IN THE SUPREME COURT OF THE STATE OF CALIFORNIA
California Supreme Court 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 TO PETITION FOR REVIEW

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ANSWER TO PETITION FOR REVIEW

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

Petitioners, Respondents and Cross-Appellants The Carolyn Nichols Revocable Living Trust, etc., et al. ("Landowners") answer the Petition for Review filed by Real Party in Interest and Appellant the State of California, by and through the Department of Water Resources ("DWR") of the Third Appellate District's decision in *Property Reserve, Inc. v. Superior Court* (2014) 224 Cal.App.4th 828.

I. INTRODUCTION.

The criteria for review set forth in California Rules of Court, rule 8.500(b)(1) are not met in this case. There is no lack of uniformity of decision among the Courts of Appeal with respect to legal questions addressed in the Decision. Nor is review necessary to settle an important question of law; the Decision comports with and applies existing law, including this Court's decision in *Jacobsen v. Superior Court* (1923) 192 Cal. 319. The Decision does not effect a "radical change" in California law, as DWR asserts. Nor does the Decision cast doubt on the constitutionality or validity of any California statute. Rather, it applies

established principles of statutory construction to a statute under which public agencies may acquire certain "pre-condemnation entry" rights.

As a matter of law, a compensable property interest can be intentionally taken only through an action in eminent domain. An action in eminent domain provides basic statutory protections for landowners, such as an appraisal of the compensable property interest and an offer based thereon, reimbursement for an independent appraisal, a notice of the agency's intent to adopt a Resolution of Necessity and the landowners' right to be heard at the hearing, a duly adopted Resolution of Necessity, and a noticed motion for possession prior to judgment. The Eminent Domain Law also affords anyone who holds an interest of record in the affected property the right to participate in the proceeding.

Governmental agencies commence actions in eminent domain when they intentionally seek to acquire compensable interests in private property, e.g., a fee interest or an easement. However, there is a right in private property – an "entry" – that does not rise to the level of a compensable property interest but is more akin to an authorized trespass. Agencies often need to acquire such "entries" for the purpose of conducting pre-condemnation studies. Most pre-condemnation entries are obtained by landowner consent. Where landowner consent cannot be

obtained, Code of Civil Procedure § 1245.010 et seq. (the "Entry Statute") allows an agency to request a court order allowing brief entry onto property for the purpose of conducting pre-condemnation studies. Because the right that may be acquired under the Entry Statute is merely an "entry," as distinguished from a compensable property interest (e.g., an easement), the procedure is abbreviated and does not provide the many protections afforded property owners in an eminent domain proceeding. As there can be no intentional taking of a compensable property interest by way of the Entry Statute, there is no compensation for the entry itself (as distinguished from compensation for actual damage or substantial interference *incidental* to the entry).

This litigation arose from an increasingly common abuse of the Entry Statute. DWR sought to acquire compensable interests in property (as distinguished from mere "entries") by way of the abbreviated procedure under the Entry Statute. Commencing Entry Statute proceedings in five counties, DWR sought these property interests in order to advance a proposed "twin tunnel" project that, if constructed, would divert fresh water around the Sacramento-San Joaquin Delta ("Delta") for conveyance to points south of the Delta. By this stratagem, DWR would have avoided the rigors of eminent domain and the

requirement of just compensation for the compensable property interests (as distinguished from compensation for actual damage and substantial interference *incidental* to an authorized entry).

Delta landowners resisted DWR's gambit. Over 150 of DWR's petition actions were eventually coordinated in San Joaquin County Superior Court. The Coordination Proceeding resulted in rulings that were ultimately reviewed by the Court of Appeal for the Third Appellate District.

The Court of Appeal's decision in *Property Reserve, Inc., et al. v. Superior Court (Department of Water Resources), etc., et al.* (2014) 224 Cal.App.4th 828 (the "Decision") applies existing law and established principles of construction in rejecting DWR's radical argument that the Entry Statute may be used as an eminent domain shortcut by which government may intentionally take a compensable property interest (e.g., an easement, as distinguished from an entry).

The Decision does not declare the Entry Statute unconstitutional or in any other way invalidate the Entry Statute. The Decision reflects a keen awareness of the presumption of constitutionality and interprets the Entry Statute so as to preserve, not undermine, its constitutionality. DWR's suggestion to the effect that the Decision invalidates the Entry

Statute or otherwise effects a change in California law is not only wrong, it is backward.

