IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

Case No. S217738

Court of Appeal Third Appellate District No. C067758, C067765, C068469

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 Superior Court Case 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 Superior Court Case No. JCCP4594
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PROPERTY RESERVE, INC.'S ANSWER BRIEF ON THE MERITS

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I. INTRODUCTION

Trespasses can be forgiven, but takings cannot.

This case presents a governmental entity's attempt to push the right of entry statutes for preliminary investigations of property for potential condemnation far beyond what the statute authorizes.

This Supreme Court in 1923 determined that precondemnation entries for investigation of property can only be authorized when entries are "innocuous". The entries sought here are not innocuous.

The State of California by and through the Department of Water Resources ("DWR") advocates for a ruling that Code of Civil Procedure section 1245.010 et seq. (the "entry statutes") permit the use of private property for 65 days of testing, 55 additional days to store materials and up to 125 days to leave traps. DWR admits its proposed activities are pursuant to its eminent domain power.[1] Yet, DWR argues no just compensation is due the owner, Property Reserve, Inc. ("PRI") for the months of use of the land.

DWR's position is contrary to the just compensation principles that entitle PRI to the rental value of the property plus any incidental damages to the property including substantial interference. Moreover, public entities

[1] Unlike most of the case law cited by DWR, this case sounds in eminent domain and does not involve the question of whether, in exercising another governmental power (i.e. the police power), the public entity has gone too far and crossed over into a compensable taking.

regularly appraise and condemn temporary construction easements when access across or use of private property adjacent to private property is needed to construct public projects. Yet, DWR contends that the use of private property prior to the construction phase of the public project is noncompensable and does not require that an easement be condemned.

DWR's position is illogical and irreconcilable. The notion that just compensation is somehow dependent on the government's characterization of the activities or the timing of the use of the private property cannot be reconciled with the constitutional protections afforded private property. The law is simple, the government must pay for the use of private property for public benefit regardless of what the government needs to use the property for.

II. PERSPECTIVE

There has only been one appellate decision on the scope of such entries since 1923 for good reason – the entries sought by the numerous public agencies throughout the state for 90 years have been minor in duration and scope. Entries to survey, photograph and take shallow soil samples, then replace the excavated area with the same earth are incidental walkabouts on property. Such entries take no more than a few days. Because of the brevity and light impact on the property the entries are not considered a possessory intent or an occupancy of the property that rises to

the level of taking. The entries are, for the most part, negotiated without court intervention.

Here DWR decided to run far beyond the historic scope of such preliminary investigations of property. DWR originally petitioned for two years of various environmental investigations and tests and soil borings encompassing thousands of man-hour intrusions onto PRI's land. That the court cut DWR back to one year does not diminish the reality that the entries granted far exceed common practice. Common practice is that condemning entities do not invoke the entry statutes to seek lengthy and invasive investigations on land without the payment of compensation. Nor does the tailoring of the entries by the trial court alter the fact that the activities granted and the geological activities as proposed result in substantial occupation of the landowner's property.

III. BACKGROUND FACTS

The Property

On September 2, 2010, DWR filed a Master Amended Petition (MAP) seeking a right of entry to 150-plus owners' parcels (Volume 1 of Petitioner PRI's Appendix Supporting Petition for Writ ("PA"), Exh. 1). Ten of thousands of acres are directly affected. The properties lie within the Sacramento-San Joaquin delta, one of the largest freshwater estuaries in the west. The MAP was supported was supported by points and authorities, declarations and proposed order for entry.

The MAP sought entries of sixty (60) intermittent twenty-four-hour (24) days spread over a period of two years for each parcel. (1 PA 4:24-27.)

PRI owns approximately 3,500 acres of property in Contra Costa County. Approximately 2,600 of those acres are subject to the MAP (hereinafter the "Property"). The Property consists of thirteen (13) contiguous Assessor's Tax parcels and DWR seeks access to conduct investigation on ten (10) of those parcels. The Property is located directly south of Discovery Bay on the south side of State Highway 4 and east of the Byron-Tracy Highway. The southeast portion of the ranch is adjacent to the northwest of the Clifton Court forebay. PRI leases the Property for farming.

The large majority of the Property consists of alfalfa, hay, and corn crops. A significant portion of the Property is irrigated pasture and a smaller portion is unirrigated pasture. (1 PA 282:8-14.) Significant portions of the Property are used as pastureland for raising approximately 200 heads of cattle. (*Ibid.*) Permanent irrigated pasture is required on the Property to feed the cattle. A crop of hay is also harvested from this pasture. (*Ibid.*)

The Property is improved with unpaved roads used for farming operations and other activities. There is fencing and signage on and around the Property. (1 PA 282:23-24.) Portions of the Property are encumbered with easements in favor of various public entities, including but not limited

to installation access to levees, pumps, and canals by Reclamation District 800, for the buyer Byron Tract in Contra Costa, California. (1 PA 280:15-18.)

Trial Court Proceedings

The trial court held hearings on October 22, 2010 (1 PA 246.) December 16-17, 2011 (2 PA 313 and 461), January 21, 2011 (3 PA 595) and February 18, 2011 (3 PA 784). The court issued rulings after each hearing. (Oct, 22: 1 PA 246; Dec. 16-17: 2 PA 589; Jan. 21: 3 PA 595; and Feb 18: 3 PA 781.)

Throughout the proceedings PRI appeared and objected to the scope of the proposed entries and resulting damage to the Property. PRI filed written opposition as well. (1 PA 253 and 732.)

PRI submitted the declaration of the property owner detailing the significant interference caused by DWR's requested entries that will disrupt activities such as harvesting, irrigation and fertilizing, and will destroy crops. (1 PA 279-285.) PRI also filed declarations of other experienced eminent domain attorneys who testified to the limited scope of rights of entry. (2 PA 289 and 294.)

The Master Amended Petition

DWR's MAP requested and the Court's Order granted entries that were geographically indeterminate. In other words, DWR seeks access to

every square foot of the property it deems necessary to conduct its studies. DWR has in effect received a blanket easement over PRI's affected parcels.

The MAP (1 PA 1-6) requested an unprecedented number of entries onto private property to conduct the following array of tests and surveys described as follows:

Environmental Activities

The "environmental activities" are grouped into "surveys" as described in detail below. DWR seeks the right to conduct these surveys on all ten (10) of PRI's affected parcels. (1 PA 8.)

1. Habitat and Species Survey for Mammals: This survey will be a habitat and species specific survey for riparian brush rabbit, riparian wood rat, salt marsh harvest mouse and bat species. Entries for habitat evaluations on each parcel will be conducted by two to four personnel using motor vehicles for access, flagging, GPS units, computer equipment, bat nets, recording and photographic equipment, and rabbit, wood rat, and mouse livetraps, "among other equipment". (1 PA 11:15-12:6.) The MAP indicates that the rabbit and wood rat survey would take 10 days, salt marsh and harvest mouse require five days and the bat surveys will require 10 days. (1 PA 12.)

2. Habitat and Species Specific Surveys for Reptiles and Amphibians: These entries and evaluations on each parcel will be conducted by two to four personnel. (1 PA 10:26-27.) Survey crews may use vehicles for

access, "aquatic traps which are approximately 2 ft. x 1 ft. in size," kayaks, coolers, nylon, "nylon snake bags for (retaining/transporting) species", flash lights, dip nets and seines among other equipment. (1 PA 10:13-11:14.) These entries and evaluations may take up to five days per parcel to complete. Neither the MAP nor the Order limits the number of traps DWR may set per parcel. The MAP indicates that where certain species are found additional entries relating to the tiger salamander and red lake frog are necessary. The Order does not address any additional days if species are found.

3. Vernal Pool Surveys: Entries to survey vernal pools will include walking and driving observation on the property by two to six personnel. The activities include netting of pools two weeks following significant rainfall and then every two weeks thereafter. (1 PA 12:8-19.)

4. Botanical Surveys: Botanical surveys require entry by DWR staff during the months of February through October. The activities are to include digging holes with a shovel or trawl approximately 2 feet wide and 2 feet deep, walking the property and accessing waterways by small boat, collecting samples of vegetation and taking photographs. For each property, DWR estimates two to six personnel will be required with entries over a period of one to 12 days but where wetlands are found additional time will be required for the surveys. (1 PA 8:21-9:3.)

5. Hydrologic Surveys: DWR indicates that between two and six personnel will require entries between one and 12 days to conduct hydrological surveys on each property. (1 PA 9:15-25.) The MAP is silent as to how the entries will be done and what equipment will be used, but presumably the entries will be by vehicle and some mechanical equipment will be used.

6. General Surveys: Between 2 and 6 DWR personnel will require one to 12 days to survey each parcel. Equipment to be utilized will include motor vehicles, GPS units, photography equipment and maps. (1 PA 9:27-10:11.)

7. Archeological Survey Activities: Archeological activities will consist of two DWR personnel. Archeological studies will require one day and where ground visibility is poor, DWR's agents will conduct "shallow soil scraping" with "a small mason's trawl with a three inch blade and the scrapings will measure one square foot in size and one to three inches deep." (1 PA 14:19-15:8; 1 PA 54:13-21.)

8. Utility Inventory Activities: DWR seeks access by two individuals for one day to perform walking surveys and inventory utilities. These activities will require passenger vehicle and camera among other things. (1 PA 15:9-22.)

