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POSSESSORY INTERESTS: A TAX WITHOUT A TEST?

Karen L. Dale*

I. INTRODUCTION

Although less well known than the familiar sales or ad valorem property taxes, California's possessory interest tax constitutes a significant source of revenue for the state.¹ The possessory interest tax is actually a species of real property tax,² and is imposed upon those with certain rights to use or possess state or federal lands.³ In the last two decades the number and type of property rights that have been held to be subject to the tax have increased dramatically.⁴

This article analyzes the factors currently used to test whether or not a taxable interest exists, examines the validity of this test, and comments upon recent extensions of the tax. The article concludes with a discussion of the proper factors that should be considered to determine whether a taxable possessory interest exists, and with suggestions for possible modifications to the taxable interest test.

II. NATURE AND HISTORY OF THE TAX

California's tax on possessory interests must be understood as part of the state's constitutional mandate which requires that all

* 1984 by Karen L. Dale

1. The possessory interest tax dates back to 1859, when the state asserted the tax against holders of gold-mining rights in public lands. *State v. Moore*, 12 Cal. 56 (1859). The Assessor's Handbook, [hereinafter cited as AH 517] revised in 1974, estimates that income to the state from possessory interest taxes is "many millions of dollars," and forms a "substantial part of the property tax base for our counties, cities, and school districts." AH 517 at 1. Because nearly half of California's land is public domain, the possessory interest tax assumes greater significance than it might for other states. K. EHRMAN & S. FLAVIN, *TAXING CALIFORNIA PROPERTY* 94 (2d ed. 1979).

2. The possessory interest tax only applies, with one exception, to interests in real property. See *infra* note 23.

3. CAL. REV. & TAX CODE § 107 (Deering 1975). Technically, a possessory interest in privately-owned land also could be separately assessed, but except where an exempt entity owns the underlying fee, there is no practical reason to separate the interests subject to taxation. K. EHRMAN & S. FLAVIN, *supra* note 1, at 93. See also *infra* note 85 and accompanying text.

4. Compare the lists of "typical" possessory interests for 1967 and 1976 cited in Comment, *The California Possessory Interest Tax: A Time Honored Concept Gets a New Twist*, 17 SANTA CLARA L. REV. 827, 848 n.94 (1977). That commentator suggests that the recent expansion may be attributed to an attempt to find revenue to "combat the rising costs of enlarged governments." *Id.* at 828 n.5.

property, unless specifically exempted, be taxed according to its full value.⁵ When the property is owned by the state or federal government, the fee itself will not be subject to taxation.⁶ However, this immunity from taxation does not extend to private parties using government-owned lands because "[e]xemption from taxation is a privilege of the Government, not an incident of the property."⁷

Early cases articulated the rationale for imposing the tax as an attempt to equitably apportion the tax burden:

"These possessions . . . are . . . a species of property Why should [the holder] not contribute its proper share, according to the value of the interest, . . . of the taxes necessary to sustain the Government which recognizes and protects it?"⁸

Thus, the earliest conception of the possessory interest tax required that it be applied to rights of possession in public lands which were significant enough to constitute "property" in the hands of the holder.

It was not until 1947, however, that the California Supreme Court articulated a precise set of standards designed to determine when a possessory right constituted a taxable possessory interest.⁹ In the landmark case of *Kaiser Co. v. Reid*,¹⁰ the state supreme court established three criteria to determine when a possessory interest exists: 1) a user must possess *a right to use and to possess* public land existing for an *ascertainable period*; 2) the interest must be *exclusive*; and 3) *a private benefit* must be received by the possessor.¹¹ During the next twenty-five years the judiciary elaborated upon this theme,¹² but only these basic factors were incorporated, with some expansion, into the California Administrative Code in 1971.¹³ The test for a possessory interest restated therein requires exclusiveness,

5. CALIF. CONST. art. XIII, § 1; CAL. REV. & TAX. CODE § 107 (Deering 1975).

6. The doctrine of federal immunity from state taxation is well-established. See *Metcalf v. Mitchell*, 269 U.S. 514 (1926); *M'Culloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819). The federal government may, if it chooses, waive such immunity. See *United States v. County of Allegheny*, 322 U.S. 174 (1944). Counties similarly may not tax state-owned land. CAL. REV. & TAX. CODE § 202 (Deering 1975) (state, county or city-owned property is exempt).

7. *Moore*, 12 Cal. at 71.

8. *People v. Shearer*, 30 Cal. 645, 657 (1866); see Comment, *supra* note 4, at 830-31 (1977).

9. See Comment, *supra* note 4, at 830-31.

10. 30 Cal. 2d 610, 184 P.2d 869 (1947).

