

#65

12/3/68

Memorandum 69-15

Subject: Study 65 - Inverse Condemnation (Unintended Physical Damage - Water Damages)

You have received Part IV of the Research Study on Inverse Condemnation together with Memorandum 69-14. That memorandum contains a summary of those portions of the study relating to liability for unintended physical damage generally and interference with land stability in particular. This memorandum contains a summary of that portion of the study relating specifically to water damage, but the general background material included in Memorandum 69-14 is omitted here.

Here, too, the staff has some concern with the feasibility of statutory treatment of this body of law but requests that the Commission consider the study and indicate what future course of action it desires.

II. SCOPE OF INVERSE LIABILITY:
THE EXPERIENCE (pages 21-54)

A. Water Damages (pages 22-23)

In the water damage cases, the courts tend to rely on the rules of private water law. The consultant believes that a review of the cases suggests that treating public agencies as if they were private individuals, for the purpose of applying rules of water law, has often proved unsatisfactory and confusing. In a number of situations, the courts have departed from the strict letter of the private rules where overriding policy reasons have been perceived for according special treatment to public agencies.

(1) Surface water. (pages 23-28) Water which is "diffused over the surface of the land, or contained in depressions therein, and resulting from rain, snow, or which rises to the surface in springs" is classified as surface water. California follows the "civil law rule" which recognizes a servitude of natural drainage as between adjoining lands and postulates liability for interference therewith. Under this rule, the duty of both upper and lower landowners is to leave the flow of surface water undisturbed. The rule is consistent with the normal expectation that buyers should take land subject to the burdens of natural drainage. But the Keys case, a recent leading California case, held that the application of the rule is governed by a test of reasonableness, judged in light of the circumstances of each case. Under this modified civil law rule, factors to be taken into account include extent of the damage, foreseeability of the harm, the actor's purpose or motive, and relative

utility of the actor's conduct as compared to the gravity of the harm caused by his alteration of the surface water flow. In the past, the courts have generally applied the civil law rule in a somewhat mechanical manner, apparently without weighing the competing interests identified as relevant to the Keys rule of reason. It is possible that different results might have been reached had the balancing process been used. In some cases, however, the label "police power" was used to make a judicial balancing of interests similar to the test of reasonableness established by the Keys case.

It is difficult to determine the effect of the Keys case on the earlier surface water decisions. It is probable, however, that future cases in this area will be resolved by a balancing of interests rather than by mechanical application of arbitrary rules. The principal uncertainties appear to revolve around the degree of weight that will be judicially assigned to the public interest objectives behind governmental improvement projects, and the extent to which the courts will undertake review of the reasonableness of the governmental plan or design which exposed the owner's land to the risk of surface water damage.

(2) Flood water. (pages 28-33) Flood waters are the extraordinary overflow of rivers and streams, including waters overflowing artificial banks or levies maintained over a substantial period of time.

The rule is that flood waters are a common enemy against which the owner of land subject to overflow by those waters may protect his land by the erection of defensive barriers and that he is not liable for damages caused to lower and adjoining lands by the exclusion of the flood waters from his own property, even though the damage to other lands is increased thereby. As far as public entities are concerned, it should

be noted that no liability is incurred merely because flood control improvements do not provide protection to all property owners.

The "common enemy" rule is not an unlimited rule of privileged self-help. Mindful of the enormous damage-producing potential of defective public flood control projects, the courts have insisted that public agencies act reasonably in the development of construction and operational plans so as to avoid unnecessary damage to private property. Reasonableness, in this context, is not entirely a matter of negligence, but represents a balancing of public need against the gravity of private harm. This tendency to reject an unqualified application of the "common enemy" rule may be attributed, in part, to the difficulty of making a sharp factual distinction between flood waters and other waters.

(3) Stream water. (pages 33-37) The decisions appear to distinguish between governmental improvements that designedly divert stream waters onto private lands, improvements that obstruct the stream and thus result in overflow and flooding of private lands, and the downstream consequences of natural channel improvement--i.e., changes in the force or direction of the current with resulting erosion of channel banks.

(a) Diversion. When waters are diverted by a public improvement from a natural watercourse onto adjoining lands, the public entity is liable for the damage to or appropriation of such lands where the diversion was the necessary or probable result even though no negligence could be attributed to the installation of the improvement. Permanently established artificial watercourses are treated like natural ones under this rule if substantial reliance interests have been generated by passage of time. Liability without fault in the diversion cases appears to reflect the strength of the interests of property owners who have acquired and developed land in justifiable reliance upon the continuance

of existing watercourses as means of natural drainage. Analysis and weighing of the respective interests in light of the particular facts before the court is not characteristic of the diversion decisions; the rule of liability for diverting stream waters is generally applied in a strictly formal fashion.

(b) Obstruction. Obstructing a natural or artificial watercourse by the construction of a public improvement has ordinarily been regarded as a basis of inverse liability only when some form of fault is established. It is necessary to establish a negligently conceived plan or a deliberate taking of lands inundated or water rights destroyed. Mere routine negligence in maintenance that is not part of a deliberately conceived program for controlling the flow of storm waters is not a basis for inverse liability.

Regardless of whether the case is characterized as a "diversion" case or an "obstruction" case, inverse liability for interference with stream waters depends upon a showing of proximate causation. Thus, no liability exists for damage caused by the intervention of a superseding force consisting of an extraordinary and unprecedented storm.

(c) Downstream consequences of natural channel improvement. Where the narrowing and deepening of a natural watercourse greatly increases the total volume, velocity, and concentration of water running in the channel, thereby creating a substantial risk of downstream damage due to overflow or intensified erosion of the stream banks, inverse liability does not exist (at least insofar as downstream damage results from increased volume of water) unless the improvement is constructed according to an inherently defective or negligently conceived plan.

(d) Importance of classification of the facts. A deliberate program intended to alter the course of a stream for a public purpose is ordinarily

treated as a "diversion" and liability exists without a showing of fault. An unintended flooding is usually attributed to a negligently planned project that creates an "obstruction" and liability is based on a showing of fault. The distinction, however, is not a sharply defined one. If natural channel improvements are regarded as causing an alteration in the direction or force of the normal current within the channel, they may readily be thought of as having "diverted" the stream and liability without fault becomes the test. By describing the channel improvements as measures to fight off the common enemy of flood waters, attention is focused upon the issue of fault and the alleged defective nature of the improvement plan. The result is that liability turns ostensibly upon the unarticulated premises that control the classification process, rather than upon a conscientious weighing of public advantage and private harm in the particular factual situation.

(4) Other escaping water cases. (pages 37-39) There are other cases that do not fall neatly into the foregoing categories.

(a) Overflow. Damage resulting from overflow of sewers is recoverable in inverse condemnation if the plaintiff establishes that the sewers were deliberately or negligently designed so as to be inadequate to accommodate the volume of sewage and storm waters reasonably foreseeable in their service area. Fault is the basis of liability.

(b) Seepage. Many decisions approve inverse condemnation liability for property damage caused by seepage of water from irrigation canals "with or without negligence."

(c) Sudden escape. The sudden escape, as distinguished from gradual seepage, of water from public conduits has been held actionable only upon proof of defective design or operational plan.

(d) Importance of classification of the facts. Inverse liability for water that escapes from irrigation channels or other conduits is sometimes based on fault and sometimes obtains without fault; the choice of the rule appears to be a function of classification of the facts, rather than the application of a consistent theoretical rationale.

Respectfully submitted,

Jack I. Horton
Junior Counsel