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COMMENTS

THE CALIFORNIA POSSESSORY INTEREST TAX: A TIME HONORED CONCEPT GETS A NEW TWIST

INTRODUCTION

In pursuit of its constitutional mandate that all property, not specifically exempted, be taxed at its fair value, California has developed a real property taxation scheme where "possessory interests" in land and improvements are taxed. The interest subjected to taxation is the right to use or possess the property or improvements, where such use or possession is unaccompanied by the ownership of the land or the improvements.

The taxation scheme is important only where the underlying fee is tax exempt. Thus, publicly held federal or state lands often generate these non-fee possessory interests which California has taxed since 1859. The historical difficulty in the application of the tax has been the courts' inability to adequately define the bounds of what constitutes a possessory interest in publicly held real property.

This comment will trace the development of the taxable possessory interest concept from its early beginnings through the most recent cases and show that the California courts' dis-

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1. CAL. CONST. art. 13, § 1 provides in relevant part: "Unless otherwise provided by this Constitution or the laws of the United States: (a) All property is taxable and . . . shall be taxed in proportion to its full value." See also Sea-Land Serv., Inc. v. County of Alameda, 12 Cal. 3d 772, 779, 528 P.2d 56, 61, 117 Cal. Rptr. 448, 453 (1974).
2. A possessory interest is generally created when a public owner of land or improvements leases the land or improvements to a private party. The public owner of the land might be the state, the federal government, a county, a municipality or a local revenue district. The private party might be an individual or a corporation.
3. CAL. REV. & TAX. CODE § 107 (West Supp. 1977). See also CAL. ADMIN. CODE tit. 18, § 21(a) (1975). California Revenue and Taxation Code § 104 classifies the right to use or possess land as real property. The possessory interest as defined by § 107 falls within the § 104 classification. The possessory interest's status as real property brings it squarely within the article 13 constitutional mandate and thus subjects it to tax.
tain for doctrinal rigidity has left the assessor free to expand the application of the tax,\textsuperscript{5} limited only by his own imagination.\textsuperscript{6} Finally, this comment will outline how the current approach to the tax has departed from the traditional concerns which caused it to be implemented.\textsuperscript{7}

**EARLY CASES AND THE KAISER RULE**

*The Early Cases*

California's earliest attempts to recognize taxable possessory interests in publicly owned tax exempt land involved federally owned property located in California, and used by residents for mining and farming. While there was no doubt that the federal land could not be taxed,\textsuperscript{8} it was unclear whether the federal exemption was available to residents using the land. The California Supreme Court confronted this issue in *State v. Moore*.\textsuperscript{9} The court found the use held by the resident to be a separate interest and therefore subject to taxation by the state. The *Moore* court carefully distinguished the possessory interest from the federally owned fee and in the process began defining what constitutes a possessory interest sufficient to trigger the tax:

The term "property in lands" is not confined to title in fee, but is sufficiently comprehensive to include any usufructuary interest, whether it be a leasehold or a mere

\textsuperscript{5} One possible explanation for recent expansion revolves around the tax on possessory interests comprising a large source of revenue used to combat the rising costs of enlarged governments. See K. EHRMAN & S. FLAVIN, TAXING CALIFORNIA PROPERTY § 50, at 60 (1967), where the authors state:

Due to the fact that about half the land in California is in the public domain, the taxation of possessory interests in this state is a significant revenue item. In 1963, possessory interests in California amounted to 165 million dollars in assessed value and contributed about 13 million dollars in tax revenue.

*Id.* (footnotes omitted).

\textsuperscript{6} For an ingenious attempt to create a possessory interest which failed, see American Airlines, Inc. v. County of Los Angeles, 65 Cal. App. 3d 325, 135 Cal. Rptr. 281 (1976) (no possessory interest in a nonexistent option period under a lease).

\textsuperscript{7} The confines of this comment do not permit any penetrating discussion of the valuation of possessory interests. For the leading California Supreme Court case discussing the method of valuation, see De Luz Homes, Inc. v. County of San Diego, 45 Cal. 2d 546, 290 P.2d 544 (1955). See also Smith, Taxing Possession of Federal Property, 4 SANTA CLARA LAW. 166 (1964).

\textsuperscript{8} The general rule of federal immunity from taxation by states evolved from McCulloch v. Maryland, 17 U.S. (4 Wheat.) 315 (1819).

\textsuperscript{9} 12 Cal. 56 (1859).
right of possession. Several persons may have, in the same land, a property which is subject to taxation, and it is not perceived that the fact, that the property of the Government is exempt from taxation, affects the right to tax the interest which private individuals have acquired in the same property. Exemption from taxation is a privilege of the Government, not an incident of the property.  

Moore's interest was a contractual mining claim, which entitled him to exclusive use and enjoyment of the land for mining purposes. The state singled out this "use and enjoyment" as a distinct "property" interest and argued that, since the state protected Moore's use and enjoyment of the property against all the world but the true owner, Moore had to contribute his fair share to support the state, as would any property owner.  

Seven years after Moore, in People v. Shearer, the supreme court again recognized taxable possessory interests in federally owned land. Shearer adversely possessed the federal land for farming purposes and in addition added valuable improvements to the land. In the court's view, Shearer's occupancy, standing alone, generated a taxable interest. The court recognized that the mere right to possess and use the land was a "valuable species of property" often yielding large revenues, and it isolated this right to possession as a valid object of state taxation.  

The rationale for taxing possessory interests in federally owned land is equally applicable where the state owns the underlying land. The California Supreme Court so held in San Pedro, Los Angeles & Salt Lake Railroad v. City of Los Angeles. San Pedro was a lessee of certain tidelands located

10. Id. at 71.  
11. Id.  
12. 30 Cal. 645 (1866).  
13. Id. at 656. The court's forceful statement on mere right to possession as a recognized "valuable species of property" illustrated that any person who used the public lands for his benefit could have had a possessory interest. "The possession itself of the public lands and the improvements thereon, whether by naked trespassers, or those who claim in addition a right of pre-emption, as to everybody except the United States, have always in California, . . . been regarded as valuable property interests." Id. at 655.  

Presently, the reasoning that mere right to possession can be a valuable property interest continues to provide the underpinning for the taxation of possessory interests. See, e.g., Lucas v. County of Monterey, 65 Cal. App. 3d 947, 952, 135 Cal. Rptr. 707, 710 (1977).  
14. 180 Cal. 18, 179 P. 393 (1919).
in Los Angeles and belonging to the state. The leasehold was characterized as a property interest owned by the lessee and was considered fully taxable pursuant to the constitutional mandate that all nonexempt property was subject to tax.\textsuperscript{15} The court noted the normal procedure for assessing a leasehold in real property, which provides for a single tax assessment to the reversioner, based on the value of the leasehold plus the value of the reversion.\textsuperscript{16} The court further noted that this normal procedure proved unworkable when the reversion holder was tax exempt, as the leasehold's value could not be taxed through the assessment of the reversion. The court concluded that the reversion holder's tax exempt status should not allow the leasehold to escape taxation and that the lessee should be separately assessed and taxed on the value of the leasehold.\textsuperscript{17}