11. *Id.*

12. See generally Comment, *supra* note 4, at 833-52.

13. CAL. ADMIN. CODE tit. 18, R. 21-28 (1977) [hereinafter cited in text as the Regulations].

durability, independence and private benefit.¹⁴

These factors are intended to provide a flexible standard, rather than a rigid test, to evaluate interests in public lands on a case-by-case basis.¹⁵ Although courts must weigh the extent to which each factor is present,¹⁶ all four factors must be present to some degree in order to support a finding that a particular interest is possessory, and therefore taxable.¹⁷

III. ANALYSIS OF THE POSSESSORY INTEREST TEST

The four criteria now used to determine whether a taxable possessory interest exists provide a superficial definiteness and specificity. A closer examination reveals, however, that the standards provided are of dubious utility and do not address all of the factors which should be considered in determining the existence of a taxable possessory interest.

A. *Property*

It is fundamental to the imposition of the possessory interest tax that the interest in question constitute "property," although this is not expressly listed as a factor in the Regulations. The legislature has defined property to include "all matters and things, real, personal, and mixed, capable of private ownership."¹⁸

Courts often gloss over this basic requirement by noting that "the use and possession of public lands in California has always been regarded as a valuable species of property."¹⁹ Because all non-

14. Although not expressly mentioned in the Regulations, the requirement of a private benefit has been clearly established by case law. CAL. ADMIN. CODE tit. 18, R. 21(a)(i) (1977); see *Wells Nat'l Servs. Corp. v. County of Santa Clara*, 54 Cal. App. 3d 579, 126 Cal. Rptr. 715 (1976). Indeed, at least one commentator considers that the private benefit factor now occupies a position of overriding importance. Comment, *supra* note 4, at 839, 842-43.

15. *Mattson v. County of Contra Costa*, 258 Cal. App. 2d 205, 209, 65 Cal. Rptr. 646, 648 (1968); 4 PETERSON, PLANT & EAGER, 4 CAL. TAX. § 82.04[3][a]. This departure from the fixed standard established in *Kaiser* has been criticized as an "erosion" of the structure and certainty previously afforded; Comment, *supra* note 4, at 833-38, but was intended to assist in dealing with the variety of interests that may be created by the ingenuity of contracting parties. 4 PETERSON, PLANT & EAGER at 82-23.

16. *Mattson*, 258 Cal. App. 2d at 209, 65 Cal. Rptr. at 648.

17. *Wells*, 54 Cal. App. 3d 579, 126 Cal. Rptr. 715. However, the "private benefit" factor may outweigh the others as a practical matter. See Comment, *supra* note 4, at 842-43; see also 4 PETERSON, PLANT & EAGER, *supra* note 15, at 82-23 (stating that when private benefit and exclusiveness are present, the other factors are likely to be found).

18. CAL. REV. & TAX. CODE § 103 (Deering 1975).

19. Comment, *supra* note 4, at 839 (describing the *Archer* court's approach as "typical").

exempt property is subject to tax,²⁰ the court can then conclude that the interest is taxable without resorting to a more rigorous analysis.

However, this conclusion may be too facile. Certain intangible interests, although clearly "property," are exempt from property tax.²¹ It could be argued that certain possessory interests, for example, those created by grazing permits, are intangible rights in tangible property and therefore are similar to other intangible, nontaxable rights, such as those created by a deed of trust or a liquor license.²² Because a grazing permit is not one of the interests classified as intangible by statute, this argument would have to be made by analogy to nontaxable intangible rights. Similar arguments have succeeded in the past.²³

Another argument that certain possessory interests should not be considered property subject to tax is that they are not property for other purposes. For instance, certain rights in public land are not compensable in condemnation proceedings²⁴ or upon termination of

20. See *supra* note 5 and accompanying text.

21. CAL. REV. & TAX. CODE § 212 (Deering 1970) (exempting notes, debentures, shares of capital stock, solvent credits, bonds, deeds of trust, mortgages, and any interest in such property). See also *Roehm v. Orange County*, 32 Cal. 2d 280, 290, 196 P.2d 550, 556 (1948) (liquor licenses exempt from tax); *Todd v. Los Angeles Co.*, 57 Cal. 2d 684, 690-91, 21 Cal. Rptr. 604, 607 (1962) (copyrights exempt).

22. This argument has been advanced in one treatise with respect to the interest of a concessionaire who provided rental televisions to public hospital patients. *Wells Nat'l Serv. Corp. v. County of Santa Clara*, 54 Cal. App. 3d 579, 585, 126 Cal. Rptr. 715, 719 (1976). The *Wells* court found a taxable possessory interest existed. *Id.* However, the treatise suggests that this opinion is questionable on several grounds, including the argument that a right to provide property is really an intangible interest. K. EHRMAN & S. FLAVIN, *supra* note 1, at 96.

23. See *Roehm v. Orange County*, 32 Cal. 2d 280, 196 P. 2d 550 (1948); *Todd Co. v. Los Angeles Co.*, 57 Cal. 2d 684, 21 Cal. Rptr. 604 (1962). See also K. EHRMAN & S. FLAVIN, *supra* note 1, at 107-08.

