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Memorandum 69-117

Subject: Studies 65.25, 65.30 - Inverse Condemnation (Water Damage; Interference With Land Stability)

Attached is the tentative recommendation relating to inverse condemnation --water damage and interference with land stability. With the exception of one or two editorial changes and consolidation into one chapter, the statutory provisions are simply those already approved at the June meeting. The preliminary part of the recommendation is, however, new and has not been reviewed or approved by the Commission.

You will recall that, at the September 1969 meeting, the Commission received a letter from the Department of Public Works outlining their objections to the basic philosophy of the recommendation. (A copy of that letter is attached as Exhibit I--pink sheets.) The Commission briefly reviewed the letter and asked the Department to supplement it, if possible, with a more detailed statement of defects in the tentative recommendation and suggested immunity provisions that could be included in the statute if the present statutory scheme is retained. We have been advised that the Department will provide us with such a supplement, but it will not be available for distribution until the meeting itself.

In the meantime, we urge you to read the attached letter and to review the recommendation. The basic objection of the Department to the proposed statute is that in some areas it imposes different and more stringent rules on a public entity than upon a private person. While this issue is certainly a significant one, the Commission considered it earlier and the staff does not believe that the letter presents anything new in this regard.

It was suggested at the last meeting that a literal reading of Sections 880.5 (page 18) and 883 (page 24) would permit liability for alteration of the flow of waters after they had escaped from a watercourse. The example given was a large school building, distant from a river, which diverts flood waters, i.e., waters already escaped from the river, onto adjacent property causing greater damage than would otherwise have occurred. We do not believe that there should be liability in such a case. Moreover, we believe that a close reading of Section 880.5 reveals that the case posited is not covered by the statute. Section 880.5 defines water damage as "damage to property caused by the alteration of the natural flow of surface or stream waters or by waters escaped from a natural or artificial watercourse." That is, the statute seems to provide only for damage caused by alteration of the flow of surface or stream waters or damage resulting from causing waters to escape. Assuming this analysis is correct, at least two problems remain: Should the statute be made clearer in this regard? Should the situation be provided for where waters already escaped (flood waters) are then diverted, causing damage to private property? It seems the latter situation can involve both facilities designed and intended to divert flood waters and facilities, e.g., schools, not intended to divert such waters. Presumably, the former should be a source of liability; the latter generally should not. But can the two situations be adequately distinguished and provided for?

We hope, after the October meeting, to be able to send this recommendation out for further comment. However, it appears that much will depend on whether we can eliminate any defects made apparent at that meeting.

Respectfully submitted,

Jack I. Horton
Associate Counsel

Memorandum 69-117 EXHIBIT I

STATE OF CALIFORNIA—BUSINESS AND TRANSPORTATION AGENCY RONALD REAGAN, Governor

DEPARTMENT OF PUBLIC WORKS
LEGAL DIVISION
1120 N STREET, SACRAMENTO 95814

September 4, 1969

Mr. John H. DeMoully
Executive Secretary
California Law Revision Commission
Stanford University
Stanford, California 94305

Dear Mr. DeMoully:

Re: Tentative Recommendation Relating to Inverse Condemnation (Water Damage; Interference with Land Stability).

Reference is made to Memorandum 69-96, relating to the tentative recommendation approved by the Commission at the June meeting. The purpose of this letter is to advise the Commission at this time of the views of the Department of Public Works with regard to the general concept of liability embodied in that portion of the recommendation relating to interference with waters. We believe the proposed statute is inherently bad, and we therefore believe that the Commission should be advised of our views at this time.

Since the Commission has not approved the entire recommendation for distribution for comment, we will not at this time attempt to comment on the individual sections or the comments thereto. Neither will this letter discuss that portion of the recommendation relating to interference with land stability.

The Department's basic objection to the proposed statute is that it imposes absolute liability on public agencies for any interference with the flow of waters and thus imposes a burden on public land ownership quite unlike that involved in private ownership. To this extent, the Department believes that the proposed statute would create an unjust and arbitrary discrimination against public and in favor of private improvement of land and in favor of those damaged by the former as against those damaged by the latter.

In this regard, there may be some merit to Professor Van Alstyne's general conclusion that liability of public agencies in water damage cases should not be resolved by the mechanical application of private law formulas. (See Van Alstyne's Study, Part 4, Page 73.) This does not mean, however, that such liability should be predicated on a new set of equally mechanical rules which in effect deny to the public land owner many of the rights of land use enjoyed by private owners. Van Alstyne suggests that there is a need for a balancing of interests which takes into account "the peculiar factors appropriate to governmental, but irrelevant to private, non-liability." (See Study, Part 4, Page 74.) But such need is not fulfilled by a statute which imposes on the public owner an absolute liability, without exception, and which in effect makes the public owner an insurer of all damage which may result from the public use of land.

Thus, although we might agree that the rules relating to private land development should not in all instances be directly applied to public land development, neither should these rules be arbitrarily rejected merely because the use happens to be public rather than private. Certainly a public agency, say a school district, in constructing a school building near a river, should have the same rights to protect its property against the ravages of flooding as would be enjoyed by the operator of a private school, or for that matter, by a neighboring property used as a sawmill or soap factory. Yet, under the proposed statute, the public owner alone would be denied the advantage of the common enemy doctrine available to property owners generally.

In the field of surface waters, there can be no question but that our courts have now retreated from a strict application of the civil law rule and that the rule has been modified to provide for a balancing of interests between adjoining property owners. (See Keys v. Romley, 64 Cal.2d 396, and Van Alstyne's Study, Part 4, Pp. 23 through 28.)

Thus a private owner may in certain circumstances be required to accept certain alterations in water flow by his upper neighbor. But this works no inequities, because such an owner has a correlative right as regards his lower neighbor.

The burden on the one side is offset by the benefit on the other. Under the proposed statute, however, this, obviously, would not be true with regard to the public owner. The proposed statute in effect reinstates the harsh consequences of the civil law rule with regard to public ownership, without the benefit of the exceptions carved out in the earlier cases or the modifications recognized in Keys v. Romley. The public owner would thus be subject to one set of rules regarding the effect on public property caused by development of neighboring private property and an entirely different set of rules regarding the effect on neighboring private property caused by development of the public property. In our view, this would lead to harsh, inequitable and inconsistent results; would make the public owner a "target" defendant in situations involving alterations to both public and private property; and would result in extremes of jury confusion in cases involving joint defendants, one public and one private.