Mapping Activities

In addition to "Environmental Activities" DWR seeks entries for conducting "mapping activities" that will take one to 12 days. Part of this mapping process involves field surveying to study alignments for a canal or tunnel. Surveying activities will require the use of two inch wood – lath stakes with flagging on the subject properties placed every hundred feet in the areas being studied for proposed alignment of the canal. (1 PA 14:10-12.) Because the MAP does not identify those areas, the stakes could potentially be anywhere on the lands of PRI.

The "geodetic mapping activities will require the installation of targets on the subject property and taking photographs from a small aircraft" during two flights spaced several weeks apart. (1 PA 13:27-28.) The targets will be set with iron pipes flush with the ground, and where livestock are present, fencing will be installed around the target markers. (1 PA 14:4-6.) DWR's staff will return to check, clean and repair the targets as necessary. (1 PA 14:7-8.) DWR will access the property with vehicles. (1 PA 13:24-14:18.)

Trial Court Proceeding

The trial court bifurcated DWR's request into two broad categories: environmental activities and geotechnical activities. (3 PA 0744, ¶4.) On February 22, 2011, after several hearings, the court issued its order regarding the environmental activities, permitting entry for investigating

real property other than geotechnical and drilling ("Entry Order"). (3 PA, Exh. 36.) The Entry Order permitted DWR to enter PRI's property for 55 days over the course of a year.

The Entry Order determined the estimated amount of probable damages caused by DWR's year-long activities on the 2,650 plus acre PRI property to be $4,000.00. The $4,000.00 is for potential damages that PRI would have to subsequently prove up to the court and does not represent probable compensation due to PRI for DWR's "use" or taking of the property. (3 PA 781.)

On April 8, 2011, the trial court issued an order denying DWR's requested entry for geological activities ("Geological Order") (3 Appellant's (DWR's) Appendix in Case No. C068469 (hereinafter "AA") 793-800). The court concluded that DWR's concession that the geological activities would result in a taking coupled with the law required denial of the Order because a permanent physical taking would result. The trial court found that the entry statutes do not authorize a taking of property and do not provide for just compensation but only incidental damages.

Appeals

PRI appealed the Entry Order by filing a Petition for Writ which the Court of Appeal summarily denied. This Court granted PRI's Petition for Review and directed the Court of Appeal to vacate its earlier order and to

hear the Petition for Writ. (*Property Reserve, Inc. v. Superior Court* (2014) 224 Cal.App.4th 828, 839.)

The April 8 Order denying DWR's requested geological activities was subsequently appealed by DWR. (3 PA 801.)

The Activities Granted Under the Order and Sought by DWR for Geological Testing

A review of the proposed activities by DWR reveals more than an unobtrusive entry as DWR's Opening Brief implies.

When you consider the scope of the order, the magnitude of the environmental investigations authorized is self-evident. DWR is permitted occupancy on PRI's ten parcels for a maximum of **235** days during a one year period. The order provides:

- For individual investigations for recreational, botanical, and hydrological surveys and tests. (3 PA 749-750.)
    - Each is performed by different personnel.
    - The locations are determined in the field solely at DWR consultants' discretion.
    - While the investigations are to be done concurrently, 1-12 days is allowed for each of the above. (This would mean for different parts of the property, there is permitted a cumulative 36 days of activity by DWR consultants for these tasks.)

- There is additional time of 1-4 days provided if wetlands are found.
- A day is defined as 7 AM to 7 PM.

- There are general surveys for sensitive bird species and/or habitats, including giant garter snake, western pond turtle, California red-legged frog and California tiger salamander. (3 PA 750:1-4.)
- In the event of discovery of California red-legged frog, night time work is authorized. (3 PA 751:25-27.)
- The specifics of the order actually translate to more than the 1-12 days to be coordinated by each investigation to a maximum of 55 total days for environmental investigations by up to eight people per entry for parcels of 2001 to 3500 acres (this is the category in which the PRI parcels fall). (3 PA 774.)
- There are 32 days of Property use and occupancy that do not count against entry limitations for pipes and targets for aerial surveys to remain on the property. (3 PA 774.)
- There are 23 more days that do not count as an entry to leave wooden staking on the property to depict potential alignments of proposed water transmission lines. (*Id.*)
- Geodetic mapping activities are allowed four site visits. (3 PA 754.)

- There are 126 days permitted for traps to be located throughout the property related to nine different species, requiring constant monitoring[2] (3 PA 751-753 and 772-774.)

The geological activities sought by DWR would add another 10 days of site occupation for:

- Soil sampling using penetration tests that require:
  - A five member crew with drill rigs and vehicles
  - 6 inch diameter hole to 40 feet
  - 5 inch diameter hole from 40-205 feet
  - Filling borings with bentonite.
- Cone penetrometer testing:
  - Four people with trucks entering the property and driving a cone into the ground with metal sledge hammer
  - A hole 300 feet deep
  - Mud rotary drills
  - Drill rigs and trucks on the land
  - Portable toilet on the property
  - Excavated soil placed in 55 gal drums stored on the land.

[2] Trapping of species is not one of the activities that the Entry Order required must be done concurrently; thus the worst case scenario is 14 days for each species. The trial court ruled that the days the traps remained on the property did not count as an entry. (3 PA 774.)

- Possession and exclusive control of 10,000 sq. ft. of the parcel for 10 days for trucks and equipment during the time for geologic testing.

(DWR's Opening Brief on the Merits (hereinafter "OB"), pp. 14-16.)

It should be noted that for all of these activities DWR will need to use PRI's private roads to get to the site of each investigation.

Beyond a duty to provide 72 hours notice, these are entries totally managed by DWR, and the property owner is not reimbursed or compensated for any supervision that it may have to provide. In other words, the property owner has lost the quiet use and enjoyment of portions of its property for the periods indicated.

Court of Appeal's Opinion

The Court of Appeal determined that DWR's proposed geological activities would result in a permanent physical occupation which is a categorical taking under *Loretto v. Teleprompter Manhattan CATV Corp.* (1982) 458 U.S. 419 (*"Loretto"*). (*Property Reserve, supra,* 224 Cal.App.4th at 842.)

The Court of Appeal held that the entry statutes could not be used to intentionally take public property because the Statutes failed to provide the California Constitutional protections contained in Article 1, Sect. 19. (*Id.* at 846.) The Court of Appeal found that the Entry Order effectively granted DWR a year-long, non-exclusive blanket easement on PRI's

property. (*Id.* at 865.) Because the entry statutes do not provide the Constitutional protections for the taking of property, the Court of Appeal reversed the Entry Order. (*Id.* at 865-866.)

IV. ARGUMENT

A. DWR's Proposed Geological Activities Are a Categorical Taking

1. DWR's Proposed Geological Activities Are a Taking Under California Precedent

The Court need look no further than the facts and holding in *Jacobsen v. Superior Court of Sonoma County* (1923) 192 Cal. 319 to determine that DWR's proposed geological activities are takings.

In *Jacobsen,* the Petaluma Municipal Water District ("District") sought an injunction to preclude the owners from interfering with the District's proposal to go upon the land with "well boring outfits, tools, machinery, and appliances for the purpose of boring holes and making excavations for the avowed object of ascertaining whether or not there was underneath the surface of [owners'] said lands rock strata or other formation suitable or necessary for the construction of dams and building of reservoirs...." (*Id.* at 322.)

Specifically, the District's tests involved the installation of a boring rig at various points on the owner's land operated by gasoline or steam engines to sink test holes from three to eight inches in diameter to a depth of 150 feet. (*Id.* at 322.) The District sought entry for four men upon the

premises for 60 days with occasional visits from the District's officials for inspection. (*Id.* at 322-323.) The District proposed to restore the land of the owners to the original condition by filling in the test holes and excavations and by removing all appliances from the land when the testing was completed.

The *Jacobsen* court rejected the District's contention that these activities would not constitute a taking of property, stating that the District's actions "constituted interference with [the owners'] exclusive rights to the possession, occupation, use and enjoyment" of their property. (*Id.* at 328.) This Court found the owners were growing crops of hay and grain on their property which to some extent would be trampled down and damaged or destroyed during the testing. (*Id.* at pp. 322-323.) The court stated that it had "no doubt" that the activities proposed by the District violated the protections afforded private property under the California and U.S. Constitutions. (*Id.* at 328.)

Importantly, *Jacobsen* rejected the District's argument that the right of such entry and occupation was permitted under section 1242 of the Code of Civil Procedure (the predecessor statute to Section 1245.010, *et seq.*). The Court found that to give the broad interpretation of the right of entry that the District argued for would render the statute violative of constitutional provisions and therefore void. (*Id.* at 329.) Instead, that

court chose to interpret the right of entry statutes in a manner that would preclude having to find the statute void and stated that:

> It is clear that whatever entry upon or examination of private lands is permitted by 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 serious impinge upon or impair the rights of the owner to the use and enjoyment of this property**. Any other interpretation would, as we have seen, render this section void and violative of the foregoing provisions of both the state and federal Constitution. (*Id.* at 329; emphasis added.)