The question of whether the *interest* is a type of property subject to tax should be clearly distinguished from that of whether the interest is *in* a type of property permitting the interest to be taxed. For example, possessory interests in *personal* property are generally exempt from the possessory interest tax. The exception is for possessory interests in personal property of a California Pollution Control Financing Authority; see CAL. REV. & TAX. CODE § 201.5 (Deering Supp. 1984); AH 517, at 9. See also Comment, *supra* note 4, at 831 n.19. Intangibles may fall into both groups: neither the intangible property itself nor any interest in such property is subject to tax. CAL. REV. & TAX. CODE § 212 (Deering 1970). With respect to grazing rights, the stronger argument clearly is that the *interest* itself is intangible. It seems unlikely that the interest would be construed to be *in* an intangible. The physical occupation of the land by the cattle suggests, if nothing else, a "storage" use of the real property.

24. Loss of a grazing permit, unlike a grazing lease, is not compensable in condemnation proceedings. Compare *United States v. Cox*, 190 F.2d 293 (10th Cir. 1951), *cert. denied*, 342 U.S. 867 (1951) and *Osborne v. United States*, 145 F.2d 892 (9th Cir. 1944) with *United States v. Certain Parcels of Land in San Bernardino Co.*, 296 F. Supp. 774 (C.D. Cal. 1969) (differentiating leases from permits because leases are "property" and entitle their holders to

the right;²⁵ similarly, these rights may not be depreciated as may other property.²⁶ The argument is that the government should be required to be consistent; if the interest is not "property" for purposes beneficial to the holder, it should not be considered property for purposes detrimental to other holders. At least one court faced with this issue examined the limited nature of the interest and concluded that although the holder's property rights *did not extend* to compensation for termination (as they did not extend to the underlying fee), those rights nevertheless were "property" in nature, albeit limited in scope.²⁷

Similarly, it could be argued that the distinction made in older case law between a lease, which could be a taxable possessory interest, and a license, which could not, was premised on a determination that licenses do not rise to the level of a property right that should be taxable.²⁸ This reading is supported by cases minimizing the importance of a license as a "mere privilege."²⁹ The possessory interest tax is, of course, rationalized as an attempt to require those making "valuable use of land" to contribute their fair share in taxes,³⁰ and even a license may be quite valuable.³¹ Thus, the Regulations have taken the position that a possessory interest may exist "regardless of how the interest is identified in the document by which it was created"³² In addition, the lease/license distinction could perhaps be explained as merely an outgrowth of the "exclusivity" requirement.³³ However, the notion that certain interests are not substantial

compensation in a condemnation proceeding).

25. *Board of Supervisors v. Archer*, 18 Cal. App. 3d 717, 726, 96 Cal. Rptr. 379, 386 (1971).

26. See *Kermit Uecker, et al. v. Commissioner*, 81 T.C. 514, 520 (1983) (depreciation on grazing permits not allowed because the permits were renewable and therefore had an indefinite life).

27. *Archer*, 18 Cal. App. 3d at 726, 96 Cal. Rptr. at 386. The *Archer* court presumably would have reached the same conclusion with respect to lack of condemnation compensation. The court noted that grazing leases were subject to compensation in condemnation proceedings, but did not discuss authorities indicating that a loss of permits may not be compensable. See *supra* note 24.

28. *Kaiser*, 30 Cal. 2d at 619, 184 P.2d at 885.

29. *Bowman v. Udall*, 243 F. Supp. 672 (D.C. Cir. 1965), *cert. denied*, 385 U.S. 878 (1966); *Mollohan v. Gray*, 413 F.2d 349 (9th Cir. 1969). This distinction has also been invoked recently in a finding by the state board that a blind vendor in a public building had a mere license and not a taxable possessory interest. K. EHRMAN & S. FLAVIN, *supra* note 1, at § 3.7 (Supp. 1984) (citing letter to County Assessors, March 21, 1980).

30. *People v. Shearer*, 30 Cal. 645, 657 (1866).

31. See 43 C.F.R. § 4130.8 (1984) (permit may be pledged as security); *Osborne*, 145 F.2d 892, 895-96 & n.5.

32. CAL. ADMIN. CODE tit 18, R. 21(a)(1) (1977).

33. The *Kaiser* court apparently believed that lessees would have exclusive use of the

enough to warrant treatment as a property right seems intuitively correct. It is superficial to argue that restrictions may affect the *scope* of an interest but not its *nature*; the nature of an interest is in part a function of the restrictions that apply to it.³⁴ The issue has yet to be fully explored.

B. *Exclusivity*

Under the test promulgated by the California Supreme Court in *Kaiser Co. v. Reid*,³⁵ exclusivity was present whenever a person had the right to possess land "against all the world, including the owner."³⁶ The notion of exclusivity, however, was severely eroded by subsequent case law, until it came to mean only that no other interests were overtly conflicting or hostile.³⁷

The Regulations adopt this counter-intuitive definition of "exclusivity," providing that:

'Exclusive use' means the enjoyment of a beneficial use of land or improvements, together with the ability to exclude from occupancy by means of legal process others who interfere with that enjoyment Exclusive use is not destroyed by one or more of the following:

- (1) Multiple use by persons making different uses of the same property in such a manner that they do not prevent the enjoyment of co-existing rights held by others, as, for example, the development of mineral resources by one person and the enjoyment of recreational use by others;
- (2) Concurrent use when the extent of each party's use is limited by the other party's right to use the property at the same time, as, for example, when two or more parties each have the independent right to graze cattle on the same land³⁸

property, while mere licensees would not. See *infra* notes 35-40 and accompanying text.

