65.25 11/4/69

Memorandum 69-134

Subject: Study 65.25 - Inverse Condemnation (Water Damage; Land Stability)

At the October 1969 meeting, the Commission briefly considered objections raised by the Department of Public Works to the tentative recommendation relating to liability for water damage under inverse condemnation. The essence of these objections was that, under the tentative recommendation, the liability of public entities for "water damage" in certain situations would be greater than that of private persons and that such greater liability would be unjust and would create procedural complexities in litigation. Needless to say, the Department indicated that it would vigorously oppose legislation taking the form of the tentative recommendation.

The Commission directed the staff to prepare a statement to be included in the Annual Report requesting authority to study those areas of private law which are related to the areas of inverse condemnation law which are being studied by the Commission to determine whether comprehensive revision or other changes in the private area are necessary or desirable in connection with revision of the law relating to inverse condemnation. A copy of that statement is attached to Memorandum 69-135.

The staff was further directed to review the present tentative recommendation on water damage and interference with land stability and identify those areas of inconsistency between the private law and the rules suggested for governing the liability of public entities for inverse condemnation. (A copy of the tentative recommendation is attached.)

Turning first to liability for interference with land stability, it would appear that the rules suggested in the recommendation are very similar

to the rules now applicable in both the public and the private areas. (See Comments to Sections 884 and 884.2, pages 29-31.) Subject to rules of mitigation and offsetting benefits, Section 884 provides "absolute" liability for land stability disturbance damage proximately caused by its improvement as designed and constructed. (The requirement of proximate causation should shield a public entity from liability for acts of God (e.g., earthquakes) in the same way as a private person.) With respect to subjacent support, the present rule in the private area is one of "absolute" liability for removal of subjacent support, i.e., for the collapse of land in its natural condition and for all damages resulting from the subsidence of soil where such subsidence would have occurred even without the weight of plaintiff's improvements. Difficult practical problems could be presented where the burden of plaintiff's improvements contribute to the damage. However, this problem appears never to have been squarely presented in California. It has been suggested that, where plaintiff's improvements contribute to the subsidence, the defendant should only be liable if negligence or intent to cause harm is shown. If such a rule were adopted in the private area, the substance of the rule could, perhaps, be incorporated into Section 884 under the guise of proximate causation. However, obviously, this is an area of ambiguity both in the present law and under the tentative recommendation.

With respect to lateral support, Section 884.2 provides that "in any situation governed by Section 832 of the Civil Code ['proper and usual excavations'], a public entity is liable to the same extent as a private person." There may be situations where lateral support is removed and Section 832 is found not applicable, e.g., perhaps quarrying operations. But, assuming this to be the case, it appears that both private persons under the common law and public entities under Section 884 would be subject to a rule of absolute liability. Their relative positions would, therefore, not change.

With respect to the imposition of fill by public entities, under present law (Albers, Reardon), "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." Section 884 would simply retain this rule. In Albers, it was assumed arguendo that private persons would not be liable under the circumstances there involved. The plaintiffs argued to the contrary, but the Court found it unnecessary to consider their contentions. Possibly theories of nuisance, trespass, the Rylands doctrine of liability for escaping substances, or the maxim that one should not be permitted to so use his own property as to cause damage to another, see Everett v. Davis, 18 Cal.2d 389, 398 (1941) (concurring opinion, J. Carter), could be applied to provide a theory of absolute liability for private persons. Nevertheless, there is now probably an inconsistency and the recommendation would perpetuate this difference.

With respect to concussion and vibration damage, at least with regard to developed areas, absolute inverse liability appears to be the rule. Private law is similar only insofar as there is strict ultrahazardous liability for blasting and rocket testing. It should be noted that this theoretical approach is somewhat different and the only activities that appear to date to have been classified as ultrahazardous are these two. Moreover, California appears to require a showing of negligence as a basis for liability where blasting occurs in a remote or unpopulated area.

Turning to the area of water damage, it is clear that the tentative recommendation would provide rules in certain situations different from those presently applied in the private sphere. But, perhaps even more important is the significant difference in approach to the question of liability. Under existing private law, the Court first classifies the type of water involved

and, then, generally rather mechanically applies the rules relating to that type of water. See, e.g., Everett v. Davis, 18 Cal.2d 389, 392-393 (1941) ("The rights of the parties therefor turn upon the legal classification of waters which, after having been confined in a natural watercourse, disperse and sink into the ground by reason of the formation of an alluvial cone."). Under the recommendation, an attempt is made to simply focus on the proximate results of a public improvement. Frankly, it is an experiment in enterprise liability, but one that seems sound in theory and preferable to the existing rules. The differences between the recommendation and the present private and public rules are these.