DWR's Petition for Review should be denied. The Decision comports with, and reaffirms the continuing vitality of existing law. The Decision does not conflict with any other published California decision. Nor does the Decision invalidate the Entry Statute. To the contrary, only if the Court of Appeal had accepted DWR's radically expansive reading of the Entry Statute would the Decision have raised doubts about the constitutionality of the Entry Statute. In short, there is no need for Supreme Court review of the Decision.

If this Court does grant DWR's Petition for Review, Landowners respectfully request, pursuant to California Rules of Court, rule 8.500(a)(2), that the Court also grant review of the three additional issues listed in Section IV, *infra*, which were fully briefed before the Court of Appeal.

II. BACKGROUND.

A. DWR's Petitions under the Entry Statute/Coordination of Actions.

DWR filed petitions under Code of Civil Procedure ("C.C.P.") § 1245.010 et seq. (the "Entry Statute"), a statute that authorizes governmental agencies to obtain brief entries onto private property to

conduct pre-condemnation studies. The petitions, filed in five counties, targeted many landowners, including the landowner Petitioners, Respondents and Cross-Appellants herein (collectively, "Landowners").

DWR's petitions were coordinated in San Joaquin County Superior Court. As the Court of Appeal noted, "[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," said properties "totaling tens of thousands of acres." (224 Cal.App.4th at p. 837.) DWR's requested entries were to be two years in duration and would have allowed DWR to access virtually the entirety of the affected properties. Each entry would allow teams of DWR agents and their vehicles and equipment to enter the properties dozens of times to conduct myriad activities, including investigations and "surveys" (biological, botanical, archaeological, etc.) and "geological" activities such as drilling.

The coordination trial judge bifurcated the proceeding into two phases: "geological" activities and "environmental" activities.

B. The Trial Court's Rulings.

The trial court's first order, issued on February 22, 2011, allowed DWR a one-year "entry" for the purpose of conducting environmental activities. By this order (the "Entry Order"), DWR acquired a year-long

temporary blanket easement on each of the affected properties.

The second order, issued on April 8, 2011, denied DWR's request for entry onto Respondents' properties for the purpose of conducting proposed batteries of geological activities, including extensive drilling and related testing.

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

Landowners challenged the Entry Order by way of a Petition for Writ of Mandate or Prohibition (Court of Appeal Case No. C067765),[1] which the Court of Appeal denied. The California Supreme Court then granted Landowners' Petition for Review, directing the Court of Appeal to vacate its previous order and to require the trial court to show cause why Landowners' Petition should not be granted.

DWR appealed directly from the trial court's April 8 Order.

The writ and appellate proceedings, though briefed separately, were later consolidated for argument and decision.

D. The Court of Appeal's Decision.

1. The Entry Order.

In addressing the Entry Order, the Court of Appeal turned to a

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[1] A similar Petition was filed by a separately represented landowner, Property Reserve, Inc., Court of Appeal Case No. C067758.

landmark California Supreme Court decision which construed the predecessor to the current Entry Statute:

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

(*Jacobsen v. Superior Court* (1923) 192 Cal. 319, 329 ["*Jacobsen*"], quoted in the Decision, 224 Cal.App.4th at p. 848.)

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. (See the discussion of *Jacobsen* at 224 Cal.App.4th pp. 846-849.) Other courts recognize *Jacobsen*'s fundamental truth: "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, 443 N.E.2d 1149, 1153-1154, citing *Jacobsen, supra*; *Hendler v. United States* (Fed. Cir. 1991) 952 F.2d 1364, 1377.)

However – *and this was Landowners' core issue* – the rights and

interests granted under the Entry Order far exceeded anything that could be allowed as an "entry" or "legal trespass." DWR attempted to use the Entry Statute to acquire **temporary easements**, which, as a matter of law, are **compensable interests in real property**. After reviewing in detail the rights and interests granted under the Entry Order, 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.

(224 Cal.App.4th at p. 864; see, also, 224 Cal.App.4th at p. 856 ["We agree with the landowners that performance of the environmental activities works a taking of a compensable property interest in the nature of a temporary easement, an interest in property that cannot be acquired directly under the entry statutes."].)

