65 2/25/69

Memorandum 69-36

Subject: Study 65 - Inverse Condemnation (Water Damage)

At the direction of the Commission, the staff has prepared and attached hereto a preliminary draft statute (pink sheets) which attempts to codify the Albers rule as it relates to damage caused by the disturbance of the natural flow of water. You have previously received Part IV of the Research Study on Inverse Condemnation and Memorandum 69-15 which contains a summary of those portions of the study relating specifically to water damage. We will not attempt in this memorandum to set forth the present law in detail, but the Comment to Section 870 of the draft statute does summarize the existing law and indicates the intended changes.

At the March meeting, you should examine the statute and consider its potential effect on existing law. Assuming that we are at least headed in the right direction with respect to the substantive rules, consideration should also be given to the form in which these rules are presented. For example, close analysis will reveal that this statute does not, in fact, extend liability very much farther (if at all) than presently exists. Yet on initial reading one may receive a very different impression. You may, therefore, wish to consider the desirability of framing the applicable rules in a "reverse" fashion. For example, separate sections could be included that expressly state that there is no liability under Section 870 for injury other than actual direct physical damage nor for damage that would have resulted if the improvement had never been constructed, and so on.

It can be anticipated that any scheme that does extend liability will be opposed by the public entities. To some extent this opposition can be

nullified by the legal arguments justifying the various extensions. More practically, this opposition can be overcome by reducing the "price tag" attached to the statute. One possibility suggested in Memorandum 69-35 is removing the requirement of prejudgment interest. Another possibility more closely related to the question of substantive liability is the possibility of offsetting benefits derived from the improvement. For example, consider an owner of property that formerly was entirely subject to intermittent flooding and could, therefore, be used only for grazing. Now as a result of a flood control project, a portion of the property is suitable for subdivision housing while another portion is subject to so much additional flooding that it is made worthless. Present rules of inverse (and direct) condemnation would require the owner to be compensated for the land lost even though the net value of the entire property is substantially increased. The example may suggest the desirability of a scheme that offsets the benefits derived from an improvement against a claim for damages. (There are countervailing considerations. E.g., should both "general" and "special" benefits be offset; will the owner by virtue of the offset be disfavored in relation to his neighbors who received the benefits without any corresponding detriment; will every "inverse" case be converted into a "condemnation" case with claims of offsetting benefit, appraiser's testimony, etc.)

The staff again expresses the hope the discussion above and the statute attached will merely serve as a springboard into a broader discussion of the various approaches to the problem of inverse liability.

Respectfully submitted,

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DRAFT STATUTE

Article 2. Water Damage

Section 870. Conditions of liability

870. Except as provided by statute, a public entity is liable for all physical damage to property and all expenses which the owner reasonably and in good faith incurs in an effort to minimize damage to his property proximately caused by the disturbance of the natural flow of water by an improvement as deliberately designed and constructed by the public entity.

Comment. Section 870 states the basic conditions of and limitations upon the liability of public entities for water damage resulting from public improvements as deliberately designed and constructed. The section complements the existing statutory liability for specific dangerous conditions either created by the negligent or wrongful act or omission of a public employee or allowed to exist after adequate notice (Section 835) and for the negligent or wrongful acts generally of public employees (Sections 815.2, 820). Thus, remaining within the ambit of the latter sections is liability for damage resulting from negligent maintenance.

Under Section 870, the public entity is liable both for the damage caused and for the expenses incurred to minimize such damage so long as the owner has acted reasonably and in good faith. This rule of damages--expressive of the common law--received explicit recognition in Albers v. County of Los Angeles, 62 Cal.2d 250, 42 Cal. Rptr. 89, 398 P.2d 129 (1965). The corollary to this rule--that the owner whose property is threatened or damaged is under a duty to take all reasonable steps to minimize his loss--is stated in Section 870.2.

Implicit perhaps in the requirement of physical damage is the intention here to deal with problems generally of "too much" rather than "too little" water. In any event, Section 870.4 makes clear that nothing in this section or article is intended to affect the existing law relating to the right to the use of water.