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. In Keys v. Romley, the Supreme Court reaffirmed this rule, but modified or qualified its application by a test of reasonableness. 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." If the other does act reasonably, the one altering the flow of surface waters is liable for the damage resulting. The meaning of "reasonableness" in this context is not yet defined. 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." Accordingly, it seems possible that the limitation of reasonableness could simply be construed as a special application of the doctrine of avoidable consequences. Such an approach would be identical to that provided in the tentative recommendation. However, the Department of Public Works

apparently believes that Keys should be given a broader interpretation. Clearly, an undefined test of reasonableness permits flexibility and a good bit of "elbow room" in litigation. The staff believes that it is difficult to justify any test of reasonableness that, in fact, requires an owner of property to do any more than take "reasonable steps available to him to minimize or prevent damage caused or imminently threatened by the improvement." See Section 881.4. Nevertheless, we would be remiss in failing to point out that the courts in the surface water area have, on occasion, applied the "police power" exception quite expansively. See O'Hara v. Los Angeles County Flood Control Dist., 19 Cal.2d 61, 63, 119 P.2d 23 (1941)("A governmental agency, however, in constructing public improvements such as streets and highways, may validly exercise its 'police power' to obstruct the flow of surface waters not running in a natural channel without making compensation for the resulting damage."). To the same effect, see Lampe v. City & County of San Francisco, 124 Cal. 546, 57 P. 461 (1899); Corcoran v. City of Benicia, 96 Cal. 1, 30 P. 798 (1892); Callens v. County of Orange, 129 Cal. App.2d 255, 276 P.2d 886 (1954)(dictum). Presumably, the Keys test of reasonableness requires in appropriate circumstances value judgments regarding the importance and merit of public projects; theoretically, application of the "police power" exception requires this same sort of value judgment. The argument then follows that these older water cases applying the "police power" are good law under the Keys reasonableness doctrine. The staff does not believe such a result is desirable or inevitable. The cases referred to, in fact, seemed to apply the "police power" exception very mechanically; that is, if the project was properly authorized, it must have been for the public welfare, therefore, the "police power" was exercised and the public entity was not liable even though a private person so obstructing the flow of surface waters

would have been. In short, the application of the exception does not seem to have always been the result of proper value judgments and excusing the entity where a private person would be liable certainly reverses the modern tendency in inverse cases. See Albers; Burrows v. State. Moreover, the "police power" exception was significantly reduced in House v. Los Angeles County Flood Control Dist., 25 Cal.2d 384, 153 P.2d 950 (1944). Here the Court held the exception inapplicable where the defendant was negligent and the damage was unnecessarily caused in a nonemergency situation. It is extremely difficult to reconcile O'Hara with House. The very essence of O'Hara was that the defendant had no duty to avoid damage to the plaintiff. House obviously implies a duty, and imposes liability for a breach of that duty. Professor Van Alstyne, relying on House and Rose v. State, concludes that the "police power" exception is of negligible significance. Rose v. State, 19 Cal.2d 713, 730-731, 123 P.2d 505 (1942)(loss of access case)(". . . it should be obvious that the police power doctrine cannot be invoked in the taking or damaging of private property in the construction of a public improvement where no emergency exists."). The staff hopes that he is correct, but until O'Hara is laid to rest, we would expect public entities to continue to urge the applicability and basic validity of its rule--a rule obviously inconsistent with that of the tentative recommendation.

Another rule has been repeated frequently in dicta--"a California landowner may not collect such water [surface waters] and discharge them upon adjacent land . . . , but he may discharge them for a reasonable purpose into the stream into which they naturally drain without incurring liability for damages to lower land caused by the increased flow of the stream." Archer v. City of Los Angeles, 19 Cal.2d 19, 27 (1941)(dictum); see San Gabriel Valley Country Club v. County of Los Angeles, 182 Cal. 392, 188 P. 554 (1920)(dictum).

The rule is self-contradictory since there should be no increased flow if the waters discharged are only those that naturally drain into the stream. What apparently is intended is that an upper owner may gather surface waters on his property that would, under natural conditions, be absorbed, evaporate, or, much more slowly, reach the stream because of vegetation and different land contours, and discharge these waters into the stream that they would reach if they were not so absorbed or impeded. Such action could drastically increase the velocity and volume of the stream in question. Recognizing the damage that can result if the stream is burdened beyond its capacity, a very different rule applying in the same situation has also been stated. This rule provides that "even though the surface waters collected are discharged in a natural channel on the upper owner's land, he is liable for flooding the land of the lower owner where the cause of the flooding is the increase in the volume of the water flowing to the lower owner beyond the capacity of the stream." Archer v. City of Los Angeles, supra at 44 (J. Carter dissenting); Callens v. County of Orange, 129 Cal. App.2d 255, 261, 276 P.2d 886 (1954) (dictum). The rules seem to be in conflict. They could be reconciled by interpreting the first rule as applying only where the collection and discharge of surface waters into a natural watercourse does not increase the volume of water in the stream beyond the stream's capacity to handle it. Such interpretation does not, however, seem to be the interpretation intended in Archer. The implication there was that the upper owner may discharge surface waters into a natural watercourse with complete impunity. This certainly is the rule advocated by the Department of Public Works and there is at least a very significant chance that it is the rule that would be applied in the private area. It is, of course, inconsistent with the tentative recommendation, and, if the tentative recommendation were enacted,

public entities could be treated more harshly than private persons and they could be subject to liability in situations where a private person would not be liable. (The staff believes that the second rule which is quite similar to that provided in the tentative recommendation is far preferable.)

