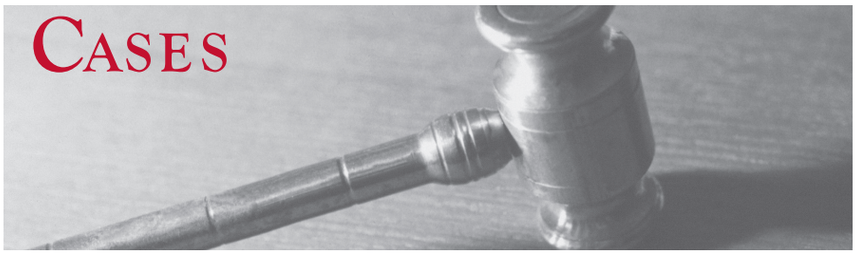
# Cases



*by IMLA Editorial Staff*

### Pre-Condemnation Environmental and Geologic Testing is a Taking

In a decision greatly increasing the procedural burden on the state when contemplating the exercise of its eminent domain powers, the California Court of Appeal for the Third Appellate District has ruled that the state must initiate eminent domain proceedings before the Department of Water Resources (DWR) can enter onto private properties for the purpose of conducting environmental studies and geological testing.

California seeks to build a tunnel to transport water from the Sacramento-San Joaquin River Delta to central and southern California, and will need to condemn land for the project. Before condemnation, the state needs to conduct environmental and geological studies on hundreds of properties under which the tunnel may be constructed. The testing activities fall into two general categories. "Environmental activities" involve surveys about hydrology, botany, wildlife, and would include taking minor soil samples and observing and trapping wildlife. "Geological activities" involve soil testing which in some cases would include boring into the ground to a depth of 200 feet and then filling in the hole with a permanent cement/bentonite grout. On each of the approximately 150 properties affected, these activities would require entry for up to 60 intermittent 24-hour days over a two year period, during which time equipment may remain on the property.

To facilitate these studies, in 2009 the DWR filed petitions for entry onto a vast number of Delta properties via the state pre-condemnation statutes (Cal. Civ. Pro. Code §1245.010 *et seq.*). Landowners contested the petitions, and the 150 cases were coordinated in San Joaquin County Superior Court. The trial court considered the environmental and geological activities separately. It granted the state permission to enter for environmental activities, conditioning such entry on the state's deposit of de minimis probable compensation for damages or loss of use (between $1000 and $6000 per owner). But the court denied permission to enter for geological activities, concluding that they resulted in a taking for which DWR would need to comply with California Eminent Domain Law.

On appeal, the state argued that the geological activities were not takings, and that the entry statutes were an acceptable constitutional substitute for state eminent domain procedures because the entry statutes provide property owners the same protections as eminent domain procedures. The property owners argued to the contrary: no only were the geological activities a taking, but the environmental testing was as well, requiring full-fledged eminent domain protections.

**HELD:** The California Court of Appeal decided in favor of the property owners on both types of entry, finding that the environmental entry constitutes a temporary taking and that the geological activities are a taking *per se* because they result in a permanent physical occupancy of private property.

**DISCUSSION:** The court rejected the state's argument that the pre-condemnation statutes satisfied the requirements of subdivision (a) of article I, Section 19 of the California Constitution. On this issue, the court concluded that the entry statutes are unconstitutional because the California takings clause requires the filing of an eminent domain action, which triggers constitutional protections for landowners including a jury trial to determine just compensation. Therefore, in order to enter the land and conduct the geological activities, the state must first condemn the land and pay for the taking through state eminent domain procedures.

The court held that the order allowing entry for environmental activities amounted to a taking of a temporary easement, requiring condemnation through the eminent domain process. Although the environmental activities did not amount to a *per se* taking, the physical invasion rose to the level of a compensable taking under the multi-factor *Penn Central* test: (1) the degree to which the invasions are intended, (2) the character of the invasions, (3) the duration of the invasions, and (4) the economic impact of the invasions.

*Penn Central* test supported the landowners' position: "Thus, in this matter, all the factors weigh in favor of finding a temporary taking. The invasion and its consequences are intended by the state similar to a direct condemnation for a temporary easement. The invasion is a physical invasion, "a government intrusion of an unusually serious character. The invasion will take place over a significant period of time, providing a one-year blanket easement to private property for entry by up to eight people for up to 66 days. These characteristics outweigh the preliminary lack of evidence on the invasions' economic impact. In short, if the State intends to take and use a temporary easement, it must directly condemn it."

The Court of Appeals acknowledged the underlying conflict in cases where 'big' state projects are complicated by individual property rights issues, but rejected the state's argument that a shortcut approach to condemnation may sometimes be warranted, explaining that "constitutional rights against the exercise of eminent domain authority are not subject to the convenience of the government."

*Property Reserve Inc. v. Superior Court*, No. C067758 (Cal. Ct. App. Mar. 13, 2014).

### Writ of Execution: Novel Facts Give Rise to Qualified Immunity

In a case involving obvious violations of plaintiffs' Fourth Amendment rights, the Sixth Circuit has nevertheless