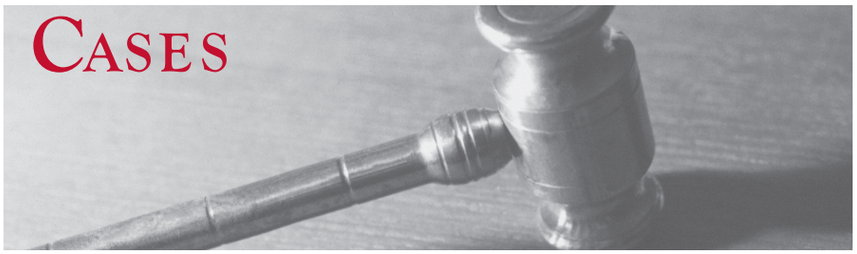
Cases



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

cleared U.S. Marshals executing a writ of execution because the legal and factual scenario had not been previously litigated.

"If the facts as alleged in the complaint are true, this case involves an incident that is more like the home raids by Red Guards during China's Cultural Revolution than like what we should expect in the United States of America." So begins the opinion by Sixth Circuit Judge Rogers in this case.

Michael Bray is an ardent anti-abortionist. In 1985 he was convicted in Maryland for damaging several abortion clinics and spent four years in prison. In 1995 he was among several defendants sued by Planned Parenthood Columbia-Willamette (PCCW) for intimidation by threat of use of force under the Freedom of Access to Clinic Entrances Act (18 U.S.C. § 248). A jury found the anti-abortion activists liable for $110 million; after appeals, PCCW was left with an $850,000 award against Bray.

A district court in Ohio subsequently issued a writ of execution authorizing U.S. Marshals to seize specified property from Bray. The writ authorized seizure of Bray's residence in Wilmington, Ohio as well as computers, cameras, other electronics and books within the residence. Aware of the writ and seeking to avoid trauma to their young children, Bray and his wife contacted the Marshals Service and were received with what they described as a spirit of "professional cooperation."

However, at 10:00 am on October 1, 2007, execution of the writ took place without warning. Four U.S. Marshals, at least two County Sheriffs, an agent for the Bureau of Alcohol Tobacco and Firearms, lawyers for PCCW and other unidentified participants appeared at the Bray home. Most of the law enforcement officers were wearing flak jackets. Bray was ordered to remain on a sofa in his front room while various people moved around his house, videotaping its contents and removing numerous boxes of personal property, including family photo albums. When Bray's wife and children returned to the home after school, they too were confined to the house.

In November 2007 a magistrate judge ordered that numerous seized items belonging to the Bray children or third parties be returned to the Brays. PCCW did not comply until July 2009.

The Brays brought suit for unreasonable search (of the home) and unreasonable seizure (of Bray) against PCCW, its law firm (Squire, Sanders & Dempsey), and three U.S. Marshals. Among other things, the Brays alleged that seven armed, flak-jacketed officers came to their home; they required Bray to sit on his sofa for four hours, denying him the use of his cell phone to contact his lawyer; and various unknown individuals roamed around the house, filming its contents.

The marshals moved to dismiss on grounds of immunity (quasi-judicial or qualified) and the lack of a *Bivens* remedy. The district court agreed, reasoning that the writ of execution gave the marshals "authority to exercise a degree of control over both the property being seized, the location wherein the property is located, and, by extension, those present at the location" and finding that the detention of Bray "served reasonable and legitimate safety and operational concerns." Absolute quasi-judicial immunity was appropriate, in addition to qualified immunity, because performing the writ of execution was "so intertwined with the judicial process" that those involved were "considered an arm of the judicial officer who is immune." Finally, filming the home was reasonable to record the condition of the property prior to its sale.

The Brays settled with PCCW and the Squire, Sanders firm but appealed the judgment in favor of the marshals.

HELD: The Sixth Circuit found that the marshals had clearly violated the Brays' Fourth Amendment rights but were nevertheless protected by qualified immunity because those rights were not clearly established at the time of the misconduct.

DISCUSSION: The Court of Appeals catalogued numerous violations of the Bray family's Fourth Amendment rights. First, detaining Michael Bray for four hours without access to his cell phone or lawyer was presumptively improper. He posed no threat whatsoever, as evidenced by the fact that the marshals allowed numerous unarmed strangers into the house. Second, allowing unauthorized persons to enter and roam the house was also a constitutional violation. The writ had merely provided for 'a' representative of PCCW to be present to help identify proper items for execution. Third, given that the PCCW retinue had no legal right to be one the scene, the wholesale filming of the house and its contents—as well as the Bray family–by other PCCW representatives was clearly unauthorized. Fourth, authorization in the writ to seize all materials written by Bray "both in published and unpublished form" created a strong inference that the real purpose of the raid was constitutionally suspect: to intimidate Bray and confiscate his disfavored writings, which were of negligible commercial value.

Nevertheless, the officers were protected under qualified immunity. In order to avoid this result, the Brays had to allege facts confirming the violation of a constitutional right that was clearly established at the time of the misconduct. Therein lay the problem: the legal question was whether "every reasonable officer" would have known that his actions violated such a right and whether "existing precedent . . . placed the statutory or constitutional question beyond debate."

Here, the legal and factual scenarios presented in the Brays' circumstances had not been addressed previously by the Sixth Circuit or the Supreme Court, so the question was not "beyond debate." While the Court had previously spoken on the issue of detaining occupants in a criminal context—the search for evidence or contraband—it had not dealt with qualified immunity in the case of a civil writ of execution. Therefore a reasonable officer might not have known that his actions were impermissible.

Similarly, the marshals might have thought it acceptable to invite additional PCCW representatives to join the raid; one Sixth Circuit precedent had allowed telephone company representatives to assist officers in the execution of a warrant relating to wiretapping. And if those additional personnel were permissible on the premises, their videotaping of the execution of the warrant was not unequivocally prohibited.

Bray v. Planned Parenthood Columbia-Willamette, Inc., No. 12-4476 (6th Cir. Mar. 21, 2014). ML