It can readily be seen how these early cases have provided an important theoretical foundation for the extension of the possessory interest tax. First, they have established the principle that California is not prevented from levying a real property tax on persons in possession of real property, even though the underlying real property is tax exempt. Second, they have illustrated the willingness of California to both recognize multiple interests in property and to treat the right to possess such interests as valuable, taxable property. Finally, these cases have supplied a general justification for taxing these multiple interests in the same property; the fact that California recog-

\begin{itemize}
  \item \textsuperscript{15} Id. at 21, 179 P. at 394. The constitutional mandate that all nonexempt property be taxed arises from article 13 of the California Constitution. See note 1 supra.
  \item \textsuperscript{16} 180 Cal. at 22, 179 P. at 395. Ideally the lessee's share of this assessment passes to him in the form of rent, set by the terms of the lease.
  \item \textsuperscript{17} Id. at 23, 179 P. at 395. The court was unable to accept the premise that the state intended to create a favored class of leaseholds which, since they could not be assessed through the normal procedure, would not be assessed at all. Id.
\end{itemize}

The state, then, devised two assessment procedures when leasehold agreements were entered into. First, when the lease involved two private parties, a single assessment was made to the holder of the reversion. Second, when the lease agreements involved a public body holding the reversion and a private party holding the leasehold, a single assessment was made to the lessee based on the value of the leasehold. Ideally, taxing one class of leaseholds directly involved no issue of discrimination. The lessee who leases property from a private lessor paid no tax directly, but paid his share of the tax indirectly through increased rent. The lessee who leases property from a public lessor paid his share of the tax directly, but the public lessor, not subject to tax, could rent at a lower figure.

nizes the interests and protects them from outside interference. What these early cases did not do, was adequately define what types of possessions would trigger the tax. They left open the question of exactly how many rights had to be conferred upon the possessor to make his interest “property” and thus taxable as a possessory interest.

The Kaiser Rule

Faced with this problem, the California Supreme Court, in *Kaiser Co. v. Reid*, attempted to define what rights had to be conferred upon the possessor of the public lands, in order for the possession to create a taxable possessory interest. The *Kaiser* court outlined three essential elements for an agreement with a public entity to rise to the level of “property” taxable as a possessory interest. First, the agreement had to confer use and possession for a determinable period, and possession had to be reasonably certain to last for that period. Second, the agreement had to confer use and possession which was exclusive against “all the world,” including the rightful owner. Finally, the agreement had to confer use and possession.

18. The strongest statement of the rationale underlying the justification for taxing these mere rights to possession, which continues to be relied upon, appeared in *People v. Shearer*, 30 Cal. 645 (1866). There the court described the interest being subjected to tax and declared the rationale behind taxing it:

> These possessions, then, are recognized as a species of property subsisting in the hands of the citizen. It is not the land itself, nor the title to the land . . . . It is not the preemption right, but is the possession and valuable use of the land subsisting in the citizen. Why should it 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?

*Id.* at 657. Under this rationale then, the right to use and possess the public lands derives its value from the state’s willingness to permit its continuance and to safeguard that use and possession for the individual. Since the state is responsible for assuring the value of the interest, the individual should contribute his slice of taxes to sustain the state. This justification has recently been relied upon as a rationale for levying a possessory interest tax. See *Board of Supervisors v. Archer*, 18 Cal. App. 3d 717, 96 Cal. Rptr. 379 (1971) (possessory interest upheld in public grazing lands).

19. 30 Cal. 2d 610, 184 P.2d 879 (1947). *Kaiser* represents the most recent attempt of the supreme court to deal with a direct challenge to an assessor’s characterization of a property interest as “possessor.” Subsequent cases have touched this issue indirectly but they have primarily involved questions relating to the valuation of possessory interests. See, e.g., *El Tejon Cattle Co. v. County of San Diego*, 64 Cal. 2d 428, 413 P.2d 146 (1966); *De Luz Homes, Inc. v. County of San Diego*, 45 Cal. 2d 546, 290 P.2d 544 (1955). Another major line of cases has involved the possible extension of the possessory interest concept to tax exempt personal property. See, e.g., *General Dynamics Corp. v. County of Los Angeles*, 51 Cal. 2d 59, 330 P.2d 794 (1958).
which generated a valuable private benefit, and this benefit in *Kaiser* was the ability to earn a profit.\(^\text{20}\)

The agreement between Kaiser and the federal government included provisions giving Kaiser rent free exclusive use and possession of federally owned shipyards in Richmond, California.\(^\text{21}\) The contract covered only the ship building activity of Kaiser and was not transferable.\(^\text{22}\)

In reaching its conclusion that the agreement constituted a taxable possessory interest, the court reaffirmed the historical reasoning that possession and use of the public lands by private parties was a valuable species of property.\(^\text{23}\) The court reasoned that the exclusive use and possession of the government property for a determinable period gave rise to the traditional type of taxable possessory interest.\(^\text{24}\)

Having rejected the argument that because the lease could be terminated by the government, Kaiser's right to use the land diminished to a mere license, which could not be taxed as real property, the court stated:

> The test... 'whether an agreement for the use of real estate is a license or a lease is whether the contract gives exclusive possession of the premises against all the world, including the owner, in which case it is a lease, or whether it merely confers a privilege to occupy under the owner, in

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\(^{20}\) The broad language of *Kaiser*, *San Pedro*, *Shearer*, and *Moore* seems to suggest that mere use and possession of public lands creates a valuable species of property subject to tax. In *Kaiser*, the shipyards were used to further a ship building business. In *San Pedro*, the tidelands were used to further a railroad business. In *Shearer*, the adverse possessors used the land for farming. In *Moore*, the land was used to further a mining business. The particular facts of each case indicate that the uses and possessions have business purposes. With the broad language of the cases in mind, it is at least arguable that the "value" of a possessory interest lies in its ability to produce a private monetary gain.

\(^{21}\) With respect to one of the shipyards, the federal government owned both the fee and the facilities and Kaiser was assessed on its possessory interests in both the land and the improvements. With respect to the other, the federal government owned only the facilities and Kaiser was assessed only on its possessory interest in the improvements.

\(^{22}\) Kaiser's use of the shipyards provided it with a vehicle to make a profit independent of whatever function it performed on behalf of the government. The court noted that it was Kaiser's status as an independent contractor, as opposed to that of a mere government agent, which led to the possessory interest tax. *30 Cal. 2d* at 622, 184 P.2d at 886.

\(^{23}\) *Id.* at 618, 184 P.2d at 884. The court cited with approval the positions taken in *Shearer*. See notes 13 & 18 supra.

\(^{24}\) *30 Cal. 2d* at 618, 184 P.2d at 884.
which case it is a license, and this is a question of law arising out of the construction of the instrument.\textsuperscript{25}

The court reasoned that although the contracts gave Kaiser secure possession for a fixed period, subject to its compliance with the terms of the lease, that was enough to give rise to a taxable possessory interest.\textsuperscript{26} The court also noted that the nontransferability of Kaiser's right to use the land and its inability to use the land for other non-shipbuilding commercial purposes did not alter the quality of the possessory interest, and hence did not affect its taxable status.\textsuperscript{27}

The function and utility of the factors laid out by the Kaiser court are readily apparent. Both the need for a determinable period of possession and the need for exclusive use and possession against all the world, including the owner, serve to help the court distinguish between those rights and duties that arise as an appendage of an interest in land and those that arise only from a contractual obligation. The distinction is important because the tax attaches only to possessory interests in land as opposed to contractual obligations, the res of which happens to be land. Thus, the court's language distinguishing a license from a lease becomes central to the assessor's ability to collect the tax.

Additionally, all three elements, the determinable period, the exclusive use, and the valuable private benefit, help to distinguish the possessory interest holder from the fee holder. If these elements are present, particularly the valuable private benefit, the court can be close to certain that the possessor is not an agent of the fee holder and therefore, not exempt from the tax.

