

ARTICLE:***PROPERTY RESERVE, INC. V. SUPERIOR COURT: WHEN A GOVERNMENTAL ENTRY TO TEST AND INSPECT PRIVATE PROPERTY MAY NOT BE A “TAKING”***

*By Basil (“Bill”) Shiber**

I. INTRODUCTION.

A recent decision by the California Supreme Court in *Property Reserve, Inc. v. Superior Court*¹ articulates the roughly four ways the government can legally enter onto or take private property. Those are:

1. It has permission of the property owner;
2. In an emergency, as a function of its police power (Tenth Amendment to the United States Constitution);
3. It takes private property for a public purpose, and pays just compensation (Fifth Amendment to the United States Constitution, made applicable to the states through the Fourteenth Amendment); or
4. It has a search warrant, based on probable cause (Fourth Amendment to the United States Constitution).

The Supreme Court’s opinion in *Property Reserve* is a mashup of the first three of these concepts. The question in *Property Reserve* was whether the California statute authorizing precondemnation entry and testing by the government (i) authorizes physical occupation of and changes to the property, and if so, whether it (ii) satisfies constitutional requirements for the taking of private property.

While the *Property Reserve* decision ultimately answered those questions affirmatively, it may have cut some constitutional corners to get there. Among other things, the court’s analysis turns on the notion that a “common law right of entry” exists in favor of the government that allows intentional and somewhat invasive governmental entry upon, testing, and inspection of private prop-

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erty that is potentially compensable but not necessarily subject to other restrictions on governmental takings of property for public use.

II. THE PRECONDEMNATION ENTRY AND TESTING STATUTE.

A. Authorized Activities.

The legislation under scrutiny was Code of Civil Procedure sections 1245.010-1245.060, which authorize precondemnation entry and testing activities by the government on property being considered for acquisition. The statutes provide: “Subject to requirements of this article, any person authorized to acquire property for a particular use by eminent domain may enter upon property to make photographs, studies, surveys, examinations, tests, soundings, borings, samplings, or appraisals or to engage in similar activities reasonably related to acquisition or use of the property for that use.”²

The current precondemnation entry and inspection statutes were enacted in 1975, as the culmination of a multiyear effort to update and reorganize California’s eminent domain statutes into a comprehensive statutory scheme.³ Of significance according to the *Property Reserve* court, the modern statute as enacted in 1965 added the word “borings” as one of the listed categories of activities authorized by the precondemnation entry and testing statutes.⁴ In the Supreme Court’s view, this change made it clear that the modern precondemnation entry and inspection statutes were not intended by the legislature to be limited to “innocuous” and “superficial” activities that did not physically affect the property.

B. Procedure For Issuance Of Order Authorizing Entry And Testing.

Before precondemnation entry or testing can occur, the statute requires either “the written consent of the owner to enter upon his property and to undertake such activities” or “an order for entry from the superior court. . .”⁵ The statute sets forth the procedure governing an order for entry as follows: “(a) The person seeking to enter upon the property may petition the court for an order permitting the entry and shall give such prior notice to the owner of the property as the court determines is appropriate under the circumstances of the particular case. (b) Upon such petition and after such notice has been given, the court shall determine the purpose of the entry, the nature and scope of the activities reasonably necessary to accomplish such purpose, and the probable amount of compensation to be paid to the owner of the property for the actual damage to the property and interference with its possession and use. (c) After

such determination, the court may issue its order permitting the entry. The order shall prescribe the purpose for the entry and the nature and scope of the activities to be undertaken and shall require the person seeking to enter to deposit with the court the probable amount of compensation.”⁶

C. Recovery Of Damages By Property Owner.

The statute authorizes the trial court, after notice and hearing, to modify any order entered and to require the public entity to deposit additional funds if it determines the initial deposit is inadequate.⁷ The funds deposited must remain on deposit for six months following the termination of the entry, unless they are sooner disbursed by the court.⁸