The holding in *Jacobsen* was reaffirmed in *County of San Luis Obispo v. Ranchita Cattle Company* (1971) 16 Cal.App.3d 383, where the court faced the interplay of section 1242 and a written right of access agreement between the owner and condemner. The right of access agreement contained general terms. That court stated that:

> . . . in the absence of language specifically defining what activities the [condemnor] intended to engage in to carry out its surveys and investigations, the "Right of Access" agreement gave the [condemnor] no more than a right to make an innocuous entry and superficial examination sufficient for the making of surveys and maps . . . . (*Id.* at 388-389, citing *Jacobsen.*)

DWR contends that the Court of Appeal's reliance on *Jacobsen* is misplaced in the wake of recent U.S. Supreme Court precedent, statutory changes, and constitutional changes. (OB, p. 32, fn. 10.) DWR's contention is incorrect. The change in the entry statutes to permit additional tests is irrelevant and does not affect the applicability of

Jacobsen, because *Jacobsen* did not hinge on what activities the statute authorized but on what activities would be constitutionally permissible. The statutory amendments did not and could not alter what constitutes a taking. (*Rose v. State* (1942) 19 Cal.2d 713, 725 [the legislature by statutory right may not deny or abrogate a right granted by the Constitution].) What was a taking under *Jacobsen* is still a taking today.

Neither in *Penn Central Transportation Co. v. New York City* (1978) 438 U.S. 104, 98 S.Ct. 2646 ("*Penn Central*") nor *Arkansas Game and Fish Commission v. United States* (2012) __ U.S. ___; 133 S.Ct. 511 ("*Arkansas Game*") changed the definition of a real property interest. Neither case indicates that property interests that were previously protected are now non-compensable interests. (*Penn Central* involved a landmark commission regulation of the amount of development above an historic structure; *Arkansas Game* reviewed the government's regulated release of dam waters to farms causing flooding on the lands of others.)

That *Jacobsen* remains good law after the statutory revisions is confirmed by the Law Revision Commission Comment to Section 1245.060 referencing *Jacobsen* in defining the scope of what constitutes "substantial interference". The Law Revision Commission Comment understood that *Jacobsen* continued to represent a limit on the scope of precondemnation entries.

2. DWR's Proposed Geological Activities Are a Categorical Taking under Federal Precedent

The Court of Appeal determined that DWR's geotechnical activities would result in the removal of soil permanently from PRI's property. This soil would be replaced with a column of bentonite grout that DWR intends to leave on the property forever. (224 Cal.App.4th 828, 842.)

The removal of soil and replacement with grout intended to remain indefinitely is a categorical physical taking under *Loretto, supra,* 458 U.S. at 435. In *Loretto* the installation of a small cable box on an apartment building resulted in a categorical taking. *Loretto* held that constitutional protections for the rights of private property cannot be made to depend on the size of the occupation. (*Id.* at 437.) Moreover, "permanent occupations of land by underground pipes or wires are takings even if the installations occupy only insubstantial amounts of space and **do not seriously interfere with the owner's use of the land.**" (*Id.* at 430, emphasis added.)

The U.S. Supreme Court has reiterated that a permanent physical occupancy requires just compensation "no matter how minute the intrusion, and no matter how weighty the public purpose behind it." (*Lucas v. South Carolina Coastal Commission* (1992) 505 U.S. 1003, 1015.) Even when the physical intrusion occupied less than one half cubic foot of space on a landowner's property. (*Id.* citing *Loretto, supra,* 458 U.S. 425.)

Thus, the Court of Appeal's determination that the bentonite column on PRI's property amounted to a permanent physical occupancy and therefore a categorical taking is correct.

DWR attempts to escape the confines of *Loretto* by arguing that the bentonite column left behind is not permanent. This argument is contrary to the factual determination of the trial court. (3 AA 793-800.) Worse, it is contrary to federal precedent. (See *Juliano v. Montgomery-Otsego-Schoharie Solid Waste Mgmt. Auth.*, 983 F. Supp. 319, 328 (N.D.N.Y. 1997) ("*Juliano*").) In *Juliano* there were 24 monitoring wells and 8 piezometers left on the property by a waste management authority. The evidence indicated that each well/piezometer consisted of a hole into which a PVC riser pipe has been inserted. The holes range in depth from 7 to 143 feet. The decommissioning of the wells/piezometers would require removing or destroying the well casing and surface seal, and filling the hole by pressure injection of cement bentonite grout. Grout from the upper five feet of the hole is then removed and the area is backfilled with compacted native materials.

Based on the description of the required activities on private property, *Juliano* concluded:

> As a matter of law that the pressure injection of cement bentonite grout is "intended to exist or function for a long, indefinite period without regard to unforeseeable conditions," *see* Random House Dictionary of the English Language, and is thus

> permanent. Accordingly, [the waste management authority's] actions constitute a permanent physical taking entitling Plaintiffs to just compensation.

(*Id.* at p 328; see also *Hendler v. United States* (Fed.Cir.1991) 952 F.2d 1364, 1376 ("*Hendler*") [monitoring wells 100 feet deep and capped with cement a permanent physical occupation under *Loretto*].)

Accordingly, DWR's assertion that the bentonite column is not permanent is incorrect as a matter of law. The geological activities proposed by DWR in the present case are indistinguishable from the activities that *Jacobsen*, *Loretto, Hendler,* and *Juliano* determined would be a taking.

3. DWR's Position that *Arkansas Game* or *Penn Central* Standards Apply to the Geological Testing Activities is Legally Unsupportable

Once the geological activities are determined to be a permanent physical occupation, a court does not engage in the analysis of the *Penn Central* factors. Justice Marshall said in *Loretto*:

> When the physical intrusion reaches the extreme form of a permanent physical occupation, a taking has occurred. In such a case 'the character of the government action' not only is an important factor in resolving whether the action works but is also determinative. (*Id.* at 426.)
>
> [A] permanent physical occupation is a government action of such a unique character that it is a taking without regard to other factors that a court might ordinarily examine. (*Id.* at 432, fn. omitted.)

This Court recognized physical invasions are not subject to the *Penn Central* analysis in *Kavanau v. Santa Monica Rent Control Bd.* (1997) 16 Cal.4th 761, 775 [*Penn Central* only applies when a regulation does not result in a physical invasion and does not deprive the property owner of all economic use of the property].

4. Other Precedent Support a Taking under These Circumstances

DWR's Opening Brief implies that the Court of Appeal's analysis was reckless and created new precedent. But other jurisdictions faced the precise argument advanced by DWR - that rights of entry statutes must be interpreted broadly and liberally to permit geological testing; and these courts have consistently applied the same logic as *Jacobsen* and the Court of Appeal.

In *County of Kane v. Elmhurst National Bank* (1982) 111 Ill.App.3d 292, the court specifically stated that the part of a right of entry order "authorizing soil borings in a geological study without the landowners' consent or a prior condemnation proceeding would be invalid **even if statutorily authorized**." (*Id.* at 299, emphasis added.) "Such drilling and excavation, even where a subsequent backfilling has been acquired, has been properly recognized as a substantial interference with the landowners' property rights rather than a minimally invasive preliminary survey causing only incidental damage." (*Id.* citing *Jacobsen, supra*, 192 Cal. 319.)

"Rather than hold that such drilling and surveying is authorized under a statute which we would then have to invalidate, we decline to read the power to make the contemplated soil and geological survey into the grant of power to make surveys." (*County of Kane v. Elmhurst Bank, supra*, 111 Ill.App.3d at 299; citing *Missouri Highway and Transportation Commission v. Eilers* (1987) 789 SW 2d 471, 473.)

In *Eilers*, the Highway Commission proposed to enter with a four wheel drive wagon, drill 10-12 holes and remove approximately 5 lbs. of soil from the property. Additionally the Commission was permitted to drill a two inch core of the subsurface rock. The court held that "although the soil survey is not an intrusion of an overwhelming magnitude, it is still an intrusion and interference with [owners' rights] as a private land owner . . . . Accordingly, the soil survey amounts to a "taking" and the Commission may not conduct the soil survey until it receives [owners'] consent or initiates judicial proceedings and pays the damages for temporary easement before entering the land." (*Id.* at 473–474.)

Finally, in *Burlington Northern and Santa Fe Railway Co. v. Chaulk* (2001) 262 Neb. 235, the court rejected the argument that Nebraska's right of entry statutes permitted geotechnical studies which included core samples two inches in diameter and 50 feet deep scattered at quarter mile intervals. The court determined that such tests constituted temporary takings which required that the power of eminent domain be exercised. (*Id.* at 245.)

The Court of Appeal's conclusion on the geological activities is consistent with *Jacobsen*, *Loretto* and other jurisdictions that have considered the issue. Nothing about the Court of Appeal's Opinion constitutes error.

B. The Environmental Testing Activities Set Forth in the February 22, 2011 Entry Order Would Result in a Taking

1. The Entry Order Conveyed a Temporary Easement

Jacobsen establishes the limit of what an entry can be:

> Whatever entry upon or examination of private lands is permitted . . . cannot amount to other than such innocuous entry and superficial examination as would suffice for the making of surveys or maps. (*Id.* at 329.)

An entry, therefore, cannot be more than a very brief, privileged trespass for noninvasive purposes. The Entry Order grants DWR the right to use PRI's property far beyond this type of "entry."

The Court of Appeal correctly found that the Entry Order exceeded the scope of an "entry" and effectively granted a non-exclusive temporary blanket easement requiring the payment of just compensation:

> Because the right to exclude the government from obtaining and possession an interest in private property is one of a property owner's most cherished rights, a private property owner should not be required to lease portions of his land rent free to the government. Under the facts and circumstances here, a blanket temporary easement for one year that authorizes from 25 to 66 days of entry by 4 to 8 people is a significant length of time for an intentional, physical invasion of private property. (224 Cal.App.4th 828, 864.)