As stated in Nichols on Eminent Domain, Third Edition, Volume 2, Section 6.441[1], Page 491:

> "...It would be a strange perversion of legal principles if the right of the owner to recover damages depended upon his ability to show that the offending structure was erected for the good of the public rather than for the profit of some individual, and if compensation was awarded one man because a public hospital was built next door to his house, and denied another for a precisely similar injury if it appeared that the use of the hospital next to his premises was limited to a particular class, and so the damage could not be said to have been inflicted for the public use, or if the construction and operation of a public railroad near one's premises was an actionable injury and the use of a perhaps more offensive private railroad was not."

The far reaching consequences of the proposed statute are perhaps well illustrated by the fact that the definition of "water damage" contained in Section 880.5, as incorporated in the basic liability provision of Section 883, would appear to make a public agency liable even for the "alteration" in the flow of waters escaping from an artificial watercourse.

Regardless of what may be a desirable rule with regard to the overflow of natural waterways, we cannot conceive of any justification for liability predicated on the mere fact that a public improvement may happen to lie within the path of waters escaping from an artificial watercourse. Under the statute, should waters escape from a privately-owned artificial waterway, and should the escaped waters be carried to a county hospital and thence deflected by the hospital building onto neighboring property, the county would be liable. This may seem to be a far-fetched example, but this appears to be the law under the statute as drafted.

Moreover, we question whether it is the true desire of the Commission to propose liability for the deflection of abnormal overflows from natural waterways. No persuasive reason is provided as to why a public owner should be any more liable than a private owner where its facilities happen to deflect an abnormal overflow of waters. For example, a large school building located in the townsite of Klamath during the December 1964 flood was of sufficient size to actually deflect and increase the velocity of flood waters onto neighboring properties. Private buildings in the area had a similar effect. Although the entire townsite was inundated with overflow from the Klamath River, it could nevertheless have been argued that such an increased velocity contributed to damage on neighboring property or perhaps even caused the washing away of building structures that might otherwise have remained. If the proposed statute had been the law at that time, the school district would apparently have been subjected to suit and liability.

Concerning the "comment" to Section 883, we are unable to agree with the statement at the top of page 25 that "this article basically codifies former law" with respect to surface waters. The case of Burrows v. State of California, 260 Cal.App.2d 29, does not purport to apply any special rules to public agencies, but instead applies the general rules announced in Keys v. Romley. Neither Keys nor Burrows stands for a rule of absolute liability. As stated in Burrows at page 32, "...Not every interference with natural drainage injurious to the land of another is now actionable. The concept of reasonable use enters the picture...." Under the proposed statute, however, every such interference with natural drainage would make a public agency liable, and it is thus most apparent that the proposed statute does not codify former law.

The statute is also directly contrary to the rule established by O'Hara v. L. A. County Flood etc. Dist., 19 Cal.2d 61, and House v. L. A. County Flood Control Dist., 25 Cal.2d 384, which provides that a public agency, in constructing a public improvement such as a street or highway, may validly obstruct the flow of surface waters not running in a natural channel, providing its conduct is reasonable under the circumstances. To the same effect see People ex rel. Dept. of Public Works v. Neider, 195 Cal.App.2d 582, and Callens v. County of Orange, 129 Cal.App.2d 255.

Although these decisions are premised on application of the police power, in reality they imply, as suggested by Van Alstyne at page 27, an early "judicial balancing of interests, similar to the process required by the Keys case but with results formulated in different terminology."

It is obviously the intent of the proposed section to now deny this "judicial balancing of interests" to public agencies -- but this should not be done under the guise of codifying former law. Clearly, cases like O'Hara will be overruled by the statute.

With regard to the rule which generally permits upper owners to utilize natural watercourses for the purpose of disposing of surface waters (San Gabriel V. C. Club v. Los Angeles, 182 Cal. 392; Archer V. City of Los Angeles, 19 Cal.2d 19), the comment at pages 25-26 recognizes that Section 883 probably changes the existing law with regard to public agencies. We do not believe that this is a wise revision of the law. The reason given for the change is stated in the comment as follows:

> "...There appears to be no persuasive reason supporting this inconsistent rule of nonliability, and Section 883 probably changes the law in this area to provide a uniform rule of liability in any case of alteration of the natural conditions."

The proposed statute does not, as suggested, prevent inconsistency -- it creates inconsistency by providing a non-uniform rule of liability for public agencies. We do not see any valid reason why a public agency should have a lesser right to

utilize a natural watercourse than a private owner. The basic rule, formulated in the San Gabriel V. C. Club case, stems from an early recognition that natural watercourses are the intended natural means for disposing of drainage due to upstream development. Thus it has been held that there is no diversion if surface waters are for a reasonable purpose gathered together and discharged into the stream that is their natural means of drainage.

The need for disposing of increased run-off is no less with regard to the development of public property than it is with regard to the development of private property. It would indeed be an anomalous situation if a privately-owned park could utilize a natural watercourse flowing through its property, but an adjoining publicly-owned park would be precluded from doing the same. There is no justification for such inconsistency.

In this respect, it is submitted that changing the law of Archer may well hinder the completion and future development of many channel improvements desperately needed because of California's increasing urbanization. At the very least, the fact that the agency responsible for such improvement would now be subject to suit from every owner between the point of improvement and the sea, would be a strong deterrent to undertaking any improvement at all.

The courts of this state have long recognized that liability in inverse condemnation properly involves a balancing of the interests of public agencies in constructing public improvements and property owners affected by such improvements. The courts have never accepted a concept of absolute liability. Thus in Crittenden v. Superior Court, 61 Cal.2d 565, the court stated at page 569:

> "...Whether a particular interference with the plaintiff's property rights constitutes a compensable taking for public use turns upon a balancing of the degree of harm to the property owner against the legitimate interests of the state."

In this regard, Albers v. County of Los Angeles, 62 Cal.2d 250, does not approve of a concept of absolute liability. As noted in Van Alstyne's Study at page 3, "It [the Albers case] is clearly not a blanket acceptance of strict liability without fault." And Van Alstyne also states at page 10:

> "Some form of fault is thus a conspicuous characteristic of inverse liability under California law. The Albers decision does not purport to change this general approach or to reject entirely the frequently expressed position that a public entity defendant 'is not absolutely liable' under the just compensation clause irrespective of its involvement in the plaintiff's damage...."