The statute also addresses the property owner’s right to recover damages relating to the entry: “(a) If the entry and activities upon property cause actual damage to or substantial interference with the possession or use of the property, whether or not a claim has been presented in compliance with [the California Tort Claims Act presentation requirements], the owner may recover for such damage or interference in the civil action or by application to the court under subdivision (c) . . . (c) If the funds are on deposit under this article, upon application of the owner, the courts will determine and award the amount the owner is entitled to recover under this section and shall order such amount paid out of the funds on deposit. If the funds on deposit are insufficient to pay the full amount of the award, the court shall enter judgment for the unpaid portion. (d) Nothing in this section affects the availability of any other remedy the owner may have for the damaging of his property.”⁹

III. CONTENTIONS OF THE PROPERTY OWNERS AND LOWER COURT DETERMINATIONS.

The *Property Reserve* case involved a massive water conveyance project designed to deliver water from northern California to central and southern California. As part of analyzing the project’s feasibility and environmental impacts, the State Department of Water Resources sought to conduct environmental and geological activities on 150 privately-owned parcels of property in San Joaquin, Contra Costa, Solano, Yolo, and Sacramento Counties. The activities consisted of physical mapping and surveying work on the property, as well as drilling deep holes to determine subsoil conditions. The activities at issue were divided into two categories for purposes of lower court consideration, the “environmental activities” and the “geological activities.”

A. Trial Court Order Authorizing Environmental Activities.

The trial court issued an order authorizing the environmental activities, which included entry onto the property for a maximum of 25 to 66 days (depending on property size) over a one year period in order to conduct designated environmental survey, sampling, and testing activities under conditions and limitations set forth in the order. The activities would generally be conducted by walking, visual observation, minor soil and plant sampling, and testing, photography, and trapping and releasing small animals. The number of persons per entry varied from two to eight persons, depending on the property size.

B. Trial Court Order Denying Petition To Conduct Geological Activities.

The proposed geological activities included “cone penetrometer testing” (CPT), which involved pushing a long rod that emits signals into the ground to determine the subsurface composition of the tested land. This testing creates a hole that is one and one-half inches in diameter and up to 205 feet in length, and that is refilled after the rod is withdrawn. The process generally requires four persons and up to four vehicles, including a truck, as well as a portable toilet, and is generally completed in one day.

In addition to the CPT testing, on some properties there was a need to drill additional, larger “soil borings” or “drill holes” that would generally be located in the vicinity of the CPT hole. These holes would range from 3-7/10ths to 8 inches in diameter and would reach up to 205 feet in depth. This process required a five person crew with larger and more equipment than the CPT, including a drilling rig, forklift, and support truck, and required the use of an area of up to 100' x 100' for a period of between 5 and 10 days. The holes would be refilled with bentonite grout, and the top two to five feet would be refilled with native topsoil.

The request to undertake these geological activities was denied by the trial court, which relied heavily on a 1923 Supreme Court decision, *Jacobsen v. Superior Court*,¹⁰ denying a public entity’s request to conduct similar drilling activities under the then-operating statute. In that case, the California Supreme Court held that the then-operative precondemnation entry and testing statute only authorized “innocuous entries and superficial testing” and not boring holes and other physical disturbances, which amounted to a taking.¹¹ Although

changes were made to the statute after the *Jacobsen* opinion, the trial court concluded that the current statute did not contemplate the type of drilling and other activities proposed, and that *Jacobsen* controlled.

C. Court Of Appeal Decision: No Environmental Or Geologic Activities.

The trial court's determinations in *Property Reserve* were appealed to the Court of Appeal, and the Court of Appeal, in a 2-1 decision, affirmed the trial court order insofar as it denied the petition to conduct geological activities, but reversed the trial court order insofar as it granted authority to conduct the environmental activities.