With respect to stream waters, both public entities and private persons are now subject to absolute liability for diversion of the natural flow. The tentative recommendation would not alter their positions. However, under present law, a public entity, and presumably a private person also, is not subject to liability for improving the natural channel--clearing, dredging, deepening, straightening, preventing absorption by lining--even though this greatly increases the total volume or velocity resulting in downstream damage. See, e.g., Archer v. City of Los Angeles, supra; O'Hara, supra; Weinberg Co. v. Bixby, 185 Cal. 87, 196 P. 25 (1921)(semble); San Gabriel Valley Country Club v. County of Los Angeles, supra. The tentative recommendation would change this rule as to public entities and the rule for private persons would then be inconsistent.

With respect to flood waters, the so-called general rule is that flood waters are a "common enemy" against which an owner may defend himself with impunity for damage to other lands caused by the exclusion of flood waters from his land. However, while flood waters are viewed as a "common enemy":

> "[T]his declaration is used in view of the means of defense resorted to rather than in the abstract. We build the banks of the river higher for our protection, it is true, but in so doing we aid nature in her effort to carry the water to its ultimate destination, and he who to protect himself from a flood should erect a barrier across the channel of one of our important rivers would probably be met with the declaration that it was not the proper mode of warfare, even against a 'common enemy.'" [Jones v. California Development Co., 173 Cal. 565, 575-576, 160 P. 823 (1916), quoting from Gray v. McWilliams, 98 Cal. 157, 32 P. 976 (1893).]

This position is reflected in other decisions which focus on the reasonableness of defensive efforts and suggest that plaintiff must not be unnecessarily damaged. See, e.g., Horton v. Goodenough, 184 Cal. 451, 194 P. 34 (1920). With respect to public entities at least, the "common enemy" rule is clearly qualified by a test of reasonableness and an entity will be liable for its negligence in planning, designing, and constructing flood control and drainage projects. House v. Los Angeles County Flood Control Dist., 25 Cal.2d 384, 153 P.2d 950 (1944). Further, the "common enemy" rule is 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, in the absence of the improvements, would not be harmed constitutes a compensable taking. Beckley v. Reclamation Board, 205 Cal. App.2d 734, 23 Cal. Rptr. 428 (1962). The tentative recommendation changes the latter rule only to the extent of eliminating the element of foreseeability. This seems entirely in accord with Albers. The result is, however, that a harsher rule is applicable to public entities. (It should be noted that the tentative recommendation is defective with regard to flood waters. Close analysis reveals that the recommendation appears to treat only improvements that cause or permit waters to escape from a stream. Thus, there is a hiatus with respect to the treatment of waters after they have escaped from the stream. Under existing law, defensive measures are permitted against the "common enemy." Such a rule seems proper in some circumstances, e.g., entity protecting school buildings during a flood, but in others, e.g., permanent flood control works erected some distance from the stream itself, it seems inverse liability should prevail. The Commission should, at some point, direct its attention towards distinguishing the two.)

The last area that might be mentioned is that of irrigation seepage. Here, under present law, there is absolute liability in both the public and

private areas, and the tentative recommendation makes no change in this regard. See Tormey v. Anderson-Cottonwood Irr. Dist., 53 Cal. App. 559, 568, 200 P. 814, 818 (1920); Power Farms v. Consolidated Irr. Dist., 19 Cal.2d 123 (1941).

The more study the staff devotes to the area of water damage, the more convinced they are that the tentative recommendation is a sound approach to the rules governing liability in this area. (The Commission should, however, review the conclusions and recommendations of Professor Van Alstyne, 20 Hastings L.J. 431, 487-516 (1969). We sent you a copy of this article. The pertinent portion of the article (footnotes omitted) are reproduced as Exhibit I.) The tentative recommendation does differ from the "risk" theory advocated by the consultant. Moreover, the recommendation does involve some departures from present law, and would result in some discrepancies between public and private law. For the most part, in the staff's opinion, the departures and discrepancies are not great. However, the entities obviously disagreed and we note their political clout. Making changes in the recommendation to conform the recommendation to existing law would obviously be self-defeating. The alternative is to bring the private law into essential conformity with those rules provided in the recommendation; this seems to be much the better choice. To do so will require, however, further legislative authority, as well as further careful study. The staff recommends that the Commission take steps in this latter direction.

Respectfully submitted,

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III. Conclusions and Recommendations: A "Risk Analysis" Approach to Inverse Liability

The foregoing review of California inverse condemnation law, as applied to claims based on unintentional damaging of private property, discloses three major areas of difficulty discussed below to which legislative reform efforts should be directed.

