FLOODS, FIRES, AND INVERSE CONDEMNATION

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INTRODUCTION

This Article examines the proper application of the doctrine of inverse condemnation in two important areas: flood damage to private property caused by a public improvement (e.g., a flood control, storm drain, or sewer project), and wildfire damage to

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private property caused by a project (e.g., electricity or telephone lines) undertaken by either a public or privately-owned utility. Under the doctrine of inverse condemnation, a plaintiff may recover for a physical injury to private property caused by a public improvement as deliberately designed, constructed, or maintained.

Unlike an eminent domain or a condemnation proceeding—where a public entity initiates the action to acquire the private property of the defendant upon the payment of just compensation—an action for inverse condemnation is initiated by the property owner for the recovery of damages resulting from the improper "taking" of the property for a public use. An inverse condemnation action may be pursued when the government has taken or damaged private property for public use without following condemnation procedures and has failed to pay the requisite compensation for the property in question.[1]

Inverse condemnation provides an important means of obtaining compensation for government harm to private property, through the vehicle of civil litigation. Such compensation provides a direct remedy for past harm due to flooding, where damage to private property was caused by the failure of a public improvement. The same is true with respect to wildfires caused by utilities. Inverse condemnation compensation distributes loss in circumstances where it is unfair to require a private landowner to bear a financial burden that should be assumed by society, more broadly.

Inverse condemnation may also provide a useful tool for redressing the harmful effects of climate change. In many instances, climate change directly contributes to the frequency and severity of floods and wildfires.[2] Projections indicate that climate change will

[1] *See* Customer Co. v. City of Sacramento, 895 P.2d. 900, 905 (Cal. 1995); City of Oroville v. Superior Ct., 446 P.3d 304, 310 (Cal. 2019) ("An inverse condemnation action is an eminent domain proceeding initiated by the property owner rather than the condemner."); *see also* Breidert v. S. Pac. Co*.,* 394 P.2d 719, 721 (Cal. 1964).

[2] For example, scientific studies indicate that extreme rainfall events and flooding have increased in the Midwest states during the past century and are expected to continue to increase in the future. *See* U.S. GLOB. CHANGE RSCH. PROGRAM, CLIMATE CHANGE IMPACTS IN THE UNITED STATES: THE THIRD NAT'L CLIMATE ASSESSMENT 424–26 (Jerry M. Melillo, Terese Richmond, & Gary W. Yohe eds., U.S. Government Printing Off. 2014). Studies also find that increased warming, drought, and insect outbreaks, all caused by or linked to climate change, have increased wildfires in the Southwestern states in the past few decades. *See id.* at 468–69. *See generally* JOHN T. ABATZOGLOU & A. PARK WILLIAMS, IMPACT OF

lead to increases in floods and wildfires in the future.[3] It is reasonable to expect that many of these future floods and wildfires will cause damage to property in excess of what has occurred in the past. Such destructive events will continue to have enormous financial consequences for individual property owners and, if found liable for the damage in inverse condemnation actions, for public entities and utilities.

Inverse condemnation also implicates environmental concerns in more subtle ways, particularly in the context of climate change and flooding. For instance, as floods become more frequent and severe, governments will have to weigh the financial risks of action versus inaction with respect to undertaking flood control improvements.[4] An important consideration in this risk-weighing analysis is the extent to which, by undertaking and operating a flood

ANTHROPOGENIC CLIMATE CHANGE ON WILDFIRE ACROSS WESTERN U.S. FORESTS, 11770 (Monica G. Turner ed., 2016), https://doi.org/10.1073/pnas.1607171113 (analyzing data and finding human-caused increases in temperature and vapor pressure deficit have enhanced fuel aridity and doubled the western United States forest fire area beyond that expected from natural climate variability alone during 1984-2015); Jeremey S. Fried, Margaret S. Torn & Evan Mills, *The Impact of Climate Change on Wildfire Severity: A Regional Forecast for Northern California*, 64 CLIMATE CHANGE 169, 169, 177–79, 188 (2004) (concluding climatic change resulted in more frequent and more intense fires in northern California); Jeremy S. Littell et al., *Climate and Wildfire Area Burned in the Western U.S. Ecoprovinces, 1916-2003*, 19 ECOLOGICAL APPLICATIONS 1003, 1003–04, 1018–19 (2009) (analyzing the relationship between climate change and wildfire burn areas during the 20th century).

[3] *See, e.g.*, U.S. GLOB. RSCH. PROGRAM, *supra* note 2, at 424–26, 468–69 (observing that increases in extreme rain events and flooding are projected to continue in the future in the Midwest; and numerous fire models project more wildfires in the Southwest as climate change continues). *See generally* ABATZOGLOU & WILLIAMS, *supra* note 2, at 11773 (analyzing studies and concluding human-caused climate change is projected to increasingly promote wildfire potential across the western United States in the coming decades); KIM KNOWLTON ET AL., *Six Climate Change-Related Events in the United States Accounted for About $14 Billion in Lost Lives and Health Costs*, 30 HEALTH AFFAIRS 2169 (2011), www.healthaffairs.org/doi/full/10.1377/hlthaff.2011.0229 (projecting California to experience climatic changes that will result in a median increase in large fires of 21% between 2005 and 2014, and an increase of 84% between 2070 and 2099).

[4] Climate change adaptation "refers to changes made to better respond to present or future climatic and other environmental conditions, thereby reducing harm or taking advantage of opportunity." U.S. GLOB. CHANGE RSCH. PROGRAM, GLOBAL CLIMATE CHANGE IMPACTS IN THE UNITED STATES 11 (Thomas R. Karl, Jerry M. Melillo & Thomas C. Peterson eds., 2009), http://downloads.globalchange.gov/usimpacts/pdfs/climate-impacts-report.pdf.

control project, the government will be liable for any resulting damage if the project fails. If the inverse condemnation liability standard essentially makes the government the absolute insurer of the lands for which it provides flood protection, the effect may well be to discourage beneficial flood control projects. In this manner, the standard of inverse condemnation liability in flood damage cases may influence the government's willingness to undertake needed climate change adaptation measures.

This Article provides a detailed discussion of the liability standards in inverse condemnation actions. These standards should ensure the proper balance between public benefit and private injury, particularly in light of the increasing relevance of such actions due to the impacts of climate change. Part I begins with an explanation of the important policies underlying inverse condemnation, such as loss distribution and deterrence of conduct likely to cause damage to private property. Next, Part I discusses the substantive law basis for an inverse condemnation cause of action. This includes analyzing the significance of the textual distinction between authorizing compensation when private property is "taken" versus when it is "taken or damaged." Finally, Part I examines legal and policy issues that arise from several traditional limitations that courts have imposed on inverse condemnation liability. These limitations include the requirement that private property was taken or damaged for a "public use," that the injury was caused by a "deliberate and purposeful" act as part of a public improvement and not by a negligent act of a public employee, that the so-called "police power" exception does not preclude compensation, and that there was an appropriate causal relationship between the damage and the public project. Each of these doctrinal limitations is important in determining inverse condemnation liability and the availability of compensation.

