#65.25 8/5/70

Memorandum 70-72

Subject: Study 65.25 - Inverse Condemnation (Water Damage)

As Memorandum 70-100 indicates, water damage is the most important aspect of inverse condemnation and the Commission has given water damage a top priority.

The background research study by Professor Van Alstyne, published in the Hastings Law Journal, is attached. You should read this study with care. It is very difficult reading. The staff has found that the more familiar we become with the problems involved in water damage the more we recognize the quality of the study. The study contains so much information that it is difficult to grasp and keep its contents in mind with merely one reading. We suggest that even those Commissioners who have previously read the study read it again.

During 1969 and early 1970, the Commission worked on a tentative recommendation on water damage and interference with land stability. (Only water damage is considered in this memorandum.) Basically, the tentative recommendation adopted the view that, when a water project causes damage to a person that otherwise would not have occurred, the cost of the damage is better imposed on the persons benefited by the water project than on the person damaged. However, if the person damaged is also benefited by the water project, the benefits must be offset against his damages. In other words, he is to be just as well off as he would have been had the project not been constructed; he is not to be awarded damages except to the extent that he is worse off. Also, the person suffering the damages is required to take reasonable steps available to him to minimize or prevent the damage caused or imminently threatened by the

improvement. The tentative statute does not deal with the problem whether the improvement must be designed to handle the 25-year, 50-year, 100-year, or 1000-year flood. In other words, it does not deal with the problem whether an improvement must be designed to handle a situation that can be expected to occur only once every 50 years or only once every 100 years.

An initial distribution of a tentative recommendation was made to a selected group of public entities. The reaction was that it would be undesirable to impose different standards for public and private improvements. This was considered undesirable since in some situations where a public improvement and a private improvement jointly cause water damage only the public entity or the private improver would be liable and the other improver would be immune. The public entity would be liable when its improvement caused damage but would be unable to recover from a private improver whose improvement caused damage to the public entity under similar circumstances. Accordingly, it appears that an attempt should be made to draft legislation that applies uniformly to all persons--both public and private--whose improvements cause water damage.

After the March 1970 meeting, the tentative recommendation (copy attached) was distributed to about 20 persons and organizations (persons who receive all material prepared for Commission meetings) for comment. We received comments from a number of state agencies and the comments are attached as exhibits to this memorandum.

We requested comments on the following questions:

1. Do you believe legislation is needed to provide rules governing liability for water damage of public entities or private person or both?

2. Is the general approach of the tentative recommendation sound? If not, what approach do you recommend?

3. What exceptions to the general rule of liability do you recommend?

4. Should the rules relating to water damage be made equally applicable to private persons? If not, what differences do you recommend?

5. What procedural provisions (such as provisions relating to the computation of interest, filing of claims, statute of limitations, and the like) do you recommend, if any?

The letters we received for the most part directed themselves to answering these questions. We do not believe it would be especially helpful to discuss them in detail. They indicate that legislation would be helpful for clarification if nothing else but that the suggested approach in the tentative recommendation (liability without fault) is unsound and that efforts should be made to decrease the liability of public entities for water damage through both substantive and procedural changes. Generally, the so-called "reasonableness" approach to liability was suggested. This approach is viewed by the persons commenting as basically a fault approach--failure to have a reasonable plan or design. (Actually, one reason that these cases are based on inverse condemnation rather than tort is that the plan or design immunity precludes tort liability.)

The staff believes that inverse condemnation liability is not the same as tort liability. Inverse condemnation liability is not based on fault. It is based on the concept that you cannot take or damage a person's property for a public use and not pay him for the damage. In other words, you cannot construct a flood control project to protect many persons and fail to compensate the person whose property the project damages. The cost of the project includes not only the cost of construction but also the damage it will cause. The inverse condemnation

policy question is whether the cost in terms of damage is to be imposed on the individuals who own the damaged property or is to be spread over the persons who are benefited by the project. Fault as such is not an issue.

The staff believes that the approach of the tentative recommendation is sound. Perhaps the addition of immunity for damage resulting from an "act of God" in terms of an event that could be expected to occur only once every 50 or 100 years might be included in the statute or perhaps some more general immunity along these lines might be included. Perhaps such a provision could be phrased in terms of reasonableness taking into account the cost of protecting against the 50-year flood and the extent of the damage likely to result from such a flood. The theory of such an exception would be that there is no taking or damaging for public use in such a case--the taking or damaging is caused by an act of God. Some of the procedural changes suggested in the letters might be made. The plaintiff might be required to establish as part of his case that the damage would not have occurred had the improvement not been constructed. Perhaps special immunity provisions dealing with particular types of situations could be added. For example, the improver might be given an immunity for damage from flood waters if the public entity acted reasonably in releasing the flood waters.

The suggestion of the public entities is to adopt the consultant's "risk analysis" approach to inverse liability. See discussion on pages 487-516.

The staff believes that the Commission should reexamine the approach to water damage at this point and determine what approach should be taken in the future. Should the statute apply to both public and private improvers? Should we attempt to find a consultant to fully explore the law relating to liability of private persons for water damage? Should we continue with the approach of the tentative recommendation and attempt to develop additional limitations on liability?

In preparing for the meeting, we suggest that you first read the attached background research study, then the attached tentative recommendation, and finally the letters from the various state agencies commenting on the tentative recommendation. We will consider the letters in detail at subsequent meetings. Also attached is a copy of Memorandum 69-134, prepared by the staff to review existing law, the changes that would be accomplished by the recommendation, and the inconsistencies that would result in the treatment of private and public improvers.

Respectfully submitted,

John H. DeMoully
Executive Secretary

OF CALIFORNIA—BUSINESS AND TRANSPORTATION AGENCY RONALD REAGAN, Governo
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June 9, 1970

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Dear Mr. DeMoully:

By your Letter of Transmittal of March 13, 1970, you solicited comments on the tentative recommendation relating to inverse condemnation liability for water damage. You asked that it be assumed that the recommended rules would be made equally applicable to private persons.

Our comments are, therefore, based on this assumption and will follow the questions set forth in your letter.

1) Do you believe legislation is needed to provide rules governing liability for water damage of public entities or private persons or both?

It is our belief that the existing rules, both in their effect on public entities and private persons, have not proved adequate primarily because of uncertainty as to what the existing rules are and as to what factors should appropriately be considered in determining liability in a given situation. In addition, with regard to governmental activities, there is a definite need to provide statutory rules which will recognize that public agencies undertaking public improvement, are not insurers of all possible damage which may be influenced by such work. This is particularly true of flood control projects. The Commission's consultant, Professor Arvo Van Alstyne, recognized this need. (Van Alstyne, Inverse Condemnation: Unintended Physical Damage, 20 Hastings Law Journal 431 (1969) at 502.) The Legislature has also recognized this need and Senate Resolution No. 80, Stats. 1965, Chap. 1301, specifically directs the Commission to include in its study a consideration of liability for inverse condemnation resulting from flood control projects noting:

"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."

2) Is the general approach of the tentative recommendation sound? If not, what approach do you recommend?

In our view, the general approach is not sound. The tentative recommendation provides for a rule of strict liability which runs counter to the conclusions of the Commission's consultant and which certainly was not envisioned by the Legislature in Resolution No. 80. We have already provided the Commission with our views on this general approach as it affects public entities by our letters of September 4, 1969 and September 29, 1969.

We additionally believe that strict liability would not be a sound approach -- even if it were applicable to private persons and public agencies alike. The history of the development of water law throughout the country reflects a need to avoid any hard and fast absolute rule -- whether it be one of strict liability or complete immunity. Those states -- including California -- which initially attempted to lay down concrete rules regarding interference with waters were only later faced with the prospect of reanalyzing and modifying these rules to provide for the equities of particular situations. As a consequence, the trend has been to abandon the old inflexible rules in favor of less rigid rules which permit a broader consideration of the equitable factors present in any factual context. We believe this result is inevitable and leads to the only practical solution. As pointed out in Keys v. Romley, 64 Cal.2d 396, at 408-9:

> "...no rule can be applied by a court of justice with utter disregard for the peculiar facts and circumstances of the parties and properties involved. ..."

We would, therefore, recommend an approach which permits a judicial balancing of the conduct of both parties. Such an approach is suggested by Professor Van Alstyne. This is also the approach of the Restatement of Torts. Indeed, in the area of surface waters, the Restatement approach would now seem to be partially adopted as California Law. See Keys v. Romley, supra, where the court not only refers to the Restatement for "a discussion of the elements of liability" (64 Cal.2d, at 410), but also states at page 410:

> "The issue of reasonableness becomes a question of fact to be determined in each case upon a consideration of all the relevant circumstances, including

> such factors as the amount of harm caused, the foreseeability of the harm which results, the purpose or motive with which the possessor acted, and all other relevant matter. (Armstrong v. Francis Corp. (1956) supra, 20 N.J. 320.) It is properly a consideration in land development problems whether the utility of the possessor's use of his land outweighs the gravity of the harm which results from his alteration of the flow of surface waters. (Sheehan v. Flynn (1894) 59 Minn. 436 [61 N.W. 462, 26 L.R.A. 632].) The gravity of harm is its seriousness from an objective viewpoint, while the utility of conduct is its meritoriousness from the same viewpoint. (Rest., Torts, § 826.) If the weight is on the side of him who alters the natural watercourse, then he has acted reasonably and without liability, if the harm to the lower landowner is unreasonably severe, then the economic costs incident to the expulsion of surface waters must be borne by the upper owner whose development caused the damage. If the facts should indicate both parties conducted themselves reasonably, then courts are bound by our well-settled civil law rule."

In considering the plaintiff's conduct, more should be involved than the sole question of whether he has sought to mitigate damages -- the expense for which can ordinarily be passed on to the otherwise liable defendant anyway. For example, in the field of surface waters, there should be a recognized obligation on the part of lower owners not to encroach on natural waterways without making adequate provision for the passage of reasonably to be anticipated flows in accordance with sound engineering practices of land development. A lower owner should, in the development of his property, recognize that urbanization and development of the watershed above him will increase runoff for which provision must be made. This was recognized in Voight v. Southern Pacific Co., 194 Cal. App. Supp. 907, where the court stated at page 910:

> "...it is our belief that the general doctrine must yield to allow changed conditions which come about in the natural growth and development of the community. It is clear that so far as a lower owner is concerned, in certain situations the development of the upper country may bring about an increase of the burden upon his land through having to accept the increased flow occasioned by construction of subdivisions, buildings, streets and so on, above his property. This is in conflict with the general principle that an upper owner may not concentrate or increase the flow of surface waters upon his lower neighbor and is in the general interest of progress and community development. ..."

Many of the surface water claims brought against the Division of Highways involve owners whose facilities are grossly inadequate for upper area urbanization. As a practical matter, he cannot sue all of the upper landowners who may have contributed to increased runoff, so he looks to the Division of Highways asserting that the Division of Highways has contributed to the flow. He will generally argue that the highway contribution is wholly responsible for his damage even though the real problem is area-wide urbanization, for which the State has made provision but for which the lower owner has not. Again, it is not enough to say that the lower owner has a duty to mitigate damages -- for when liability ensues, costs of mitigation are passed on to the defendant. The lower owner's conduct should be considered -- not just on the question of damages -- but also on the question of liability.

In a similar vein, many of our claims in the area of flood waters involve situations where private owners have encroached onto areas that can be expected to periodically overflow. In our view, where one has built in a known flood hazard area, and where flooding occurs, he should not be heard to complain that his neighbor's house deflects the flow onto his house any more than his neighbor should be permitted to make a similar claim of him.

In this regard, proposed Section 880.5 provides:

> "'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."

In our letter to you of September 4, 1969, at page 4, we questioned whether it was the true desire of the Commission to propose liability for the deflection of flood waters. We were assuming that Section 880.5 and the underlying concept of the tentative recommendation was to impose liability for interference with any water flow for the reason that the comment to Section 883 specifically states that "any distinction between surface, stream, and flood waters" is eliminated. Memorandum 69-117 dated September 24, 1969, states that where an improvement, such as a school building, diverts flood waters onto adjacent property, there should not be liability. We concur. Memorandum 69-117 also suggests that a close reading of Section 880.5 reveals that the case posited is not covered by the statute. If this is so, however, the tentative recommendation does make a distinction between flood and other waters and, moreover, makes no provision for liability in flood water situations. The proposed Section 880.5 is at best unclear, and if it is not intended to affect flood waters, it should specifically so state.

In any event, where the sole basis of a claim is that owner "A's" improvements have diverted flood flows onto owner "B's" improvements, and when both are located in a flood area, there should be no liability for alteration in flow whether the improvements are public or private. One who lives in the shadow of a volcano should not be permitted to claim his neighbor's barn diverted lava flows onto his barn. The same is true of those who develop in flood zones.

In conclusion, we would urge adoption of a statutory scheme which embodies concepts of reasonableness on the part of both parties. These concepts should incorporate consideration of sound engineering practices. No property owner should be absolutely liable for every consequent damage which may be influenced by his improvements. We know of no justification as to why water law requires a strict liability treatment.

With regard to the rule of Archer v. City of Los Angeles, 19 Cal.2d 19 (which permits upper owners to increase the flow of natural watercourses by reasonable means without liability for overflow below), we believe this is a necessary and just rule which places a proper obligation on the lower owner to accommodate increased flows due to the development of the upper watershed. This has long been the law of California and lands have been developed in light of this law. A sudden shift in legal principle which would now allow lower owners to claim damages from new developments would make any new developer a target defendant for any minor contribution. And any retroactive statute would create potential liability on the part of every land developer who built upon his property in light of the existing law. Such a radical departure from existing law would create chaos in the field of water litigation.

3) What exceptions to the general rule of liability do you recommend?

We, of course, are opposed to any general rule of liability. It is difficult to discuss exceptions to any other rule unless we know what that rule is. In general, however, we believe the Division of Highways could easily live with a rule incorporating concepts of reasonable use and sound engineering practice. The Division of Highways presently makes every effort to avoid unnecessary damage to upper or lower owners, and it has long been the policy of the Division of Highways to perpetuate natural drainage. We generally locate our cross culverts at natural drainageways, and size and locate drainage facilities to take into consideration both existing and potential developments above and below the highway.

As a potential lower owner claimant (it must be remembered that the highway owner is both an upper and lower owner and is also concerned with damage that others may cause to the highway ownership), where upper owners utilize natural drainageways, and where their development is properly engineered, we generally have no problem. Our primary concern is with developers who fail to follow natural drainageways and who sometimes seek to utilize highway facilities which are not designed to handle, for example, a new subdivision development's runoff.

Our primary problem with lower owners involves those who obstruct natural drainageways, making our culverts inadequate or inoperable. We would anticipate, however, that the factors involved in a reasonable use concept would protect the Division of Highways from such improper land development, as it would protect any other owner. The threat of a flooded highway and consequent injury to the traveling public, however, warrants retention of Streets and Highways Code Section 725 making such conduct unlawful and permitting use of the notice provisions of Sections 720, 726 and 727. We do feel that this statute could be improved by clarifying its application to any obstruction of a natural drainageway, whether it falls within the legal definition of a "watercourse" or not. Obstruction of a drainageway, of course, violates the existing civil law rule and gives the State the basis for an action in injunctive relief or for damages -- but it is unclear whether Section 725 is applicable to this type of situation. Moreover, Section 725(a) like Section 725(b)(3) should relate not only to actual damage but to the creation of a hazard to public travel as well. See also Penal Code Section 588 which supplements the provisions of the Streets and Highways Code.

4) Should the rules relating to water damage be made equally applicable to private persons? If not, what differences do you recommend?

Generally -- yes. As we stated in our letter of September 29, 1969, it is our basic conclusion that the approach should be one of applying the general rules of water law applicable as between private owners. There may be projects that require special treatment, such as those relating to flood control, but this would not ordinarily involve our department. Generally, a statute which incorporated concepts of reasonable use and which would preserve the common enemy doctrine of flood waters and the rule of the Archer case, and which would also protect against the claims of those who develop in flood risk areas, would not require special exceptions for highway development.

5) What procedural provisions (such as provisions relating to the computation of interest, filing of claims,

statute of limitations, and the like) do you recommend, if any?

Public agencies have become target defendants in flood cases as is perhaps best illustrated by the rash of claims filed against the Division of Highways for facilities located along and over northern rivers during the 1964 flood. Physical evidence of such flooding, however, soon disappears. It becomes a monumental task in investigating claims unless they are promptly received, and this investigation procedure is very costly to any public agency maintaining large numbers of structures, such as bridges, each one of which can create exposure to claims. We feel that the one-year period of limitations for damage to real property is much too long and a private property owner should be able to determine whether or not he has a claim much sooner than this. We would recommend adoption of the 100-day period.

The law should also clearly provide that the claim set forth a legal description of the property involved. Many times, claims received by us do little more than state that it is for damage to real property located at a post office address with a rural route number. Frequently, it is most difficult to determine exactly what property is involved.

The claimant should also be required to specifically identify the particular public improvement which caused the damage and to state the manner in which said improvement caused the damage. Our experience has been that many property owners' attorneys interpret Government Code Section 910 as requiring no more than a statement that a claimant's property in the town of X, California, suffered flood damage in the amount of X dollars, as a result of "State highway facilities". It has been our experience that, in some instances, the attorney filing the claim has not even given thought as to which highway facilities may be involved, nor as to whether a legitimate claim even exists. Thus, claims are received in wholesale quantities from attorneys who hope that later facts might indicate some possible highway involvement. The costs of investigation under these circumstances are not only great but frequently unnecessary -- for the claim will not even be pursued. We have even experienced claims filed on behalf of property owners who, when interviewed, denied any knowledge of having filed such a claim. This causes us to believe that Government Code Section 910.2 should be changed to require that the claimant personally sign his claim.

Concerning the computation of interest, we believe that the usual rule which allows interest only after judgment

should prevail. We can see no reason why the law should be different in the area of waters, and we can see no reason why a public agency should be required to pay pre-judgment interest where a private party, held liable for the same type of conduct, would not.

We hope that the foregoing will be of some assistance to the Commission in developing a statutory approach in this most difficult area of the law.

Very truly yours,

Edward J. Connor Jr.

EDWARD J. CONNOR, JR.
Attorney

Memorandum 70-72

EXHIBIT II

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June 3, 1970

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Re: Tentative Recommendation Relating to Inverse Condemnation Liability for Water Damage

Dear Mr. DeMoully:

This is in reply to the Commission's request for comments relative to their tentative recommendation relating to inverse condemnation liability for water damage.

In its letter of transmittal, the Commission asked several questions in connection with the tentative recommendation. The first question states:

1. Do you believe legislation is needed to provide rules governing liability of water damage of public entities or private persons, or both?

We feel that legislation is needed to clarify existing law.

2. Is the general approach of the tentative recommendation sound? If not, what approach do you recommend?

The Commission's approach to the problem is unsound. For example, the proposed section 883 would make the governmental entity liable, without exception, for all water damage proximately caused by its improvement. This provision would overrule the holding of the Supreme Court enunciated in Albers v. County of Los Angeles, 62 Cal.2d 250, namely, that a governmental entity is not liable when exercising its constitutional police power (See Gray v. Reclamation District No. 1500, 174 Cal. 622), nor is it liable where it is legally privileged to

inflict the particular injury (See Archer v. City of Los Angeles, 19 Cal.2d 19). Proposed section 883 would also eliminate the rule of reasonableness which the Supreme Court in Keys v. Romley, 64 Cal.2d 396, established when dealing with surface waters. Also, this proposal would withhold from the state the immunities applicable when acting in aid of navigation. (See Colberg, Inc. v. State of California ex rel. Dept. of Pub. Wks., 67 Cal.2d 408.) We believe that these concepts should remain an integral part of our law and any statutory provisions relating to inverse condemnation should acknowledge these principles. Further, we feel that a governmental entity should not be liable for damages in inverse condemnation unless there is fault on the part of the governmental entity. In this regard, it is our opinion that where a governmental entity employs sound engineering practices in the planning, designing and construction of its projects, that the entity should not be liable for damages proximately caused by the improvement. This concept should be embodied in any statutes enacted re inverse condemnation liability.

Our position is based primarily upon two facts that are evident from the experience of this office. The first is that under present law the State has been confronted with millions of dollars of claims, and if the law were changed to a rule of strict liability, both the amount of the claims and the final payout in settlement or judgment would increase by enormous measure. (By far the greatest liability exposure the State presently faces for all the services it performs lies in inverse condemnation, even under present law.) The second is that with a rule of strict liability, governmental entities will not construct all of the needed flood control projects of general benefit because the total dollar exposure will be undeterminable and far in excess of the funds that the taxpayer will deem appropriate.

A brief resume can best illustrate the first point. (The figures only relate to claims handled by the Attorney General and do not include claims against the State involving roads and facilities of the Department of Public Works.) As a result of the flooding which occurred in Northern California in December of 1955, the State received approximately 275 claims for flood damage which were based upon a theory of inverse condemnation. The total amount of money involved in these claims was $25,132,000. A number of these claims were tried in Sutter,

Yuba, Yolo and Butte Counties, with the State paying a total of approximately $6,600,000 in judgments and settlements, including interest. The State Reclamation Board administered the funding for the defense of most of these claims, and the costs incurred in the defense thereof were approximately $590,000. This amount does not include the Reclamation Board office and clerical costs nor expenses incurred by our office in the way of attorneys' salaries, costs of investigations, clerical, etc.

As a result of the high water that occurred in 1962, we received one claim for flood damage based upon a theory of inverse condemnation in the amount of $150,000.

In 1964, we received approximately 93 claims for flood damage which were based upon a theory of inverse condemnation. The total amount involved was approximately $55,201,000.

As a result of the high water which occurred in 1967, we received approximately 24 claims for flood damage which were based on a theory of inverse condemnation. The total amount involved in these claims was approximately $2,257,000.

In 1969, we again had some high water, and as a result thereof we received 7 claims totaling approximately $374,000. These claims were also based upon a theory of inverse condemnation.

High water occurred again in 1970 in Northern California along the Sacramento River and its tributaries, and we have thus far received approximately 162 claims totaling over $11,000,000. (The total amount in claims for water damage received from January 1965 to date is approximately $69,000,000.) The statutory period for filing claims has not expired, and it is reasonable to expect that additional claims will be filed. It is apparent from the claims received that the claimants' theory for recovery is based upon inverse condemnation.

In addition to the $590,000 expended by the State Reclamation Board, our office has, to date, spent approximately $725,000 for consulting services, including work done by the Department of Water Resources, in the defense of the flood damage claims and suits. Our expenses for consulting services have averaged over $125,000 per year. Also, our office has incurred court costs of approximately $60,000. All of the

1955 flood damage suits have been disposed of and, as indicated above, we have paid out approximately $6,600,000 in judgments and settlements. Most of the 1964 claims have been litigated, and we have been fortunate in disposing of all but approximately $2,000,000 of these claims. We have paid out approximately $62,000 in settlements. The balance of the claims have either been dismissed or tried with judgments rendered in favor of the State of California. A number of these cases are presently on appeal. Whether any money will have to be paid in this litigation is questionable.

In connection with the 1962 flood, the one claim filed is presently on appeal. With respect to the 1967 claims, approximately half of the claims are on appeal (appeals here are based on pleadings and not the facts) and the other half are yet to be tried.

The defense of inverse condemnation suits for water damage is a difficult task under the present decisional law. However, were the law to be changed to provide that the governmental entity would be liable for all damages without the benefit of the presently recognized exceptions to liability, it would create an intolerable situation. The amount in judgments and settlements would, undoubtedly, increase. Further, the number of claims would surely increase and our already high costs of defense would likewise increase. Needless to say, the State's exposure to liability would almost be unlimited, especially with respect to projects which were completed years ago. Inverse condemnation liability for water damage should not be expanded. If any action is taken in this area, it should be directed towards bringing into proper perspective the doctrine that the governmental entity is not an insurer merely because the government has undertaken a public project. It should not be held to standards greater than the private sector. The concept of sound engineering practices as a standard of care required by public entities would tend to achieve this desired goal. Therefore, we recommend that any statutory provisions enacted in the field of inverse condemnation liability for water damage embody the concept of sound engineering practices and also recognize the exceptions to liability under prevailing decisional law interpreting the applicable constitutional provision (Article I, § 14, Cal. Const.).

3. What exceptions to general rule liability do you recommend?

We respectfully refer the Commission to our prior answer.

4. Should the rules relating to water damage be made equally applicable to private persons? If not, what defenses do you recommend?

At this time there are recognized differences in the law as applied to public entities and as opposed to private persons. One example of this is found in the police power, which is applicable to the State but not available to private persons. Also, the State has certain inherent powers with respect to navigation which are not available to the private landowner. These are two distinctions which should be continued in any statutory provisions enacted in the field of law relating to inverse condemnation. Also, consideration should be given to the fact that the State, at great expense, in embarking upon large flood control projects, is providing substantial benefits for large areas of population. The feasibility of such projects is based upon a benefit cost ratio. If all possible damage that may be caused by the project is considered as an item of cost, it is possible that needed projects would not be economically feasible. It is foreseeable that the public necessity may override the risk of private loss. To insure the construction of needed projects, serious consideration should be given to provide the government with immunities when engaged in flood control projects. To increase liability in this area is to risk the probability of eliminating needed flood control projects. This phenomenon was recently encountered by our office when the State was confronted with the need for doing additional maintenance work in the area of the Colusa Weir and the Cache Creek Settling Basin. The State was reluctant to spend additional money due to the possibility of further exposure to liability for water damage by this additional participation in the project. The additional work was essential for the proper operation of the public improvement and the monies were eventually made available. There appears to be a great awareness and concern in some segments of State government with respect to the exposure of the State to liability in the area of inverse condemnation. There is a serious question as to whether the State will continue to participate in flood control projects under the present state of the law, and this reluctance will undoubtedly be compounded were the poposed section 883 to be enacted.

5. What procedural provisions do you recommend, if any?

Contrary to the usual rule of actions against a public entity which allows interest only from the date of the judgment, a plaintiff, in an inverse condemnation proceeding, is presently entitled to interest from the date of injury if he obtains a judgment for damages in his favor (Youngblood v. Los Angeles County Flood Control Dist., 56 Cal.2d 603). Where there has been an actual taking in the traditional sense, i.e., the public entity has taken over private property and is possessing and using same, it would seem reasonable that the property owner be entitled to interest from the date of taking. However, where there has not been a taking but merely a damaging, we fail to see any valid distinction between an inverse condemnation proceeding and the usual tort action wherein interest is only allowed from the date of judgment. Thus, where there has been no taking but merely a damaging, it is recommended that legislation be considered which would permit interest only from the date of judgment.

Under our present law, an individual seeking damages to personal property or growing crops must file a claim with the public entity not later than the 100th day after the accrual of this cause of action. A claim relating to any other property damage must be presented not later than one year after the accrual of the cause of action (Government Code section 911.2). Hence, a claimant seeking damage to real property has one year in which to file his claim. From past experience, we have found that on numerous occasions claims for real property damage are not filed until several months after the occurrence of the event complained of; that by the time we are able to make an investigation, the property has already been restored to its prior condition. Our investigation is often meaningless. It would seem reasonable that an individual would know within 100 days whether his real property has been damaged or not, and that this is sufficient time to permit him to file a claim with the entity. Thus, we recommend that serious consideration be given to shortening the time for filing a claim for real property damage from one year to 100 days to conform to the statutory period applicable to personal property and growing crops.

In many cases the claimant, in filing a claim against a public entity for damages to real property, merely gives a

general description of the location of the subject property. This may be considered sufficient under our present claims provisions; however, when the governmental entity attempts to make an investigation of the alleged damage to the real property, it often encounters considerable difficulty in actually locating the damaged property. Expense is often incurred in searching the files of the county assessor's office in an attempt to ascertain the location of the property. To eliminate this problem and expense, consideration should be given to adopting a statute which would require the claimant to give a definitive legal description of the subject property allegedly damaged. The statute should also provide that failure to do so is fatal to a later action.

It would also be desirable to codify the rule that complaints be limited to the property described in the claim. This provision should also be jurisdictional. In addition, it would be desirable to require claimants to personally verify their claims. We have found on occasion instances where claims have been filed and the claimant was personally unaware of the fact. Such a provision would eliminate this problem.

Consideration should also be given to the enactment of legislation which would require a claimant, in presenting his claim, to specifically identify the public improvement involved and state how the improvement caused the alleged damage, injury, or loss. This requirement should also be jurisdictional.

In 1968 the legislature amended section 947 of the Government Code and eliminated the provision which provided that where judgment is rendered for the public entity in any action against it, allowable costs incurred by the public entity in the action be, in no event, less than $50.00 as against each plaintiff. This provision provided some measure of protection to the public entities from an avalanche of bogus and unworthy claims. At present, there is no similar provision to protect against wholly unworthy claims. The public entity has to undertake the expense of investigation in the defense of numerous claims filed, which can be quite costly, as evidenced above. A public entity, if it prevails, may not, in some instances, be able to recover one cent for the expense incurred in the defense of the claim. It is recommended that the deletion made to section 947 of the Government Code in 1968 be reinstated and the amount of the award be increased to at least $100.00 from each plaintiff.

There are occasions where the facts disclose that the public improvement has caused compensable damage and also may cause successive future damage to private property. Consideration should be given to the adoption of legislation which would permit a governmental entity, under such circumstances, to propose a plan subject to the court's approval by which the injury-producing features of the public improvement will be corrected or their harmful impact reduced in lieu of payment of compensation in whole or in part. A public entity should have the choice of whether to pay damages to correct the deficiency or condemn the rights necessary to allow compensation for the damage.

The public entity is not, and should not be, an insurer of its public works for any and all damages that might result therefrom. It seems reasonable that the public entity should not be liable under a theory of inverse condemnation unless it is shown that the public entity failed to employ sound engineering practices in the planning, designing and construction of its public works. This concept should be the underlying theme for any liability arising out of inverse condemnation. No good reason can be advanced why the public entity should be held to a higher standard for its public works than is private enterprise.

Therefore, we recommend that serious consideration should be given to embodying the concept of "sound engineering practices" into our statutory law relating to inverse condemnation. Unless this standard or one similar is established as a basis for liability in an inverse condemnation action, the drain on the public treasury is without limits.

Very truly yours,

THOMAS C. LYNCH
Attorney General

Lloyd Hinkelman

LLOYD HINKELMAN
Deputy Attorney General

LH:bh

Memorandum 70-72 EXHIBIT III

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May 21, 1970

California Law Revision Commission
School of Law
Stanford, California 94305

Gentlemen:

I have received the tentative recommendation relating to inverse condemnation relative to water damage and interference with land stability.

There is one basic practical problem from the standpoint of public entities now inherent in court decisions and not alleviated but reinforced by the tentative recommendation. The standard form of public liability insurance policy issued to public entities has but one exclusion and that relates to liability arising from condemnation. This presumably includes inverse condemnation under the language of the policy.

Liability of public entities for water damage was predicated by the courts upon inverse condemnation in instances where private parties would be liable in tort in order to avoid the soverign immunity doctrine. This rationale should no longer appl and to the extent that public entities are to be held liable on any theory where a private party would be held liable, it shoul be based upon tort and not upon inverse condemnation. To do otherwise is to give the insurance companies a potential escape f their policies in situations where such an escape should not be available. It is the opinion of the undersigned that any legisla revision should divide the liability of public entities into two classifications, of tort and inverse condemnation.

Certain other problems arise which do not appear to be answered by the tentative recommendations. Let us assume either acceptance of subdivision improvements by a city including street and storm drains or construction of storm drain facilities whereb waters are diverted into a storm drain channel. In both instance increased waters are collected into the streets and related storm drain channels or storm drain facilities over and above what woul occur with the land in its natural state. As we know, hydrologists will classify storms according to intensity, eg. 10 year, 25 year, 50 year, 100 year storms, etc. It is perfectly reasonable to have a public entity design such facilities to handle the waters emanating from storm intensity occasioned by storms of a s

which can be anticipated to occur at reasonable intervals. It is not reasonable for instance to require a public entity to design against a 100 year storm. I do not think it is a satisfactory answer to say that the city or other public entity could prove that the damage would have occurred anyway. This is extremely difficult. I call to your attention the case of Olson vs. County of Shasta, (1970) 85 Cal. Rptr. 77. Unless provision is made to clarify this type of situation, cities are going to be very hesitant to approve subdivisions without a complete comprehensive flood control scheme being installed all at once for a drainage area. This is simply impractical in many areas as the funds are not available.

The above are two areas in which the undersigned has had some personal experience and lead to considerable concern. I do hope that your Commission could give them some study. If I can be of any assistance, please let me know.

Very truly yours,

Martin E. Whelan, Jr.
City Attorney, City of Brea

MEWjr/jae

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May 20, 1970

California Law Revision Commission
School of Law
Stanford, California 94305

Re: Tentative Recommendation Re Inverse Condemnation

Gentlemen:

Thank you for transmitting the tentative recommendation relating to inverse condemnation regarding water damage and interference with land stability.

I have reviewed the material and have one question in regard to the proposed additions to the Government Code. The amendments appear to be aimed at covering public agency liability for improvements designed and constructed by public agencies. It does not appear to cover rules relating to liability of public agencies for comparable damage caused by improvements as to which the public agency approved, or could have approved, the design and construction of the improvement.

Is it the intention of the Law Revision Commission that the proposed new legislation cover the problems of liability of public agencies where they have, in the exercise of their jurisdiction, required others to install improvements in accordance with requirements established by the public entity? For example, improvements installed as conditions of approval of final subdivision maps or improvements installed as conditions of use permits or variances. In this regard we are concerned about the theory apparently expressed in Steiger v. City of San Diego (1958), 163 Cal.App. 2nd 110.

We are also concerned about the situation where public agencies had power to control installation of improvements.

We are particularly concerned, in this regard, by the decision in Frustuck v. City of Fairfax (1963) 212 Cal. App. 2nd 345 and the reasoning and citations listed therein.

Very truly yours,

James T. Morton

for WILSON, JONES, MORTON & LYNCH

JTM:gl

Memorandum 70-72

EXHIBIT V

STATE OF CALIFORNIA—RESOURCES AGENCY

RONALD REAGAN, Gover

PARTMENT OF WATER RESOURCES

P.O. BOX 388
SACRAMENTO
95802

July 1, 1970

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

Dear Mr. DeMoully:

Pursuant to your request for comments dated March 13, 1970, we have reviewed the Commission's Tentative Recommendation for revision of inverse condemnation liability for water damage. Also, in accordance with your request we have considered the applicability of the principles of the Tentative Recommendation to private liability for water damage.

The Recommendation by seemingly reverting to strict liability for any conduct resulting in water damage would not be a modernization of the law and is unsatisfactory. The strict liability approach is mechanistic and achieves certainty but injects rigidity into the law; rigidity which of necessity must disregard the circumstances of the properties involved, the comparative merit of the parties' conduct, and the interrelationship of that conduct to the community's interests. Furthermore strict liability as a basis of inverse liability for water damage is inconsistent with the analysis of the Commission's consultant, Arvo Van Alstyne who concluded that the "general fiscal deterrents in the form of indiscriminately imposed strict liabilities" may be more inimical to overall social and economic purposes than "specifically limited liabilities determined by the reasonableness of the risk assumptions" associated with the conduct causing damage. Van Alstyne, Inverse Condemnation: Unintended Physical Damage, 20 Hastings Law Journal 431 (1969).

The strict liability approach of the Tentative Recommendation would introduce differing and discriminatory rules of liability for public and private parties. Any attempt to extend the approach to private liability is no more rationally supportable than its application to public liability.

The Recommendation is also unacceptable in that it purports to abrogate the common enemy doctrine and the rule of Archer v. City of Los Angeles 19 Cal. 2d 19, 119 P. 2d (1941). Both doctrines are well established and should be preserved.

Preservation of the "common enemy" doctrine in inverse condemnation liability for water damage is essential to public agencies. Whether acting on behalf of a group of landowners in constructing a flood control project or merely protecting its property from flood damage a public entity is indistinguishable from a private landowner. To impose liability on a public entity for constructing flood control facilities while immunizing an adjoining private landowner by application of the common enemy doctrine is wholly unjustified. Such inconsistent treatment could prevent construction of needed flood control facilities in just the circumstance where individual landowners could not afford the undertaking and of necessity must exercise their right to repel flood waters collectively through a public agency. Conversely, application of the common enemy doctrine to public agencies preserves the same relative liability for exercise of the collective rights as for exercise by the individual landowners, and would ensure construction and extension of flood control projects which are in the general public interest.

Further abrogation of the common enemy doctrine would be insonsistent with the legislative concern for expansion of public liability which was manifested in the resolution authorizing the study of inverse condemnation liability for water damage. In Senate Resolution No. 80, Stats. 1965, Chap. 1301 it was expressly noted,

> "The study...(of inverse condemnation liability from flood control projects)...is necessary because of the magnitude of the potential liability for inverse condemnation under the recent decisions of the California courts."

The Recommendation in abrogating the common enemy doctrine would insure the unlimited expansion in liability which was only a threat when the Legislature authorized the study. To avoid requiring public agencies to be insurers of damage resulting from flood control or protection measures the common enemy doctrine must be retained.

The rule of the Archer case recognizes the right of upper landowners within a watershed to inflict downstream damage as a consequence of increasing the flow in natural water courses. This rule effects a reasonable allocation of risks consistent with the contemporary trend toward urbanization. Since most owners are both upper and lower with respect to particular neighbors, they enjoy both the burdens and benefits of the rule.

This Department in constructing and operating the State Water Project has incorporated cross drainage features to accommodate existing drainage patterns and to utilize natural

stream channels where possible. These features were designed and incorporated on the premise that the State enjoyed the rights recognized in Archer to increase the velocity or volume of water in natural stream channels even though some damage might attend that action. To alter the rule enunciated in the Archer case at this time would subject this Department, as well as other public agencies similarly situated, to an unwarranted rash of litigation and an inordinate financial burden, whether from resulting liability or the costs of physically modifying all cross drainage features. Furthermore, the most recent definitive statement of inverse liability, Albers v. County of Los Angeles, 62 Cal. 2d 250, 398 P. 2d 129, 42 Cal. Rptr. 89 (1965) recognized the validity of the Archer rule and expressly preserved it. Similarly we believe the Commission's Recommendation should recognize and restate the rule of the Archer case.

Our analysis indicates that a rational rule of water damage liability, both public and private, must be predicated on a judicial evaluation of the "comparative reasonableness" of the conduct of all interested parties. The process of evaluation should encompass all considerations relevant to the reasonableness of the parties such as the probability of injury, available means to mitigate the effect of the threatened hazard, extent of local acceptability of the activity, the overall public purposes served, the peculiar factors inherent in the performance of governmental functions, and any other equitable factors.

To foster proper recognition of all relevant factors, particularly those relating to the functions of public entities both the rule of comparative reasonableness and the principal factors in applying the rule should be legislatively articulated. The Commission's consultant similarly recognized this need to ensure proper application of such a rule.

We believe a rule of comparative reasonable conduct with appropriate exceptions to preserve the common enemy doctrine and the rule of the Archer case would put in proper perspective the obligations and relationships of adjoining landowners while avoiding the strictures of arbitrarily imposed absolute liability. Such a rule contrary to a rule of strict liability, could be responsive to changes in the character and philosophies of land use, as well as recognizing the diversity of circumstances and legitimate interests and activities producing water damage.

In closing we note that historically public and private liability for water damage has enjoyed a general parity in large measure due to judicial resort to private liability for public liability concepts. We believe that the parity of public and private liability should be retained in areas of comparable activities. Where activities are peculiar to the execution of

[Civ. No. 32487. Second Dist., Div. Five. Jan. 21, 1970.]