Without regard to fault, and subject only to the owner's duty to take reasonable steps to minimize any damage, Section 870 imposes liability on the public entity for all physical damage proximately caused by the disturbance of the natural water conditions by a public improvement. Eliminated is any distinction between surface, stream, and flood waters, as well as any necessity to classify a disturbance or change as an obstruction, diversion, or merely a natural channel improvement. With respect to surface water, Section 865 basically restates former law. See Burrows v. State, 260 Adv. Cal. App. 29, ____ Cal. Rptr. ____ (1968). See also Keys v. Romley, 64 Cal.2d 396, 50 Cal. Rptr. 273, 412 P.2d 529 (1966); Pagliotti v. Acquistapace, 64 Cal.2d 873, 50 Cal. Rptr. 282, 412 P.2d 538 (1966). Similarly, with respect to stream waters diverted by an improvement thereby causing damage to private property, this section merely continues former law. See, e.g., Youngblood v. Los Angeles County Flood Control Dist., 56 Cal.2d 603, 15 Cal. Rptr. 904, 364 P.2d 840 (1961). Former law may, however, have required pleading and proof of fault with respect to the obstruction of stream waters. See, e.g., Youngblood v. Los Angeles County Flood Control Dist., supra; Beckley v. Reclamation Board, 205 Cal. App.2d 734, 23 Cal. Rptr. 428 (1962). The distinction between diversion and obstruction was not, however, a sharply defined one, and may have merely reflected the difference between a deliberate program (inverse) and negligent maintenance (tort). Compare Bauer v. County of Ventura, 45 Cal.2d

276, 289 P.2d 1 (1955), with Hayashi v. Alameda County Flood Control and Water Conservation Dist., 167 Cal. App.2d 584, 334 P.2d 1048 (1959). This latter distinction is preserved in the present statutory scheme. On the other hand, under former law, there was no inverse liability for improvement of the natural channel--narrowing, deepening, preventing absorption by lining--even though it greatly increased the total volume or velocity resulting in downstream damage. See, e.g., Archer v. City of Los Angeles, 19 Cal.2d 19, 119 P.2d 1 (1941); San Gabriel Valley Country Club v. County of Los Angeles, 182 Cal. 392, 188 Pac. 554 (1920). There appears to be no persuasive reason supporting this inconsistent rule of nonliability, and Section 870 changes the law in this area to provide a uniform rule of liability in any case of alteration of the natural conditions. (A recent attempt to distinguish the cases supporting the latter rule was based on the ground that these cases were predicated on the "right" of an upper riparian owner to discharge water into a natural channel. See Albers v. County of Los Angeles, 62 Cal.2d 250, 260-262, 42 Cal. Rptr. 89, ____, 398 P.2d 129, ____ (1965). This attempt seems, however, to merely restate the conclusion.)

With respect to flood waters, the so-called general rule formerly was that flood waters are a "common enemy" against which an owner of land may defend himself with impunity for damage to other lands caused by the exclusion of flood waters from his land. See Clement v. State Reclamation Board, 35 Cal.2d 628, 220 P.2d 897 (1950); Lamb v. Reclamation Dist. No. 108, 73 Cal. 125, 14 Pac. 625 (1887). However, this rule was qualified by a requirement of reasonableness. House v. Los Angeles County Flood Control Dist., 25 Cal.2d 384, 153 P.2d 950 (1944). Further, the rule was subject to the condition that a permanent system of flood control that deliberately

incorporated a known substantial risk of overflow of flood waters upon private property that in the absence of the improvements would not be harmed constituted a compensable taking. Beckley v. Reclamation Board, 205 Cal. App.2d 734, 23 Cal. Rptr. 428 (1962). In essence then, while Section 870 rejects the "common enemy" rule with respect to flood waters, it may do little more than focus proper attention on the proximate results of a deliberate, planned public improvement. It should be noted that nothing in Section 870 alters the existing rule that liability is not incurred merely because flood control improvements do not provide protection to all property owners. See Weck v. Los Angeles County Flood Control Dist., 80 Cal. App.2d 182, 181 P.2d 935 (1947). In short, the law recognizes that some degree of flood protection is better than none. Moreover, the requirement of proximate causation prevents a claimant from recovering for any more damage than that caused solely by the improvement. Thus, property subject to inundation in its natural state may be damaged by a public improvement but it is only the incremental change that is compensable.

Section 870.2. Owner's duty to minimize loss

870.2. A public entity is not liable under Section 870 for physical damage which the public entity establishes could have been avoided by reasonable steps available to the owner of the property damaged to minimize his loss.

Comment. Section 870.2 merely states the applicable general rule that an owner whose property is being taken or damaged by a public entity is under a duty to take all reasonable steps available to minimize his loss. Albers v. County of Los Angeles, 62 Cal.2d 250, 269, 42 Cal. Rptr. 89, ____, 398 P.2d 129, ____ (1965), citing with approval 18 Am. Jur., Eminent Domain, § 262 at 903; 29 C.J.S., Eminent Domain, § 155 at 1015 n.69; 4 Nichols, Eminent Domain § 14.22 at 525 (3d ed. 1962). The form of the statement ensures that the public entity will bear the burden of pleading and proving any breach of the requisite duty.

Section 870.4. Effect upon law governing use of water

870.4. Nothing in this chapter affects the law governing the right to the use of water.

Comment. Section 870.4 makes clear that neither Section 870 nor any other provision of this chapter is intended to affect in any way the rights governing the use of water. Water rights in the latter context remain governed by Article XIV of the California Constitution and the various provisions of the Water Code relating thereto.