Part II focuses on some of the legal and policy concerns that courts consider in modern applications of inverse condemnation in the context of water damage claims, particularly when determining the proper standard of liability. With respect to inverse condemnation cases generally, most jurisdictions have endorsed a strict liability standard as the fairest method of vindicating the relevant loss-distribution and deterrence policies. However, in cases seeking compensation for damage caused by certain flood improvement projects, courts have recognized competing policy concerns, such as the desire to promote flood management. These

concerns have induced courts to adopt a multi-factored "reasonableness" standard specific to some, but not all, water damage cases. The discussion in Part II examines the implications and desirability of strict liability or reasonableness rules in water damage cases.

In Part III, the analysis turns to inverse condemnation as a tool to obtain compensation for private property damaged or destroyed in wildfires caused by electric utilities. In the wildfire context, there are significant unresolved legal and policy issues. A preliminary question is whether inverse condemnation should apply only when the defendant is a publicly-owned and operated utility, or also when the defendant is a for-profit, privately-owned utility. Perhaps the most important legal and policy issue is the proper standard of liability, given the enormous potential liability for damages to property and people.[5] For example, damage to private property from the recent utility-caused wildfires in California could exceed $30 billion.[6] Consequently, the proper standard of liability—whether strict liability or some sort of reasonableness test—will have significant repercussions for government entities, utilities, property owners, and the public.

How courts define the standard of liability in inverse condemnation cases will become increasingly important in both the flooding and wildfire contexts. The continuing nature of climate

[5] Although a wildfire caused by a utility could happen in any state, some of the most devastating recent fires have occurred in California. For example, the 2018 "Camp" fire caused 86 deaths and destroyed 18,804 structures, the 2017 "Tubbs" fire caused 22 deaths and destroyed 5,636 structures, and the 2015 "Valley" fire caused 4 deaths and destroyed 1,955 structures. *See* Bettina Boxall, *State Spends $32 Million on Fuel Breaks, But Will It Help?*, L.A. TIMES, Sept. 15, 2019, at A1; *Top 20 Most Destructive California Wildfires*, CAL FIRE (Nov. 3, 2020), https://www.fire.ca.gov/media/11417/top20_destruction.pdf. Government investigators determined that Southern California Edison's power lines ignited the 2017 "Thomas" fire that killed two people and later gave rise to a massive mudflow that resulted in 21 deaths. *See* Joseph Serna, *Officials Say Edison Power Lines Caused Thomas Fire*, L.A. TIMES, March 14, 2019, at B1.

[6] One California utility, Pacific Gas & Electric Company (PG&E), caused an estimated $30 billion in damages due to wildfires in 2017-2018. *See PG&E Falls Deeper into the Hole as Wildfire Costs Grow*, L.A. TIMES (Nov. 7, 2019), https://www.latimes.com/business/story/2019-11-07/pge-expects-6-billion-in-wildfire-costs-this-year; *see also* John Roach, *California Wildfires Will Cost Tens of Billions, AccuWeather Estimates*, ACCUWEATHER (Nov. 3, 2019), https://www.accuweather.com/en/weather-news/california-wildfires-will-cost-tens-of-billions-accuweather-estimates/612548 (estimating that total damages and economic loss caused by California wildfires in 2019 will exceed $80 billion).

change will likely mean more flooding in some areas of the United States and more wildfires in others. This Article examines issues concerning the standard of liability in both contexts with the goal of determining their proper resolution by the courts. While the analysis will often focus on California authorities, it draws upon sources from other jurisdictions as relevant.

I. OVERVIEW OF INVERSE CONDEMNATION

A. *Policy Basis*

The Fifth Amendment of the Constitution requires "just compensation" for "private property taken for public use."[7] In discussing this constitutional just compensation requirement, courts typically explain that the "fundamental policy underlying inverse condemnation is that the cost of damage to a private owner resulting from a public use that benefits the community should be spread among those benefited rather than allocated to a single member of the community."[8] In other words, "the decisive consideration is whether the owner of the damaged property if uncompensated would contribute more than his proper share to the public undertaking."[9] Accordingly, as in an ordinary condemnation context, the policy basis for an inverse condemnation cause of action is cost spreading or loss distribution.[10]

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[7] U.S. CONST. amend. V.

[8] Williams v. Moulton Niguel Water Dist., 232 Cal. Rptr. 3d 356, 365 (Ct. App. 2018); Pac. Bell v. City of San Diego, 96 Cal. Rptr. 2d 897, 903 (Ct. App. 2000) (quoting Belair v. Riverside Cnty. Flood Control Dist., 764 P.2d 1070, 1074 (Cal. 1988)).

[9] Holtz v. Superior Ct., 475 P.2d 441, 445 (Cal. 1970) (quoting Clement v. State Reclamation Bd., 220 P.2d 897, 905 (Cal. 1950)); *see also Williams*, 232 Cal. Rptr. 3d at 365.

[10] *See* Albers v. County of Los Angeles, 398 P.2d 129, 136–37 (Cal. 1965); *Holtz,* 475 P.2d at 445 (observing the underlying purpose of inverse, as well as ordinary, condemnation is loss spreading); Daniel R. Mandelker, *Inverse Condemnation: The Constitutional Limits of Public Responsibility*, 1966 WIS. L. REV. 3, 8–9 (1966) (explaining that the purpose behind both inverse and ordinary condemnation "is to socialize the burden of loss—to afford relief to the landowner in cases in which it is unfair to ask him to bear a burden that should be assumed by society."); *see also* Armstrong v. United States, 364 U.S. 40, 49 (1960) ("The Fifth Amendment's guarantee that private property shall not be taken for a public use without just compensation was designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be

Inverse condemnation also serves other important purposes, such as encouraging risk reduction and deterring conduct likely to cause damage to private property. The very real possibility of significant financial liability instructs the government to consider the impacts of its policy choices more carefully. For example, when a public entity determines whether, where, and how to design, construct, and maintain a flood control improvement, it must weigh the financial risk associated with less safe cost saving measures rather than undertaking the project in a more expensive, but safer, manner. Similarly, to avoid ruinous inverse condemnation liability, a utility company must take steps to reduce the risk of causing wildfires. This deterrence purpose is most pronounced with respect to project maintenance, where a public entity or a utility may be tempted to make a policy decision to save money by declining to pursue a reasonable maintenance program.[11] To avoid liability, when a public entity undertakes a flood control project, it must adopt and operate an adequate plan of maintenance.[12] Likewise, a utility must not only consider where to place electrical wires and other infrastructure, but it must also engage in effective inspection and

borne by the public as a whole."); Lingle v. Chevron U.S.A., Inc., 544 U.S. 528, 537 (2005) (quoting *Armstrong*).