The Erosion of the Kaiser Rule

The elemental approach of the Kaiser rule offered some degree of structure and certainty in the application of the pos-

\textsuperscript{26} 30 Cal. 2d at 619, 184 P.2d at 885.
\textsuperscript{27} Id. at 624, 184 P.2d at 888. Terms in a lease agreement which restrict the use of the premises will operate to lower the assessed value of the leasehold, but will not operate to remove the leasehold from the status of a possessory interest. Similarly, terms in the lease agreement providing for cancellation or for nontransferability will operate only to lower the assessed value of the leasehold, but will not affect the status of the leasehold as a possessory interest.
cessory interest tax, but it similarly restricted a fluid application of the tax. *Rand Corp. v. County of Los Angeles* and *Mattson v. County of Contra Costa* marked the first movements away from the rigidity of the *Kaiser* rule.

*Rand* represented the appellate courts' first departure from the elements previously found necessary in *Kaiser* to establish a taxable possessory interest. *Rand*, a nonprofit corporation, received a property tax assessment for its possessory interests in tax exempt federally owned improvements. Rand's basic contention was that its status as a nonprofit corporation should excuse it from tax on its possessory right. The court, however, found no need to link the private use of tax exempt property to financial advancement. It reasoned that

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30. It might be argued that *Tilden v. County of Orange*, 89 Cal. App. 2d 586, 201 P.2d 86 (1949), had, previous to *Rand*, disposed of the requirement that the private benefit, conferred upon the lessee by the lease agreement, be tied to financial gain in order to create a taxable possessory interest. In *Tilden*, the possessory interest tax fell on sublessees of tax exempt, publicly owned land who were merely using the land as residences. However, the court noted that the tax should properly have been levied on the lessor, who clearly procured financial gains by reason of his leases. *Id.* at 588, 201 P.2d at 87.
31. *Rand*'s contract with the government also included a termination clause, but, as in *Kaiser*, it operated only to adjust the value of the possessory interest; it did not operate to remove it from the status of property taxable as a possessory interest. 241 Cal. App. 2d at 588, 50 Cal. Rptr. at 700.

Rand's tax exempt improvements were located on taxable land and Rand argued that this left it outside *CAL. REV. & TAX. CODE* § 107 (West Supp. 1976), which provides in relevant part: "'Possessory interests' means the following: (a) Possession of, claim to, or right to possession of land or improvements, except when coupled with ownership of the land or improvements in the same person. (b) Taxable improvements on tax-exempt land." The *Rand* court noted that a portion of the improvements taxed in *Kaiser* were on privately owned land, see note 21 supra, but also stated that the *Kaiser* court had not confronted this issue. The *Rand* court concluded, however, that the use of tax exempt improvements was just as valuable on taxable land, as that same use on tax exempt land, and this distinction would not defeat the theory underlying the tax. 241 Cal. App. 2d at 592-93, 50 Cal. Rptr. at 702-03.
32. 241 Cal. App. 2d at 590, 50 Cal. Rptr. at 701.
33. *Id.* A further deviation from the *Kaiser* fact pattern occurred in *McCaslin v. De Camp*, 248 Cal. App. 2d 13, 56 Cal. Rptr. 42 (1967). *McCaslin* confirmed the *Rand* position that profit need not be an element of the private benefit conferred by the use and possession, and went one step further in finding that a nonbusiness use of the tax exempt property could give rise to a taxable possessory interest.

*McCaslin* was an irrigation district employee who paid a monthly rental to reside, at the behest of the district, in district owned housing on district owned tax exempt land. *McCaslin* argued that he resided in the home as an agent of the district and thus his tenancy was tax exempt. The court made short work of *McCaslin*'s contentions. It articulated the general principle that this type of lease arrangement, where the reversion was exempt, allowed an assessment to be made directly to the party with the
the underlying theory of Kaiser was that mere possession of the public lands or improvements was a valuable species of property and the holder of such a right to possession should contribute its fair share to sustain the government which protects it. Once Rand's interest was viewed as property, it fell victim to the constitutional mandate that all nonexempt property be taxed.

The Rand court was consistent with Kaiser in insisting that possession be secure for some determinable period in order to give rise to a possessory interest. It was equally consistent with Kaiser in insisting that the use and possession of the property be exclusive against the whole world, including the owner. Notably, however, Rand clearly expanded on the Kaiser notion of what constituted a valuable private benefit. The court allowed a valuable private benefit to arise from a use of the public land or improvements that did not generate a commercial profit. The Rand court enlarged the types of uses and possessions that could give rise to a possessory interest to include those uses and possessions which accomplish an important private purpose.

In Mattson, an appellate court again departed from a strict application of the elements of Kaiser. Mattson had an

possessory right. The court then focused on the "residency" aspects of McCaslin's tenancy as giving rise to a valuable private benefit apart from his employment. The court concluded that the exclusive use and possession of the premises as a residence was a sufficient private benefit to support the creation of a possessory interest, despite the residency being a condition of employment. Id. at 17-18, 56 Cal. Rptr. at 45-46. 34. 241 Cal. App. 2d at 592, 50 Cal. Rptr. at 702-03. 35. Id. at 593, 50 Cal. Rptr. at 703. The authority for taxing the possessory interest in Rand and other California cases arises from its classification as property and the constitutional duty to impose taxes on all nonexempt property. See notes 1 & 3 supra; see also CAL. REV. & TAX. CODE § 201 (West 1970).

The Shearer court's characterization of "mere possession" as a "species of property", see note 18 supra, and the adherence to that view by subsequent courts, could potentially lead to the classification of any interest in publicly owned property as possessory — immediately taxable unless a specific exemption can be found. It should be recognized that any expansion of the types of interests in publicly owned property which can be classified as possessory produces a corresponding expansion in the tax base for any particular taxing entity.

36. See note 31 supra.
37. Again, it cannot be overlooked that this exclusive use and possession does not have to pertain to any use one might make of the leased property; the use and possession need only be exclusive with respect to the valuable private benefit conferred by the contract itself. See note 27 supra.
38. In the wake of the Rand and McCaslin decisions, one could argue that private benefit means simply any advantageous use one can derive from the property. For a discussion of McCaslin, see note 33 supra.
agreement with the city of Concord entitling him to operate a refreshment service and clubhouse at a municipal golf course. In rejecting Mattson's contention that he was a mere concessionaire, the court reviewed the entire agreement, weighed the rights conferred on Mattson by the agreement against the essential elements needed to create a possessory interest, and found the agreement created a possessory interest. The court announced a concise new approach for testing whether rights conferred by an agreement generated a possessory interest:

In arrangements of the general nature of the one before us, to which a unit of government is a party, almost inevitably there are some features of relative durability, independence, exclusiveness and fixedness, and others of relative impermanence, subjection to control and public participation. In each case, judgment must be made by examination of the agreement in its entirety.

40. Id. The terms of the agreement gave Mattson the sole right to serve food and beverages at the clubhouse for five years, with a right of first refusal to a new contract for the same services for another five year period. The agreement called for the payment of 5% of the gross receipts from the operations to the city. The city required Mattson to post a faithful performance surety bond and required him to carry liability insurance to cover injuries occurring on the property. Mattson also had to keep the premises in good repair and supply all the requisite items needed for the conduct of the business.

The city reserved the right to terminate due to substandard performance, or upon breach of any of the terms of the contract. The city also required that the quality of service be on parity with neighboring restaurants. The city could discharge any employee it found objectionable and if the city manager found any operation to be detrimental it was to cease. Id. at 208-09, 65 Cal. Rptr. at 647-48.

41. Id. at 207, 65 Cal. Rptr. at 647. The court was quick to note that the descriptive words of the agreement calling Mattson a "concessionaire" and not a "lessee" did not control the issue of whether Mattson did in fact possess a leasehold estate. Id.; see text accompanying note 25 supra.