34. For instance, an interest in fee is a real property interest, while the more restricted leasehold is considered personality.

35. 30 Cal. 2d 610, 619, 184 P.2d 879, 885 (1947). See *supra* notes 10-11 and accompanying text.

36. *Id.*

37. See, e.g., *Mattson v. County of Contra Costa*, 258 Cal. App. 2d 205, 210-12, 65 Cal. Rptr. 646, 649-50 (1968) (refreshment concessionaire at public golf course had "exclusive" possession even though the clubhouse was open to the general public). See also Comment, *supra* note 4, at 835 n.37.

38. CAL. ADMIN. CODE tit. 18, R. 21(e) (1977). After the issuance of the Regulations in 1971 (and no doubt in reliance thereon), the case law has continued to apply this eviscerated definition of exclusivity. See *Sea-Land Services v. County of Alameda*, 36 Cal. App. 3d 837, 842, 112 Cal. Rptr. 113, 116 (1974) (right to load and unload vessels at public harbor terminal was "exclusive" despite multiple users, where taxpayer had priority rights in case of "business need"); see also *Seatrains Terminals of Calif. v. County of Alameda*, 83 Cal. App. 3d 69,

Thus, "exclusivity" requires only that the "valuable private benefit conferred by the contract itself" be exclusive.³⁹ Because it is unlikely that anyone would enter a contract unless it conferred some benefit, it would seem that under this test *any* contractual right would technically confer an "exclusive" benefit.⁴⁰

C. Durability

The durability factor stems from the *Kaiser* requirement that an interest have a "determinable period."⁴¹ Later cases have contrasted durability with "impermanence."⁴²

However, it is difficult to ascertain whether durability is intended to refer to the unconditional nature⁴³ of an interest, or to its duration.⁴⁴ The opposite of either could be considered an "impermanent" interest. For instance, an unrestricted right to use land for one day arguably could be "durable" because the period is fixed and the right is unconditional. On the other hand, the brevity of such a right could be construed as making it "impermanent."⁴⁵ The Regulations

147 Cal. Rptr. 578, (1978) (use was exclusive despite multiple users); and *Archer*, *supra* note 25, at 726-27, (citing the Regulations' statement that multiple users under grazing permits will not destroy exclusivity).

The court in *Archer* gave at least a nod to the possibility that directly conflicting uses would prevent exclusivity, noting that "Although there is a danger that the government could grant more grazing permits for cattle than the grazing land could hold, this is a very remote danger . . ." *Archer*, *supra* note 25, at 725, 96 Cal. Rptr. 379, 385. Thus, it would seem clear that at least where other users prevent full enjoyment of the resources, the courts are willing to concede that the requisite "exclusivity" is not present. *But see infra* notes 39-40 and accompanying text.

39. Comment, *supra* note 4, at 835 n.37.

40. It is difficult to conceive of a contract giving one only a right to compete with others for beneficial use of the land. Even such a right, however, could be considered to result in a private benefit. Without the right to compete, there would be *no* chance for beneficial use of the land. Obviously, the value of such an interest would be less than the value of noncompetitive users' rights.

41. 30 Cal. 2d 610, 618.

42. *Mattson*, 258 Cal. App. 2d at 209, 65 Cal. Rptr. at 648.

43. For instance, one authority suggests that an interest that is revocable at will would not be durable. 4 PETERSON, PLANT & EAGER, *supra* note 15, at § 82.04[3].

44. Cases site terms of 5 to 20 years. *See infra* note 45. Despite the specified term, one authority suggests that agreements subject to cancellation on short notice presumably also would not qualify, if the cancellation option were likely to be exercised at any moment. 4 PETERSON, PLANT & EAGER, *supra* note 15, at § 82.04[3]. When the past history of the parties indicates that a cancellation provision will not be exercised, sufficient durability has been found present. *Freeman v. County of Fresno*, 126 Cal. App. 3d 459, 179 Cal. Rptr. 764 (1981); 4 PETERSON, PLANT & EAGER, *supra* note 15, at § 82.04[3].

45. *See* 4 PETERSON, PLANT & EAGER, *supra* note 15, at § 82.04[3] n.89 (focusing on the duration of an agreement, and noting cases involving terms of 5 to 20 years).

do nothing to clarify this ambiguity.⁴⁶ Arguably, then, the "durability" test requires nothing more than an interest not be terminable at will.