[11] *See, e.g.*, City of Oroville v. Superior Ct., 446 P.3d 304, 313–14 (Cal. 2019) (discussing the connection between inverse condemnation liability and maintenance plans); Arreola v. County of Monterey, 122 Cal. Rptr. 2d 38, 70–72 (Ct. App. 2002) (holding flood damage caused by inadequate maintenance of levee, pursuant to County's deliberate policy to cut expenses by forgoing proper maintenance, supports inverse condemnation liability); Pac. Bell v. City of San Diego, 96 Cal. Rptr. 2d 897, 907–10 (Ct. App. 2000) (finding the city's deliberate decision to install a water system without monitoring capabilities and to use a "wait until it breaks" cost-savings approach for detecting deterioration subjected city to inverse condemnation liability for flood damage caused by a burst water pipe); *see also* authorities cited *infra* notes 12 & 13.

[12] For example, catastrophic floods recently occurred in Midland County, Michigan after a pair of dams collapsed following record rainfall. Reportedly, the dam owners had repeatedly failed to maintain and improve spillways, which would have relieved pressure on the structures. *See* Matthew Cappucci & Andrew Freedman, *Michigan Dams Fail near Midland; Catastrophic Flooding Underway*, WASH. POST (May 20, 2020, 8:17 PM), https://www.washingtonpost.com/weather/2020/05/20/michigan-dams-fail-midland/; Keith Matheny, *Michigan Puts $175M Price Tag on Flooding Damage in Midland County*, DETROIT FREE PRESS (June 8, 2020, 4:17 PM), https://www.freep.com/story/news/local/michigan/2020/06/08/midland-flood-damage-major-disaster-whitmer/5321673002/.

preventive maintenance to identify and correct hazardous conditions on its transmission lines.[13]

There is one additional observation about the policy reasons underlying inverse condemnation, as well as about the scope of the analysis in this Article. "Takings" are often classified as either physical or regulatory. A physical taking occurs when a governmental entity physically appropriates, invades, or damages private property in order to confer a public benefit.[14] A regulatory taking occurs when a government entity imposes restrictions that either deny a property owner all economically viable use of the property or unreasonably interferes with the owner's right to use and enjoy the property.[15] Either type of taking may provide the basis for an inverse condemnation cause of action. Each type implicates numerous legal and policy issues, sometimes unique to one category of takings, and sometimes the same for both.[16] This Article will focus on physical takings, although some of the issues discussed may also apply to regulatory takings.

[13] *See, e.g.*, CAL. PUB. UTILS. COMM'N, APPENDIX A: SED INCIDENT INVESTIGATION REPORT FOR 2019 CAMP FIRE WITH ATTACHMENTS 12, 20 (Nov. 8, 2019) (finding the "Camp Fire," which destroyed 18,804 structures and caused 85 fatalities, was caused by vegetation contact with PG&E's electrical distribution lines because PG&E failed to properly inspect, identify, and correct such hazardous conditions on its transmission lines); CAL. PUB. UTILS. COMM'N, DECISION APPROVING PROPOSED SETTLEMENT AGREEMENT WITH MODIFICATIONS (May 7, 2020) (imposing penalties of $2.137 billion on PG&E for the role it played in igniting wildfires in 2017 and 2018 by failing to maintain an effective program to identify and correct hazardous conditions on its transmission lines), available at: http://docs.cpuc.ca.gov/PublishedDocs/Published/G000/M336/K236/336236538.pdf.

[14] *See, e.g.*, *Lingle*, 544 U.S. at 537 (observing that the "paradigmatic taking requiring just compensation is a direct government appropriation or physical invasion of private property"); Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1014–15 (1992) (citing earlier cases).

[15] *See, e.g.*, Murr v. Wisconsin, 137 S. Ct. 1933, 1942–43 (2017) (discussing whether state and local minimum lot size regulations constituted a regulatory taking); Palazzolo v. Rhode Island, 533 U.S. 606, 630 (2001) (affirming finding that state wetlands regulations did not deprive plaintiff landowner of all beneficial use because the uplands portion of the property can still be improved); *Lucas*, 505 U.S. at 1015 (1992) (declaring that the denial of all economically beneficial use of land constitutes a regulatory taking); Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 124–25 (1978) (discussing factors relevant to determine whether there is a regulatory taking when municipal zoning law impedes the use of property without depriving the owner of all beneficial use).

[16] For example, the "public use" requirement applies to both types of takings. *See* authorities cited *supra* note 14, and *infra* notes 36–40 and accompanying text.

B. *Substantive Law Basis*

The substantive law basis for an inverse condemnation cause of action varies, sometimes significantly, from state to state. One reason for this is that in most states, the state's constitution authorizes an inverse condemnation cause of action through a specific eminent domain provision.[17] As a result, although the Takings Clause of the Fifth Amendment of the United States Constitution applies to the States through the Fourteenth Amendment,[18] few inverse condemnation actions rely only on the federal Constitution because in many states, the state constitutional provision confers broader rights of recovery than those available under the federal Takings Clause.[19]

A majority of states authorize compensation for private property "taken or damaged" for public use.[20] However, a sizable

[17] *See* authorities cited *infra* notes 20 & 21.

[18] *See* Dolan v. City of Tigard, 512 U.S. 374, 383–84 (1994); *see also* Chi., Burlington & Quincy R.R. Co. v. Chicago, 166 U.S. 226, 239 (1897).

[19] *See, e.g.*, Henderson v. City of Columbus, 827 N.W.2d 486, 493–94 (Neb. 2013) (observing that the Nebraska Constitution broadens the entitlement for just compensation beyond property that is actually "taken" by a government entity and includes compensation for property that is "damaged"); Customer Co. v. City of Sacramento, 895 P.2d 900, 906–07 (Cal. 1995) (explaining that the addition of the words "or damaged" to the California Constitution in 1979 "was intended to clarify that the application of the just compensation provision is not limited to physical invasions of property taken for 'public use,' but also encompasses special and direct damage to adjacent property resulting from the construction of public improvements"); Lenertz v. City of Minot, 923 N.W.2d 479, 488 (N.D. 2019) (opining that North Dakota constitutional provision is broader than its federal counterpart because the state provision intended to secure owners not only possession but also those rights which render possession valuable); Diversified Holdings v. City of Suwanee, 807 S.E.2d 876, 891 (Ga. 2017) (Peterson, J., concurring) (observing the just compensation clauses in the state and federal constitutions may not have the same scope and meaning).