DAVID SHEFFET, Plaintiff and Respondent, v.
COUNTY OF LOS ANGELES et al., Defendants and Appellants.

SUMMARY

Plaintiff, as the owner of realty, brought an action against the county and a construction company for damages caused by surface waters and mud draining across and onto plaintiff's property and into a drainage ditch from the land and streets owned by defendants. Plaintiff further sought an injunction ordering defendants to refrain from draining surface waters across plaintiff's land. The trial court awarded plaintiff $50 in damages against both defendants and issued an injunction enjoining defendants from in any manner discharging onto plaintiff's property or within the ditch located on plaintiff's property surface waters in excess of defendants' existing prescriptive rights. Defendants were further ordered to take corrective steps within a specified time to prevent excess drainage. (Superior Court of Los Angeles County, William E. Fox, Judge.)

On appeal, the injunctive relief was affirmed only so far as it related to the over-crown run-off, which resulted from the negligent design of the crown height or road pitch and which had no relation to the reasonableness of the public improvement sought to be created. As to the county, the judgment was reversed as to the relief sought to be granted as to any increased use of the ditch for water-diversion purposes only, the court noting the county's power of inverse condemnation. The case was remanded to the trial court on the issue of damages, since the plaintiff was entitled to both the cost of erecting any preventative structure on his property and the damage caused by the burden of requiring such protective structures. (Opinion by Stephens, Acting P. J., with Aiso and Reppy, JJ., concurring.)

HEADNOTES

Classified to McKinney's Digest

(1) **Waters § 393 — Protection Against Surface Waters — Discharging Water on Neighboring Land.**—Neither an upper nor a lower land-

owner may act arbitrarily and unreasonably in his relations with others and still be immunized from all liability; therefore, it is incumbent on everyone to take reasonable care in using his property to avoid injury to adjacent property through the flow of surface waters. Failure to exercise reasonable care may result in liability by an upper to a lower landowner.

(2) **Waters § 391—Protection Against Surface Waters.**—Anyone threatened with entry to his property by the flow of surface waters has the duty to take reasonable precautions to avoid or reduce any actual or potential injury.

(3) **Waters § 393 — Protection Against Surface Waters — Discharging Water on Neighboring Land.**—Where the actions of both the upper and lower landowners are reasonable and necessary with regard to avoiding injury from the flow of surface waters, any injury must necessarily be borne by the upper landowner who changes a natural system of drainage.

(4) **Waters § 393 — Protection Against Surface Waters — Discharging Water on Neighboring Land.**—Requiring a lower landowner to take affirmative action before he complains of unreasonable surface water diversion by an upper landowner would in many instances place an unreasonable burden on the lower landowner; all that he is required to do is act reasonably.

(5) **Waters § 412 — Protection Against Surface Waters — Remedies — Questions of Law and Fact.**—The issue of reasonableness in taking action to prevent damage by diversion of surface waters becomes a question of fact to be determined in each case on a consideration of all the relevant circumstances, including such factors as the amount of harm caused, the foreseeability of the harm that results, the purpose or motive with which the landowner acted, and all other relevant matter.

(6) **Waters § 393 — Protection Against Surface Waters — Discharging Water on Neighboring Land.**—Reasonable conduct in preventing damage from a diversion of surface waters may or may not require affirmative action by the lower owner, depending on all the circumstances. The social utility of the upper owner's conduct in diverting the water must be weighed against the burden that such conduct would impose on the lower owner.

(7) **Damages § 29—Mitigation and Reduction of Loss.**—A person who may minimize damage and fails to do so cannot recover for the excess damage occurring; but one who reasonably acts to minimize the damage should recover the costs of such minimization as damages.

[See **Cal.Jur.2d**, Damages, § 111 et seq.; **Am.Jur.2d**, Damages, § 43.]

(8) **Damages § 32—Mitigation and Reduction of Loss—Duty to Minimize—In Cases of Injury to Property.**—Where an injured person acts reasonably to minimize damage or by inaction does not unreasonably increase his damages, he may recover damages for any diminution in the value of his land also involved.

(9) **Eminent Domain § 208—Inverse Condemnation—Damages: Waters § 400—Protection Against Surface Waters—Public Works.**—The increased use of a property owner's ditch for a diversion of surface waters, as the result of a public improvement, is in the nature of inverse condemnation (Code Civ. Proc., § 1238); and a county is not, as a matter of law, prohibited from increasing a servitude if such increase is without unreasonable damage to the owner of the servient estate and compensation for any diminution in the property's value is paid by the county.

[See **Cal.Jur.2d**, Waters, § 735; **Am.Jur.**, Waters (1st ed § 85).]

(10) **Eminent Domain § 204 — Inverse Condemnation.** — Against public bodies, when damage is incurred by virtue of a public improvement, the right of action accords with the rules established in inverse condemnation; but where the damage is done by a private party without the powers of condemnation there is no action in inverse condemnation though a similar result obtains.

(11) **Eminent Domain § 204—Inverse Condemnation.**—Inverse condemnation is the name generally ascribed to a remedy that a property owner is permitted to prosecute, to obtain the just compensation that the Constitution assures him when his property, without prior payment therefor, has been taken or damaged for public use.

(12) **Waters § 398—Protection Against Surface Waters—Rule as to City Lots.**—Though a county merely approved the plans and accepted the streets of a subdivision, leaving the actual planning and construction to a private contractor, it was not thereby shielded from liability from the overflow of the streets' crown into an adjacent property owner's

ditch, where the overflow, though resulting from the improvement, was not a necessary consequence of the improvement to the higher ground.

(13) **Eminent Domain § 208—Inverse Condemnation—Damages.**—Absent something in the nature of a protective covenant, where a public entity approves the plans for a subdivision, including a drainage system, and there is damage to adjacent property as a result of those improvements, the public entity, not the subdivider, is liable in an inverse condemnation suit.

(14) **Injunctions § 12—Matters Controllable.**—Where a taking of private property for public use is attempted under the power of eminent domain without providing for compensation, an injunction will lie; if property has been taken for a public use without providing for compensation, an unqualified injunction may be refused if the public use has intervened.

(15) **Eminent Domain § 204—Inverse Condemnation.**—The appropriate course to pursue when a public use has attached to private property is to sue for damages in inverse condemnation; unless plaintiff can show good reason why such remedy would not be adequate, he is not entitled to an injunction where the public use has intervened.

(16) **Eminent Domain § 204—Inverse Condemnation.**—Where a property owner permits completion by a public agency of a work that results in the taking of private property for public use, the owner will be denied the right to enjoin the agency, and his only remedy is a proceeding in inverse condemnation to recover damages.

(17) **Waters § 400—Protection Against Surface Waters—Public Improvements.**—Though a surface water diversion may not be part of a public improvement, the resultant run-off and diversion, if intended, is caused by the improvement; and where public use of the improvement obtains, the damages that also result and that are attached thereto are within the authority of the agency causing the improvement, to the same extent as is the improvement itself.

(18) **Public Works § 12—Liability for Negligence.**—Neither a party injured by construction of a public works nor the courts may impose corrective authority on public works already created unless they are negligently constructed or constructed in a manner unnecessary to the public improvement; distinct from those already created are those not yet existent, for then the relative merits of injury may be weighed against the public's benefits.

(19) **Waters § 408 — Protection Against Surface Waters — Remedies — Injunction.**—A mandatory injunction could issue ordering a county to cease engaging in acts of negligence in the maintenance of an inadequate drainage system, where the crown height or road pitch in a subdivision resulted in excessive run-off into a ditch on private property on lower ground and the run-off had no relation to the reasonableness of the public improvement sought to be created.

(20) **Eminent Domain § 204—Inverse Condemnation.**—Inverse condemnation does not involve ordinary negligence, but rather, damages that are a natural consequence of the public improvement.

(21) **Eminent Domain § 204—Inverse Condemnation: Waters § 408—Protection Against Surface Waters—Remedies—Injunction.**—An injunction issued against a county exceeded the bounds of judicial authority insofar as it related to an increased use of plaintiff's drainage ditch on lower ground by an overflow of surface waters; approval in that respect would authorize an injunction that would effectively negate the government's power to take property through inverse condemnation.

(22) **Eminent Domain § 207—Inverse Condemnation—Complaint.**—A cause of action in inverse condemnation was substantially set forth, though subject to improvement by amended pleading, where plaintiff alleged that defendant county allowed construction of a subdivision on land above plaintiff's property, that defendant allowed construction of and accepted the streets on said land, that the construction reduced the natural drainage area on said land, causing substantial surface waters to be discharged onto plaintiff's property and overload his drainage ditch, and that these surface waters continued to be discharged onto his land. Such facts, if true, constitute a taking for a public purpose.

(23) **Appeal § 1096 — Invited Error — Findings.** — Defendants may not complain on appeal of defects in the court's findings for which they are responsible.

(24) **Appeal § 973(4)—Theory of Case—New Theory on Appeal.**—Appellant cannot change the theory of his case after the failure of his strategy in the trial court.

(25) **Waters § 200—Ditches—Natural Channel as Conduit.**—A mere canal or ditch will not be considered a natural watercourse unless it is a mere

enlargement or alteration of an existing natural watercourse, even though it is the most convenient way to drain land. Moreover, a natural watercourse must be fed from other and more permanent sources than surface waters unless they naturally converge to form a definite channel.

[See Am.Jur., Waters (1st ed § 76).]

(26) **Waters § 400—Protection Against Surface Waters—Public Improvements.**—Where a measure conceived by a county to prevent an overflow of surface waters from a public improvement onto plaintiff's lower land was a measure that might reasonably be expected to be taken by the county, its failure to take such precaution goes directly to the unreasonableness of its actions; and whatever plaintiff must erect on his property to prevent damage, he is entitled to both the cost of the erection and the damage caused by the burden requiring such protective structures.

(27) **Eminent Domain § 208 — Inverse Condemnation — Damages.** — An owner whose property is being taken or damaged by a public entity has the duty to take all reasonable steps available to minimize his loss.

(28) **Waters § 400—Protection Against Surface Waters—Public Improvements.**—A county has the duty to construct its streets in such manner as to accomplish the purpose for which they were intended, and this includes providing a road with such crown or pitch as to divert oncoming surface waters that would flood lower property; if the approved design fails to meet the purpose for which it was created and the condition of the street results in causing damage, its maintenance in such condition may be enjoined, for the resultant damage is not for the public use.

COUNSEL

Darby, Fleming, Anderson & Hager and Donald F. Yokaitis for Plaintiff and Respondent.

John D. Maharg, County Counsel, M. L. Lathrop, Deputy County Counsel, Garrick & Lane and James C. Foster for Defendants and Appellants.

OPINION

STEPHENS, Acting P. J.—This is an appeal by defendant County of Los Angeles (County) and defendant Gibco Construction, Inc. (Gibco) from a judgment of the Superior Court of Los Angeles County in favor of plaintiff and against defendants. The action was brought by plaintiff, as an owner of real property, against defendants for damages caused by surface waters and mud draining across and onto plaintiff's property and into the drainage ditch on plaintiff's property from the land and streets owned by the defendants; for an injunction ordering defendants to refrain from draining surface waters across plaintiff's land; and for an injunction ordering defendants to take corrective steps to prevent the draining of surface waters onto plaintiff's land and in plaintiff's drainage ditch in excess of the existing prescriptive rights of defendants. After a court trial, plaintiff was awarded $50 in damages against both defendants,[1] and the court issued the following injunction: "Defendants Gibco Construction, Inc., a corporation, and County of Los Angeles, and each of them, are enjoined from in any manner discharging onto the real property of Plaintiff or within the ditch located upon Plaintiff's property, in excess of Defendants' existing prescriptive rights, the surface waters which collect from time to time on said Defendants' lands, walks, curbs, drives, gutters and streets, and further, said Defendants, and each of them, are hereby ordered, directed and required to take corrective steps within 240 days hereto to prevent the said draining of surface waters onto Plaintiff's land and upon and in Plaintiff's ditch in excess of Defendants' existing prescriptive rights."

Plaintiff has owned and resided on the real property known as 396 East Mendocino Street in Altadena, California since 1952. Prior to March 1965, the property located across the street from plaintiff was higher and unimproved land. In March of 1965, defendant Gibco commenced construction of a subdivision on the property, then known as Tract No. 29892. The property was cleared of trees and brush in March of 1965, and grading was commenced during the months of April and May 1965. Plans for the subdivision were prepared by engineers employed by defendant Gibco, and were approved by defendant County. Contained in the plans were two one-block-long streets: Deodara (running east and west) and Oliveras (running north and south). After they had been completed and had passed final inspection, they were dedicated as public highways and accepted by defendant County "for all public purposes and liability attaching thereto." Due to this construction, the natural area available for absorption of surface waters on the tract was reduced by 51.4 percent. This reduction, combined

[1]At time of argument on appeal, both defendants waived appeal as to this portion of the judgment.

with the design of Oliveras and Deodara Streets, created an increased and different pattern of surface-flow from the tract, concentrating the run-off to and down Oliveras, which dead-ended at its intersection with Mendocino immediately north of plaintiff's easterly driveway apron. Prior to November 1965, plaintiff had experienced no flow of surface water onto his property from across the street. In various rainstorms between 1965 and December 1966, water and mud from the tract flowed onto and flooded plaintiff's property, via the overflow from Oliveras, across Mendocino and down the driveway on the east side of plaintiff's property, as well as mud and water from the tract being deposited in the drainage ditch on the west side of his land. Plaintiff made several complaints to the County and Gibco, but neither defendant took any steps to alleviate the problem of water and mud flowing from the tract.

On this appeal from the judgment, defendants raise five contentions: (1) the plaintiff did not act reasonably in protecting his property; (2) the injunction is vague, confusing, and incapable of being carried out; (3) an injunction does not lie where plaintiff has only suffered nominal damages; (4) plaintiff's drainage ditch is a natural watercourse and defendants may properly discharge surface waters into it; (5) by statute, defendant County is immune from liability in this case.

California courts follow a modified rule of civil law in determining the rights and liabilities of adjoining landowners with respect to the flow of surface waters.[2] (1) As stated in *Keys* v. *Romley*, 64 Cal.2d 396, 409

[2]For a general discussion of surface waters and the civil law rule relating thereto, see 52 C.J.S., § 723 et seq., Waters, p. 364; also, as what appears to have been a forerunner of *Keys* v. *Romley*, 64 Cal.2d 396 [50 Cal.Rptr. 273, 412 P.2d 529], *infra*, see *Voight* v. *Southern Pac. Co.*, 194 Cal.App.2d Supp. 907 at p. 910 [15 Cal. Rptr. 59].

The text of 1 Cal.Jur.2d, § 5, Adjoining Landowners, 732-733 is of particular interest. There it is noted that California has adopted the rule of the civil law as it relates to surface waters. (Since the text was written pre-*Keys* and pre-*Pagliotti* v. *Acquistapace*, 64 Cal.2d 873 [50 Cal.Rptr. 282, 412 P.2d 538], *infra*, we must add that the rule in California is now a *modified* civil law rule.) After stating that "the owner of higher land has no right, for his own relief, either to divert the surface water from his land onto adjoining land over which it would not naturally have flowed [citing *Turner* v. *Tuolumne County Water Co.*, 25 Cal. 397; *Wood* v. *Moulton*, 146 Cal. 317, 80 P. 92], or, by accumulating such water upon his own land, or in ditches or other like artificial channels, to precipitate it upon adjoining land in increased quantities or in a form different from that it which it is accustomed naturally to flow," the text then states, "It seems that this doctrine has no application to city lots. The owner of such a lot, in the exercise of proper dominion over his property, may make changes in its surface which are essential to its enjoyment, even though he may thereby interfere with the flow of water from or onto an adjoining lot." No citation of authority is given for this conclusion, and it appears to have been considerably limited by the subsequent statement, "If the owner of a city lot wishes to remove water, whether arising from rain or from a cause originating on his lot, he must conduct it directly

[50 Cal.Rptr. 273, 412 P.2d 529]: "No party, whether an upper or a lower landowner, may act arbitrarily and unreasonably in his relations with other landowners and still be immunized from all liability. [¶] It is therefor incumbent upon every person to take reasonable care in using his property to avoid injury to adjacent property through the flow of surface waters. Failure to exercise reasonable care may result in liability by an upper to a lower landowner. **(2)** It is equally the duty of any person threatened with injury to his property by the flow of surface waters to take reasonable precautions to avoid or reduce any actual or potential injury. **(3)** [¶] If the actions of both the upper and lower landowners are reasonable, necessary, and generally in accord with the foregoing, then the injury must necessarily be borne by the upper landowner who changes a natural system of drainage, in accordance with our traditional civil law rule." Thus, as the court in *Burrows* v. *State of California*, 260 Cal.App.2d 29, 32-33 [66 Cal.Rptr. 868] pointed out, *Keys* laid down three express rules: (1) if the upper owner is reasonable and the lower owner is unreasonable, the upper owner wins; (2) if the upper owner is unreasonable and the lower owner is reasonable, the lower owner wins; (3) if both the upper and lower owners are reasonable, the lower owner wins.[3]

Here, defendants argue that plaintiff failed to take any reasonable precautions to protect his property from the flow of water and mud. The trial court expressly rejected this contention.[4] Assuming that the rule of *Keys* is applicable here, unless there is no substantial evidence to support this finding, we are bound by the decision of the trial court. (*Mantonya* v. *Bratlie*, 33 Cal.2d 120, 128 [199 P.2d 677].)

Defendants contend that plaintiff acted unreasonably because he failed to take any affirmative action to protect his property and never consulted

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from his lot to a sewer or other place for receipt and discharge of such water, and cannot discharge it upon the lot of another without the latter's consent." (See *Armstrong* v. *Luco*, 102 Cal. 272, 275 [36 P. 674].)

[3]We note that there is nothing in *Burrows* which suggests that *Keys* does other than modify the civil law rule relating to the diversion of surface waters, the result of which affected recoverable damages. *Keys* does not create a new or different cause of action, but does recognize that the absolute liability resulting from strict application of the civil law as to surface waters was unreasonable. Under the facts of that case, the court held that where an upper owner diverts surface waters in such manner as to do no damage to the lower owner because of the *actual*, though not natural, contours of the lower property, the lower owner may not *necessarily* recover for injury caused by his subsequent modification of the terrain, thus permitting the diverted waters to invade his property. It leaves open the question of whether the subsequent terrain modification was reasonable, as weighed against the upper owner's reliance upon the existent conditions.

[4]The rejection by the court of this contention is the finding of reasonableness on the part of plaintiff. It may be based upon reasonable inaction, as well as affirmative action.

any person or firm with respect to alterations in his property which might protect it from the flow of surface waters. (4) Defendants would have us read *Keys* as necessarily requiring affirmative action on the part of a lower landowner before he can complain of unreasonable surface water diversion by an upper landowner. However, such an interpretation of *Keys* would in many instances place an unreasonable burden on the lower landowner. All that he is required to do is act reasonably. *Keys* recognizes that, "New Jersey, which had been one of the pioneers in adopting the common enemy doctrine and had applied it with considerable strictness, abandoned the old rule in *Armstrong* v. *Francis Corp.* (1956) 20 N.J. 320 [120 A.2d 4, 59 A.L.R.2d 413]," and adopted a rule of reasonable use. It must be noted that in *Francis*, the cost of protecting the lower riparian owner's property was required to be borne by the upper owner. Thus, though California has had the very antithesis of the common-enemy rule relating to surface waters, and still does, except as modified by the *Keys* rule of reasonable use, it is not suggested in *Keys* that where additional burdens and protective measures are required to be taken by a lower owner, the cost thereof should not be borne by the party permitted to impose them.[5] The court recognized also that the lower owner's cause of action included the totality of the injury, past, present, and future (p. 411).

The companion case of *Keys* is *Pagliotti* v. *Acquistapace*, 64 Cal.2d 873 [50 Cal.Rptr. 282, 412 P.2d 538], in which the modified rule of *Keys* was applied. There, two private adjoining landowners each sought to enjoin the other. The lower owner sought to enjoin the upper from diverting surface waters at an increased rate and volume through a swale crossing the lower owner's property "in a concentrated manner." The upper owner sought to enjoin the maintenance by the lower owner of a dam obstructing the diversion of surface waters in the manner being done. The court held that if the upper owner acted reasonably and the resultant change in the manner of use of his natural right to expulsion of surface waters caused no appreciable damage to the lower owner, the upper owner could, with immunity to liability, modify the natural disposition of such waters. The trial court had required the upper owner to construct and maintain a drainage ditch across the lower land. It must have concluded that such

[5]The language used in *Keys* is as follows: "The gravity of harm is its seriousness from an objective viewpoint, while the utility of conduct is its meritoriousness from the same viewpoint. (Rest., Torts, § 826.) If the weight is on the side of him who alters the natural course, then he has acted reasonably and without liability; if the harm to the lower landowner is unreasonably severe, then the economic costs incident to expulsion of surface waters must be borne by the upper owner whose development caused the damage." This *must* be read in the context of the facts then before the court. To hold otherwise would give a private upper landowner an absolute right to impose burdens upon the land of a lower owner by merely paying for the damages incurred. This would eliminate injunctive relief where the upper owner is acting unreasonably. Certainly this was not the court's holding.

a ditch caused *no appreciable* damage, but cost of construction and maintenance was to be borne by the upper owner. Such a result, though a modification or extension of the rule of *Francis*, was in conformity with the rationale of that case, and confirms our analysis. To the same effect is *Inns* v. *San Juan Unified School Dist.*, 222 Cal.App.2d 174, 177 [34 Cal.Rptr. 903], citing and approving the statement of the trial court that "An upper land owner has a natural easement or servitude which permits him to discharge surface waters through the drainage mechanism of a natural swale, hollow or depression. His right is limited to disposition of the water through the chosen channels of nature. He cannot increase the volume or velocity by collecting the water in pipes or artificial ditches. If he does so to the damage of the lower landowner, he is liable to the latter." **(5)** As the court in *Keys* stated: "The issue of reasonableness becomes a question of fact to be determined in each case upon a consideration of all the relevant circumstances, including such factors as the amount of harm caused, the foreseeability of the harm which results, the purpose or motive with which the possessor acted, and all other relevant matter." **(6)** Reasonable conduct may or may not require affirmative action by the lower owner, depending upon all the circumstances. The social utility of the upper owner's conduct must be weighed against the burden that such conduct would impose on the lower owner. More often than not, the lower owner's unreasonable conduct will consist not of his failure to take affirmative steps to protect his property, but of affirmative conduct increasing the danger to his property. In *Keys*, for example, the plaintiff had removed a dirt wall from the rear of his property, thereby permitting his land to be flooded. The court held that this act would have to be weighed against the defendants' act of changing the contours of their property in order to make a finding on the issue of reasonableness.

(7) The person who *may* minimize damage and fails to do so cannot recover for the excess damage occurring.[8] On the other hand, a person who reasonably acts to minimize the damage should recover the costs of such "minimization" as damages. **(8)** Where, however, the injured person acts reasonably, by action to minimize the damage, or by inaction which does not unreasonably *increase* his damages, if there is a diminution in the value of his land also involved, we see no reason why he may not recover for the damage. This same rationale is expressed in *Inns* v. *San Juan Unified School Dist.*, *supra*, 222 Cal.App.2d 174, wherein it states (pp. 179-180): "There was evidence that the cost of a pipe to carry the

[8]This result answers the query posed in *Burrows*, *supra*, by footnote 3, where the court said, "It is not clear from *Keys* whether the Supreme Court left room for the fourth possible permutation, namely, a situation where both are unreasonable."

water discharged from appellant's pipe across the respondents' land and to a public drain would be, as one witness put it, between four and five thousand dollars, and as another witness put it, between two and three thousand dollars. The trial court viewed the property and may have been of the opinion that construction of such a pipe would remedy the situation caused by appellant's trespass and restore the value of the land to what it has been. If that be true, then the court could properly conclude that the cost of the pipe measured the diminution in value of respondents' property."

The case of *Armstrong* v. *Francis Corp*., *supra*, 20 N.J. 320 [120 A.2d 4, 59 A.L.R.2d 413] cited by the court in *Keys* involved a situation somewhat similar to the instant case. In that case, defendant, in the course of developing a large housing project, substantially augmented the flow of surface water through a natural channel on plaintiff's land, causing considerable damage. The court, following the rule of reasonable use, entered a decree requiring the defendant to pipe the channel so as to protect the plaintiff's land. There is no indication that the plaintiff made any alterations in his property to protect it from the increased flow of surface water. The court held that while home-building projects are socially beneficial, there was no reason why the economic cost incident to the expulsion of surface waters should be borne by the adjoining landowners, rather than by those undertaking such projects for profit. (Cf. *Pagliotti* v. *Acquistapace*, *supra*, 64 Cal.2d 873.)[7]

Upon an examination of the record, we have determined that there is substantial evidence to support a finding that plaintiff acted reasonably in relation to his property.[8] **(9)** So far as the County is concerned, however, we conclude that the increased use of plaintiff's ditch, as a result of the improvement, is in the nature of inverse condemnation (Code Civ. Proc., § 1238),[9] that the County is not, as a matter of law, prohibited from increasing a servitude if such increase is without unreasonable damage to the owner of the servient estate and compensation for any diminution in the property's value is paid by the County. (*Granone* v. *County of Los Angeles*, 231 Cal.App.2d 629, 646 [42 Cal.Rptr. 34].) The effect of *Keys* and *Pagliotti*, then, is to point the way for complete recovery by a property

[7]For general discussions of the conflicting rules relating to surface water disputes, see 39 So.Cal.L.Rev. 128, Comment, *California Surface Waters*; 17 Hastings L.J. 826, Note, *California Surface Waters*; and Witkin, Sum. Cal. Law (1969 Supp.), § 328 A, *Real Property*.

[8]While a lower landowner's failure to take affirmative action to protect his property does not necessarily mean he is denied relief against the upper landowner, his lack of action may be relevant in computing the damages to which he is entitled. (See also footnote 6 herein, page 730.)

[9]The question of damages for which Cohen may be liable is discussed *infra*, beginning on page 735.

owner whose property is damaged by the actions of another. **(10)** Against public bodies, when the damage is incurred by virtue of a public improvement, the right of action is in accordance with the rules established in inverse condemnation; where the damage is done by a private party (private person without powers of condemnation such as those enjoyed by public utilities or educational institutions (*University of Southern Cal.* v. *Robbins*, 1 Cal.App.2d 523 [37 P.2d 163])), there is, of course, no action in inverse condemnation, but a similar result obtains. *Keys* and *Pagliotti* are expressions of that same conflict that Arvo Van Alstyne noted in his article, *Statutory Modification of Inverse Condemnation: The Scope of Legislative Power*, 19 Stan.L.Rev. 727, at page 735: "Inverse condemnation epitomizes a struggle between the security of 'established economic interests' and 'the forces of social change' which cannot be rationally resolved by a mere search for definitions."

Defendant County's liability for inverse condemnation is predicated upon Article I, section 14 of the California Constitution, which provides that "[p]rivate property shall not be taken or damaged for public use without just compensation having first been made to . . . the owner. . . ." **(11)** " 'Inverse condemnation' is the name generally ascribed to the remedy which a property owner is permitted to prosecute to obtain the just compensation which the Constitution assures him when his property without prior payment therefor, has been taken or damaged for public use." (Van Alstyne, *Inverse Condemnation*, *supra*, at page 730.)

In *Albers* v. *County of Los Angeles*, 62 Cal.2d 250 [42 Cal.Rptr. 89, 398 P.2d 129], the State Supreme Court, construing Article I, section 14, held that, with two exceptions, any actual physical injury to real property proximately caused by a public improvement as deliberately designed and constructed, whether or not foreseeable, entitles the injured landowner to recovery for inverse condemnation. The two exceptions set forth in *Albers* involved situations like those in (1) *Gray* v. *Reclamation Dist. No. 1500*, 174 Cal. 622 [163 P. 1024], where it was held that damage resulting from a legitimate exercise of the state's police power (in that case, flood control, navigational improvement, and reclamation work) is noncompensable provided the "proper limits" of that power have not been exceeded; and (2) *Archer* v. *City of Los Angeles*, 19 Cal.2d 19 [119 P.2d 1], where the state, as an upper riparian owner, has the right to inflict the damage (discussed *infra*, at page 740). In *Gray*, the court noted that future flooding would be eliminated as soon as the balance of the project was completed, and that the plaintiffs would derive substantial long-term benefits from the abatement of flood damage and improvement of navigation. Thus, the first exception noted by *Albers* is inapplicable to the instant case.

It is not clear whether, by holding that the landowner could recover whether or not the damage to his land was a foreseeable consequence of the public improvement, the court in *Albers* impliedly disapproved earlier cases reaching a contrary result. (See, e.g., *Bauer* v. *County of Ventura*, 45 Cal.2d 276 [289 P.2d 1] (which had held that a plaintiff could not recover against a public entity in inverse condemnation without the pleading and proving of a claim actionable against a private person under analogous circumstances); *Frustuck* v. *City of Fairfax*, 212 Cal.App.2d 345 [28 Cal.Rptr. 357].) In his article, *Unintended Physical Damage*, 20 Hastings L.J. 431 at 493-495, Arvo Van Alstyne observes: "*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 [footnote omitted], 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 [footnote omitted], absence of fault may be treated as simply an insufficient justification for shifting the unforeseeable loss from the project that caused it to be [sic] 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." Since it was the trial court's finding that the County acted unreasonably in accepting the dedication of Deodara and Oliveras Streets, the layout of which caused the defective drainage of Mendocino Street, we are not required to resolve the question posed by Professor Van Alstyne.[19]

Citing *Bauer* v. *County of Ventura*, *supra*, and *Granone* v. *County of Los Angeles*, *supra*, 231 Cal.App.2d 629, Van Alstyne, *Inverse Condemnation*, *supra*, notes (pp. 731-738): "[T]he constitutional remedy often overlaps normal tort remedies and provides an alternative basis of relief. . . . The law of governmental tort liability (or immunity) and the law of inverse condemnation have long been characterized by significant inter-relationships." But inverse condemnation does not involve ordinary acts of carelessness in the carrying out of the public entity's program. (*Miller* v. *City of Palo Alto*, 208 Cal. 74 [280 P. 108]; *Hayashi* v. *Alameda County Flood Control Dist.*, 167 Cal.App.2d 584, 591-592 [334 P.2d 1048]; *Western Assur. Co.* v. *Sacramento & San Joaquin Drainage Dist.*, 72 Cal.App. 68 [237 P. 59]; Leon Thomas David, *Municipal Liability in Tort in California*, Part III,

[19]For discussions of the impact of the *Albers* decision, see Note, *Inverse Condemnation, Foreseeability Abandoned in California: Albers* v. *County of Los Angeles*, 13 U.C.L.A. L.Rev. 871; Note, *Government Subdivisions Liable for Unforeseen Damagings Under California Inverse Condemnation Law*, 17 Stan.L.Rev. 763; Witkin, Sum. Cal. Law, *Constitutional Law* (1969 Supp.), § 212 A.

7 So.Cal.L.Rev. 214, 215-220.) Property is only deemed taken or damaged for a public use if the injury is a necessary consequence of the public project. (*Albers* v. *County of Los Angeles, supra,* pp. 263-264.) Van Alstyne (*Inverse Condemnation, supra,* at page 781) states: "It now appears settled that if the construction or maintenance of a public project is designed to serve the interests of the community as a whole, any property damage caused by the project or by its operations as deliberately conceived is for a public use and is constitutionally compensable.[2N7] On the other hand, '[d]amage resulting from negligence in the routine operation having no relation to the function of the project as conceived' is not within the purview of section 14 [of Article I of the California Constitution.][2N8] **(12)** Here, the increased burden upon plaintiff's ditch was a necessary consequence of the design of the tract and the creation and improvement of the streets. However, the overflow of the streets' crown, while resultant, was not a necessary consequence of the improvement to the higher ground. It is true that defendant County merely approved the plans and accepted the streets, leaving th actual planning and construction to a private contractor, but the County is not thereby shielded from liability.

The case of *Frustuck* v. *City of Fairfax, supra,* involved a situation factually similar to that presently before us. There, the development and improvement of higher lands resulted in an increase in the flowage of surface waters which naturally drained across plaintiff's lower property. These improvements diverted the storm waters from their natural channels in such a manner that the additional water could not be handled by the existing 20 inch culvert which ran beneath the street to a ditch located on plaintiff's property. The excess water overflowed onto plaintiff's land. To alleviate this condition, the City enlarged the culvert carrying the waters to the plaintiff's ditch. The result was a flow of water which could not be handled by the ditch, and flooding occurred. The court found that there was created an increased burden to plaintiff's property, constituting inverse condemnation. The court stated (pp. 362-363): "The liability of the City is not necessarily predicated upon the doing by it of the actual physical act of diversion. The basis of liability is its failure, in the exercise of its governmental power, to appreciate the probability that the drainage system from Marinda Oaks to the Frustuck property, functioning as deliberately conceived, and as altered and maintained by the diversion of waters from their normal channels, would result in some damage to private property. (*Youngblood* v. *Los Angeles County Flood Control Dist., supra,* 56 Cal.2d 603, 607 [15 Cal.

[2N7] *See Bauer* v. *County of Ventura,* 45 Cal.2d 276, 289 P.2d 1 (1955); *Grunone* v. *County of Los Angeles,* 231 Cal.App.2d 629, 42 Cal.Rptr. 34 (2d Dist., 1965); *Ambrosini* v. *Alisal Sanitary Dist.,* 154 Cal.App.2d 720, 317 P.2d 33 (1st Dist. 1957).

[2N8] *Bauer* v. *County of Ventura, supra,* note 287, at 286, 289 P.2d at 7 (dictum)."

Rptr. 904, 364 P.2d 840]; *Bauer* v. *County of Ventura*, *supra*, p. 285; *Ward Concrete Products Co.* v. *Los Angeles County Flood etc. Dist.*, 149 Cal. App.2d 840, 846-847 [309 P.2d 546].) Drainage systems concern the whole community. Their construction and maintenance become a matter of public policy and are subjects of independent statute. (*Bauer* v. *County of Ventura*, *supra*, p. 285.) They are, as here, proper subjects for the required approval by public agencies. The approval of the subdivision maps and plans which include drainage systems, as well as the approval which we are entitled to presume was given to the construction and the improvement on the church property by the City in the performance of official duty (Code Civ. Proc., § 1963, subd. 15), constitute a substantial participation incident to the serving of a public purpose. Such drainage systems when accepted and approved by the City become a public improvement and part of its system of public works. (*Steiger* v. *City of San Diego*, 163 Cal.App.2d 110 [329 P.2d 94].) The fact that the work is performed by a contractor, subdivider or a private owner of property does not necessarily exonerate a public agency, if such contractor, subdivider or owner follows the plans and specifications furnished or approved by the public agency. When the work thus planned, specified and authorized results in an injury to adjacent property the liability is upon the public agency under its obligation to compensate for the damages resulting from the exercise of its governmental power. (*Heimann* v. *City of Los Angeles*, 30 Cal.2d 746, 756 [185 P.2d 597]; *Steiger* v. *City of San Diego*, *supra*, 163 Cal.App.2d 110, 113; *Alisal Sanitary Dist.* v. *Kennedy*, 180 Cal.App.2d 69, 82 [4 Cal.Rptr. 379].)" In the instant case, the defendant County is liable to the plaintiff for the same reasons as expressed in *Frustuck*, upon its approval of the plans.

Gibco's liability, however, is a different question. **(13)** In the absence of something in the nature of a protective covenant, where a public entity approves the plans for a subdivision, including a drainage system, and there is damage to adjacent property as a result of those improvements, the public entity, not the subdivider, is liable in an inverse condemnation suit. (*Eachus* v. *City of Los Angeles*, 130 Cal. 492 [62 P. 829, 80 Am. St. Rep. 147]; *Steiger* v. *City of San Diego*, 163 Cal.App.2d 110, 113 [329 P.2d 94]; *Anderson* v. *Fay Improv. Co.*, 134 Cal.App.2d 738, 745 [286 P.2d 513].)

The whole of the injunction goes to the manner of discharging waters, none of which are within the control of defendant Gibco. We do not say that a prohibitory injunction against active negligence on the part of Gibco to the extent it may still have property interests in the tract would not be proper. This, however, is not the purport of the injunction as ordered. As we have heretofore noted in footnote 1, there has been a waiver of appeal by Gibco from that portion of the judgment relative to the damage award of $50. There is no evidence of negligent conduct by Gibco con-

tributing to or causing the water or mud flow other than would naturally result from the terrain alteration and the concentration of the surface waters into the streets. We can readily envisage a situation where a subdivider, during development of the property, may have a duty to prevent ground erosion and the depositing of soil or debris on the land of the lower owner. It would seem reasonable to require a subdivider to take preventive measures to preclude such incidents, and nothing we say here negates responsibility for such negligence, but that is not encompassed in the problem now before us. What the facts here establish is that the surface waters' run-off was increased in volume, and was directed and concentrated into the public street in the expected fashion occasioned by the approved subdivision plan. Thus, the diversion in question, so far as Gibco was concerned, was only the drainage of surface waters by an abutting property owner into a public street. As was stated in *Portman* v. *Clementina Co.*, 147 Cal.App.2d 651, 659-660 [305 P.2d 963]: "[O]ur Supreme Court, in *Shaw* v. *Sebastopol*, 159 Cal. 623 [115 P. 213] and *Richardson* v. *City of Eureka*, 96 Cal. 443 [31 P. 458] treated the drainage of surface waters over a public street as a use thereof by abutting property owners which could not be unlawfully obstructed."

For that reason, inverse condemnation is an accomplished fact as to any diminution in value of plaintiff's property caused by the additional burden placed on the ditch, and an injunction will not lie where the damage to plaintiff is not unreasonable under the propriety of the improvement. (Cf. *Hassell* v. *City & County of San Francisco*, 11 Cal.2d 168 [78 P.2d 1021]; *Andrew Jergens Co.* v. *Los Angeles*, 103 Cal.App.2d 232 [229 P.2d 475], where an injunction was the proper remedy to prevent prospective developments.) Except for the minor clean-up recovery for the mud occasioned during tract development and the over-crown run-off via the plaintiff's driveway, plaintiff's action must be limited to damages for the loss in value of his property. Had plaintiff acted prior to the construction of the tract and the streets, an injunction might well have been the proper remedy to limit the burden on the ditch to preexistent prescriptive rights. But he cannot now require the County to undo that which has been accomplished and which does not create an unreasonable increase in the burden which the land already bore. **(14)** As the court in *Frustuck* stated (pp. 370-371): "The general rule is that where a taking of private property for public use *is attempted* under the power of eminent domain without any provision having been made for compensation, an injunction will lie. (***Beals*** v. *City of Los Angeles*, *supra*, 23 Cal.2d 381, 388 [144 P.2d 839]; *Geurkink* v. *City of Petaluma*, 112 Cal. 306, 309 [44 P. 570].) If the property ***has been taken*** for a public use without any provision being made for compensation, an unqualified injunction may be refused if a public use has intervened. (***Beals*** v. *City of Los Angeles*, *supra*, p. 388.) Accordingly, it has been held

that when a public use *has attached*[,] a prohibitory injunction should be granted only in the event no other relief is adequate. (*Hillside Water Co.* v. *City of Los Angeles*, 10 Cal.2d 677, 688 [76 P.2d 681]; *Peabody* v. *City of Vallejo*, 2 Cal.2d 351, 378 [40 P.2d 486].) **(15)** The appropriate course to pursue when such a use has attached is to sue for damages in inverse condemnation, and unless the plaintiff can show good reason why such remedy would not be adequate, he is not entitled to an injunction where a public use has intervened. (*Hillside Water Co.* v. *City of Los Angeles*, *supra*, p. 688. **(16)** Moreover, where a property owner permits the completion by a public agency of the work which results in the taking of private property for a public use he will be denied the right to enjoin the agency. His only remedy under such circumstances is a proceeding in inverse condemnation to recover damages. (*Lamb* v. *California Water & Tel. Co.*, 21 Cal.2d 33, 41 [129 P.2d 371]; *Peckwith* v. *Lavezzola*, 50 Cal.App.2d 211, 219-220 [122 P.2d 678]; see *Podesta* v. *Linden Irr. Dist.*, 141 Cal.App.2d 38 [296 P.2d 401].)"