A. Clarification of the Basis of Inverse Liability

One of the most striking features of California decisional law is the dual approach to inverse liability. In some types of cases (*e.g.*, landslide, water seepage, stream diversion, concussion), present rules appear to impose inverse liability without regard for fault; in others (*e.g.*, drainage obstruction, flood control, pollution) an element of fault is required to be pleaded and proved by the claimant. The confusion produced by this judicial ambivalence has been compounded, in part, by an understandable tendency of counsel to pursue the "safe" course of action. Faced by appellate dicta to the effect that an inverse liability claimant cannot recover against a public entity without the pleading and proving of a claim actionable against a private person under analogous circumstances,[272] plaintiffs' lawyers often have proceeded, it seems, on the erroneous assumption, readily accepted by defense counsel and thus by the court, that a showing of fault was indispensable to success. Appellate opinions in such cases, after trial, briefing, argument, and decision predicated upon that assumption, do little to dispel the theoretical cleavage.[273] Only occasionally have reported opinions explicitly noted, ordinarily without attempting to reconcile, the interchangeability of the "fault" and "no fault" approaches to inverse liability.[274] Even the recent *Albers* decision, which at least set the record straight by revitalizing the position that inverse liability may be imposed without fault, did not undertake a thorough canvass of the law, but rather left many doctrinal ends dangling. Uniform statutory standards for invocation of inverse condemnation responsibility thus would be a significant improvement in California law, both as an aid to predictability and counseling of claimants and as a guide to intelligent planning of public improvement projects.

It already has been suggested above that the concept of fault as a basis of inverse liability includes a broad range of liability-producing acts and omissions that, in individual cases, are not required to be identified with precision, provided the operative facts are located within the extremes.[275] If private property is damaged by the construction of a public improvement, the cases relate that "the state or its agency must compensate the owner therefore . . . whether the damage was intentional or the result of negligence on the part of the governmental agency."[276] In this typical pre-*Albers* statement, the kind of fault becomes immaterial, but fault is assumed to be essential. Yet the case[277] cited in principal support of the quoted statement is also the chief authority relied upon in *Albers* to sustain liability without fault. Reconciliation of the seeming inconsistency, it is believed, is possible in a manner consistent with acceptable policy considerations.

Each of the variant kinds of fault that are recognized as a potential basis for inverse liability includes the fundamental notion that the public entity, by adopting and implementing a plan of improvement or operation, either negligently or deliberately exposed private property to a risk of substantial but unnecessary loss. Negligence in this context often appears to be an after-the-fact explanation, couched in familiar tort terminology, of what originally amounted to the deliberate taking of a calculated risk.[278] Foreseeable damage is not necessarily inevitable damage. Plan or design characteristics that incorporate the probability of property damage under predictable circumstances may later be judicially described as "negligently" drawn; yet, in the original planning process, the plan or design with its known inherent risks may have been approved by responsible public officers as being adequate and acceptable for non-legal reasons. For example, the damage, although foreseeable, may have been estimated at a low order of probability, frequency, and magnitude, while the added cost of incorporating minimal safeguards may have been unacceptably high in proportion to available manpower, time and budget.[279] Again, additional or supplementary work necessary to avoid or reduce the risk, although contemplated as part of long-term project plans, may have been deferred due to more urgent priorities in the commitment of public resources. The governmental decision (whether made by design engineers, departmental administrators, budget officers, or elected policy-makers) to proceed with the project under these conditions thus may have represented a rational (and hence by definition non-negligent) balancing of risk against practicability of risk avoidance.[280]

When the government, acting in furtherance of public objectives, has thus taken a calculated risk that private property might be damaged, and such damage has eventuated, a decision as to inverse liability should be preceded by a discriminating appraisal of the relevant facts. The usual doctrinal approach surely is consistent with this view: "The decisive consideration is whether the owner of the damaged property if uncompensated would contribute more than his proper share to the public undertaking."[281] But whether the loss constitutes more than a "proper" share depends upon a careful balancing of the public and private interests involved, so far as those interests are identified, accepted as relevant, and exposed to factual scrutiny.

Assuming foreseeability of damage, the critical factors in the initial stage of the balancing process relate to the practicability of preventive measures, including possible changes in design or location. If prevention is technically and fiscally possible, the infliction of avoidable damage is not "necessary" to the accomplishment of the public purpose.[282] The governmental decision to proceed with the project without incorporating the essential precautionary modifications in the plan thus represents more than a mere determination that effective damage prevention is not expedient. It is also a deliberate policy decision to shift the risk of future loss to private property owners rather than to absorb such risk as a part of the cost of the improvement paid for by the community at large. In effect, that decision treats private damage costs, anticipated or anticipatable, but uncertain in timing or amount or both, as a deferred risk of the project. If and when they materialize, however, the present analysis suggests that those costs should be recognized as planned costs in-

flicted in the interest of fulfilling the public purpose of the project, and thus subject to a duty to pay just compensation.[283]