The Court of Appeal's conclusion is correct as an easement is an interest in the land of another, which entitles the owner of the easement to a limited use or enjoyment in the burdened land. (*Colvin v. Southern Cal. Edison Co.* (1987) 194 Cal.App.3d 1306, 1312.) The only difference between a permanent easement and a temporary easement is the duration. Here DWR is effectively acquiring a year-long right to intermittently use PRI's property for investigatory purposes.

2. A Temporary Easement is a Compensable Property Interest

An easement "is unquestionably compensable 'property'." (*S. Cal. Edison Co. v. Bourgerie* (1970) 9 Cal.3d 169, 172-73 citing 2 Nichols on Eminent Domain 173 (3d ed. 1970) § 5.72; see also *Redevelopment Agency v. Tobriner* (1984) 153 Cal. App. 3d 367, 375 [whether they are called restrictive covenant, equitable servitudes, or easements, the interests ... are property interests in the constitutional sense].) The Court of Appeal properly determined that the entries sought by DWR are a taking of a property interest even though the proposed activities are temporary and intermittent. (*Holtz v. San Francisco Bay Area Rapid Transit Dist.* (1976) 17 Cal.3d 648, 653 [the concept of compensable property interests has widened to include not only taking of physical possession or title to real property but also encroachments on lesser property rights].)

Federal precedent also recognizes that an easement is a protected interest in property. (*United States v. Dickinson,* 331 U.S. 745, 748, 67 S.Ct. 1382, 91 L.Ed. 1789 (1947) ["Property is taken in the constitutional sense when inroads are made upon an owner's use of it to an extent that, as between private parties, a servitude has been acquired either by agreement or in course of time."]; *Otay Mesa Prop. L.P. v. United States,* 86 Fed. Cl. 774, 791 (2009) aff'd, 670 F.3d 1358 (Fed. Cir. 2012) [government liable for the physical taking of an easement over parcels due to the installation and use of the seismic sensors].)

A review of eminent domain cases shows that temporary easements are interests in real property that public entities recognize must be condemned when an entity exercises the power of eminent domain. (See, e.g., *City of Carlsbad v. Rudvalis* (2003) 109 Cal.App.4th 667, 673 [construction of road required condemnation of temporary construction easement]; *City of Fremont v. Fisher* (2008) 160 Cal.App.4th 666, 674 [city condemned temporary construction easement].)

3. The Entry Order Would Result in a Physical Taking of a Protected Property Interest

Accordingly, an easement is an interest in property. The fact that the easement is temporary does not change the requirement that just compensation be paid. (*Sacramento and San Joaquin Drainage District v. Goehring* (1970) 13 Cal.App.3d 58, 66 [A temporary taking or taking that

amounts to nothing more than an easement requires compensation]; accord *Kaiser Aetna v. U.S.* (1979) 444 U.S. 164, 179-180 [even if the government physically invades only an easement in property, it must nonetheless pay just compensation].)

Just compensation is due when the government has "taken or damaged" a cognizable property right. (*Selby Realty Co. v. City of San Buenaventura* (1973) 10 Cal.3d 110, 119-120.) Additionally, "[w]hen the government **physically takes possession of an interest in property** for some public purpose, it has a categorical duty to pay compensation." (*Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency* (2002) 535 U.S. 302, 322; emphasis added.)

A taking "may consist of an act of dispossession, or of acts of appropriation, destruction or damage." (*Frustuck v. City of Fairfax* (1963) 212 Cal.App.2d 345, 364 citing *People ex rel. Dept. of Pub. Works v. Peninsula Title Guar. Co.* (1956) 47 Cal.2d 29, 34.)

The Entry Order would appropriate a one year easement on PRI's property damaging PRI's right to the quiet use and enjoyment of its land. The Court of Appeal correctly prevented this constitutional violation from being allowed.

DWR continually argues that DWR is not taking a permanent interest in the land and DWR will have no continuing rights after the entries end. (OB, pp. 16, 25-26 and 29.) This lack of permanency, however, does not

mean there is no taking. *Hendler, supra,* determined the concept of physical taking does not require that in every instant, the occupation be exclusive or continuous and uninterrupted. *(Hendler, supra,* 952 F.2d at 1377.) "In this context, 'permanent' does not mean forever, or anything like it. A taking can be for a limited term . . . what is 'taken' is, in the language of real property law, an estate for years, that is, a term of finite duration as distinct from the infinite term of an estate in fee simple absolute." (Cites omitted.) (*Id.* at 1376.) Of course, while called an estate for years, the term can be for less than a year. (Cites omitted.) (*Ibid.*)

Hendler held that constructing wells and subsequent entries by government agents, vehicles and equipment to monitor and service the wells constituted a physical taking that required compensation. (*Id.* at 1377-1378.) While the government activities were temporally intermittent the impact was not 'temporary' as the EPA activities were a taking of the owner's right to exclude for the duration of the period for which the wells were on the property and subject to the government's need to service them. (*Id.* at 1378.) Accordingly, a non-exclusive, investigative property interest for a term of years was more than just a transient and inconsequential trespass, and constituted a taking. (*Id.* at 1376-1377.)

While *Hendler* did not quantify with precision what level of physical occupancy, of what kind, and for what duration constitutes a taking, it looked at the record before the court and concluded the occupancy by the

government was comfortably within the degree necessary to make out a taking. "When the governmental intrusion is a substantial physical occupancy of private property as this is, *Loretto* establishes that there is a taking." (*Id.* at 1377.)

Hendler determined that "permanency" is properly understood as a focus on the character of the governmental intrusion and not solely the duration of the invasion, since the Supreme Court had previously found takings where the duration was temporary. (*United States v. General Motors Corp.* (1945) 323 U.S. 373 [the government's appropriation of the unexpired term of a warehouse lease was a taking; that it was finite went to determining compensation rather than to whether a taking had occurred], *United States v. Petty Motor Co.* (1946) 327 U.S. 372 [federal government acquired the remainder of a lease for a building], and *Kimball Laundry Co. v. United States* (1949) 338 U.S. 1, 69 S.Ct. 1434, 93 L.Ed. 1765 [federal government appropriated private business for public use during World War II].)

Hendler's logic is confirmed in *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency* (2002) 535 U.S. 302, 322:

> When the government physically takes possession of an interest in property for some public purpose, it has a categorical duty to compensate the former owner, *United States v. Pewee Coal Co.*, 341 U.S. 114, 115, 71 S.Ct. 670, 95 L.Ed. 809 (1951), regardless of whether the interest that is taken constitutes an entire parcel or merely a part thereof. Thus, compensation is mandated when a leasehold is taken and the government occupies the property for its own purposes, even though that use

> is temporary. *United States v. General Motors Corp.*, 323 U.S. 373, 65 S.Ct. 357, 89 L.Ed. 311 (1945); *United States v. Petty Motor Co.*, 327 U.S. 372, 66 S.Ct. 596, 90 L.Ed. 729 (1946). Similarly, when the government appropriates part of a rooftop in order to provide cable TV access for apartment tenants, *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 102 S.Ct. 3164, 73 L.Ed.2d 868 (1982).

The first three cases cited by *Tahoe-Sierra* do not involve a permanent physical occupancy by the government, or its agents. The landowners were not required to allow a permanent improvement remain on the premises. Yet the Supreme Court identified these takings as examples of categorical takings because of the character of the governmental intrusion—a physical invasion where the government appropriated an interest in property. In the present case, the taking of a temporary easement—a protected interest in real property—for occupancy by DWR's agents is a physical taking requiring compensation.

4. Quiet Use and Enjoyment is a Protected Property Interest

DWR focuses solely on physical damage and ignores the case law concerning protected property interests specifically the right to exclude others. DWR fails to acknowledge that abridgment of these rights is compensable.

> If property then consists, not of intangible things themselves, but in certain rights in an appurtenant to those things, it follows that when a person is deprived of any of those rights he is to that extent deprived of his property, and hence that his property may be taken in the constitutional sense though his title and

> possession remain undisturbed, and that it may be laid down as a general proposition, based upon the nature of property itself, that **whenever the lawful rights of an individual to the possession, use or enjoyment of his land are in any degree abridged or destroyed by reason of the power of eminent domain, his property is pro tonto taken, and he is entitled to compensation.** (*Pac. Tel. and Telco v. Eshelman* (1913) 166 Cal. 640, 664, citing Lewis on Eminent Domain, 2d. ed., § 56; 3d ed., section 65; emphasis added.)

The essence of all property is the right to exclude. (*Loretto v. Teleprompter Manhattan CATV Corp.* (1982) 458 U.S. 419, 435.) The right to exclude is so universally held to be a fundamental element of the property right, even if the government physically invades only an easement in property, it must nonetheless pay just compensation. (*Kaiser Aetna v. United States* (1979) 444 U.S. 164 at 179-180.) PRI's right to exclude extends to the government and DWR. "In the bundle of rights we call property, one of the most valued is the right to the sole and exclusive possession—a right to *exclude* strangers or for that matter friends, but especially the Government." (*Hendler v. United States, supra*, 952 F.3d at 1375.)