There have been cases wherein injunctions, both mandatory and prohibitory, have issued. One such case (*Robinson* v. *County of San Diego*, 115 Cal.App. 153 [300 P. 971]) compelled a public entity to alter street improvements which occasioned the flooding of a plaintiff's land. There, the County caused a highway to be graded and lowered and ditches to be constructed on both sides thereof so that surface waters were diverted, thus causing them to flow onto plaintiff's property. The court perpetually enjoined the County from so diverting the waters that had not previously flowed upon plaintiff's property. However, as the court there recognized, the record of the trial was unintelligible, and it is therefore impossible for us to determine whether the ditches causing the diversion were temporary or permanent. In *Los Angeles Brick & Clay Products Co.* v. *City of Los Angeles*, 60 Cal.App.2d 478 [141 P.2d 46], and the case it relied upon, *Farrell* v. *City of Ontario*, 36 Cal.App. 754 [173 P. 392], mandatory injunctions were issued. The injunctive relief cases such as *Robinson*, *Farrell*, and *Los Angeles Brick* treat the diversion of surface waters as a nuisance, and not as a necessary consequence of the public improvement. **(17)** While it is true that the surface water diversion may not be a part of the public improvement, nevertheless the resultant run-off and diversion, where intended, is caused by the improvement. Where the public use of the improvement obtains, the damages which also result and which are attached thereto are within the authority of the agency causing the improvement, to the same extent as is the improvement itself. (*Granone* v. *County of Los Angeles*, *supra*, 231 Cal.App. 629 at p. 646.) **(18)** In cases such as the one before us, neither the consequentially injured party nor the courts may superimpose corrective authority upon public works already created unless they are negligently constructed, or constructed in a manner unnecessary

to the public improvement. Distinct from those already created are those not yet existent, for then the relative merits of injury may be weighed against the benefits to the public. As we have pointed out, the use of the ditch, by the increase of its burden, did not cause a different injury, though it may well have constituted a diminution in property value for which plaintiff may recover. This portion of the improvement was designed to accomplish the very result of which plaintiff complains. The over-crown run-off, however, is but the result of negligent design of the crown height or road pitch, and has no relationship to the reasonableness of the public improvement sought to be created.' As to such unnecessary, unintentional, and negligently created consequences of the public improvement, we see neither logic nor reason which prohibits the issuance of an injunction to prohibit the maintenance thereof. Our conclusion in this respect reconciles the cases which have issued an injunction with the later cases such as *Frustuck*.

We note that those cases in which an injunction has issued were decided before *Spaulding* v. *Cameron*, 38 Cal.2d 265 [239 P.2d 625]. In *Spaulding*, the court stated (at p. 267): "In early decisions of this court it was held that it should not be presumed that a nuisance would continue, and damages were not allowed for a decrease in market value caused by the existence of the nuisance but were limited to the actual physical injury suffered before the commencement of the action. (*Hopkins* v. *Western Pac. R. Co.*, 50 Cal. 190, 194; *Severy* v. *Central Pac. R. Co.*, 51 Cal. 194, 197; see, also, *Coats* v. *Atchison T. & S. F. R. Co.*, 1 Cal.App. 441, 444-445 [82 P. 640].) The remedy for a continuing nuisance was either a suit for injunctive relief or successive actions for damages as new injuries occurred. Situations arose, however, where injunctive relief was not appropriate or where successive actions were undesirable either to the plaintiff or the defendant or both. Accordingly, it was recognized that some types of nuisances should be considered permanent, and in such cases recovery of past and anticipated future damages were [sic] allowed in one action. (*Eachus* v. *Los Angeles Consol. Elec. Ry. Co.*, 103 Cal. 614, 622 [37 P. 750, 42 Am.St.Rep. 149]; *Williams* v. *Southern Pac. Co.*, 150 Cal. 624, 626-628 [89 P. 599]; *Rankin* v. *DeBare*, 205 Cal. 639, 641 [271 P. 1050]; see McCormick on Damages, § 127, pp. 504-505.)" We do not believe, however, that *Spaulding* has actually overruled the rationale behind *Los Angeles Brick* and the other cases cited. It does point the way to the ruling of *Frustuck*. If the earlier cases present a conflict in theory, we believe the better rule applicable to situations where a public entity has completed its improvements is expressed in *Frustuck*.[11]

[11]"Judicial action in the area of inverse condemnation has not been entirely satisfactory; most authorities readily acknowledge that the case law is disorderly, incon-

(19) In the instant case, the injunction is proper as it relates to the over-crown run-off, and a mandatory injunction could issue ordering the County to cease engaging in such acts of negligence in the maintenance of the inadequate drainage system. In *Hayashi* v. *Alameda County Flood Control*, 167 Cal.App.2d 584, at pp. 591-592 [334 P.2d 1048], the court states: "The most recent cases have made a distinction between negligence which occurs when a public agency is carrying out a deliberate plan with regard to the construction of public works, and negligence resulting in damage growing out of the operation and maintenance of public works. These cases hold that the damage resulting from the former type of negligence is compensable under article I, section 14, whereas damages resulting from the second type of negligence are not recoverable in an inverse condemnation proceeding, but are recoverable, if at all, only in a negligence action. (*Bauer* v. *County of Ventura*, 45 Cal.2d 276 [289 P.2d 1]; *Ward Concrete Products Co.* v. *Los Angeles Flood etc. Dist.*, 149 Cal.App.2d 840 [309 P.2d 546]; *Youngblood* v. *City of Los Angeles*, 160 Cal.App.2d 481 [325 P.2d 587].) It has been definitely held that a property owner may not recover in an inverse condemnation proceeding for damages caused by acts of carelessness or neglect on the part of a public agency. (*Neff* v. *Imperial Irrigation Dist.*, 142 Cal.App.2d 755 [299 P.2d 359].) In the present case the district did not cause the original break in the levee, nor is it charged that such occurred by reason of negligence. Negligent design or construction is not charged, nor did the district deliberately divert the water onto the plaintiffs' lands. It is charged with negligent failure to act thereafter, that is, with negligence in the operation and maintenance of its property. In our opinion that does not charge a taking of property for public use under the Constitution."

(20) Inverse condemnation does not involve ordinary negligence, but rather, damages which are a natural consequence of the public improvement. (*Western Salt Co.* v. *City of Newport Beach*, *271 Cal.App.2d —— [76 Cal.Rptr. 322].) **(21)** The injunction as issued, however, exceeds the bounds of judicial authority in the instant case as it relates to the increased use of the ditch. Were it to be approved in that respect, it would authorize an injunction which would effectively negate the power of the government to take property through inverse condemnation.

(22) While plaintiff did not specifically allege that his property had been taken or damaged for a public purpose and therefore inversely condemned, his first amended complaint did allege facts which would support a cause of action for inverse condemnation. The pleading alleges that

sistent, and diffuse. [Footnote omitted.]" (Van Alstyne, *Inverse Condemnation, supra*, p. 732.)

*Advance Report Citation: 271 A.C.A. 454.

defendant County allowed the construction of a subdivision on the land above his property; that defendant County allowed the construction of and accepted the streets on said land; that said construction reduced the natural drainage area on said land, causing substantial amounts of surface water to be discharged onto his property and overload his drainage ditch; and that these surface waters continue to be discharged onto his land. These facts, if true, constitute a taking by way of damage to plaintiff's land and for a public purpose. Adequate and timely notice and demand are alleged. Thus, a cause of action in inverse condemnation is substantially set forth, though subject to improvement by amended pleading.

Defendants contend on appeal that plaintiff's drainage ditch is a natural water course. However, neither defendant raised this theory until defendant County argued it in its Points and Authorities dated November 1, 1967. Neither defendant set forth in any pleading any allegation that the ditch was a natural water course. Neither defendant requested or moved to conform any pleading to any evidence concerning the issue of a natural water course. On March 3, 1967, plaintiff, in his proposed findings of fact, included a finding that the drainage ditch was not and had never been a natural water course. The defendants objected to this proposed finding on the ground it was unnecessary, and the court deleted it, indicating that the proposed finding concerning defendants' prescriptive rights covered the point. Defendants did not request a special finding on the issue of a natural water course. **(23)** The defendants may not now complain on appeal of defects in the court's findings for which they are responsible. (*Fontana* v. *Upp*, 128 Cal.App.2d 205, 211 [275 P.2d 164]; *Tucker* v. *Cave Springs Min. Corp.*, 139 Cal.App. 213, 218 [33 P.2d 871].) **(24)** "It is fundamental that an appellant cannot change the theory of his case after the failure of his strategy in the trial court." (*Arthur* v. *London Guar. & Acc. Co.*, 78 Cal.App.2d 198 [177 P.2d 625].) Therefore, defendants are not entitled to appellate consideration of this issue.

However, on the evidence in the case before us, we would conclude that defendants' arguments would fail on the merits. Pursuant to exception (2) set forth in *Albers*, the County correctly argues that an upper landowner may discharge surface waters into a natural water course and increase its volume without subjecting itself to liability for any damage suffered by a lower landowner, even if the stream channel is inadequate to accommodate the increased flow. (*Archer* v. *City of Los Angeles*, *supra*, 19 Cal.2d 19.) It is the County's contention that because of its long continued use, plaintiff's drainage ditch constitutes a natural water course. It relies on the cases of *Clement* v. *State Reclamation Board*, 35 Cal.2d 628 [220 P.2d 897] and *San Gabriel Valley Country Club* v. *County of Los Angeles*,

182 Cal. 392 [188 P. 554, 9 A.L.R. 1200]. These cases involved artificial changes to already existing natural water courses. In *Clement*, the court held that levees constructed by farmers along the banks of the Sacramento River had, after long continued maintenance, become the natural banks of the river. **(25)** A mere canal or ditch, on the other hand, will not be considered a natural water course unless it is a mere enlargement or alteration of an existing natural water course, even though it is the most convenient way to drain the land. (*Darr* v. *Carolina Aluminum Co.*, 215 N.C. 768 [3 S.E.2d 434]; 93 C.J.S., Waters, § 129.) Moreover, a natural water course must be fed from other and more permanent sources than mere surface waters unless they naturally converge to form a definite channel. (*Sangainetti* v. *Pock*, 136 Cal. 466 [69 P. 98, 89 Am.St.Rep. 169]; *Los Angeles Cemetery Assn.* v. *City of Los Angeles*, 103 Cal. 461 [37 P. 375]; *South Santa Clara Valley Water Conservation Dist.* v. *Johnson*, 231 Cal.App.2d 388 [41 Cal.Rptr. 846]; 93 C.J.S., Water, § 3.)

We have heretofore discussed the right of the County to increase the burden upon the ditch, provided recompense for diminution of value, if any, is paid under the theory of inverse condemnation. Plaintiff's complaint, however, goes beyond the problem of excess water in his ditch. His complaint is that the water races down the new street, across Mendocino, and down his driveway, flooding across his yard, depositing debris, as well as causing erosion. We are therefore not confronted with the narrow problem of increased waters through the ditch, as the County would suggest. It may be that one means of reducing the plaintiff's damage would be to adequately corral the waters so as to funnel them through the ditch, but this is not the sole problem presented on this appeal. Likewise, it is no defense that, on afterthought, the County conceived of a preventive measure which might have been taken by plaintiff but was not, if plaintiff's not having foreseen the preventive measure was not unreasonable. **(26)** Also, where the preventive measure is one which might reasonably be expected to be taken by the County, its failure to take such precaution goes directly to the unreasonableness of its actions. In the instant case, the County suggests that a grate and drain could have been constructed by plaintiff at his driveway apron to funnel the waters across his land to the drainage ditch. While this may be a possible solution, it goes more to the damage occasioned by the introduction of the waters onto plaintiff's property than to the issue of reasonable or unreasonable action by plaintiff. (*Frustuck* v. *City of Fairfax*, *supra*, pp. 368-369.) Certainly, whatever plaintiff must erect on his property, he is entitled to both the cost of such erection and the damage caused by the burden requiring such protective structures. **(27)** As the court in *Albers* observed (at pp. 269-273): "On the issue now before us the general rule is that an owner whose property

is being taken or damaged by a public entity is under a duty to take all reasonable steps available to minimize his loss. (18 Am.Jur., Eminent Domain, § 262, p. 903; 29 C.J.S., Eminent Domain, § 155, p. 1015, n. 69; 4 Nichols on Eminent Domain (3d ed. 1962) § 14.22, p. 525.) . . .

"No reason appears why the rule in California should be harsher than that of our sister states. No overriding public policy demands that in eminent domain proceedings in California the owner of property be denied recovery for expenses reasonably and in good faith incurred in an effort to minimize his loss [footnote omitted]. On the contrary, it would seem that the public interest would be served by allowing the possibility of such a recovery: the owner, who is ordinarily in the best position to learn of and guard against danger to his property, would thereby be encouraged to attempt to minimize the loss inflicted on him by the condemnation, rather than simply to sit idly by and watch otherwise avoidable damages accumulate. To the extent that the loss is minimized, of course, the amount of the public entity's liability to the owner is reduced; and adequate protection for the public entity would seem to be provided by the requirements of good faith and reasonableness (see *Zidel* v. *State* (Ct. Cl. 1949) *supra*, 198 Misc. 91 [96 N.Y.S.2d 330, 337]). . . .

"If, in accordance with the general rule and the dictates of public policy, the duty to mitigate damages is held to apply in eminent domain cases, the fair market value of the property taken or damaged will be *decreased* by the amount which the owners reasonably and in good faith spend in discharging that duty. Such amount can usually be determined with precision, as it was in the case before us. It is therefore unnecessary to draw a technical distinction between designating this amount as a separate item of damages or merely placing it on the debit side in computing the fair market value of the property after the taking; in either event the result will be the same."

The suggestion of the County above discussed might have been a solution to the problem; nevertheless, the obligation to prevent future damage from the County's maintenance of its negligently constructed street was that of the County. **(28)** The burden is on the County to construct its streets in such manner as to accomplish the purpose for which they were intended. This includes providing the road with such crown or pitch as to divert the oncoming surface waters in the direction intended. If the approved design fails to meet the purpose for which it was created and the condition of the street results in causing damage, its maintenance in such condition may be enjoined, for the resultant damage is not "for the public use."

The issuance of the injunction, so far as it relates to the use of the ditch,

while erroneous and requiring reversal, was a clear attempt by the trial court to provide relief to plaintiff for the damage he has been occasioned. Though that remedy cannot be affirmed, the determination of liability need not be disturbed so far as defendant County is concerned. So far as the injunction related to over-crown run-off, the injunctive relief is affirmed.

As to defendant County, the judgment is reversed as to the relief sought to be granted as to any increased use of the ditch for water diversion purposes only, and the case is remanded to the trial court on the issue of damages only, in conformity with this opinion.

As to defendant Gibco, the judgment is reversed as to both liability and damages.

Aiso, J., and Reppy, J., concurred.

#65.25 7/6/70

BACKGROUND STUDY RELATING TO INVERSE CONDEMNATION:

WATER DAMAGE, INTERFERENCE WITH LAND STABILITY,

AND SIMILAR PROBLEMS*

*The attached article was prepared as a background study for the California Law Revision Commission by the Commission's consultant, Professor Arvo Van Alstyne. The article was published in 20 Hastings Law Journal 431 (1969). It is copyrighted by Hastings College of the Law and is reproduced here with permission.

The Commission assumes no responsibility for any statement made in this study, and no statement in this study is to be attributed to the Commission. The Commission's action will be reflected in its own recommendation which will be separate and distinct from this study. The Commission should not be considered as having made a recommendation on a particular subject until the final recommendation of the Commission on that subject has been submitted to the Legislature.

[The table of contents below has been prepared to facilitate use of the following article by Professor Van Alstyne]

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Inverse Condemnation: Unintended Physical Damage*

By Arvo Van Alstyne**

Introduction

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.[1] The stark California constitutional mandate that just compensation be paid when private property is taken "or damaged" for public use[2] has induced courts, for want of more precise guidance, to invoke analogies drawn from the law of torts and property as keys to liability.[3] The decisional law, therefore, contains numerous allusions to concepts of "nuisance,"[4] "trespass,"[5] and "negligence,"[6] as well as to notions of strict liability without fault.[7] Unfortunately, judicial opinions seldom seek to reconcile these

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* This article is based on a research study prepared by the author for the California Law Revision Commission. The opinions, conclusions and recommendations contained herein are entirely those of the author and do not necessarily represent or reflect those of the California Law Revision Commission or its individual members.

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[1] *See generally* Kratovil & Harrison, *Eminent Domain—Policy and Concept*, 42 Calif. L. Rev. 596 (1954); Mandelker, *Inverse Condemnation: The Constitutional Limits of Public Responsibility*, 1966 Wis. L. Rev. 3.

[2] Cal. Const. art. I, § 14. Approximately one-half the states require just compensation for "damaging" as well as "taking." 2 P. Nichols, Eminent Domain § 6.44 (rev. 3d ed. 1963).

[3] Inverse condemnation has been said to be "in the field of tortious action." Douglass v. Los Angeles, 5 Cal. 2d 123, 128, 53 P.2d 353, 355 (1936). *See generally* Van Alstyne, *Statutory Modification of Inverse Condemnation: The Scope of Legislative Power*, 19 Stan. L. Rev. 727, 736-42 (1967).

[4] *See, e.g.*, Granone v. Los Angeles County, 231 Cal. App. 2d 629, 42 Cal. Rptr. 34 (1965). The origin of governmental liability for nuisance, as an aspect of inverse condemnation liability, is discussed in Van Alstyne, *Governmental Tort Liability: A Public Policy Prospectus*, 10 U.C.L.A.L. Rev. 463, 493-98 (1963).

[5] *See, e.g.*, Los Angeles Brick & Clay Prods. Co. v. Los Angeles, 60 Cal. App. 2d 478, 141 P.2d 146 (1943).

[6] *See, e.g.*, House v. Flood Control Dist., 25 Cal. 2d 384, 153 P.2d 950 (1944).

[7] *See, e.g.*, Albers v. Los Angeles County, 62 Cal. 2d 250, 398 P.2d 129, 42 Cal. Rptr. 89 (1965).

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.[8]

The purpose of this article, therefore, is to explore and analyze in depth those areas of inverse condemnation law most in need of legislative clarification and correction, and to point out the theoretical guidelines needed to formulate a uniform, consistent, and predictable statutory inverse liability scheme.

I. Preliminary Overview

Before attempting to analyze those typical inverse condemnation claims based on unintended tangible property damage, it is necessary to conduct a preliminary review of the four major strands of doctrinal development most frequently encountered in these cases: (1) inverse liability without fault; (2) fault as a basis of inverse liability; (3) the significance of private law in the adjudication of inverse liability claims; and (4) the doctrine of *damnum absque injuria*.

A. Inverse Liability Without "Fault"

In 1956, a major landslide occurred in the Portuguese Bend area of Los Angeles County, triggered by the pressure exerted by substantial earth fills deposited by the county in the course of extending a county road through the area. Over five million dollars in residential and related improvements were destroyed by the slide. Although it was known to the county that the surface area overlay a prehistoric slide, competent geological studies had concluded that the land had stabilized and that further slides were not reasonably to be expected. In a suit against the county for damages, findings were specifically made to the effect that there was no negligence or other wrongful conduct or omission on the part of the defendant; plaintiff property owners, however, were awarded judgment on the basis of inverse condemnation. This judgment was affirmed on appeal by the California Supreme Court in *Albers v. County of Los Angeles*.[9]

[8] Liability for property damage has frequently been sustained in California cases upon alternative theories of inverse condemnation and tort as applied to the same facts. *See, e.g.*, Bauer v. Ventura County, 45 Cal. 2d 276, 289 P.2d 1 (1955); Granone v. Los Angeles County, 231 Cal. App. 2d 628, 42 Cal. Rptr. 34 (1965).

[9] 62 Cal. 2d 250, 398 P.2d 129, 42 Cal. Rptr. 89 (1965).

Albers thus reconfirmed the previously announced, but often forgotten, principle that liability may exist on inverse condemnation grounds in the absence of fault. Reviewing the prior decisions, the court pointed out that the California courts, from the earliest case[10] interpreting the "or damaged" clause added to California's constitutional eminent domain provision in 1879,[11] had repeatedly held public entities liable for foreseeable[12] physical damage caused by a public improvement project undertaken for public use, whether the work was done carefully or negligently.[13] The problem before the court in *Albers* was stated explicitly in these terms:

> The issue is how 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 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.[14]

The conclusion announced was that, in general, "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."[15]

This conclusion was supported, in the Court's view, by relevant policy considerations:

> The following factors are important. 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 prox-

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[10] Reardon v. San Francisco, 62 Cal. 492, 6 P. 317 (1885).

[11] *See* Van Alstyne, *Statutory Modification of Inverse Condemnation: The Scope of Legislative Power*, 19 STAN. L. REV. 727, 771-76 (1967) (historical background of CAL. CONST. art. I, § 14).

[12] The *Albers* opinion appears to treat foreseeability as an element of fault. *Cf.* RESTATEMENT (SECOND) OF TORTS § 302 (1965). Foreseeability is more typically regarded, in the inverse liability decisions, as an element of proximate cause. See text accompanying notes 33-35 *infra*.

[13] *See* Clement v. State Reclamation Bd., 35 Cal. 2d 628, 220 P.2d 897 (1950); Powers Farms v. Consolidated Irr. Dist., 19 Cal. 2d 123, 119 P.2d 717 (1941); Tyler v. Tehama County, 109 Cal. 618, 42 P. 240 (1895); Reardon v. San Francisco, 62 Cal. 492, 6 P. 317 (1885); Tormey v. Anderson-Cottonwood Irr. Dist., 53 Cal. App. 559, 568, 200 P. 814, 818 (1921) (opinion of Supreme Court en banc denying hearing). These cases, all cited in *Albers*, do not discuss directly the matter of foreseeability of the damages claimed; the facts in each case, however, are consistent with actual or constructive foresight. For other examples of inverse liability without "fault," see text accompanying notes 225-31 *infra*.

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

[15] *Id.* at 263-64, 398 P.2d at 137, 42 Cal. Rptr. at 97.

> imate 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 than 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."[16]

A close reading of the *Albers* opinion indicates that the rule announced is not as favorable to inverse liability as might appear at first glance. It is clearly *not* a blanket acceptance of strict liability without fault.[17] Three important qualifications are indicated. First, *Albers* supports liability *absent* foreseeability of injury (i.e., without fault) only when inverse liability would obtain in a situation involving the same facts *plus* foreseeability (i.e., plus fault). Secondly, the rule is limited to instances of "direct physical damage." Finally, the damage must be "proximately caused" by the public improvement as designed and constructed.

The first of these qualifications assumes that inverse liability ordinarily rests—although not invariably[18]—upon a showing of fault. Unfortunately, the nature of this "fault," and thus the dimensions of inverse liability under situations such as *Albers* where fault is *not* present, is rooted in decisional law that is less than crystal clear. It appears, however, that there are significant types of government projects which, while ultimately producing unforeseeable—or even foreseeable—damage to private property, may nevertheless be undertaken without risk of inverse liability. The *Albers* opinion explicitly withholds liability, for example, when the public entity's conduct is legally privileged, either under ordinary property law principles or as a non-compensable exercise of the police power.[19]

The second qualification limits the *Albers* approach to "direct physical damage," thereby excluding instances of non-physical "consequential" damages.[20] The terms, "direct" and "physical," in this

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[16] *Id.* The quotation is from Clement v. Reclamation Bd., 35 Cal. 2d 628, 642, 220 P.2d 897, 905 (1950).

[17] Efforts to secure judicial approval for the idea that inverse condemnation is a form of strict liability have generally failed. *See* Youngblood v. Los Angeles County Flood Control Dist., 56 Cal. 2d 603, 364 P.2d 840, 15 Cal. Rptr. 904 (1961); Smith v. East Bay Mun. Util. Dist., 122 Cal. App. 2d 613, 265 P.2d 610 (1954); Curci v. Palo Verde Irr. Dist., 69 Cal. App. 2d 583, 159 P.2d 674 (1945).

[18] *Cf.* Van Alstyne, *Statutory Modification of Inverse Condemnation: Deliberately Inflicted Injury or Destruction*, 20 STAN. L. REV. 617 (1968).

[19] 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 text accompany notes 46-87 *infra*.

[20] The ambiguous term "consequential damages" is often employed to describe generically the kinds of losses for which inverse condemnation lia-

context connote a "definite physical injury to land or an invasion of it cognizable to the senses, depreciating its market value."[21] The cases relied on in *Albers*, for example, involve structural injury to buildings,[22] erosion of the banks of a stream,[23] waterlogging of agricultural land by seepage from a leaking irrigation canal,[24] and flooding and deposit of mud and silt by an overflowing river.[25] The opinion indicates that non-physical losses, such as decreased business profits or diminution of property values due to diversion of traffic or circuity of travel resulting from a public improvement, are not recoverable under this rationale.[26]

The third qualification—requiring that the damage be proximately caused by the public improvement as designed and constructed—involves a troublesome conceptual premise. When the defendant's wrongful act or omission does not directly produce the injury com-

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bility is denied, where no physical injury to, or appropriation of, tangible property is involved. *See* Richards v. Washington Terminal Co., 233 U.S. 546, 554 (1914); 2 P. Nichols, Eminent Domain § 6.4432, at 503 (rev. 3d ed. 1963). One of the purposes for which the "or damaged" clause was added to the constitution was to narrow the categories of injuries previously regarded as "consequential" and thus noncompensable. *E.g.*, Reardon v. San Francisco, 66 Cal. 492, 6 P. 317 (1885) (recognizing that certain kinds of consequential damages were made compensable by the 1879 constitution); Eachus v. Los Angeles Consol. Elec. Ry., 103 Cal. 614, 37 P. 750 (1894) (*semble*). Thus, although some kinds of non-tangible damagings (i.e., loss of property values) resulting from public projects are now compensable, Bacich v. Board of Control, 23 Cal. 2d 343, 144 P.2d 818 (1943) (loss of ingress and access), others are still deemed consequential and not within the purview of the just compensation clause. See cases cited note 26 *infra*. *See generally* 2 P. Nichols, *supra* § 6.4432[2], at 508-19.

[21] Albers v. Los Angeles County, 62 Cal. 2d 250, 260, 398 P.2d 129, 135, 42 Cal. Rptr. 89, 95 (1965), *quoting* 18 Am. Jur. *Eminent Domain* § 139, at 766 (1939).

[22] Reardon v. San Francisco, 66 Cal. 492, 6 P. 317 (1885).

[23] Tyler v. Tehama County, 109 Cal. 618, 42 P. 240 (1895).

[24] Powers Farms v. Consolidated Irr. Dist., 19 Cal. 2d 123, 119 P.2d 717 (1941) (dictum); Tormey v. Anderson-Cottonwood Irr. Dist., 53 Cal. App. 559, 200 P. 814 (1921) (opinion of Supreme Court en banc on denial of hearing).

[25] Clement v. Reclamation Bd., 35 Cal. 2d 628, 220 P.2d 897 (1950).

[26] "Such cases as *People v. Symonds*, 54 Cal. 2d 855, involving loss of business and diminution of value by diversion of traffic, circuity of travel, etc., do not involve direct physical damage to real property, but only diminution in its enjoyment." Albers v. Los Angeles County, 62 Cal. 2d 250, 262, 398 P.2d 129, 136, 42 Cal. Rptr. 89, 96 (1965). *Accord*, People *ex rel.* Department of Pub. Works v. Ayon, 54 Cal. 2d 217, 352 P.2d 519, 5 Cal. Rptr. 151 (1960); People *ex rel.* Department of Pub. Works v. Russell, 48 Cal. 2d 189, 309 P.2d 10 (1957). For a more detailed discussion concerning recovery of business profits under inverse liability, see Note, *The Unsoundness of California's Noncompensability Rule as Applied to Business Losses in Condemnation Cases*, 20 Hastings L.J. 675 (1969).

plained of, California tort law generally refers to foreseeability of injury as the test of whether the act or omission is sufficiently "proximate" that liability may attach.[27] Recognizing that "cause-in-fact" may, in strict logic, be traced in an endless chain of cause and effect relationships to exceedingly remote events, the reasonable foreseeability test is regarded as a useful mechanism for confining tort liability within rational limits.[28] But the premise of the *Albers* decision is that neither the harmful consequences of the county's road building project nor the intervening landslide which produced them were foreseeable; the landslide damage was compensable even though wholly unexpected and unforeseeable, and the result of a reasonably formulated and carefully executed plan of construction. Manifestly, the term "proximate cause" must have a special meaning in this context.

Although no decision has been found analyzing in depth the proximate cause concept where inverse liability obtains without fault, the language of several opinions suggests that it requires a convincing showing of a "substantial" cause-and-effect relationship which excludes the probability that other forces alone produced the injury.[29] For example, the decisions sometimes speak of the damage in such cases as being actionable if it is the "necessary or probable result" of the improvement,[30] or if "the immediate, direct, and necessary effect" thereof was to produce the damage.[31] Proof that the injurious consequences followed in the normal course of subsequent events, and were produced predominantly by the improvement, seems to be the focus of the judicial inquiry.[32]

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[27] *See* Akins v. Sonoma County, 67 Cal. 2d 185, 199, 430 P.2d 57, 65, 60 Cal. Rptr. 499, 507 (1967); Moseley v. Arden Farms Co., 26 Cal. 2d 213, 157 P.2d 372 (1945); Gibson v. Garcia, 96 Cal. App. 2d 681, 216 P.2d 119 (1950). It is not necessary that the extent of harm, or the exact manner in which it is incurred, be foreseeable. *E.g.*, Osborn v. Whittier, 103 Cal. App. 2d 809, 230 P.2d 132 (1951).

[28] *See* Premo v. Grigg, 237 Cal. App. 2d 192, 197, 46 Cal. Rptr. 683, 687 (1965); F. Harper & F. James, The Law of Torts § 20.5, at 1134-51 (1956); W. Prosser, The Law of Torts § 51, at 320-21 (3d ed. 1964). The same results are reached in most but not all cases, by using foreseeability to limit the scope of duty rather than causation. *See* Green, *Foreseeability in Negligence Law*, 61 Colum. L. Rev. 1401 (1961).

[29] The term "substantial" is part of the vocabulary of tort law. *See* Restatement (Second) of Torts § 431, comment *a* at 433 (1965).

[30] Youngblood v. Los Angeles County Flood Control Dist., 56 Cal. 2d 603, 607, 364 P.2d 840, 842, 15 Cal. Rptr. 904, 906 (1961); Granone v. Los Angeles County, 231 Cal. App. 2d 629, 648, 42 Cal. Rptr. 34, 47 (1965).

[31] Los Angeles Cemetery Ass'n v. Los Angeles, 103 Cal. 461, 470, 37 P. 375, 378 (1894). *See also* Conger v. Pierce County, 116 Wash. 27, 198 P. 377 (1921).

[32] Despite the generality of typical judicial language, *see* cases cited notes 30 & 31 *supra*, there appears to be an implication running through the deci-

The opinion in *Albers* rejects foreseeability as an element of the public entity's duty to pay just compensation when its improvement project directly sets in motion the natural forces (i.e., landslide), which results in damage to private property. Foreseeability still may be a significant operative factor in determining liability in other types of cases, however, such as cases in which independently generated forces, not induced by the entity's actions, contribute to the injury. For example, the construction by a public entity of a culvert through a highway embankment is, by hypothesis, the result of foresight that flooding is likely to occur in the absence of suitable drainage. If the culvert proves to be of insufficient capacity during normally foreseeable storms, inverse liability obtains because the flooding, as a foreseeable consequence of the project, was proximately caused by the inherently defective design of the culvert.[83] But if at the same location flooding is produced by insufficiency of the culvert to dispose of the runoff of a storm of unprecedented and extraordinary size beyond the scope of human foresight, the project is regarded as not the proximate cause of damage that would not have resulted under predictable conditions.[84] In other words, where there is an intervening force which cuts off and supersedes the original chain of causation, and the public improvement itself was planned and constructed in a manner reasonably sufficient to cope with foreseeable conditions without causing private damage, then the public entity should not be held responsible for damage that results from the independent, intervening force.[85]

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sions that mere cause-in-fact, under the usual "but for" test, may not be sufficient unless accompanied by a showing that the injurious results were an inescapable or unavoidable consequence. Great Northern Ry. v. State, 102 Wash. 348, 173 P. 40 (1918); RESTATEMENT (SECOND) OF TORTS § 433, comment d (1965). Cause-in-fact in the usual sense must, of course, be shown. Youngblood v. Los Angeles County Flood Control Dist., 56 Cal. 2d 603, 364 P.2d 840, 15 Cal. Rptr. 904 (1961); Janssen v. Los Angeles County, 50 Cal. App. 2d 45, 123 P.2d 122 (1942).

[83] Granone v. Los Angeles County, 231 Cal. App. 2d 629, 42 Cal. Rptr. 34 (1965).

[84] Los Angeles Cemetery Ass'n v. Los Angeles, 103 Cal. 461, 37 P. 375 (1894); Dick v. Los Angeles, 34 Cal. App. 724, 168 P. 703 (1917) (dictum). To constitute an unforeseeable "act of God" which cuts off the chain of causation, however, the storm must be truly unforeseeable. The mere fact that it may be a heavy storm of unusual intensity or volume, or even set local records for magnitude, is not enough if heavy storms are expectable in the area. Southern Pac. Co. v. Los Angeles, 6 Cal. 2d 545, 55 P.2d 847 (1936).

[85] RESTATEMENT (SECOND) OF TORTS § 432(1) (1965). The fact that the storm was unprecedented and unforeseeable, however, does not absolve the public entity from liability for additional damage which would not have occurred in the absence of the improvement. Jefferis v. Monterey Park, 14 Cal. App. 2d 113, 57 P.2d 1374 (1936); Nahi v. Alta Irr. Dist., 23 Cal. App. 333,

Albers, under this analysis, is clearly distinguishable from the "act of God" cases. In *Albers*, the county road project was planned and constructed with reasonable care in light of all foreseeable future conditions; yet, due to unforeseeable circumstances, the project directly set in motion, and thereby substantially caused, the property damage for which compensation was sought. Liability was thus imposed, since, for the policy reasons summarized in the court's opinion, the just compensation clause supports and requires such an imposition where a direct casual connection between a public project and private property damage is established. In the "act of God" cases, however, the direct causal *connection* is *broken* by the intervention of an unforeseeable force of nature which, of itself, was *not* set in motion or produced by the entity's improvement undertaking. Absent such direct, or *proximate* causation, compensation is not required. On the other hand, to the extent that the intervention of independent natural forces is reasonably foreseeable, the entity's failure to incorporate adequate safeguards for private property into the improvement plan remains a proximate, although concurrent, cause of the resulting damage, and thus a basis of inverse liability.

B. Fault as a Basis of Inverse Liability

Most of the pre-*Albers* decisions in California sustaining inverse liability for unintended physical injury to property are predicated expressly on a fault rationale grounded upon foreseeability of damage as a consequence of the construction or operation of the public project as deliberately planned.[56] On the other hand, a substantial number of contemporaneous decisions seemingly affirm the proposition that negligence is not a material consideration if, in fact, a taking or damaging for public use has occurred.[57] This apparent inconsistency of basic doctrine, however, appears to be reconcilable.

The key to an understanding of the cases, it is believed, is the fact that negligence is only a particular kind of fault. What the courts appear to be saying, although somewhat inexactly perhaps, is that it is not necessary to inquire into the exact nature or quality of the fault upon which inverse liability is predicated where the facts demonstrate that some form of actionable fault does exist.[58] When the

137 P. 1080 (1913) (dictum). *See also* Stone v. Los Angeles County Flood Control Dist., 81 Cal. App. 2d 902, 185 P.2d 396 (1947).

[56] There are two leading decisions on this point. Bauer v. Ventura County, 45 Cal. 2d 276, 289 P.2d 1 (1955); House v. Los Angeles County Flood Control Dist., 25 Cal. 2d 384, 153 P.2d 950 (1944).

[57] See cases cited note 13 *supra*.

[58] *See, e.g.*, Clement v. Reclamation Bd., 35 Cal. 2d 628, 641, 220 P.2d 897, 905 (1950), where it is stated that "[t]he construction of the public improvement is a deliberate action of the state or its agency in furtherance of public

probability of resulting damage is reasonably foreseeable, the adoption and non-negligent execution of a risk-prone plan of public improvement rationally can be deemed, with certain exceptions to be discussed, either: (a) negligence in adopting an inherently defective plan, or in failing to modify it or incorporate reasonable safeguards to prevent the anticipated damage;[39] (b) negligent "failure to appreciate the probability that, functioning as deliberately conceived, the public improvement . . . would result in some damage to private property;"[40] (c) "intentional" infliction of the damage by deliberate adoption of the defective plan with knowledge that damage was a probable result;[41] or (d) inclusion in the plan, whether negligently or deliberately, of features that violate a recognized legal duty that the public entity, like private persons similarly situated, owes to neighboring owners as a matter of property law.[42] But, in each instance, it is not materially significant whether the "inherently wrong" plan[43] was the product of inadvertence, negligent conduct, or delib-

purposes. If private property is damaged thereby the state or its agency must compensate the owner therefor, [citations] whether the damage was intentional or the result of negligence on the part of the governmental agency." (Emphasis added). In Reardon v. San Francisco, 66 Cal. 492, 505, 6 P. 317, 325 (1885), it was stated in conclusion that the California Constitution requires compensation to the owner "where the damage is directly inflicted, or inflicted by want of care and skill." (Emphasis added). Torrney v. Anderson-Cottonwood Irr. Dist., 53 Cal. App. 559, 568, 200 P. 814, 818 (1921) (opinion of Supreme Court en banc on denial of hearing) held that negligence was not essential to inverse liability, since "the care that may be taken in the construction of the public improvement which causes the damage is wholly immaterial to the right of the plaintiff to recover damage, if the improvement causes it."

[39] *See* House v. Los Angeles County Flood Control Dist., 25 Cal. 2d 384, 153 P.2d 950 (1944); Granone v. Los Angeles County, 231 Cal. App. 2d 629, 42 Cal. Rptr. 34 (1965) (alternative holding); Beckley v. Reclamation Bd., 205 Cal. App. 2d 734, 23 Cal. Rptr. 428 (1962) (alternative holding); Ward Concrete Co. v. Los Angeles County Flood Control Dist., 149 Cal. App. 2d 840, 309 P.2d 546 (1957); *cf.* W. Prosser, The Law of Torts § 51 (3d ed. 1964); Restatement (Second) of Torts § 302 (1965).

[40] Bauer v. Ventura County, 45 Cal. 2d 276, 286, 289 P.2d 1, 7 (1955) (alternative holding); *see* Kaufman v. Tomich, 208 Cal. 19, 280 P. 130 (1929); Ambrosini v. Alisal Sanitary Dist., 154 Cal. App. 2d 720, 317 P.2d 33 (1957) (alternative holding).

[41] Youngblood v. Los Angeles County Flood Control Dist., 56 Cal. 2d 803, 364 P.2d 840, 16 Cal. Rptr. 904 (1961) (dictum); Clement v. Reclamation Bd., 35 Cal. 2d 628, 220 P.2d 897 (1950).