42. 258 Cal. App. 2d at 209, 65 Cal. Rptr. at 648. For the major features of the agreement, see note 40 supra.

43. 258 Cal. App. 2d at 209, 65 Cal. Rptr. at 648. Durability under the Mattson balancing test involves an examination of the factor Kaiser found critical, i.e., the security of the possession for a determinable period. The Mattson court omitted any discussion of fixedness, but that factor would arguably be present if the agreement was viewed as sufficiently durable. Independence involves an examination of who controls the enterprise operated by the individual on the public land. To give rise to a possessory interest, the operation must be sufficiently autonomous to constitute more than a mere agency, but the public body can retain numerous controls if the controls do not operate to disadvantage the party in the conduct of his business. The independence factor does not expand the list of elements necessary to create a possessory interest. Implicit in the rationale behind the possessory interest from its inception was that it was a "separate interest," independent of others' rights in the land. A use and posses-
The court's generalized balancing process blurred the distinct elements of *Kaiser* and in the process reduced the quantum of rights required for the existence of a possessory interest.

The court found no need to translate the requirement that use and possession be "exclusive" into a denial of Mattson's possessory interest in the clubhouse area, despite the fact the area was accessible to the general public. The court opined that the freedom of the general public to enter the area did not detract from the existence of Mattson's possessory interest, because those who entered were potential patrons. The court held that the entire agreement gave Mattson a substantial interest, with sufficient exclusiveness of possession, even against the city, to classify the interest conferred as possessory.

Just as *Rand* had expanded the notion of what type of private benefit was needed to give rise to a possessory interest, *Mattson* expanded the types of uses and possessions that could give rise to a possessory interest. The decision established that "exclusive" possession could exist in spite of the fact that others made use of the publicly owned land with the lessee, provided that the several uses were not mutually inconsistent.

The decision also established a new method of determining what types of agreements created taxable possessory interests.

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44. 258 Cal. App. 2d at 210, 65 Cal. Rptr. at 649.
45. Id. at 210, 65 Cal. Rptr. at 649. The *Kaiser* court set out a rigid distinction between a lease and a license and this distinction proves crucial to the scheme of possessory interest taxation. 30 Cal. 2d at 619, 184 P.2d at 885. The lease in *Kaiser* required exclusive possession against the whole world, including the owner. Id.; see text accompanying note 25 *supra*. A lease constitutes property capable of ownership and thus will give rise to the possessory interest tax. A license does not constitute property and will not give rise to a real property tax. *See* Roehm v. County of Orange, 32 Cal. 2d 280, 290, 196 P.2d 550, 556 (1948).

The *Mattson* court did not bind itself to the rigid *Kaiser* distinction between lease and license. Under the *Kaiser* formula, public access to the dining area would have defeated exclusiveness, which would have defeated the possessory interest tax. The *Mattson* court shifted the focus of the exclusiveness requirement to whether the nonexclusive aspect of Mattson's possession converted Mattson's interest to something less than "substantial." The *Mattson* court then concluded that the public access (the nonexclusive aspect of the possession) enhanced Mattson's interest. Thus, the element of exclusiveness was retained. 258 Cal. App. 2d at 210, 65 Cal. Rptr. at 649.

46. *See* note 45 *supra*. 
in publicly held tax exempt land. The court would weigh the rights conferred by the agreement against the essential elements needed to create a possessory interest and determine whether or not the balance favored a possessory interest.

The balancing approach still involved a close look at the three elements which Kaiser found essential for an agreement to give rise to a taxable possessory interest, with two of the elements altered significantly by Rand and Mattson. The agreement must still confer a reasonably secure use and possession for a determinable period; the use and possession must still be exclusive, but only in so far as no other simultaneous uses of the property detract substantially from the use conferred by the agreement; and the use and possession must still give rise to a valuable private benefit, which can be equated with the accomplishment of an important private purpose.

Nevertheless, the overriding belief that the holder of a valuable use and possession should contribute his fair share to the state that recognizes and protects it, seemingly led the courts in Rand and Mattson to quantify less precisely the interests held by the parties. In the process, the elements of Kaiser were left less than distinctly intact.

**Board of Supervisors v. Archer: A Quantum Leap**

In the aftermath of Mattson, the State Board of Equalization introduced its guidelines to aid local tax assessors in determining precisely what types of uses and possessions of publicly owned land and improvements constituted possessory interests. Construing these guidelines, the Third District Court of Appeal decided Board of Supervisors v. Archer, which demonstrates the current approach utilized in determining when use...

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47. See notes 43 & 45 supra.
48. See 258 Cal. App. 2d at 212, 65 Cal. Rptr. at 650.
49. See Cal. Admin. Code tit. 18, §§ 21-22 (1975). The administrative code essentially adopts the California tax code definition of possessory interests but also sets out a subclass of "taxable possessory interests" which are "possessory interests in nontaxable publicly owned real property." See id. § 21 (emphasis added). The code also adopts the Mattson balancing approach for testing whether the use and possession conferred by an agreement is sufficiently durable, independent and exclusive so as to give rise to a possessory interest. See id. In addition, the code adopts the Mattson view that simultaneous uses of land not mutually inconsistent can each be exclusive, which allows many possessory interests to exist in the same public land, providing a further extension of the tax base. See id.
and possession of public lands gives rise to a taxable possessory interest, and which represents a quantum leap from the position of the court in *Kaiser*.

Typically, a court using the *Archer* approach will initially describe the California constitutional and statutory scheme mandating the taxation of all nonexempt property,\(^{51}\) and note that the use and possession of the public lands in California has always been regarded as a valuable species of property, the holder of which should contribute his fair share of taxes to the government which recognizes and protects that right to possession.\(^{52}\) At this point the *Archer* and *Kaiser* approaches diverge. While *Kaiser* would rigidly apply its three-prong test, *Archer* examines the agreement conveying the rights in the public land, weighing them against the elements of *Kaiser* and *Mattson* to determine if the agreement on balance creates a possessory interest.\(^{53}\) More often than not, if the court finds that the agreement creates an interest in the publicly owned property which gives rise to a valuable private benefit,\(^{54}\) the balance will favor the existence of a possessory interest which will be subjected to tax.\(^{55}\)

In *Archer* specifically, the complaining parties held grazing permits issued by the federal government on tax exempt

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51. See note 35 *supra*.
52. See note 18 *supra*.
53. See notes 43 & 45 *supra*.
54. The agreement must create an interest in the publicly owned property or the possessory interest tax will not fall. See American Airlines, Inc. v. County of Los Angeles, 65 Cal. App. 3d 325, 135 Cal. Rptr. 261 (1976); note 6 *supra*.

In *American Airlines* the airline had leased a terminal on publicly owned land at Los Angeles International for a term of 28 years. The lease had no option for renewal and the airline and the airport had come to no understanding about any renewal. With 18 years remaining on the lease the assessor sought to value the possessory interest held by the airline under the lease on the basis of 25 years of remaining possession. 65 Cal. App. 3d at 327, 135 Cal. Rptr. at 262-63. The assessor based the valuation on a "reasonably anticipated term of possession" under a theory that the airline and the airport "would have to get together" out of necessity and agree on renewal. *Id.* at 329-30, 135 Cal. Rptr. at 264. The court concluded that the airline had no possessory interest in the premises beyond the length of its lease. The court refused to raise a hope or expectation of future use into something "capable of private ownership," as real property must be for purposes of taxation. *Id.* at 331-32, 165 Cal. Rptr. at 265-66. See also Cal. Rev. & Tax Code § 103 (West 1970).