In the view of the Department, any form of fault is conspicuously missing from the proposed statute and it does indeed substitute concepts of "absolute liability" and would subject public agencies to practically unlimited liability for any damage resulting from any change in the flow of waters. It is conceded that the existing rules of water law are unclear and difficult in application, but this is true with regard to the development of all property generally. It is not believed that publicly-owned lands should properly be singled out for individual treatment, especially where the problem of difficult application is resolved by substitution of a rule of absolute liability.

Sincerely,

Edward J. Connor, Jr.

EDWARD J. CONNOR, JR.
Attorney

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August 5, 1969

STATE OF CALIFORNIA

C A L I F O R N I A L A W

R E V I S I O N C O M M I S S I O N

TENTATIVE RECOMMENDATION

relating to

INVERSE CONDEMNATION

Water Damage

Interference with Land Stability

CALIFORNIA LAW REVISION COMMISSION
School of Law
Stanford University
Stanford, California 94305

WARNING: This tentative recommendation is being distributed so that interested persons will be advised of the Commission's tentative conclusions and can make their views known to the Commission. Any comments sent to the Commission will be considered when the Commission determines what recommendation it will make to the California Legislature.

The Commission often substantially revises tentative recommendations as a result of the comments it receives. Hence, this tentative recommendation is not necessarily the recommendation the Commission will submit to the Legislature.

NOTE

This recommendation includes an explanatory Comment to each section of the recommended legislation. The Comments are written as if the legislation were enacted since their primary purpose is to explain the law as it would exist (if enacted) to those who will have occasion to use it after it is in effect.

September 10, 1969

LETTER OF TRANSMITTAL

Resolution Chapter 130 of the Statutes of 1965 directed the Law Revision Commission to undertake a study to determine "whether the decisional, statutory, and constitutional rules governing the liability of public entities for inverse condemnation should be revised, including but not limited to the liability for inverse condemnation resulting from flood control projects." Pursuant to this directive, the Commission has given priority to the water damage aspects of inverse condemnation liability and has prepared this recommendation which deals with the major areas of liability for water damage and interference with land stability. Nevertheless, the legislation included in this recommendation is structured to permit revisions and additions to embrace new areas of potential liabliity as they present themselves and time and resources permit their study.

Professor Arvo Van Alstyne, the Commission's research consultant, has prepared a series of background research studies on inverse condemnation. The research study pertinent to this recommendation is separately published. See Van Alstyne, Inverse Condemnation: Unintended Physical Damage, 20 Hastings L. J. 431 (1969). Only the recommendation--as disinguished from the research study--represents the tentative conclusions of the Law Revision Commission.

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TENTATIVE RECOMMENDATION OF THE CALIFORNIA

LAW REVISION COMMISSION

relating to

INVERSE CONDEMNATION

Water Damage and Interference with Land Stability

BACKGROUND

The Albers Decision

On January 22, 1965, the California Supreme Court, in Albers v. County of Los Angeles,[1] reaffirmed the principle that liability may exist on a theory of inverse condemnation in the absence of fault. In Albers, the added pressure of substantial earth fills deposited in the course of a county road project triggered a major landslide which spread along a prehistoric fault causing $5,360,000 in damage to houses and other property in the area. In an inverse condemnation action, the trial court held that the damage was directly and proximately caused by the defendant county in constructing the road and gave judgment for the plaintiffs, specifically finding that there was no negligence or other wrongful conduct or omission on the part of the county. The Supreme Court unanimously affirmed.

In affirming, the court stated the issue in these terms:

> [H]ow should this court, as a matter of interpretation and policy, construe article I, section 14, of the Constitution in its application to any case where actual physical damage is proximately caused to real property, neither intentionally nor negligently, but is the proximate result of the construction

1. 62 Cal.2d 250, 398 P.2d 129, 42 Cal. Rptr. 89 (1965).

> of a public work deliberately planned and carried out by the public agency, where if the damage had been foreseen it would render the public agency liable.[2]

The court stated the policy considerations it considered relevant and important to the determination of the issue as follows:

> First, the damage to this property, if reasonably foreseeable, would have entitled the property owners to compensation. Second, the likelihood of public works not being engaged in because of unseen and unforeseeable possible direct physical damage to real property is remote. Third, the property owners did suffer direct physical damage to their properties as the proximate result of the work as deliberately planned and carried out. Fourth, the cost of such damage can better be absorbed, and with infinitely less hardship, by the taxpayers as a whole then by the owners of the individual parcels damaged. Fifth . . . "the owner of the damaged property if uncompensated would contribute more than his proper share to the public undertaking."[3]

The court concluded that, "with the exceptions stated in Gray [where the damage was held noncompensable because inflicted in the proper exercise of the police power][4] . . . and Archer [where the damage was held noncompensable because the state at common law as an upper riparian proprietor had the right to inflict the damage][5] . . . , any actual physical injury to real property proximately caused by the improvement as deliberately designed and constructed is compensable under article I, section 14, of our Constitution whether foreseeable or not."[6]

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2. Albers v. Los Angeles County, 62 Cal.2d 250, 262, 398 P.2d 129, 136, 42 Cal. Rptr. 89, 96 (1965).

3. Id. at 263, 398 P.2d at 137, 42 Cal. Rptr. at 97. The quotation is from Clement v. Reclamation Bd., 35 Cal.2d 628, 642, 220 P.2d 897, 905 (1950).

4. See Gray v. Reclamation Dist. No. 1500, 174 Cal. 622, 163 P. 1024 (1917). The language used in the text to describe the holding in the Gray case is taken from the court's opinion in the Albers case.

5. See Archer v. City of Los Angeles, 19 Cal.2d 19, 119 P.2d 1 (1951). The language used in the text to describe the holding in the Archer case is taken from the court's opinion in the Albers case.