[20] The majority of states have adopted constitutional language similar to that of Article I, § 19, of the California Constitution: "Private property may be taken or damaged for public use only when just compensation … has first been paid to … the owner." *E.g.*, ALASKA CONST. art I, § 18; ARIZ. CONST. art. II, § 17; ARK. CONST. art. 2, § 22; CAL. CONST. art. 1, § 19; COLO. CONST. art. II, § 15; GA. CONST. art. I, § III, para. 1; ILL. CONST. art. I, § 15; LA. CONST. art. I, § 4; MINN. CONST. art. I, § 13; MISS. CONST. art. III, § 17; MO. CONST. art. I, § 26; MONT. CONST. art. II, § 29; NEB. CONST. art. 1, § 21; N.M. CONST. art. II, § 20; N.D. CONST. art. I, § 16; OKLA. CONST. art. II, § 23; PA. CONST. art. 1, § 10; S.D. CONST. art. VI, § 13; TEX. CONST. art. I, § 17; UTAH CONST. art. 1, § 22; VA. CONST. art. I, § 11; WASH. CONST. art. I, § 16; W. VA. CONST. art. III, § 9; WYO. CONST. art.

minority provide for compensation only where private property is "taken" for public use,[21] mirroring the language of the Takings Clause of the Fifth Amendment.[22] In some applications, this textual distinction between "taken" and "taken or damaged" makes a significant difference in the outcome of an inverse condemnation claim.[23]

For example, in *E-L Enterprises v. Milwaukee Metropolitan Sewerage District*,[24] the plaintiff property owner brought an inverse condemnation action against the Municipal Sewerage District, seeking damages for the cost of repair to a building on plaintiff's property. In constructing a sewer, the District had unreasonably removed groundwater from plaintiff's property, which damaged the building's supports and caused the building to settle.[25] A jury awarded the plaintiff over $300,000 in damages for the cost of repairs, which was affirmed by the court of appeals.[26] The Wisconsin Supreme Court reversed, observing that in order to trigger the "just compensation" clause under the Wisconsin Constitution, there must be "taking" of private property for public use.[27] The court explained that two types of governmental conduct

1, § 33; *see* Maureen E. Brady, *The Damaging Clauses*, 104 VA. L. REV. 341, 344, n.6 (2018) (collecting authorities).

[21] For example, Article I, § 13, of the Wisconsin Constitution provides, "The property of no person shall be taken for public use without just compensation therefor." The Constitutions in at least seventeen other states contain similar restrictive language. *E.g.*, CONN. CONST. art. I, § 11; FLA. CONST. art. X, § 6(a); IDAHO CONST. art. I, § 14; IND. CONST. art. I, § 21; IOWA CONST. art. I, § 18; ME. CONST. art. I, § 21; MD. CONST. art. III, § 40; MICH. CONST. art. X, § 2; NEV. CONST. art. 1, § 8(6); N.H. CONST. pt. 1, art. 12; N.J. CONST. art. I, § 20; N.Y. CONST. art. 1, § 7; OHIO CONST. art. 1, § 19; OR. CONST. art. I, § 18; R.I. CONST. art. I, § 16; S. C. CONST. art. I, § 33; VT. CONST. ch. I, art. II; WIS. CONST. art. I, 13. *See* Brady, *supra* note 20, at 349, n.30 (collecting authorities).

[22] The Fifth Amendment to the U.S. Constitution states, in relevant part: "Nor shall private property be taken for public use without just compensation." U.S. CONST. amend. V.

[23] *See generally* Brady, *supra* note 20, at 347–74 (discussing examples of the difference between "taking" and "damaging" clauses).

[24] *See* E-L Enters., Inc. v. Milwaukee Metro. Sewerage Dist., 785 N.W.2d 409 (Wis. 2010).

[25] *See id.* at 417–18 (explaining how the groundwater removal caused rotting to the supports for the building's foundation).

[26] *See id.* at 415.

[27] *See id.* at 417. The Wisconsin Constitution states: "The property of no person shall be taken for public use without just compensation therefor." WIS. CONST. art. I, § 13.

can constitute a "taking" under the Wisconsin Constitution: (1) "an actual physical occupation" of private property or (2) a restriction that deprives an owner "of all, or substantially all, of the beneficial use of his property."[28] Because the defendant District neither physically possessed or occupied plaintiff's building nor imposed a restriction that deprived the plaintiff of all, or substantially all, of the beneficial use of its property, there was therefore no "taking" of plaintiff's property within the meaning of the Wisconsin Constitution.[29] The court characterized the damage to plaintiff's property as only "consequential damages" caused by government action, which are not compensable under the Wisconsin Constitution.[30]

The *E-L Enterprises* court pointed out that, unlike the constitutions of some other states, the U.S. Constitution and the Wisconsin Constitution provide only that the private property shall not be "taken" for public use without just compensation, but "there is no mention of just compensation for property merely 'damaged' for public use."[31] The court acknowledged that compensation would likely be authorized in this scenario in a state with a "taken or damaged" constitutional provision.[32] Indeed, the facts of *E-L Enterprises v. Milwaukee Metropolitan Sewerage District* would seem to present a classic case for inverse condemnation recovery in "taken or damaged" states.[33] However, in a few states, the lack of a constitutional "damaged" provision makes little difference in the application of inverse condemnation. Courts in those states have interpreted a "taking" broadly to encompass a substantial impairment of the beneficial use and enjoyment of property.[34] For

[28] *E-L Enters., Inc.*, 785 N.W.2d at 417.
[29] *See id.* at 418–421.
[30] *See id.* at 418, 421.
[31] *Id.* at 421.
[32] *See id.*
[33] *See infra* Part II.A.1.
[34] *See, e.g.*, Brown v. Warchalowski, 471 A.2d 1026, 1029 (Me. 1984); J.K.S. Realty, LLC v. City of Nashua, 55 A.2d 941, 946–47 (N.H. 2012); State *ex rel.* Doner v. Zody, 958 N.E.2d 1235, 1247–52 (Ohio 2011); Hawkins v. La Grande, 843 P.2d 400 (Or. 1992); Vokopun v. City of Lake Oswego, 56 P.3d 396, 400 (Or. 2002) (noting any destruction, restriction, or interruption of use and enjoyment of property constitutes a taking). *See also E-L Enters.*, 785 N.W.2d at 431 (Prosser, J., dissenting) (collecting cases from various states); Mandelker, *Inverse Condemnation, supra* note 10, at 18–20; 2A David Shultz, NICHOLS ON EMINENT

purposes of this Article, the analysis assumes that the relevant state inverse condemnation provisions apply to private property "damaged," as well as "taken," by a public entity.