The permit holders received property tax assessments for their possessory interests in the government owned grazing land. The permittees contended the grazing permits were mere licenses and not property, and thus not taxable as possessory interests. The court acknowledged that the permits were temporary, revocable, and that multiple permits could have been issued with respect to the same tract of land. Notwithstanding these features, the court concluded that the permit holders received a valuable possession in the public lands that materially aided them in their businesses. The court reasoned that these types of permit agreements with the federal government conferred some or all of the elements Mattson found crucial to the creation of a possessory interest and the balance in this case favored the creation of a possessory interest.

Archer remains consistent with the previous cases by insisting that possession be reasonably secure for a determinable period, in order to give rise to a possessory interest. This element of durability was readily satisfied, as the possession was reasonably secure for the length of the permit. Further, the permits were renewable upon application by the holder. Archer is also consistent with the prior case law in requiring that the

56. The permits entitled the holder to pasture his cattle upon the government land. Although temporary, they were renewable upon application by the permittees. The permits were also revocable and multiple permits could be issued upon the same land. 18 Cal. App. 3d at 725, 96 Cal. Rptr. at 385.
57. Id. at 722, 96 Cal. Rptr. at 683.
58. Id. at 725-26, 96 Cal. Rptr. at 385. Although the court conceded that the multiple permit feature generated the possibility that a glut of permits could have been issued with respect to any one tract, it found the probability of this occurring extremely remote. Id. at 725, 96 Cal. Rptr. at 385. Presumably, however, if a greater number of permits were issued with respect to any one tract, then the value of any individual’s possessory interest in that tract would be lowered.
59. Id. The court additionally noted that the California Administrative Code confirmed its conclusion that the permittees held taxable possessory interests. Id. at 726-27, 96 Cal. Rptr. at 386.

The court simply supplied the sections it viewed as relevant, without any reasoning as to how they aided in affirming the outcome of the case. The court quoted § 21(a) which provided the code’s definition of a possessory interest. The permit holders in Archer met the terms of this section since they had use and possession of the property without holding a fee simple or life estate in the property. The court then quoted § 21(a)(1), presumably to demonstrate that the grant of the permit conferred the essential type of use and possession required by the code. The permit holders in Archer met the terms of this section since they had a durable and independent possession, with the possible exception that the possession was not exclusive. But, the court then quoted § 21(e)(2), presumably to demonstrate that the type of concurrent use the permit holders made of the property did not destroy the requirement of exclusiveness. See CAL. ADMIN. CODE tit. 18, § 21 (1975).
use and possession confer a valuable private benefit. This element was readily satisfied as the possession enabled the party to earn a potential profit, and thus allowed the party to accomplish an important private purpose.

*Archer* is equally consistent in demanding that the possession conferred be exclusive, and is aligned with the *Mattson* position that multiple use of the property will not defeat the exclusiveness requirement. Exclusiveness in *Mattson*, however, involved multiple uses of the property that were not mutually inconsistent, whereas the multiple uses in *Archer*, involving the grazing of cattle upon the same tract of land, were detrimental to one another and therefore, mutually inconsistent. To overcome this, the *Archer* court shifted the focus of the "exclusiveness" element to whether the individual's possession, standing alone, could be viewed as valuable. Thus, the individual's possession would be judged exclusive if it accomplished an important private purpose and any other users of the same land could not *totally* inhibit the individual from accomplishing his important private purpose.60

*Archer*, unlike *Mattson*, involved no elaborate attempt to weigh the rights conferred by the agreement against the indi-

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60. One case, which followed *Archer*, implied that the California Supreme Court had recognized that multiple users, making similar uses of the same property, could each have a taxable possessory interest in that property. *Georgia Pac. Corp. v. County of Mendicino*, 340 F. Supp. 1061 (N.D. Cal. 1972) (motion for summary judgment), *on the merits*, 357 F. Supp. 380 (N.D. Cal. 1973), *aff'd*, 515 F.2d 285 (9th Cir. 1974). In *Georgia Pacific* the court was asked, on motion for summary judgment, to determine whether several timber companies, each leasing tax exempt national forest lands for use in their business, could have a taxable possessory interest in that land. The court looked to the California Supreme Court opinion in *El Tejon Cattle Co. v. County of San Diego*, 64 Cal. 2d 428, 413 P.2d 146, 50 Cal. Rptr. 546 (1966), as an important precedent. The court in *El Tejon* was confronted with the question of how to value a grazing leasehold, and the question of whether or not the lease gave rise to a possessory interest was not contested. The *Georgia Pacific* court noted, however, that the supreme court had analyzed the nature of the lessee's interest, and by upholding the assessor's valuation, had necessarily concluded that the assessor's classification of the leasehold as a possessory interest was valid. In that light, the court further noted that the lessee in *El Tejon* was not the sole user of the land. 340 F. Supp. at 1066. The court concluded that *El Tejon* would support the position that "an interest in real property [was] taxable as 'possessory' so long as the holder of the interest [was] protected from interference by other users." *Id.* at 1067. The *Georgia Pacific* court properly stated that its holding, as well as the holding in *Archer*, went beyond *El Tejon*, but it stated that the cases were close enough so that the supreme court would probably follow *Archer*. *Id.* The difference in the two classes of cases, however, can be viewed as crucial. *El Tejon*, like *Mattson*, involved other users who did not conflict with the use the possessory interest holders made of the property, whereas the use in *Archer* and *Georgia Pacific* can be viewed as at least mutually detracting.
vidual elements necessary to create a possessory interest.\textsuperscript{61} The major portion of the court’s analysis was directed at whether or not the agreement conferred upon the holder of the interest a valuable use and possession. The \textit{Archer} court’s analysis in that respect represents a quantum jump from the rigid three part analysis used by the \textit{Kaiser} court in determining whether or not an agreement dealing with the public lands gave rise to a taxable possessory interest.\textsuperscript{62} \textit{Archer} merges that three part analysis into a solitary focus on whether or not the possession confers upon the holder of the interest a valuable private benefit, or allows the party to accomplish an important private purpose.\textsuperscript{63}

\textbf{Post Archer Developments}

The \textit{Archer} court’s analysis of when a possessory interest existed in publicly owned land proved helpful in cases involving similar facts\textsuperscript{64} and was readily adaptable to cases involving multiple users of the same property.\textsuperscript{65}

\begin{itemize}
  \item \textsuperscript{61} See note 43 and accompanying text supra.
  \item \textsuperscript{62} See text accompanying note 20 supra.
  \item \textsuperscript{63} The rigid \textit{Kaiser} analysis erected considerable barriers to agreements dealing with the public lands giving rise to taxable possessory interests. The \textit{Archer} analysis was less demanding and, far from providing barriers, it paved the way for a whole host of agreements dealing with the public land which would give rise to taxable possessory interests.
  \item \textsuperscript{64} See \textit{Dressler v. County of Alpine}, 64 Cal. App. 3d 557, 134 Cal. Rptr. 554 (1976) (permittees had possessory interest in public pasture land though permits had value for less than one year).
  \item \textsuperscript{65} See \textit{Sea-Land Serv., Inc. v. County of Alameda}, 36 Cal. App. 3d 837, 112 Cal. Rptr. 113 (1974). \textit{Sea-Land} had a 20 year preferential assignment agreement for the use of publicly owned marine terminals. Pursuant to the agreement, \textit{Sea-Land} had use of the property only for the loading and unloading of vessels, the public had access over the property, and the state could use the terminals for its vessels when \textit{Sea-Land} was not. The trial court concluded that \textit{Sea-Land} had no possessory interest since the agreement did not give \textit{Sea-Land} exclusive possession of the property against the whole world, including the owner.
  \item The court of appeal disagreed, however, stating that the trial court’s definition of exclusiveness did not comport with \textit{Archer}. It reasoned that \textit{Sea-Land} had exclusive possession of the property when it had a “business need”, and that was all \textit{Archer} demanded. \textit{Id.} at 842, 112 Cal. Rptr. at 117. The \textit{Sea-Land} fact pattern clearly met the \textit{Archer} test of exclusiveness, since none of the multiple uses of the property conflicted. The state could not use the property when \textit{Sea-Land} had a business use for it, and the public access did not conflict with \textit{Sea-Land}, even when \textit{Sea-Land} used the property. The court concluded that the agreement conferred upon \textit{Sea-Land} a valuable
\end{itemize}
More importantly, however, it had a significant impact on three cases which represent the current extension of the concept of taxable possessory interests. The three recent cases further fix the courts' focus on the element of benefit—to the near exclusion of all else.