[42] Pacific Seaside Home for Children v. Newbert Protection Dist., 190 Cal. 544, 213 P. 967 (1923) (diversion of natural stream); Newman v. City of Alhambra, 179 Cal. 42, 175 P. 414 (1918) (obstruction of natural drainage); Steiger v. San Diego, 163 Cal. App. 2d 110, 329 P.2d 94 (1958) (collection and discharge of surface waters).

[43] House v. Los Angeles County Flood Control Dist., 25 Cal. 2d 384, 391, 153 P.2d 950, 954 (1944) (Curtis, J.).

eration, for the same result—inverse liability—follows unless there is a sufficient showing of legal justification for infliction of the harm.

Some form of fault is thus a conspicuous characteristic of inverse liability in most California cases. The *Albers* decision does not purport to overthrow this general approach or to reject entirely the frequently expressed position that a public entity defendant "is not absolutely liable"[44] under the just compensation clause irrespective of its involvement in the plaintiff's damage. It merely recognizes an additional occasion for inverse liability by holding that lack of foreseeability does not preclude recovery for directly caused physical property damage which would have been recoverable under a fault rationale had that damage been foreseeable.[45]

C. Private Law as a Basis of Inverse Liability

The concept of "fault" supporting inverse liability has been further expanded by the absorbtion of principles of private law into the law of eminent domain. Inverse liability of public entities often has been sustained on the ground that the entity breached a legal duty which it owed to the plaintiff, with such duty being determined by reference to those legal axioms governing private individuals.[46] For example, a private person is under a duty to refrain from obstructing a natural stream so as to divert it upon his neighbor's lands.[47] Correspondingly, a public entity that obstructs or diverts a stream may be liable in inverse condemnation for the resulting damages.[48] Moreover, even when the entity is engaged in privileged conduct, such as the erection of protective works against flood waters, it, like private persons, must act reasonably and non-negligently.[49]

The initial use of private legal concepts as a framework for resolving inverse condemnation claims was a reflection, in part, of the judicial expansion of inverse condemnation as a means for avoiding the discredited doctrine of sovereign tort immunity.[50] The constitu-

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[44] Youngblood v. Los Angeles County Flood Control Dist., 56 Cal. 2d 803, 807, 364 P.2d 840, 841, 15 Cal. Rptr. 904, 905 (1961).

[45] See text accompanying notes 27-35 *supra*.

[46] *See*, e.g., Beckley v. Reclamation Bd., 205 Cal. App. 2d 734, 23 Cal. Rptr. 428 (1962) (alternative holding).

[47] Horton v. Goodenough, 184 Cal. 451, 194 P. 34 (1920).

[48] Clement v. Reclamation Bd., 35 Cal. 2d 628, 220 P.2d 897 (1950); Elliott v. Los Angeles County, 183 Cal. 472, 191 P. 899 (1920); Smith v. Los Angeles, 66 Cal. App. 2d 562, 153 P.2d 69 (1944).

[49] Bauer v. Ventura County, 45 Cal. 2d 276, 289 P.2d 1 (1955); House v. Los Angeles County Flood Control Dist., 25 Cal. 2d 384, 153 P.2d 950 (1944); Granone v. Los Angeles County, 231 Cal. App. 2d 629, 42 Cal. Rptr. 34 (1965) (alternative holding).

[50] *See generally* Mandelker, *Inverse Condemnation: The Constitutional Limits of Public Responsibility*, 1966 Wis. L. Rev. 3.

tional mandate to pay just compensation when private property was "damaged for public use" provided a strong and ready peg upon which to hang a cloak of liability despite a claim of governmental immunity. But the need to establish rational limits to the apparently unqualified constitutional mandate suggested the use of rules of law limiting private tort liability as analogues for denying inverse liability in similar situations. Not unexpectedly, then, the constitutional inverse condemnation clause came to be thought of as merely a waiver of governmental immunity, and an authorization for a self-executing remedy which the injured property owner would not otherwise have had against the state and its agencies.[51] Moreover, as the edifice of governmental immunity began to crumble beneath the weight of exceptions admitted by judicial decisions and occasional legislation, a considerable degree of overlapping of inverse and non-immune tort liabilities became commonplace.[52] Plaintiffs often sued alternatively on inverse and tort theories, with considerable success,[53] thereby confirming the notion that inverse condemnation was merely a remedy to enforce substantive standards found in the law of private torts.

The *Albers* decision, of course, qualified this conception by reaffirming the original position that inverse liability has an independent substantive content which obtains even when private tort liability does not.[54] Moreover, even before *Albers*, the underlying premise of the remedy approach had been largely removed by the judicial abrogation of sovereign immunity.[55] Thereafter, in California, as in a number of other states, the old immunity rule was supplanted by a comprehensive statutory system of governmental tort liability that was in certain respects broader and in other respects narrower than its private counterparts.[56] But while the legislature acted to divorce

[51] *See* Bauer v. Ventura County, 45 Cal. 2d 276, 282-83, 289 P.2d 1, 5 (1955): "Section 14 [of article I], however, is designed not to create new causes of action but only to give the private property owner a remedy he would not otherwise have against the state for the unlawful dispossession, destruction or damage of his property. . . . The effect of section 14 is to waive the immunity of the state where property is taken or damaged for public purposes."

[52] *See, e.g.*, Granone v. Los Angeles County, 231 Cal. App. 2d 629, 42 Cal. Rptr. 34 (1965) where the liability was affirmed on the alternate grounds of inverse condemnation, nuisance, and statutory liability for dangerous condition of public property.

[53] Bauer v. Ventura County, 45 Cal. 2d 276, 289 P.2d 1 (1955); Granone v. Los Angeles County, 231 Cal. App. 2d 629, 42 Cal. Rptr. 34 (1965).

[54] Albers v. Los Angeles County, 62 Cal. 2d 250, 260, 398 P.2d 129, 135, 42 Cal. Rptr. 89, 95 (1965).

[55] Judicial abrogation of sovereign immunity had taken place only four years prior to the *Albers* decision. *See* Muskopf v. Corning Hosp. Dist., 55 Cal. 2d 211, 359 P.2d 457, 11 Cal. Rptr. 89 (1961).

[56] California Tort Claims Act of 1963, CAL. GOV'T CODE §§ 810-95.8; A.

governmental tort liability from its inconvenient ties with private tort liability, no similar changes were made with respect to inverse liabilities. As a result, to the extent that the legal principles applied in inverse condemnation litigation remain tied to private tort law analogies, a significant incongruity and source of confusion can be observed between the scope of governmental tort and inverse liabilities. One conspicuous illustration is the different consequences flowing from defects in the plan or design of public improvements, which on private law principles support *inverse* liability,[57] but which, under present statutory provisions, ordinarily provide no basis for governmental *tort* liability.[58]

D. Damnum Absque Injuria

Some mention should also be made here of those situations where, irrespective of gounds for inverse liability under the above mentioned theories and principles, the injury suffered by the property owner is nevertheless held to be *damnum absque injuria*. In California, two lines of decisions recognize that public entities are privileged, in certain situations, to inflict physical damage upon private property for a public purpose without incurring inverse liability. In effect, these cases establish two judicially-created exceptions to the otherwise unqualified language of the constitutional command that just compensation be paid.

(1) *The "Police Power" Cases*

In sustaining the liability of Los Angeles County *for* landslide damage in the *Albers* case, the Supreme Court explicitly distinguished "cases . . . like *Gray v. Reclamation District No. 1500* . . . where the court held the damage noncompensable because inflicted in the proper exercise of the police power."[59] In *Gray*,[60] plaintiffs' lands were

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VAN ALSTYNE, CALIFORNIA GOVERNMENT TORT LIABILITY (Cal. Cont. Educ. Bar ed. 1964).

[57] *E.g.*, Bauer v. Ventura County, 45 Cal. 2d 276, 289 P.2d 1 (1955) (negligent improvement of drainage ditch by raising of bank); Granone v. Los Angeles County, 231 Cal. App. 2d 839, 42 Cal. Rptr. 34 (1965) (negligently designed culverts).

[58] *See* CAL. GOV'T CODE § 830.6, where public entities are exonerated from tort liability for personal injuries caused by defective plan or design of public improvements if the design or plan could reasonably have been approved by responsible public officials. This immunity has been given a broad interpretation. Becker v. Johnston, 67 Cal. 2d 169, 430 P.2d 48, 60 Cal. Rptr. 485 (1967); Cabell v. California, 67 Cal. 2d 150, 430 P.2d 34, 60 Cal. Rptr. 476 (1967); *see* Note, *Sovereign Liability for Defective or Dangerous Plan or Design—California Government Code Section 830.6*, 19 HASTINGS L.J. 584 (1968).

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

[60] Gray v. Reclamation Dist. No. 1500, 174 Cal. 632, 163 P. 1024 (1917).

threatened with temporary inundation from Sacramento River flood waters due to a partially completed system of levees being built by the defendant reclamation district. In the past, these flood waters had spread out harmlessly over lower lands, leaving the plaintiffs' property unharmed. In reversing an injunction against the maintenance of the levees, the court concluded that any damage sustained by the plaintiffs would be the consequence of a proper exercise of the police power for which the district was not liable.[61] As an independent alternative ground of decision, it was determined that construction of the district's levees constituted the exercise of a legal right to protect the district's lands against the "common enemy" of escaping flood waters, and for that reason also was noncompensable.[62] The latter ground alone adequately supported the result on appeal; but the opinion discusses, at some length, the scope of the "police power" rationale.

Briefly summarized, *Gray* reasons that (1) governmental flood control, navigational improvement, and reclamation work is "referable to the police power";[63] (2) damage resulting from a legitimate exercise of the police power is noncompensable, provided the "proper limits" of that power have not been exceeded;[64] and (3) the balance of interests relating to the facts at hand required the conclusion that the damage in question was noncompensable under this test.[65] The factual elements cited as persuasive of this conclusion included the temporary nature of the flooding complained of; the fact that future flooding would be eliminated as soon as the balance of the project was completed; the availability to the plaintiffs of the right of self-protection under the "common enemy" rule; the "vast magnitude and importance" of the flood control project to the state as a whole; and the fact that the plaintiffs, like other landowners within the project area,

[61] Similar conclusions had been reached on the basis of facts which occurred prior to adoption of the "or damaged" clause in the 1879 constitution. Lamb v. Reclamation Dist. No. 108, 73 Cal. 125, 14 P. 625 (1887); Green v. Swift, 47 Cal. 536 (1874).

[62] The common enemy doctrine is discussed at text accompanying notes 110-30 *infra*.

[63] Gray v. Reclamation Dist. No. 1500, 174 Cal. 622, 638, 163 P. 1024, 1031 (1917).

[64] "[W]hether in any given instance, as in this instance, the proper limits of the police power have been exceeded, with the result that unlawful confiscation or damage is worked, remains still a question for consideration. . . . Always the question in each case is whether the particular act complained of is without the legitimate purview and scope of the police power. If it be then the complainant is entitled to injunctive relief or to compensation. If it be not, then it matters not what may be his loss, it is damnum absque injuria." *Id.*

[65] *Id.* at 645-46, 163 P. at 1034.

would derive substantial long-term benefits from the abatement of flood damage and the improvement of navigation which completion of the project would assure.[66]

Manifestly, *Gray* does not stand for the proposition that property damage caused by a public improvement based upon the police power is necessarily *damnum absque injuria*. It suggests, at most, that judicial classification of the project as an exercise of the "police power" adds persuasiveness to the public interest which must be weighed against private detriment in adjudicating compensability. The very term "police power" is inherently undefinable.[67] Its semantic role in the present context is to serve only as a shorthand expression denoting the assertion of governmental power to advance public health, safety, and welfare in a qualitatively substantial sense. The interests represented by these public objectives simply outweighed those asserted by the property owners in *Gray*. Unfortunately, loose language in the opinion,[68] when taken out of context, fails to convey a correct impression of the actual holding, a defect also perpetuated by some later decisions fully reconcilable on their facts.[69]

The implications of the "police power" exception postulated in *Gray* were subjected to thorough reconsideration by the Supreme

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[66] *Id.*

[67] *See* Hadacheck v. Sebastian, 239 U.S. 394, 410 (1915), where it was stated that "we are dealing with one of the most essential powers of government—one that is the least limitable."; *cf.* Goldblatt v. Hempstead, 369 U.S. 590, 594 (1962), where it was stated that "[t]he term 'police power' connotes the time-tested conceptional limit of public encroachment upon private interests. Except for the substitution of the familiar standard of 'reasonableness' this Court has generally refrained from announcing any specific criteria." *See generally* Havran, *Eminent Domain and the Police Power*, 5 NOTRE DAME LAW. 380 (1930); Sax, *Takings and the Police Power*, 74 YALE L.J. 36 (1964).

[68] The court's police power discussion in *Gray* relies heavily upon decisions involving the noncompensability of losses of value resulting from police regulations, rather than cases like *Gray* itself, in which physical damage or destruction was in issue. The principal cases discussed include Hadacheck v. Sebastian, 239 U.S. 394 (1915) (decrease in exploitation value due to land-use regulation); Chicago & Alton Ry. v. Tranberger, 238 U.S. 67 (1915) (regulation requiring construction of drainage culverts by railroad at its own expense); Chicago B. & Q. Ry. v. Illinois, 200 U.S. 561 (1906) (requirement that railroad deepen, widen, and bridge any natural watercourse crossing its right-of-way). The opinion seems to be oblivious to the distinction, clearly recognized as a significant one in more recent times, between property value diminution unaccompanied by physical invasion and losses caused by tangible injury to or interference with use or enjoyment of property. *Compare* United States v. Causby, 328 U.S. 256 (1946) *with* Goldblatt v. Hempstead, 369 U.S. 590 (1962).

[69] *See, e.g.*, O'Hara v. Los Angeles County Flood Control Dist., 19 Cal. 2d 61, 119 P.2d 23 (1941).

Court some twenty-five years later.[70] The factual context was quite different, however. Property owners were seeking inverse recovery for losses of property values (*i.e.*, non-physical damage) allegedly caused by highway improvements. Defendant public entities, relying upon dicta in *Gray* and its progeny, sought refuge in the doctrine that losses caused by an exercise of the police power were *damnum absque injuria*. The argument was rejected on the facts before the court, although the continued vitality of the doctrine, as properly conceived, was reaffirmed. The police power, said the court, "generally . . . operates in the field of regulation, except possibly in some cases of emergency. . . ."[71] The constitutional guarantee of the just compensation clause would be vitiated by a broader view; hence, "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."[72] This verbal equivalency of "emergency" and "police power" is not inconsistent with the interest-balancing approach taken in *Gray*. It treats governmental action to cope with emergencies as entitled to judicial preference, although not necessarily controlling significance, in the interest-balancing process.

This judicial restatement of the police power theory was reaffirmed, and directly applied, in the 1944 decision of *House v. Los Angeles County Flood Control District*.[73] Physical damage attributed to levee improvements along the Los Angeles River, which allegedly caused flooding and erosion of the plaintiff's land, was held, on demurrer, to be recoverable in inverse condemnation. The court again cautioned that private property damage may be noncompensable when inflicted by government "under the pressure of public necessity and to avert impending peril."[74] But the plaintiff had alleged that the improvements in question were constructed negligently, pursuant to a plan which was contrary to good engineering practice. From the pleadings, it was apparent that the "defendant district, with time to exercise a deliberate choice of action in the manner of its installation of the river improvements, followed a plan 'inherently wrong' and thereby caused needless damage" to the plaintiff's property.[75] *Need-*

[70] Rose v. California, 19 Cal. 2d 713, 123 P.2d 505 (1942). *See also* People v. Ricciardi, 23 Cal. 2d 390, 144 P.2d 799 (1943); Badich v. Board of Control, 23 Cal. 2d 343, 144 P.2d 818 (1943).

[71] Rose v. California, 19 Cal. 2d 713, 730, 123 P.2d 505, 515 (1942).

[72] *Id.* at 730-31, 123 P.2d at 516.

[73] 25 Cal. 2d 384, 153 P.2d 950 (1944); *accord*, Smith v. Los Angeles, 66 Cal. App. 2d 562, 153 P.2d 69 (1944).

[74] House v. Los Angeles County Flood Control Dist., 25 Cal. 2d 384, 391, 153 P.2d 950, 953 (1944). *See also* Archer v. Los Angeles, 19 Cal. 2d 19, 24, 119 P.2d 1, 4 (1941).

[75] House v. Los Angeles County Flood Control Dist., 25 Cal. 2d 384, 392, 153 P.2d 950, 954 (1944). O'Hara v. Los Angeles County Flood Control Dist.,

less damage is not damage required by the public necessity that motivates the exercise of the police power. Thus, a cause of action for inverse condemnation was stated since "the principles of nonliability and *damnum absque injuria* are not applicable when, in the exercise of the police power, private, personal and property rights are interfered with, injured or impaired in a manner or by a means, or to an extent that is not reasonably necessary to serve a public purpose for the general welfare."[76]

The *House* approach has been followed consistently in later decisions. Thus, in the absence of a compelling emergency, the police power doctrine will not shield a public entity from inverse liability where physical damage to private property could have been avoided by proper design, planning, construction and maintenance of the improvement.[77] The kind of emergency which will preclude inverse liability is, moreover, narrowly circumscribed. Illustrations given in the *House* opinion itself are limited to "the demolition of all or parts of buildings to prevent the spread of conflagration, or the destruction of diseased animals, of rotten fruit, or infected trees where life or health is jeopardized."[78] In the generality of situations within the

19 Cal. 2d 81, 119 P.2d 23 (1941), was distinguished upon the ground that the plaintiff there had failed to allege negligence.

[76] House v. Los Angeles Flood Control Dist., 25 Cal. 2d 384, 392, 153 P.2d 950, 954 (1944). This position had the explicit concurrence of four members of the court. Mr. Justice Traynor, with Mr. Justice Edmonds concurring, wrote a separate opinion reaching the same result, but on the ground that the plaintiff's complaint adequately alleged a negligent and unprivileged diversion of water flowing in a natural channel. Agreement with the majority view of the police power, however, was indicated by this statement: "Barring situations of immediate emergency, neither the property law nor the police power of the state entitles a governmental agency to divert water out of its natural channel onto private property." *Id.* at 397-98, 153 P.2d at 957. A second concurring opinion was written by Mr. Justice Carter. He took the position that the majority had not gone far enough in recognizing inverse compensability for property damage resulting from public improvements; but he agreed in principle with what he regarded as a "commendable step" in the right direction. *Id.* at 398, 153 P.2d at 957. On limiting the scope of the police power doctrine the court was essentially unanimous.

[77] Youngblood v. Los Angeles County Flood Control Dist., 56 Cal. 2d 608, 364 P.2d 840, 15 Cal. Rptr. 904 (1961) (dictum); Bauer v. Ventura County, 45 Cal. 2d 276, 289 P.2d 1 (1955); Ward Concrete Co. v. Los Angeles County Flood Control Dist., 149 Cal. App. 2d 840, 309 P.2d 546 (1957); Veteran's Welfare Bd. v. Oakland, 74 Cal. App. 2d 818, 169 P.2d 1000 (1946). Although some of the cases intimate that the rule is limited to instances of damage resulting from defective design or construction, the *Bauer* case squarely holds that it obtains also with respect to a defectively conceived plan of maintenance and operation as distinguished from routine negligence in carrying out an otherwise proper plan. Bauer v. Ventura County, *supra* at 285, 289 P.2d at 7.

[78] House v. Los Angeles County Flood Control Dist., 25 Cal. 2d 384, 391,

purview of the present article, it seems evident that the police power exception is of negligible significance.

(2) *The "Legal Right" Cases*

Returning to the aforementioned analogies to private law, a second justification for denying compensation for physical damage caused by public improvements is adduced. When a private person would be legally privileged to inflict like damage without tort liability, a public entity also has a "legal right" to do so without obligation to pay just compensation.[79] By hypothesis, such damage does not constitute the violation of any right possessed by the injured party.[80] This rule, which is reaffirmed in *Albers*,[81] has been applied to deny inverse liability in a variety of situations. Examples include cases involving damages caused by public improvements designed to accelerate the flow of a natural watercourse,[82] control the overflow and spread of flood waters,[83] and collect and discharge surface storm waters through natural drainage channels.[84]

The rationale of these "legal right" cases, however, does not imply that the absence of a cause of action against a private person necessarily or invariably precludes a claim for inverse compensation against the state. Broad statements in several decisions, purporting to so declare, were expressly disapproved in the *Albers* case as stating the

153 P.2d 950, 953 (1944). The problem of inverse liability for deliberate destruction of private property in the kinds of situations referred to by the court is discussed in Van Alstyne, *Statutory Modification of Inverse Condemnation: Deliberately Inflicted Injury or Destruction*, 20 STAN. L. REV. 617 (1968).

[79] *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); Kambish v. Santa Clara Valley Water Conservation Dist., 185 Cal. App. 2d 107, 8 Cal. Rptr. 215 (1960).

[80] *See, e.g.*, Youngblood v. Los Angeles County Flood Control Dist., 56 Cal. 2d 603, 608, 364 P.2d 840, 842, 15 Cal. Rptr. 904, 906 (1961): "[I]f a property owner would have no cause of action against a private citizen on the same facts, he can have no claim for compensation against the state under section 14 [of article I]." *Accord*, Bauer v. Ventura County, 45 Cal. 2d 276, 282-83, 289 P.2d 1, 5 (1955).

[81] Albers v. Los Angeles County, 62 Cal. 2d 250, 261-62, 398 P.2d 129, 135-36, 42 Cal. Rptr. 89, 95-96 (1965). For a recent application of the "legal right" approach, *see* Joslin v. Marin Muni. Water Dist., 67 Cal. 2d 132, 429 P.2d 889, 60 Cal. Rptr. 377 (1967).

[82] San Gabriel Valley Country Club v. Los Angeles County, 182 Cal. 392, 188 P. 554 (1920).

[83] Gray v. Reclamation Dist. No. 1500, 174 Cal. 622, 163 P. 1024 (1917) (alternative ground); Lamb v. Reclamation Dist. No. 108, 73 Cal. 125, 14 P. 625 (1887) (alternative ground).

[84] Archer v. Los Angeles, 19 Cal. 2d 19, 119 P.2d 1 (1941).

rule "much more broadly than required by the facts."[85] The court in *Albers*, in fact, expressly "assumed" that a private person in the position of the defendant county would *not* be liable.[86] That assumption, however, was based on findings of fact that denied the existence of any fault whatsoever, a normal prerequisite to private tort liability in all but certain exceptional situations.[87] It was not based on the premise—which is at the root of the "legal right" cases—that the defendant was legally *privileged* to inflict the particular injury. The court's conclusion in *Albers* thus represents an interpretation of the just compensation clause of the constitution as imposing a broader range of public responsibility than the law of private torts.

II. Scope of Inverse Liability in California

The foregoing discussion was intended to be merely a preliminary introduction to the basic doctrinal threads of inverse liability. The interweaving of these different theoretical strands into the finished tapestry that is inverse condemnation law is revealed only by a closer examination of the entire decisional pattern. For convenience, the cases in this section are grouped into four categories having similar factual characteristics. First, the water damage cases, probably the single most prolific source of inverse litigation, are examined. Second are cases dealing with physical disturbance of site stability by landslides, loss of lateral support, and like causes. The third group of cases involves the physical deprivation of advantageous conditions associated with land ownership, such as loss of water supply, annual accretions, or potability of water (i.e., water pollution). Finally, decisions relating to miscellaneous forms of temporary or "one-time" physical injury to property are reviewed.

A. Water Damage

A significant feature of the inverse condemnation decisions dealing with property damage caused by water—whether it be damage due to flooding, soaking, silting, erosion, or hydraulic force—is the tendency of the courts to rely upon the rules of private water law. Although the facts do not always lend themselves to this approach, inverse liability of public agencies is determined in the main by the peculiarities of private law rules governing interference with "sur-

[85] Albers v. Los Angeles County, 62 Cal. 2d 250, 260, 398 P.2d 129, 135, 42 Cal. Rptr. 89, 95 (1965).

[86] *Id.* at 262 n.3, 398 P.2d at 136 n.3, 42 Cal. Rptr. at 96 n.3.

[87] *See generally* W. Prosser, The Law of Torts 506-44 (3d ed. 1964). The court in *Albers* found it unnecessary to consider whether liability without fault could be supported by private law principles as applied to the facts before it.

face waters," "flood waters," and "stream waters."[88] This judicial disposition to blend the complex rules of water law with those governing inverse liability ordinarily is defended on the ground that public entities, in the management and control of their property, should not be subjected to different or more onerous rules of liability than private persons similarly situated.[89] A review of the cases, however, suggests that treating public agencies as if they were private individuals, for the purpose of applying rules of water law, often has proved unsatisfactory and confusing. In a number of situations, therefore, the courts have departed from the strict letter of the private rules where overriding policy reasons have been perceived for according special treatment to public agencies.

(1) *Surface Water*

Water that is "diffused over the surface of the land, or contained in depressions therein, and resulting from rain, snow, or which rises to the surface in springs" is classified as surface water.[90] Private liability for interference with surface water is governed by a wide range of diverse rules throughout the United States, each replete with its own variations.[91] The so-called common law or "common enemy" doctrine accepted by many states, under which each landowner is privileged to fend off surface waters as he sees fit, without regard to the consequences for his neighbors, generally has been rejected by California decisions.[92] Instead, the "civil law rule," which recognizes a servitude of natural drainage as between adjoining lands and postulates liability for interference therewith, has been the traditional California approach. This has been true not only in cases involving private litigants[93] but also in those dealing with public entities in inverse condemnation actions.[94] Under this rule, the duty of both upper

[88] *See generally* David, *Municipal Tort Liability in California (pt. 4)*, 7 S. CAL. L. REV. 295 (1934).

[89] Womar v. Long Beach, 45 Cal. App. 2d 648, 114 P.2d 704 (1941).

[90] Keys v. Romley, 64 Cal. 2d 396, 400, 412 P.2d 529, 531, 50 Cal. Rptr. 273, 275 (1966); *see* H. TIFFANY, REAL PROPERTY, 740 (3d ed. 1939); RESTATEMENT OF TORTS § 846 (1939).

[91] *See* Kinyon & McClure, *Interferences With Surface Waters*, 24 MINN. L. REV. 891 (1940).

[92] *See* Keys v. Romley, 64 Cal. 2d 396, 412 P.2d 529, 50 Cal. Rptr. 273 (1966). But see Lampe v. San Francisco, 124 Cal. 546, 57 P. 461 (1899).

[93] LeBrun v. Richards, 210 Cal. 308, 291 P. 825 (1930); Ogburn v. Connor, 46 Cal. 346 (1873).

[94] Archer v. Los Angeles, 19 Cal. 2d 19, 119 P.2d 1 (1941); Shaw v. Sebastopol, 159 Cal. 623, 115 P. 213 (1911) (dictum); Los Angeles Cemetery Ass'n v. Los Angeles, 103 Cal. 461, 37 P. 375 (1894) (dictum); Corcoran v. Benicia, 96 Cal. 1, 30 P. 798 (1892); Andrew Jergens Co. v. Los Angeles, 103 Cal. App. 2d 232, 229 P.2d 475 (1951).

and lower landowners is to leave the flow of surface water undisturbed.

In the recent important decision in *Keys v. Romley*,[95] the Supreme Court, after careful reconsideration of the competing rules and their supporting policies, reaffirmed California's acceptance of the civil law rule. This rule, the court observed, was consistent with the normal expectation that buyers should take land subject to the burdens of natural drainage. It also had the advantage of greater predictability than the common law rule, and correspondingly diminished the opportunity for litigation. On the other hand, a rigid application of the civil law rule might inhibit property development, since improvements frequently would cause a change in the drainage pattern and thus invite potential liability, especially in urban areas. The court concluded, therefore, that the application of the civil law rule must be governed by a test of reasonableness, judged in light of the circumstances of each case. "No party, whether an upper or a lower landowner, may act arbitrarily and unreasonably in his relations with other landowners and still be immunized from all liability."[96]

Under this modified civil law rule, the issue of reasonableness is "a question of fact to be determined in each case upon a consideration of all the relevant circumstances . . . ."[97] Factors to be taken into account include the extent of the damage, the foreseeability of the harm, the actor's purpose or motive, and the relative utility of the actor's conduct as compared with the gravity of the harm caused by the alteration of surface water flow. In this balancing of interests, said the court,

> [I]f the weight is on the side of him who alters the natural watercourse, then he has acted reasonably and without liability; if the harm to the lower landowner is unreasonably severe, then the economic costs incident to the expulsion of surface waters must be borne by the upper owner whose development caused the damage. If the facts should indicate both parties conducted themselves reasonably, then courts are bound by our well-settled civil law rule [and the upper landowner who changed the drainage pattern is liable for the resulting injuries].[98]

Although the *Keys* decision involved only private landowners, presumably it affects public entities as well, since inverse liability actions based on interference with surface waters generally have been resolved in the past by a relatively strict application of the civil law rule. Obstructing the flow of surface waters by a street improvement

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[95] 64 Cal. 2d 396, 412 P.2d 529, 50 Cal. Rptr. 273 (1966). *See also* Pagliotti v. Aquistapace, 64 Cal. 2d 873, 412 P.2d 536, 50 Cal. Rptr. 282 (1966).

[96] Keys v. Romley, 64 Cal. 2d 396, 409, 412 P.2d 529, 536, 50 Cal. Rptr. 273, 280 (1966).

[97] *Id.* at 410, 412 P.2d at 537, 50 Cal. Rptr. at 281.

[98] *Id.*

and thereby causing flooding of lands that otherwise would not have been injured has been held actionable on this rationale.[99] A public entity that gathered surface waters together and discharged them upon lower lands with increased volume or velocity by a drainage system which did not conform to the natural drainage pattern was likewise liable.[100] Similarly, public entities have been held not privileged to collect surface waters by the paving of streets and, without providing adequate drains, by conducting them to a low point where they are cast in unusual quantities upon private property that otherwise would not be flooded.[101] But if the gathered waters were discharged into a natural watercourse that was their normal means of drainage, lower owners injured because the channel was inadequate to handle the increased flow were held to have no recourse.[102]

The courts generally applied the civil law rule in a somewhat mechanical manner, apparently without weighing the competing interests identified as relevant to the new rule of reason. It is possible that different results might have been reached had the balancing process been used. For example, the construction of a drainage system by an upper improver that discharges surface waters upon adjoining property in a concentrated stream, where no other feasible alternative is available, may be reasonable and, if relatively slight harm results, noncompensable under the rule in *Keys v. Romley*.[103] Conversely, the gathering of surface waters into a system of impervious storm drains which follow natural drainage routes may result in greatly increased volume, velocity and concentration of water, and

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[99] Conniff v. San Francisco, 67 Cal. 45, 7 P. 41 (1885). *See also* Stanford v. San Francisco, 111 Cal. 198, 43 P. 605 (1896); Los Angeles Cemetery Ass'n v. Los Angeles, 103 Cal. 461, 37 P. 375 (1894) (dictum).

[100] Inns v. San Juan Unified School Dist., 222 Cal. App. 2d 174, 34 Cal. Rptr. 903 (1963); Callens v. Orange County, 129 Cal. App. 2d 255, 276 P.2d 886 (1954).

[101] Steiger v. San Diego, 163 Cal. App. 2d 110, 329 P.2d 94 (1958); Andrew Jergens Co. v. Los Angeles, 103 Cal. App. 2d 232, 229 P.2d 475 (1951); Farrell v. Ontario, 39 Cal. App. 351, 178 P. 740 (1919).

[102] Archer v. Los Angeles, 19 Cal. 2d 19, 119 P.2d 1 (1941). A mere swale that serves as a natural route for escaping surface waters, but which does not have fixed banks and channel bed, is not a watercourse under this rule. *See* Inns v. San Juan Unified School Dist., 222 Cal. App. 2d 174, 34 Cal. Rptr. 903 (1963); Steiger v. San Diego, 163 Cal. App. 2d 110, 329 P.2d 94 (1958).

[103] *See* Pagliotti v. Aquistapace, 64 Cal. 2d 873, 412 P.2d 538, 50 Cal. Rptr. 282 (1966), where the trial court's judgment enjoining the defendant from damming off the discharge of surface waters from the plaintiff's paved parking lot, where no other feasible means of disposal existed, was reversed for reconsideration under the modern "reasonableness" test. The dictum suggested that the same result may be found proper on remand after balancing the interests. Earlier cases on analogous facts have generally imposed liability. See notes 100-01 *supra*.

thus may constitute an unreasonable method for disposing of such water when weighed against the seriousness of the resulting harm to lower landowners whose property is damaged as a result.[104]

The inverse condemnation cases decided prior to *Keys* were not entirely consistent, however; some departed somewhat from the strict letter of the civil law rule. For example, a few decisions advanced the view that interferences with the flow of surface waters would not be a basis of inverse liability where the obstruction was erected in the exercise of the police power.[105] Other like decisions, reflecting judicial concern that the development of an adequate system of public streets and highways not be deterred,[106] tended to relieve public entities from liability when they blocked the ordinary discharge of

[104] *Compare* Archer v. Los Angeles, 19 Cal. 2d 19, 119 P.2d 1 (1941) *with* Inns v. San Juan Unified School Dist., 222 Cal. App. 2d 174, 34 Cal. Rptr. 903 (1963). *Inns* held that the district was inversely liable for the discharge of surface waters into a swale through a 28-inch concrete pipe. It was stated to the contrary in *Archer* that "[a] California landowner . . . may discharge [surface waters] *for a reasonable purpose* into the stream into which they naturally drain without incurring liability for damage to lower land caused by the increased flow of the stream". Archer v. Los Angeles, *supra* at 26-27, 119 P.2d at 6 (emphasis added). In other states, inverse liability has been imposed in similar fact situations without regard for fault. *See, e.g.*, Lucas v. Carney, 167 Ohio St. 416, 149 N.E.2d 236 (1958); Snyder v. Platte Valley Pub. Power & Irr. Dist., 144 Neb. 306, 13 N.W.2d 160 (1944).

[105] *See* O'Hara v. Los Angeles County Flood Control Dist., 19 Cal. 2d 61, 63-64, 119 P.2d 23, 24 (1941): "In the present case the plaintiffs would . . . have a cause of action against a private person who obstructed the flow of surface waters from their land [in the manner that has been alleged]. 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 . . . . The defendant therefore is under no obligation to compensate for the damage caused by the obstruction;" Callens v. Orange County, 129 Cal. App. 2d 255, 276 P.2d 886 (1954) (dictum) (same effect as *O'Hara*). As noted above, text accompanying notes 70-78 *supra*, the police power rationale has been modified substantially by decisions subsequent to *O'Hara*.

[106] *See, e.g.*, Lampe v. San Francisco, 124 Cal. 546, 57 P. 461, 1001 (1899). The question whether street improvements represent a sufficiently urgent public interest to justify inroads upon the constitutional guarantee of just compensation for "damage" to private property appears not to have been considered fully in any of the surface water decisions. *But see* Milhous v. Highway Dep't, 194 S.C. 33, 8 S.E.2d 852 (1940), where it was said that the constitutional property interest prevails without regard for private liability rules. This required a holding of state liability for obstructing surface waters notwithstanding the "common enemy" rule under which private obstruction would be nonactionable. Loss of direct access, however—an intangible detriment often far less damaging than flooding—is regarded as compensable when caused by street improvements. Bacich v. Board of Control, 23 Cal. 2d 343, 144 P.2d 818 (1943).

surface waters and caused flooding of private lands where such action was necessary for the grading and paving of streets.[107] These decisions seem to imply a judicial balancing of interests, similar to the process required by the *Keys* case, but with the results formulated in different terminology.[108] The label, "police power," for example, assimilates value judgments regarding the importance and social merit of the particular government conduct that would be appropriate under the *Keys* test.

It is thus possible to speculate that the *Keys* decision may not fully have impaired the authority of all the earlier surface water decisions; but such conjecture is a flimsy basis for prediction. It is probable, however, that future cases in this area will be resolved by a balancing of interests rather than by the mechanical application of arbitrary rules. The principal uncertainties appear to revolve around the degree of weight that will be assigned by the courts to the public interest objectives behind governmental improvement projects, and the extent to which a review of the reasonableness of the governmental plan or design that exposed the owner's land to the risk of surface water damage will be undertaken by these courts.[109]

[107] Corcoran v. Benicia, 96 Cal. 1, 30 P. 798 (1892); Dick v. Los Angeles, 34 Cal. App. 724, 168 P. 703 (1917) (dictum). *See also* Womar v. Long Beach, 45 Cal. App. 2d 643, 114 P.2d 704 (1941) (*semble*). Surface waters flowing in a natural or artificial channel, however, cannot be obstructed with impunity where the result is to cast them upon lands which normally would not have received them. Newman v. Alhambra, 179 Cal. 42, 175 P. 414 (1918); Larrabee v. Cloverdale, 131 Cal. 96, 63 P. 143 (1900); Conniff v. San Francisco, 67 Cal. 45, 7 P. 41 (1885); Weisshand v. Petaluma, 37 Cal. App. 296, 174 P. 955 (1918).

[108] The opinion in O'Hara v. Los Angeles County Flood Control Dist., 19 Cal. 2d 61, 119 P.2d 23 (1941), for example, intimates that construction of public improvements along a stream "for purposes of flood control is . . . essential to the public health and safety" and for that reason outweighs the private property interest at stake. *Id.* at 63, 119 P.2d at 24. Corcoran v. Benicia, 96 Cal. 1, 30 P. 798 (1892), suggests that the interest of a landowner in property below official street grade is subordinate to the public interest in grading and paving at grade, since any temporary injury due to impounding of surface waters may be alleviated by bringing the adjoining property up to grade. *Id.* at 4, 30 P. at 798. *See* Dick v. Los Angeles, 34 Cal. App. 724, 168 P. 703 (1917) (to the same effect as *Corcoran*). *See also* Stanford v. San Francisco, 111 Cal. 198, 43 P. 605 (1896), where inverse liability was affirmed for injury due to the flooding of property above the street grade as a result of street improvements. *Corcoran* was distinguished as a case where the owner of the property assumed the risk of flooding by building below the grade.

[109] *See* Keys v. Romley, 64 Cal. 2d 396, 412 P.2d 529, 50 Cal. Rptr. 273 (1968); text accompanying note 95 *supra*. The modified civil law rule adopted in *Keys* has been treated as applicable to inverse condemnation actions based on alleged damage from interference with surface waters. Burrows v. State, 260 A.C.A. 29, 66 Cal. Rptr. 868 (1968) (holding, under *Keys*, that burden of pleading and proving that plaintiff lower owner unreasonably failed to take

(2) *Flood Water*

"It is well established," said Justice Traynor, "that the flood waters of a natural watercourse are a common enemy against which the owner of land subject to overflow by those waters may protect his land by the erection of defensive barriers, and that he is not liable for damage caused to lower and adjoining lands by the exclusion of the flood waters from his own property, even though the damage to other lands is increased thereby."[110] Governmental entities acting for landowners in a particular area likewise may provide flood protection against the common enemy without incurring inverse liability for resulting damages.[111] For the purpose of applying this rule, flood waters are deemed the extraordinary overflow of rivers and streams.[112] Although the term normally refers to waters overflowing the natural banks of a river, artificial banks or levees maintained over a substantial period of time are treated as natural banks where a community of property owners, in reliance upon their continued existence, has conformed thereto in its land-use activities and in the construction of improvements.[113]

The "common enemy" rule reflects judicial apprehension that property development would be stifled unless an individualistic view were taken by the law. "Not to permit an upper landowner to protect his land against the stream would be in many instances to destroy the possibility of making the land available for improvement or settlement and condemn it to sterility and vacancy."[114] The rule, taken literally, contemplates that each landowner has a reciprocal right to protect his own land without regard for the consequences which his acts may visit upon others. However, no landowner may permanently stereo-

precautions to avoid or reduce injury is upon the defendant state as upper owner).