On the other hand, if the foreseeable type of damage is deemed technically impossible or grossly impracticable to prevent within the limits of the fiscal capability of the public entity, the decision to proceed with the project despite the known danger represents an official determination that public necessity overrides the risk of private loss. The shifting of the risk of loss to private resources is not sought to be supported on grounds of mere prudence or expedience but on the view that the public welfare requires the project to move ahead despite impossibility of more complete loss prevention. In this situation, an additional variable affects compensation policy. The magnitude of the public necessity for the project at the particular location, with the particular design or plan conceived for it, must be assessed in comparison to available alternatives for accomplishing the same underlying governmental objective with lower risk, but presumably higher costs (*i.e.*, higher construction and/or maintenance expense, or diminished operational effectiveness).[284] Unavoidable damage of slight or moderate degree, especially where widely shared or offset by reciprocal benefits, does not always demand compensation under this approach. Such damage may be reasonably consistent with the normal expectations of property owners and with community assumptions regarding equitable allocation of public improvement costs. But relevant reliance interests ordinarily do embrace an understanding that the stability of existing property arrangements will not be disturbed arbitrarily, or in substantial degree, by governmental improvements, and that project plans ordinarily will seek to follow those courses of action that will minimize unavoidable damage so far as possible.[285]

The importance of the project to the public health, safety and welfare, in relation to the degree of unavoidable risk and magnitude of probable harm to private property, thus constitutes the criterion for estimating the reasonableness of the decision to proceed. A change in the location of a highway, for example, may add only slightly to length and total construction costs, yet may reduce substantially the frequency or the extent of property damage reasonably to be anticipated from interference by the highway with storm water runoff. Alternately, the change might make it possible to include more adequate drainage features in the project plans without exceeding budgetary limits. On the other hand, the erection of a massive water storage tank at a particular location may entail a relatively low risk of landslide under foreseeable conditions, yet be justified by emergency considerations (*e.g.*, impending failure of other facilities), the need for adequate hydrostatic pressure peculiarily available by storage at that location, or the costs that pumping equipment, together with longer distribution lines and access roads, would entail if a less suitable location were selected. The calculated risk implicit in such governmental decisions appears capable of rational judicial review, particularly if aided by statutory standards relevant to compensation policy. The factual elements deserving consideration, for example, do not appear unlike those specified in present statutory rules governing the liability in tort of public entities for dangerous conditions of public property.[286]

Although the preceding discussion has centered chiefly upon the concept of fault as a basis of inverse liability, it seems evident that the risk analysis here advanced also could be applied fruitfully in cases, like *Albers*, in which inverse liability obtains notwithstanding unforeseeability of injury and absence of fault. *Albers* may simply embody an implicit hypothesis that practically every governmental decision to construct a public improvement involves, however remotely, at least some unforeseeable risks that physical damage to property may result. In the presumably rare instance where substantial damage does in fact eventuate "directly" from the project,[287] and is capable of more equitable absorption by the beneficiaries of the project (ordinarily either taxpayers or consumers of service paid for by fees or charges) than by the injured owner,[288] absence of fault may be treated as simply an insufficient justification for shifting the unforeseeable loss from the project that caused it to be the equally innocent owners. Absence of foreseeability, like the other factual elements in the balancing process, is, in effect, merely a mitigating but not necessarily exonerating circumstance.

The risk analysis here advanced, it is submitted, reconciles most of the seemingly inconsistent judicial pronouncements as to the need for fault as a basis of inverse liability. Consistent with the intent of the framers of the just compensation clause to protect property interests against even the best intentioned exercises of public power,[289] it avoids as well a fruitless search for the somewhat artificial moral elements inherent in the tort concepts of negligence and intentional wrongs. It assumes that in the generality of cases, the governmental entity with its superior resources is in a better position to evaluate the nature and extent of the risks of public improvements than are potentially affected property owners, and ordinarily is the more capable locus of responsibility for striking the best bargain between efficiency and cost (including inverse liability costs) in the planning of such improvements.[290] Reduction in total social costs of public improvements may also be promoted by this approach, since political pressure generated by concern for inverse liability costs imposed upon taxpayers may be expected to produce both a reduction in the number of risk-prone projects undertaken and an increase in the use of injury-preventing plans and techniques.[291]

It may be objected, of course, that the risk analysis approach assumes the competence of judges and juries to sit in review upon basic governmental policy decisions involving a high degree of discretion and judgment—a competence explicitly denied by prevailing legislation dealing with governmental liability in tort.[292] However meritorious the objection may be in considering statutory tort policy,[293] it fails in the face of settled constitutional policy regarding eminent domain. The cases are legion that approve inverse condemnation liabilities grounded precisely upon determinations of judges or juries that the consequences of carefully considered discretionary decisions of public officials, including decisions relating to the plan or design of public improvements, amounted to a "taking" or a "damaging" of pri-

vate property for public use.[294] To deny adjudicability in such cases would effectively remove from the purview of the just compensation clause those very situations in which compensation was clearly intended to be available for the protection of property owners.[295] In any event, the risk analysis approach does not interfere directly with official power or discretion to plan or undertake public projects; it merely determines when resulting private losses must be absorbed as part of the cost of such projects.