United States v. County of Fresno

In United States v. County of Fresno, federal forest rangers had agreements with the Forest Service allowing them to reside in government-owned housing on national forest land. The rangers received a property tax assessment for their possessory interests in the tax-exempt, federally owned residences. The rangers contended that they resided in the homes as a condition of their employment and thus, were mere agents of the government, having no property interest which could be subjected to tax.

On appeal, the court concluded the rangers' agreements gave rise to taxable possessory interests. The court stated that a possessory interest usually involved the right of a private use and possession of public property and thus, resulted in a taxable possessory interest.


67. 50 Cal. App. 3d 633, 123 Cal. Rptr. 548 (1975), aff'd on other grounds, 429 U.S. 452 (1977). Initially, the Forest Service did not require its rangers to live in its dwellings, although it reserved the right to require them to do so if it was subsequently found necessary for the protection of the public or the natural resources. While living in the dwelling unit, the rangers paid rent and utilities, they could not sub-lease or assign the unit, and the Service could move them among the units so each unit was used efficiently. If an emergency arose, the Service retained additional rights. It could move additional employees into a unit or evict temporarily an employee and his family.

68. Id. at 638, 123 Cal. Rptr. at 550-51. The agency argument has been urged successfully. See Pacific Grove-Asilomar Operating Corp. v. County of Monterey, 43 Cal. App. 3d 675, 117 Cal. Rptr. 874 (1974). Pacific Grove, a nonprofit company, managed state-owned conference grounds under an agreement with the state. The court tested the rights conferred by the agreement against the elements Mattson found necessary to give rise to a taxable possessory interest, and found that the balance favored the creation of an agency. The court noted that Pacific Grove did not have exclusive use of the property since the property was open to the general public. The court further noted that Pacific Grove's management of the property was not independent, but subject in every way to state control. Finally, the court concluded that Pacific Grove derived no private benefit from its management of the public property.

69. 50 Cal. App. 3d at 639, 123 Cal. Rptr. at 551.
individual or corporation to make use of government owned tax exempt land or improvements and that that right gave rise to a privately held property interest which the state could tax.\textsuperscript{70} The court acknowledged that not all agreements dealing with publicly owned, tax exempt land resulted in taxable possessory interests, and recognized that the agreement had to confer upon the user a measure of exclusiveness. For an employment agreement to result in a taxable possessory interest, the court reasoned, the agreement had to provide the employee with "something more than a means for accomplishing [an] employers' purposes."\textsuperscript{71} In the court's opinion these agreements provided the rangers with a residence, and the use of the public property as a residence accomplished an independent private purpose outside of the scope of employment, which was sufficiently valuable to give the rangers taxable possessory interests.\textsuperscript{72}

It is interesting to note that Fresno County, like Archer, involved no elaborate attempt to balance the rights conferred by the agreement against the factors necessary to create a possessory interest.\textsuperscript{73} Rather, the major portion of the court's analysis was directed at resolving the issue of whether or not the agreement conferred a valuable private benefit upon the holder of the interest. The practical effect of this type of focus was to merge the rigid Kaiser analysis into a search for a valuable private benefit.\textsuperscript{74} This shift in focus, seemed to cause the

\begin{itemize}
\item \textsuperscript{70} Id. at 638, 123 Cal. Rptr. at 550.
\item \textsuperscript{71} Id. at 638, 123 Cal. Rptr. at 550-51.
\item \textsuperscript{72} Id. at 639, 123 Cal. Rptr. at 551.
\item \textsuperscript{73} If the rights conferred by the agreement in Fresno County were balanced against the factors Mattson found necessary to give rise to a taxable possessory interest, it is arguable that the balance would have favored the creation of a possessory interest. The residence provided by the agreement conferred on the rangers a valuable private benefit by way of a place to reside. The possession seemed reasonably secure for a determinable period, since a ranger could have occupied a residence indefinitely if the Service found no need to transfer him. The possession conferred by the agreement also seemed to meet the Archer test of exclusiveness. The rangers had, at any given time, exclusive use and possession of the property as a residence, though they might be evicted for short periods in an emergency. The threat of emergency eviction could have been analogized to the threat that a glut of permits might be issued with respect to any tract of grazing land. Both would result in the lowering of the value of the possessory interest but would not defeat its creation. See note 58 supra.
\item \textsuperscript{74} See note 55 and accompanying text supra. Fresno County underscored the fact that the agreement need not pertain to a business use of the property in order for it to confer upon an individual a valuable private benefit. The agreement need only allow the party obtaining possession to accomplish an important private purpose in order for it to satisfy the private benefit element in the possessory interest analysis.
\end{itemize}
Fresno County court to reverse its reasoning process: first, drawing the conclusion that the agreement conferred upon the rangers a valuable private benefit and thus created a possessory interest, and second, reasoning that the agreement was sufficiently durable, independent, and exclusive to justify the conclusion that the agreement gave rise to a possessory interest. A sounder approach to answering the question of whether or not the rights conferred upon an individual by an agreement resulted in the creation of a taxable possessory interest would have: first, examined the agreement and balanced the rights conferred by the agreement against the elements necessary to create a possessory interest, and second, concluded whether the agreement had or had not conferred enough of the required elements to result in the creation of a taxable possessory interest. In this latter approach, the question of whether or not the agreement conferred a valuable private benefit would only be one factor in the court's analysis of whether or not the rights conferred by the agreement resulted in a taxable possessory interest, and not the overriding factor in the court's conclusion.

Fresno County is also important because it raises and/or resolves a number of issues surrounding the application of the tax other than the issue of what constitutes a possessory interest.

In Fresno County, the rangers also charged that the possessory interest tax was a violation of the supremacy clause; an unconstitutional attempt by the state to tax the federal government.\(^75\) The court of appeal rejected this argument\(^76\) and the rangers appealed the issue to the Supreme Court of the United States, where the California possessory interest tax was upheld as not violative of the supremacy clause.\(^77\) The majority opinion acknowledged the general rule that states could not impose taxes on the federal government,\(^78\) but beyond that it noted a more recent rule permitting the state to constitutionally levy taxes on those who worked with the federal government, so long

\(^75\) 50 Cal. App. 3d at 640, 123 Cal. Rptr. at 552. See also U.S. Const. art. VI, cl. 2.