6. Albers v. County of Los Angeles, 62 Cal.2d 250, 263-264, 398 P.2d 129, 137, 42 Cal. Rptr. 89, 97 (1965).

The substantive limitations of the Albers doctrine bear repeating. Liability is provided only for injury to property--any liability for personal injury is excluded. Injury must be the proximate result of a public improvement as deliberately designed and constructed--all cases of negligent maintenance are thereby eliminated and damage must be the direct and proximate result of the improvement. Liability for unforeseeable damage exists only if liability would have existed had the damage been foreseen. Thus conduct legally privileged under the police power or under common law principles remains privileged. Moreover, the decision does not pronounce new principles of liability but rather reaffirms existing ones. Indeed, in the area of water damage--the most prolific source of claims based on inverse condemnation--the court went almost out of its way to distinguish and preserve two leading cases, Gray v. Reclamation Dist. No. 1500, and Archer v. City of Los Angeles. Nonetheless, perhaps because of the striking demonstration of the magnitude of potential liability, perhaps because of the conceivable scope of the asserted policy considerations, or perhaps because of the court's unequivocal rejection of the notion that a public entity can only be liable if a private person under the same circumstances would be liable,[7] the Albers decision generated tremendous concern among public entities--concern over the

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7. The statement that liability cannot be imposed upon the sovereign unless it could be imposed upon a private person under the same facts had appeared in many pre-Albers decisions; however, in none of these was the statement necessary to the decision. E.g., Youngblood v. Los Angeles County Flood Control Dist., 56 Cal.2d 603, 364 P.2d 840, 15 Cal. Rptr. 904 (1961)(defendant held liable for diversion of waters in circumstances where private person would be liable); Archer v. City of Los Angeles, 19 Cal.2d 19, 119 P.2d 1 (1941) (defendant--upper riparian proprietor--had common law right to inflict damage); San Gabriel Valley Country Club v. County of Los Angeles, 182 Cal. 392, 188 P. 554 (1920)(same); Gray v. Reclamation Dist. No. 1500, 174 Cal. 622, 163 P. 1024 (1917)(damage inflicted by valid exercise of police power); Lamb v. Reclamation Dist. No. 108, 73 Cal. 125, 14 P. 625 (1887)(decision based on pre-1879 law; "or damaged" clause not applicable).

ramifications of the decision itself and, more basically, the doctrine of inverse condemnation. As a result, the Legislature directed the Law Revision Commission to undertake a study to determine "whether the decisional, statutory, and constitutional rules governing the liability of public entities for inverse condemnation should be revised, including but not limited to the liability for inverse condemnation resulting from flood control projects."[8] Pursuant to this directive, the Commission has given priority to the water damage aspects of inverse condemnation liability and has prepared this recommendation which deals with the major areas of liability for water damage and interference with land stability.[9]

Inverse Condemnation Liability for Water Damage

For the most part, the California courts have relied upon the rules of private water law in dealing with inverse condemnation liability for property damage caused by water. Thus, the decisions speak of interference with "surface waters," "stream waters," and "flood waters," and refer to the private area for the "civil law" rule, for distinctions based on

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8. Cal. Stats. 1965, Res. Ch. 130, p. 5289. No doubt about the motivation behind this directive exists; the resolution itself states: "The study of this topic is necessary because of the magnitude of the potential liability for inverse condemnation under recent decisions of the California courts."

9. The Commission has concentrated on these two areas because they seem to provide the most significant source of claims, both numerically and in terms of the magnitude of potential liability.

"diversion" versus "obstruction," and for the "common enemy" rule.

Surface waters. Very simply, surface water is water diffused or spread over the surface of the land, resulting from rain or snow, prior to its being gathered in a natural stream or channel.[10] With respect to surface waters, California has followed the "civil law rule," which recognizes a servitude of natural drainage between adjoining land and predicates liability on any interference therewith.[11] Very recently, the Supreme Court reaffirmed California's acceptance of this rule, but modified or qualified its application by a test of reasonableness.[12] Thus, the duty of both upper and lower landowners is to leave the flow of surface waters undisturbed, but where the flow is altered "reasonably" by one, it becomes incumbent upon the other also to act "reasonably."[13] If the other acts reasonably, the one altering the flow of surface waters is liable for the damage resulting.[14]

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10. Keys v. Romley, 64 Cal.2d 396, 400, 412 P.2d 529, 531, 50 Cal. Rptr. 273, 275 (1966).

11. Archer v. Los Angeles, 19 Cal.2d 19, 119 P.2d 1 (1941); Andrew Jergens Co. v. Los Angeles, 103 Cal. App.2d 232, 229 P.2d 475 (1951).

12. Keys v. Romley, 64 Cal.2d 396, 412 P.2d 529, 50 Cal. Rptr. 273 (1966); Burrows v. State, 260 Cal. App.2d 29, 66 Cal. Rptr. 868 (1968).

13. The meaning of "reasonableness" in this context is not yet defined. But the court of appeal in Burrows stated that, "Whenever in this opinion we speak of the lower owner's conduct as being reasonable or unreasonable, we refer only to a failure to take the protective measures mentioned by the Supreme Court." Id. at ____ n.2, 66 Cal. Rptr. at ____ n.2. It seems possible that the limitation of reasonableness could be simply construed as a special application of the doctrine of avoidable consequences.

14. Keys v. Romley, 64 Cal.2d 396, 412 P.2d 529, 50 Cal. Rptr. 273 (1966); Burrows v. State, 260 Cal. App.2d 29, 66 Cal. Rptr. 868 (1968).

Stream water. Stream water is water gathered in a natural watercourse and confined within a definite channel with bed and banks.[15] As a general rule, "when waters are diverted by a public improvement from a natural watercourse onto adjoining lands the agency is liable for the damages to or appropriation of such lands where such diversion was the necessary or probable result even though no negligence could be attributed to the installation of the improvement.[16] On the other hand, obstructing a watercourse by the construction of a public improvement ordinarily has been regarded as a basis of liability only when some form of fault is established.[17] This distinction between diversion and obstruction has never been sharply defined; it is obvious that many kinds of stream obstructions can cause a diversion of stream waters, and conversely a stream diversion ordinarily requires an obstruction of some sort. Indeed, the distinction may simply rest upon a faulty judicial classification of facts and may reflect the difference between a deliberate program (inverse liability without fault) and negligent maintenance (tort).[18] A third group of cases dealing with stream waters concerns the downstream

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15. Horton v. Goodenough, 184 Cal. 451, 453, 194 P. 34, 35 (1920).