Certainty and predictability also would be improved significantly by the enactment of general legislative standards for the determination of inverse liability. The "risk theory" of inverse liability, here suggested, provides a possible approach to uniform guidelines that would eliminate arbitrary distinctions based on fault, absence of fault, and varieties of fault. Moreover, since it seems likely that the practical impact of the *Albers* decision will be more frequent imposition of inverse liability without fault,[296] it is noteworthy that the American Law Institute has under consideration a proposal to restate the law of strict tort liability for abnormally dangerous activities by reference to factors not unlike those suggested as appropriate to the "risk theory." Determination whether an activity is "abnormally dangerous," for example, would be determined as a matter of law (*i.e.*, not as a jury question) by considering such factors as the degree of risk, gravity of potential harm, availability of methods for avoiding the risk, extent of common participation in the activity, appropriateness to the locality, and social and economic importance to the community of the activity.[297] Limitations upon strict liability in tort have been recommended also where the damage was caused by the intervention of an unforeseeable force of nature (i.e., "act of God"),[298] where the plaintiff assumed the risk,[299] and where the injury was due to the abnormally sensitive nature of the plaintiff's activities.[300]

A somewhat similar approach is suggested as well by the prevailing interpretation of those Massachusetts statutes authorizing compensation for "injury . . . caused to . . . real estate" by state highway work.[301] Proceeding from the premise that statutory authority for construction of highways contemplates the use of reasonable care, the Massachusetts courts have concluded that statutory compensation is available only when the claimed damage was a "necessary" or "inevitable" result of the work when performed in a reasonably proper manner.[302] To recover, the claimant must show that the damage was either (a) unavoidable by exercise of due care, or (b) economically impracticable to avoid in fact even if technically avoidable.[303] This dual approach thus imposes inverse (statutory) liability where the plan, design, or method of construction of the public improvement incorporates a deliberately accepted risk of private property injury, but relegates to tort litigation any injuries caused by mere negligence in carrying out the public entity's program.[304]

B. De-emphasis of Private Law Analogies

The existing judicial gloss on the just compensation clause is, to a considerable degree, a reflection of legal concepts derived from the

private law of property and torts. The analogues, however, are unevenly drawn, sometimes disregarded, and occasionally confused. There is no compelling reason why rules of law designed to adjust jural relationships between private persons necessarily should control the rights and duties prevailing between government and its citizenry.[305] Indeed, the definition of the constitutional term "property" —a term that merely connotes the aggregate of legal interests to which courts will accord protection[306]—often is different, when damage has resulted from governmental conduct, from its definition when comparable private action caused the injury. For example, the "police power" may immunize government from liability where private persons would be held responsible;[307] conversely, public entities may be required to pay compensation for harms which private persons may inflict with impunity.[308] Yet, in other situations (notably the water damage cases) private law principles are invoked without hesitation as suitable resolving formulae for inverse liability claims.[309]

The present uneasy marriage between private law and inverse condemnation has none of the indicia of a comprehensively planned or carefully developed program of legal cohabitation. Its current status may perhaps best be understood as the product of an episodic judicial process that often regards factual similarity as more important than doctrinal consistency. In this process, the doctrinal treatment invoked in flooding cases tends to beget like handling of other flooding cases, in seepage cases of other seepage cases, and in pollution cases of other pollution cases; cross-breeding between these genealogical lines is relatively rare. The interchangeability of private and public precedents has, of course, some superficially deceptive virtues, including consistency and predictability. These apparent advantages, however, are obtained at the risk that significant differences between the interests represented by governmental functions and like private functions may be overlooked and the application of legal rules consequently distorted.

The water damage cases provide a useful illustration of the point. The "common enemy" rule, which California decisions invoke to absolve riparian owners from liability for damage caused by reasonable flood protection improvements, may arguably possess merit as applied to individual proprietors. In the interest of promoting useful land development through individual initiative, the law should not discourage private efforts to take protective action against the emergency of menacing flood waters even though other owners who act less diligently or are unable to command the resources to protect themselves may sustain losses as a result.[310] Indeed, during the early development of the State, prior to the proliferation of governmental agencies explicitly charged with flood control duties, the owner's privilege to construct protective works was perhaps indispensable to the safeguarding of valuable agricultural lands from destruction.[311] Moreover, potential damage resulting from the undertakings of individuals in this regard is not likely to be extensive or severe.

The rationale of the "common enemy" rule, however, is of dubious validity when considered in the context of governmentally administered flood control projects developed for the collective protection of entire regions. The aggregation of resources involved in most flood control district developments, as well as the comprehensive nature of such schemes, imports a quantum jump in damage potential. For example, a major project may well entail massive outlays of public

funds over an extended period of years for the construction of an area-wide network of interrelated check dams, catch basins, stream bed improvements, drainage channels, levees, and storm sewers, all programmed for completion in a logical order dictated primarily by engineering considerations. The realities of public finance may, at the same time, require the cost to be distributed over a substantial time span, either in the form of accumulations of proceeds from periodic tax levies for capital outlay purposes or through one or more bond issues.