\(^76\) The court of appeal made short work of the supremacy clause argument by noting that the tax was not levied against the federal government or its property, but against the private citizen and his "separate" real property interest in the government owned land and improvements. 50 Cal. App. 3d at 640, 123 Cal. Rptr. at 552. See also text accompanying note 10 supra.


as it was imposed equally on other parties similarly situated within the state.\textsuperscript{79} The court concluded that, though the tax fell solely on private citizens who worked for the Forest Service, it was not discriminatory and thus not unconstitutional.\textsuperscript{80} The court reasoned that, though the tax was only imposed on renters in the appellee counties if the owner of the property was tax exempt, the tax did not discriminate in this respect since the renters who rented from nonexempt property owners presumably paid their share of the tax through increased rent. Against this background, the court said that the rangers were no worse off than those who rented in the private sector.\textsuperscript{81}

The real significance of the Supreme Court’s decision in \textit{Fresno County} may lie in the issues raised by the dissenting opinion.\textsuperscript{82} The dissent argued that the tax levied by California discriminated against the federal rangers in at least two respects and that the supremacy clause should have protected them from that discrimination.\textsuperscript{83}

Initially, the dissent suggested the tax was discriminatory because the rentals charged by the government were arrived at by reference to the prevailing rates in the private sector. The dissent argued that, since the private renters were picking up their share of the tax in the form of higher rentals, the federal rangers were paying the tax twice—the share in the rental charge plus the possessory interest tax levied by the county.\textsuperscript{84}

In addition, the dissent suggested the tax was discriminatory because it didn’t apply, within California, to all residential users of tax exempt property. In support of this point, the dissent argued that the tax applied only to the residential users of “publicly owned” tax exempt property and not the residential users of real property owned by other tax exempt organizations such as private hospitals, religious organizations, or private schools. In light of this fact, the dissent maintained that the only individuals who were in a similar position to the rangers


\textsuperscript{80} 429 U.S. at 464.

\textsuperscript{81} \textit{Id.} \textit{See} note 17 \textit{supra}.

\textsuperscript{82} Justice Stevens was the lone dissenter.

\textsuperscript{83} 429 U.S. at 469-70.

\textsuperscript{84} \textit{Id.} at 469. Justice Stevens noted that this discriminating aspect could conceivably be eliminated if the government went to the potentially burdensome expense of revising its rent schedules. \textit{Id.} at 470 n.5.
ers were those state employees residing in state owned housing. The distinction the dissent made between the tax treatment of residential users of publicly owned tax exempt property and that of residential users of privately owned tax exempt property arguably creates discrimination on the state level with respect to the possessory interest taxation scheme. Conceptually at least, the theory of the possessory interest would apply to either publicly or privately owned tax exempt property. Ideally, the residential users of property in either case are charged lower rentals because the fee holder-lessee pays no tax. In addition, the residential users of the property in either case hold a valuable separate property interest which the state recognizes and protects. Theoretically then, one would not expect the fee holders' exemption in either case to extend to the residential user, whose possession would be separately valued and subjected to tax.

Despite the conceptual similarity, the residential use of privately owned tax exempt property has been held nontaxable in California in the case of the housing of hospital personnel, the housing of church personnel, and the housing of married students and faculty at a private university. These residential uses of privately owned tax exempt property have been held to fall within the welfare exemption provision outlined in the California Constitution. This exemption has been interpreted to include any incidental use made of the privately owned tax exempt property which can be viewed as furthering the primary use made of the privately owned tax exempt property.

If it is merely the status of the reversioner which gives rise to a taxable possessory interest, the California possessory interest taxation scheme could produce some incomprehensible results as the following hypothetical indicates:

85. Id. at 471. Justice Stevens differentiated even these individuals from the rangers since it was easier for state owners to adjust the rent schedule to compensate for the impact of the tax. Id.
86. For the conceptual operation of the taxation scheme, see note 17 supra.
88. See Serra Retreat v. County of Los Angeles, 35 Cal. 2d 775, 221 P.2d 59 (1950).
90. See CAL. CONST. art. 13, § 1c (current version at §§ 3, 4).
91. The California Administrative Code defines a taxable possessory interest as one where the reversioner is a public body. See CAL. ADMIN. CODE tit. 18, § 21(b) (1975).
(1) College student A attends college X which is located on publicly owned land. A resides in a dormitory on the publicly owned land of the school. A’s residency might give rise to a taxable possessory interest by virtue of his presence on publicly owned tax exempt land.

(2) College student B attends college Y located on the privately owned land of the school. B’s residency cannot give rise to a taxable possessory interest by virtue of his presence on privately owned tax exempt land, since it is covered by the welfare exemption.\(^9\)

Although *Fresno County* deals heavily with federal issues and questions of supremacy, at its heart is the taxation of an interest that has not traditionally been taxed—a single family residence on tax exempt publicly held land.\(^9\) The aggressiveness of the assessor in pushing for taxation of previously untaxed interests, coupled with an increasing focus on the element of private benefit, can lead only to the taxation of an ever expanding number of possessory interests.\(^9\)

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In *English*, the court focused on the use made of the property rather than the nature of the owner. Thus, since dorm-living aided the student in pursuing his education, public policy demanded that it be covered by the welfare exemption and spared from tax. *Id.*


94. Compare K. EHRRMAN & S. FLAVIN, TAXING CALIFORNIA PROPERTY § 50, at 61 (1967) with *id.* at 34 (Supp. 1976). The 1967 edition listed the more typical possessory interests as:

1. Forest Service permits for residential and commercial purposes including resorts and stores.
2. Industrial, commercial, and residential harbor leases.
3. Downtown garage leases.
4. Possession and use of residential properties on public property incidental to employment.
5. Airport permits, including parking and garage leases.
7. Forest Service timber-cutting permits.

The 1976 supplement listed the more typical possessory interests as:

1. Forest Service permits: residential and commercial, including ski lifts, resorts, stores and cabins.
3. Downtown auto parking leases.
4. Possession and use of residences owned by public agencies.
5. Employees housing on tax exempt land.
6. Airport permits, including parking and garage leases.
7. Grazing land permits.
8. Indian land leases.
9. The right to cut and remove standing timber on public lands.
In *Wells National Services Corp. v. County of Santa Clara*, the plaintiff had an exclusive agreement to provide and service rental televisions to patients in a county hospital. Wells received a property tax assessment for its possessory interest in the publicly owned hospital district land. Wells argued that its agreement to provide televisions did not create a leasehold estate and therefore, it held no real property that was taxable as a possessory interest. Wells also argued that the agreement did not confer a possessory interest upon it, since the agreement failed to satisfy the requirement of exclusiveness in two important respects: first, the agreement did not require Wells to rent televisions to two sections of the hospital, which had their own televisions; and second, even in areas where the agreement permitted Wells to rent, the agreement allowed private individuals to supply their own sets.

Despite these contentions, the court concluded that the rental agreement gave rise to a taxable possessory interest. Initially, the court rejected Wells' contention that because an agreement did not confer a leasehold interest, it could not confer a possessory interest. The court reasoned that the agreement could give rise to a taxable possessory interest if it conferred upon the holder of the interest something more than mere agency status. The court found that under the terms of the agreement Wells was more than a mere agent, as it had totally independent control of the rental and service proce-

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10. Gas, petroleum, or other hydrocarbon rights in public lands.
11. Unpatented mining claims.
12. The possession of public property at harbors, factories, airports, golf courses, marinas, recreation areas, parks, stadiums, and government facilities.
13. Possession and use of government-owned fixed equipment.
14. Air rights over public lands or freeways.
95. 54 Cal. App. 3d 579, 126 Cal. Rptr. 715 (1976).
96. Under the terms of the contract, Wells had the exclusive right to provide rental television receivers to the hospital patients. He also set the rental price, retained title to all the equipment, and assumed the risk of any damage to its property. The term of the contract was for six years and it contained no cancellation provision. Under the terms of the contract, Wells rented only to certain sections of the hospital and in the areas where Wells did rent, private individuals could bring their own televisions. The district independently agreed with Wells to try to prevent private individuals from bringing their own sets, whenever this was possible. Id. at 582-83, 126 Cal. Rptr. at 717.
97. *Id.* at 583-84, 126 Cal. Rptr. at 717-18.
98. *Id.* at 585, 126 Cal. Rptr. at 719.
99. *Id.* at 583, 126 Cal. Rptr. at 717.
The court next rejected the contention that the agreement did not confer the type of exclusive possession necessary to create a taxable possessory interest. In resolving this question, the court first noted that Wells had the exclusive right to provide rental televisions and an express agreement from the hospital to shield Wells from substantial competition from private individuals, who might bring their own sets. The court concluded that these two features of the agreement combined to give Wells the exclusiveness of possession required to give rise to a possessory interest. The court further noted that even if Wells faced substantial competition, from patients who might bring their own sets, the exclusiveness of possession required to create a possessory interest would not be destroyed.

