

#65

1/22/69

First Supplement to Memorandum 69-15

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

At the last meeting, the Commission discussed Keys v. Romley, 64 Cal.2d 396, 50 Cal. Rptr. 273, 412 P.2d 529. The Commission's consultant and staff took the view that this case applied to public entities as well as private persons and that liability for diversion of surface waters could be based on such diversion even though the public entity was not negligent in creating such diversion. This position was questioned by some members of the Commission but not by the representatives of the public entities who were present at the meeting.

The Department of Public Works has directed our attention to Burrows v. State of California, 260 Adv. Cal. App. 29 (March 1968) (hearing by Cal. Sup. Ct. denied). This case holds that the Keys case applies to public entities. We have reproduced the Burrows case as Exhibit I and suggest that you read the case for background prior to the meeting.

You will note that the Burrows case holds that the plaintiff had stated a cause of action against a private party under Keys and therefore a motion for the defendant for judgment on the pleadings was improperly granted. The court found it unnecessary to discuss whether Albers would give the plaintiff a right to compensation for diversion of surface water even though he would have no cause of action against a private party. You will recall that the representatives of public entities advised us at the meeting that some trial courts were imposing liability for water damage under the Albers theory. Thus, if the Commission took the approach of codifying the rule of the Keys case as applied to liability for diversion of surface water and further provided that liability did not

otherwise exist against a public entity for diversion of surface water, the net result would be to provide certainty as to the test to be used to determine liability and to eliminate liability for water diversion that (possibly) may exist under the Albers decision. On the other hand, it might be thought that when a public improvement causes diversion of water that results in damage to a property owner, the property owner should be reimbursed for any expenses he incurs in avoiding or mitigating the damages.

It should be noted that the principle of Keys that the plaintiff must act reasonably to avoid or mitigate the damages is a principle that might be given broader application (i.e., not be restricted to water diversion cases) in the area of water damage.

It should also be noted that the Keys case states: "What is, in any particular case, reasonable use or management has been held to be a mixed question of law and fact to be submitted to the jury under proper instructions." This rule might be modified to make the question of reasonableness a question for the court, rather than the jury, and leaving only the question of compensation to the jury (as in direct eminent domain cases).

The staff believes that the approach suggested above offers sufficient promise to justify attempting to draft a statute governing public entity liability for water diversion using this approach.

Respectfully submitted,

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Executive Secretary