[110] Clement v. Reclamation Bd., 35 Cal. 2d 628, 635-36, 220 P.2d 897, 901-02 (1950).

[111] *Id.* *See also* San Gabriel Valley Country Club v. Los Angeles County, 182 Cal. 392, 188 P. 554 (1920); Lamb v. Reclamation Dist. No. 108, 73 Cal. 125, 14 P. 625 (1887). The common enemy rule, first announced in California in *Lamb*, was originally developed in English cases. *E.g.*, The King v. Commissioners, 8 B. & C. 355, 108 Eng. Rep. 1075 (K.B. 1828) (construction of groins by sewer commissioners to prevent erosion from ocean held privileged as protective measure against the "common enemy").

[112] H. TIFFANY, REAL PROPERTY § 740 (3d ed. 1939).

[113] Clement v. Reclamation Bd., 35 Cal. 2d 628, 220 P.2d 897 (1950); Beckley v. Reclamation Bd., 205 Cal. App. 2d 734, 23 Cal. Rptr. 428 (1962); Weck v. Los Angeles County Flood Control Dist., 80 Cal. App. 2d 182, 181 P.2d 935 (1947). *See also* Natural Soda Prods. Co. v. Los Angeles, 23 Cal. 2d 193, 143 P.2d 12 (1943); 1 S. WIEL, WATER RIGHTS IN THE WESTERN STATES § 60, at 59 (3d ed. 1911).

[114] San Gabriel Valley Country Club v. Los Angeles County, 182 Cal. 392, 401, 188 P. 554, 558 (1920).

type the condition of the river by erecting flood barriers adequate for the moment, and later seek to prevent others from putting up levees of their own that raise the water level and make the former works insufficient.[115] In addition, an important corollary of the rule recognizes that no liability is incurred merely because flood control improvements do not provide protection to all property owners.[116] Nor does the state, in undertaking to control floods, become an insurer of those lands which are given protection,[117] as there are practical limits to the degree of protection that can be provided.[118] In effect, the law recognizes that some degree of flood protection is better than none.

The "common enemy" rule, however, is not applied as an unlimited rule of privileged self-help. Mindful of the enormous damage-producing potential of defective public flood control projects, the courts have insisted that public agencies must act reasonably in the development of construction and operational plans so as to avoid unnecessary damage to private property.[119] Reasonableness, in this context, is not entirely a matter of negligence, but represents a balancing of public need against the gravity of private harm.[120] In an imminent emergency, for example, a reduction in stream level by the deliberate flooding of unimproved private lands in order to prevent substantial and widespread destruction of the entire community by otherwise uncontrolled flood waters may be regarded as a reasonable, and thus noncompensable, exercise of the police power.[121] But a per-

[115] Jackson v. United States, 230 U.S. 1 (1913), *cited with approval in* Gray v. Reclamation Dist. No. 1500, 174 Cal. 622, 163 P. 1024 (1917).

[116] Weck v. Los Angeles County Flood Control Dist., 80 Cal. App. 2d 182, 181 P.2d 935 (1947); Janssen v. Los Angeles County, 50 Cal. App. 2d 45, 123 P.2d 122 (1942); *cf.* United States v. Sponenbarger, 308 U.S. 256 (1939).

[117] Youngblood v. Los Angeles County Flood Control Dist., 56 Cal. 2d 603, 364 P.2d 840, 15 Cal. Rptr. 904 (1961).

[118] Los Angeles Cemetery Ass'n v. Los Angeles, 103 Cal. 461, 37 P. 375 (1894) (no liability for damage resulting from inadequacy of culvert to drain waters from extraordinary and unforeseeable flood).

[119] House v. Los Angeles County Flood Control Dist., 25 Cal. 2d 384, 153 P.2d 950 (1944). The rule as to private owners is similar. *See, e.g.*, Weinberg Co. v. Bixby, 185 Cal. 87, 97, 196 P. 25, 30 (1921): "If the defendants merely fend the intruding [flood] waters from their own premises in a *reasonable and prudent manner*, they cannot be held responsible for the action of the stream in depositing more silt and debris either in the channel or on adjacent lands below than would have been done had it been permitted to spread over defendants' lands." (Emphasis added).

[120] Beckley v. Reclamation Bd., 205 Cal. App. 2d 734, 23 Cal. Rptr. 428 (1962); *cf.* United States v. Sponenbarger, 308 U.S. 256 (1939); Keys v. Romley, 64 Cal. 2d 396, 412 P.2d 529, 50 Cal. Rptr. 273 (1966).

[121] *See* Rose v. State, 19 Cal. 2d 713, 730, 123 P.2d 505, 515 (1942) (dictum); *cf.* Van Alstyne, *Statutory Modification of Inverse Condemnation: Deliberately Inflicted Injury or Destruction*, 20 STAN. L. REV. 617, 619-23 (1968) ("denial destruction" to prevent conflagration).

manent 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 exceeds "the humane limits of the police power" and constitutes a compensable taking of an easement for flowage.[122] The "common enemy" rule likewise does not permit a public entity to establish a system of improvements designed to divert both actual flood waters and natural stream waters out of their natural channel upon property that otherwise would not have been inundated.[123] It is settled also that flood control improvements which are designed in accordance with a negligently conceived plan and which cause damage to private property while functioning as so conceived are a basis of inverse liability even though their object is to control the "common enemy," flood waters.[124]

The noticeable judicial tendency to reject an unqualified application of the "common enemy" rule may be attributed, in part, to the difficulty of making a sharp factual distinction between flood waters and other waters. For example, when a watercourse which has been improved by flood control measures overflows, it is not always an easy matter to decide whether the flooding resulted from legally privileged efforts to repel the "common enemy" or from an unprivileged diversion of natural stream water.[125] Another illustration of this difficulty is the well-known case of *Archer v. City of Los Angeles*,[126] in which the prevailing opinion explicitly predicates denial of liability for downstrewam flooding upon the privilege of upstream owners to deposit gathered surface waters into natural watercourses. Later decisions, however, have explained *Archer* as a case of non-liability un-

[122] Beckley v. Reclamation Bd., 205 Cal. App. 2d 734, 752, 23 Cal. Rptr. 428, 440 (1962).

[123] Clement v. Reclamation Bd., 35 Cal. 2d 628, 220 P.2d 897 (1950).

[124] Youngblood v. Los Angeles County Flood Control Dist., 56 Cal. 2d 603, 364 P.2d 840, 15 Cal. Rptr. 904 (1961) (dictum); Bauer v. Ventura County, 45 Cal. 2d 276, 289 P.2d 1 (1955); House v. Los Angeles County Flood Control Dist., 25 Cal. 2d 384, 153 P.2d 950 (1944); Granone v. Los Angeles County, 231 Cal. App. 2d 629, 42 Cal. Rptr. 34 (1965); Weck v. Los Angeles County Flood Control Dist., 80 Cal. App. 2d 182, 181 P.2d 935 (1947) (dictum). Although inverse liability can be based upon a negligently conceived plan of maintenance or operation of a public improvement, Bauer v. Ventura County, *supra*, ordinary negligence in the course of routine operations will support only a possible tort recovery. *See* Kambish v. Santa Clara Valley Water Conser. Dist., 185 Cal. App. 2d 107, 8 Cal. Rptr. 215 (1960); Hayashi v. Alameda County Flood Control & Water Conser. Dist., 167 Cal. App. 2d 584, 334 P.2d 1048 (1959); Smith v. East Bay Mun. Util. Dist., 122 Cal. App. 2d 613, 265 P.2d 610 (1954).

[125] *Compare* Clement v. Reclamation Bd., 35 Cal. 2d 628, 648-51, 220 P.2d 897, 909-11 (1950) (Carter, J.) (dissenting opinion) with San Gabriel Valley Country Club v. Los Angeles County, 182 Cal. 392, 188 P. 554 (1920). *See also* House v. Los Angeles County Flood Control Dist., 25 Cal. 2d 384, 397, 153 P.2d 950, 957 (1944) (Traynor, J.) (concurring opinion).

[126] 19 Cal. 2d 19, 119 P.2d 1 (1941).

der the "common enemy" rule governing flood waters.[127] But, apart from difficulties of classification, the trend also appears to represent a judicial conviction that the "common enemy" rule, unmodified by a test of reasonable conduct, would be an unacceptable basis for arbitrary disruption of rationally grounded expectations of private property owners. The courts have recognized that the magnitude of governmental projects often far exceeds the scope of flood protection works reasonably to be anticipated at the hands of neighboring private landowners.[128] A strict and literal assertion of the rule, therefore, if applied to government flood control projects, could well be disastrous to private interests. Accordingly, it has been said, "No court has ever so abused the 'common enemy' doctrine as to constitute it the common enemy of the riparian owner."[129] Finally, the modern approach appears to accept the fact that a rational ordering of duties and liabilities with respect to flood waters is better achieved by the balancing of interests represented in the varying circumstances of individual cases than by a more rigid and inflexible application of narrowly defined property rights.[130]

(3) *Stream Water*

The prevalence of natural watercourses[131] makes it inevitable that public improvements will affect the flow of stream waters in a variety of circumstances, causing flooding and erosion to private property. While early cases intimated that such consequences did not amount to a constitutional "taking,"[132] it is now accepted that injuries

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[127] *Compare* Archer v. Los Angeles, 19 Cal. 2d 19, 28, 119 P.2d 1, 6 (1941) ("evidence . . . shows clearly that the storm drains constructed by defendants either followed the channel of natural streams . . . or discharged into the creek surface waters which would naturally drain into it") *with* Clement v. Reclamation Bd., 35 Cal. 2d 628, 642, 220 P.2d 897, 905 (1950) ("applicability of common enemy doctrine is set forth in Archer") *and* Beckley v. Reclamation Bd., 205 Cal. App. 2d 734, 747, 23 Cal. Rptr. 428, 437 (1962) ("[i]n . . . Archer . . . no one was preventing plaintiff . . . from protecting his lands from floods [under the common enemy doctrine]").

[128] *See* Beckley v. Reclamation Bd., 205 Cal. App. 2d 734, 751-52, 23 Cal. Rptr. 428, 439-40 (1962).

[129] *Id.*

[130] *See* Comment, *California Flood Control Projects and the Common Enemy Doctrine*, 3 STAN. L. REV. 361, 364-66 (1951); *cf.* Keys v. Romley, 64 Cal. 2d 396, 412 P.2d 529, 50 Cal. Rptr. 273 (1966).

[131] "[B]y a watercourse is not meant the gathering of errant water while passing through a low depression, swale, or gully, but a stream in the real sense, with a definite channel with bed and banks, within which it flows at those times when the streams of the region habitually flow." Horton v. Goodenough, 184 Cal. 451, 453, 194 P. 34, 35 (1920); *see* Inns v. San Juan Unified School Dist., 222 Cal. App. 2d 174, 34 Cal. Rptr. 903 (1963) (swale through which surface water normally drained held not a watercourse).

[132] *See* Green v. Swift, 47 Cal. 536 (1874).

of this kind, where shown to have been caused by public improvements,[123] can amount to a "damaging" for which just compensation must be paid.[124] The decisions appear to distinguish between: (a) governmental improvements that designedly divert stream waters onto private lands; (b) improvements that obstruct the stream and thus result in overflow and flooding of private lands; and (c) improvements that merely change the force of direction of the current with resulting erosion of channel banks.

As a general rule, "when waters are diverted by a public improvement from a natural watercourse onto adjoining lands the [public] agency is liable for the damage 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."[125] In such cases, the private property "is as much taken or damaged for a public use for which compensation must be paid as if it were condemned for the construction of a highway or school."[126] Permanently established artificial watercourses are treated like natural ones under this rule, whereby substantial reliance interests have been generated with the passage of time.[127]

Judicial acceptance of inverse liability without fault in diversion cases appears to reflect the strength of the interests of property owners who have acquired and developed land in justifiable reliance upon the continuance of existing watercourses as means of natural drainage.[128] The risk of damage from disturbance of the established stream

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[123] Causation often presents difficult problems of proof. *See, e.g.*, Youngblood v. Los Angeles County Flood Control Dist., 56 Cal. 2d 603, 364 P.2d 840, 15 Cal. Rptr. 904 (1961); Stone v. Los Angeles County Flood Control Dist., 81 Cal. App. 2d 902, 185 P.2d 396 (1947).

[124] *See* Beckley v. Reclamation Bd., 205 Cal. App. 2d 734, 23 Cal. Rptr. 428 (1962) (review of most of the important California decisions).

[125] Youngblood v. Los Angeles County Flood Control Dist., 56 Cal. 2d 603, 607, 364 P.2d 840, 841, 15 Cal. Rptr. 904, 905 (1961) (dictum); Pacific Seaside Home for Children v. Newbert Protection Dist., 190 Cal. 544, 213 P. 967 (1923); Elliott v. Los Angeles County, 183 Cal. 472, 191 P. 899 (1920). *See also* Ghiozzi v. South San Francisco, 72 Cal. App. 2d 472, 164 P.2d 902 (1946) (dictum).

[126] Clement v. Reclamation Bd., 35 Cal. 2d 628, 637, 220 P.2d 897, 903 (1950). Cases in other states are generally in accord. *See, e.g.*, Lage v. Pottawattamie County, 232 Iowa 944, 5 N.W.2d 161 (1942); Armbruster v. Stanton-Pilger Drainage Dist., 169 Neb. 594, 100 N.W.2d 781 (1960). *See also* Smith v. Los Angeles, 66 Cal. App. 2d 562, 153 P.2d 69 (1944).

[127] Clement v. Reclamation Bd., 35 Cal. 2d 628, 638, 220 P.2d 897, 903 (1950), in which it was held that the state may not "without liability tear out a man-made flood protection that has existed for sixty-two years to the lands of plaintiff upon which substantial sums have been expended in reliance upon the continuance of the protection."

[128] *See* Beckley v. Reclamation Bd., 205 Cal. App. 2d 734, 751-52, 23 Cal. Rptr. 428, 439-40 (1962).

pattern is regarded as one that cannot be shifted with impunity to the property owner, even under a claim of exercise of the police power,[139] merely to promote the community welfare. The detrimental impact of the contrary rule in discouraging private property owners from making improvements apparently is regarded as too onerous to permit a withholding of just compensation. Analysis and weighing of the respective interests in the light of the particular facts before the court, however, is not characteristic of these decisions; the rule of liability for diverting stream waters is generally applied in a strictly formal fashion.[140]

Obstructing a natural or artificial[141] watercourse by the construction of a public improvement, on the other hand, ordinarily has been regarded as a basis of inverse liability only when some form of fault is established.[142] For example, the construction of a dam designed to store water which will foreseeably flood certain lands not directly condemned by the constructing agency constitutes a deliberate taking of those lands thereby inundated,[143] as well as of downstream water

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[139] This assumes, of course, that no state of emergency existed. As the court stated in Smith v. Los Angeles, 66 Cal. App. 2d 562, 578, 153 P.2d 69, 78 (1944): "[S]imply because the district constructed the dikes in question for the purpose of flood control does not make it immune from liability for damage inflicted thereby upon the plaintiff. There was here no emergency requiring split-second action." If there had been such an emergency, the result would probably have been different. See text accompanying notes 72-78 *supra*.

[140] *See, e.g.*, Rudel v. Los Angeles County, 118 Cal. 281, 50 P. 400 (1897); Guerkink v. Petaluma, 112 Cal. 306, 44 P. 570 (1896). In litigation growing out of the great Feather River flood of December 1955, the state was adjudged liable upon the basis of ambiguous findings of fact that a levee on the west side of the Feather River, in the planning and design of which the state had "participated," had "caused waters of the Feather River to be diverted onto Plaintiffs' property east of the Feather River and thus caused harm to Plaintiffs' property." Pedrozo v. State, No. 41265, Findings of Fact and Conclusions of Law ¶ 4 (Butte County Super. Ct., Cal., Jan. 30, 1967).

[141] Artificial and natural watercourses are treated alike in the obstruction cases, apparently without regard for the length of existence of the artificial channel. *See, e.g.*, Newman v. Alhambra, 179 Cal. 42, 175 P. 414 (1918); Larrabee v. Cloverdale, 131 Cal. 96, 63 P. 143 (1900); *cf.* Bauer v. Ventura County, 45 Cal. 2d 276, 289 P.2d 1 (1955). *See also* notes 113 & 137 *supra*.

[142] *See, e.g.*, Youngblood v. Los Angeles County Flood Control Dist., 56 Cal. 2d 603, 364 P.2d 840, 15 Cal. Rptr. 603 (1961) (dictum recognized liability without fault for diversion of stream waters, but intimated that in other cases, including obstructions of watercourses, 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).

[143] United States v. Kansas City Life Ins. Co., 339 U.S. 799 (1950); United States v. Dickinson, 331 U.S. 745 (1947); Jacobs v. United States, 290 U.S. 13 (1933); Cotton Land Co. v. United States, 75 F. Supp. 232 (Ct. Cl. 1948); Brazos River Auth. v. Graham, 163 Tex. 167, 354 S.W.2d 99 (1961).

rights that are destroyed,[144] and is, therefore, a basis for inverse liability. The "fault" involved in this type of situation arises from the fact that the agency knew, or should have known, that these lands and interests would be taken, and yet had failed to provide compensation for these foreseeable "takings" through direct condemnation proceedings before the construction. Likewise, the construction, maintenance, or operation of drainage improvements according to a negligently conceived plan, which exposes private property to a substantial risk of damage by interfering with the flow of water therein, is actionable.[145] Again, the building of a street embankment across a known watercourse without providing culverts or other means of drainage, so that foreseeable back-up flooding occurs, requires payment of compensation.[146] Even if culverts are provided, inverse liability obtains if their design characteristics, contrary to sound engineering standards, are insufficient to allow the drainage of reasonably predictable volumes of water flowing in the stream from time to time.[147] Mere routine negligence in maintenance, however, such as the negligent failure to clear debris from an improved flood control channel, where the accumulation of such debris is not part of a deliberately conceived program for controlling the flow of storm waters, is not a basis of inverse liability, although it may support liability on a tort theory.[148]

The necessity for the pleading and proof of fault in the obstruction cases, while no fault is required for liability in the diversion cases, has caused a certain amount of confusion in the California case law. It is obvious that many kinds of stream obstructions may cause a

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[144] Dugan v. Rank, 372 U.S. 609 (1963); United States v. Gerlach Live Stock Co., 339 U.S. 725 (1950). *But see* Joslin v. Marin Mun. Water Dist., 67 Cal. 2d 132, 429 P.2d 889, 60 Cal. Rptr. 377 (1967).

[145] Bauer v. Ventura County, 45 Cal. 2d 276, 289 P.2d 1 (1955), in which a negligent plan for the maintenance of a drainage ditch which contemplated deposit and non-removal of stumps, debris, and intersecting pipe which obstructed the flow of water, was held actionable on the inverse theory. *See* Baum v. Scotts Bluff County, 169 Neb. 816, 101 N.W.2d 455 (1960) (to the same effect as *Bauer*).

[146] Larrabee v. Cloverdale, 131 Cal. 96, 63 P. 143 (1900); Richardson v. Eureka, 96 Cal. 443, 31 P. 458 (1892); Jefferis v. Monterey Park, 14 Cal. App. 2d 113, 57 P.2d 1374 (1936); White v. Santa Monica, 114 Cal. App. 330, 299 P. 819 (1931). Cases in other states are generally in agreement. *See, e.g.*, Renninger v. State, 70 Idaho 170, 213 P.2d 911 (1950).

[147] Grahone v. Los Angeles County, 231 Cal. App. 2d 629, 42 Cal. Rptr. 34 (1965); Weisshand v. Petaluma, 37 Cal. App. 296, 174 P. 955 (1918).

[148] *Compare* Hayashi v. Alameda County Flood Control & Water Conser. Dist., 167 Cal. App. 2d 584, 334 P.2d 1048 (1959) (tort, but not inverse liability, for routine negligence in failing to clear debris) *with* Bauer v. Ventura County, 45 Cal. 2d 276, 289 P.2d 1 (1955) (inverse liability obtained for defective plan which includes retention of debris).

diversion of stream waters, and, conversely, diversion normally requires an obstruction of some kind. Whether fault must be shown by the injured property owner thus depends, to some extent, upon how the facts are classified. A deliberate program intended to alter the course of a stream for a public purpose is ordinarily treated under the "diversion" rubric, while unintended flooding is usually attributed to a negligently planned project that creates an "obstruction."[149] The distinction, however, is not a sharply defined one, and plaintiffs have sometimes sought recovery alternatively on both theories while pleading the same facts.[150]

Regardless of the factual approach employed, inverse liability for interference with stream waters depends upon a showing of proximate causation. In the principal litigation against the State arising out of the virtual destruction of the town of Klamath in the great flood of December, 1964, for example, the trial court denied liability on the alternative grounds that any obstruction to the flow of water allegedly created by either an old bridge, or a partially completed new bridge, located near the townsite "did not constitute a substantial factor" in causing plaintiffs' damages,[151] and that in any event the damage was caused by the intervention of a superseding force consisting of an extraordinary and unprecedented storm.[152]

A third group of cases dealing with stream waters concerns the downstream consequences of natural channel improvement. For example, the narrowing and deepening of a natural watercourse and the construction of a concrete stream bed may increase greatly the total volume, velocity and concentration of water running in the channel by preventing absorption of stream waters and eliminating natural impediments to stream flow. This, in turn, would create a substantial risk of downstream damage due to overflow or intensified erosion of the stream banks. For policy reasons, centered upon the fear of discouraging upstream land development, this kind of channel improvement (at least insofar as downstream damage results from an increased volume of water) is not regarded as an actionable basis for inverse liability[153] unless it is constructed according to an in-

[149] *See* Beckley v. Reclamation Bd., 205 Cal. App. 2d 734, 23 Cal. Rptr. 428 (1962) (both theories held available under facts).

[150] *Id. See also* Granone v. Los Angeles County, 231 Cal. App. 2d 629, 42 Cal. Rptr. 34 (1965); Pedrozo v. State, No. 41265 (Butte County Super. Ct., Cal., Jan. 30, 1967) (ambiguous findings).

[151] Crivelli v. State, No. 9142, Findings of Fact and Conclusions of Law ¶ 2 (Del Norte County Super. Ct., Cal., Aug. 4, 1966).

[152] *Id.* ¶ 5. Public improvement design standards are not required to provide adequate capacity or strength for storms of unforeseeable magnitude. Los Angeles Cemetery Ass'n v. Los Angeles, 103 Cal. 461, 37 P. 375 (1894); see notes 33-35 *supra*.

[153] *See* Archer v. Los Angeles, 19 Cal. 2d 19, 27, 119 P.2d 1, 6 (1941); San

herently defective or negligently conceived plan.[154] Here again, however, classification of the facts plays a significant role. If the improvements are regarded as causing an alteration in the direction of force of the normal current within the channel, they may readily be thought of as having "diverted" the stream. This approach supports a holding of inverse liability without fault for resulting downstream erosion of the banks.[155] By describing the channel improvements as measures to fight off the common enemy of flood waters, however, attention is focused upon the issue of fault and the alleged defective nature of the improvement plan.[156] The result is to make liability *vel non* turn ostensibly upon the unarticulated premises that control the classification process, rather than upon a conscientious appraisal of the relativity of public advantage and private *harm* in the particular factual situation.

(4) *Other Escaping Water Cases*

The prevailing ambivalent approach, under which some water damage situations are exposed to a "liability without fault" rationale, while others require a showing of intentional or negligent fault, is observable also in cases that do not fit neatly into the foregoing categories. Damage resulting from the overflow of sewers, for example, is recoverable in inverse condemnation if the plaintiff establishes that the sewers were deliberately or negligently designed so as

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Gabriel Valley Country Club v. Los Angeles County, 182 Cal. 392, 188 P. 564 (1920). Although dictum in *San Gabriel Valley Country Club* suggests that nonliability attends an increase in both volume and velocity of downstream flow, the actual holding in both this case and in *Archer* is limited to damage resulting from increased volume only. This result may thus be consistent with the "common enemy" rule, under which individual efforts to stave off flood waters *may* increase downstream volume without incurring liability. The potential erosive effect of increased velocity, however, creates a hazard of greater destructive impact and possibly permanent devastation. Neither decision, it is submitted, should necessarily be taken as authoritative in the latter type of case.

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

[155] *See, e.g.*, Tyler v. Tehama County, 109 Cal. 618, 42 P. 240 (1895) (diversion of current by bridge abutment resulting in downstream erosion); *cf.* Green v. Swift, 47 Cal. 536 (1874) (not a "taking" under pre-1879 constitution). Cases in other states generally sustain inverse liability without fault in such cases. *See, e.g.*, Dickinson v. Minden, 130 So. 2d 160 (La. 1961); Tomasek v. State, 196 Ore. 120, 248 P.2d 703 (1952); Morrison v. Clackamas County, 141 Ore. 564, 18 P.2d 814 (1933); Conger v. Pierce County, 116 Wash. 27, 198 P. 377 (1921).

[156] Granone v. Los Angeles County, 231 Cal. App. 2d 629, 42 Cal. Rptr. 34 (1965); Beckley v. Reclamation Bd., 205 Cal. App. 2d 734, 23 Cal. Rptr. 428 (1962).

to be inadequate to accommodate the volume of sewage and storm waters reasonably foreseeable in their service area.[157] The element of fault as the basis of liability, however, is underscored by a corollary rule: inadequacy due to an unprecedented volume of water that could not reasonably be anticipated in the planning process constitutes no basis for inverse liability.[158]

On the other hand, there are also many decisions that flatly approve inverse liability for property damage caused by the seepage of water from irrigation canals, "with or without negligence."[159] The leading case to this effect involves a ruling of the District Court of Appeal that inverse liability for water seepage may be predicated upon a showing of negligent construction or maintenance by an irrigation district. On denying the district's petition for hearing, the Supreme Court, in a unanimous opinion, expressly disapproved the court's intimations as to the necessity of negligence.[160] Where the damage is "caused directly" by seepage from the district's canal, inverse liability obtains without any showing of fault: "In such cases the care that may be taken in the construction of the public improvement which causes the damage is wholly immaterial to the right of the plaintiff to recover damage, if the improvement causes it."[161] The sudden escape of water from a public entity's irrigation canal, however, has been held actionable only upon allegations and proof of defective design or operational plan.[162]

Under the cases, then, inverse liability for water that escapes from irrigation channels or other conduits is based sometimes on fault and obtains sometimes without fault; the choice of rule appears to be a function of classification of the facts, rather than the application of a consistent theoretical rationale. Liability without fault in these situa-

[157] Ambrosini v. Alisal Sanitary Dist., 154 Cal. App. 2d 720, 317 P.2d 33 (1957) (alternative ground). *See also* Mulloy v. Sharp Park Sanitary Dist., 164 Cal. App. 2d 438, 330 P.2d 441 (1958) (*semble*).

[158] *See* Southern Pac. Co. v. Los Angeles, 5 Cal. 2d 545, 55 P.2d 847 (1936) (break in aquaduct—rule recognized but held inapplicable on facts). *See also* notes 33-35 *supra*.

[159] Powers Farms v. Consolidated Irr. Dist., 19 Cal. 2d 123, 126, 119 P.2d 717, 720 (1941) (dictum); Lourence v. West Side Irr. Dist., 233 Cal. App. 2d 582, 43 Cal. Rptr. 889 (1965); Hume v. Fresno Irr. Dist., 21 Cal. App. 2d 348, 69 P.2d 483 (1937); Ketcham v. Modesto Irr. Dist., 135 Cal. App. 180, 26 P.2d 876 (1933).

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

[161] *Id.* This statement is quoted approvingly in the recent case of Albers v. Los Angeles County, 62 Cal. 2d 250, 258, 398 P.2d 129, 133, 42 Cal. Rptr. 89, 93 (1965).

[162] Curci v. Palo Verde Irr. Dist., 69 Cal. App. 2d 583, 159 P.2d 674 (1945). *See also* Southern Pac. Co. v. Los Angeles, 5 Cal. 2d 545, 55 P.2d 847 (1936) (break in aquaduct caused by storm which was foreseeable).

tions appears in theory to be an application of the doctrine announced in the famous English case of *Rylands v. Fletcher*,[163] under which a landowner is strictly liable without fault for damage done to the property of others by the escape of substances with a mischief-producing capacity, such as water, collected and impounded upon his land for some "non-natural" purpose.[164] The theory, however, has little support in California decisional law, for the California courts appear to have rejected the *Rylands* doctrine as applied to escaping waters.[165] The use of water for irrigation purposes in a semi-arid state such as California, it is said, is not only a "natural" use of land but is useful and beneficial to a degree that should not be deterred by threat of strict liability.[166] Yet, as noted above, the same courts have displayed no reluctance in approving inverse liability for irrigation water seepage without regard for negligence,[167] and also, upon similar facts, regularly have imposed tort liability without fault on a nuisance theory.[168]

This seeming inconsistency of approach may possibly be reconcilable. An irrigation ditch built and maintained in a careful manner may, nonetheless, necessarily be located where natural conditions (*e.g.*, porous subsoil) make percolation or seepage a predictable risk

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[163] L.R. 3 H.L. 330 (1868); *see* Bohlen, *The Rule in Rylands v. Fletcher*, 59 U. PA. L. REV. 298, 373, 423 (1911).

[164] Water seepage problems have been regarded as within the *Rylands* doctrine in certain jurisdictions. *See, e.g.*, Union Pac. R.R. v. Vale Irr. Dist., 253 F. Supp. 251 (D. Ore. 1966).

[165] Guy F. Atkinson Co. v. Merritt, Chapman & Scott Corp., 123 F. Supp. 720 (N.D. Cal. 1954) (collapse of cofferdams); Clark v. DiPrima, 241 Cal. App. 2d 823, 51 Cal. Rptr. 49 (1966) (water escaping from break in irrigation ditch); Curci v. Palo Verde Irr. Dist., 69 Cal. App. 2d 583, 159 P.2d 674 (1945) (sudden escape of water from irrigation ditch). The *Rylands* doctrine has been denied application to a case of water escaping from a private reservoir. Sutliff v. Sweetwater Water Co., 182 Cal. 34, 186 P. 766 (1920). *But see* Rozewski v. Simpson, 9 Cal. 2d 515, 71 P.2d 72 (1937), suggesting that the application of *Rylands* to some kinds of escaping water cases may be an open question. Liability without fault has been accepted in California decisions dealing with certain types of ultrahazardous activities. *See, e.g.*, Luthringer v. Moore, 31 Cal. 2d 489, 190 P.2d 1 (1948); Comment, *Absolute Liability for Ultrahazardous Activities: An Appraisal of the Restatement Doctrine*, 37 CALIF. L. REV. 269 (1949).

[166] *See* Clark v. DiPrima, 241 Cal. App. 2d 823, 51 Cal. Rptr. 49 (1966).

[167] See cases cited note 159 *supra*.

[168] *See, e.g.*, Fredericks v. Fredericks, 108 Cal. App. 2d 242, 238 P.2d 643 (1951); Nelson v. Robinson, 47 Cal. App. 2d 520, 118 P.2d 350 (1941); Kall v. Carruthers, 59 Cal. App. 555, 211 P. 43 (1922); *cf.* Nola v. Orlando, 119 Cal. App. 518, 6 P.2d 984 (1932). Nuisance liability is a long-recognized exception to the doctrine of governmental tort immunity in California. *E.g.*, Ambrosini v. Alisal Sanitary Dist., 154 Cal. App. 2d 720, 317 P.2d 333 (1957). It evolved principally from decisions grounded on inverse condemnation. Van Alstyne,

of the improvement.[169] Proof of fault may then be regarded as immaterial from either an inverse liability or a nuisance law viewpoint, because the existence of damage caused by the irrigation improvement supports an inference, as a matter of law, that the defendant either deliberately exposed the plaintiff to the risk of foreseeable harm or negligently adopted a defective plan of improvement that incorporated that risk.[170] Moreover, statutory policy supports the view that seepage damage should be treated as a cost of the water project.[171] On the other hand, when the escaping water is not attributable to some inherent risk of the project as planned, but results from an unexpected deficiency in its practical operation, a specific factual showing of fault may be necessary because the basis for the legal inference is no longer present.[172]

B. Interference With Land Stability

As in water damage cases, the judicial process has had little success in bringing order and consistency to the law of inverse condemnation for damage caused by a disturbance of soil stability. Here, too, the California cases exhibit a schizophrenic tendency to vacillate between

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A Study Relating to Sovereign Immunity, 5 CAL. LAW REVISION COMM'N, REPORTS, RECOMMENDATIONS & STUDIES 225-30 (1963). Because of its inherent ambiguity, it has been relied upon frequently as a convenient basis for imposing liability without regard for fault. Comment, *Absolute Liability for Ultrahazardous Activities: An Appraisal of the Restatement Doctrine*, 37 CALIF. L. REV. 269, 270 n.7 (1949).

[169] *See* U.S. DEP'T AGRIC., WATER: THE YEARBOOK OF AGRICULTURE 311 (1955).

[170] *See* Curci v. Palo Verde Irr. Dist., 69 Cal. App. 2d 583, 587, 159 P.2d 674, 676 (1945), where it is said that "[a]n examination of the foregoing cases [including *Powers*, *Hume*, and *Ketcham*] . . . show[s] that in the majority of them the landowner sought recovery for damages caused by seepage from canals constructed through porous soil that did not confine and hold water . . . . Although the canal was constructed carefully and according to specifications this has been referred to as improper designing or improper planning which would make the irrigation district liable for damage. In some cases it is pointed out that this seepage of water may be prevented easily by puddling the canal with clay, by the use of oil on the banks and bottom, or by other simple means." *See also* Tormey v. Anderson-Cottonwood Irr. Dist., 53 Cal. App. 559, 200 P. 814 (1921).

[171] *See* CAL. WATER CODE § 12627.3: "It is declared to be the policy of the State that the costs of solution of seepage and erosion problems which arise or will arise by reason of construction and operation of water projects should be borne by the project."

[172] Curci v. Palo Verde Irr. Dist., 69 Cal. App. 2d 583, 159 P.2d 674 (1945). *But see* Boitano v. Snohomish County, 11 Wash. 2d 664, 120 P.2d 490 (1941), where the unexpected opening of an underground spring in the course of gravel operations created a resultant necessity for drainage in which the county was held inversely liable without fault when excess waters were directed over the plaintiff's property.

a theory of liability based on fault and one that admits liability without fault.

In *Reardon v. San Francisco*[173] (the earliest California decision interpreting the "or damaged" clause of the 1879 constitution), the city, in the course of a street grading and sewer installation project, deposited large quantities of earth and rock upon the street surface to raise its grade, causing the unstable subsurface to shift and thereby damage the foundations of the plaintiffs' abutting buildings. Although the damage was both foreseeable and foreseen (the city had been warned that it was occurring), the city took no steps to protect the plaintiffs' property. The Supreme Court affirmed a judgment for the plaintiffs, but did not predicate its decision upon fault. On the contrary, it held that when a landowner is damaged as a consequence of public work, "whether it is done carefully and with skill or not, he is still entitled to compensation for such damage" under the command of the just compensation clause of the constitution.[174] The opinion is a square holding on this point,[175] as the court had concluded preliminarily that the plaintiffs could not recover on common law tort principles since no breach of a duty owed them was shown. Moreover, they could not recover inverse damages for a "taking," since no physical invasion of their land had occurred. Thus, the plaintiffs' judgment was sustained solely upon the ground that their property had been constitutionally "damaged."

The approach taken in *Reardon*, making fault immaterial to inverse liability for physical damage directly caused by public improvement projects, was widely accepted in states which, like California, had expanded the just compensation clause of the state constitution to include "damaging" as well as "taking."[176] On almost identical

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[173] 66 Cal. 492, 6 P. 317 (1885).

[174] *Id.* at 505, 6 P. at 325.

[175] A recent student work has classified *Reardon* as "dictum". Note, 13 U.C.L.A.L. Rev. 871, 872 (1966). This analysis ignores the reasoning of the court's unanimous opinion, as summarized in the text. Text accompanying notes 156-61 *supra*. Moreover, subsequent decisions of the Supreme Court have explicitly treated *Reardon* as a holding on the point here being discussed. *See, e.g.*, Tormey v. Anderson-Cottonwood Irr. Dist., 53 Cal. App. 559, 568, 200 P. 814, 818 (1921) (opinion of Supreme Court on denial of hearing).

[176] *See, e.g.*, Atlanta v. Kenny, 83 Ga. App. 823, 64 S.E.2d 912 (1951) (house collapsed into trench for fire communications); Brewitz v. St. Paul, 256 Minn. 525, 99 N.W.2d 456 (1959) (gullying and erosion due to loss of support after street grade lowered); Great N. Ry. v. State, 102 Wash. 348, 173 P. 40 (1918) (slides and earth deposits resulting from uphill blasting and road work). A contrary view is often taken in states limiting inverse compensation to "takings." Hoene v. Milwaukee, 17 Wis. 2d 209, 116 N.W.2d 112 (1962) (damage to foundation of building due to inadequately constructed highway unable to sustain heavy traffic); Wisconsin Power & Light Co. v. Columbia County, 3 Wis. 2d 1, 87 N.W.2d 279 (1958) (displacement of soil as result of

facts, for example, the Supreme Court of Washington has reached the same result as in *Reardon*.[177] This approach also has been followed in subsequent California decisions,[178] but in an uneven pattern. The collapse of a building due to the construction of a tunnel beneath it, for example, has been regarded as a basis of inverse liability without fault.[179] Moreover, affirmance of landslide liability in the recent *Albers* decision makes it clear that the *Reardon* doctrine of inverse liability without fault is part of the current constitutional law of California.[180] Yet, numerous other California decisions exist that seem to affirm fault as an essential prerequisite, at least in some circumstances, to inverse liability.[181]

Even in cases closely analogous to *Reardon*, dealing with damage resulting from shifting soil, fault has been emphasized as a criterion of inverse liability. For example, damage to a house caused by excavation in the street for the installation of a sewer, which removed lateral support for the plaintiff's land, was held recoverable because the city's construction plans were "intrinsically dangerous and inherently wrong" according to expert engineering testimony adduced by plaintiff.[182] In sustaining inverse liability under similar circum-

deposit of heavy fill material caused twisting and destruction of transmission tower); *cf.* Edison Co. v. Campanella & Cardi Constr. Co., 272 F.2d 430 (1st Cir. 1959), where it was said by way of dictum that damage to transmission towers due to displacement of soil by a highway embankment was not a "taking" but possibly subject to statutory liability. *See generally* 2 P. NICHOLS, EMINENT DOMAIN § 6.4432[2], at 508-19 (rev. 3d ed. 1963).

[177] Hinckley v. Seattle, 74 Wash. 101, 132 P. 855 (1913). *See also* Department of H'ways v. Widner, 388 S.W.2d 583 (Ky. 1965) (destruction of home in landslide caused by removal of lateral support during downhill road project held compensable without proof of negligence); Newport v. Rosing, 319 S.W. 2d 852 (Ky. 1958) (similar facts and holding as in *Widner*).

[178] *See, e.g.*, Tyler v. Tehama County, 109 Cal. 618, 42 P. 240 (1895); Tormey v. Anderson-Cottonwood Irr. Dist., 53 Cal. App. 559, 200 P. 814 (1921). *See also* Powers Farms v. Consolidated Irr. Dist., 19 Cal. 2d 123, 119 P.2d 717 (1941) (dictum).