16. Youngblood v. Los Angeles County Flood Control Dist., 56 Cal.2d 603, 607, 364 P.2d 840, 841, 15 Cal. Rptr. 904, 905 (1961); Pacific Seaside Home for Children v. Newbert Protection Dist., 190 Cal. 544, 213 P. 967 (1923).

17. See, e.g., Youngblood v. Los Angeles County Flood Control Dist., supra note 16 (dictum recognizing liability without fault for diversion, intimating that in other cases, including obstructions, fault required); Beckley v. Reclamation Bd., 205 Cal. App.2d 734, 23 Cal. Rptr. 428 (1962)(complaint held sufficient to state cause of action on ground of diversion, without fault, and alternatively, cause for negligent obstruction of stream waters).

18. Compare, Bauer v. County of Ventura, 45 Cal.2d 276, 289 P.2d 1 (1955), with Hayashi v. Alameda County Flood Control & Water Conservation Dist., 167 Cal. App.2d 584, 334 P.2d 1048 (1959).

consequences of natural channel improvement--narrowing, deepening, preventing absorption by lining. This kind of improvement may greatly increase the volume of water and result in substantial downstream damage, but it has not been regarded as a basis for inverse liability.[19]

Flood waters. Flood waters are the extraordinary overflow of streams and rivers.[20] Flood waters are "a common enemy" and a landowner or government entity acting in behalf of landowners in a particular area may provide protection against these waters without incurring inverse liability for resulting damages.[21] However, this rule is both qualified by a requirement of reasonableness[22] and subject to the condition that a permanent system of flood control that deliberately incorporates a known substantial risk of overflow of flood waters upon private property that would not otherwise be harmed constitutes a compensable taking.[23]

Seepage. Finally, a fourth category of escaping water cases is that of seepage of water from irrigation canals. Where damage is caused directly by seepage from an irrigation canal, inverse liability obtains without any showing of fault.[24]

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19. See Archer v. Los Angeles, 19 Cal.2d 19, 119 P.2d 1 (1941); San Gabriel Valley Country Club v. Los Angeles County, 182 Cal. 392, 188 P. 554 (1920). These are "legal right" cases; that is, in each the defendant as an upper riparian proprietor was held to have a "right" to act as it did and inflict the damage sustained.

20. H. Tiffany, Real Property § 740 (3d ed. 1939).

21. Clement v. Reclamation Bd., 35 Cal.2d 628, 220 P.2d 897 (1950); Lamb v. Reclamation Dist. No. 108, 73 Cal. 125, 14 P. 625 (1887).

22. House v. Los Angeles County Flood Control Dist., 25 Cal.2d 384, 153 P.2d 950 (1944).

23. Beckley v. Reclamation Board, 205 Cal. App.2d 734, 23 Cal. Rptr. 428 (1962).

24. Tormey v. Anderson-Cottonwood Irr. Dist., 53 Cal. App. 559, 568, 200 P. 814, 818 (1921)(opinion of Supreme Court on denial of hearing).

Inverse Condemnation Liability for Interference With Land Stability

In the area of interference with land or soil stability, the California Supreme Court[25] held in the Reardon case --decided very soon after the "or damaged" clause was added to the constitution--and again very recently in the Albers case,[26] that generally "any actual physical injury to real property proximately caused by the improvement as deliberately designed and constructed is compensable under article I, section 14, of our Constitution whether foreseeable or not."[27] However, the apparently limitless scope of this rule was circumscribed by recognition and exception of those cases where the public entity's conduct is legally privileged, either under ordinary property law principles or as a noncompensable exercise of the police power.[28] This exception could lead in this area to the same kind of specific application of private rules based on a classification of facts that prevails in the water damage area. For example, Albers and Reardon could be categorized as "imposition of fill" cases. Section 832 of the Civil Code which authorizes "proper and usual excavations," and requires only that "ordinary care and skill . . . be used and reasonable precautions taken," limits liability for removal of lateral support. Does Section 832 confer the sort of legal privilege excepted in Albers? Existing cases fail to answer or even discuss this question. In the other typical cases of interference with land

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25. Reardon v. San Francisco, 66 Cal. 492, 6 P. 317 (1885).

26. Albers v. County of Los Angeles, 62 Cal.2d 510, 398 P.2d 129, 42 Cal. Rptr. 89 (1965).

27. Id. at 263-264, 398 P.2d at 137, 42 Cal. Rptr. at 97.

28. Illustrative decisions cited in Albers include Archer v. Los Angeles, 19 Cal.2d 19, 119 P.2d 1 (1941)(privilege); Gray v. Reclamation Dist. No. 1500, 174 Cal. 622, 163 P. 1024 (1917)(police power); see Van Alstyne, Inverse Condemnation: Unintended Physical Damage, 20 Hastings L.J. 431, 440-448 (1968).

stability, the problem seems less acute for strict inverse liability for removal of subjacent support[29] and for concussion and vibration damage appear to be the present rule.[30]

Mitigation of Damages and Offset of Benefits

In both areas--that is, liability for water damage and liability for interference with land stability--limitations on liability are seldom clearly articulated. It would be presumed that both the general damage rule requiring avoidance and mitigation of damages[31] and the rule of offsetting benefits applicable in direct condemnation cases do apply;[32] but the law at best is unclear.

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29. Porter v. City of Los Angeles, 182 Cal. 515, 189 P. 105 (1920).

30. Los Angeles County Flood Control Dist. v. Southern Cal. Bldg. & Loan Ass'n, 188 Cal. App.2d 850, 10 Cal. Rptr. 811 (1961).

31. Albers clearly holds that expenses reasonably and in good faith incurred in an effort to minimize loss are recoverable from the entity. The corollary to this rule that an owner whose property is damaged or threatened with damage is under a duty to take available reasonable steps to minimize his loss is also recognized therein. But cf. Western Salt Co. v. City of Newport Beach, 271 Adv. Cal. App. 454 (1969).

32. See Code Civ. Proc. § 1248(3); Sacramento & San Joaquin Drainage Dist. v. W.P. Roduner Cattle & Farming Co., 268 Adv. Cal. App. 215 (1968).