A related concept that is addressed by the Regulations is the "continuity" of an interest.⁴⁷ The requisite degree of continuity will vary depending on "the location and character of the property," but will be present whenever the property is used "to substantially the same extent as would an owner engaged in the same activity."⁴⁸ Thus, intermittent use of the property is sufficient to establish a possessory interest when the interruption of the use is dictated by factors outside the user's control.⁴⁹ Several questions remain, however. What if the interruption is purely a matter of the user's preference, as opposed to external limitations? Even an owner clearly subject to taxation could conceivably make unpredictably recurrent use of land. Is *any* repetitive use thus sufficient? How do the concepts of durability and continuity interact?

A closer examination of the "continuity" criterion suggests that it is, in fact, a nontest. Uninterrupted use will always be "continuous;" use interrupted by weather or other conditions will amount to substantially the same amount of use as an owner would make and thus will be deemed "continuous;" and use that is voluntarily interrupted logically should not affect a "continuous" *right* to use the land. The only remaining possibility is an interest that allows only sporadic use of the land in a way not typical of an owner's use and not dictated by external factors which would affect an owner. An example would be a right to graze cattle on federal lands on Tuesdays only. As the ludicrousness of this example illustrates, it is unlikely that any such "interest" would exist because such use would be impractical.

The continuity test was probably intended to allow recurrent but nonconsecutive uses to be treated as continuous and thus "durable." However, as explained above, few interests are likely to lack continuity. Thus, the continuity test seems to add little to the minimal requirements arguably necessary for "durability."⁵⁰

46. CAL. ADMIN. CODE tit. 18, R. 21 (1977).

47. CAL. ADMIN. CODE tit. 18, R. 22(a) (1977).

48. *Id.*

49. For example, in *Dressler v. County of Alpine*, 64 Cal. App. 3d 557, 134 Cal. Rptr. 554 (1976), grazing permits were issued for only a part of each year, but this term apparently was dictated by weather or other conditions. Here the Forest Service land was snowbound and "unavailable for grazing until about June of each year." 65 Cal. App. 3d at 563. The shortness of available use may, of course, affect the interest's value. *Id.* at 564.

50. See *supra* notes 41-46 and accompanying text.

D. Independence

The independence factor, although not one of the original three *Kaiser* criteria,⁵¹ was foreshadowed by *Kaiser's* requirement of a right to use and private benefit.⁵² This factor requires that the exempt landowner not control the interest-holder's use of the property. The rationale behind this requirement is that control indicates that the user is a mere agent of the owner; if this is the case, the owner's immunity from tax⁵³ extends to user's activities.⁵⁴

As a practical matter, the existence of an agency relationship may be difficult to prove when any private benefit is present,⁵⁵ especially a benefit not related to the scope of the user's employment activities.⁵⁶ Further, at least one court has found that certain types of control by the owner merely reduce the value of the possessory interest, rather than negate its existence.⁵⁷ Consequently, lack of independence will rarely be found, suggesting that this factor is of limited utility.

E. Private Benefit

The private benefit requirement which was one of the original *Kaiser* factors, was not expressly incorporated into the Regulations,⁵⁸ but has become a dominant factor in courts' analyses of possessory

51. See *supra* notes 10-14 and accompanying text.

52. Comment, *supra* note 4, at 836 n.43 ("separate interest" notion was implicit in possessory interest rationale from its inception).

53. See *supra* note 6.

54. See *Pacific Grove-Asilomar Operating Corp. v. County of Monterey*, 43 Cal. App. 3d 675, 117 Cal. Rptr. 874 (1974) (holding a nonprofit corporation's use of land in managing facilities of a state park to be exempt as a mere agency, when the state reserved control of the park's budget, inventory and fees).

55. See, e.g., *McCaslin v. DeCamp*, 248 Cal. App. 2d 13, 56 Cal. Rptr. 42 (1967) (government employee not an "agent" despite occupying land as a condition of employment); *United States v. County of Fresno*, 50 Cal. App. 3d 633, 638, 123 Cal. Rptr. 548, 550 (1975), *aff'd*, 429 U.S. 452 (1977) (rangers occupying government-owned houses in federal forests are not "agents," as the right to live in such houses served purposes beyond those of the government/employer); Comment, *supra* note 4, at 853 ("It will be a clever advocate who can persuade the court [that an agency argument] is true.").

56. Compare *Pacific Grove*, 43 Cal. App. 3d 675, with cases cited in note 55, *supra*.

57. *Freeman v. County of Fresno*, 126 Cal. App. 3d 459, 178 Cal. Rptr. 764 (1981) (amusement machine operator was subject to county control of number, type and placement of the machines). Such "control," however, might be viewed merely as a threshold restriction on the site to be used, rather than control over an agent's activities. It is interesting that the agency argument was not raised.

