; *Kimball Laundry Co. v. United States* (1949) 338 U.S. 1 [government takeover of laundry plant for wartime public use]; *San Joaquin Drainage District v. Goehring* (1970) 13 Cal.App.3d 58, 66 [owner recovered only damages, not rental value].)

The landowners also assert that *Metropolitan Water Dist. of Southern California v. Campus Crusade for Christ* (2007) 41 Cal.4th 954 addressed only severance damages, and not valuation of a temporary easement. (Nichols Answer 17-20.) In fact, in *Campus Crusade*, the acquisitions included a seven-year temporary construction easement, which the landowner alleged damaged its use of the property. (*Id.* at p. 963.) In order to obtain compensation for that temporary easement and severance, this Court concluded the owner must show damage caused by interference with the actual intended use of the property. (*Campus Crusade*, *supra*, 41 Cal.4th at p. 975; see AOB at 23, 38.) Where the owner had "not identified

any intended use of the property during the relevant period, nor [had] it identified any specific loss attributable to the delay in construction," the owner was not entitled to compensation for the temporary entry. (*Ibid.*; see also *Orange County Flood Control Dist. v. Sunny Crest Dairy, Inc.* (1978) 77 Cal.App.3d 742, 762-764 [rejecting recovery of two years' rent during a business transition period, finding no evidence of a physical taking of the remainder or its impairment of any permissible use].)

The landowners desire compensation for what amounts to mere inconvenience. This is not compensable. (*Department of Public Works v. Ayon* (1960) 54 Cal.2d 217, 228-229.) In this Court's words:

> Personal inconvenience, annoyance or discomfort in the use of property are not actionable types of injuries. [Citations] "It would unduly hinder and delay or even prevent the construction of public improvements to hold compensable every item of inconvenience or interference attendant upon the ownership of private real property because of the presence of machinery, materials, and supplies necessary for the public work which have been placed on streets adjacent to the improvement." [Citation.]

(*Ibid.*)

The deposit is adequate for the activities involved, particularly given the lack of any evidence that the entries will have any impact on the use of the properties or their value.

3. The statutes provide for prompt release of deposited funds.

The landowners argue that the entry statutes do not provide for "prompt release" because an owner may not be able to immediately withdraw the deposit at the time of possession. (PRI Answer 54-55.) But the Legislature specifically designed the entry statutes to provide a "simple and expeditious method" for the prompt release of the deposited funds. (Cal. Law Revision Comm. com., 19 West's Ann. § 1245.060.) The Legislature's determination that the provision's release of funds is

sufficiently "prompt" is entitled to deference. The availability to the owner of "the probable amount of the owner's just compensation" satisfies the owner's right to compensation at the time of possession, and the fact that the owner has to apply to withdraw the funds does not amount to an unconstitutional delay in recovery. (*Mt. San Jacinto*, *supra*, 40 Cal.4th at p. 666.)

Further, while some funds may not be immediately available for withdrawal, that is because such funds are deposited to cover *potential* damages that have not yet occurred and may never occur. There can be no "just compensation" for damages unless and until they occur. (*City of San Diego v. Neumann* (1993) 6 Cal.4th 738, 747-748 [just compensation does not encompass "conjectural or speculative" damages].)

4. The entry statutes allow the owner to obtain a jury trial to determine compensation

The landowners acknowledge that the entry statutes allow the owner to obtain a jury trial to determine the amount of just compensation, but incorrectly argue that this is not constitutionally sufficient. (PRI Answer 55-56.)

First, the landowners contend that the Constitution requires a jury determination of just compensation *prior* to the taking. (PRI Answer 55.) But the second sentence of the just compensation clause expressly authorizes the Legislature to provide for pre-judgment possession. (Cal. Const., art. I, § 19, subd. (a).)

Second, the landowners contend that the Constitution forbids requiring the owner to file a separate action to obtain a jury trial. (PRI Answer 55-56.) But the Constitution requires only that a jury trial be available, not that any particular procedure be provided for obtaining one. (Cal. Const., art. I, § 19, subd. (a) [just compensation must be "ascertained by a jury unless waived"].)

At all times, an owner may assert the right to a jury trial by filing any appropriate civil action to determine any damages. (§ 1245.060, subd. (a).) This satisfies the plain language of the Constitution.

C. Public Policy Supports the State's Continued Ability to Use the Entry Statutes as Intended by the Legislature

The landowners mischaracterize the State's public policy arguments, suggesting the State's position is that the desire to reduce costs and increase government efficiency trumps constitutional considerations. (Nichols Answer 64-65; PRI Answer 58.) While the entry statutes do in fact promote efficiency, they do so within constitutional bounds, in the furtherance of the public interest. The statutes should continue to be available for determining project feasibility, before commencement of major infrastructure projects.

As this Court has noted: "If the property owner can be insured just compensation, there is little, if any, justification for delaying public improvements and, thereby, increasing the tax burden on the public." (*Mt. San Jacinto, supra,* 40 Cal.4th 648, 658, fn. 5, citing 3 Cal. Law Revision Com. Rep.(1961) at p. B-29; see also *Ayon, supra,* 54 Cal.2d at pp. 228-229.) In drafting the entry statutes, the Legislature succeeded in forging a constitutional balance respecting the interests of the government, the public, and property owners. This legislative determination is entitled to deference. (40 Cal.4th at p. 656.)

CONCLUSION

This Court should reverse the Court of Appeal's decision and hold that the State may proceed with its proposed environmental and geological investigations under the authority of the precondemnation statutes.

Dated: February 23, 2015

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CERTIFICATE OF COMPLIANCE

I certify that the attached **PETITION FOR REVIEW** uses a 13 point Times New Roman font and contains 8,376 words.

Dated: February 23, 2015

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DECLARATION OF SERVICE BY U.S. MAIL

I declare:

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

On **February 23, 2015**, I served the attached:

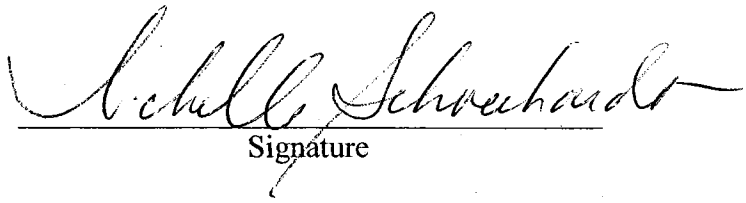
REPLY TO ANSWERS TO OPENING BRIEF

by placing a true copy thereof enclosed in a sealed envelope in the internal mail collection system at the Office of the Attorney General at 1300 I Street, Sacramento, CA 95814, addressed as follows:

SEE ATTACHED SERVICE LIST

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on **February 23, 2015**, at Sacramento, California.

Michelle Schoenhardt
Declarant


Signature

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

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