[179] Porter v. Los Angeles, 182 Cal. 515, 189 P. 105 (1920). Although this opinion is concerned primarily with an issue of the statute of limitations, its substantive aspects have been regarded in subsequent decisions as authoritative with respect to issues of liability. *See* Los Angeles County Flood Control Dist. v. Southern Cal. Bldg. & Loan Ass'n, 188 Cal. App. 2d 850, 855, 10 Cal. Rptr. 811, 813 (1961). *See also* Marin Mun. Water Dist. v. Northwestern Pac. R.R., 253 Cal. App. 2d 82, 92, 61 Cal. Rptr. 520, 526 (1967).

[180] Albers v. Los Angeles County, 62 Cal. 2d 250, 398 P.2d 129, 42 Cal. Rptr. 89 (1965); *see* text accompanying notes 9-35 *supra*.

[181] *See, e.g.*, Bauer v. Ventura County, 45 Cal. 2d 276, 289 P.2d 1 (1955); House v. Los Angeles County Flood Control Dist., 25 Cal. 2d 384, 153 P.2d 950 (1944).

[182] Kaufman v. Tomich, 208 Cal. 19, 280 P. 130 (1929). The court here observes that it is unnecessary to determine whether liability was based on

stances, however, an attempted police power justification for destruction of lateral support was rejected on the ground that "there is no reason to invoke the doctrine of police power to protect public agencies in those cases where damage to private parties can be averted by *proper* construction and *proper* precautions in the first instance."[183] These cases may possibly be explained as a product of unnecessary judicial preoccupation with private law analogies in the development of inverse condemnation law.[184] The opinions themselves, however, contain no intimation of a judicial willingness to recognize inverse liability on any basis other than fault; only by a subtle and sophisti-

tort or inverse condemnation principles, for the same result would obtain in either event.

[183] Veteran's Welfare Bd. v. Oakland, 74 Cal. App. 2d 818, 831, 169 P.2d 1000, 1009 (1946) (emphasis added). *See also* Wofford Heights Ass'n v. Kern County, 219 Cal. App. 2d 34, 32 Cal. Rptr. 870 (1963).

[184] The common law rule of absolute liability for deprivation of lateral support, RESTATEMENT OF TORTS § 817 (1939), has been modified in California. CAL. CIV. CODE § 832. Under this statutory rule, except in the case of very deep excavations, the adjoining owner is liable only if loss of lateral support results from negligence or from failure to notify one's neighbor so that he may take protective measures. *See* Wharam v. Investment Underwriters, 58 Cal. App. 2d 346, 136 P.2d 363 (1943); Conlin v. Coyne, 19 Cal. App. 2d 78, 64 P.2d 1123 (1937). Section 832, however, applies only to lateral support situations; it does not impair the former rule of strict liability for loss of subjacent support. Marin Mun. Water Dist. v. Northwestern Pac. R.R., 253 Cal. App. 2d 82, 61 Cal. Rptr. 520 (1967); RESTATEMENT OF TORTS § 820 (1939); *cf.* Porter v. Los Angeles, 182 Cal. 515, 189 P. 105 (1920). Accordingly, Kaufman v. Tomich, 208 Cal. 19, 280 P. 130 (1929), and Veteran's Welfare Bd. v. Oakland, 74 Cal. App. 2d 818, 169 P.2d 1000 (1946), may arguably be regarded as consistent with the fault rationale required in lateral support cases by section 832, while Porter v. Los Angeles, *supra*, and Reardon v. San Francisco, 66 Cal. 492, 6 P. 318 (1885), may be understood as instances of strict liability for loss of subjacent support. This explanation, however, is inconsistent with explicit language in *Reardon* that "there could be no . . . recovery at common law." *Id.* at 505, 6 P. at 325. It has no formal support or recognition in *Kaufman*, *Veteran's Welfare Board*, or *Porter*.

It is not entirely clear whether section 832 governs excavation work by public agencies. It has been said to be inapplicable to street excavation work by a municipal contractor which impairs lateral support of abutting land. Cassell v. McGuire & Hester, 187 Cal. App. 2d 579, 593, 10 Cal. Rptr. 33, 42 (1960) (dictum); *cf.* Gazzera v. San Francisco, 70 Cal. App. 2d 833, 161 P.2d 806 (1945) (city held not liable for loss of lateral support in absence of showing that street excavation work caused plaintiff's damage; section 832 neither cited nor discussed). On the other hand, previous uncertainty whether general statutory provisions governing tort liability were applicable to governmental entities has now been resolved, since sovereign immunity has been abrogated in California, in favor of applicability. *E.g.*, Flournoy v. State, 57 Cal. 2d 497, 370 P.2d 331, 20 Cal. Rptr. 627 (1962) (wrongful death act held applicable to state). Under the latter view, it seems that section 832 would be regarded today as apropos in a lateral support case maintained against a public entity either on an inverse or tort theory.

cated analysis can they be reconciled with the rationale of the *Reardon* and *Albers* decisions.

C. Loss of Advantageous Conditions

The value of real property is often directly dependent upon advantageous conditions physically associated with it, such as an adequate supply of potable water. Government activities, however, may impair or terminate the existence of such physical attributes and thereby substantially diminish the sum total of the value-enhancing features that comprise the owner's property interest. In a California case, for example, the construction of a tunnel as part of a municipal water supply project diverted an underground stream which fed natural springs used by a farmer for irrigation purposes. Loss of this valuable water supply source was held to be a compensable damaging of property, although there was no evidence that the city had acted negligently or unreasonably.[185] Similarly, upstream improvements, such as a dam, that divert stream water to governmental purposes in derogation of established water rights of downstream riparian owners also may constitute a basis of constitutional liability.[186] Loss of water supply, however, is recognized as a basis of inverse liability only so far as the injured party is recognized to possess a property right therein.[187]

The crucial significance of private property law concepts in the

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[185] De Freitas v. Suisun, 170 Cal. 263, 149 P. 553 (1915). A landowner's interest in spring water located on his premises is recognized, ordinarily, as being equally protectible with his ownership of the surface. State v. Hansen, 189 Cal. App. 2d 604, 11 Cal. Rptr. 335 (1961). The interest of a surface owner in percolating underground waters, however, has traditionally been subject to a rule of correlative reasonable use. Katz v. Walkinshaw, 141 Cal. 116, 74 P. 766 (1903); *cf.* Pasadena v. Alhambra, 33 Cal. 2d 908, 207 P.2d 17 (1949), *cert. denied*, 339 U.S. 937 (1950). *See generally* Hillside Water Co. v. Los Angeles, 10 Cal. 2d 677, 76 P.2d 681 (1938), where the city was held liable for the diminution of artesian well pressure resulting from extensive pumping and exportation of water from an underground basin.

[186] Dugan v. Rank, 372 U.S. 609 (1963); United States v. Gerlach Live Stock Co., 339 U.S. 725 (1950).

[187] Joslin v. Marin Mun. Water Dist., 67 Cal. 2d 132, 429 P.2d 889, 60 Cal. Rptr. 377 (1967); De Freitas v. Suisun, 170 Cal. 263, 149 P. 553 (1915); Volkmann v. Crosby, 120 N.W.2d 18 (N.D. 1963) (city held inversely liable for impairment of private artesian well supply by drilling of municipal well); Canada v. Shawnee, 179 Okla. 53, 64 P.2d 694 (1936) (similar to facts in *Volkmann*); Griswold v. Weathersfield School Dist., 117 Vt. 224, 88 A.2d 829 (1952) (school district held inversely liable for diversion of underground stream, with consequent drying up of plaintiff's spring, due to blasting in course of district improvement project). Judicial enforcement of property rights in water, however, may be unavailable where conflicting prescriptive rights have matured. *See* Pasadena v. Alhambra, 33 Cal. 2d 908, 207 P.2d 17 (1949).

disposition of cases of this kind is underscored by the recent state Supreme Court case of *Joslin v. Marin Municipal Water District*.[188] This decision denied compensation to downstream riparian owners for damage caused by loss of accretions of commercial sand and gravel deposits upon their land, which formerly had been carried in suspension by the waters of Nicasio Creek. The defendant district, in order to develop a municipal water supply, had constructed a dam across the creek which obstructed the normal flow of waters and thus terminated the periodic replenishment of sand and gravel used by the plaintiffs in their business. The value of the plaintiffs' land allegedly was diminished in the amount of $250,000. Inverse liability was denied under the prevailing California doctrine of reasonable beneficial use which governs the relative property interests of riparian owners (such as the plaintiffs) and upstream appropriators (such as the defendant district).[189] The plaintiffs' use of the stream waters for acquisition of commercial sand and gravel—commodities in plentiful supply for which no significant interest in development and conservation by stream water usage could be identified—was held to be clearly unreasonable and therefore subordinate, as a matter of law, when contrasted with the district's interest in the beneficial use of those waters for domestic and industrial purposes. In effect, no compensable property right of the plaintiffs had been taken or damaged.[190]

In *Joslin*, the court distinguished two important cases relied upon by the plaintiffs. The first, a decision of the United States Supreme Court, declared that loss of natural irrigation through seasonal overflow of riparian lands, caused by the construction of an upstream dam, constituted a compensable "taking" of the landowners' riparian property interest.[191] Reliance on seasonal flooding of a stream for agricultural irrigation purposes was regarded there as a reasonable beneficial use of river water by a riparian owner, and thus a compensable

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[188] 67 Cal. 2d 132, 429 P.2d 889, 60 Cal. Rptr. 377 (1967).

[189] *See* CAL. CONST. art. XIV, § 3 (1928), which modified the strict doctrine of superiority of riparian to appropriative rights as applied in cases like Herminghaus v. Southern Cal. Edison Co., 200 Cal. 81, 252 P. 607 (1926). By the 1928 amendment, the rule of reasonable beneficial use became firmly established as the legal framework for adjudication of competing claims to water in California. Peabody v. Vallejo, 2 Cal. 2d 351, 40 P.2d 486 (1935); Chow v. Santa Barbara, 217 Cal. 673, 22 P.2d 5 (1933); CAL. WATER CODE §§ 100-01.

[190] *See* Peabody v. Vallejo, 2 Cal. 2d 351, 369, 40 P.2d 486, 492 (1935). *But see* Miramar Co. v. Santa Barbara, 23 Cal. 2d 170, 143 P.2d 1 (1943); Note, *Eminent Domain: Damage Without Taking, Damnum Absque Injuria*, 32 CALIF. L. REV. 91 (1944) (court evenly divided as to existence, as against the state, of property right in littoral owner to uninterrupted sandy accretions from natural ocean currents).

[191] United States v. Gerlach Live Stock Co., 339 U.S. 725 (1950); *see* Annot., 20 A.L.R.2d 656 (1951).

interest. Use by the plaintiffs in *Joslin* for sand and gravel accretions, however, was deemed not reasonable under the circumstances.[192]

The second case, a California decision, held that loss of accretions of sand and gravel as the result of the construction of a concrete flood control channel in the bed of a natural watercourse, thereby preventing overflow of the waters and deposit of their contents upon the plaintiffs' land, constituted the taking of a property right the value of which was required to be included in severance damages in the flood control district's eminent domain suit to condemn the channel easement.[193] This decision, however, did not involve a clash between a riparian owner and an upper appropriator in light of the "reasonable and beneficial use" test, but was concerned only with the question of the extent to which the land not taken for flood control purposes, on which plaintiff's long-established gravel business was situated, had sustained severance damages by reason of the flood control channel project. The Supreme Court in *Joslin* expressly disapproved any language in the earlier case which intimated that the use of stream flow for replenishment of sand and gravel accretions was a reasonable one or could be regarded as giving rise to a property right as against an appropriator who was putting the water itself to reasonable and beneficial use.[194]

According to the *Joslin* opinion, the critical determination whether a particular use of water is reasonable and beneficial "is a question of fact to be determined according to the circumstances in each particular case."[195] Ample latitude for the weighing of policy

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[192] *Cf.* CAL. WATER CODE § 106: "It is hereby declared to be the established policy of the State that the use of water for domestic purposes is the highest use of water and that the next highest use is for irrigation." The *Joslin* opinion, it should be noted, does not constitute a clear approval of the *Gerlach* decision; it may be read, instead, as merely explaining and distinguishing *Gerlach* as based on a determination, which the *Joslin* court was not required to reexamine, that the riparian use there in question was in fact "reasonable" under the circumstances. In any event, *Joslin* strongly intimates that "reasonableness" is a relative concept, to be determined by comparing the relative social utility of the competing water uses before the court. For example, it would not be inconsistent with *Joslin* for a court, under some circumstances, to conclude that agricultural irrigation purposes (a secondary priority of use under section 106) may be unreasonable when in conflict with water supply for domestic consumption. Moreover, the hierarchy of priorities as between other forms of water usage not mentioned in section 106 remains uncertain and subject to case-by-case elaboration, absent additional legislative clarification.

[193] Los Angeles County Flood Control Dist. v. Abbot, 24 Cal. App. 2d 728, 76 P.2d 188 (1938).

[194] Joslin v. Marin Mun. Water Dist., 67 Cal. 2d 132, 145, 429 P.2d 889, 898, 60 Cal. Rptr. 377, 386 (1967).

[195] *Id.* at 139, 429 P.2d at 894, 60 Cal. Rptr. at 382. Accordingly, a use

factors judicially regarded as relevant to the compensability issue is thus allowed. For example, in *City of Los Angeles v. Aitken*,[196] the court's opinion, after emphasizing the importance of natural recreational facilities both to the state's economic well-being and to the health and welfare of its citizens, concluded that the use of navigable lake waters for recreation and as an adjunct to the scenic and recreational use of littoral lands (whose value for that purpose directly depended upon the continued existence of the lake) was a reasonable beneficial use entitled to judicial protection. A secondary factor supporting this conclusion was the virtual unusability of the lake waters in question for domestic or irrigation purposes, due to excessive impregnation with minerals and alkali. Finally, the *Aitken* opinion stresses the fact that substantial investments had been made along the lake shore in reasonable and good-faith reliance upon the continuance of the natural lake level. Accordingly, the diversion of the waters of tributary streams feeding the lake, even though for the concededly reasonable and beneficial purpose of augmenting a municipal water supply, was held to constitute the damaging of property rights of littoral owners for which just compensation was required to be paid.

Although a careful perusal of *Aitken* suggests that the frustration of substantial investment-backed expectations, reasonably grounded in experience, was the pivotal factual element of the decision, *Joslin* seemingly rejects the view that the magnitude of private loss is of legal significance. The destruction of a valuable, long-standing, and socially useful business enterprise grounded upon reasonable expectation that periodic replenishments of sand and gravel would continue to be supplied by natural river flow, was countenanced as not a compensable damaging because of the general preference shown by California law for domestic water use. Unlike *Aitken*, the *Joslin* result seems to reflect a judicial disposition to permit decision in cases of this kind to turn upon abstract classifications of water use priorities, thereby making unnecessary the more difficult task of assessing the weight of the competing interests revealed by the adjudicative facts. Absent a comprehensive legislative scheme of relative priorities, however, this approach scarcely improves predictability. In any event, it appears to disregard significant factual and policy considerations which, in other contexts (*e.g.*, *Albers*,) have been regarded as determinative of the public duty to pay just compensation for economic losses caused by governmental activities.

It could be argued that the inherent uncertainty of the reason-

recognized as beneficial under some circumstances may, under other circumstances, be subordinated to more important uses. *See* Tulare Irr. Dist. v. Lindsay-Strathmore Irr. Dist., 3 Cal. 2d 489, 45 P.2d 972 (1935); CAL. WATER CODE § 106.

[196] 10 Cal. App. 2d 460, 52 P.2d 585 (1935).

able beneficial use criterion of compensable water rights has been reduced at least partially by statutory provisions. The result in the *Aitken* case, for example, apparently has been codified in somewhat expanded form. Section 1245 of the California Water Code makes every municipality that appropriates water from any watershed or its tributaries fully liable to persons within the watershed area for "injury, damage, destruction or decrease in value of [their] property, business, trade, profession or occupation" caused by the appropriation. The *Joslin* opinion, however, considered the quoted language as indicating only a legislative intent to provide statutory compensation in those limited situations in which a constitutionally secured right to just compensation already existed. In holding that the plaintiffs' business and occupational losses were not compensable under section 1245, the court reasoned that "since there was and is no [constitutionally cognizable] property right in the instant unreasonable use, there has been no taking or damaging of property. Since by constitutional fiat no property right exists, none is created by statutory provisions intended to provide compensation for the deprivation of protectible property interests."[197] This view, which treats the statute as a useless and redundant exercise of legislative power, wholly ignores clear language in section 1245 suggesting that the legislature was not attempting to formulate a rule of compensation enmeshed in technical notions of what is a constitutionally protectible property interest, but was seeking to protect against economic loss (i.e., "decrease in value") caused by water appropriation to any previously established "business, trade, profession or occupation" in the watershed. The *Joslin* sand and gravel enterprise may not have been "property" in the constitutional sense, but it is difficult to understand why it was not a "business" or "occupation" in the statutory sense. Moreover, the court in *Joslin* ignored the possibility that section 1245 is simply another proviso in the extensive array of statutory mandates requiring compensation to be be paid for governmentally caused economic losses despite the absence of a constitutional compulsion to do so.[198]

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[197] Joslin v. Marin Mun. Water Dist., 67 Cal. 2d 132, 146, 429 P.2d 889, 898, 60 Cal. Rptr. 377, 386 (1967).

[198] *See* Van Alstyne, *Statutory Modification of Inverse Condemnation: Deliberately Inflicted Injury or Destruction*, 20 STAN. L. REV. 617, 630-32 (1968), collecting and discussing numerous statutes. The most directly analogous statutory pattern of required compensation for economic losses caused by public improvements, absent constitutional compulsion to compensate, relates to the reimbursement of costs incurred by private utility companies in relocating underground facilities and structures in order to make room for, or accommodate, public projects (*e.g.*, sewers, water mains, drainage facilities, street improvements). *See* Van Alstyne, *Government Tort Liability: A Public Policy Prospectus*, 10 U.C.L.A.L. REV. 463, 501-02 (1963). The constitutional validity of statutory indemnification in such situations is, of course, well-

It should be noted that other legislation relating to water resources, from a practical viewpoint, may have an impact upon inverse liability claims for interferences with water uses, although the nature and extent of the impact cannot be evaluated on an abstract basis. Claims of appropriative rights to surplus stream water, for example, are now subject to an application-permit procedure made applicable to all appropriators, including municipalities,[199] and designed to allocate such claims on "terms and conditions . . . [which] will best develop, conserve, and utilize in the public interest the water sought to be appropriated."[200] The relativity of water uses also has been given partial definition by statutory declarations that "domestic use is the highest use and irrigation is the next highest use of water,"[201] together with statutory preferences for appropriations by municipalities for domestic consumption purposes.[202] Finally, provision is made for administrative adjudication of competing claims to water by the State Water Rights Board,[203] as well as for court referral of water rights controversies to this agency.

Although the statutory framework appears to provide an orderly basis for the determination of water rights, it leaves the determination of compensability for governmental "takings" or "damagings" of interests in water in a state of uncertainty. The only explicit legislative effort to deal with the problem has been nullified by the exceedingly narrow interpretation of Water Code section 1245 announced by *Joslin*. The "reasonableness" test (which *Joslin* indicates applies to all competing water claims and not merely to disputes between appropriators and riparian users) is derived ultimately from the language of article XIV, section 3 of the California Constitution,[204] but this fact

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settled. Dittus v. Cranston, 53 Cal. 2d 284, 347 P.2d 671, 1 Cal. Rptr. 327 (1959). *See also* Southern Cal. Gas Co. v. Los Angeles, 50 Cal. 2d 713, 329 P.2d 289 (1958).

[199] CAL. WATER CODE § 1252.5. *See generally id.* §§ 1200-1801.

[200] *Id.* § 1253. *See also* id. §§ 10000-507, where the "State Water Plan" and "California Water Plan" provisions, under which the state has assumed a primary interest in the orderly and coordinated conservation, development, and utilization of all water resources in the state, has been codified.

[201] *Id.* §§ 106, 1254.

[202] *Id.* §§ 106.5, 1460-64. *But see id.* §§ 10505, 11460-63 ("county of origin" and "watershed of origin" preferences); Note, *State Water Development: Legal Aspects of California's Feather River Project*, 12 STAN. L. REV. 439, 450-55 (1960).

[203] CAL. WATER CODE §§ 2000-76 (references); *id.* §§ 2500-2866 (administrative adjudication subject to court review).

[204] CAL. CONST. art. XIV, § 3 (1928), provides in part: "It is hereby declared that because of the conditions prevailing in this State the general welfare requires that the water resources of the State be put to beneficial use to the fullest extent of which they are capable, and that the waste or unreasonable use or unreasonable method of use of water be prevented, and that the con-

should not and does not preclude legislative clarification of the criteria to be used by the courts in applying this test to specific circumstances.[205] Indeed, the *Joslin* decision itself relies heavily upon legislative provisions which declare the predominant importance of domestic water use in the socio-economic environment of California, as well as the absence of such legislative standards respecting sand and gravel accretions, as support for its conclusion that the latter interest was not a reasonable and beneficial use as contrasted with the former. More explicit and comprehensive legislative clarification, including possible amendment of Water Code section 1245 in order to make its basic intent indisputably clear, would seem to be a desirable legislative objective.

The recognition of certain aspects of water rights as compensable "property" interests has been accompanied in recent years by a growing body of law likewise giving effect to the landowner's compensable interest in the purity of both water and air. Pollution, ordinarily comprised of domestic and industrial wastes, and sometimes of silt, often is attributable to governmental functions, such as the collection of waste matter in sanitary sewer systems for concentrated discharge (ordinarily after some form of treatment) at a relatively few outlets, or (in the case of silting) public construction projects conducted without adequate erosion controls.[206] Sewage disposal, in addition, sometimes produces pollution of the atmosphere by noxious odors which drastically impair the usability and value of property subjected thereto.[207]

Governmental liability for environmental pollution often has been sustained on a tort theory of nuisance.[208] California case law

servation of such waters is to be exercised with a view to the reasonable and beneficial use thereof in the interest of the people and for the public welfare. The right to water or to the use or flow of water in or from any natural stream or water course in this State is and shall be limited to such water as shall be *reasonably required for the beneficial use to be served*, and such right does not and shall not extend to the waste or unreasonable use or unreasonable method of use or unreasonable method of diversion of water. . . ." (Emphasis added).

[205] *See id.*: "This section shall be self-executing, and the Legislature may also enact laws in furtherance of the policy in this section contained." *Cf.* Van Alstyne, *Statutory Modification of Inverse Condemnation: The Scope of Legislative Power*, 19 STAN. L. REV. 727 (1967).

[206] *See generally* Schwob, *Pollution—A Growing Problem of a Growing Nation*, in U.S. DEP'T OF AGRIC., WATER—THE YEARBOOK OF AGRICULTURE 636 (1955); Edelman, *Federal Air and Water Control: The Application of the Commerce Power to Abate Interstate and Intrastate Pollution*, 33 GEO. WASH. L. REV. 1067 (1965).

[207] *E.g.*, Sewerage Dist. v. Black, 141 Ark. 550, 217 S.W. 813 (1920); Ivester v. Winston-Salem, 215 N.C. 1, 1 S.E.2d 88 (1939).

[208] *See Annot.*, 40 A.L.R.2d 1177 (1955) (sewage disposal plants); Annot., 38 A.L.R.2d 1265 (1954) (pollution of underground waters).

has provided support for this approach in the past.[209] However, it is no longer entirely clear whether governmental nuisance liability will be recognized in California in light of the legislative decision in 1963 placing all governmental tort liability upon a statutory basis while omitting to provide explicitly for liability on a nuisance theory.[210] Inverse condemnation appears to offer an acceptable alternate remedy that would survive legislative disapproval.[211] Before abrogation of sovereign immunity from tort liability, the California cases recognized nuisance liability as an exception to the general rule of tort immunity; but the exception was largely an evolutionary development rooted in inverse condemnation liability for property damage.[212] To the extent that nuisance and inverse liability overlap one another, the inverse remedy still would be available in pollution cases.[213]

Elsewhere, public entities have been held liable on inverse condemnation grounds in such diverse situations as sewage contamination of oyster beds,[214] pollution of private water resources,[215] ocean salt water intrusion upon agricultural lands riparian to a river because of upstream diversion of fresh water,[216] silting of a private lake

[209] *See* Hassell v. San Francisco, 11 Cal. 2d 168, 78 P.2d 1021 (1938) (injunction against maintenance of comfort station in public park on showing that nuisance would result); Adams v. Modesto, 131 Cal. 501, 63 P. 1083 (1901) (open sewer ditch nuisance); Ingram v. Gridley, 100 Cal. App. 2d 815, 224 P.2d 798 (1950) (sewage pollution of stream).

[210] The legislative history of the Tort Claims Act of 1963 indicates a deliberate legislative decision to preclude governmental tort liability for damages on a common law nuisance theory. *See* SENATE COMM. ON THE JUDICIARY, REPORT ON S. 42, CAL. S. JOUR. 1867 (daily ed. Apr. 24, 1963), *quoted in* A. VAN ALSTYNE, CALIFORNIA GOVERNMENT TORT LIABILITY 497-98 (Cal. Cont. Educ. Bar 1964). However, nuisance liability is not purely a matter of common law doctrine in California; it is codified. CAL. CIV. CODE §§ 3479, 3491, 3501. Arguably, therefore, nuisance liability may still obtain under the last-cited provisions. Van Alstyne, *Statutory Modification of Inverse Condemnation: The Scope of Legislative Power*, 19 STAN. L. REV. 727, 740 n.56 (1967).

[211] *See* Van Alstyne, *Modernizing Inverse Condemnation: A Legislative Prospectus*, 8 SANTA CLARA LAW. 1, 11 (1967).

[212] Van Alstyne, *A Study Relating to Sovereign Immunity*, in 5 CAL. LAW REVISION COMM'N, REPORTS, RECOMMENDATIONS & STUDIES 225-30 (1963).

[213] *See* County Sanitation Dist. No. 2 v. Averill, 8 Cal. App. 2d 556, 47 P.2d 786 (1935) (dictum); *cf.* Ambrosini v. Alisal Sanitary Dist., 154 Cal. App. 2d 720, 317 P.2d 33 (1957).

[214] Gibson v. Tampa, 135 Fla. 637, 185 So. 319 (1938).

[215] Game & Fish Comm'n v. Farmers Irr. Co., 149 Colo. 318, 426 P.2d 562 (1967) (pollution by waters discharged from fish hatchery); Cunningham v. Tieton, 60 Wash. 2d 434, 374 P.2d 375 (1962) (percolation from sewage lagoon to underground wells); Snavely v. Goldendale, 10 Wash. 2d 453, 117 P.2d 221 (1941) (sewage discharge into stream).

[216] Early v. South Carolina Pub. Serv. Auth., 228 S.C. 392, 90 S.E.2d 472 (1955); Rice Hope Plantation v. South Carolina Pub. Serv. Auth., 216 S.C. 500, 59 S.E.2d 132 (1950).

from erosion of an unstabilized highway embankment,[217] and persistent pollution of the atmosphere by noxious and offensive odors from a sewage disposal plant.[218] Negligence or alternative findings of fault are not regarded as essential to liability in these cases; regardless of the care with which the public improvement is operated, if it in fact creates a condition that substantially damages property values, the public entity must absorb the resulting cost.[219] In addition, by grounding these decisions upon the constitutional mandate to pay just compensation, the courts have blocked municipal contentions that liability should not attach to the performance of essential "governmental" functions, such as sewage disposal,[220] or that liability should not be recognized for governmental activities expressly authorized by statute.[221]

The persistence of a nuisance rationale at the heart of the inverse condemnation decisions dealing with environmental pollution damage introduces into the law of inverse liability the same vagaries, uncertainties, and obscurities of decisional processes that plague ordinary tort litigation pursued on a nuisance theory.[222] In addition, it may blur significant distinctions between the interests represented by public agencies and those which pertain to private persons. For example, a comparison of public and private defendants may disclose substantial differences of size, legal responsibility, territorial impact, fiscal resources, and available practical alternatives. All these differences should be considered in a rational balancing process. On the other hand, the nuisance analogue does usefully direct attention to the remedial resources inherent in the powers of equity to abate the source

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[217] Department of H'ways v. Cochrane, 397 S.W.2d 155 (Ky. App. 1965); Kendall v. Department of H'ways, 168 So. 2d 840 (La. App. 1964), *writ refused*, 247 La. 341, 170 So. 2d 864 (1965).

[218] Clinard v. Kernersville, 215 N.C. 745, 3 S.E.2d 267 (1939); Gray v. High Point, 203 N.C. 756, 166 S.E. 911 (1932).

[219] *See, e.g.*, Clinard v. Kernersville, 215 N.C. 745, 3 S.E.2d 267 (1939); Parsons v. Sioux Falls, 65 S.D. 145, 272 N.W. 288 (1937); *cf.* Pheonix v. Johnson, 51 Ariz. 115, 75 P.2d 30 (1938).

[220] *See* Brewster v. Forney, 223 S.W. 175 (Comm'n App. Tex. 1920); Southworth v. Seattle, 145 Wash. 138, 259 P. 26 (1927).

[221] *See* Parsons v. Sioux Falls, 65 S.D. 145, 272 N.W. 288 (1937); Aliverti v. Walla Walla, 162 Wash. 487, 298 P. 698 (1931); *cf.* Ambrosini v. Alisal Sanitary Dist., 154 Cal. App. 2d 720, 317 P.2d 33 (1957).

[222] "There is perhaps no more impenetrable jungle in the entire law than that which surrounds the word 'nuisance.' It has meant all things to all men, and has been applied indiscriminately to everything from an alarming advertisement to a cockroach baked in a pie. There is general agreement that it is incapable of any exact or comprehensive definition. Few terms have afforded so excellent an illustration of the familiar tendency of the courts to seize upon a catchword as a substitute for analysis of a problem . . . ." W. PROSSER, THE LAW OF TORTS 592 (3d ed. 1964).

of harm rather than merely award just compensation and thereby confirm the permanence of the injury.[223]

D. Miscellaneous Physical Damage Claims

The factual setting of inverse liability claims is not complete without at least brief attention to a variety of other circumstances in which physical injuries to property have been conceptualized as constitutional "damagings."

(1) *Concussion and Vibration*

Property damage caused by shock waves from blasting and other activities has resulted in varying judicial views.[224] In jurisdictions that recognize inverse liability only for a "taking," structural damage as the result of vibrations from heavy equipment (*e.g.*, a pile driver)[225] or from shock waves caused by blasting,[226] ordinarily is held to be noncompensable. Consistent with the widely recognized rule that injuries caused by blasting in a populated area are an occasion for absolute tort liability,[227] however, California regards such injuries as an

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[223] *See, e.g.*, Jones v. Sewer Improvement Dist., 119 Ark. 166, 177 S.W. 888 (1915); Lakeland v. State, 143 Fla. 761, 197 So. 470 (1940); Briggson v. Viroqua, 264 Wis. 47, 58 N.W.2d 646 (1953). The limited availability of remedies other than damages, where inverse takings or damagings have occurred, is surveyed in Note, *Eminent Domain—Rights and Remedies of an Uncompensated Landowner*, 1962 WASH. U.L.Q. 210. *See also* Horrell, *Rights and Remedies of Property Owners Not Proceeded Against*, 1966 U. ILL. L.F. 113.

[224] In private tort law, a division of authority exists as to whether such damage is actionable without fault. Annot., 20 A.L.R.2d 1372 (1951); *see* notes 227 and 232 and accompanying text *infra* for the California position.

[225] State *ex rel.* Fejes v. Akron, 5 Ohio St. 2d 47, 213 N.E.2d 353 (1966). This result is also reached in some "damaging" states by narrow construction. *See, e.g.*, Klein v. Department of H'ways, 175 So. 2d 454 (La. App. 1965), *writ refused*, 248 La. 369, 178 So. 2d 656 (1965) (collapse of roof due to vibration from pile drivers held noncompensable since not an intentional or purposeful infliction of damage); Beck v. Boh Bros. Constr. Co., 72 So. 2d 765 (La. App. 1954) (similar).

[226] Bartholomae Corp. v. United States, 253 F.2d 716 (9th Cir. 1963) (atomic test detonations); Sullivan v. Commonwealth, 355 Mass. 619, 142 N.E.2d 347 (1957) (non-negligent blasting during aquaduct tunnel project); Crisafi v. Cleveland, 169 Ohio St. 137, 158 N.E.2d 379 (1959) (single blast during park improvement project). Some of the holdings of noncompensability for blast and vibration damage appear to be based on the view that the resulting injuries were *de minimis*. *See, e.g.*, Moeller v. Multnomah County, 218 Ore. 413, 345 P.2d 813 (1959); *cf.* Louden v. Cincinnati, 90 Ohio St. 144, 106 N.E. 970 (1914) (severe and prolonged blast and vibration damage may amount to a "taking").

[227] Colton v. Onderdonk, 69 Cal. 155, 10 P. 395 (1886); Smith v. Lockheed Propulsion Co., 247 Cal. App. 2d 774, 56 Cal. Rptr. 128 (1967); Balding v. D.B. Stutsman, Inc., 246 Cal. App. 2d 559, 54 Cal. Rptr. 717 (1966).

inversely compensable "damaging" of property regardless of the care or the negligence of the public entity in causing them.[228] Moreover, the California decisions have rejected efforts to limit strict liability to damages from blast-projected missiles,[229] ruling that the plaintiff's right to recovery does not turn on whether the damage was caused by atmospheric concussion, vibration of the soil, or throwing of debris, but upon the extrahazardous nature of the defendant's activities.[230] The same conclusions have been reached with respect to subterranean damage caused by the vibration of a large rocket motor undergoing testing.[231]

The rationale of strict inverse liability for concussion and vibration damage caused by blasting or similar activities has recognized limits; thus, California requires a showing of negligence as a basis of liability where the blasting occurred in a remote or unpopulated area.[232] Activities of this type undertaken in a residential area are deemed to create a risk of substantial harm which cannot be eliminated entirely even by the use of utmost care. Thus, the policies of negligence deterrence and loss distribution support a rule imposing strict liability upon the enterprise which exposes property owners to that risk and which is ordinarily in a position best able to absorb the loss.[233] In remote and unsettled areas, however, the risk is minimized

[228] Los Angeles County Flood Control Dist. v. Southern Cal. Bldg. & Loan Ass'n, 188 Cal. App. 2d 850, 10 Cal. Rptr. 811 (1961) (vibration damage from pile driver). Cases in other "damaging" states are in substantial agreement. *See, e.g.*, Richmond County v. Williams, 109 Ga. App. 670, 137 S.E.2d 343 (1964) (physical damage from pile driver vibration held compensable, while annoyance from dust, fumes and noise held noncompensable); Muskogee v. Hancock, 58 Okla. 1, 158 P. 622 (1916) (concussion damage from blasting during sewer construction); Knoxville v. Peebles, 19 Tenn. App. 340, 87 S.W. 2d 1022 (1935) (vibration and concussion damage from blasting).

[229] Inverse liability for damage caused by rocks and debris thrown upon private property by construction blasting is generally recognized. *See, e.g.*, Jefferson County v. Bischoff, 238 Ky. 176, 37 S.W.2d 24 (1931); Adams v. Sengel, 177 Ky. 535, 197 S.W. 974 (1917).

[230] *See* McGrath v. Basich Bros. Constr. Co., 7 Cal. App. 2d 573, 46 P.2d 961 (1935); McKenna v. Pacific Elec. Ry., 104 Cal. App. 538, 286 P. 445 (1930); *accord*, Whiteman Hotel Corp. v. Elliott & Watrous Eng'r Co., 137 Conn. 562, 79 A.2d 591 (1951).

[231] Smith v. Lockheed Propulsion Co., 247 Cal. App. 2d 774, 56 Cal. Rptr. 128 (1967) (loss of underground water supply due to subterranean vibration and earth shifting caused by test of rocket engine of unusual power and size). Where inverse liability is limited to a "taking", however, contrary results have been reached. *See, e.g.*, Leavell v. United States, 234 F. Supp. 734 (E.D.S.C. 1964) (jet engine test).

[232] *See* Alonso v. Hills, 95 Cal. App. 2d 778, 214 P.2d 50 (1950); *cf.* Houghton v. Loma Prieta Lumber Co., 152 Cal. 500, 93 P. 82 (1907) (personal injuries from blasting in unpopulated area); Wilson v. Rancho Sespe, 207 Cal. App. 2d 10, 24 Cal. Rptr. 296 (1962) (fire caused by blasting in remote area).

[233] The strict liability rule, however, has been strongly criticized as in-

by environmental conditions. The social utility of property development overrides the relatively slight risk of damage and justifies the withholding of liability unless fault is established.[234] This dual rationale incorporates a rough balancing technique of limited scope that could well achieve equitable results, as well as predictability, in allocating losses from blasting and like conduct by private individuals.[235] The cases, however, indicate a judicial disposition to apply the same rules that govern private activities to the solution of inverse liability claims against public entities, without taking into account the significant differences between private and public undertakings that may alter the balance of interests.[236]

(2) *Escaping Fire and Chemicals*

Claims against public entities for negligently permitting fire to escape from the control of public employees and damage nearby property are deemed to be grounded upon tort theory in California.[237] Until recently, such claims ordinarily have withered on the vine of sovereign immunity.[238] However, while the courts generally have refused to regard escaping fire as a basis for inverse liability when only mere negligence is involved,[239] it is clear that in a proper case the inverse remedy would be fully applicable. For example, it has been held that a public rubbish disposal dump operated pursuant to a plan that deliberately keeps fire burning to consume trash deposited

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consistent with a rational balancing of the competing interests in the light of modern technology. *See, e.g., Reynolds* v. W. H. Hinman Co., 145 Me. 343, 75 A.2d 802 (1950); Smith, *Liability for Damage to Land by Blasting* (pts. 1-2), 33 HARV. L. REV. 542, 667 (1920).

[234] *See* Berg v. Reaction Motors Div., 37 N.J. 396, 181 A.2d 487 (1962), cited in Smith v. Lockheed Propulsion Co., 247 Cal. App. 2d 774, 785-86, 56 Cal. Rptr. 128, 137-38 (1967); RESTATEMENT OF TORTS § 520 (1938).

[235] *See* Smith v. Lockheed Propulsion Co., 247 Cal. App. 2d 774, 786, 56 Cal. Rptr. 128, 138 (1967).

[236] *Cf.* Los Angeles County Flood Control Dist. v. Southern Cal. Bldg. & Loan Ass'n, 188 Cal. App. 2d 850, 10 Cal. Rptr. 811 (1961). *But see* Pumphrey v. J. A. Jones Constr. Co., 250 Iowa 559, 94 N.W.2d 737 (1959), where no liability was incurred for concussion damage caused by non-negligent blasting by a government waterway project contractor under government supervision and in accordance with government-approved plans.

[237] *See* Miller v. Palo Alto, 208 Cal. 74, 280 P. 108 (1929); Hanson v. Los Angeles, 63 Cal. App. 2d 426, 147 P.2d 109 (1944).

[238] *See* Miller v. Palo Alto, 208 Cal. 74, 280 P. 108 (1929); Hanson v. Los Angeles, 63 Cal. App. 2d 426, 147 P.2d 109 (1944).