58. See CAL. ADMIN. CODE tit. 18, R. 21 (1977) and note 14 *supra*. The Regulations do, however, require that the user be able to exclude interfering parties from the land by legal process, a right that arguably constitutes a per se private benefit. CAL. ADMIN. CODE tit. 18, R. 21(e).

interests.⁵⁹

Because possessory interest taxes are intended to prevent an undue advantage to users of public lands and to ensure an equitable distribution of the tax burden,⁶⁰ it is logical that the tax be imposed only where the user is expected to derive some benefit from the use. However, the concept of private benefit, like that of exclusivity, has become severely attenuated in recent years as courts have applied the possessory interest tax to an expanded variety of interests. Cases have now established that a use need not generate a profit in order to produce a "private benefit."⁶¹ Further, the "benefit" conferred may be relatively slight.⁶² It is difficult to conceive of a right to use public lands worth paying a fee to obtain—or, for that matter, worth utilizing—which could not be said to produce a private benefit under this test. Viewed in this light, the "private benefit" requirement is tautological; if a right is worth obtaining, it has value to the individual user and thus produces a private benefit.

It seems, then, that the possessory interest requirements as currently applied have ceased to have any exclusionary force. Although the tax would probably survive a constitutional attack on grounds of vagueness,⁶³ the test should be re-examined to ensure that the spectrum of possessory interests has not been unduly expanded.

59. See Comment, *supra* note 4, at 842, and note 14, *supra*.

60. 4 PETERSON, PLANT & EAGER, *supra* note 15, at § 82.04[3][a]; Comment, *supra* note 4, at 831 n.18, 852.

61. *Rand Corp. v. County of Los Angeles*, 241 Cal. App. 2d 585, 50 Cal. Rptr. 698 (1966) (nonprofit corporation using federally-owned improvements found subject to possessory interest tax); *McCaslin v. DeCamp*, 248 Cal. App. 2d 13, 56 Cal. Rptr. 42 (1967) (employee's use of government housing was taxable, even though such residency was a condition of his employment); *Lucas v. County of Monterey*, 65 Cal. App. 3d 947, 135 Cal. Rptr. 707 (1977) (use of public harbor slip to moor boat produces private benefit); see also Comment, *supra* note 4, at 834-35.

62. See *Lucas v. County of Monterey*, 65 Cal. App. 3d 947, 135 Cal. Rptr. 707 (1977) (use of harbor slip). A recent Attorney General opinion indicates that even the right to a parking space on government land may constitute a possessory interest. 62 Op. Att'y Gen. 143; see *infra* notes 82-86 and accompanying text.

63. The requirement of fair warning or *nulla poena sine lege* is an essential element of due process in the civil context, just as it is in the criminal context. See *Lambert v. California*, 355 U.S. 225 (1957); *Ashton v. Kentucky*, 384 U.S. 195 (1966) (vague laws in any area are constitutionally infirm); *Hogan v. Atkins*, 411 F.2d 576 (5th Cir. 1969) (vagueness should be measured by common understanding and practices). In this case, a standard has at least been articulated, however weak it has become. See *Williams v. Brewer*, 442 F.2d 657 (8th Cir. 1971) (ambiguous statute not necessarily void for vagueness); *Massachusetts Welfare Rights Org. v. Ott*, 421 F.2d 525 (1st Cir. 1969); but see *Boutilier v. Immigration & Naturalization Serv.*, 387 U.S. 118 (1967) (void for vagueness rule applies in civil cases where standard is so indefinite as to be no rule at all).

IV. A SUGGESTION FOR CHANGE

The myriad of problems with the possessory interest test arose from well-intentioned efforts to define the parameters of such interests.⁶⁴ A beneficial change in the test must therefore focus on redefining these parameters.

Any workable definition of a taxable possessory interest must recognize the implicit and explicit rationale behind the possessory interest tax. While it would be naive to ignore the fact that the tax allows counties to generate revenue by taxing land that would otherwise be exempt,⁶⁵ there is nevertheless some merit in the oft-repeated justifications for the tax: that it is a fair burden to impose upon those with rights that are recognized and protected by the system; and that it prevents users of tax-exempt land from obtaining an unfair advantage over their private-sector counterparts. It is clear that *some* uses of tax-exempt land are significant enough to warrant the imposition of tax.

But where shall the line be drawn? What interests are so minor that the user (who, after all, already pays a permit⁶⁶ or rental⁶⁷ fee) should not be expected to pay a tax in addition? And what interests are so significant that in fairness the user should be expected to contribute his fair share to the tax base?

The solution to this conundrum lies in the definition of property: those interests which rise to the level of a true property right should be subject to the tax, while mere contractual rights should be excluded.⁶⁸ It seems logical that it was this distinction between a property right and a contractual interest that the courts were attempting to draw by contrasting a lease with a license,⁶⁹ and a taxable possessory interest with a "mere privilege."⁷⁰ The distinction has

64. See, e.g., the rationales articulated in *People v. Shearer* and *Mattson v. County of Contra Costa*, *supra* notes 8 and 15, and accompanying text.

65. The Supreme Court held, as indeed it had to in order to uphold the tax, that the tax was *not* a tax on the exempt landowner. *United States v. County of Fresno*, 429 U.S. 452, 457-62 (1977). The fact remains, however, that a possessory interest tax generates revenue from the same property.