RECOMMENDATIONS

The foregoing brief review of the existing law demonstrates its inconsistent and unsatisfactory nature. Undue concentration upon the type of waters involved, narrow classification of the facts, and rigid, mechanical application of the so-called rules have tended to obscure underlying policy criteria and to produce confusion, uncertainty, and occasionally seemingly erroneous results. To eliminate these deficiencies, the Commission makes the following recommendations concerning inverse condemnation liability for water damage and interference with land stability:

1. Without attempting constitutional amendment, a statutory scheme sufficiently comprehensive to serve as the exclusive basis[33] of inverse condemnation liability for water damage and interference with land stability should be enacted.[34] The case-by-case judicial process is both time-consuming and expensive. Without such a statute, many years have passed and many more will pass before the extent of liability for inverse condemnation and the defenses to such liability can be determined with any certainty. The enactment of clear legislative guidelines in a statute that is the exclusive basis of liability will provide certainty and should discourage suits founded on novel and unsound theories asserted under the broad, ambiguous language of the constitution. The result will be greater, more even-handed justice and substantial savings in both public and private resources.

2. Logically consistent rules of liability should be provided;

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33. Recognition that the ultimate source for such liability lies in the constitution does not preclude the enactment of reasonable, consistent legislative rules governing such liability. See Van Alstyne, Statutory Modification of Inverse Condemnation: The Source of Legislative Power, 19 Stan. L. Rev. 727 (1967).

34. The recommended legislation is structured to permit revisions and additions to embrace new areas of potential liability as they present themselves and time and resources permit their study.

differences based on the type of waters involved or the particular source of soil disturbance should be eliminated. The general rule should focus on the direct and proximate consequences flowing from the construction of public improvements and--subject to defenses and offsets against damages--should provide liability for all damages to property proximately caused by a public improvement as deliberately designed and constructed. Limitation to "damage to property"[35] will preclude liability for personal injury and preserve this important restriction inherent in the doctrine of inverse condemnation.[36] The recommended rule would be remarkably consistent with much of the present law but would avoid the narrow, inhibiting classifications and categorizations now featured and thereby aid analysis and reasoned application of the restated rule.[37] It would,

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35. "Property" in this context should have the same meaning given that term in Article I, Section 14, of the California Constitution.

36. The statute would not alter but rather would complement the existing statutory scheme dealing with liability for dangerous conditions of property (Chapter 2 of Part 2 of Division 3.6 of Title 1 of the Government Code) and liability generally for both property damage and personal injury caused by negligent or wrongful acts or omissions of public employees (Chapter 1 of Part 2 of Division 3.6 of Title 1 of the Government Code).

37. The deficiencies in existing law are summarized by Professor Van Alstyne in Van Alstyne, Inverse Condemnation: Unintended Physical Damage, 20 Hastings L.J. 431, 431-432 (1969) as follows:

> The law of inverse condemnation liability of public entities for unintended physical injuries to private property is entangled in a complex web of doctrinal threads. The stark California constitutional mandate that just compensation be paid when private property is taken "or damaged" for public use has induced courts, for want of more precise guidance, to invoke analogies drawn from the law of torts and property as keys to liability. The decisional law, therefore, contains numerous allusions to concepts of "nuisance," "trespass," and "negligence," as well as to notions of strict liability without fault. Unfortunately, judicial opinions seldom seek to reconcile these divergent approaches. The need for greater uniformity, consistency, and predictability is particularly pressing in the physical damage cases, for they comprise the single most significant class of inverse condemnation claims, whether measured numerically or in terms of the magnitude of potential liabilities. Clarification also would be desirable in order to mark the borderline between the presently overlapping, and hence confusing, rules governing governmental tort and inverse condemnation liabilities.

finally, satisfy the constitutional imperative that requires compensation for a taking or damaging if the property owner "if uncompensated would contribute more than his proper share to the public undertaking."[38]

3. The following constitutionally permissible limitations on inverse condemnation liability should be specifically recognized by statute:

(1) A public entity should not be liable for damage which would have resulted had the improvement not been constructed. Thus, for example, attempting but failing to provide complete flood protection should offer no basis for liability. Moreover, a claimant should not be permitted to recover for any portion of damage not caused solely by the public improvement--i.e., damage that would have occurred anyway in the absence of an improvement does not form a basis for recovery. This exception is essential if needed water projects are not to be discouraged.

(2) The value of any benefit conferred by the improvement upon the property damaged should be deducted from the damages suffered. The public entity should not be required to confer a benefit upon a property owner for which the entity receives no reimbursement and at the same time be required to compensate the owner for damages without regard to the benefit conferred.

(3) An owner whose property is taken, damaged, or imminently threatened with damage should be required to take available, reasonable steps to minimize his loss. However, he should be entitled to recover expenses reasonably and in good faith incurred in an effort to minimize such loss from the public entity.

(4) Section 832 which provides the standard of liability for a private person who makes "proper and usual excavations" should be made specifically applicable to public entities. There appears no sound reason why a public entity should be held to any stricter standard of care than a private person under these circumstances.

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38. See, e.g., Albers v. County of Los Angeles, 62 Cal.2d 250, 263, 398 P.2d 129, 137, 42 Cal. Rptr. 89, 97 (1965).

RECOMMENDED LEGISLATION

The Commission's recommendation would be effectuated by enactment of the following measure:

An act to add Chapter 20 (commencing with Section 880) to Part 2 of Division 3.6 of Title 1 of the Government Code, relating to governmental liability.

The people of the State of California do enact as follows:

Section 1. Chapter 20 (commencing with Section 880) is added to Part 2 of Division 3.6 of Title 1 of the Government Code, to read:

CHAPTER 20. INVERSE CONDEMNATION

Article 1. Definitions

Section 880. Construction of article

880. Unless the provision or context otherwise requires, the definitions contained in this article govern the construction of this chapter.

Comment. In addition to the definitions in this article, see also the definitions in Part 1 (commencing with Section 810) which are applicable to this chapter. E.g., § 811.2 (defining "public entity").

Section 880.1. Alteration

880.1. "Alteration" includes, but is not limited to, diversion, obstruction, acceleration, concentration, or augmentation.

Comment. See the Comment to Section 880.5.

Section 880.2. Improvement

880.2. "Improvement" means any work, facility, or system owned by a public entity.

Comment. Section 880.2 provides a broad definition of improvement. Thus, for example, under Article 3 (water damage), the word "improvement" embraces not only flood control, water storage, reclamation, irrigation, and drainage facilities of every size and variety but also such non-water-oriented improvements as buildings and parking lots which alter the flow of water.