Like the trial court, the Court of Appeal relied heavily on the 1923 *Jacobson* decision, and concluded that the current precondemnation entry and testing statutes would be constitutionally valid only if the statutes were interpreted to authorize activities that are sufficiently "innocuous" and "superficial" that they do not constitute a taking or damaging of property within the meaning of the California takings clause. In the majority's view, the proposed geological activities would result in permanent structures being placed on the subject properties for extended periods and the effective acquisition of a "temporary blanket easement for one year." Such an easement was a compensable property interest and the precondemnation entry and testing statutes did not authorize the acquisition of such an interest. Justice Blease dissented, concluding that neither the environmental activities authorized by the trial court nor the geological activities proposed by the government constituted a taking or damaging of property.

D. California Supreme Court Grants Review.

The California Supreme Court granted review of the court of appeal decision. The questions before the Court were (1) whether the activities contemplated by the government—and particularly the activities involving physical drilling and occupation of the property—were a taking, (2) whether those activities were authorized by the precondemnation entry and testing statutes, and (3) whether those statutes met constitutional requirements, specifically the Fifth Amendment to the United States Constitution and Article I, Section 19 of the California Constitution.¹²

IV. CONSTITUTIONAL FRAMEWORK.

As noted above, when the government enters onto or takes private property, several state and federal constitutional rights are potentially implicated.

A. Federal Takings Clause.

The Federal Takings Clause, set forth in the Fifth Amendment of the United States Constitution, concisely states: “Nor shall private property be taken for public use without just compensation.” The United States Supreme Court has interpreted the Federal Takings Clause to require a state to establish a procedure through which a property owner can recover just compensation after a taking has occurred. While the Fifth Amendment requires the payment of just compensation, it does not require that such compensation be paid in advance of, or contemporaneously with, the taking.¹³

B. California Takings Clause.

The Takings Clause of the California Constitution, embodied in Article I, section 19, subdivision (a), provides: “Private property may be taken or damaged for a public use and only when just compensation, ascertained by the 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.”

The California Takings Clause differs from the Federal Takings Clause in that it affords a property owner the right to have just compensation determined by a jury. Moreover, the first sentence requires the payment of compensation before the actual condemnation. However—and this was important for purposes of the issues under review in the *Property Reserve* case—this latter requirement is qualified by the second sentence: “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.”

In some cases, a government project cannot wait on the jury’s determination of just compensation, but rather must proceed in the interim. In that situation, the second sentence of the clause allows the government to obtain immediate possession by deposit of probable compensation, subject to the property owner’s

ultimate right to have a jury determine what is due. On this authority, the Legislature has enacted the “quick take” statutes.¹⁴

C. The Police Powers Clause.

Under the Tenth Amendment to the United States Constitution, the powers not delegated to the federal government are reserved to the states or to the people. These residual powers—or the states’ “police power”—are exercised through the enactment and enforcement of laws. As discussed below, this principle was lurking—like a modern-day photo bomber—in the background of the *Property Reserve* opinion.

V. THE CALIFORNIA SUPREME COURT’S ANALYSIS.

The Supreme Court’s analysis involved measuring the precondemnation entry and testing statute against the requirements of the California and Federal Constitutions to determine if the statute met those requirements.

A. Federal Takings Clause.

The Court first considered the federal Takings Clause and noted that it does not require (1) determination of compensation by a jury, nor (2) payment of compensation before the condemnation occurs. All that the Federal Takings Clause requires is that the state make available a process by which just compensation can be recovered after the taking has occurred. The court held that the precondemnation entry and testing statutes meet those requirements because they not only provide for a statutory compensation procedure, but also expressly preserve a property owner’s right to pursue and obtain damages in a civil action, including through an inverse condemnation action.¹⁵ Thus, the law provides “a reasonable, certain and adequate” procedure for compensation, meeting the requirements of the federal Constitution.¹⁶

B. California Takings Clause.

The Court’s analysis with respect to the California Takings Clause was where the case turned. Specifically, the Court noted that the California Takings Clause provides that private property may be taken or damaged for public use “only when just compensation, ascertained by a jury unless waived, has first been paid to, or into court for, the owner.”¹⁷ Thus, at least in its first sentence, the California Constitution requires both a (1) jury determination of compensation due, and (2) compensation prior to condemnation. As noted earlier, however, the

second sentence of the clause qualifies the latter requirement because it states that “the Legislature may provide for possession by the condemnor following the 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.” Thus, the Legislature may provide for immediate possession if an “eminent domain” proceeding is commenced and probable compensation deposited. The precondemnation entry and testing statutes provide for deposit of “probable compensation,” so the question was whether the statutes constituted an “eminent domain proceeding” allowing for prejudgment possession.