C. *Limitations on Inverse Condemnation Liability*

Traditionally, courts have imposed several limitations on inverse condemnation recovery, sometimes as a matter of constitutional interpretation, but more often pursuant to common law doctrine. These limitations include the requirement that private property was taken or damaged for a "public use," that the injury was caused by a "deliberate and purposeful" act as part of a public improvement and not by a negligent act of a public employee, that the so-called "police power" exception does not preclude compensation, and that there is a causal connection between the property damage and the public improvement. If one of these requirements is not met, a court will deny inverse condemnation compensation. Each of these limitations is examined in more detail below.

1. The Public Use Requirement

The Takings Clause in the Fifth Amendment to the U.S. Constitution, as well similar clauses in state constitutions, requires compensation for private property taken for "public use."[35] The public use requirement limits the government's power of eminent domain—the government can take any property it wants for a "public use," so long as it pays just compensation. This limitation, however, rarely imposes a significant restriction on a government's eminent domain power because what constitutes a "public use" includes a broad notion of "public purpose." For example, in *Kelo v. City of New London*, the United States Supreme Court endorsed a city's power to take property through eminent domain pursuant to a comprehensive economic development plan, even though some of the condemned property was transferred to a private developer and would not be open to use by the general public.[36] Because the City's comprehensive economic development plan was designed to benefit the entire community rather than a particular class of identifiable

DOMAIN § 6.01[d] (3d ed. 2020) (observing that the historical distinctions between the two clauses may be gradually eroding).

[35] *See* authorities cited *supra* notes 20–21 and cases cited *infra* notes 36–48.

[36] *See generally* Kelo v. City of New London, 545 U.S. 469 (2005).

individuals, the Court reasoned that the challenged takings had a "public purpose" and thereby satisfied the public use requirement of the Fifth Amendment.[37] Accordingly, the "public use" prerequisite in the federal Takings Clause is greatly diminished, perhaps even nonexistent, in its ability to limit government action in modern eminent domain proceedings.[38] The same is mostly true with respect to the eminent domain power under the Takings Clauses in state constitutions, although some states have not adopted *Kelo*'s broad definition for economic development cases.[39]

Regardless of how broadly or narrowly a state defines "public use" for purposes of eminent domain, this limitation has little or no impact on compensation in the inverse condemnation context.[40] Although courts routinely state that an inverse condemnation claimant must prove that the entity has taken or damaged property for a "public use," they just as routinely find this prerequisite

[37] *See id.* at 484–90.

[38] *See* Abraham Bell, *Private Takings*, 76 U. CHI. L. REV. 517, 535–36 (2009); 8A David Shultz, NICHOLS ON EMINENT DOMAIN § G22.01 (3d ed. 2020) (explaining that "the definition of public use has expanded so that now practically any acquisition meets the test if it serves a public purpose, confers a benefit on the public, furthers the state's police powers, or otherwise is within a state's legitimate governmental authority").

[39] *E.g.*, Bd. of Cnty. Comm'rs v. Lowery, 136 P.3d 639, 648–52, 651 n.20 (Okla. 2006) (holding the Oklahoma state constitutional eminent domain provisions place more stringent "public use" limitation on governmental eminent domain power than the limitations imposed by the Fifth Amendment, and joining other jurisdictions including Arizona, Arkansas, Florida, Illinois, South Carolina, Michigan, and Maine, which have rejected *Kelo's* broad definition of "public purpose" on state constitutional grounds); Bailey v. Myers, 76 P.3d 898, 904 (Ariz. Ct. App. 2003) (holding that "when a proposed taking for a redevelopment project will result in private commercial ownership and operation, the Arizona Constitution requires that the anticipated public benefits must substantially outweigh the private character of the end use so that it may truly be said that the taking is for a use that is 'really public'"); Manufactured Housing Cmtys. of Wash. v. State, 13 P.3d 183, 189 (Wash. 2000) (observing that the Washington Supreme Court has consistently held that a "beneficial use is not necessarily a public use"). Some states have rejected *Kelo*'s definition of "public use" by constitutional amendment. *E.g.,* MICH. CONST., art. X, § 2 (amended 2006); N.H. CONST., pt. 1, art. 12a (amended 2006).

[40] *See* Arvo Van Alstyne, *Statutory Modification of Inverse Condemnation: The Scope of Legislative Powers*, 19 STAN. L. REV. 727, 781 (1967) [hereinafter *Statutory Modification*] (discussing why the question of public use is less significant in inverse condemnation actions as opposed to eminent domain proceedings).

satisfied.[41] Here, as one court explained, "public use" is aptly defined to mean any use that "concerns the whole community or promotes the general interest in its relation to any legitimate object of government."[42] The fundamental reason for this broad definition is that an inverse condemnation action occurs *after* property has been taken or damaged by a public entity. It would be anomalous to permit a governmental entity to exercise eminent domain power, but then to deny inverse condemnation compensation *post hoc* once that power has already been exercised.[43]

For this reason, the most appropriate view—and the view borne out by case law—is that a deliberate taking or damage to private property by a public entity, for *any* purpose, is subject to inverse condemnation compensation.[44] In other words, neither a "public use" nor a "public purpose" requirement is an element of an inverse condemnation cause of action.[45] This approach was adopted by the Oregon Supreme Court in *Boise Cascade Corp. v. Bd. of Forestry,* where the plaintiff lumber company brought an inverse condemnation action against the state's department of forestry

[41] *See* authorities cited *infra* notes 42–44.

[42] Cal. State Auto. Ass'n v. City of Palo Alto, 41 Cal. Rptr. 3d 503, 506 (Ct. App. 2006) (quoting Frustuck v. City of Fairfax, 28 Cal. Rptr. 357, 365 (Ct. App. 1963)); *see* BRUCE A. ACKERMAN, PRIVATE PROPERTY AND THE CONSTITUTION 190 n.5 (1977) ("[T]he modern understanding of 'public use' holds that any state purpose otherwise constitutional should qualify as sufficiently 'public' to justify a taking.").

[43] As the North Carolina Supreme Court explained in *Wilkie v. City of Boiling Springs Lakes*, 809 S.E.2d 853, 862 (N.C. 2018): "Although a condemning entity must establish that a proposed taking will further a public purpose before a condemnation can be authorized, we can see no reason why a reciprocal burden to establish the existence of a public purpose should be imposed upon a property owner who has been deprived of his or her property by government action taken for a non-public purpose."

[44] *See, e.g.*, *id.* (concluding that the availability of the inverse condemnation remedy is not dependent upon the purpose which led to the infliction of injury for which the affected property owner seeks redress); Kirkpatrick v. City of Jacksonville, 312 So. 2d 487, 490 (Fla. Dist. Ct. App. 1975) (per curiam) ("The proviso that a landowner's property may be taken from him only 'for a public purpose' is for the landowner's protection and is not placed in the Constitution as a sword to be used against the landowner when the state has summarily taken his property without due process"); Harris Cnty. Flood Control Dist. v. Kerr, 499 S.W.3d 793, 813 (Tex. 2016) (Lehrmann, J., concurring) (stating that "it makes no sense to say that a property owner is entitled to compensation if the government does the right thing but not if it does the wrong thing").

