#65.25 10/1/69

First Supplement to Memorandum 69-117

Subject: Study 65.25 - Inverse Condemnation (Water Damage)

Attached to this memorandum is another letter from the Department of Public Works reiterating their basic objection to the tentative recommendation relating to inverse condemnation liability for water damage. This letter was delivered personally by the author, Mr. Connor, and John DeMoully and I had an opportunity to review the Department's position with him. It seems apparent to us that the Department will resist bitterly (and we think successfully) any attempt to impose rules of public liability in this area that differ significantly from those governing private liability. We also believe, however, that significant progress has been made, that further work can be profitable, and that the tentative recommendation does provide a sound approach to what the law should be in the public area and perhaps in the private area too. We suggest accordingly that the Commission request broader authority to study this area with a view towards a comprehensive, overall revision of the law. If the Commission accepts this suggestion, the staff has prepared a statement that might be included in the Annual Report to authorize such a study. (See Exhibit I) If such a request is to be made, we will review the tentative recommendation before the next meeting to determine if any special problems would result if it were made applicable to private persons as well as public entities.

Respectfully submitted,

Jack I. Horton
Associate Counsel

EXHIBIT I

A study to determine whether the law relating to liability for water damage should be revised

In 1965, 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."[1] Pursuant to this directive, the Commission has given priority to the water damage aspects of inverse condemnation. A research study has been prepared,[2] and significant progress has been made towards completion of a recommendation relating to this area of the law. This work reveals that, in the past, the California courts have relied generally upon the rules of private water law in dealing with inverse condemnation liability for property damage caused by water.[3] These rules in certain situations appear unsatisfactory and certain changes seem required. However, such changes in the public sphere alone and the resultant inconsistencies could cause serious problems. The Commission accordingly requests authority to study the law relating to the liability of both private persons and public entities to determine whether a comprehensive revision of this entire body of the law is required.

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1. Cal. Stats. 1965, Res. Ch. 130, p. 5289.

2. See Van Alstyne, Inverse Condemnation: Unintended Physical Damage, 20 Hastings L. J. 431 (1969).

3. Id. at 448-449.

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

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

September 29, 1969

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

Dear Mr. DeMoully:

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

By our letter to you of September 4, 1969, we advised you of our view that a concept of strict liability is an inherently bad approach to inverse condemnation liability for interference with waters. At the September 5, 1969, meeting, we stated that we would provide you with additional comment and our recommendations concerning a statutory approach to the problem. This letter is intended to serve that purpose.

It is our basic conclusion that the approach should be one of applying the general rules of water law applicable as between private owners. This is not to say that we believe that these rules in all instances lead to a desirable judicial balancing of interests in public liability cases; but, we believe that in a great many situations the adoption of entirely different rules would lead to an unfortunate inconsistency in the law where no overall purpose is served by such inconsistency. It is, therefore, our view that the approach should be one of analyzing those areas where modification of existing rules appears desirable, rather than an outright rejection of those rules in favor of some new and different concept.

In taking this position, we recognize that existing water law is far from clear, especially in the field of surface waters. However, this is a problem faced by all property owners, public and private. Perhaps there is a need for overall statutory clarification; but in our view there is no valid

purpose to be served by a statute which would single out for strict liability the development of public property alone. If strict liability is to be the rule applicable to the effect on waters caused by paving a parking lot for a city administration building, it should only be so because this same rule would be applicable to the paving of a similar parking lot for a department store.

Concerning specific areas of water law, we first of all believe that the rule of Archer v. City of Los Angeles, 19 Cal.2d 19, should be preserved. This is the rule which permits upper owners to utilize the natural watercourses provided by nature as a means of draining their lands, and which allows the reasonable improvement of such channels for accomplishing this purpose. As we pointed out in our September 4 letter, there is no persuasive reason why the rule should be different for public agencies. Certainly, a public golf course should be entitled to the same right to use a natural watercourse as would be enjoyed by a neighboring private golf course.

Consider the consequences of the rule proposed in the tentative recommendation. It might be that the combined additional runoff from two upstream golf courses, one private and one public, would be sufficient to cause a problem downstream. Under the proposed statute, the public-owned golf course alone would be faced with liability. Moreover, there would be no possibility of contribution from the private owner, who would not even be made a party to the lawsuit. Surely, such a result is not a desirable one, unless there is some valid reason for imposing greater liability on public golf courses than private golf courses.

In the field of surface waters, we believe any statute should be consistent with the concepts of reasonable use discussed in Keys v. Romley, 64 Cal.2d 396, although special consideration could be given to any factors deemed appropriate to governmental, but irrelevant to private, nonliability (see Van Alstyne, Inverse Condemnation: Unintended Physical Damage, 20 Hastings Law Journal 431 at 503).