DWR repeatedly argues that its proposed activities will not conflict with PRI's use of its property. *Hendler*, however, illustrates that this is not a proper standard for determining whether a taking has occurred. In *Hendler,* the trial court had granted an expansive order allowing the EPA to install monitoring wells and recurrent entry rights to take samples and

measurements from these wells. The trial court claimed that while the order was expansive it was not "necessarily inimical to simultaneous use of the property by the owners as long as they did not interfere with the EPA's beneficent activities." (*Hendler, supra,* 952 F.2d at 1374.) *Hendler* dismissed this logic, as it:

> This misconceives the meaning and purpose of the constitutional protections underlying the Fifth Amendment. The Government does not have the right to declare itself a co-tenant-in-possession with a property owner. Among a citizen's - including a property owner's - most cherished rights is the right to be left alone. (*Ibid.)*

5. The Character of the Government Action is Determinative In This Case

Even if this Court determines that taking a recognized interest in real property is not a per se taking, that this is a forced occupancy by the government in pursuit of a uniquely governmental function would result in a taking under *Penn Central* and *Arkansas Game.*

First, it is important to recognize that the order will result in a physical occupation or physical taking as opposed to a regulatory taking. This Court has previously recognized that this is an important distinction. In *Hensler v. City of Glendale* (1994) 8 Cal. 4th 1, 9-10:

> [I]t is important to note that a "regulatory" taking differs . . . Where the government authorizes a physical occupation of property (or actually takes title), the Takings Clause generally requires compensation. [Citation.] But where the government merely regulates the use of property, compensation is required only if considerations such as

> the purpose of the regulation or the extent to which it deprives the owner of the economic use of the property suggests that the regulation has unfairly singled out the property owner to bear a burden that should be borne by the public as a whole. (Citing *Yee v. City of Escondido* (1992) 503 U.S. 519.)

Tahoe Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency (2002) 535 U.S. 302 also identifies that physical takings are subject to different considerations than regulatory takings:

> This longstanding distinction between acquisitions of property for public use, on the one hand, and regulations prohibiting private uses, on the other, makes it inappropriate to treat cases involving physical takings as controlling precedents for the evaluation of a claim that there has been a 'regulatory taking,' and vice-versa. (*Id.* at 323.)

Accordingly, when property is damaged or a physical invasion has taken place, the right to just compensation arises because an irrevocable taking has already occurred. (*Hensler v. City of Glendale, supra,* 8 Cal.4th at 13.) Importantly, a constitutional "taking is not restricted to a mere change of physical possession, but includes a **permanent or temporary** deprivation of an owners use or enjoyment of his land." (*Frustuck v. City of Fairfax* (1963) 212 Cal.App.2d 345, 364 quoting *Pacific Telephone, etc. Co. v. Eshelman* (1913) 166 Cal. 640; emphasis added.)

Federal jurisprudence also recognizes the significant distinction between a physical invasion and a regulation limiting the use of private property. "The paradigmatic taking requiring just compensation is a direct

government appropriation or physical invasion of private property." (*Lingle v. Chevron U.S.A., Inc.* (2005) 554 U.S. 528, 528-529.) Thus, "[t]he clearest sort of taking occurs when the government encroaches upon or occupies private land for its own proposed use." (*Palazzolo v. Rhode Island* (2001) 533 U.S. 606, 617.)

Even the Supreme Court's regulatory takings cases are careful to recognize that physical occupancy is a special type of taking. *Penn Central* recognizes that a "taking may more readily be found when the interference with property can be characterized as a physical invasion by the government." (428 U.S. at 124). Additionally "government actions that may be characterized as acquisitions of resources to permit or facilitate uniquely public functions have often been held to constitute takings." (428 U.S. at 128.) *Loretto* reiterates that even when a taking is not permanent a "physical invasion is a government intrusion of an unusually serious character." (458 U.S. at 433, citing to *Kaiser Aetna, supra.*) *FCC v. Florida Power Corp.* (1987) 480 U.S. 245 determined that the government affects a physical taking where it *requires* the landowner to submit to the physical occupation of his land. "This element of required acquiescence is at the heart of the concept of occupation." (*Id.* at 252.)

In the present case DWR would appropriate a lengthy, temporary, physical invasion of a portion of PRI's property for the public purpose of determining the route and feasibility of a public project. The Entry Order

requires PRI's forced acquiescence to the occupation of the land by numerous government agents. The use of PRI's property by DWR is related to the use of the eminent domain power for the construction of a public project which is unquestionably a uniquely governmental function. These factors overwhelmingly confirm that the Entry Order would result in a taking.

6. Temporary and Intermittent Takings Require Compensation

The California constitutional protections against the taking of property without just compensation do not require that the taking be permanent. (*Imperial Cattle Co. v. Imperial Irrigation District* (1985) 167 Cal.App.3d 263.) Nor does compensation lie only where the public agency permanently acquires private property. (*Orme v. State of California ex rel. Dept. of Water Resources* (1978) 83 Cal.App.3d 178, 184.) Yet, DWR continually stresses that it will have no continuing interest or rights after the entries are completed. The takings analysis, however, is not changed because the invasions by DWR are temporary.

In general, if particular government action would constitute a taking when permanently continued, temporary action of the same nature may lead to a temporary takings claim. (See *First English Evangelical Lutheran Church of Glendale v. Cnty. of Los Angeles* (1987) 482 U.S. 304, 328; *Arkansas Game, supra,* 133 S.Ct. at 515 ["Ordinarily, this Court's

decisions confirm, if governmental action would qualify as a taking when permanently continued, temporary actions of the same character may also qualify as a taking."].)

Jacobsen also forecloses any finding that the temporary nature of the right of entry prior to condemnation cannot rise to the level of a taking:

> It is idle to attempt to argue that such entry, occupation, disturbance, and destruction of the properties of these petitioners would not constitute such an interference with their exclusive rights to the possession, occupation, use, and enjoyment of their respective holdings as would amount to a taking and damaging thereof to the extent and ***during the period of such entry upon said lands*** and of the operations of the corporation thereon. (*Jacobsen, supra,* 192 Cal. at 328; emphasis added.)

This Court, in *Heimann v. City of Los Angeles* (1947) 30 Cal.2d 746, cites *Jacobsen* as an example of actionable, **temporary** injury to real property resulting from public entity use and interference with private property. (*Id.* at 755-756.) In *City of Needles v. Griswold* (1992) 6 Cal.App.4th 1881, 1890, the court rejected the city's argument that the city's use of Griswold's personal property for 90 days was too brief to result in a taking of property.

DWR also stresses the intermittent nature of its entries but this does not affect the determination of a taking, as continuous occupancy is not required for a taking. (*Kaiser Aetna v. United States* (1979) 444 U.S. 164 [government's desire to provide intermittent public use of a lagoon required

payment of just compensation]; *Hendler, supra,* 952 F.2d at 1377 [the occupation need not be exclusive, continuous or uninterrupted to violate Fifth Amendment].)

7. Restoring Land Does Not Alter the Fact that a Taking Has Occurred

DWR also makes much of the fact that the lands will be returned to as near original condition as possible. In *Orme, supra,* the State Department of Public Works argued that the landowners may not recover for taking caused by flooding because the state's water pumps later lowered the groundwater and reduced the damage to a temporary status. *Orme* rejected the Department's claim that there was no taking because the land could ultimately be restored to its original status, stating "There is no justification for holding that the test of 'taking' is whether the lands thereafter may be restored to their original condition." (83 Cal. App. 3d 178, 184 citing *People by and through the Dept. of Public Works v. Peninsula Title Guaranty Co.* (1956) 47 Cal.2d 29, 34; see also *United States v. Dickinson*, 331 U.S. 745, 751 (1947) [flooding of claimant's land was a taking even though claimant successfully "reclaimed most of his land which the Government originally took by flooding"].)

8. *Arkansas Game* Did Not Enunciate a New Test for Temporary Takings

DWR contends that the U.S. Supreme Court, in *Arkansas Game*, enumerated a new multi-factor analysis that must be applied to all

temporary physical takings. DWR's position fails to recognize the extremely limited holding of *Arkansas Game, supra,* 133 S. Ct. 511. *Arkansas Game* dealt solely with an asserted takings exemption for government induced temporary flooding, resulting from a government policy to release water from a dam. (133 S. Ct. at p. 515-516.) The U.S. Corp. of Engineers between 1993-2000 temporarily modified the flow from its dam to supply downstream farmers which resulted in collateral flooding of a conservation area. (*Ibid.*) The federal circuit reversed the temporary taking finding on the basis that only permanent or inevitably recurring flooding is a taking. (*Id.* at 515.)

The Supreme Court overturned the federal circuit and enunciated a very limited holding: "We rule today, simply and only, that government-induced flooding temporary in duration gains no automatic exemption from Takings Clause inspection." (*Id.* at 522.)

DWR's assertion that the Supreme Court has enunciated a new multi-factor test that other courts must now follow in determining whether a temporary taking has occurred stretches the Supreme Court's opinion beyond its stated purpose. Had the Supreme Court intended to alter the standards for all temporary physical invasions it would have explicitly stated this.

Moreover, *Arkansas Game* does not alter the law that a temporary easement is an interest in real property requiring compensation.