The court in Wells, as did the court in Archer, took the position that the exclusive possession necessary to give rise to a possessory interest was not destroyed by multiple uses of the public land which were mutually inconsistent. Wells, unlike Archer, involved an elaborate attempt by the court to balance the rights conferred by the agreement against the factors necessary to create the possessory interest.

The impact of Wells, lays in its extension of the possessory interest rationale to a markedly different type of use of the public lands. Under previous cases, the possessory interest holder made significant use not only of the public land, but also of the improvements on it in order to obtain the valuable private benefit which gave rise to the taxable possessory interest. In Wells, however, the possessory interest holder made only the briefest possible use of the public land. More significant was the fact that the ultimate use of the public land was made by the hospital patient—the lessee of the television sets.

100. Id. at 585, 126 Cal. Rptr. at 719. The independence was manifested by Wells' control over the fees charged, the billings, the collections, and the maintenance of the television equipment. Id.

101. Id. at 584, 126 Cal. Rptr. at 718. The court stated it was clear from other cases that exclusive possession against the world was not required to create a possessory interest. Rather, it found that shared possession, although a factor in reducing valuation, did not affect the existence of a possessory interest. Id.; see, e.g., Sea-Land Serv., Inc. v. County of Alameda, 36 Cal. App. 3d 837, 112 Cal. Rptr. 113 (1974); Board of Supervisors v. Archer, 18 Cal. App. 3d 717, 96 Cal. Rptr. 379 (1971).

102. The durability requirement was readily satisfied in Wells by the six year term of the agreement. Wells also had sufficient independence under the terms of the agreement. See note 100 and accompanying text supra. Wells also had sufficient exclusiveness of possession. See note 101 and accompanying text supra. The requirement that the agreement confer a valuable private benefit was readily satisfied by the fact that it contributed to the growth and profit of the corporation's business.
Wells supports the conclusion that extensive use of the public lands will not be necessary in order for an agreement to give rise to a taxable possessory interest. Indeed, Wells can be used to support the position that the use of public lands by a lessee can give rise to a taxable possessory interest in the lessor, even absent any use whatsoever by the lessor.

**Lucas v. County of Monterey**

In *Lucas v. County of Monterey*, the plaintiff had an agreement with a tax exempt harbor district which permitted him to berth his boat in a designated slip. Lucas received a property tax assessment for his possessory interest in the publicly owned harbor area. Lucas contended that his interest in the harbor lands was nonpossessory and thus nontaxable.

After dealing with a number of related statutes, the court concluded that the rights conferred on Lucas by the agreement gave rise to a taxable possessory interest, because the interest he held was a valuable possession—one that others had formed a waiting list to secure.

The *Lucas* decision, like *Archer*, involved no elaborate attempt to balance the rights conferred by agreement, against the factors necessary to give rise to a possessory interest. The

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103. The general rationale behind the possessory interest tax scheme applies easily to Wells. By virtue of an exclusive contract with a public body, Wells gained the right to go on the public land and make money. This agreement generated a valuable private benefit which the state recognized and protected, and thus, it should have given rise to a tax. But the Wells court extended this general rationale to agreements where the private benefit was not derived from the possessory interest holder's use of the tax exempt land, but rather from third party use, and it was this latter use of the public lands which allowed Wells to accomplish its important private purpose.


105. Under the terms of the agreement, Lucas could not assign his slip without the harbor district's permission, and if Lucas was absent, the district could reassign the slip to another boat. The agreement was revocable by the district without notice, but the understanding was that the district would not revoke the permit, so long as the slip was being fully utilized.

The slip itself was an area outlined by a floating dock, which was affixed by pilings to the harbor floor. Lucas was entitled to attach mooring lines to fixtures on the dock and was able to use the dock space adjacent to his boat for storage. Lucas was also entitled to use fresh water which was piped into the dock area and electrical power which was connected to it. *Id.* at 949-50, 135 Cal. Rptr. at 708-09.

106. **CAL. REV. & TAX. CODE** § 107.4 (West Supp. 1977). The code section basically eliminated Lucas' type of slip arrangement from the class of taxable possessory interests by defining it as "non-exclusive."

107. 65 Cal. App. 3d at 955-56, 135 Cal. Rptr. at 712.

108. If the rights conferred by the agreement were balanced against the factors necessary to create a taxable possessory interest, it is arguable that the agreement
court simply reviewed the agreement to see if it conferred on Lucas a valuable use and possession, and when it found that it did, it concluded that Lucas had a possessory interest which was subject to tax. The significance of *Lucas* is twofold. First, it marks the ultimate failure to apply the rigid *Kaiser* rule and second, it completes the courts evolutionary focus on private benefit, to the point that renting a boat slip becomes a possessory interest.

**CONCLUSION**

The concept of taxable possessory interests in California developed from the concern of the state legislature that private parties were making valuable use of federal lands with potentially no tax liability. The state's concern was directed primarily at those who reaped monetary rewards from their possessions, for fear that they would gain an inordinate advantage over residents using private land who paid their full share of property tax.

Broad statements in early court opinions had implied that mere use and possession of public land generated a valuable species of property which could be taxed, while application of the tax was limited to parties who gained monetary benefit from their use and possession. Later court opinions, however, relied on these statements as the theoretical justification for imposing a possessory interest tax on parties who gained no monetary advantage from their use and possession. The *Lucas* decision represents the present culmination of this viewpoint, as indicated by the court's conclusion that an individual docking his boat in a public harbor had a valuable property interest that could be subjected to tax.

Similarly, early California court decisions developed a rigid analysis for testing whether or not an agreement gave rise to a taxable possessory interest. Although courts in California have seemingly paid lip service to this analytical approach in resolving whether or not an agreement created a taxable pos-

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should have given rise to a taxable possessory interest. The agreement was sufficiently durable, since the permit could have been renewed indefinitely if Lucas used the slip. The agreement was exclusive, since Lucas had sole possession of his slip when he was in the harbor. The agreement was sufficiently independent, since Lucas had full control over the use he made of the slip. Finally, the agreement conferred a valuable private benefit, since it gave Lucas a location to berth his boat.

109. See note 20 supra.

110. See text accompanying note 20 supra.
possessory interest, the current approach simply focuses on whether or not particular agreements generate a valuable private benefit. In summary then, it at least seems arguable that if the court finds that the agreement confers upon the interest holder a valuable private benefit, it will find that the agreement creates a taxable possessory interest.

Given this approach, it appears that anyone who uses public lands pursuant to any type of agreement will have a taxable possessory interest. Indeed, there appear to be only two ways to escape the levy of the tax; either by successfully arguing that one is an agent of a public body while using the land, or by arguing that one's agreement with the public body gives rise to no private benefit. It will be a clever advocate who can persuade the court that either of these arguments is true.

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