



# When is Physical Invasion Allowed?

California ruling affirms rights of landowners to a condemnation before a condemnation

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Condemnation before a condemnation? That's the very situation you might have after a recent California appellate court decision rendered the state's 38-year-old precondemnation entry statutes, which are part of California's established Eminent Domain Law, as unconstitutional and in violation of the takings provisions of Article I, Section 19 of the California Constitution. That section prevents a government entity from taking or damaging a piece of private property without first filing a condemnation action. The case, *Property Reserve, Inc v. The Superior Court*, pitted the strength of the constitutional rights granted to landowners squarely against the state's authority to take private property.

## Background

In an ongoing effort to manage the state's dwindling water resources, the state of California proposed to build a tunnel to transport water from the north to the south.

Before considering the condemnation process, which involved land from over 150 owners and 240 private properties, the state was required to study the environmental and geological suitability of hundreds of properties on which the tunnel might be constructed. The California Constitution has always required that a condemnor provide affected landowners with all of their constitutional protections against the exercise of eminent domain authority, including the determination of just compensation. The key question for the trial and appellate courts was whether the state's request for entry for those precondemnation activities was based upon a statutory scheme that violated the state's Constitution.

## The Case

The state filed separate petitions for entry onto each of the properties, according to the statutory procedures authorizing these precondemnation activities. The trial court combined the separate state petitions

into a single petition applying to all of the properties seeking to conduct precondemnation geological and environmental studies.

For the geological studies, the state identified and requested authority to enter the properties and conduct borings and drillings in the ground that would leave permanent columns of cement in the bored holes up to depths of 200 feet. The court denied the state's petition for entry to conduct the geological activities. It ruled these activities constituted a taking, and they could be authorized only in a direct condemnation action and not by the statutory precondemnation procedure.

Surprisingly, the trial court granted the state's petition to enter the affected properties to conduct environmental studies. It permitted the state to enter the properties and conduct its studies for up to 66 days during the year. The court concluded that such access, and the environmental activities to be performed, did not constitute a taking. As required by the statutory procedure, the court created the condition that the state set aside a predetermined amount of money to compensate the landowners in the event the state's activities caused actual damage or substantial interference to the properties. Dissatisfied with the trial court's rulings, both the property owners and the state appealed.

### Geological vs. Environmental Entry

As part of the geological study, the state proposed to bore holes in the ground between 100 and 205 feet deep with a diameter of up to six inches, remove the earth from those borings, and fill the holes with permanent cement/bentonite grout. As a result of proposed permanent physical invasion, as in this situation, the state is required to exercise its eminent domain authority before it can perform the geological activities.

The appellate court affirmed the trial court decision to not approve the entry by concluding that the entry statutes did not provide a constitutionally valid eminent domain proceeding by which the state could take the landowners' property

interests to accomplish the geological activities. This is because the proceeding, as a matter of California constitutional law, did not provide for a condemnation suit in which the landowners receive all of their constitutional rights and just compensation against the state's exercise of its eminent domain authority on a direct and permanent taking.

But, unlike the geological activities, the environmental activities would not include a physical invasion, sometimes referred to as "a taking per se." The proposed entry would not result in a permanent occupancy of property or deny the landowners of all economically beneficial uses of their properties. The appellate court found that, in effect, the state sought to acquire a temporary blanket easement for one year to access the landowners' properties for a total of two months or more by as many as eight people at a time, and to conduct its studies wherever may be appropriate on the lands subject to reasonable restrictions set by the trial court. Even though temporary and regulated, the occupancy nonetheless intentionally acquires an interest in real property without paying for it.

The appellate court noted that the right to exclude the government from obtaining and possessing 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. The degree to which the invasions are intended, the character of the invasions, the amount of time the invasions will last, and the invasions' economic impact are all factors convincing the court that the environmental activities authorized by the entry order constituted a temporary taking which warranted compensation.

### Dissenting Opinion

In stark contrast, the decision included a spirited and lengthy dissenting opinion, which found the majority's reasoning failed by not according the statutes the simplest presumption of constitutionality. The majority insisted that eminent domain statutes must be strictly construed, but this does not mean that they cannot be

presumed constitutional, and the cases on which the majority relies are not on point. The statutory scheme fulfills the constitutional requirements of just compensation and a jury trial, and associated procedural uncertainties, such as the burden of proof, should be resolved with reference to the Eminent Domain Law.

### Conclusion

Practically speaking, California public agencies will now have to get voluntary rights of entry rather than those formerly available under the statutory scheme. For example, no pre-project environmental soil testing or occupational habitat monitoring will likely be allowed unless you get an appraisal, make a formal offer, hold a resolution of necessity hearing and then process a condemnation lawsuit for the right of entry. And then if the agency needs the property for the project, start the acquisition process all over again. A condemnation before a condemnation.

The appellate court majority noted that its rulings imposed more work on the condemning agencies and the court, but stated, "constitutional rights against the exercise of eminent domain authority are not subject to the convenience of the government." The trial court's order denying the master petition for entry to perform the geological activities was affirmed, the trial court's order granting the master petition for entry to perform the environmental activities was reversed, and the matter was remanded to the trial court with instructions to enter a new order denying the master petition for entry to perform the environmental activities. Notably, the state is actively seeking further review of this case and depublication. 🌐

### References

*Property Reserve, Inc. v. The Superior Court, In the Court Of Appeal of the State Of California, Third Appellate District - C067758, Filed March 13, 2014.*  
<http://www.courts.ca.gov/courtsofappeal.htm>

*Hendler v. United States, supra, 952 F.2d at pp. 1374-1375.*

*California Code of Civil Procedure sects. 1245.010, et seq.*