Section 880.3. Land stability disturbance damage

880.3. "Land stability disturbance damage" means damage to property caused by the removal of subjacent or lateral support or by any other disturbance of soil stability.

Comment. Section 880.3 emphasizes the result or impact on the property affected rather than the particular cause of damage.

Section 880.4. Property

880.4. "Property" has the same meaning as the meaning given that word in Section 14 of Article I of the California Constitution.

Comment. Section 880.4 insures that "property" will be given the same meaning in this chapter as it has in Section 14 of Article I. See Section 881.

Section 880.5. Water damage

880.5. "Water damage" means damage to property caused by the alteration of the natural flow of surface or stream waters or by waters escaped from a natural or artificial watercourse.

Comment. Section 880.5, together with Section 880.1 (defining "alteration"), eliminates any difference in liability based on the causative nature of the change in flow of waters. See the Comment to Section 883.

Article 2. General Provisions

Section 881. Chapter establishes rules governing inverse condemnation liability

881. This chapter establishes the rules governing the liability of a public entity under Section 14 of Article I of the California Constitution for damage caused by an improvement as designed and constructed by the public entity. As used in this section, "damage" means water damage and land stability disturbance damage.

Comment. This chapter is intended to provide a scheme sufficiently comprehensive to serve as the exclusive basis of inverse condemnation liability for water damage (defined in Section 880.5) and land stability disturbance damage (defined in Section 880.3). Sections 883 and 884 make clear this intention while recognizing the ultimate constitutional source for such liability. Although inverse condemnation liability has its source in Section 14 of Article I of the California Constitution, this does not preclude the enactment of reasonable, consistent legislative rules governing such liability. See Van Alstyne, Statutory Modification of Inverse Condemnation: The Scope of Legislative Power, 19 Stan. L. Rev. 727 (1967).

Section 881.2. Only damage caused solely by improvement compensable

881.2. A public entity is not liable under this chapter for damage which would have resulted had the improvement not been constructed.

Comment. Section 881.2 may merely make explicit what is implicit in the requirement of proximate causation under Sections 883 and 884. For example, Section 881.2 makes clear that nothing in Section 883 affects the former 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.

Section 881.2 also insures that a claimant may not recover 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. Similarly, earthquake damage which would have resulted had an improvement not been constructed would be noncompensable under Section 884. However, an improvement that has been in existence for a long period of time may form the basis of reasonable reliance interests and be considered a natural condition. Damage resulting from a subsequent improvement, though no worse than would have resulted if neither improvement had ever been constructed, may therefore properly form the basis of a claim for damages. Clement v. State Reclamation Board, 35 Cal.2d 628, 220 P.2d 897 (1950).

Section 881.4. Duty to mitigate damages; recovery of expenses of mitigation

881.4. (a) A public entity is not liable under this chapter for damage which the public entity establishes could have been avoided if the owner of the property had taken reasonable steps available to him to minimize or prevent damage caused or imminently threatened by the improvement.

(b) A public entity is liable for all expenses which the owner establishes he reasonably and in good faith incurred in an effort to minimize or prevent damage to his property caused or imminently threatened by the improvement.

Comment. Section 881.4 codifies the rule that an owner whose property is being taken or damaged by a public entity is under a duty to take available reasonable steps to minimize his loss, and the corollary to this rule that expenses reasonably and in good faith incurred in an effort to minimize the loss are recoverable from the entity. Albers v. County of Los Angeles, 62 Cal.2d 250, 269, 398 P.2d 129, , 42 Cal. Rptr. 89, (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)); Burrows v. State of California, 260 Cal. App.2d 29, 32 n.2, 66 Cal. Rptr. 868, n.2 (1968). But cf. Western Salt Co. v. City of Newport Beach, 271 Adv. Cal. App. 454 (1969). See also City of Los Angeles v. Kossman, 274 Adv. Cal. App. 136, 139, Cal. Rptr. , (1969). The form of the respective statements ensures that the proper party will bear the burden of pleading and proving any breach of the requisite duty or obligation.

Section 881.4 does not attempt to particularize with regard to what constitutes reasonable steps available for mitigation. The myriad of situations that can arise precludes such an attempt. Nevertheless, it should be noted that in appropriate circumstances the reasonableness of an owner's conduct could be affected by his giving notice to the entity of threatened danger and by his willingness to accept preventive measures provided by the entity.

The doctrine of avoidable consequences stated in Section 881.4 is qualified by the requirement that damage be imminently threatened. This makes clear that the threat must be impending or threatening to occur immediately.

Section 881.6. Offset of benefits against damages

881.6. In determining any damages recoverable under this chapter, the trier of fact shall deduct the value of any benefit conferred by the improvement upon the owner of the property damaged.

Note: Section 881.6 states a rule of offsetting benefits. The Commission is, however, presently engaged in the study of a comprehensive revision of the law relating to eminent domain. It is the Commission's present intention that the rule provided in Section 881.6 will be consistent with that to be provided for direct condemnation after this aspect of direct condemnation has been studied by the Commission. The rule stated in Section 881.6 is, therefore, merely a preliminary general statement reflecting the Commission's tentative decision that "benefits" should be offset. The rule is, however, analogous to the general tort rule that, in determining damages suffered as a result of a tortious act, consideration may be given where equitable to the value of any special benefit conferred by that act. See Maben v. Rankin, 55 Cal. 2d 139, 358 P.2d 681, 10 Cal. Rptr. 353 (1961) (action for assault and battery and false imprisonment stemming from psychiatric care); Estate of de Laveaga, 50 Cal.2d 480, 326 P.2d 129 (19) (interest beneficiary received benefit of interest paid on interest erroneously held as principal); Hicks v. Drew, 117 Cal. 305, 314-315, 49 P. 189 (1897) (flooding case); Restatement, Torts § 920. It is also presently reflected in the set-off of special benefits against severance damage in a direct condemnation case. See Code of Civil Procedure Section 1248(3); Sacramento & San Joaquin Drainage Dist. v. W.P. Roduner Cattle & Farming Co., 268 Adv. Cal. App. 215 (1968).

Article 3. Water Damage

Section 883. Liability for water damage

883. Except as provided by this chapter, a public entity is liable under Section 14 of Article I of the California Constitution for all water damage proximately caused by its improvement as designed and constructed.