[45] *See* cases cited *supra* notes 42–44.

alleging that the defendant had "taken" plaintiff's property by issuing orders that prevented the plaintiff from logging on its property.[46] When the case reached the Oregon Supreme Court, the defendant Board argued that the plaintiff, in order to recover, was required to prove that the Board had an express grant of eminent domain power from the legislature.[47] The court rejected that argument, holding that such a requirement may apply in a straightforward eminent domain proceeding in which the issue is whether the state had the power to take certain property, but not in an inverse condemnation proceeding when the plaintiff seeks compensation for a taking that has already occurred.[48]

A more significant issue is whether inverse condemnation liability applies when the defendant is a private, not a public, entity. In contrast to cases concerning a public entity, courts do not assume that a private actor's taking or damaging of property is for a public purpose.[49] For example, in wildfire cases, damage to private property is often caused by an electrical service project undertaken by a privately-owned utility. Such a utility exists to make a profit, not primarily to benefit the public. [50] As will be discussed in Part III of this Article, courts have adopted a broad notion of "public use" in wildfire cases, thereby making inverse condemnation applicable to a privately-owned utility.

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[46] 935 P.2d 411, 413 (Or. 1997).

[47] *See id.*

[48] *See id.* at 422.

[49] *See generally,* DiMartino v. City of Orinda, 95 Cal. Rptr. 2d 16 (Ct. App. 2000) (reversing inverse condemnation liability because there was no evidence to support the conclusion that the county constructed, required, or supervised the portion of the drainpipe running under plaintiffs' property); Ullery v. County of Contra Costa, 248 Cal. Rptr. 727, 730–33 (Ct. App. 1988) (ruling inverse condemnation liability not applicable for damages to private property caused by private development or authorized by a public entity where the entity's sole affirmative action was the issuance of permits and the approval of the subdivision map).

[50] Investor-owned private electric utility companies, such as PG&E and SDG&E in California, pay annual dividends to common shareholders. *See* PG&E CORP. 2019 ANNUAL JOINT REPORT TO SHAREHOLDERS, pp. iii-v, 64–65, 233–235, http://investor.pgecorp.com/financials/annual-reports-and-proxy-statements/default.aspx; SEMPRA ENERGY 2019 ANNUAL REPORT, pp. 2, 56-58, www.sempra.com/annualreport; *see also infra* notes 245–254 and accompanying text.

2. Inverse Condemnation vs. Negligence

An important and problematic limitation on inverse condemnation recovery is based on the distinction between an injury caused by a negligent act of a public employee as opposed to one caused by a "deliberate and purposeful" act that is part of a public improvement.[51] Over fifty years ago, Professor Daniel Mandelker observed that the cases applying this distinction did not set forth a coherent and consistent analysis of the limits of inverse condemnation that explains why there is no right of compensation in the act-of-negligence cases.[52] Some courts simply stated that no liability can be imposed for single tortious acts which fall under the state's sovereign immunity rule, while others explained that under inverse condemnation the act must be "intentional or purposeful," other courts ruled that the injury to property must be "permanent" and not "temporary," and still other courts simply stated the distinction without explanation.[53] Unfortunately, little has changed to clarify this distinction during the intervening half century.

Recent cases still adhere to the distinction between a negligent act, which does not fall under the aegis of inverse condemnation, and a "deliberate and purposeful" act, which does.[54] But these cases offer little in the way of meaningful factual and conceptual explanation. For example, in *Henderson v. City of Columbus*,[55] the

[51] *See* Mandelker, *supra* note 10, at 24–28 (discussing the distinction between ordinary torts, which will not be compensated under inverse condemnation, and takings or damage, which will).

[52] *See id.*

[53] *Id.*

[54] *See, e.g.*, Knutson v. City of Fargo, 714 N.W.2d 44, 48–50 (N.D. 2006) (holding inverse condemnation claim requires a deliberate act to take or damage property); City of Dallas v. Jennings, 142 S.W.3d 310, 313–15 (Tex. 2004) (discussing the proper standard for the requirement that only an intentional act can give rise to takings liability); Vokoun v. City of Lake Oswego, 56 P.3d 396, 400–02 (Or. 2002) (ruling claim for inverse condemnation requires showing that public entity intended to take property for public use); Customer Co. v. City of Sacramento, 895 P.2d 900, 908–09 (Cal. 1995) (ruling damages resulting from negligence in the routine operation having no relation to the function of the project as conceived is not within the scope of inverse condemnation); Electro-Jet Tool Mfg. Co. v. City of Albuquerque, 845 P.2d 770, 774–77 (N.M. 1992) (agreeing with cases from several jurisdictions and holding a property owner must prove conduct on the part of the government actor more serious, in terms of culpability or probability of harm, than mere negligence); Brady, *supra* note 20, at 387, n.242 (collecting cases).

[55] *See* 827 N.W.2d 486, 493–94, 496–97 (Neb. 2013).

Nebraska Supreme Court employed this distinction to justify rejecting the plaintiffs' inverse condemnation claim. The plaintiffs had sued the City of Columbus after a malfunction in the city-run sanitary sewerage disposal system caused raw sewage to flood their home.[56] A power failure during a heavy rainstorm had caused two sewerage pumps to stop working in the plaintiffs' neighborhood.[57] The City's utility supervisor reactivated both pumps but failed to inspect whether they were working properly.[58] An expert retained by the plaintiffs opined that reactivating the two pumps overloaded the sanitary sewer system, forcing raw sewage into plaintiffs' home, and "that the overload would not have occurred if the supervisor had taken alternative action such as turning on only one pump or pumping the sewage toward alternate routes."[59]

The *Henderson* court focused on the initial question of whether the City's actions constituted a taking or damaging for public use. The court ruled that plaintiffs must show that the injury to property "was intended or was the foreseeable result of authorized government action."[60] Because the plaintiffs failed to establish that the City took action that it knew or could foresee would result in damage to the plaintiffs' property, the plaintiffs failed to establish an inverse condemnation claim.[61] The court noted that, while the present case involved only a single event in which sewerage flooded, frequent and recurring sewerage overflow can be the basis for a compensable claim.[62]

Cases like *Henderson* provide a working hypothesis for factually distinguishing between negligence and inverse condemnation: damage to property caused by a single act of negligence on the part of a public employee does not establish an inverse condemnation cause of action, but damage caused by *recurring* acts of the same nature may constitute a viable claim. For example, in *Robinson v. City of Ashdow*n, effluent from the sewer system—constructed and operated by the defendant City—intermittently flooded plaintiffs' house over a nine-year period,