Piecemeal construction, often an inescapable feature of such major flood control projects, creates the possibility of interim damage to some lands left exposed to flood waters while others are within the protection of newly erected works.[312] Indeed, the partially completed works, by preventing escape of waters that previously were uncontrolled, actually may increase the volume and velocity of flooding with its attendant damage to the unprotected lands, often to such a degree that private action to repel the onslaught is completely impracticable.[313] The prevailing private law doctrine embodied in the "common enemy" rule, however, imposes no duty upon the public entity to provide complete protection against flood waters; like private riparians, the entity is its own judge of how extensively it will proceed with its improvements. Increased or even ruinous damage incurred by the temporarily unprotected owners, due to the inability of the improvements to provide adequate protection to all, therefore, is not a basis of inverse liability.[314] The constitutional promise of just compensation for property damage for public use thus yields to the overriding supremacy of an anomalous rule of private law.

Assimilation of private concepts into inverse condemnation law also may produce governmental liability in circumstances of dubious justification. This result, in part. can be explained by the blurred definitional lines which distinguish the various categories of factual circumstances (*e.g.*, "surface water," "stream water," flood water) to which disparate legal treatment is accorded under private law rules.[315] But it is also a consequence of the failure of the private law rules to accord appropriate weight to the special interests that attend the activities of governmental agencies. For example, it is arguable that strict liability for damage resulting from the diversion of water flowing in a natural watercourse may be reasonably sensible as applied to adjoining riparian owners; a contrary view would expose settled reliance interests to the threat of repeated and diverse private interferences that could discourage natural resource development. 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.[316] Where this is so, the community may suffer more by general fiscal deterrents resulting from indiscriminately imposed strict liabilities than by specifically limited liabilites determined by the reasonableness of the risk assumptions underlying each diversion.

Liability in water damage cases, it is submitted, should not be reached by mechanical application of private law formulas. Instead, it should be based upon a conscientious appraisal of the overall public purposes being served, the degree to which the loss is offset by re-

ciprocal benefits, the availability to the public entity of feasible preventive measures or of adequate alternatives with lower risk potential, the severity of damage in relation to risk-bearing capabilities, the extent to which damage of the kind sustained is generally regarded as a normal risk of land ownership, the degree to which like damage is distributed at large over the beneficiaries of the project or is peculiar to the claimant, and other factors which in particular cases may be relevant to a rational comparison of interests.[317]

Recent California Supreme Court decisions indicate that a balancing approach along these lines henceforth will be taken in cases involving loss of stream water supply and claims of damage resulting from interference with surface water.[318] But it is far from certain whether, absent legislative standards, the balancing process in such cases would take into account all the peculiar factors appropriate to governmental, but irrelevant to private, nonliability. Similarly, it is arguable that prevailing private law rules governing liability for damage due to concussion and explosion may be unrealistically severe as applied in an inverse condemnation context.[319]

Conversely, growing national concern over problems of environmental pollution[320] necessarily is focused on the continuing expansion of governmental functions capable of contributing to pollution problems (*e.g.*, sewage collection and treatment, garbage and rubbish collection).[321] Accordingly, a statutory rule of strict inverse liability arguably may be regarded as a desirable incentive to the development of intragovernmental anti-pollution programs supported by widespread cost distribution. This certainly would be preferable to an unfounded adherence to somewhat ambiguous legal concepts developed in comparable private litigation.[322]

The law of inverse condemnation liability for loss of soil stability and deprivation of lateral support, as already noted, is also in need of clarification by legislation.[323] Here again, because of the vast volume of construction work undertaken by governmental agencies with potential damage-producing characteristics, a rational approach—already adopted, for example, in several states, including Connecticut,[324] Massachusetts,[325] Pennsylvania,[326] and Wisconsin[327]—might well substitute a statutory rule of strict inverse liability in place of rules developed for private controversies and predicated upon fault.[328] In connection with damage claims arising from drifting chemical sprays used in governmental pest abatement work, where current statutory provisions appear to impose a large measure of strict liability,[329] legislation again would be helpful to clarify applicability of the relevant provisions to public entities.[330]

Legislative development of uniform inverse liability guidelines which avoid reliance upon established private legal rules would improve predictability and rationality of decision-making. Statutory criteria also would tend to clarify the factors of risk exposure to be considered by responsible public officials, and might well produce systematic improvements in preventive procedures associated with the planning and engineering of public improvements.