The Court then noted that a “classic” condemnation action is ordinarily required when a public entity seeks to acquire title to property. That type of action is governed by the “quite elaborate and lengthy process” set forth in the Eminent Domain Law and related statutes.¹⁸ However, the Court noted that the California Takings Clause does not require the commencement of a “classic” condemnation action whenever private property is taken or damaged for a public use. For example, a property owner has the right to institute an *inverse condemnation action* after a taking has occurred, in which proceeding a property owner may recover just compensation, just as it would in a classic condemnation action.¹⁹

The Court further noted that the situation before it involving precondemnation entry and testing “falls between the classic condemnation proceeding where the public entity is seeking to obtain title to or compensable property interest in the property and the typical inverse condemnation where the public entity does not intend to enter or intrude upon private property but damage to such property nonetheless ensues.”²⁰ It is in that “middle ground” that the precondemnation entry and testing statutes were intended to operate.

The Court also noted the general police power recognized at common law, which authorizes public entities “to enter and to engage in official activities on private property for a very wide range of purposes [such as] to execute search warrants, to conduct health and safety inspections, to enforce fish and game regulations, to carry out workplace inspections, and to investigate and eliminate nuisances.”²¹ The Court observed the general rule that statutes are presumed to be constitutional.²²

With those background principles in mind, the Court analyzed the specific orders at issue.

C. Are The Proposed Activities A Taking In The First Instance?

With respect to the environmental testing activities, the Court noted that “it is questionable . . . whether the authority afforded by the trial court’s environmental order can accurately be characterized as granting the department a compensable property interest for purposes of the State Takings Clause.”²³ While noting the well-established principle that “the right to exclude others is one of the most essential sticks in the bundle of rights that are commonly characterized as property,”²⁴ the Court referred to what it called the “common law rule” allowing public officials the privilege to enter private property in order to conduct statutorily authorized activities on such property.

According to the Court, the right to exclude is not “an absolute or unqualified attribute of property ownership [and] entries onto private property by public officials or employees to conduct statutorily authorized activities are a long-recognized limitation of a property owner’s right to exclude others.” Here, the environmental activities were designed to minimize any interference with the landowner’s use of the property, the landowner would retain full possession of the property, and no significant damage to the property was intended or anticipated. The Court held these types of nonintrusive governmental entries were similar to those authorized by the general police power to enter onto property for a valid purpose.²⁵

The Court expressed similar doubt that the proposed geologic activities constituted a taking, noting that even though the property was to be physically altered, it would be returned to (or very close to) its original condition. The Court noted that United States Supreme Court precedent holding that a physical invasion or entry, however slight, constituted a taking²⁶ was distinguishable, because of the absence of any permanent occupation or change to the property.²⁷

Ultimately, the Court sidestepped the question whether the activities were a taking by concluding it need not decide the issue because even if they were, they were authorized by the precondemnation entry and testing statutes.

D. Assuming The Activities Are A Taking, Does The Statute Satisfy The California Takings Clause?

The Court first determined that there was no requirement of a “classic” condemnation action prior to precondemnation entry and testing. “A classic condemnation action is required when a public entity seeks to obtain legal title

or permanent property interest in private property” but “in the precondemnation entry and testing setting, a public entity is not seeking to obtain legal title to a property interest or exclusive possession of any portion of the property for a significant period of time.”²⁸ The Court noted that the trial court and Court of Appeal’s reliance on its earlier opinion in *Jacobson v. Superior Court*²⁹ was misplaced, because that case preceded revisions of the entry and testing statutes that were designed to address the issues raised by *Jacobson*.