This point - that the Entry Order granted DWR a temporary easement, as distinguished from an "entry" - lies at the heart of the litigation. Tellingly, throughout the exhaustive briefing in this case DWR never even acknowledged, much less addressed, the question of whether the Entry Order granted an easement or other "compensable property

interest." Consistent with that strategy of denial and misdirection, DWR's Petition for Review again avoids any discussion of easements or the Decision's key holding that the easement granted by the Entry Order constitutes a "compensable property interest."

2. The April 8, 2011 Order.

Regarding DWR's Requested "Geological" Entries, the Court of Appeal provided an overview of those activities, 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 up to 10-day period of time required for each boring, as well as the equipment, personnel and time required for each cone penetrometer test ("CPT"). (See 224 Cal.App.4th pp. 838, 841-842.) Furthermore, DWR's request for geological entries was not for a single boring and/or CPT on each parcel; rather, DWR sought multiple drillings and CPTs on Landowners' properties. (224 Cal.App.4th at pp. 840-841, 843-844.)

The Court of Appeal observed that DWR's proposed geological activities involved the physical removal of soil from Landowners'

properties (a "taking" in the most basic sense) and replacement of that soil with "permanent physical" columns of "hardened cement." Without more – and as both the trial court and the Court of Appeal recognized – DWR's request, on its face, was for a "taking" under *Jacobsen*, *Loretto v. Teleprompter Manhattan CATV Corp.* (1982) 458 U.S. 419, 426, 73 L.Ed.2d 868, 876, 102 S. Ct. 3164 ("*Loretto*"), and other decisions involving physical takings.

DWR conceded that its proposed geological entries would constitute takings. (Decision, 224 Cal.App.4th at p. 840.) As the Court of Appeal recognized, even without that concession, under any standard for determining what constitutes a taking by way of physical invasion of private property, DWR's proposed geological activities – **on the face of DWR's request** – would constitute a taking. (*Id.* ["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. As a result, the State must exercise its eminent domain authority before it can perform the geological activities."].)

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III. ARGUMENT.

A. The Court of Appeal Properly Construed the Entry Statute with Due Regard to the Presumption of Constitutionality; The Decision Did Not Declare the Entry Statute to be Unconstitutional or Otherwise Invalid.

DWR's Petition for Review is predicated largely on a caricature of the Decision. By exaggerating certain aspects of the Decision while ignoring or downplaying others, DWR suggests that the Decision somehow invalidates the Entry Statute or otherwise changes California law. That suggestion is false. The Decision nowhere concludes that the Entry Statute is unconstitutional or an unlawful exercise of legislative authority.

DWR asserts that the Court of Appeal failed to accord the Entry Statute the presumption of constitutionality. Not so. The Decision reflects an acute awareness of the presumption of constitutionality and, in a manner similar to that of the Supreme Court in *Jacobsen*, interprets the Entry Statute so as to preserve, not undermine, its constitutionality. (See, e.g., the discussion at 224 Cal.App.4th pp. 845-846, 849-855.)[2]

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[2] 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

In *Jacobsen*, a governmental agency urged the Supreme Court to construe the entry statute at issue in such a way that it would 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

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> doing violence to the statute's language, renders the statute valid. [Citations omitted.] 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.'" [Citations omitted.] The exercise of eminent domain authority "is strictly defined and limited by the express terms of the constitution or statute creating it." [*Jacobsen,* 192 Cal. at p. 325.] 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.'" [Citation omitted.]
>
> 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.

(224 Cal.App.4th at pp. 845-846.)

> 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, quoted in the Decision, 224 Cal.App.4th at p. 848.)

Similarly, in this case DWR urged a radical and expansive reading of the Entry Statute that would: (1) allow a governmental taking of a compensable property interest (a temporary blanket easement), without compensation or the benefit of the landowner protections afforded in an eminent domain action; and (2) allow a governmental agency to physically invade and take private property (removing soil from the site and replacing it with a permanent column of a cement-like substance up to 200 feet in length) in violation of the rules and principles articulated in *Jacobsen* and *Loretto*, among other decisions.

Had the Court of Appeal adopted DWR's proposed interpretation of the Entry Statute, then the Decision would indeed have run afoul of the rule that courts must, if possible, reject any construction of a statute that would render the statute unconstitutional. In short, DWR's argument on this point is not only wrong, it is backward.

