



Precondemnation "Right of Entry" Statutes Challenged as Unconstitutional Takings

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For years, public agencies have utilized a statutory "right of entry" procedure to gain access to private property to conduct investigations and testing before deciding whether to move forward with a condemnation action. (See Code Civ. Proc., § 1245.010 et seq.) Often, this happens during an environmental review process conducted pursuant to the California Environmental Quality Act ("CEQA"), during which agencies must assess the environmental impacts a proposed project would have. Sometimes, the "entry" involves little more than someone wandering around a property for a few hours. But in other cases, the investigation is more far-reaching, including things such as soil borings and animal traps.

These activities are rarely questioned. So long as the government acts reasonably and provides for compensation to the owner if the investigation causes any damage, these entries routinely go off without a hitch. But that may all change in light of a decision issued last week by the Court of Appeal.

On March 13, 2014, the Court of Appeal issued its decision in *Property Reserve, Inc. v. Superior Court*. The Court struck down an agency's efforts to conduct precondemnation investigation and testing pursuant to the right of entry statutes. The Court held that any significant physical intrusion onto private property constituted a taking for which just compensation must be paid. This meant that the agency was required to proceed with an "eminent domain proceeding" which, in turn requires that the property owner be provided with certain protections, including the right to a jury trial – something the "right of entry" statutes do not provide.

Background

The State of California, acting through the Department of Water Resources, wants to build a tunnel to transport water. Before it can do so, it must conduct testing to determine the "environmental and geological suitability of hundreds of properties on which the tunnel may be constructed." Pursuant to long-standing California law, the State sought to obtain rights of entry onto those properties to allow its investigation and testing to proceed. With respect to geologic testing, the State sought to conduct soils testing that included

myriad borings drilled to a depth of 200 feet. Once the testing was complete, the borings would be filled in with a concrete mixture. With respect to environmental testing, the State sought to conduct inspections and testing on the properties over a one-year period. The rights of entry would allow various numbers of people to conduct inspections on various numbers of days, depending on the size of the property (up to eight people inspecting for 66 days during the year).

Some of the owners challenged the proposed testing and investigation, claiming that the testing and inspections the State wanted to conduct constituted a taking, for which the owners were entitled to just compensation, along with the full panoply of procedural protections California law affords to condemnees.

The trial court issued a split decision. It concluded that the geologic testing – which would result in the State's leaving permanent columns of concrete underneath the ground of the properties – did constitute a taking and the State could not accomplish this work through the statutory right of entry procedure. With respect to the environmental investigation, the court felt differently. It concluded that the environmental testing was allowed under the right of entry statutes, so long as procedural protections were in place to limit the imposition the State's activities could have on the property owners. The court fashioned a complex set of rules and restrictions, but granted the State's rights of entry orders for the environmental investigation. Neither side was happy with this result, and both sought review from the Court of Appeal.

The Decision

The Court of Appeal started with the geologic testing, but it had little difficulty with its analysis. Concluding that the concrete mixture filling the boring holes was a permanent physical occupation of the property, the Court held that the geologic testing constituted a "per se taking." This was not a surprising holding, since by the time of oral argument, the State admitted these activities effected a taking.

The real question, from the State's perspective, was whether the right of entry statutes were constitutionally sufficient to address such a taking. The Court held that they were not. Probably the most significant deficiency the Court found was the fact that the right of entry statutes provide no mechanism for a jury trial, one of the fundamental constitutional mandates for an eminent domain proceeding. "If the state intends to acquire an interest in private property directly, no matter how small an interest, the California Constitution requires it to initiate a condemnation suit that provides the affected landowner with all of his constitutional protections against eminent domain in that action. The entry statutes do not provide such a condemnation suit."

The Court then moved on to the environmental testing. The Court first explained that no "bright-line rules for determining whether a temporary physical invasion constitutes a taking" exist. Rather, Court explained that a temporary right of entry must be evaluated based on four criteria:

1. **The degree to which the invasions are intended.** The Court noted that as to this factor, a right of entry always qualifies as an "intended" invasion, thus weighing heavily in favor of finding a taking.
2. **The character of the invasions.** Here, the Court contrasted regulatory "invasions" (which are less likely to qualify as a taking) from true physical invasions. Again, as to a right of entry, the character of the invasion is a physical invasion (i.e., suggesting they qualify as takings).
3. **The amount of time the invasions will last.** This is where the Court left an opening to allow routine entries, since the "takings" at issue in *Property Reserve* involved the potential for 66 days of physical invasion spread over an entire year -- a far cry from a typical inspection that might last a few hours.

4. **The invasions' economic impact on the landowners and interference with their distinct investment-backed expectations.** This factor derives from the famous *Penn Central* test for evaluating regulatory takings claims. The Court acknowledged that no evidence existed that the investigations at issue would cause any economic impact. Still, the Court downplayed this factor, explaining that it played little role in situations of an actual physical invasion. "This is because if the government intentionally and physically invades private property to the extent it requires a permanent or temporary interest in that property to accomplish its public purposes, it must pay for that interest, no matter how small the interest may be."

Based on these factors, the Court held that the environmental investigations constituted a taking and, as a result, they suffered from the same fatal flaw as the geologic testing. Therefore, the State was likewise not permitted to conduct the inspections through the right of entry statutes.

In a lengthy dissent, Justice Blease criticized much of the majority opinion. But as to the "time" factor, he was especially critical, pointing out that the size of the properties at issue had to be considered. By his math, even the properties that were subject to as many as 66 days of inspections would receive minimal impacts: "If the [majority] opinion had simply divided the [property] size (3,500) by the number of days (66) and by the number of persons (eight) allowed entry, it would have arrived at 6.6 acres per one entrant per one day over a year, hardly a burdensome impact on the property, especially when considered in the light of the numerous conditions placed by the order on the conduct of the entry."

The Decision's Impact and What We Should Expect Next

The main question left hanging in the *Property Reserve* opinion is where one draws the line in its aftermath. Any right of entry that will involve a permanent physical occupation of property is not allowed under the right of entry statutes. And "significant" invasions are likewise not allowed, even if they do not result in a permanent presence. But is a two-day inspection "significant"; does that constitute a taking? What about a two-hour inspection that disturbs nothing? These are the questions over which agencies and property owners will be pondering, and the decision does not offer any clear answers.

We expect an aggressive campaign to get the opinion depublished (meaning it would not be citable in the future), and it would not be surprising if the State seeks Supreme Court review given the stakes involved.

There may also be other responses to the decision. The Court suggests that the problem it found with the right of entry statutes does not necessarily mean that inspections must be preceded by a full-blown eminent domain action. Rather, the Court explained that the Legislature could modify the right of entry procedures to ensure that the owner receives the necessary minimal constitutional protections. Thus, if efforts to depublish and obtain Supreme Court review are unsuccessful, the next battle over this issue may take place in the Legislature.

Finally, note one important caveat to all of this. The decision applies only where the agency and the property owner do not agree to the terms of a Right of Entry, giving rise to the agency's need to seek a court order. The owner can always agree to allow the agency to conduct its precondemnation investigation and testing, and what we may see in the short term is property owners seeing this decision as an opportunity to extract some money in exchange for allowing the agency to enter onto its property.