[239] *See* Miller v. Palo Alto, 208 Cal. 74, 280 P. 108 (1929), in which the inverse condemnation theory was held inapplicable where the complaint alleged a single act of negligence that permitted escape of fire from the city dump. *See also* McNeil v. Montague, 124 Cal. App. 2d 326, 268 P.2d 497 (1954); Western Assurance Co. v. Sacramento & San Joaquin Drainage Dist., 72 Cal. App. 68, 237 P. 59 (1925).

therein can expose the public entity to statutory tort liability for intentionally maintaining a dangerous condition of public property.[240] The deliberate adoption of such a plan, however, also clearly supports inverse condemnation liability where damage results.[241] Fault, in the form of an inherently defective plan involving the use of fire for a public purpose, is the conceptual basis of this application of the just compensation clause. The water seepage cases, which typically impose inverse liability without fault, are regarded as distinguishable.[242] Water seeping from an irrigation ditch creates a relatively permanent condition reducing the utility of the affected land as a direct consequence of the functioning ("public use") of the ditch; fire escaping from control of public employees, however, does not produce such "direct" consequences unless the plan of use itself includes the risk of its escape as an inherent feature of the project functioning as conceived.[243]

Judicial disposition of inverse liability claims resulting from the drifting of chemical sprays employed for such public objectives as weed or insect control follows the same approach as the escaping fire cases. Mere routine negligence will not support inverse liability,[244] but a deliberately adopted plan of use that includes the prospect of property damage as a necessary consequence of the application of chemicals is recognized as actionable.[245] It should be mentioned, how-

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[240] Osborn v. Whittier, 103 Cal. App. 2d 609, 230 P.2d 132 (1951). *See also* Pittam v. Riverside, 128 Cal. App. 57, 16 P.2d 768 (1933) (dictum).

[241] *See* Bauer v. Ventura County, 45 Cal. 2d 276, 284-85, 289 P.2d 1, 7 (1955), expressly distinguishing *Miller*, *McNeil* and *Western Assurance Co.* as instances of escaping as a result of a single act of negligence in routine operations, and sustaining the sufficiency of a complaint for inverse condemnation (for flood damage) based on an inherently defective plan of construction and maintenance of a governmental project. See text accompanying notes 38-43 *supra*. This distinction was also noted in Western Assurance Co. v. Sacramento & San Joaquin Drainage Dist., 72 Cal. App. 68, 77, 237 P. 59, 63 (1925), where the court observed that inverse liability would obtain if the work that caused the fire had been done "in accordance with specific directions of . . . plans and specifications" approved by the district and the damage had resulted "necessarily and directly" therefrom.

[242] *See* McNeil v. Montague, 124 Cal. App. 2d 236, 268 P.2d 497 (1954).

[243] See note 241 *supra*.

[244] Neff v. Imperial Irr. Dist., 142 Cal. App. 2d 755, 299 P.2d 359 (1956); St. Francis Drainage Dist. v. Austin, 227 Ark. 167, 296 S.W.2d 668 (1956); Dallas County Flood Control Dist. v. Benson, 157 Tex. 617, 306 S.W.2d 350 (1957).

[245] *See* St. Francis Drainage Dist. v. Austin, 227 Ark. 167, 296 S.W.2d 668 (1956) (dictum); Dallas County Flood Control Dist. v. Benson, 157 Tex. 617, 306 S.W.2d 350 (1957) (dictum); *cf.* Bauer v. Ventura County, 45 Cal. 2d 276, 289 P.2d 1 (1955); Cope v. Live Stock Sanitary Bd., 176 So. 657 (La. App. 1937) (death of mule by ingestion of arsenic solution during anti-tick dipping operation).

ever, that the trend of the private law cases involving damage from chemical sprays appears to be toward imposition of strict liability.[246] The tendency of the courts to employ private law analogies in inverse liability cases suggests that the latter decisions may follow suit.

The escaping fire and chemical drift cases further illustrate the overlap of tort and inverse remedies against public entities in California. Under current statutory law, however, the overlap is of little importance because an injured property owner today appears to have fully adequate remedial weapons in tort litigation with respect to both escaping fire[247] and chemical drift.[248] There may be some procedural advantages, however, in pursuing the inverse remedy in certain situa-

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[246] *See* Note, *Crop Dusting: Two Theories of Liability?*, 19 HASTINGS L.J. 476 (1968). Technical data cited in this note suggest that substantial drift from chemical applications is an inherent risk of dusting and spraying operations notwithstanding use of reasonable care.

[247] The former doctrine of sovereign immunity has been supplanted by a statutory rule making public entities liable, except where otherwise provided by statute, for the tortious acts and omissions of their employees. CAL. GOV'T CODE § 815.2. Although there is a specific statutory immunity for "any injury caused in fighting fires," CAL. GOV'T CODE § 850.4, this immunity would not preclude governmental tort liability for negligently permitting a fire started or attended by public employees to escape. There are four theories that are available to supplant immunity. First, negligently permitting the fire to escape is probably not within the purview of the immunity for "fighting fires." A. VAN ALSTYNE, CALIFORNIA GOVERNMENT TORT LIABILITY § 7.29 (Cal. Cont. Educ. Bar ed. 1964). Secondly, there is an express statutory liabilliability for negligently or willfully permitting a fire to escape. CAL. HEALTH & SAFETY CODE § 13007. This section, although framed in general terms, applies to public entities and their employees. Flournoy v. State, 57 Cal. 497, 370 P.2d 331, 20 Cal. Rptr. 627 (1962). This section supersedes (that is, "otherwise provides") the immunity provisions of the Government Code. CAL. GOV'T CODE § 815 (introductory exception); A. VAN ALSTYNE, *supra* §§ 5.11, 5.28. Thirdly, negligently or deliberately permitting a fire under the control of a public employee to escape appears to constitute a failure to exercise reasonable diligence to discharge a mandatory duty imposed by statute. CAL. HEALTH & SAFETY CODE § 13000; CAL. PUB. RESOURCES CODE § 4422. This is a basis of governmental liability under CAL. GOV'T CODE § 815.6. Fourthly, escaping fire would, in some cases, be actionable as a dangerous condition of public property. Osborn v. Whittier, 103 Cal. App. 2d 609, 230 P.2d 132 (1951); CAL. GOV'T CODE § 835.

[248] Although governmental use of dangerous chemicals for pest control purposes is expressly authorized by statute, CAL. AGRIC. CODE §§ 14002, 14003, 14033, such authorization does not relieve the user from liability for property damage caused thereby. *Id.* §§ 14003, 14034. Moreover, use of pesticides in such a manner as to cause "any substantial drift" is a misdemeanor, the commission of which appears to be an actionable tort. *Id.* §§ 9, 12972; Note, *Crop Dusting: Two Theories of Liability?*, 19 HASTINGS L.J. 476, 486-87 (1968). However, the applicability of the Agricultural Code provisions to governmental entities, and their interrelationship to the Tort Claims Act of 1963, are in need of clarification. *See* note 330 *infra*.

tions.[249]

(3) *Privileged Entry Upon Private Property*

In the course of performing their duties, public officers often have need, and commonly are authorized by statute, to enter private property to make inspections and surveys, abate public nuisances, and perform other governmental functions.[250] These official entries and other related activities on private property, if restricted to reasonable performance of public duties, are privileged and do not constitute a basis of personal tort liability of the public officer.[251] If, however, the privilege is abused by the commission of a tortious act in the course of the entry, the common law regards the officer as personally liable *ab initio* for both the original trespass and all resulting injuries.[252] The Tort Claims Act of 1963 rejects the *ab initio* approach, but does recognize liability of both the public entity and its employee for tortious injuries inflicted by the latter during an otherwise privileged entry.[253]

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[249] Actions to impose statutory tort liability for a dangerous condition of public property, note 247 *supra*, are subject to certain defenses not available in inverse condemnation. *See, e.g.*, CAL. GOV'T CODE §§ 835.2, 835.4 (lack of notice and reasonableness of entity's actions after notice). *See also id.* § 830.6 (immunity for injury resulting from defective plan or design where not wholly unreasonable at time of adoption); Note, *Sovereign Liability for Defective or Dangerous Plan or Design—California Government Code Section 830.6*, 19 HASTINGS L.J. 584 (1968).

[250] *See, e.g.*, CAL. CODE CIV. PROC. § 1242 (surveys of land required for public use); CAL. HEALTH & SAFETY CODE § 2270(f) (investigations and nuisance abatement work by mosquito abatement district); CAL. WATER CODE § 2229 (surveys for irrigation district purposes). For a comprehensive list of citations, see Van Alstyne, *A Study Relating to Sovereign Immunity*, in 5 CAL. L. REVISION COMM'N, REPORTS, RECOMMENDATIONS & STUDIES 110-19 (1963). Entries into private buildings, unless consent is given by the owner, must be supported by a valid search warrant. See v. Seattle, 387 U.S. 541 (1967); Camara v. Municipal Court, 387 U.S. 523 (1967). Under the cited decisions, however, the warrant may authorize an "area inspection," and need not be particularized to individual structures.

[251] Giacona v. United States, 257 F.2d 450 (5th Cir. 1958); Onick v. Long, 154 Cal. App. 2d 381, 316 P.2d 427 (1957); Commonwealth v. Carr, 312 Ky. 393, 227 S.W.2d 904 (1950); Johnson v. Steele County, 240 Minn. 154, 60 N.W.2d 32 (1953); 1 F. HARPER & F. JAMES, THE LAW OF TORTS § 1.20, at 56-57 (1956); RESTATEMENT OF TORTS § 211 (1934).

[252] RESTATEMENT OF TORTS § 214 (1934), has apparently been approved as the California rule. Onick v. Long, 154 Cal. App. 2d 381, 316 P.2d 427 (1957); Reichhold v. Sommarstrom Inv. Co., 83 Cal. App. 2d 173, 256 P. 592 (1927). *See also* Heinze v. Murphy, 180 Md. 423, 24 A.2d 917 (1942); 1 F. HARPER & F. JAMES, THE LAW OF TORTS § 1.21, at 58-59 (1956).

[253] The California Tort Claims Act of 1963 declares public entities and public employees immune from tort liability for authorized official entries upon private property, but this immunity does not extend to injuries caused

Freedom from trespass liability, however, does not absolve the public entity from inverse condemnation liability. For example, although a public entity may be privileged to enter and remove obstructions from drainage channels running through private property as a means of promoting flood protection, damage sustained by adjoining private property as a result of the work performed (e.g., piling of rock and debris on channel banks) is compensable.[254] Similarly, a public entity acts fully within its rights in undertaking to install storm drains within an easement traversing private land, until its operations substantially obstruct normal use of the land in ways not shown to be essential to the performance of the work.[255]

The fact that the entry is pursuant to statutory authority does not alter the result. Statutory authorizations for official entries upon private lands generally are held to be valid on their face[256] since the courts feel constrained to assume that the contemplated interference with private property rights ordinarily will be slight in extent, temporary in duration, and *de minimis* in amount. As the leading California case of *Jacobsen v. Superior Court*[257] declares, the privilege of entry for official purposes is available only for "such innocuous entry and superficial examination . . . as would not in the nature of things seriously impinge upon or impair the rights of the owner to the use and enjoyment of his property."[258] Minor and trivial injuries, in effect, are noncompensable; the public purpose to be served by the entry requires subordination of private property rights to this limited

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by the employee's "own negligent or wrongful act or omission." CAL. GOV'T CODE § 821.8; *see* A. VAN ALSTYNE, CALIFORNIA GOVERNMENT TORT LIABILITY § 5.62 (Cal. Cont. Educ. Bar ed. 1964).

[254] Frustuck v. Fairfax, 212 Cal. App. 2d 345, 28 Cal. Rptr. 357 (1963); Bernard v. State, 127 So. 2d 774 (La. 1961). *See also* Podesta v. Lindeen Irr. Dist., 141 Cal. App. 2d 38, 296 P.2d 401 (1956), where the burdening of a servitude for drainage by widening and deepening a normally dry watercourse traversing a private ranch, thereby preventing its use for agricultural purposes, was held compensable.

[255] There are many examples of actionable interferences. Heimann v. Los Angeles, 30 Cal. 2d 746, 185 P.2d 597 (1947) (substantial temporary interference with access to adjoining property by storage of construction materials and erection of sheds upon and in front of plaintiff's land); O'Dea v. San Mateo County, 139 Cal. App. 2d 659, 294 P.2d 171 (1956) (obstruction of surface for over ten months by storing drainage pipes on easement while awaiting underground installation).

[256] Irvine v. Citrus Pest Dist. No. 2, 62 Cal. App. 2d 378, 144 P.2d 857 (1944); Contra Costa County v. Cowell Portland Cement Co., 126 Cal. App. 267, 14 P.2d 606 (1932) (by implication); *see* Annot., 29 A.L.R. 1409 (1924).

[257] 192 Cal. 319, 219 P. 986 (1923).

[258] *Id.* at 329, 219 P. at 991. *See also* Dancy v. Alabama Power Co., 198 Ala. 504, 73 So. 901 (1916); 2 P. NICHOLS, EMINENT DOMAIN § 6.11, at 379-83 (rev. 3d ed. 1963).

extent, at least.[259]

The threatened entry that the owner was seeking to prevent in *Jacobsen* contemplated the occupation of parts of the owner's ranch for two months by municipal water district employees, and the use of power machinery to make test borings and excavations to determine the suitability of the premises for use as a possible water reservoir. Recognizing that the resulting damages could not be a basis of tort liability, absent negligence, wantonness, or malice, the supreme court nevertheless concluded that they would constitute a compensable damaging of the owner's right to possession and enjoyment of his property. The district's argument of necessity was rejected. The fact that extensive soil testing, to depths up to 150 feet, was deemed essential to an intelligent evaluation of the suitability of the site for reservoir purposes—a determination that necessarily must precede any decision to institute condemnation proceedings—was held insufficient to *justify* an uncompensated interference of this magnitude with private property.

The *specific* holding in the *Jacobsen* case has been obviated by a special statutory procedure, enacted in 1959, as section 1242.5 of the Code of Civil Procedure. Public entities with power to condemn land for reservoir purposes are authorized to petition the superior court for an order permitting an exploratory survey of private lands to determine their suitability for reservoir use, when the owner's consent cannot be obtained by agreement. The order, however, must be conditioned upon the deposit with the court of cash security, in an amount fixed by the court, sufficient to compensate the owner for damage resulting from the entry, survey, and exploration, plus costs and attorneys fees incurred by the owner.

While section 1242.5 is limited to reservoir site investigations, other types of privileged official entries may also cause substantial private detriment.[260] But, as discussed below, this provision constitutes a useful starting point for generalized legislative treatment of the problem of damage from privileged official entries upon private property.

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[259] *See* Heimann v. Los Angeles, 30 Cal. 2d 746, 185 P.2d 597 (1947) (no inverse recovery for personal discomfort or annoyance or for insubstantial interferences with property); *cf.* People *ex rel.* Department of Pub. Works v. Ayon, 54 Cal. 2d 217, 352 P.2d 519, 9 Cal. Rptr. 151 (1960) (*semble*).

[260] *See* Onorato Bros. v. Massachusetts Turnpike Auth., 336 Mass. 54, 142 N.E.2d 389 (1957) (highway route survey); Wood v. Mississippi Power Co., 245 Miss. 103, 146 So. 2d 546 (1962) (utility line route survey); Vreeland v. Forest Park Reser. Comm'n, 82 N.J. Eq. 349, 87 A. 435 (Ct. of Err. and App. 1913) (fire prevention); Litchfield v. Bond, 186 N.Y. 66, 78 N.E. 719 (1906) (county boundary survey); Rhyne v. Mount Holly, 251 N.C. 521, 112 S.E.2d 40 (1960) (weed abatement work); cases cited in notes 254-45 *supra*.

(4) *Physical Occupation or Destruction by Mistake*

It is well settled that, absent an overriding emergency, the intentional seizure or destruction of private property by a governmental entity acting in furtherance of its statutory powers subjects it to inverse condemnation liability.[261] De facto appropriations of this type, however, often represent an erroneous exercise of governmental power based upon a negligent, or otherwise mistaken, assumption that the government owns the property taken. In such cases, the view that the entity's actions are merely tortious (and thus nonactionable as against the immune sovereign) *generally* has been rejected where the dispossession is a permanent one to which a public use has attached.[262] For example, inverse liability obtains where the entity constructs public improvements upon private land which its project officers negligently assume has been acquired for that purpose.[263] The same result has been reached where the mistake was purely one of law, in that the officers acted in the mistaken belief that under pending condemnation proceedings an immediate entry was authorized.[264] Destruction of buildings and other improvements on a private ranch by naval personnel engaged in aerial gunnery and bombing practice, in the erroneous belief that the ranch was included within a naval gunnery range, has also been held a compensable taking.[265]

Although the cited cases appear to be analogous to private trespass actions,[266] significant differences may be noted. Although the

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[261] *See* Dugan v. Rank, 372 U.S. 609 (1963); 2 P. NICHOLS, EMINENT DOMAIN § 6.21, at 393 (rev. ed. 1963); Van Alstyne, *Statutory Modification of Inverse Condemnation: Deliberately Inflicted Injury or Destruction*, 20 STAN. L. REV. 617 (1968) (emergency exception). *See also* Wofford Heights Ass'n v. Kern County, 219 Cal. App. 2d 34, 32 Cal. Rptr. 870 (1963) (unintentional but foreseeable damage held compensable).

[262] *See, e.g.*, Eyherabide v. United States, 345 F.2d 565 (Ct. Cl. 1965); Department of H'ways v. Gisborne, 391 S.W.2d 714 (Ky. 1965).

[263] Napa v. Navoni, 56 Cal. App. 2d 289, 132 P.2d 566 (1942) (water pipeline laid in plaintiff's land under mistaken belief that easement had been acquired); Department of H'ways v. Gisborne, 391 S.W.2d 714 (Ky. 1965) (contractor in good faith reliance proceeded with improvement work on land which highway engineer mistakenly staked out); *cf.* Road Dep't v. Cuyahoga Wrecking Co., 171 So. 2d 50 (Fla. App. 1965) (highway contractor removed building from land not yet condemned, apparently by mistake).

[264] Bridges v. Alaska Housing Auth., 375 P.2d 696 (Alas. 1962) (owner awarded value of building, attorneys fees, and damages for mental anguish when private structure destroyed). *See also* R.J. Widen Co. v. United States, 357 F.2d 988 (Ct. Cl. 1966) (United States Corps of Engineers mistakenly commenced flood control work under joint federal-state project three months before state, pursuant to agreement, "took" the property by condemnation).

[265] Eyherabide v. United States, 345 F.2d 565 (Ct. Cl. 1965).

[266] *Compare* Napa v. Navoni, 56 Cal. App. 2d 289, 139 P.2d 566 (1942)

public trespass may be capable of being discontinued, the injured party does not have the option, ordinarily open to private litigants, to seek recovery for past damages together with specific removal of the offending structure or condition.[267] Where a public use has intervened, the courts ordinarily refuse to enjoin continuance of the invasion, and relegate the plaintiff instead to recovery of compensation for whatever property damage inflicted, both past and future.[268] In addition, the plaintiffs in factually similar private tort litigation may recover not only for property damage but also for personal discomfort and annoyance caused by the trespassory invasion,[269] while these elements of damage generally are excluded from the purview of inverse condemnation.[270] The overlap of the tort and inverse remedies under present California law is thus somewhat less than complete duplication.[271]

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 prop-

(inverse condemnation) with Slater v. Shell Oil Co., 56 Cal. App. 2d 864, 137 P.2d 713 (1943) (trespass).

[267] *Cf.* Spaulding v. Cameron, 38 Cal. 2d 265, 239 P.2d 625 (1952). *See generally* Kornoff v. Kingsburg Cotton Oil Co., 45 Cal. 2d 265, 288 P.2d 507 (1955); Slater v. Shell Oil Co., 56 Cal. App. 2d 864, 137 P.2d 713 (1943); RESTATEMENT (SECOND) OF TORTS § 161, comment b (1965). The option is ordinarily denied, however, when the offending structure is maintained as a necessary part of a public utility operation. Thompson v. Illinois Central R.R., 191 Iowa 35, 179 N.W. 191 (1920); McCormick, *Damages for Anticipated Injury to Land*, 37 HARV. L. REV. 574, 584-85 (1924).

[268] Frustuck v. Fairfax, 212 Cal. App. 2d 345, 28 Cal. Rptr. 357 (1963); *cf.* Loma Portal Civic Club v. American Airlines, Inc., 61 Cal. 2d 582, 394 P.2d 548, 39 Cal. Rptr. 708 (1964) (denial of injunction to prevent excessive jet aircraft noise by commercial planes landing and taking off at public airport held proper in view of public interest in continuation of air transportation).

[269] Kornoff v. Kingsburg Cotton Oil Co., 45 Cal. 2d 265, 288 P.2d 507 (1955).

[270] *See* People *ex rel.* Dep't of Pub. Works v. Ayon, 54 Cal. 2d 217, 352 P.2d 519, 9 Cal. Rptr. 151 (1960); Haimann v. Los Angeles, 30 Cal. 2d 746, 185 P.2d 597 (1947); Brandenburg v. Los Angeles County Flood Control Dist., 45 Cal. App. 2d 306, 114 P.2d 14 (1941). *Contra*, Bridges v. Alaska Housing Auth., 375 P.2d 696 (Alas. 1962).

[271] Although common law governmental immunity is no longer a defense to trespass as a remedy against California public entities for mistaken occupation or destruction of private property, relief in tort may not always be available in light of the special defenses included in the California Tort Claims Act of 1963. *See, e.g.*, CAL. GOV'T CODE §§ 820.2 (discretionary conduct), 820.4 (non-negligent enforcement of law), 821.8 (trespass within express or implied authority).

erty, 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

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[272] *See, e.g.*, Archer v. Los Angeles, 19 Cal. 2d 19, 24, 119 P.2d 1, 4 (1941). Statements to this effect in *Archer* and other cases were characterized as dicta in Albers v. Los Angeles County, 62 Cal. 2d 250, 398 P.2d 129, 42 Cal. Rptr. 89 (1965).

[273] *See, e.g.*, Bauer v. Ventura County, 45 Cal. 2d 276, 289 P.2d 1 (1955); Ward Concrete Co. v. Los Angeles County Flood Control Dist., 149 Cal. App. 2d 840, 309 P.2d 546 (1957).

[274] *See, e.g.*, Granone v. Los Angeles County, 231 Cal. App. 2d 629, 42 Cal. Rptr. 34 (1965); Beckley v. Reclamation Bd., 205 Cal. App. 2d 734, 23 Cal. Rptr. 423 (1962).

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

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[275] See text accompanying notes 38-43 *supra*.

[276] Clement v. Reclamation Bd., 35 Cal. 2d 628, 641, 220 P.2d 897, 905 (1950). *See also* Youngblood v. Los Angeles County Flood Control Dist., 56 Cal. 2d 603, 364 P.2d 840, 15 Cal. Rptr. 904 (1961).

[277] Reardon v. San Francisco, 66 Cal. 492, 6 P. 317 (1885).

[278] *See* Smith v. Los Angeles, 66 Cal. App. 2d 562, 578, 153 P.2d 69, 78 (1944): "During this [six year] period the district had ample time and opportunity to make adequate provision for the care of the diverted waters and for the protection of plaintiffs' property. It was simply a *choice of means deliberately made* by the governing board of the district in selecting one method of controlling possible future floods as against another." (Emphasis added). *See also* Lubin v. Iowa City, 257 Iowa 383, 391, 131 N.W.2d 765, 770 (1965), where the court said in affirming an order granting plaintiff a new trial in an action for damages to a flooded basement caused by a break in an 80 year old water main installed six feet beneath the surface without a reasonable inspection capability that "[a] city . . . so operating knows that eventually a break will occur, water will escape and in all probability flow onto the premises of another with resulting damages. . . . *The risk from such a method of operation should be borne by the water supplier* who is in a position to spread the cost among the consumers who are in fact the true beneficiaries of this practice and of the resulting savings in inspection and maintenance costs." (Emphasis added). *Cf.* Broeder, *Torts and Just Compensation: Some Personal Reflections*, 17 HASTINGS L.J. 217, 224 (1965).

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.[219] 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.[220]

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[219] The legislative approach to governmental tort liability for dangerous conditions of public property includes directly analogous considerations. There are several examples. First, tort liability cannot be based upon defects in the plan or design of a public improvement where reasonable grounds for official approval thereof existed at the time the plan or design was accepted. Cabell v. State, 67 Cal. 2d 150, 430 P.2d 34, 60 Cal. Rptr. 476 (1967); CAL. GOV'T CODE § 830.6; Note, *Sovereign Liability for Defective or Dangerous Plan or Design—California Government Code Section 830.6*, 19 HASTINGS L.J. 584 (1968). Secondly, a condition of public property which causes injury is not regarded as "dangerous" if the court determines, as a matter of law, that the risk of harm thereby created was minor, trivial, or insignificant in light of the surrounding circumstances. CAL. GOV'T CODE § 830.2; *see* Barrett v. Claremont, 41 Cal. 2d 70, 256 P.2d 977 (1953). Thirdly, even if the condition is a dangerous one, liability is not imposed if the public agency establishes that either "(a) . . . the act or omission that created the condition was reasonable . . . [as] determined by weighing the probability and gravity of potential injury . . . against the practicability and cost of taking alternative action . . . ." or "(b) . . . the action it took to protect against the risk . . . or its failure to take such action was reasonable . . . [as] determined by taking into consideration the time and opportunity it had to take action and by weighing the probability and gravity of potential injury . . . against the practicability and cost of protecting against the risk of such injury." CAL. GOV'T CODE § 835.4; *see* A. VAN ALSTYNE, CALIFORNIA GOVERNMENT TORT LIABILITY §§ 6.29, 6.30 (Cal. Cont. Educ. Bar ed. 1964).

[220] *See* RESTATEMENT (SECOND) OF TORTS § 302, comment a (1965). Evidence that planners or designers failed to employ sound engineering practices, *e.g.*, Granone v. Los Angeles County, 231 Cal. App. 2d 629, 42 Cal. Rptr. 34 (1965) (expert testimony), may thus be explainable on grounds other than negligence. The deficient culverts in *Granone*, for example, may have represented an intermediate or temporary stage of the channel improvement project; the county may have elected to bridge the stream by a less expensive technique (earth fill pierced by culverts) within current budget appropriations, rather than the more expensive expedient of a wide-span steel and concrete bridge. On the other hand, the decision to culvert rather than bridge may, in fact, have been due to negligence or incompetence of the responsible

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-

officers. The latter conclusion, if true, would merely move the risk analysis back an additional step. Employment of engineers, designers, and managers to develop and execute public improvement projects of substantial size and complexity entails a calculated risk of human error resulting in defective plans. An alternate analysis might emphasize the view that standards of personnel recruitment, methods of qualification investigation, and levels of compensation may not have been pitched at a level reasonably calculated to exclude the risk of employing untrained, incompetent, and careless designers and planners.

[281] Clement v. Reclamation Bd., 35 Cal. 2d 628, 642, 220 P.2d 897, 905 (1950).

[282] *See* House v. Los Angeles County Flood Control Dist., 25 Cal. 2d 384, 392, 153 P.2d 950, 954 (1944): "In view of the organic rights to acquire, possess and protect property and to due process and equal protection of the laws, the principles of nonliability and *damnum absque injuria* are not applicable when in the exercise of the police power, private, personal and property rights are interfered with, injured or impaired in a manner or by a means, or to an extent that is not reasonably necessary to serve a public purpose for the general welfare."

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]

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[283] *See* Smith v. Los Angeles, 66 Cal. App. 2d 562, 578, 153 P.2d 69, 78 (1944).

[284] *Cf.* Bacich v. Board of Control, 23 Cal. 2d 343, 359, 144 P.2d 818, 828 (1943) (Edmonds, J.) (concurring opinion): "The factors to be considered in deciding an inverse condemnation claim are, on the one hand, the magnitude of the damage to the owner of the land, and, on the other, the desirability and necessity for the particular type of improvement and the danger that the granting of compensation will tend to retard or prevent it. . . . In addition, before compensation may be denied, the court must find that the particular improvement be *not unreasonably more drastic or injurious than necessary* to achieve the public objective." (Emphasis added).

[285] *See* Clement v. Reclamation Bd., 35 Cal. 2d 628, 220 P.2d 897 (1950) (reliance on flood protection afforded by existing levees); Podesta v. Linden Irr. Dist., 141 Cal. App. 2d 38, 296 P.2d 401 (1956) (reliance upon continuance of drainage channel in natural condition); Los Angeles County Flood Control Dist. v. Abbot, 24 Cal. App. 2d 728, 76 P.2d 188 (1938) (reliance on accretions of sand); Los Angeles v. Aitken, 10 Cal. App. 2d 460, 52 P.2d 585 (1935) (reliance on continued water level of recreational lake).

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 pecularily 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

[286] See note 279 *supra*. It is clear, however, that the conditional "plan or design" immunity, CAL. GOV'T CODE § 830.6, withholds tort liability in precisely the same situations in which well settled rules of inverse condemnation law impose liability. *Compare* Cabell v. State, 67 Cal. 2d 150, 430 P.2d 34, 60 Cal. Rptr. 476 (1967) (tort liability withheld) *with* Granone v. Los Angeles County, 231 Cal. App. 2d 629, 42 Cal. Rptr. 34 (1965) (inverse liability affirmed).

[287] Even though the risk may be deemed remote or even unforeseeable, the damage that eventuates is actionable if it results "directly" from the improvement. *See* Albers v. Los Angeles County, 62 Cal. 2d 250, 298 P.2d 129, 42 Cal. Rptr. 89 (1965); text accompanying notes 27-35 *supra*. *See also* House v. Los Angeles County Flood Control Dist., 25 Cal. 2d 384, 397, 153 P.2d 950, 957 (1944) (Traynor, J.) (concurring opinion): "It is of no avail to defendant that the invasion of plaintiff's property in the manner in which it hap-

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,[285] absence of fault may

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pened was not foreseable. . . . The public purpose was not the mere construction of the improvement but the protection that it would afford against floods. The dangers inherent in the improvement would cause injury only when storms put the flood control system to a test. The injury sustained by plaintiff was therefore not too remote."

[285] The conclusion in *Albers* that the County of Los Angeles was a better loss distributor than the plaintiff property owners (the losses in question were presumably not of a kind ordinarily covered by insurance) is unexceptional. But many public entities have very limited fiscal resources. *See* Van Alstyne, *Governmental Tort Liability: A Public Policy Prospectus*, 10 U.C.L.A.L. REV. 463, 465 n.7 (1963), where "the tremendous disparities in size, population and fiscal capacity" of local public entities are pointed out. It is evidenced by the fact that some counties, cities, and special districts "function on *annual* fiscal budgets of less than $50,000, while other cities, counties and districts have budgets averaging more than that sum *per day*." *See generally* [1965-1966] CAL. CONTROLLER ANN. REP., FINANCIAL TRANSACTIONS CONCERNING SPECIAL DISTRICTS OF CALIFORNIA; J. VIEG, CALIFORNIA LOCAL FINANCE (1960). The total liability of the defendant in *Albers* exceeded $5,000,000. Reliance upon loss distribution capacity as a significant criterion of inverse liability would thus, upon occasion, result in inequitable and discriminatory treatment of equally deserving property owners, depending upon the differing fiscal capacities of the defendant public entities.

This difficulty, of course, could be *minimized* by development of adequate means for funding of inverse liabilities by even the smallest of public entities. Even if it is assumed that commercial insurance against such risks is obtainable at reasonable premiums, it is not entirely clear that adequate statutory authority exists for public entities to insure against all inverse liabilities. *See* CAL. GOV'T CODE §§ 989-991.2, 11007.4 (authorizing insurance against "any injury"). But *see id.* § 810.8 (defining "injury" to mean losses that would be actionable if inflicted by a private person). Since inverse liability may obtain where private tort liability does not, *Albers* v. Los Angeles County, 62 Cal. 2d 250, 398 P.2d 129, 42 Cal. Rptr. 89 (1965), comprehensive tort liability insurance may still be regarded as inapplicable to some inverse claims. Existing statutory authority to fund judgment liabilities with bond issues, CAL. GOV'T CODE §§ 975-75.6, is, however, clearly broad enough to include inverse liability judgments. A. VAN ALSTYNE, CALIFORNIA GOVERNMENT TORT LIABILITY § 9.16 (Cal. Cont. Educ. Bar ed. 1964). And although authority for payment of judgments by installments, CAL. GOV'T CODE § 970.6, is, in terms, limited to "tort" judgments, A. VAN ALSTYNE, *supra*, § 9.15, inverse liabilities may possibly be a form of "tort" for this purpose. *See generally* Douglass v. Los Angeles, 5 Cal. 2d 123, 128, 53 P.2d 353, 355 (1935).

In principle, the existing devices for funding tort liabilities appear to provide ample flexibility for administering inverse liabilities of the great majority of public entities. The statutes should, however, be clarified to avoid any doubt as to their applicability to inverse situations. In addition, the "catastrophe" liability problem should be given appropriate legislative attention. *See* Van Alstyne, *A Study Relating to Sovereign Immunity*, in 5 CAL. LAW REVISION COMM'N, REPORTS, RECOMMENDATIONS & STUDIES 308-11 (1963) (similar proposal geared to local "fiscal effort"); Borchard, *State and*

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 meri-

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Municipal Liability in Tort—Proposed Statutory Reform, 20 A.B.A.J. 747, 751-52 (1934) (proposal for state "backup" insurance to supplement insurance efforts of small local entities). The development of an equitable plan of state-funded "backup" insurance presupposes the availability of appropriate and fair tests of local fiscal effort to fund such protection more directly. Such tests appear to be available. *See* U.S. ADVISORY COMM'N ON INTERGOVERNMENTAL RELATIONS, MEASURES OF STATE AND LOCAL FISCAL CAPACITY AND EFFORT (1962).

[289] *See* Van Alstyne, *Statutory Modification of Inverse Condemnation: The Scope of Legislative Power*, 19 STAN. L. REV. 727, 771-78 (1967), for a review of the constitutional convention proceedings which led to adoption of the "or damaged" clause in section 14 of article I of the California Constitution.

[290] *Cf.* Calabresi, *The Decision for Accidents; an Approach to Nonfault Allocation of Costs*, 78 HARV. L. REV. 713 (1965).

[291] *See generally* 2 F. HARPER & F. JAMES, THE LAW OF TORTS § 11.4 (1956); Calabresi, *Some Thoughts on Risk Distribution and the Law of Torts*, 70 YALE L.J. 499, 500-17 (1961).

[292] *See* CAL. GOV'T CODE §§ 820.2, 830.6; A. VAN ALSTYNE, CALIFORNIA

torious 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 private 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

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GOVERNMENT TORT LIABILITY §§ 5.51-.57 (Cal. Cont. Educ. Bar ed. 1964). *See also* California Law Revision Commission, *Recommendation Relating to Sovereign Immunity*, in 4 CAL. LAW REVISION COMM'N, REPORTS, RECOMMENDATIONS & STUDIES 807, 810 (1963).

[293] *See* Gregoire v. Biddle, 177 F.2d 579 (2d Cir. 1949); Ne Casek v. Los Angeles, 233 Cal. App. 2d 131, 43 Cal. Rptr. 294 (1965). *But see* Van Alstyne, *Governmental Tort Liability: A Public Policy Prospectus*, 10 U.C.L.A.L. REV. 463, 473-91 (1963).

[294] There are two leading California decisions. Bauer v. Ventura County, 45 Cal. 2d 276, 289 P.2d 1 (1955); House v. Los Angeles County Flood Control Dist., 25 Cal. 2d 384, 153 P.2d 950 (1944).

Cases in other states are discussed in Mandelker, *Inverse Condemnation: The Constitutional Limits of Public Responsibility*, 1968 WIS. L. REV. 3. Imposition of inverse liability upon public entities for defectively designed public structures is consistent with the trend in private tort law toward imposition of liability upon architects and engineers for defective plans. *See* Comment, *Architect Tort Liability in Preparation of Plans and Specifications*, 55 CALIF. L. REV. 1361 (1967).

[295] *See* Van Alstyne, *Statutory Modification of Inverse Condemnation: The Scope of Legislative Power*, 19 STAN. L. REV. 727 (1967).

[296] See text accompanying notes 9-35 *supra*. Despite the implications of the *Albers* decision, however, subsequent inverse litigation has continued to revolve principally around the concept of fault. *See, e.g.*, Sutfin v. State, 261 A.C.A. 39, 67 Cal. Rptr. 665 (1968) (flooding caused by highway improvement and related flood control works).

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

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[297] RESTATEMENT (SECOND) OF TORTS § 520, at 56 (Tent. Draft No. 10, 1964): "In determining whether an activity is abnormally dangerous, the following factors are to be considered: (a) Whether the activity involves a high degree of risk of some harm to the person, land or chattels of others; (b) whether the gravity of the harm which may result from it is likely to be great; (c) whether the risk *cannot* be eliminated by the exercise of reasonable care; (d) whether the activity is not a matter of common usage; (e) whether the activity is inappropriate to the place where it is carried on; and (f) the value of the activity of the community." *See also* id. § 521, stating that there should be no strict liability for abnormally dangerous activities required or authorized by law; liability should be governed by the standard of reasonable care appropriate to such activity.

[298] *Id.* § 522(a), at 82 (minority proposal by Reporter, W. Prosser, and three Advisors).

[299] *Id.* § 523, at 86. *See also* id. § 524, at 91 (contributory negligence).

[300] *Id.* § 524A, at 93.

[301] MASS. GEN. LAWS ANN. ch. 81, § 7 (1964). *See, e.g.*, United States Gypsum Co. v. Mystic River Bridge Auth., 329 Mass. 130, 106 N.E.2d 677 (1952). Although Massachusetts is a "taking" state, it has enacted an extensive pattern of legislation providing for payment of compensation for damage inflicted by governmental programs. For citations of Massachusetts cases, *see generally* 2 P. NICHOLLS, EMINENT DOMAIN § 6.42-.43, at 464-86 (rev. 3d ed. 1963).

[302] The development of the Massachusetts doctrine is reviewed fully in Boston Edison Co. v. Campanella & Cardi Constr. Co., 272 F.2d 430 (1st Cir.

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"

1959). This case is factually similar to Reardon v. San Francisco, 66 Cal. 492, 6 P. 317 (1885).

[303] Boston Edison Co. v. Campanella & Cardi Constr. Co., 272 F.2d 430 (1st Cir. 1959); Murray Realty, Inc. v. Berke Moore Co., 342 Mass. 689, 175 N.E.2d 366 (1961). *See also* Webster Thomas Co. v. Commonwealth, 336 Mass. 130, 143 N.E.2d 216 (1957). Economic considerations are deemed relevant to a determination of the practicability of damage avoidance. "In determining whether the damage was inevitable, the test is not whether the method was absolutely necessary, but whether in choosing another method so as to avoid damage 'the expense would be so disproportionate to the end to be reached as to make [the other method] from a business and common sense point of view impracticable.'" Murray Realty, Inc. v. Berke Moore Co., *supra* at 692, 175 N.E.2d at 368. In this case, the use of explosives for demolition work had been disapproved by the state as too risky, and the "pin and feather" method (drilling a series of holes and driving wedges to break paving) as too expensive and time-consuming. Adoption of the steel-ball-and-crane technique was found to be a reasonable decision and, absent negligence in the actual use of this technique, was thus a basis for statutory liability for "necessary" damage that resulted. In Boston Edison Co. v. Campanella & Cardi Constr. Co., *supra*, the twisting of the plaintiff's foundation as a result of dumping heavy fill on unstable soil on an adjoining public improvement site was held to be foreseeable, but the evidence failed to support a finding that avoidance techniques were practicable.

[304] *See, e.g.*, Murray Realty, Inc. v. Berke Moore Co., 342 Mass. 689, 175 N.E.2d 366 (1961) (negligent use of steel ball for demolition work); Holbrook v. Massachusetts Turnpike Auth., 338 Mass. 218, 154 N.E.2d 905 (1958) (flood damage due to negligently constructed embankment that interfered with drainage).