56 *See id.* at 489–90.
57 *See id.*
58 *See id.*
59 *Id.* at 489–90.
60 *Id.* at 495.
61 *See id*. at 496–97.
62 *See id*. at 494–96.

despite plaintiffs' continued pleas to the City for relief.[63] The question presented to the Arkansas Supreme Court in *Robinson* was whether instances of negligence may, if sustained over a long period of time, give rise to a claim for inverse condemnation.[64]

The *Robinson* court acknowledged the commonly stated rule that "negligent acts committed during the routine operation of a public improvement" do not typically give rise to a claim for inverse condemnation.[65] However, unlike cases where a single instance of sewage overflow into a home was immediately corrected by the city,[66] the plaintiffs in *Robinson* continually and repeatedly notified the City of the problem but to no avail.[67] Based on these additional facts, the *Robinson* court viewed the City's failure to remedy the sewer system problem as purposeful and "intentional," rather than negligent, damage to the plaintiffs' private property.[68] The court concluded that, under such circumstances, an inverse condemnation claim based on liability without fault was appropriate.[69]

The *Henderson* and *Robinson* decisions both demonstrate that, under certain circumstances, acts of negligence by a public entity may support an inverse condemnation cause of action. Courts in other states have reached the same conclusion.[70] The California courts have been particularly active in attempting to delineate the boundaries between negligence and inverse condemnation. These cases have developed a set of general rules designed to provide some meaningful factual and doctrinal distinctions.

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[63] *See* 783 S.W.2d 53, 54 (Ark. 1990).

[64] *See id.* at 54.

[65] *Id.* at 55.

[66] *See id*. at 56 (referring to an earlier decision, *City of Fort Smith v. Anderson*, 410 S.W.2d 597 (Ark. 1967), as an example of such single-instance cases).

[67] *See Robinson*, 783 S.W.2d at 56.

[68] *See id*.

[69] *See id.* at 56–57. If the plaintiffs' action was determined to be one for negligence and not inverse condemnation, the defendant municipality would have been immune from tort liability under Arkansas law. *See id.* at 57–58 (Turner, J., dissenting).

[70] *See, e.g.*, Knutson v. City of Fargo, 714 N.W.2d 44, 48–50 (N.D. 2006) (stating under North Dakota law inverse condemnation requires some deliberate act by a public entity, "whether done intentionally, negligently, or even innocently"); Trinity Broad. of Denver, Inc. v. City of Westminster, 848 P.2d 916, 922 (Colo. 1993) (indicating an inverse condemnation claim arises where the defendant "was so grossly negligent as to raise its conduct to being deliberate").

There have been several cases in California involving damage to property caused by the failure of a flood control project.[71] *Tilton v. Reclamation District No. 800* is a typical example.[72] In *Tilton*, the defendant reclamation district's levees failed, causing floods on plaintiffs' properties.[73] Plaintiffs subsequently sued for both negligence and inverse condemnation, alleging that the levee failures were caused by improper operation and maintenance on the part of the defendant.[74] In determining whether the plaintiffs' complaint properly stated a cause of action for inverse condemnation, as opposed to negligence, the *Tilton* court extracted several relevant rules from factually similar cases.[75] The court explained, somewhat opaquely, that these cases made "a distinction between negligence that occurs when a public entity 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."[76] "Damage resulting from the former type of negligence is compensable" in an inverse condemnation proceeding, but damages resulting from the second type are recoverable, if at all, only in a negligence action.[77] Stated another way, the damage caused by negligent operation or maintenance of a public improvement can support inverse condemnation liability where that improvement, *as designed, constructed, or maintained*, presented an inherent risk of danger to private property and the public entity "deliberately chose a course of action—or inaction—in the face of that known risk."[78]

Applying these rules to the facts, the *Tilton* court concluded that the plaintiffs alleged only "garden variety inadequate maintenance," which is not an adequate basis for an inverse condemnation claim, "as distinguished from a faulty plan involving

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[71] *See, e.g.*, Tilton v. Reclamation Dist. No. 800, 48 Cal. Rptr. 3d 366, 367–68 (Ct. App. 2006); Arreola v. County of Monterey, 122 Cal. Rptr. 2d 38, 38 (Ct. App. 2002); Paterno v. State, 87 Cal. Rptr. 2d 754, 754 (Ct. App. 1999).

[72] *See* 48 Cal. Rptr. 3d at 366–68.

[73] *See id.*

[74] *See id.*

[75] *See id.* at 370–71, 372 (discussing Hayashi v. Alameda Cnty. Flood Control & Water Conservation Dist., 334 P.2d 1048 (Ct. App. 1959); *Arreola*, 122 Cal. Rptr. 2d 38; and *Paterno*, 87 Cal. Rptr. 2d 754).

[76] Tilton v. Reclamation Dist. No. 800, 48 Cal. Rptr. 3d at 371 (quoting *Hayashi,* 334 P. 2d at 1053).

[77] *Id*.

[78] *Id*. at 372 (quoting *Arreola,* 122 Cal. Rptr. 2d at 533) (emphasis added).

the design, construction and maintenance of a levee."[79] With respect to the negligence claim, the *Tilton* court found that the plaintiffs failed to plead the existence of any state or federal law that imposed a "mandatory duty" on the defendant to prevent leakage of its levees and, therefore, it was determined that the defendant had merely performed a discretionary function when it undertook levee maintenance.[80] The court held that because the plaintiffs had not established the existence of a "mandatory duty," a requirement of liability for a negligent act under California's Tort Claims Act, the defendant was immune from tort liability.[81]

Recently, in *City of Oroville v. Superior Court*,[82] the California Supreme Court confirmed the distinction made in *Tilton* between negligent conduct and a negligent plan. The court further explained that the "inherent risk" aspect of inverse condemnation is not limited to the deliberate design or construction of the public improvement, but that it also encompasses risks from the maintenance or continued upkeep of the public work:

> A public entity might construct a public improvement and then entirely neglect any kind of preventive monitoring or maintenance for the improvement. If the public entity makes a policy choice to benefit from the cost savings from declining to pursue a reasonable maintenance program, for instance, inverse condemnation principles command "the corollary obligation to pay for the damages caused when the risks attending these cost-saving measures materialize."[83]

Therefore, *City of Oroville* shows that failure to conduct maintenance as part of a calculated trade-off represents the city assuming an "inherent risk" for which it may be held liable.

When combined, *Tilton, City of Oroville*, and the other California cases present a somewhat workable test; a negligent governmental policy or *plan* of maintenance supports inverse condemnation liability, but negligent *conduct* by government employees in the routine operation of an adequate plan does not.[84]

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[79] *Id.* at 373–74.