A collateral advantage might be the identification of situations, elucidated in the process of formulating appropriate criteria of *public* liability, in which reciprocal *private* liabilities may also appear worthy of legislative treatment. For example, a review of water damage problems in Wisconsin led in 1963 to an abrogation of formerly inflexible rules and the substitution of a new statutory duty, imposed correlatively upon both public entities and private persons, requiring the use of "sound engineering practices" in the construction of improvements so that "unreasonable" impediments to flow of surface water and stream water would be eliminated.[331] California statutes, however, have taken precisely the opposite stance: private landowners are denied the full benefit of private law rules according upper owners a privilege to discharge surface waters upon lower lying lands, as well as the "common enemy" privilege to repel flood waters, where damage to or flooding of state or county highways results.[332] As standards are developed for the inverse liability of governmental entities injuring private property, consideration also should be given to the possible justification if any, for retention of inconsistent standards such as these governing the liability of private persons for damage to public property.

Complete displacement of existing private rules may not be essential to an effective legislative program; indeed, in certain respects those rules may be worthy of retention.[333] Improvement also could take the form of statutory presumptions tied to existing liability criteria. This is essentially the approach now taken in private litigation involving interferences with surface water drainage. Where both parties are shown to have acted reasonably in disposing of and protecting against surface waters, liability ordinarily falls upon the upper owner who altered the drainage pattern unless he can establish that the social and economic utility of his conduct outweighs the detriment sustained as a result.[334] A comparable legislative approach, for example, might provide that property damage newly caused by a public improvement is presumptively compensable in inverse condemnation if private tort liability would follow on like facts, but is subject to a defense by the public entity grounded upon the existence of overriding justification. Conversely, property damage which public improvements (*e.g.*, flood control works) were intended, but failed, to prevent could be declared presumptively non-recoverable if that same result would obtain under private law. The result would be contrary, however, if the claimant could bring forth persuasive evidence that the inadequacy of the improvement was attributable to the unreasonable taking of a calculated risk by the entity that such damage would not result.

Constitutional protections for property rights, it should be noted, do not preclude the fashioning of reasonable inverse liability rules which differ from the rules of liability applied between private property owners. Over half a century ago, the California Supreme Court declared the existence of legislative power to alter the rules of private property law to the extent necessary to carry out the beneficent public purpose of government.[335] Moreover, the United States Supreme Court has indicated that the basic content of the "property" rights protected by the just compensation clause is governed by state law,[336] and that "no person has a vested right in any general rule of law or

policy of legislation entitling him to insist that it shall remain unchanged for his benefit."[337] Significant changes in settled rules of law, of course, have repeatedly been given effect by the courts in actions against public entities, both in inverse condemnation[338] and in tort actions.[339]

C. Statutory Dissolution of Inconsistencies Caused by the Overlap of Tort and Inverse Condemnation Law

It is widely recognized that inverse condemnation liabilities developed, in part, as limited exceptions to the governmental immunity doctrine.[340] The abrogation of that doctrine in California, and its replacement by a statutory regime of governmental tort liability and immunity has produced inconsistencies between tort and inverse liabilities of governmental entities which are a source of confusion, and occasional injustice.[341]

The precise status of nuisance as a source of inverse liability, notwithstanding its omission from the purview of statutory tort liabilities recognized by the California Tort Claims Act, is a prime example of law in need of legislative clarification.[342] In addition, the frequent interchangeability of tort and inverse condemnation theories, where property damage has resulted from a dangerous condition of public property, may result in inverse liability notwithstanding a clearly applicable statutory tort immunity.[343] Lack of conceptual symmetry also is seen in the fact that damages for personal injuries or death often are wholly unrecoverable (due to a tort immunity) even though full recovery for property losses is assured by inverse condemnation law upon precisely the same facts.[344]

D. Expansion of Statutory Remedies

Procedural disparities also deserve legislative treatment. The remedy in inverse condemnation generally contemplates the recovery of monetary damages,[345] although in special circumstances the courts sometimes have developed a "physical solution" where successive future damaging to an uncertain or speculative degree is anticipated.[354] Ordinarily, however, injunctive or other equitable relief is not available in an inverse condemnation action where a public use of the property has attached.[355] Accordingly, equitable powers to mold decrees to fit the practical situations presented in inverse litigation seldom have been exploited in California inverse condemnation litigation, perhaps on the assumption that "just compensation" contemplates pecuniary relief only.[356] If, by statute, inverse condemnation actions were treated as tort actions, greater flexibility of remedial resources could become available to adjust the relations between the parties in an equitable fashion.[357] Moreover, alternative ways to redress the property owner's grievance could be provided, perhaps subject to the public entity's option. In water damage cases, for example, a Wisconsin statute permits the entity to choose whether to pay damages, correct the deficiency, or condemn the rights necessary to allow a continuation of the damage.[358] Qualified judgments, under which a reduction in the amount of the inverse damage award is conditioned upon correction of the cause of the damage, also might be authorized.[359]

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August 5, 1969

STATE OF CALIFORNIA

CALIFORNIA LAW REVISION COMMISSION

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.

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 held in the Reardon case[25] --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 <u>imminently</u> 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.