66. In the case of grazing permits, the fee is based on anticipated usage, calculated in animal units per month ("AUM's"). An AUM is the amount of grass an adult cow will eat in a month. Grazing for other animals (horses, calves, sheep, etc.) is calculated as a fraction of an AUM. K. EHRMAN & S. FLAVIN, *supra* note 1, at 539-40; letter to K. Dale from a Susanville Rancher (Nov. 14, 1983) (on file at the Santa Clara Law Review).

67. See *McCaslin*, 248 Cal. App. 2d 13; *United States v. County of Fresno*, 429 U.S. 452.

68. See *supra* notes 18-34 and accompanying text.

69. *Kaiser*, 30 Cal. 2d 610, 184 P.2d 879. See also notes 28-33 and accompanying text.

70. See *supra* cases cited in note 29.

intuitive appeal as well; because the possessory interest tax properly applies only to "property," nonproprietary interests should therefore be excluded.⁷¹

Unfortunately, this distinction raises a new set of problems. The difference between a property right and a contractual interest has been the source of much learned debate, and no firm conclusions appear imminent.

However, there are two major differentiating factors between contract and property rights. First, a property right, unlike a contractual interest, is inherently freely alienable. That is, property "ownership" connotes an unfettered ability to sell. Contractual rights may or may not be alienable; the restriction, if any, will depend on the terms of the contract and often on the consent of the other contracting party.

Second, a property right not only confers a potential for benefit upon its holder, it also subjects him to the risk of loss if the "res" is damaged or destroyed. In a contractual situation, however, impossibility of performance or destruction of the object of the contract has long been held to excuse further performance and to permit rescission. The loss, unless otherwise contractually provided, is borne solely by the owner.

The distinction between a property right and a contractual interest, however, is not always a clear one. What of hybrid instruments such as leases, which have the nature of both a property conveyance and a contract? Leases have historically been treated as conveying property rights; yet the modern trend is to apply contract principles to the interpretation and enforcement of leases.⁷²

There may be no solution to the property-vs.-contract question with regard to leases in general. Yet, in this context, the two tests of alienability and burden-of-risk provide at least a workable starting point for distinguishing between property and contract rights, and therefore between interests that should be subject to the possessory interest tax and interests that should not. These tests are both reasonably easy to apply and produce results that seem logically correct. For example, a grazing permit that is alienable and in which the holder has a sufficient investment such that fire damage to the range would cause more than mere relocation losses,⁷³ should be deemed to

71. See *supra* note 5 and accompanying text.

72. 3 B. WITKIN, SUMMARY OF CALIFORNIA LAW, REAL PROPERTY § 423 (8th ed. 1973).

73. Relocation or substitution losses would be incurred by *any* contracting party if the object of the contract was destroyed. Those with an ownership interest — e.g., permit holders

convey a property right and therefore a possessory interest. On the other hand, rights in residential housing related to employment should virtually never be considered taxable "property" even if alienable. Although the lessee may be obligated to continue to pay rent in the case of breach by the lessor,⁷⁴ he generally does not stand to lose more than his relocation costs in the event of destruction of the house.⁷⁵

The concepts of alienability and risk of loss may be useful in revising the four-factor test to provide a more realistic and workable standard for possessory interests:

1. The exclusivity test should be returned to a meaningful criterion by requiring that the use in question be truly exclusive. That is, while different concurrent (but nonconflicting) uses of land may be allowed, an interest should be the *only permitted use of its kind* in order to qualify as exclusive. Multiple identical uses, if restricted to separate geographical areas, should also be recognized as exclusive. For instance, separate grazing permits could be issued to Rancher 1 for the North forty acres of a parcel, and to Rancher 2 for the South forty, with the uses considered exclusive because they do not overlap.⁷⁶

2. The durability test should be strengthened and clarified by specifying a minimum fixed term, such as five years. Interests in excess of this term would be conclusively presumed to meet the standard; interests of shorter duration should be examined to see how closely they approach the five-year mark and to see how strongly the other factors are present.

who have prepaid a nonrefundable fee for a five-year term — would suffer a loss greater than merely finding replacement pasturage. Similarly, those with interests in property for which no ready replacement exists should be considered to be "at risk" with respect to the interest.

74. Under the traditional view, the covenants were considered independent, and breach by one party did not excuse performance by the other. The emerging trend, however, is to treat the obligations as dependent. 3 B. WITKIN, *supra* note 72, at § 505 (1973 & Supp. 1984).

75. Upon destruction of the premises, either party may terminate the lease. CAL. CIVIL CODE §§ 1932(2), 1933(4) (Deering 1981). See also 3 B. WITKIN, *supra* note 72, at § 497.

76. An interesting problem is posed if Ranchers 1 and 2 share a common water hole in the middle of the parcel. Use of the water hole is clearly not exclusive under this definition. However, should this destroy the "exclusivity" of the entire parcel? The more logical conclusion is probably that neither rancher should be held to have a possessory interest in the common area, but that exclusive possessory rights should be recognized in the remaining areas.