DWR's argument is particularly odd in light of the fact that Landowners never challenged the constitutionality of the Entry Statute, a point made unequivocally in their appellate briefs:

> Respondents and Cross-Appellants have never argued that the Entry Statute, which authorizes innocuous pre-condemnation entries, is unconstitutional on its face. However, as interpreted and applied by the State Contractors and DWR, it would indeed be unconstitutional. That cannot be allowed. "Wherever statutes conflict with constitutional provisions, the latter must prevail." [Citations omitted.]
>
> This Court should reject any construction of the Entry Statute that would render it unconstitutional. [Citations omitted.]

(Petitioners' Answer to State Water Contractors' *Amicus Curiae* Brief at p. 10; to the same effect, see Petitioners' Traverse at pp. 16-17 ["[If] one assumed that the Legislature intended to codify the constitutional requirements discussed in *Jacobsen*, the legislation would be void insofar as it purported to authorize a taking of private property without strict adherence to Article I, section 19 of the Constitution."]; Petition for Writ of Mandate, pp. 76-77 ["Petitioners do not contend that C.C.P. §1245.010, et seq. is unconstitutional. On its face -- and as applied by courts of this state for many years -- the statute merely facilitates brief and innocuous pre-condemnation entries when necessary to achieve a valid public purpose. The Entry Statutes have never been interpreted or applied to effectuate anything other than a *de minimis* entry. They have never been used to effectuate a taking, and any interpretation of the statute that would allow such a result should be rejected on constitutional

grounds."].)

The Decision refers to a "facial challenge," but not to a facial challenge to the Entry Statute itself. (See 224 Cal.App.4th at pp. 845, 846.) Read in context, the "facial challenge" referenced in the Decision 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, at times[3], by DWR. As stated in the Decision:

> 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 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.**

(224 Cal.App.4th at p. 844, emphasis added.)

DWR notes that the current Entry Statement was intended to

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[3] "At times" is an apt qualifier here because DWR changed its theory of the case at several junctures. DWR conceded that its proposed geological activities would work a taking per se and, at another point in the appellate proceeding, that "the entry statutes do not provide a constitutionally valid eminent domain proceeding by which the State can take the landowners' property interests to accomplish the geological activities." (224 Cal.App.4th at p. 840; see, also, p. 845.)

comply with *Jacobsen*. That is true. However, nothing in the Entry Statute or its legislative history supports a conclusion that the Legislature intended to allow for an intentional taking of private property 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 Code Civ. Proc., §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 in its briefs 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 (which is what an "entry" is). (*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 obviated 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 Decision's discussion of *Jacobsen* and the Entry Statute's deposit and compensation provisions, at 224 Cal.App.4th pp. 850-851.)

In the wake of the Decision, public agencies remain free to petition for temporary entry permits allowing entries onto private property to conduct pre-condemnation investigative activities. Any such entries must comply with the requirements of the Entry Statute and must not transgress constitutional limitations articulated in *Jacobsen* and other decisions.

In short, the Decision addresses an increasingly common abuse of

the Entry Statute and, in doing so, reaffirms the continuing vitality of existing law. It does so without creating any conflict with any other published decision.

The Decision also does so with full recognition of the statewide public interests that may be affected, both those of governmental agencies and those of landowners and others with interests affected by public projects. However, that does not distinguish the Decision from myriad other Court of Appeal decisions that also affect important statewide interests. Nor, in the absence of a conflict between decisions of the Courts of Appeal or a change in California law, does it warrant Supreme Court review.

B. The Entry Statute's Requirement of a Deposit to Cover Any Actual Damage and Substantial Interference Incidental to an Entry is Wholly Distinct from the Compensation Awarded in an Eminent Domain Action for the Taking of a Compensable Interest in Real Property.

DWR contends that the deposit of probable compensation required under C.C.P. §1245.030, subd. (b) is somehow related to – or the equivalent of – the "just compensation" requirement for a taking by eminent domain. Again, not true.

The deposit required under §1245.030, subd. (b) is only for "actual damage to the property and interference with its possession and use." As

stated in the Decision:

> If the condemner's entry and activities "cause actual damage to or substantial interference with the possession or use of the property," the owner may recover for that damage and interference either by filing a new civil action (*§ 1245.060, subd. (a)*), or by applying to the court for recovery from the funds the condemner deposited with the court (*§ 1245.060, subds. (a), (c)*).

(224 Cal.App.4th at p. 851.)