DWR's attempt to apply all of the *Penn Central* and *Arkansas Game* factors as a checklist or single method of determining a taking is contrary to this Court's precedent. In *Kavanau, supra,* 16 Cal. 4th 761, this Court exhaustively analyzed the U.S. Supreme Court's takings jurisprudence including *Penn Central* and identified all of the various factors that might be considered and stated:

> This list is not a comprehensive enumeration of all the factors that might be relevant to a takings claim, and we do not propose a single analytical method for these claims. Rather, we simply note factors the high court has found relevant in particular cases. **Thus, instead of applying these factors mechanically, checking them off as it proceeds, a court should apply them as appropriate to the facts of the case it is considering.** (*Kavanau, supra*, 16 Cal. 4th at 776; emphasis added.)

Under the facts of this case, as noted previously, the character of the intrusion permitted by the Entry Order coupled with the taking of the right to exclude is determinative that a taking would occur. No additional analysis is necessary. There is no reason to analyze all the additional potential considerations identified by *Arkansas Game*. But, in as much as DWR attacks the Court of Appeal analysis, a brief rebuttal in support of the Court of Appeal's analysis is required.

The first *Arkansas Game* factor is duration. Without citation to a single legal authority DWR argues that intermittent entries for 25 to 66 days are not of a sufficient duration to be a taking. (OB, p 22.) The only

rationale given why this duration is not a taking is because the entries are "intermittent" and DWR would have no" right of re-entry" once the testing was complete. (*Id.*) As discussed *supra* at Section B.7 there is no requirement that the activities be continuous or permanent to be a taking. Moreover, the fact that DWR ultimately returns possession and relinquishes rights in the property does not rectify the Constitutional violation that has already occurred. (*First English, supra*, 482 U.S. at p. 332 (Dissent of Justice Stevens) ["the State certainly may not occupy an individual's home for a month and then escape compensation by leaving and declaring the occupation 'temporary'"].)

The argument that the duration is short is belied by the totality of entries sought by DWR. DWR would be permitted to use or enter PRI's land for up to 250 days in one year as follows:

- 14 days geotechnical investigation
- 55 days environmental investigation (by up to 8 persons)
- 32 days to leave pipes and targets related to surveying on property
- 23 days to leave wood stakes on the property
- 126 days to place traps related to 9 species

All of these entries would require the use of PRI's private roads in addition to the land used for the investigations. DWR would effectively be a cotenant in possession for almost 70% of the year rent free. This duration is not a superficial entry but rather a non-exclusive investigatory easement

that results in a temporary taking of property for a public use. (*Hendler*, *supra,* 952 F.2d 1364, 1375–1377.)

The next *Arkansas Game* factor is the impact to the owner's reasonable investment backed expectations. As the Court of Appeal noted this factor is not really raised in a physical invasion case:

> This factor, however, unlike in the context of a regulatory taking where it is routinely utilized, is less significant in an intentional physical invasion that acquires a property right. The more similar a government's action is to a direct taking, the less significant the invasion's economic impact must be in our weighing. This is because if the government intentionally and physically invades private property to the extent it requires a permanent or temporary interest in that property to accomplish its public purposes, it must pay for that interest, no matter how small the interest may be. (224 Cal.App.4th 828, 864-865.)

Nevertheless, DWR fails to analyze the investment backed expectation in the context of California law as required. "The determination whether a taking has occurred includes consideration of the property owner's distinct investment-backed expectations, a matter often informed by the law in force in the State in which the property is located." (*Arkansas Game*, *supra*, 133 S. Ct. at 522 citing *Lucas v. South Carolina Coastal Council* (1992) 505 U.S. 1003, 1019.)

The California law in this instance is found in *Jacobsen, supra,* 192 Cal. at 329 and *County of San Luis Obispo v. Ranchita Cattle Company* (1971) 16 Cal.App.3d 383, 388-389. Both cases held that entry upon

private lands permitted by the Entry Statute cannot amount to anything other than such innocuous entry and superficial examination as would suffice for making surveys or maps. There is nothing in California's background legal principles that would inform a potential owner that an entity with the power of condemnation could have a right to enter and use its land for up to 250 days a year. Thus, PRI has more than a unilateral expectation. (OB, p. 21.) PRI has a reasonable belief and expectation its property will be free of the expansive entries that DWR seeks under the Entry Statute.

DWR next contends, pursuant to *Arkansas Game*, that the severity of the interference militates against the finding of a taking. (OB, pp. 22-23.) The impact on PRI's right to exclude others standing alone is sufficiently severe to find a taking. (*Cwynar v. City of San Francisco* (2001) 90 Cal.App.4th 637, 664-665; *Hendler, supra,* 952 F.2d at 1364-1375) [the right to exclude others is one of the most protected rights of property owners].) PRI however, also details the impact of the physical invasions by DWR in the declaration of Dan McCay (1 PA 278) which is summarized in Section C.2 of this Brief.

Ironically, in noting that severity of the interference is a factor to be considered in determining whether a temporary interference constitutes a taking *Arkansas Game* states: "[W]hile a single act may not be enough, a continuance of them in sufficient number and for a sufficient time may

prove [a taking]. Every successive trespass adds to the force of the evidence." (*Arkansas Game*, *supra*, 133 S.Ct. at 522-523 citing *Portsmouth Harbor Land & Hotel Co. v. United States* (1922) 260 U.S. 327, 329-330.)

This is precisely the issue before this Court. This is not a typical precondemnation entry for a couple of days to conduct a survey. DWR seeks the right to successively enter or store materials on PRI's property for up to 250 days. It is the sheer number of entries and use of PRI's property for all manner of investigation and testing that violates PRI's right to quiet use and enjoyment of its property.

Tellingly, DWR does not cite to any federal or California legal authority to support its argument that the proposed entries are not severe enough to be a taking. DWR completely ignores *Hendler* which found ongoing investigative entries to be a temporary taking. (952 F.2d at 1375–1377.) Nor does DWR reconcile its severity analysis with this Court's holding in *Jacobsen,* which ruled that many of the activities that DWR proposes are severe enough to constitute a temporary taking and damaging of property:

> It is idle to attempt to argue that such entry, occupation, disturbance, and destruction of the properties of these petitioners would not constitute such an interference with their exclusive rights to the possession, occupation, use, and enjoyment of their respective holdings as would amount to a taking and damaging thereof . . . . (*Jacobsen, supra,* 192 Cal.2d at 328.)

Finally, DWR argues that there cannot be a taking unless there is an intent to damage the property. (OB, pp. 24-25.) DWR's "intent to damage" standard is a tort standard that has no bearing on the self-executing protections of California Constitution, Article 1, Section 19. (*Albers v. County of Los Angeles* (1965) 62 Cal.2d 250, 263-264 [physical injury to real property is compensable whether foreseeable or not].) Here DWR seeks a temporary easement to conduct its tests. There is no question that DWR intends to enter and occupy the property. The Court of Appeal correctly concluded:

> Here, . . . [t]he invasions are the foreseeable result of authorized governmental action. These invasions will happen not just once, but are intended to occur up to 66 days over a one-year period by as many as eight people at a time per owner. This is a significant intentional invasion of private property. (224 Cal.App.4th 828, 862.)

The Court of Appeal's analysis is consistent with U.S. Supreme Court jurisprudence and correctly determined that the invasions sought by the Entry Order would result in a taking.

C. Parcel Specific Evidence of Damages is Not Necessary to Enjoin a Constitutional Violation

DWR is preoccupied with the notion that parcel specific evidence of actual damages is a legal prerequisite to finding a taking. (OB, pp. 20, 22 and 27.) DWR's position is legally and factually inaccurate.

1. A Person Does Not Have to Suffer a Constitutional Violation Before Seeking Relief from the Court.

DWR focuses on the evidence not provided by the Owners and completely ignores the evidentiary importance of the Entry Order and DWR's declarations and testimony in support thereof. The Entry Order details all of the activities to be conducted, by how many people, utilizing what types of equipment and for how long. The Entry Order is sufficient on its face to determine that the property interest "awarded" to DWR is a blanket easement that substantially interferes with PRI's property rights, independent of evidence of damages for each specific parcel.

PRI's position is that the lengthy and invasive entries sought would constitute a taking of a temporary easement without payment of just compensation. The Court of Appeal concluded that the entry statutes do not provide for the payment of just compensation. (224 Cal.App.4th 828, 853 and 865.) PRI is not required to suffer an actual constitutional violation before it can seek redress. "The general rule is that where a taking of private property for public use is attempted under the power of eminent domain without any provision having been made for compensation, an injunction will lie." (*Sheffet v. County of Los Angeles* (1970) 3 Cal.App.3d 720, 736 citing *Beals v. City of Los Angeles* (1943) 23 Cal.2d 381, 388 and *Geurkink v. City of Petaluma* (1896) 112 Cal. 306, 309.)

Again, *Jacobsen* is instructive. The court stated the very existence of an unconstitutional entry order "cast a shadow over [the Owners] right to the full and exclusive use, enjoyment and disposition" of their property. (*Jacobsen, supra,* 192 Cal. at 330.) "That their property is less valuable, less usable, less leasable and less salable with the shadow of the impending [entry order] and threatened taking or damage hanging over it would seem to be beyond dispute of question...." (*Ibid.)* The entry order was more than error; "it was a transgression of a fundamental right guaranteed to every citizen charged with an offense or whose property is sought to be taken, of being heard before he is condemned to suffer injury." (*Jacobsen, supra,* 192. Cal. 332.)