A temporal, as opposed to spatial, division of rights is another matter. If Rancher 1 had the right to use the water hole from 8 a.m. to noon, and Rancher 2 could use the water hole from noon to 4 p.m., should the uses be considered exclusive? Aside from the fact that such a division of access rights is highly unlikely to occur, the problem posed is more one of durability than of exclusivity. Even if the rights were considered exclusive, they probably would not meet the durability test. See *infra* note 77 and accompanying text.

The concept of continuity should be preserved, but restated to clarify its basic thrust. Nonconsecutive uses should be recognized as being "durable" if either the interruption of use is voluntary, or the hiatus is required by natural forces beyond the control of the user. An interest should not be considered continuous, and therefore not durable, where sporadic use of the land is dictated by restrictions on the interest itself.⁷⁷

3. The independence test should be discarded entirely. It is clear without regard to a possessory interest test that agents of a tax-exempt principal will not be taxed for their use of public land.⁷⁸ Agency concepts are sufficiently well-developed to make it unnecessary—and even ill-advised—to duplicate them with additional criteria within the possessory interest context.

4. The concept of private benefit should be modified to require not only an opportunity for benefit or gain, but also to provide a chance of loss.⁷⁹ This test would essentially incorporate an "at risk" requirement: i.e., is there an investment (with or without a profit motive) that is subject to loss?⁸⁰

It will be noted that under the proposed criteria, many of the interests currently found to be taxable would not meet this new test for a possessory interest.⁸¹ Rather than undermining the validity of the proposed test, this observation confirms the extent to which the current factors have cast an over-inclusive net.

V. FUTURE OF THE TAX: ASSESSOR'S DREAM, TAXPAYERS' NIGHTMARE

Treatise writers have suggested that "[t]here are almost no limits to which the possessory interest concept can [sic] be pushed,"⁸²

77. In the case of the time-share water hole rights described in note 76, *infra*, the interest *as to the water hole* should not be considered continuous because the intermittent use is established at the discretion of the permit grantor, rather than dictated by natural conditions or by the user's preference.

78. See *supra* notes 53-57 and accompanying text.

79. See *supra* notes 71-75 and accompanying text.

80. A de minimus exception appears already to exist; current law recognizes that certain otherwise taxable interests may be *so small in value* that the cost of collection exceeds the potential revenue. Thus, interests under \$2,000 in value are exempted. CAL. REV. & TAX. CODE § 155.20 (Deering Supp. 1985).

81. For instance, the interests that were held to be taxable in *Archer*, 18 Cal. App. 3d 717; *Lucas*, 65 Cal. App. 3d. 947; *McCaslin*, 248 Cal. App. 2d 13; and *Sea-Land*, 36 Cal. App. 3d 837, would most likely be exempt under the proposed criteria. The interests in *Moore*, 12 Cal. 56, and *Mattson* 258 Cal. App. 2d 205, however, probably would not. See *supra* notes 73-76 and accompanying text.

82. K. EHRMAN & S. FLAVIN, *supra* note 1, at § 3.7.

and this assessment seems to be accurate under the current criteria used by the courts. Interests as minor as government officials' rights to assigned parking spaces may be subject to the tax;⁸³ the right to use public freeways may be next.⁸⁴ It has been suggested that the possessory interest tax could be extended to rights in *privately*-owned tax-exempt property;⁸⁵ and a crack has already appeared in the old rule that possessory interests in government-owned *personal* property are not subject to the tax.⁸⁶ These are logical—and profitable—areas for expansion and, absent revisions in the current possessory interest analysis, may be expected to be the subject of future efforts by county assessors to impose the tax.

VI. CONCLUSION

Courts should make a concerted effort to hold these expansive tendencies in check by analyzing "new" possessory interests with significantly more rigor than was demonstrated in the past. If a new set of rules is not adopted by the legislature to guide the analysis of potential possessory interests, there should at the very least, be a deliberate attempt to apply the old rules in a meaningful way. It will be the duty of counsel to insist that courts do so.

83. 62 Op. Att'y Gen. 143 (1979); K. EHRMAN & S. FLAVIN, *supra* note 1, at § 3.7 (Supp. 1984) (Of course, the Attorney General opinion recognizes that interests worth less than \$2,000 may be exempt under CAL. REV. & TAX. CODE § 155.20).

84. Presumably, such right of use would exist for a determinable period (the life of each car), and because two cars cannot occupy the same space at the same time, this usage would be "exclusive" under the soft definition currently used. Clearly, a benefit is provided.

85. Comment, *supra* note 4, at 847-48. Such uses are currently exempted under the welfare exemption excluding the land itself from taxation. *Id.*

86. See *supra* note 23. But see *General Dynamics Corp. v. County of Los Angeles*, 51 Cal. 2d 59, 330 P.2d 794 (1958).