Comment. Section 883 states the basic rule of liability of public entities for water damage resulting from public improvements as deliberately designed and constructed. See Section 880.5 (defining "water damage").

Section 883 complements the existing statutory scheme dealing with liability for dangerous conditions of property (Chapter 2 commencing with Section 830) and liability generally for the negligent or wrongful acts of public employees (Chapter 1 commencing with Section 814). As a consequence of the requirement of deliberate design and construction, liability for damage resulting from negligent maintenance remains within the ambit of the latter sections.

Section 883 imposes liability only for damage to property; no liability is imposed for personal injury. See Section 880.5 (defining "water damage") and Section 880.4 (defining "property"). Also implicit in the definition of water damage is the intent to deal with problems generally of "too much" rather than "too little" water. See Section 883.2.

Without regard to fault, and subject only to the owner's duty to take reasonable steps to minimize any damage (Section 881.4) and the provision for offsetting benefits against damage (Section 881.6), Section 883 imposes

liability on the public entity for all damage to property 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 of change as an obstruction, diversion, or merely a natural channel improvement. With respect to surface water, this article basically codifies former law. See Burrows v. State, 260 Cal. App.2d 29, 66 Cal. Rptr. 868 (1968). See also Keys v. Romley, 64 Cal.2d 396, 412 P.2d 529, 50 Cal. Rptr. 273 (1966); Pagliotti v. Acquistapace, 64 Cal.2d 873, 412 P.2d 538, 50 Cal. Rptr. 282 (1966). Similarly, with respect to irrigation seepage and to stream waters diverted by an improvement thereby causing damage to private property, the former law is continued. See, e.g., Youngblood v. Los Angeles County Flood Control Dist., 56 Cal.2d 603, 364 P.2d 840, 15 Cal. Rptr. 904 (1961) (diversion); Tormey v. Anderson-Cottonwood Irr. Dist., 53 Cal. App. 559, 568, 200 P. 814, 818 (1921) (opinion of Supreme Court on denial of hearing) (seepage). 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 apparently 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 P. 554 (1920). There appears to be no persuasive reason supporting this inconsistent rule of nonliability, and Section 883 probably changes the law in this area to provide a uniform rule of liability in any case of alteration of the natural conditions.

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 P. 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 883 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, consistent with the intention to provide statutory rules governing inverse condemnation liability, this chapter attempts to deal only with liability for damage caused by public improvements. No attempt is made to provide rules governing the private sector, i.e., liability for damage caused by private improvements, or to predict the effect, if any, of this article on such rules. The rules governing private liability may, therefore, differ from the rules set forth herein, requiring separate application of these different rules of law to the respective parties where public and private improvements are concurring causes of damage.

Section 883.2. Law governing use of water not affected

883.2. Nothing in this chapter affects the law governing the right to the use of water either in quantity or quality.

Comment. Section 883.2 makes clear that this chapter is not 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. Moreover, it is clear that this chapter is concerned with problems of quantity, not quality. Nothing in this chapter is intended to affect the law relating to liability for pollution of water.

Article 4. Interference With Land Stability

Section 884. Liability for interference with land stability

884. Except as provided by this chapter, a public entity is liable under Section 14 of Article I of the California Constitution for land stability disturbance damage proximately caused by its improvement as designed and constructed.

Comment. Section 884 states the basic conditions of liability of public entities for damage to property resulting from the disturbance of soil stability by public improvements as deliberately designed and constructed. The section complements the existing statutory liability for dangerous conditions of public property and for negligence generally in the same fashion as Section 883. See the Comment to Section 883. Similarly, Section 884 is qualified by the rule of offsetting benefits stated in Section 881.6 and by the duty of a property owner to take all reasonable steps available to him to minimize his loss. See Section 881.4 and the Comment thereto.

Subject to the exception stated in Section 884.2, Section 884 is intended to cover all forms of interference with land stability. Included, therefore, are situations of removal of both lateral and subjacent support, imposition of fill or other overloads on public property, as well as concussion and vibration. In each of these areas, subject only to the owner's duty to minimize his damage and to the exception provided in Section 884.2, Section 884 imposes liability on the public entity without regard to fault for damage to property proximately caused by the disturbance of the existing soil stability conditions by a public improvement. The section

simply restates former law with respect to the removal of subjacent support (Porter v. City of Los Angeles, 182 Cal. 515, 189 P. 105 (1920)); and the imposition of fill (Albers v. County of Los Angeles, 62 Cal.2d 510, 398 P.2d 129, 42 Cal. Rptr. 89 (1965); Reardon v. San Francisco, 66 Cal. 492, 6 P. 317 (1885)). Similarly, at least with regard to developed areas, strict inverse liability for concussion and vibration damage appeared to be the former rule. See, e.g., Los Angeles County Flood Control Dist. v. Southern Cal. Bldg. & Loan Ass'n, 188 Cal. App.2d 850, 10 Cal. Rptr. 811 (1961). While California appears generally to require a showing of negligence as a basis of liability where blasting occurs in a remote or unpopulated area (see Houghton v. Loma Prieta Lumber Co., 152 Cal. 500, 93 P. 82 (1907)), the issue of inverse liability for damage resulting from such concussion and vibration seems never to have arisen and has, therefore, never been answered. Section 884 makes clear that there is to be no distinction made in the rules governing liability for damage caused by concussion or vibration whether the public improvement be located in a remote or unpopulated area or in a populated, developed area; in both instances, the public entity is liable for direct physical damage proximately caused by the public improvement as deliberately designed and constructed.

Where lateral support is disturbed by a public improvement, Section 884 provides a rule of strict inverse liability except where Civil Code Section 832 is applicable. See Section 884.2 and the Comment thereto.

Section 884.2. Exception to liability for removal of lateral support; application of Civil Code Section 832

884.2. Notwithstanding Section 884, in any situation governed by Section 832 of the Civil Code, a public entity is liable to the same extent as a private person.

Comment. Section 884.2 states a limited exception to the rule of strict inverse condemnation liability provided by Section 884. There appears to be no sound reason why a public entity should be held to any stricter standard of care than a private person in making the "proper and usual excavations" embraced by Section 832 of the Civil Code. Therefore, in situations where Section 832 modifies the absolute common law duty of lateral support and requires only that "ordinary care and skill shall be used and reasonable precautions taken," the liability of a public entity is similarly limited.