[305] *Cf.* Albers v. Los Angeles County, 62 Cal. 2d 250, 398 P.2d 129, 42 Cal. Rptr. 89 (1965). *But see* Sutfin v. State, 261 A.C.A. 39, 67 Cal. Rptr. 865 (1968); Burrows v. State, 260 A.C.A. 29, 66 Cal. Rptr. 868 (1968). *See also* Milhous v. Highway Dep't, 194 S.C. 33, 8 S.E.2d 852 (1940), where the state

—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

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was held liable for flooding due to the obstruction of surface waters even though, under private water law rules, a private person would not be liable; inverse liability for the "taking" of private property was held to be unfettered by rules of common law.

[306] *See* 2 P. NICHOLS, EMINENT DOMAIN § 5.1, at 4-8 (rev. 3d ed. 1963).

[307] See text accompanying notes 59-78 *supra*. *See also* Van Alstyne, *Statutory Modification of Inverse Condemnation: Deliberately Inflicted Injury or Destruction*, 20 STAN. L. REV. 617 (1968).

[308] See text accompanying notes 9-35 *supra*.

[309] *See, e.g.*, Sutfin v. State, 261 A.C.A. 39, 67 Cal. Rptr. 665 (1968) (stream water diversion); Burrows v. State, 260 A.C.A. 29, 66 Cal. Rptr. 868 (1968) (surface water diversion).

less diligently or are unable to command the resources to protect themselves may sustain losses as a result.[210] 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.[211] 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

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[210] See note 114-18 *supra*.

[211] *See* San Gabriel Valley Country Club v. Los Angeles County, 182 Cal. 392, 188 P. 554 (1920). The first comprehensive legislative approach to regional flood control involved the creation of the Sacramento & San Joaquin Drainage District as a state agency to implement, in cooperation with the federal government, the flood control plans formulated by the California Debris Commission. Cal. Stats. 1913, ch. 170, at 252; *see* Gray v. Reclamation Dist. No. 1500, 174 Cal. 622, 163 P. 1024 (1917). Local flood control organizations, until recent years, consisted principally of relatively small drainage, levee, or flood control districts created pursuant to general enabling statutes. *E.g.*, CAL. WATER CODE APP. §§ 6-1 to -29 (1968) (corresponds to Protection District Act of 1895, Cal. Stats. 1895, ch. 201, §§ 1-29); CAL. WATER CODE APP. §§ 9-1 to -25 (1968) (corresponds to Levee District Act of 1905, Cal. Stats. 1905, ch. 310, §§ 1-16). A few flood control districts of more sweeping geographical scope had been established by special legislation before 1939. CAL. WATER CODE APP. §§ 28-1 to -23 (1968) (Los Angeles County); CAL. WATER CODE APP. §§ 36-1 to -23 (1968) (Orange County); CAL. WATER CODE APP. §§ 37-1 to -31 (1968) (American River Basin). However, the modern trend to establishment of such districts in a majority of the counties of California by carefully tailored special laws began in 1939 with the creation of the San Bernardino County Flood Control Act. CAL. WATER CODE APP. §§ 43-1 to -28 (1968) (corresponds to Cal. Stats. 1939, ch. 78, §§ 1-28). In the 30 years since then, some 35 major flood control districts have been created by special act. *See* CAL. WATER CODE APP. §§ 46-106 (1968). The validity of such specially created districts, despite the constitutional prohibition against local and special legislation, has been affirmed repeatedly. *See* American River Flood Control Dist. v. Sweet, 214 Cal. 778, 7 P.2d 1030 (1932).

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.

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[312] *See, e.g.*, Gray v. Reclamation Dist. No. 1500, 174 Cal. 622, 163 P. 1024 (1917).

[313] *See* Beckley v. Reclamation Bd., 205 Cal. App. 2d 734, 23 Cal. Rptr. 428 (1962); Comment, *California Flood Control Projects and the Common Enemy Doctrine*, 3 STAN. L. REV. 361 (1951). A collateral problem, to which little or no attention has been given in the case law, is the question of notice. The physical activity of one farmer in putting up protective levees might well give adequate notice to his immediate neighbors of the need for similar self-help to repel the "common enemy"; but it seems unrealistic to expect that lower landowners will necessarily realize that upstream flood control improvements being installed by a large public district, possibly many miles distant, will augment the volume, velocity, and intensity of downstream flow to a degree that warrants additional protective barriers. To the extent that the "common enemy" rule assumes that the resulting downstream flood damage is the result of the injured owner's failure to take self-protective measures, despite absence of notice of the need to do so, it tends to function as a rule of strict liability operating in reverse. *Cf.* 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). The analogous problem of allocating responsibility for protection against loss of lateral support due to normal excavations for improvement purposes has been resolved by statutory provision for the giving of "reasonable notice" by the improver as a condition of non-liability. CAL. CIV. CODE § 832; *see* note 184 *supra*.

[314] Gray v. Reclamation Dist. No. 1500, 174 Cal. 622, 163 P. 1024 (1917). *See also* United States v. Sponenbarger, 308 U.S. 256 (1939); Kambish v. Santa Clara Valley Water Conser. Dist., 185 Cal. App. 2d 107, 8 Cal. Rptr. 215 (1960); Weck v. Los Angeles County Flood Control Dist., 80 Cal. App. 2d 182, 181 P.2d 935 (1947).

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 reciprocal 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]

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[315] See text accompanying notes 125-30, 149-50, 155-56 *supra*.

[316] *See, e.g.*, Clement v. Reclamation Bd., 35 Cal. 2d 628, 220 P.2d 897 (1950); Rudel v. Los Angeles County, 118 Cal. 281, 50 P. 400 (1897).

[317] Although most of the California decisions have tended to exemplify a somewhat mechanical application of doctrinal precepts, *e.g.*, Caliens v. Orange County, 129 Cal. App. 2d 255, 276 P.2d 886 (1954), some notable exceptions can be found. *E.g.*, Dunbar v. Humboldt Bay Mun. Water Dist., 254 Cal. App. 2d 480, 62 Cal. Rptr. 358 (1967) (damage issues); Beckley v. Reclamation Bd., 205 Cal. App. 2d 734, 23 Cal. Rptr. 428 (1962) (liability issues); Smith v. Los Angeles, 66 Cal. App. 2d 562, 153 P.2d 89 (1944) (liability issues). Instructive examples of explicit balancing of interests are also found in United States v. Gerlach Live Stock Co., 339 U.S. 725 (1950) (feasability of equitable cost

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]

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distribution deemed relevant to compensability for loss of riparian rights due to seasonal overflowing of agricultural lands); United States v. Willow River Power Co., 324 U.S. 499 (1945) (appraisal of competing private and public interests deemed relevant to compensability for loss of head due to increase in water level).

[318] *See* Joslin v. Marin Mun. Water Dist., 67 Cal. 2d 132, 429 P.2d 889, 60 Cal. Rptr. 377 (1967) (stream water); Keys v. Romley, 64 Cal. 2d 396, 412 P.2d 529, 50 Cal. Rptr. 273 (1966) (surface water); Burrows v. State, 260 A.C.A. 29, 66 Cal. Rptr. 868 (1968).

[319] See text accompanying notes 297-300 *supra*.

[320] *See, e.g.*, Water Quality Act, 33 U.S.C. § 466 (Supp. I, 1965); Water Pollution Control Act, 33 U.S.C. § 466a (Supp. II, 1966); Clean Air Act, 42 U.S.C. § 1857 (1964); 1 FED. WATER POLLUTION CONTROL ADM'N, THE COST OF CLEAN WATER: SUMMARY REPORT *passim* (1968); U.S. DEPT. OF AGRIC., A PLACE TO LIVE: THE YEARBOOK OF AGRICULTURE 83-132 (1963).

[321] It has been estimated authoritatively that "municipal waste treatment plant and interceptor sewer construction costs to attain federal water quality standards in the five-year period, FY 1969-73, will require the expenditure of $8.0 billion," excluding land costs. 1 FED. WATER POLLUTION CONTROL ADM'N, THE COST OF CLEAN WATER: SUMMARY REPORT 10 (1968). *See also* Bryan, *Water Supply and Pollution Control Aspects of Urbanization*, 30 LAW & CONTEMP. PROB. 176, 188-92 (1965).

[322] See text accompanying notes 206-23 *supra*. *But see* N.J. Rev. Stat. § 40:63-129 (1967): "The owner of any land adjacent to any plant, works or station for the treatment, disposal or rendering of sewage . . . who shall sustain any direct injury by reason of the *negligence or lack of reasonable care* of the contracting municipalities . . . in the establishment and maintenance of any such plant, works, or station, may maintain an action at law . . . for

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]

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the recovery of all damages sustained by him by reason of such injury." (Emphasis added). Since the concept of "nuisance" appears to be the principal doctrinal basis for tort liability (and possibly for inverse liability) in pollution cases, there is a need for legislative clarification of the extent of governmental tort liability for nuisance under the Tort Claims Act of 1963. Note 210 and accompanying text *supra*.

[323] See text accompanying notes 173-84 *supra*.

[324] CONN. GEN. STAT. REV. § 13a-82 (1966).

[325] MASS. GEN. LAWS ch. 81, § 7 (1964).

[326] PA. STAT. tit. 26, § 1-612 (Supp. 1966).

[327] WIS. STAT. § 80.47 (1957).

[328] To some extent, of course, a form of strict inverse liability is already required in some cases by the decision in Albers v. Los Angeles County, 62 Cal. 2d 250, 398 P.2d 129, 42 Cal. Rptr. 89 (1965). The full implications of this decision, however, remain to be worked out. *Cf.* Sutfin v. State, 261 A.C.A. 39, 67 Cal. Rptr. 665 (1968) (dictum) (opinion quotes extensively from pre-*Albers* opinions).

[329] *See* note 248 *supra*.

[330] For example, the legislature in CAL. AGRIC. CODE §§ 14003, 14093, has explicitly authorized governmental agencies to use certain dangerous chemicals in pest control operations, while the use of 2,4-D and other injurious herbicides in accordance with administrative regulations is authorized (apparently, but not explicitly, applicable to public entities) by a different section. *Id.* § 14033. Use of these chemicals may, of course, result in damage to private property. *See* Comment, *Crop Dusting: Two Theories of Liability?*, 19 HASTINGS L.J. 476 (1968). Legislative recognition of this risk is implicit in provisions declaring that authorized and lawful use of pesticides will not relieve "any person" from liability for damage to others caused by such use. CAL. AGRIC. CODE §§ 14003, 14034. Furthermore, in the interest of preventing improper and harmful methods from being employed, the legislature has delegated extensive authority to the director of agriculture to promulgate regulations, including a permit procedure, to govern the actual use of injurious agricultural chemicals. *Id.* §§ 14005-11, 14033. All users are under a mandatory duty to prevent substantial drift of economic poisons employed in the course of pest control operations and to conform to applicable regulations. *Id.* §§ 12972, 14011, 14032, 14063.

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

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It seems probable that the courts would hold governmental agencies subject to the cited statutory provisions. Fiournoy v. State, 57 Cal. 2d 497, 370 P.2d 331, 20 Cal. Rptr. 627 (1962) (general statutory language held applicable to public entities absent legislative intent to contrary). However, this conclusion is open to some doubt. Express reference to public agencies in certain code sections, CAL. AGRIC. CODE §§ 14063, 14093, suggests the intended nonapplicability of others in which no such reference is included. On the other hand, the code expressly makes the sections dealing with "Injurious Materials," *id.* §§ 14001-98, inapplicable to public entities while engaged in research projects. *Id.* § 14002. This impliedly indicates that it does apply in nonresearch situations. Legislation clarifying applicability would, it is submitted, be helpful.

Assuming applicability of the code provisions, the scope of governmental tort liability resulting from violations is not entirely clear. In some instances, such violations, for example, the use of a method of chemical pest control which caused substantial drift in violation of section 12972 would presumably constitute a basis for entity liability for breach of a mandatory duty. CAL. GOV'T CODE § 815.6. In some instances, however, it may be questionable whether such property damage resulted from actionable negligence in applying the chemicals or from the immune discretionary determination to apply them under circumstances in which drift, and resultant damage, was inevitable. CAL. GOV'T CODE §§ 820.2, 855.4; A. VAN ALSTYNE, CALIFORNIA GOVERNMENTAL TORT LIABILITY 639 & n.4 (Cal. Cont. Educ. Bar ed. 1964). If no negligence is found or the discretionary tort immunity obtains, the question remains whether liability could be predicated upon inverse condemnation or nuisance theories. *See* Bright v. East Side Mosquito Abatement Dist., 168 Cal. App. 2d 7, 335 P.2d 527 (1959) (nuisance theory). On the need for legislative treatment of the scope of nuisance liability of public entities, in conjunction with inverse condemnation, see notes 168, 208-223 and accompanying text *supra*. Finally, it is not clear whether the special "report of loss" procedures, which may affect the injured party's ability to establish the extent of his damages from chemical drift, CAL. AGRIC. CODE §§ 11761-65, are applicable to governmental operations or are limited to private commercial pest control activities. Clarification of these doubtful areas by legislation would also be helpful.

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.[351] 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.[352] 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 stand-

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[351] WIS. STAT. § 88.87 (Supp. 1967). In this measure, the Wisconsin legislature explicitly recognizes that some diversions and changes in both volume and direction of flow of surface and stream waters are the inevitable consequences of the improvement of property by public and private proprietors. Accordingly, in the interest of eliminating discouragements to the physical development of land, and to promote responsible drainage engineering to reduce unnecessary water damage, a statutory test of "reasonableness" was substituted for the less flexible and more mechanical criteria recognized under prior law. See Note, *Highways—Flood Damage—Proposed Modification of Common Enemy Doctrine*, 1963 WIS. L. REV. 649. Other states have taken varying approaches. In North Dakota highway construction is required to be "so designed as to permit the waters . . . to drain into coulees, rivers, and lakes according to the surface and terrain . . . in accordance with scientific highway construction and engineering so as to avoid the waters flowing into and accumulating in the ditches to overflow adjacent and adjoining lands." N.D. CENT. CODE § 24-03-06 (1960). Also when a highway has been constructed over a watercourse into which surface waters from farmlands flow and discharge, the state conservation commission, on petition, "shall determine as nearly as practicable the maximum quantity of water, in terms of second feet, which such watercourse or draw may be required to carry," after which the responsible authority is required to install a culvert or bridge of sufficient capacity to permit "such maximum quantity of water to flow freely and unimpeded through the culvert or under such bridge." *Id.* § 24-03-08 (1960). In Ohio, an administrative procedure exists for adjusting claims for private damage resulting from the overflow or leakage of a public reservoir, canal or dam, or the insufficiency of a public culvert. An appointed board of commissioners is required to award "such damages as they may deem just" upon a finding that the injury resulted from "defective construction of any part of the public work which might have been avoided by the use of ordinary skill or care, or resulted from the want of proper care on the part of the officers or agents of the state in maintaining or repairing" the improvement. OHIO REV. CODE ANN. §§ 123.39-.42 (Page 1953).

[352] CAL. STREETS & H'WAYS CODE §§ 725, 1487, 1488; People ex rel. Dep't of Pub. Works v. Lindskog, 195 Cal. App. 2d 562, 16 Cal. Rptr. 58 (1961); *cf.* Colusa County v. Strain, 215 Cal. App. 2d 472, 30 Cal. Rptr. 415 (1963) (sustaining validity of county ordinance requiring permit for land leveling or excavation work that changes drainage pattern, even though such work may be privileged under common law rules governing water damage). *But see* People v. Stowell, 139 Cal. App. 2d 728, 294 P.2d 474 (1956).

ards 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.[883] 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.[884] 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,

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[883] For example, present statutory provisions relating to liability for escaping fire, note 247 *supra*, and for damage to drifting of injurious chemicals used in past abatement work, note 248 *supra*, may be reasonably appropriate for retention as part of the tort-inverse liability framework. Modification of the existing statutes in the interest of clarification may, however, be necessary. See the suggestions relating to the chemical drift problem in note 330 *supra*.

[884] Burrows v. State, 260 A.C.A. 29, 66 Cal. Rptr. 866 (1968). Care should be taken, of course, to appraise the validity of the suggested approach in varying kinds of situations. For example, the problem of flooding of adjoining property as the result of inadequate drainage of public streets is marked, in the California cases, by excessive confusion and uncertainty. See text accompanying notes 106-08 *supra*. Consideration should be given to the question whether, in this type of case, damages should be administered under a rule of strict liability. *See, e.g.*, S.C. Code Ann. § 59-224 (1962), by which municipalities are under a mandatory duty to provide "sufficient drainage" for surface water collected in streets, after demand by property owners, and are liable for failure or refusal to do so. Hall v. Greenville, 227 S.C. 375, 88 S.E.2d (1955). On the other hand, in this type of case, consideration should be given to the question whether there is need for a rule of reasonableness geared to standard engineering expertise. See note 331 *supra*.

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]

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[335] Gray v. Reclamation Dist. No. 1500, 174 Cal. 622, 653, 163 P. 1024, 1037 (1917).

[336] *See* Van Alstyne, *Statutory Modification of Inverse Condemnation: The Scope of Legislative Power*, 19 STAN. L. REV. 727, 758-59 (1967).

[337] Chicago & Alton R.R. v. Tranbarger, 238 U.S. 68, 76 (1915), where a statute which imposed a duty on railroads to construct culverts for drainage of surface water across a right-of-way, contrary to state common law rules of property law, was held not a compensable "taking" of a property right.

[338] *See, e.g.*, Joslin v. Marin Mun. Water Dist., 67 Cal. 2d 132, 429 P.2d 889, 60 Cal. Rptr. 377 (1967), discussing the historical changes in California law relating to riparian water rights.

[339] There are many cases sustaining the retroactive application of statutory provisions destroying previously accrued tort causes of action against governmental agencies. *E.g.*, Los Angeles County v. Superior Court, 62 Cal. 2d 839, 402 P.2d 866, 44 Cal. Rptr. 796 (1965); Flournoy v. State, 230 Cal. App. 2d 520, 41 Cal. Rptr. 190 (1964).

[340] Van Alstyne, *Statutory Modification of Inverse Condemnation: The Scope of Legislative Power*, 19 STAN. L. REV. 727, 758-59 (1967).

[341] *See, e.g.*, Burbank v. Superior Court, 231 Cal. App. 2d 675, 42 Cal. Rptr. 23 (1965) (mandamus granted to compel trial court to sustain demurrer to complaint for interference with surface water drainage so that plaintiff would be required to set out tort and inverse theories of liability in separate counts). *See also* text accompanying notes 46-58 *supra*.

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]

The overlap of trespass and inverse condemnation is reflected presently in section 1242.5 of the California Code of Civil Procedure, under which public entities with power to condemn land for reservoirs, on petition and deposit of security for damages, may obtain a court order authorizing reservoir site investigations upon private land. Ordinarily, official entries upon private land are a privileged exercise

[342] *See* notes 168, 208-23 and accompanying text *supra*.

[343] *See, e.g.*, Granone v. Los Angeles County, 231 Cal. App. 2d 629, 42 Cal. Rptr. 34 (1965) (defective plan of culvert design held actionable for inverse condemnation purposes; court does not, however, discuss possible application of immunity provision of CAL. GOV'T CODE § 830.6). *Cf.* Burbank v. Superior Court, 231 Cal. App. 2d 675, 42 Cal. Rptr. 23 (1965) (newly created defenses to "dangerous property condition" liability, as provided in CAL. GOV'T CODE § 835.4, held retroactively applicable; such defenses, however, impliedly deemed not a limitation upon inverse condemnation). The need for legislative reconsideration of the present tort immunity for public improvements which are dangerous because of their plan or design, CAL. GOV'T CODE § 830.6, is underscored by the Supreme Court's position that the reasonableness of the plan must be judged solely as of its origin, without regard for latent dangers inherent therein which became apparent in the course of use and experience. Cabell v. State, 67 Cal. 2d 150, 430 P.2d 34, 60 Cal. Rptr. 476, (1967); Note, *Sovereign Liability for Defective or Dangerous Plan or Design—California Government Code Section 830.6*, 19 HASTINGS L.J. 584 (1968). Inverse liability thus serves as a "loophole" to the tort immunity conferred for initial bad planning; but neither tort nor inverse remedies are available for governmental failure to correct known dangers that later develop. Any incentive for accident prevention or for upgrading public facilities for safety purposes is not conspicuous here.

[344] Although inverse condemnation liability is not limited to real property but extends also to personalty, *see* Sutfin v. State, 261 A.C.A. 39, 67 Cal. Rptr. 665 (1968), it has never been deemed applicable to personal injuries or death claims. Brandenburg v. Los Angeles County Flood Control Dist., 45 Cal. App. 2d 306, 114 P.2d 14 (1941); note 270 *supra*. However, if the factual basis for inverse liability also constitutes a nuisance, damages for personal injuries are recoverable. *See* Murphy v. Tacoma, 60 Wash. 2d 603, 374 P.2d 976 (1962); *cf.* Bright v. East Side Mosquito Abatement Dist., 168 Cal. App. 2d 7, 335 P.2d 527 (1959).

of governmental authority.[345] Section 1242.5 was designed to meet the special problem of substantial property damage likely to occur from the kinds of technical operations, including soil tests, trenching, and drilling operations, often necessitated by reservoir investigations.[346] It appears, however, that section 1242.5 is both too broad and too narrow. By requiring a preliminary court proceeding in all cases, without regard for the degree of improbability that substantial damage will result from the entity's proposed investigatory methods, it imposes a requirement that often is unduly burdensome, time-consuming, and constitutionally unnecessary.[347] At the same time, since other kinds of privileged entries also may result in substantial property damage,[348] section 1242.5 is more restricted in scope than its policy rationale warrants.

What is required are general statutory criteria based upon section 1242.5, but limited to those cases in which its safeguards are required most urgently. It would be desirable, for instance, to make the procedure mandatory only when the owner's consent is not obtainable through negotiations,[349] and the planned survey (regardless of purpose) includes the digging of excavations, drilling of test holes or borings, extensive cutting of trees, clearing of land areas, moving of large quantities of earth, use of explosives, or employment of vehicles or mechanized equipment. Bypassing the formal statutory procedure by voluntary agreement with the owner could be promoted by a statutory requirement that, in any event, the entity at its sole expense must repair and restore the property, so far as possible, after the survey is concluded.[350] In addition, the entity could be required to com-

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[345] CAL. CODE CIV. PROC. § 1242; CAL. GOV'T CODE § 821.8; A. VAN ALSTYNE, CALIFORNIA GOVERNMENT TORT LIABILITY § 5.62 (Cal. Cont. Educ. Bar ed. 1964).

[346] *See* Jacobsen v. Superior Court, 192 Cal. 319, 219 P. 986 (1923); text accompanying note 257 *supra*.

[347] *See* 2 P. NICHOLS, EMINENT DOMAIN § 6.11 (rev. 3d ed. 1963); Annot., 29 A.L.R. 1409 (1924). Disproportionate costs of administering a system for settlement of nominal inverse condemnation claims is a rational basis for withholding compensation for trivial injuries. *See* Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 HARV. L. REV. 1165, 1214 (1967); *cf.* Bacich v. Board of Control, 23 Cal. 2d 343, 144 P.2d 818, 839 (1943) (Traynor, J.) (dissenting opinion).

[348] See note 260 *supra*.

[349] The petition and deposit procedure need be employed only "in the event . . . [the public] agency is unable by negotiations to obtain the consent of the owner." CAL. CODE CIV. PROC. § 1242.5.

[350] Precedent for imposition of a duty to restore the previous condition of the premises is found in numerous statutes providing, in connection with authorization for the construction of public improvements in or across streets, rivers, railroad lines, and the like, that the public entity "shall restore" the intersection, street, or other location to its former state. *See, e.g.*, CAL.

pensate the owner for his damages if for any reason the entity is unable fully to restore the premises to their previous condition.[851] Other minor defects in section 1242.5, while not discussed in this article, should also be abrogated.[852]

HEALTH & SAFETY CODE § 6518 (sanitary districts); CAL. PUB. UTIL. CODE § 16486 (public utility districts); CAL. WATER CODE § 71695 (municipal water districts). Statutory provisions to this effect are collected in Van Alstyne, *A Study Relating to Sovereign Immunity*, in 5 CAL. LAW REVISION COMM'N, REPORTS, RECOMMENDATIONS & STUDIES 91-96 (1963).

[851] Statutes of other states, which authorize official entries upon private property for survey and investigational purposes, typically require the entity to reimburse the owner for "any actual damage" resulting therefrom. Kansas allows entry by the turnpike authority to make authorized "surveys, soundings, drillings and examinations." The authority is required to make reimbursement for "any actual damages." KANS. STAT. ANN. § 68-2005 (1964). Massachusetts permits entry by the highway department for authorized "surveys, soundings, drillings or examination." The department is required to restore lands to previous condition, and to reimburse owner for "any injury or actual damage . . . ." MASS. GEN. LAWS ANN. ch. 81, § 7F (1964). Ohio authorizes the condemning public agencies, prior to instituting eminent domain proceedings, to enter to make "surveys, soundings, drillings, appraisals, and examinations" after notice to the property owner. The agency is required to "make restitution or reimbursement for any actual damage resulting" to the premises or improvements and personal property located thereon. OHIO REV. CODE ANN. § 163.03 (Supp. 1966). Oklahoma also allows entry by the department of highways to make "surveys, soundings and drillings, and examinations" with the department required to make reimbursement for "any actual damages resulting" to the premises. OKLA. STAT. tit. 69, § 46.1-.2 (Supp. 1966). In Pennsylvania the condemning agencies are authorized to enter property, prior to filing a declaration of taking, to make "studies, surveys, tests, soundings and appraisals." Agencies are required to pay "any actual damages sustained" by the owner. PA. STAT. ANN. tit. 26, § 1-409 (Supp. 1966).

The courts have generally construed statutes of this type as limited to reimbursement for substantial physical damages only. *See e.g.*, Onorato Bros. v. Massachusetts Turnpike Auth., 336 Mass. 54, 142 N.E.2d 389 (1957), where recovery was denied for "trivial" damage caused by the setting of surveyors' stakes, and for temporary loss of marketability due to apprehension by prospective buyers that the property being surveyed would be condemned in the near future; *cf.* Wood v. Mississippi Power Co., 245 Miss. 103, 146 So. 2d 546 (1962). Since the owner may fear that some injuries will occur despite the entity's assurances to the contrary, authority for the entity to pay the owner a reasonable amount within stated limits as compensation for prospective apprehension and annoyance (in addition to assurance of payment of actual damages) could also usefully assist in promoting owner cooperation through negotiation.

[852] Defects deserving consideration include:

(1) It is not entirely clear under section 1242.5 whether the court proceedings preliminary to the order for the survey are *ex parte* or on notice to the owner. *See* Los Angeles v. Schweitzer, 200 Cal. App. 2d 448, 19 Cal. Rptr. 429 (1962) (on appeal from order for reservoir survey made under section 1242.5 in which report fails to indicate whether owner received notice and hearing; interlocutory order held nonappealable). Since no elements of

D. Expansion of Statutory Remedies

Procedural disparities also deserve legislative treatment. The remedy in inverse condemnation generally contemplates the recovery of monetary damages,[353] although in special circumstances the courts

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emergency justify summary entries for survey and testing purposes, it is doubtful that *ex parte* proceedings would meet the requirement of procedural due process. *Cf.* People v. Broad, 216 Cal. 1, 12 P.2d 941 (1932) (notice and hearing required before narcotics *forfeiture* of vehicle effective); Thain v. Palo Alto, 207 Cal. App. 2d 173, 24 Cal. Rptr. 515 (1962) (notice and hearing required, absent emergency, before weed abatement action taken on private property). Assurance of a fully informed decision with respect to the amount of security to be required would be promoted by a noticed hearing with opportunity for presentation of evidence by the owner. If in the course of the survey, the deposit becomes inadequate because of unforeseen injuries inflicted, the court should also be authorized to require deposit of additional security and the statute should indicate the procedures open to the owner to obtain such an order.

(2) Section 1242.5 is silent on the scope of the court's authority to inquire into the techniques of exploration and survey that are contemplated, and as to the extent of its power to impose limitations and restrictions upon their use in the interest of reducing the prospective damages or of requiring utilization of the least detrimental techniques where alternatives are technologically feasible. *See* Los Angeles v. Schweitzer, *supra* (appeal from trial court order imposing specific limitations upon investigatory methods, under section 1242.5, dismissed without consideration of merits).

(3) Section 1242.5 fails to provide for remedies available to the owner when a public entity fails to invoke the statutory procedure, whether inadvertently or by design.

(4) Although section 1242.5 expressly authorizes the landowner to recover, out of the deposited security, compensation for the damages caused by the survey, plus court costs and a reasonable attorney fee "incurred in the proceedings before the court," it is not clear what "proceeding" is referred to—the initial proceeding leading to the order permitting the survey, or the subsequent proceeding to obtain compensation for the damages incurred, or both.

[353] Legislative clarification of the rules of damages applicable in inverse condemnation proceedings would be appropriate, since present statutory provisions governing eminent domain awards are geared solely to affirmative condemnation proceedings. *See* CAL. CODE CIV. PROC. §§ 1248-55b. Consideration should be given to the following aspects of inverse damages rules:

(a) Should a "before-and-after" test, as a measure of loss of value, be established by statute as the basic rule of damages, in accordance with the decisional law? *See* Rose v. State, 19 Cal. 2d 713, 737, 123 P.2d 505, 519 (1942). It is clear that loss of value is not the only constitutionally permissible measure of just compensation. United States v. Virginia Elec. & Power Co., 365 U.S. 624 (1961); Citizens Util. Co. v. Superior Court, 59 Cal. 2d 805, 382 P.2d 356, 31 Cal. Rptr. 316 (1963). If this standard is adopted, however, it should be recognized that exceptions may be needed to deal equitably with situations in which damage to improvements may not be reflected in diminished land value. *See, e.g.*, Kane v. Chicago, 393 Ill. 172, 64 N.E.2d 506 (1946) (no inverse damage recognized where, after destruction of building, land was more

sometimes have developed a "physical solution" where successive fu-

valuable than before); Evans v. Wheeler, 209 Tenn. 40, 348 S.W.2d 500 (1951) (detriment to operation of riding academy, caused by diversion of river, held noncompensable since no loss was established when property values were judged by "before-and-after" method in light of fact that highest and best use was for residential subdivision); Note, *Compensation For a Partial Taking of Property: Balancing Factors in Eminent Domain*, 72 YALE L.J. 392 (1962). Furthermore, the method of computing loss of value should exclude increased values attributable to general inflationary trends, especially where the damage was inflicted over an extended period of time. *See* Steiger v. San Diego, 163 Cal. App. 2d 110, 329 P.2d 94 (1958).

(b) Should "special" benefits be set off against inverse damages, in accordance with the case law? *See* Dunbar v. Humboldt Bay. Mun. Water Dist., 254 Cal. App. 2d 480, 62 Cal. Rptr. 358 (1967). In affirmative eminent domain proceedings, special benefits may only be set off against severance damages, not against the value of what is taken. CAL. CODE CIV. PROC. § 1248; *see* Gleaves, *Special Benefits: Phantom of the Opera*, 40 CALIF. ST. B.J. 245 (1965); Comment, *The Offset of Benefits Against Losses in Eminent Domain Cases in Texas: A Critical Appraisal*, 44 TEX. L. REV. 1564 (1966). Inverse litigation, however, ordinarily does not involve issues of severance damages; hence, to allow a complete offset against inverse damages might, in some cases, reduce the plaintiff's recovery to zero. *Cf.* United States *ex rel.* TVA v. Land in Hamilton County, 259 F. Supp. 377 (E.D. Tenn. 1966), even though, had the identical facts been the subject of an affirmative condemnation suit, no offset would have been permissible. *But see* CAL. CODE CIV. PROC. §§ 534, 1248. Section 1248 provides for an offset of specifically defined benefits against damages for appropriation of water. This section is incorporated by reference in section 534 which provides for an inverse damage award as alternative relief in a suit to enjoin appropriation of water

(c) To what extent should expenses incurred by the plaintiff in an effort to mitigate inverse damages be recoverable? Such mitigation expenses are presently recoverable under the decisional law, when incurred in good faith and in reasonable amount, even though the mitigation efforts were unsuccessful. Albers v. Los Angeles County, 62 Cal. 2d 250, 269-72, 398 P.2d 129, 140-42, 42 Cal. Rptr. 89, 100-02 (1965). Such mitigation expenses are recoverable in addition to loss of market value. *Id. See also* Game & Fish Comm'n v. Farmers Irr. Co., — Colo. —, 426 P.2d 562 (1967); Kane v. Chicago, 392 Ill. 172, 64 N.E.2d 506 (1945).

(d) When "cost-to-cure" is less than loss of market value, should this measure of damages be authorized or required in lieu of loss-of-value? *See* Dunbar v. Humboldt Bay Mun. Water Dist., 254 Cal. App. 2d 480, 62 Cal. Rptr. 358 (1967) (cost of remedial measures held relevant to damage issues); Steiger v. San Diego, 163 Cal. App. 2d 110, 329 P.2d 94 (1958) (cost of constructing adequate drainage to alleviate erosion held relevant to loss of value); Bernard v. State, 127 So. 2d 774 (La. 1961) (cost of construction of new bridge to restore access destroyed by enlargement of drainage canal); Brewitz v. St. Paul, 256 Minn. 525, 99 N.W.2d 456 (1959) (cost of retaining wall to control erosion caused by lowering of street grade). Should the cost of available remedial measures limit inverse damages where the owner, by unreasonably failing to take such measures in mitigation of damages, increased the physical injuries and loss of value sustained? *See* United States v. Dickinson, 331 U.S. 745, 751 (1947) (fair to measure erosion damage by

ture 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 de-

cost of reasonable protective measures which plaintiffs could have undertaken). *See generally* Note, *Compensation for a Partial Taking of Property: Balancing Factors in Eminent Domain*, 72 YALE L.J. 392 (1962).

(e) Should removal and relocation costs be authorized in inverse condemnation proceedings? *Cf.* Albers v. Los Angeles County, 62 Cal. 2d 250, 267-68, 396 P.2d 129, 139, 42 Cal. Rptr. 89, 98 (1965) (removal and relocation costs held not allowable in addition to loss of value). *See generally* HOUSE COMM'N ON PUB. WORKS, 88TH CONG., 2D SESS., STUDY OF COMPENSATION AND ASSISTANCE FOR PERSONS AFFECTED BY REAL PROPERTY ACQUISITION IN FEDERAL AND FEDERALLY ASSISTED PROGRAMS 194-237 (Comm. Print 1964) (collection of statutory provisions for relocation and removal costs); U.S. ADVISORY COMM'N OF INTERGOVERNMENTAL RELATIONS, RELOCATION: UNEQUAL TREATMENT OF PEOPLE AND BUSINESS DISPLACED BY GOVERNMENTS (1965).

(f) Should attorney fees and expert witness fees be recoverable in inverse condemnation proceedings? Ordinarily, such losses are not presently recoverable in inverse suits. *See* Frustuck v. Fairfax, 230 Cal. App. 2d 412, 41 Cal. Rptr. 56 (1964), in which the abandonment of the project causing inverse damages was held not a basis for a statutory award of attorneys fees and expert witness fees under CAL. CODE CIV. PROC. § 1255a. *But see id.* § 632 (attorneys fees authorized in water appropriation suit where defendant posts bond on obtaining modification of injunction).

[354] *See* Pasadena v. Alhambra, 33 Cal. 2d 908, 207 P.2d 17 (1949) (allocation of water rights in underground basin); Hillside Water Co. v. Los Angeles, 10 Cal. 2d 677, 76 P.2d 661 (1938) (replacement of public school water supply depleted by municipal exportation). Unconditional mandatory orders for physical correction of a cause of recurrent damaging have sometimes been approved. *See, e.g.*, Union Pac. R.R. v. Irrigation Dist., 253 F. Supp. 251 (D. Ore. 1966) (mandatory correction of seepage from irrigation canal); Weimhand v. Petaluma, 37 Cal. App. 296, 174 P. 958 (1918) (mandatory installation of culvert); Colella v. King County, — Wash. 2d —, 433 P.2d 154 (1967) (mandatory injunction to county to provide drainage for plaintiff's lands). It is submitted, however, that the public entity preferably should be given a choice, in the form of a conditional judgment, whether to undertake physical correction of the difficulty or to pay just compensation and thereby acquire the right to continuation of the injurious condition in the future. *See, e.g.*, Gibson v. Tampa, 135 Fla. 637, 185 So. 319 (1938) (city could not be compelled to erect expensive sewage treatment plant in lieu of just compensation for pollution damage); Buxel v. King County, 60 Wash. 2d 404, 374 P.2d 250 (1962) (city given alternative between construction of drainage facilities or payment of damages); *cf.* Harrisonville v. W. S. Dickey Clay Mfg. Co., 289 U.S. 334, 339-41 (1933) (Brandeis, J.) (injunction against sewage nuisance conditioned upon city's failure to pay damages). The latter view would reduce the danger of judicial interference with the discretionary determinations of elected public officials in matters relating to fiscal and budget policy, scope of improvement projects, and arrangement of priorities in allocation of public resources.

[355] Peabody v. Vallejo, 2 Cal. 2d 351, 40 P.2d 486 (1935); Frustuck v. Fairfax, 212 Cal. App. 2d 345, 28 Cal. Rptr. 357 (1963). However, there are cases to the contrary. Note 354 *supra*. Injunctive relief has been recognized

crees 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]

It appears reasonably probable that much of the artificiality of inverse condemnation law, derived largely from its use as a device to evade sovereign immunity, can be eliminated by the codification of statutory standards. Moreover, in cases where unintended physical property damage is the basis of the claim, it is now both possible (due to the demise of sovereign immunity) and desirable (in the interest of greater certainty and predictability,) to develop a single legislative

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as generally appropriate to prevent a threatened taking or damaging of private property if a public use has not yet materialized. Beals v. Los Angeles, 23 Cal. 2d 381, 144 P.2d 839 (1944); *cf.* Hassell v. San Francisco, 11 Cal. 2d 168, 78 P.2d 1021 (1938) (nuisance).

[356] For a good review of the flexible inverse remedies which could be made available, see Note, *Eminent Domain—Rights and Remedies of an Uncompensated Landowner*, 1962 WASH. U.L.Q. 210. *See also* Horrell, *Rights and Remedies of Property Owners Not Proceeded Against*, 1966 U. ILL. L. FORUM 113; Oberst & Lewis, *Claims Against the State of Kentucky—Reverse Eminent Domain*, 42 KY. L.J. 163 (1953); Note, *Compensation for a Partial Taking of Property: Balancing Factors in Eminent Domain*, 72 YALE L.J. 392 (1962).

[357] *See, e.g.*, Enos v. Harmon, 157 Cal. App. 2d 746, 321 P.2d 810 (1958) (mandatory injunction, plus damages, awarded in private tort suit to compel removal of obstruction to flow of irrigation water). *See also* CAL. CODE CIV. PROC. § 1251 (authorization for condemning agency to elect to build fences, in lieu of paying damages, when property is taken for highway purposes).

[358] WIS. STAT. § 88.87, -.89 (Supp. 1967).

[359] See note 354 *supra*. In appropriate cases, the court could be authorized to award just compensation for damages accrued in the past, plus a mandatory order to undertake corrective measures to prevent damage in the future, unless the defendant public entity formally asserts its desire to acquire title to a permanent easement or servitude and pay compensation therefor. *See* Game & Fish Comm'n v. Farmers Irr. Co., — Colo. —, 426 P.2d 562 (1967) (stream pollution); Armbruster v. Stanton-Pilger Drainage Dist., 169 Neb. 594, 100 N.W.2d 781 (1960) (stream diversion and erosion).

remedy with adequate scope and flexibility to supplant the uncertain and inconsistent inverse condemnation action developed by the courts. The prospect is a worthy challenge for modern law reform.