The mere cloud of the unconstitutional entries constitutes sufficient damage and individualized damage assessments are not required.

2. DWR Misstates the Evidence Produced by PRI

Even if some parcel specific factual evidence is necessary PRI has met this standard. DWR's brief understates the evidence of substantial interference produced by PRI in the declaration of Daniel McCay. (1 PA 278.) While Mr. McCay does qualify some of his concerns with the word "potential," he does not equivocate with the following statements:

- The access requested by DWR will significantly interrupt the ongoing economic activities on the property. (1 PA 283:1-3.)

- It will destroy crops. (1 PA 283:4.)
- DWR's requested access, including daily access to check traps, would significantly disrupt fertilization and the use of pesticides. (1 PA 283:17-19.)
- Every pit or bore hole located in a field will necessarily destroy any crops located at and around the test location. (1 PA 283:20-21.)[3]
- Harvesting crops with the presence of such pits and bore holes will require circumnavigating each study location. (1 PA 283:21-22.)
- Installation of survey stakes at one hundred-foot intervals will require traversing through the growing crops and the destruction of some portion of the crops at and between each installed stake. (1 PA 284:3-5.)
- Installation of an unspecified number of animal traps, to be checked on a daily basis over the course of one full year, will damage crops in the vicinity of the traps. (1 PA 284:6-8.)
- At a minimum, coordinating harvesting around the locations of an unspecified number of existing traps will

[3] DWR's original Petition for Entry sought to dig test pits five feet wide and 20 feet long. DWR withdrew the test pits when it amended its Petition.

significantly increase the time and work associated with harvesting.

(1 PA 284:9-11.)

None of these statements are qualified. Therefore, DWR misstates Daniel McCay's declaration in stating that there is no evidence of economic impact or interference to PRI's Property (OB, pp. 20, 22 and 27).

D. The Precondemnation Entry Statutes (Code of Civil Proc. Sections 1245.010-1245.060) Do Not Provide a Constitutionally Valid Eminent Domain Proceeding for the Intentional Taking of Property.

1. Constitutional Requirements of Article 1, Section 19

Under our system of government, all powers not granted by the Constitution of the United States to the federal government are reserved to the states; and the power of eminent domain is one of those reserved powers. This power however, may be limited by constitutional provision. (*Rose v. State* (1942) 19 Cal.2d 713, 719.) Article I, Section 19 is one of these limiting provisions. The constitutional limitations are easily discernable from the text of the Article 1, Section19 (a):

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

Article I, Section 19, therefore, is a restriction placed by the Constitution upon the State itself, and upon all of its agencies who derive from it their power of eminent domain. (*Rose v. State* (1942) Cal. 2d 713, 720.) In addition to a public use, Article I, Section 19 (a) imposes additional constraints on the exercise of the power of eminent domain and early possession by requiring an action in eminent domain be initiated, a deposit of probable just compensation and a jury trial (unless waived) to determine that compensation.

This Court has determined that a taking occurs at the time of possession. (*Redevelopment Agency v. Gilmore* (1985) 38 Cal.3d 790, 801.) The California Constitution requires that just compensation be ascertained by a jury *before* the taking occurs unless the public entity avails itself of the one exception to the general rule which is detailed in the second sentence of Article I, section 19(a).

The one exception to this general rule is that "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."[4] (Art. 1, Section 19(a).)

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[4] The Legislature has enacted provisions pursuant to this constitutional grant. See Code of Civil Procedure sections 1255.010 – 1255.480.

Thus, the California Constitution "presents a public agency with two alternative courses of action before it may exercise its power to take private property for public benefit." (*City of Needles v. Griswold* (1992) 6 Cal.App.4th 1881, 1892.) First, it may comply with the general rule by trying the action before a jury, "allowing the jury to determine the amount of compensation due to the property owner, and taking possession only after that sum has been paid to the owner (or deposited into the court if the owner is appealing)." (*Ibid.*) Or, "it may avail itself of the right to file a condemnation action, ask the court to estimate the probable amount of compensation which would be found to be due at trial, deposit that sum with the court for the owner's benefit, and take immediate possession of the property while the action is pending." (*Ibid.*)

2. The Entry Statutes Fail to Comply with the Requirements of Article I, Section 19.

DWR advances novel contentions that the entry statutes are intended to be a proceeding under the eminent domain law for the condemnation of property and the procedural requirements of the entry statutes complies with the requirements of Article 1, Section 19. (OB, pp. 36, 37-41.) DWR's contentions do not withstand scrutiny.

First, the entry statutes do not require a complaint in eminent domain prior to the issuance of the entry order. Instead the entry statutes only require a petition. (Code of Civil Procedure section 1245.030(a).) A

complaint in eminent domain is an implicit requirement under the general rule and an explicit requirement under the exception. "The only legal procedure provided by the constitution and statutes of this state is that of a condemnation action...." [N]o court in any other action or proceeding than an action in eminent domain has jurisdiction to order the taking or damage of private property for a public use." (*Jacobsen, supra,* 192 Cal. at 331; *Griswold, supra*, 6 Cal.App. 4th at 1895-1896.)

DWR's argument that the Legislature intended the entry statutes as an alternative proceeding to condemn property is contradicted by Code of Civil Procedure section 1250.110: "[a]n eminent domain proceeding is commenced by filing a complaint with the court." Yet the entry statutes are initiated by a petition. (Section 1245.030.) To argue, as DWR does, that a petition is the equivalent of a complaint to commence an eminent domain proceeding is contrary to the rules of statutory construction. "[W]hen the legislature has carefully employed a term in one place and has excluded it in another, it should not be implied where excluded." *(Grubb & Ellis Co. v. Bello* (1993) 19 Cal.App.4th 231, 240.) Had the legislature intended to permit eminent domain proceedings to be commenced by petition than the Legislature would have included a petition in Section 1250.110.

a. The Deposit Under the Entry Statutes is Not Just Compensation

DWR incorrectly equates the deposit of probable compensation under Code of Civil Procedure section 1245.030, subd. (b) with the just compensation mandated by Article 1, Section 19. The deposit provided for in Section 1245.030, subd. (b) is for "actual damage to or substantial interference with the possession and use of the property." The entry statutes do not address just compensation for entry but, rather only permit for reimbursement of actual damages *after* the entry has concluded and upon an application by the owner (Code of Civil Procedure section §1245.060 and Law Revision Commission Comment thereto.)

The trial court specifically ruled: "The court finds that the probable amount of compensation is not based on the rental value . . . . Instead it is based on the probable damages or interference to the use of the property." (5 Petitioners' [Nichols, et al.] Appendix of Exhibits in Support of Petition for Writ of Mandate, Prohibition or Other Appropriate Relief p. 1291.)

The Court of Appeal similarly determined that:

> The 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 substantial interference with its possession or use where an interest in property was not intentionally taken. (224 Cal.App.4th 828, 852.)

The Court of Appeal's conclusion is correct. To effectuate just compensation the entry statutes must provide a landowner with the rental value for the period of the taking **plus** any damages to the property that may result. (*Sacramento and San Joaquin Drainage District v. Goehring* (1970) 13 Cal.App.3d 58, 66 citing 4 Nichols on Eminent Domain (3d ed.) § 12.5, p. 343.)

Federal precedent confirms that the proper standard of compensation in a temporary takings context is the fair rental value of the property taken. (*Kimball Laundry Co. v. United States* (1949) 338 U.S. 1, 7, *United States v. General Motors* (1944) 323 U.S. 373 and *United States v. Petty Motor Co.* (1946) 327 U.S. 372.)

The Supreme Court's logic is persuasive on why rental value must be applied in temporary takings cases:

> Indeed, if the difference between the market value of the fee on the date of the taking and that on the date of return were taken to be the measure, there might frequently be situations in which the owner would receive no compensation whatever because the market value of the property had not decreased during the period of the taker's occupancy. (*Id.*)

The compensation allowed under the entry statutes does not provide for the rental value of the property. The statute only permits a landowner to be compensated or reimbursed for actual damages to the property.

The Dissent to the Opinion contends that the compensation provided for in the entry statutes includes compensation for the use of the property as well as damages. (224 Cal.App.4th at 886 [value of the property's use is the measure of just compensation in the entry statute].) As a firm specializing in eminent domain we can confirm that the Dissent is laboring under a misconception about how trial courts and public entities have applied the entry statutes. Public entities consistently contend there is no compensation for the actual entry on use of the property required and an owner must prove actual damages to receive **any** compensation. The failure to provide for just compensation precludes the entry statutes from being used to take property.

b. The Entry Statutes Do Not Provide for Prompt Release at Time of Possession

Further, the deposit provisions of the entry statutes do not comply with the Constitutional mandate that the just compensation be available to the owner at the time of possession. (*Steinhardt v. Superior Court* (1902) 137 Cal. 575, 578-579 [early possession provision found unconstitutional

as the owner could not immediately withdraw the funds, nor had the amount of compensation yet been decided by a jury].[5])

The compensation the entry statutes provide is only for actual damages or substantial interference that happens *after* possession is taken. DWR does not explain how filing a claim only after actual damages occur rather than at the time of possession comports with Article 1, Section 19.