The current statute requires a public entity (1) to seek and obtain a properly limited court order prior to undertaking precondemnation activities, (2) to deposit into court the amount likely to cover any loss that the property owner sustains as a result of those activities, and (3) to pay damages to the property owner to compensate for any injury or substantial interference with possession or use that the owner incurs as a result of the activities.³⁰ These provisions were intended by the Legislature to satisfy the obligations imposed by the California Takings Clause, and they did. The procedure set forth in the statute, according to the Court, is authorized by the second sentence of Article I, section 19, subdivision (a) of the California Constitution, which, although designed for the “quick take” context,³¹ is not limited to that context.

The one flaw the Court found in the precondemnation entry and testing statutes was that those statutes do not expressly provide for the right to a trial by jury to determine the amount of just compensation. That right is guaranteed by the California Takings Clause, and therefore to the extent that it is not provided for by the precondemnation entry and testing statutes, those statutes are unconstitutional.³²

However, rather than holding the statutes unconstitutional, the Court elected to reform the statutes so as to afford the property owner the option of obtaining a jury trial on damages. In support of this approach, the Court noted that a statute may be judicially reformed to meet constitutional requirements if the Court “can conclude with confidence that (i) it is possible to reform the statute in a manner that closely effectuates policy judgments clearly articulated by the enacting body, and (ii) the enacting body would have preferred such a reformed version of the statute to invalidation of the statute.”³³ Those requirements were met, according to the Court.

Justice Liu concurred in the majority’s conclusion but would have held that “Article I, Section 19(a)’s requirement that a public agency commence a classic

condemnation proceeding before taking property does not apply to situations where there is genuine uncertainty as to whether or to what extent a taking or any damage will occur.”³⁴ Justice Liu noted that the purpose of California’s Takings Clause is not to prevent the government from undertaking legitimate activities that may impact property rights, but rather to ensure that just compensation is paid. Justice Liu’s concurrence reflected an academic difference of opinion with respect to the correct analysis, but reached the same result.

VI. CONCLUSIONS AND OBSERVATIONS.

As noted at the outset of this article, the Court’s opinion in this case is a results driven mashup of several concepts. The Court recognizes the practical importance of testing and inspection prior to the government committing to a condemnation, and saves the Legislature from itself by reforming the statute to include an omitted right to jury trial.

However, the Court in its background analysis implies that the general police powers of the government to enter onto and physically change property are broader than they actually are. In the situations referred to by the Court, the government’s activities were not directed at the property per se, but rather were intended to enforce other laws and regulations. The police power exception to the requirement of just compensation is appropriate only when a significant, emergent public interest is furthered under the pressure of public necessity.³⁵ Stated another way, at least up until the *Property Reserve* decision, it could be assumed that the police power defense could only be utilized when there was a true emergency requiring immediate governmental action. That is clearly not the case with a project that has been planned over an extended period of time.

In *Property Reserve*, the Court implies that the government entering onto and temporarily occupying private property to determine if it is suitable for acquisition is similar to a utility meter reader entering onto property for purposes of calculating what the property owner owes, or a policeman chasing a thief. However, in the examples cited, it is a benefit or service provided to the property owner that triggers the government’s entry, whereas in this case it is solely the government’s decision to “kick the tires” that triggers the entry.

The high court further blurs the line between inverse condemnation and direct condemnation by holding that the constitutional requirement of jury-determined just compensation can as readily be satisfied in an inverse condemnation action brought by the owner as a direct condemnation action

brought by the government. However, that approach puts the burden on the property owner to initiate an inverse condemnation action in order to vindicate his or her constitutional rights of just compensation.

In these ways, the Court appears to be willing to sacrifice potentially inconvenient constitutional protections for practical expediency. However, as United States Supreme Court Justice Holmes noted many years ago in a seminal inverse condemnation opinion: “A strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way.” (*Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 416, 43 S. Ct. 158, 67 L. Ed. 322 (1922).) *Property Reserve* may be such a “shorter cut.”

