

California Supreme Court Upholds Pre-condemnation Entry and Testing Law with Addition of Jury Option

On July 21, 2016, the California Supreme Court validated California's pre-condemnation entry and testing statutes (Code of Civil Procedure sections 1245.010-1245.060), but determined that the law must be judicially reformed to be consistent with constitutional requirements for eminent domain proceedings by allowing affected landowners to have a jury determine the measure of damages to which they are entitled. In [*Property Reserve, Inc. v. Superior Court*](#), the State Department of Water Resources ("DWR") sought a court order to enter more than 150 privately owned properties as part of DWR's effort to investigate the feasibility of building a new tunnel or canal in the Sacramento-San Joaquin Delta for delivering water from Northern California to Central and Southern California.

DWR's investigation included conducting environmental surveys and geological testing – which required drilling boring holes – on private property for up to 66 days. The landowners challenged the trial court's order allowing DWR to enter the properties to conduct environmental sampling, arguing that DWR should have been required to initiate a condemnation proceeding, rather than proceed under the statutory pre-condemnation procedure. The trial court denied DWR's proposal to conduct geological sampling as requiring a "classic" condemnation proceeding, which DWR challenged. The Court of Appeal overturned the trial court's order allowing DWR's environmental sampling activities, and ruled that a condemnation action was required for DWR to conduct both its environmental and geological sampling activities.

DWR challenged the Court of Appeal's decision in the Supreme Court, which issued a unanimous decision (with Justice Liu filing a concurring opinion) holding that DWR could conduct both environmental surveys and geological testing under the pre-condemnation entry and testing statutes, but that the law must be reformed to include a jury trial provision. Prior to the Supreme Court's reformation of the statute, an agency seeking a pre-condemnation entry order was required to compensate the landowner for damages as determined by the court, unless the landowner filed a separate civil action demanding a jury trial. Characterizing the lack of a statutory jury trial option as a "constitutional flaw," the Supreme Court decided to reform the pre-condemnation statute to include a jury trial option, rather than invalidate it as applied to activities rising to the level of



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compensable takings. According to the Court, the State Legislature in drafting the pre-condemnation statutes clearly “intended to adopt a procedure that satisfies the requirements of the California takings clause.” (Slip Op. at 65.) However, the Supreme Court did not reach the questions of whether DWR’s environmental or geological testing activities actually constituted takings.

By reforming the pre-condemnation statutes to build in a jury trial option, the Supreme Court’s decision allows agencies to avoid full-scale condemnation proceedings for certain sampling and testing activities on private property, while enabling property owners to have a jury determine the measure of their damages for such activities without the need for initiating a separate civil action.

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