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 with use incidental to an entry, is self-evident: the Entry Statute provides a mechanism by which government can obtain an "entry" only, not a compensable property interest, the intentional taking of which requires commencement of an action in eminent domain. As explained by the Court of Appeal:

> [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.

(224 Cal.App.4th at p. 852.)

C. The Entry Order, On Its Face, Granted DWR a Temporary Easement which, as a Matter of Law, is a Compensable Property Interest; DWR's Assertion that Review is Needed to "Restore Case-Specific Factual Inquiries" is a Red Herring Argument.

Regarding the rights and interests granted DWR under the Entry Order, the Decision states:

> We agree with the landowners that performance of the environmental activities works a taking of a compensable property interest in the nature of a temporary easement, an interest in property that cannot be acquired directly under the entry statutes.

(224 Cal.App.4th at p. 856.)

DWR's arguments about specific proposed activities and its emphasis on a speculative case-by-case examination of actual interference with use misapprehends the fundamental nature of Landowners' argument with respect to the Entry Order and the thrust of the Decision. The Court of Appeal's conclusion that the Entry Order grants DWR a temporary blanket easement against Landowners' properties was properly made based on the face of the Entry Order. (See discussion at 224 Cal.App.4th, pp. 859-860.)

As a matter of law, an easement (as distinguished from an "entry")

is a "compensable property interest." (224 Cal.App.4th at p. 856.)

A "compensable property interest" (as distinguished from an "entry") cannot be intentionally taken by government other than by eminent domain, which provides landowners with myriad constitutional safeguards that are not provided under the Entry Statute. (See, 224 Cal.App.4th at pp. 851-855, 865-866.)

Once it is determined, **on the basis of the face of the Entry Order**, that the interest granted is a temporary easement, the legal analysis is essentially complete. As the Court of Appeal observed, the Entry Statute provides a procedure by which government may acquire the right to enter private property to conduct pre-condemnation investigative activities consistent in scope and duration with the principles articulated in *Jacobsen*. It cannot be used to acquire an easement.

Like other courts, the Court of Appeal correctly examined the scope and nature of the interests conferred by the Entry Order itself. One need not wait until the governmental entry and related activities have actually occurred in order to determine whether the Entry Order, **on its face**, effects a taking. (See, *e.g.*, *Jacobsen* [court properly determined that the governmental agency's request, on its face, would effect a taking].)

Again, DWR's stubborn refusal to discuss temporary easements or "compensable property interests" is significant. In any such discussion, DWR would have to confront the fact that agencies commonly acquire temporary easements by way of eminent domain. Such temporary easements, though they vary significantly in duration and size, are all compensable property interests. For that reason, they are 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 [for purposes of constructing a road extension, 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].)

A temporary easement is a compensable property interest, regardless of how it is obtained, *e.g.*, by agreement or by condemnation. A temporary easement is a compensable property interest, regardless of whether the easement holder exercises that easement in a manner so as to actually interfere with the landowner's activities on the property. For that matter, a temporary easement is no less a compensable property interest even if the easement holder never exercises the easement at all.

Nor does a temporary easement cease to be a compensable property interest simply because it was obtained by way of a pre-condemnation entry procedure or because the agency's proposed activities are those listed as permissible activities in the Entry Statute. The dispositive consideration is the fact that the easement or other interest at issue ***is*** a compensable property interest, not ***how*** it is obtained or what pre-condemnation activities are proposed. That is one of the basic lessons of

Jacobsen.

As the Court of Appeal correctly concluded, the Entry Order exceeded what may be granted under the Entry Statute precisely because it gave DWR a temporary blanket easement over Landowners' properties.

D. DWR's Public Policy Argument, Based on Allegedly "Onerous Burdens" Created by the Court of Appeal's Decision, Does Not Justify Supreme Court Review.

DWR warns of onerous burdens on governmental agencies resulting from the Decision. It may well be that as a result of the Decision, and in the absence of landowner consent, public entities that wish to acquire a compensable interest in private property (e.g., an easement) in order to conduct pre-condemnation studies may have to conduct some additional planning in order to comply with constitutional mandates. This is hardly an inappropriate or unduly onerous burden for agencies that are already required by law to plan ahead and conduct public hearings in connection with public projects.