In the end, *Property Reserve* is unlikely to change in any dramatic way the government’s ability to undertake precondemnation entry and testing. The only change is that a property owner can demand that a jury, rather than a judge, determine any compensation ultimately owed. However, given that the amounts at issue in connection with a precondemnation entry and testing will typically be low, and the transactional cost of having a jury make the determination of compensation will typically be high, property owners may be dissuaded from exercising that right. On a practical level, to the extent the jury right is exercised, and the government decides to acquire the property, the jury determination of damages for the government’s precondemnation entry and inspection will likely be combined with the jury determination of compensation owed for the taking of the property.

ENDNOTES:

¹*Property Reserve, Inc. v. Superior Court*, 1 Cal.5th 151 (2016).

²Code Civ. Proc., § 1245.010.

³Stats. 1975, ch. 1275, §§ 1-5, pp. 3409-3466.

⁴*Property Reserve, Inc. v. Superior Court*, 1 Cal. 5th at 184.

⁵Code Civ. Proc., § 1245.020.

⁶Code Civ. Proc., § 1245.030.

⁷Code Civ. Proc., § 1245.040.

⁸Code Civ. Proc., § 1245.050.

⁹Code Civ. Proc., § 1245.060.

¹⁰*Jacobsen v. Superior Court of Sonoma County, Department No. 2*, 192 Cal. 319, 219 P. 986 (1923).

¹¹*Property Reserve, Inc. v. Superior Court*, 1 Cal. 5th at 177-180.

¹²*Id.* at 167.

¹³*Williamson County Regional Planning Com'n v. Hamilton Bank of Johnson City*, 473 U.S. 172, 194-195, 105 S. Ct. 3108, 87 L. Ed. 2d 126 (1985).

¹⁴A quick take is where the government obtains an order allowing it immediate possession of property it seeks to condemn, based on its filing of a complaint for condemnation and deposit into court for the property owner's benefit the "probable compensation" owed for the taking. (See generally Code Civ. Proc., §§ 1255.010-1255.480.)

¹⁵*Property Reserve, Inc. v. Superior Court*, 1 Cal. 5th at 186.

¹⁶*Id.*

¹⁷*Id.* at 188.

¹⁸See Code Civ. Proc., §§ 1245.210-1263.530; *Property Reserve, Inc. v. Superior Court*, 1 Cal. 5th at 188.

¹⁹*Property Reserve, Inc. v. Superior Court*, 1 Cal. 5th at 189.

²⁰*Id.* at 190.

²¹*Id.* at 191.

²²*Id.* at 192.

²³*Id.* at 196.

²⁴*Id.* at 151, citing *Nollan v. California Coastal Com'n*, 483 U.S. 825, 831, 107 S. Ct. 3141, 97 L. Ed. 2d 677 (1987).

²⁵*Id.* at 196, fn. 18.

²⁶*E.g., Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 426, 102 S. Ct. 3164, 73 L. Ed. 2d 868 (1982).

²⁷*Property Reserve, Inc. v. Superior Court*, 1 Cal. 5th at 209-211.

²⁸*Id.* at 199.

²⁹*Jacobsen v. Superior Court of Sonoma County, Department No. 2*, 192 Cal. 319, 219 P. 986 (1923).

³⁰*Property Reserve, Inc. v. Superior Court*, 1 Cal. 5th at 198.

³¹See generally Code Civ. Proc., §§ 1255.010 to 1255.480.

³²*Property Reserve, Inc. v. Superior Court*, 1 Cal. 5th at 208.

³³*Kopp v. Fair Pol. Practices Com.*, 11 Cal. 4th 607, 615, 47 Cal. Rptr. 2d 108, 905 P.2d 1248 (1995).

³⁴*Property Reserve, Inc. v. Superior Court*, 1 Cal. 5th at 216.

³⁵*House v. Los Angeles County Flood Control Dist.*, 25 Cal. 2d 384, 392, 153 P.2d 950 (1944).