DWR argues that the entry statutes are similar to the quick take provisions which this Court determined to be constitutional in *Mt. San Jacinto v. Azusa Pacific* (2007) 40 Cal.4th 648, 657-658. The reason this Court found the quick take procedure to be constitutional was the availability of the just compensation at the time of possession. (*Id.*) Thus, *Mt. San Jacinto* supports PRI's contention that the entry statutes do not comport with the constitutional requirements because possession (entry) is granted prior to an owner having a right to any compensation.

c. The Entry Statutes Do Not Provide for a Jury Determination of Just Compensation

Finally, the entry statutes authorize a judge, without a jury, to award damages after the entry. The lack of a jury to ascertain just compensation prior to the entry precludes any argument that the entry statutes comply with the general rule requiring a jury determination prior to the taking.

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[5] *Steinhardt* interpreted a different Constitutional provision but the policy underlying the *Steinhardt* decision was incorporated into art. I, § 19(a). (*Mt. San Jacinto v. Azusa Pacific* (2007) 40 Cal.4th 648, 657-658.)

DWR's contention that an individual can file a separate action to secure a jury determination improperly puts the onus on the owner to sue and impermissibly shifts the burden as the Court of Appeal identified. (224 Cal.App.4th 828, 852-855.)

3. Just Compensation is Solely a Judicial Function

DWR contends that the legislative history demonstrates "that the legislature specifically drafted [the entry statute] to comply with the just compensation clause . . . the legislature's determination that these statutes provide constitutionally valid procedures to accomplish the specific activeties that they authorize is entitled to substantial deference." (OB, p. 34.)

DWR's contention is incorrect. Although deference is accorded legislative judgment when a statute is challenged as exceeding the permissible scope of the police power, no question of deference arises when just compensation is sought under the takings clause. (*Santa Monica Beach, Ltd. v. Superior Court* (1999) 19 Cal. 4th 952, 1006 ["When a claim for just compensation is made under the takings clause, however, deference is neither appropriate nor permitted."].)

"Because 'just compensation' is a concept rooted in the federal constitution it cannot be abrogated by state law, the process of determining just compensation is purely a judicial function which cannot be circumscribed by the legislature. When the state takes or damages private property it cannot through its legislative arm limit the price it will pay or

the manner of its payment." (*Aetna Life & Cas. Co. v. City of Los Angeles*, (1985) 170 Cal. App. 3d 865, 879 citing *Monongahela Navig'n Co. v. United States* (1893) 148 U.S. 312, 327, 13 S.Ct. 622, 626; see, also *Redevelopment Agency v. Gilmore, supra,* 38 Cal.3d at 797 [Elements of just compensation "cannot be made to depend upon state statutory provisions."].)

DWR's focus on legislative intent is the proverbial "red-herring." The proper inquiry is not what the Legislature intended when it adopted the entry statutes. Rather the inquiry is whether the entry statutes actually fulfill the requirements of Article 1, Section 19 for the taking of property. This is a strictly judicial question and no deference to the Legislature is required.

Regardless of what the Legislature intended the entry statutes fail to provide for just compensation, prompt release of just compensation prior to or contemporaneous with taking, or a jury determination of the compensation due. Therefore the entry statutes cannot be applied as an alternate eminent domain proceeding.

E. DWR's Public Policy Arguments Are Overblown

1. DWR's "Added Burden and Costs" Argument is Contrary to the Purpose of the Just Compensation Clause.

Our State and Federal Constitutions guarantee property owners "just compensation" when their property is "taken for a public use." (Cal.

Const., art. 1, § 19; U.S. Const., 5th Amend. *Kavanau v. Santa Monica Rent Control Board* (1997) 16 Cal.4th 761, 770. ["The determination that governmental action constitutes a taking is, in essence, a determination that the public at large, rather than a single owner, must bear the burden of an exercise of state power and the public interest."] *Id.* citing *Agins v. City of Tiburon* (1980) 440 U.S. 255, 260.) The Fifth Amendment's just compensation provision is "designed to bar government from forcing some people alone to bear public burdens which, in all fairness and justice should be borne by the public as a whole [citation]." (*First Lutheran Church v. Los Angeles County* (1987) 482 U.S. 304, 318-319.)

Yet, DWR contends that the Court of Appeal should be reversed because of costly and unnecessary delays for public projects. (OB, p. 41.) The burden on the public entity is not a proper basis for denying just compensation. The Court of Appeal recognized this principle and stated "[N]o doubt our ruling imposes more work on condemning agencies and the courts. However, constitutional rights against the exercise of the eminent domain authority are not subject to the convenience of the government." (224 Cal.4th at p. 866; see also *In re Kevin G.* (1985) 40 Cal.3d 644, 648 ["Impairment of constitutional rights . . . will not be suffered in return for efficiency"].)

DWR details all steps it must go through to condemn property once property is determined to be suitable for a project. (OB, p. 41.) These "steps" are actually protections put in place to protect landowners.

DWR does not explain why an owner whose property is taken or damaged **before** the public agency determines it is suitable for condemnation is not entitled to the same protections. Under DWR's argument the owner's protections depend on what step in the process the public agency is in and totally disregards whether the activities constitute a taking or damaging of property.

2. Public Entities Can Still Conduct Extensive Investigations but Must Condemn an Easement

DWR's concerns also ignore reality. Public agencies can and often do negotiate with landowners for entries. This is what happens in many cases provided the proposed entries are short and noninvasive. Where the entries are invasive the public agency can avoid condemnation actions by purchasing easements from the owners. Thus condemnation actions will be avoided in most precondemnation entry situations.

Requiring trial courts to apply constitutional constraints to rights of entry does not mean that DWR or other public entities are without a means to undertake extensive investigations and studies prior to embarking on the construction of a public project. The public entity can file a condemnation action for a temporary easement to conduct the investigation for a specified

period with payment of just compensation for the investigatory easement. (See Julius L. Sackman, *Nichols on Eminent Domain*, 3rd Ed., section 32.06; *Gernand v. Illinois Commerce Commission* (1997) 286 Ill.App.3d pp. 945-946. [If invasive acts are to be performed while on the land as part of a precondemnation entry, the condemnor entering upon the land should exercise its powers of eminent domain to seek a temporary easement.].)

Gernand v. Illinois Commerce Commission (1997) 286 Ill. App.3d 934, though decided in another jurisdiction, is factually and legally supportive of PRI's argument that invasive, prolonged studies to determine feasibility prior to condemnation are beyond the scope of precondemnation right-of-entry statutes and require a temporary construction easement. *Gernand* dealt with a public entity which desired to do testing to determine the most feasible solution to a ground water pollution problem. (*Id.* at 937.) The public entity initially sought access to conduct the testing by availing itself of the Illinois statute permitting precondemnation land surveys. The condemnor's request was denied because the testing procedures went beyond the scope of the statute. (*Id* at 941.) The public entity then sought to condemn temporary easements to conduct the tests and the court determined that this was the proper procedure. (*Id.* at 941, 944.)

V. CONCLUSION

The Entry Order and proposed geological activities are more than a noninvasive survey of PRI's property. PRI's property would be occupied

and controlled by DWR wherever DWR's environmental investigators deem it necessary to go, on whatever days they decided, over a one-year period. DWR's geologic consultants would bore and take soils at depths to 205 feet from the land and leave the holes filled with bentonite. During the time of drilling its agents would store equipment, vehicles and barrels of extracted earth on the land.

All of this requires physical occupancy and control of the land by DWR's agents.

To undertake such an occupancy DWR must comply with all the constitutional protections afforded landowners and not attempt to use the entry statutes to secure an uncompensated taking. The Court of Appeal determination that the Entry Order be reversed and the geological activities be denied should be affirmed.

Dated: December 5, 2014 MATTEONI, O'LAUGHLIN & HECHTMAN

By: _____
Gerald Houlihan

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CERTIFICATE OF COMPLIANCE

I, GERALD HOULIHAN, hereby certify that the attached

PROPERTY RESERVE, INC.'S ANSWER BRIEF ON THE MERITS

uses a 13 point Times New Roman font and contains words.

MATTEONI, O'LAUGHLIN &
HECHTMAN

Date: December 5, 2014

By: _____
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CERTIFICATE OF COMPLIANCE

I, GERALD HOULIHAN, hereby certify that the attached

PROPERTY RESERVE, INC.'S ANSWER BRIEF ON THE MERITS

uses a 13 point Times New Roman font and contains 13,983 words.

MATTEONI, O'LAUGHLIN & HECHTMAN

Date: December 5, 2014

By: _____

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DECLARATION OF SERVICE BY U.S. MAIL

I, Carol Ann Bianco-Webb, declare: I am a citizen of the United States, over 18 years of age, and not a party to the within action. I am employed in the County of Santa Clara; my business address is 848 The Alameda, San Jose, CA 95126.

On December 5, 2014, I served the attached **PROPERTY RESERVE, INC.'S ANSWER BRIEFS ON THE MERITS** on all parties in this action, as addressed below, by causing a true copy thereof to be distributed as follows:

✔ BY MAIL: I am "readily familiar" with the firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with the U.S. Postal Service on that same day with postage thereon fully prepaid in the ordinary course of business in San Jose, CA.

See Attached Service List

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

Carol Ann Bianco-Webb

Carol Ann Bianco-Webb

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California Supreme Court Case No. S217738

Property Reserve, Inc. v. Superior Court (Department of Water Resources)

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