More importantly, the "burden" of which DWR complains is the burden imposed by compliance with constitutional limitations and requirements. The fact that compliance with constitutional requirements may in some instances impair governmental efficiency is neither peculiar to these circumstances nor a basis for Supreme Court review. On this

point, the law is clear: "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 Commission v. United States* (2012) ___ U.S. __, 133 S.Ct. 511, 521; 184 L.Ed.2d 417 ["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"].)

On this point, the Decision mirrors existing law and policy:

> 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.

(224 Cal.App.4th at p. 866, emphasis added.)

In short, the Decision recognizes that constitutionally protected interests must not be sacrificed at the alter of alleged government efficiency. That, surely, is not a basis for Supreme Court review.

DWR's suggestion that the Decision will require government agencies to condemn property even before they have a project is also without merit. Nothing in the Decision affects the right of agencies and landowners to enter into consensual entry arrangements.

Where landowner consent cannot be obtained, the Decision 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 Decision limit the government's activities. DWR cannot be heard to complain about ***that*** limitation, and ***that*** limitation does not justify Supreme Court review.

IV. REQUEST FOR REVIEW OF ADDITIONAL ISSUES IF REVIEW IS GRANTED.

A. The Additional Issues.

As allowed by the Rules of Court, rule 8.500(a)(2), Landowners

request review of the following additional issues if this Court grants DWR's Petition for Review. These issues were fully briefed before the Court of Appeal but were not addressed in the Court of Appeal's Decision.

> (1) Did the trial court err in ruling that the owners of affected leasehold estates and easements are not indispensable parties in a proceeding under the Entry Statute, Code of Civil Procedure § 1245.010 et seq.?
>
> (2) Did the trial court err in denying Cross-Appellants' request for discovery into the basis of DWR's Petition under the Entry Statute, Code of Civil Procedure § 1245.010 et seq.?
>
> (3) Did the trial court err in ruling that the Entry Statute, Code of Civil Procedure § 1245.010 et seq., excuses or exempts DWR from the permitting requirements of affected Reclamation Districts?

B. Standard of Review Applicable to Additional Issues If Review Is Granted.

The above-listed additional issues present questions of law, subject to de novo review.

C. Basis for Review of Additional Issues If DWR's Petition for Review Is Granted.

Landowners raised the additional issues set forth above in both the trial court and the Court of Appeal. Because the Court of Appeal affirmed the trial court's April 8, 2011 Order and granted Landowners' writ petition with respect to the Entry Order, there was no need to address

the additional issues. However, if this Court grants DWR's Petition for Review, the additional issues could again be important.

1. Indispensable Parties.

The properties targeted by DWR are largely agricultural. Most are leased to agricultural businesses for farming and related activities. Some are leased to residential tenants. Reclamation districts, which are charged by statute with responsibility for reclamation works on and near the affected properties, own easements and other interests in many of the affected properties.

DWR sought a temporary blanket easement. If granted, it would have had a substantial impact on the leasehold owners who actually farm and/or live on the affected properties, as well as on the Reclamation Districts. Landowners argued that owners of such leasehold estates and easements are indispensable parties under Code Civ. Proc. §389. The trial court disagreed, and DWR was allowed to proceed by naming only the owners of the fee interests in the targeted Delta properties.

Had DWR invoked the Entry Statute for its intended purpose, i.e., to obtain an "entry" of duration and scope allowable under *Jacobsen* and related decisions, the indispensable party issue would probably not have arisen at all. However, in the context of an argument as to whether an

agency may acquire a compensable property interest by way of the Entry Statute, the question of who must be named in such a proceeding is very much at issue. The owners of the leasehold estates and easements hold "an interest relating to the subject of the action and [are] so situated that the disposition of the action in [their] absence may (i) as a practical matter impair or impede [their] ability to protect that interest . . . ." (Code Civ. Proc., §389.)

As one would expect, in any eminent domain action to acquire a compensable property interest, agencies are required to name all persons having or claiming an interest. Section 1250.220, subd. (a) is unequivocal: "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."[4] If the Entry Statute were construed in such a way as to allow the intentional taking of a compensable property interest, then the same requirement should apply.

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[4] Of course, the fact that the Entry Statute does not include such broad and inclusive language further underscores the fact that the Entry Statute was never intended as an eminent domain shortcut by which an agency could acquire a compensable property interest.