In this connection we would once again like to point out that we do not believe that the present proposed statute codifies existing law on surface waters, as is suggested in the comment to Section 883. The Keys case contemplates a judicial balancing of interests rather than strict liability. As stated by Van Alstyne (20 Hastings Law Journal at 451):

> "...For example, the construction of a drainage system by an upper improver that discharges surface waters upon adjoining property in a concentrated stream, where no other feasible alternative is available, may be reasonable and, if relatively slight harm results, noncompensable under the rule in Keys v. Romley...."

Neither do we agree with the suggestion in Footnote 13 at page 5 of the background material, that it seems possible that the limitation of reasonableness "could be simply construed as a special application of the doctrine of avoidable consequences." Such a conclusion would represent nothing more than a return to the harsh consequences of the unmodified civil law rule, for a party threatened with injury has always had a duty to mitigate his damage. The reference in the Keys case to the Restatement of Torts, Sections 822-833, for "a discussion of the elements of liability" makes it very clear that the judicial balancing of interests contemplates considerably more than the doctrine of avoidable consequences. Indeed, it suggests acceptance, in California, of the Restatement rules.

Turning now to the area of flood waters and flood control, we believe that there should be no retreat from the protection of the common enemy doctrine in connection with the development of public property. As we pointed out in our September 4 letter, we can see no reason why a public school property should have any less right to protect itself from the ravages of flood waters than a private school property. Affected property owners are protected from abuses of the common enemy doctrine by concepts of "reasonableness" which at present are an inherent part of the rule. Neither should there be any liability merely because a public improvement happens to stand in the path of flood waters escaping from a natural watercourse, nor, for that matter, water escaping from an artificial watercourse.

With regard to flood control projects, we believe that there is a need for specifically limiting the liability of public agencies. The advent of Albers v. County of Los Angeles, 62 Cal.2d 250, and its interpretation by many plaintiff's lawyers, has brought about a rash of claims in this area which already has resulted in an enormous financial drain in the costs of defense alone. In this connection, the State of California has been subjected to numerous flood claims over the past few years. If the Commission desires, we would be happy to supply it with statistics and number of such claims.

Many of the claims have been pursued on the assumption that under Albers, a public agency should be strictly liable. Public agencies have therefore been singled out as target defendants for flood damage, even though in many, if not most, of the cases it is conceded that the public improvements were properly engineered.

The public entity should not be made an insurer of its public works for any and all damages that might result therefrom. It seems reasonable that the public entity should not be liable under a theory of inverse condemnation unless it is shown that the public entity failed to employ sound engineering practices in the planning, designing and construction of its public works. This concept should be the underlying theme for any liability arising out of inverse condemnation. No good reason can be advanced why the public entity should be held to a higher standard for its public works than is private enterprise. Serious consideration should therefore be given to embodying the concept of "sound engineering practices". Unless this standard or one similar is established as a basis for liability in an inverse condemnation action, the drain on the public treasury is without limits.

We also believe that in some circumstances there is a need for granting public agencies greater protection than presently enjoyed by private owners. With regard to stream diversions, we agree with Van Alstyne's conclusion (20 Hastings Law Journal at 502) that assimilation of private concepts of liability "may produce governmental liability in circumstances of dubious justification." As Van Alstyne states:

> "...Stream diversions, however, may be integral features of coordinated flood control, water conservation, land reclamation, or agricultural irrigation projects undertaken on a large scale by public entities organized for that very purpose. Where this is so, the community may suffer more by general fiscal deterrents resulting from indiscriminately imposed strict liabilities than by specifically limited liabilites [sic] determined by the reasonableness of the risk assumptions underlying each diversion."

In conclusion, it is our recommendation that the basic approach of any statute should be premised on adoption of the rules applicable as between private property owners. Any other approach will only lead to a diverse development in the law in many situations where this result is unintended, unnecessary, and undesirable. There may well be a need for certain special rules covering special situations, but this need can be expressly provided for.

In any event, we remain strongly opposed to any statutory scheme based on a concept of strict liability, for the reasons stated in our September 4 letter. In this regard, it may be observed that although the Commission's consultant, Professor Van Alstyne, does not recommend the "mechanical" application of private law formulas, neither does he recommend adoption of a concept of strict liability. The tentative proposed statute definitely runs counter to his recommendation that an attempt be made to provide for a judicial balancing of interests between public agencies and affected property owners (Van Alstyne, Inverse Condemnation: Unintended Physical Damage, 20 Hastings Law Journal 431 at 502).

Sincerely,

Edward J. Connor Jr.

EDWARD J. CONNOR, JR.
Attorney