2. Landowners' Right to Discovery.

The trial court denied Cross-Appellants' request for discovery into the basis for DWR's Master Amended Petition and the declarations filed in support of the petition. Had the entry requested by DWR been a proper "entry," the right to discovery would probably not have become an issue. However, DWR sought a series of intentional takings. Under these circumstances, the trial court's denial of the discovery rights Landowners would have enjoyed in an eminent domain proceeding was erroneous.[5]

3. Impact on the Affected Reclamation Districts.

Many or most of the subject properties lies within the boundaries of Reclamation Districts. They include areas on which levees and drainage facilities are located. The levees are of paramount importance, as they prevent the tides and flood flows from inundating the lands within the boundaries of the Reclamation Districts. The drainage facilities include canals and appurtenances necessary to dewater the lands. Such levees and drainage facilities are "reclamation works" within the meaning

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[5] Again, the fact that the Entry Statute appears not to contemplate the discovery rights that would be accorded defendants in an ordinary eminent domain action underscores the fact that the Entry Statute was never intended as a means by which an agency could acquire a compensable property interest.

of Water Code §50013.

The Reclamation Districts are the public agencies responsible for, and exercising, complete control over the maintenance and operation of the reclamation works within their jurisdictions, including the reclamation works on the subject properties. Many of DWR's proposed activities, particularly the geotechnical activities, require permission from the Reclamation Districts.

However, the trial court, relying on the language of the Entry Statute, rejected any suggestion that DWR would be required to comply with the permitting requirements of the Reclamation Districts. In effect, the trial court ruled that the Entry State exempts or excuses an agency from compliance with such requirements.

That question became a non-issue in light of the Court of Appeal's decision. However, it could become an issue again in the event that this Court grants DWR's Petition for Review.

V. CONCLUSION.

In sum, none of the criteria for Supreme Court review are met in this case. There is no conflict among the Courts of Appeal with respect to the legal questions addressed in the Decision, nor does the Decision create new law. Rather, the Decision applies existing precedent and well-

established principles of construction in rejecting DWR's request for an expansive and constitutionally infirm application of the Entry Statute. The Decision does not invalidate the Entry Statute or cast doubt upon its constitutionality; to the contrary, the Decision preserves the legality and vitality of the Entry Statute by rejecting DWR's interpretation which, if accepted, would have rendered the statute unconstitutional. The only "radical" position advanced in this litigation is that urged by DWR.

Dated: May 12, 2014

Respectfully submitted,

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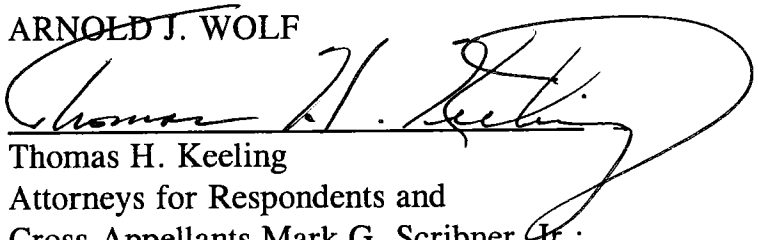

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CERTIFICATE OF WORD COUNT

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 TO PETITION FOR REVIEW, this brief has 6,852 words.

Dated: May 12, 2014

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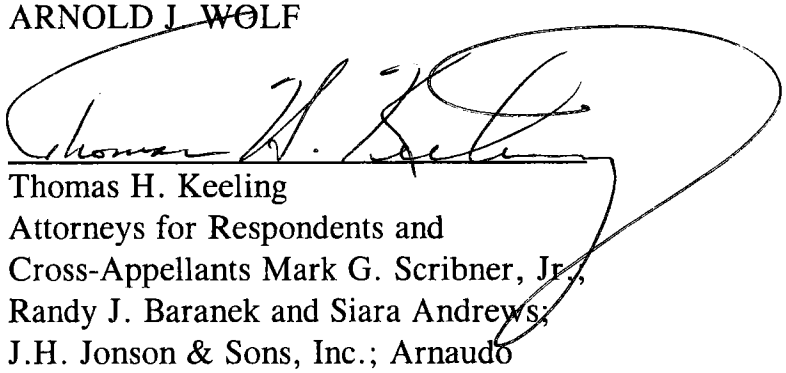

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PROOF OF SERVICE

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 TO PETITION FOR REVIEW

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 May 12, 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 May 12, 2014, at Stockton, California.

Tonia M. Robancho

TONIA M. ROBANCHO

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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