[80] *See id.* at 373–77.

[81] *See id.*

[82] *See* City of Oroville v. Superior Ct., 446 P.3d 304, 312 (Cal. 2019).

[83] *Id*. at 313 (quoting Pac. Bell v. City of San Diego, 96 Cal. Rptr. 2d 897, 908 (Ct. App. 2000)).

[84] *See Pac. Bell*, 96 Cal. Rptr. 2d at 905–07; Paterno v. State, 87 Cal. Rptr. 2d 754, 767–69 (Ct. App. 1999).

However, the distinctions made in those cases raise a fundamental question: why should damage caused by an inadequate plan, design, construction, or maintenance be treated any differently than damage due to negligence in carrying out an adequate plan? Consider the following hypothetical. A county designs and constructs an underground storm drain system in a residential area that, over time, deteriorates causing a sinkhole and flooding plaintiffs' private property. Although the system functioned properly for years, the underground pipes failed due to the county's negligent "wait until it breaks" maintenance plan. Under these circumstances, the plaintiffs would have an action for inverse condemnation against the county.[85] As the *City of Oroville* court explained:

> It may be sensible in some sense for a public entity to forgo regular monitoring and repair and instead adopt a "wait until it breaks" plan of maintenance to save on the costs of imposing a monitoring system. But the damages that result from the inherent risks posed by the public entity's maintenance plan should be spread to the community that benefits from lower costs, instead of leaving property owners adversely affected by the public entity's choice to shoulder the burden alone.[86]

In contrast, assume the county had adopted a monitoring and periodic maintenance plan that operated adequately to repair the storm drain pipes before they deteriorated. In the process of replacing a corroded section of pipe, a county employee fails to properly connect the new pipe to the old ones. As a result of this negligence, the drainage system leaks during the next rainstorm causing a sinkhole and the flooding of plaintiffs' residence. Under this scenario, the plaintiffs would only have a claim for negligence against the county, but not for inverse condemnation. Yet in both situations, the plaintiffs have suffered the same damage to private property, caused by the same public entity. In light of the cost-spreading or loss-distribution policies underlying inverse

[85] The facts of this hypothetical are similar to the actual facts in *City of San Diego*. Although the hypothetical involves a water damage case, the same result would occur in a wildfire case. A wildfire caused by a utility's negligent design plan of wire spacing or maintenance plan of trimming trees near wires in blaze-prone zones supports inverse condemnation liability whereas a negligent act by an employee in the course of routine maintenance, such as accidentally cutting an electric power line that hits the ground and ignites a brush fire, would not. *Cf. City of Oroville,* 446 P.3d at 313–14 (discussing negligent maintenance and inverse condemnation in a water damage case).

[86] *Id.* at 313–14.

condemnation, there is no principled reason for treating these scenarios differently. In both situations, the adverse impact on the individual property owner and the concomitant need for compensation is identical.

Unfortunately, the distinction between negligence and inverse condemnation is too ingrained to expect the courts to eliminate it altogether. Of course, concerns about relying on negligence claims, as opposed to inverse condemnation claims, might be overstated if the distinction merely means the compensation is available but must be sought on a different substantive law basis. However, in many cases the effect of proceeding on a different legal basis is more profound. In some states, depending on the circumstances, sovereign immunity may preclude recovery for negligence altogether, meaning recovery may be impossible absent an inverse condemnation claim.[87] This was the ultimate outcome in *Tilton*, discussed above.

3. The Police Power Exception

An important common law limitation on inverse condemnation liability is the so-called "police power" or "emergency" exception.[88] Under this doctrine, damage to or even destruction of private property under a valid exercise of the "police power" often requires

[87] *E.g.*, Lainer Invs. v. Dep't of Fire & Power, 215 Cal. Rptr. 812, 815 (Ct. App. 1985) (holding city was immune from its operational negligence under the fire facilities statutory immunity); Knutson v. City of Fargo, 714 N.W.2d 44, 50–51 (N.D. 2006) (holding discretionary immunity barred landowners' claims that city negligently maintained its water mains); City of Dallas v. Jennings, 142 S.W.3d 310, 315–16 (Tex. 2004) (ruling city immune from plaintiffs' nuisance suit); Robinson v. City of Ashdown, 783 S.W.2d 53, 57–58 (Ark. 1990) (Turner, J., dissenting).

[88] *See, e.g.*, United States v. Caltex, 334 U.S. 149, 154 (1952) (observing that "the common law had long recognized that in times of imminent peril such as when fire threatens a whole community the sovereign could, with immunity, destroy the property of a few that the property of the many and the lives of the many could be saved"); Gray v. Reclamation Dist. No. 1500, 163 P. 1024, 1031 (Cal. 1917) (holding that reclamation district's construction of levees was a valid exercise of its police power and, therefore, the district was not liable to plaintiffs for flood damage to their property caused by the levee); *see generally* Brian Angelo Lee, *Emergency Takings*, 114 MICH. L. REV. 391 (2015) (discussing various emergency takings doctrines).

no compensation under the "just compensation" clause.[89] Traditionally, if a particular act is within the scope of the public entity's police power, the resulting damage to private property is *damnum absque injuria*—damage without injury.[90] In other words, in certain situations a public entity may be privileged to inflict damage upon private property for a public purpose without incurring liability.[91] This judicially-created exception to the otherwise unqualified constitutional language has a long history in both state and federal courts.[92] California courts have been the most active in defining and developing this doctrine.[93] Today, as applied by those courts, the police power exception to inverse condemnation compensation is quite limited.[94] As explained below, the California courts have narrowly defined the kind of emergency that will preclude inverse condemnation liability.[95]

According to the California Supreme Court, the police power exception applies when damage to private property is inflicted by a public entity "under pressure of public necessity and to avert impending peril."[96] Classic examples are the demolition of buildings to prevent the spread of fire and the destruction of diseased animals or rotten fruit where life or health is jeopardized.[97] In other words,

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[89] *See* Arvo Van Alstyne, *Inverse Condemnation: Unintended Physical Damage*, 20 HASTINGS L.J. 431, 442–47 (1969) (discussing the doctrine) (hereinafter, *Inverse Condemnation*).

[90] *See id.*, at 442–47 (discussing the doctrine).

[91] *See id*. (discussing the effect of the doctrine).

[92] *See* Lee, *supra* note 88, at 393 n.7, 449–53 (collecting and discussing authorities).

[93] *See* Van Alstyne, *Inverse Condemnation, supra* note 89, at 442–47 (discussing California cases).

[94] Professor Van Alstyne made a similar observation in 1969. After reviewing the then-existing California inverse condemnation cases applying the police power doctrine, he concluded that "the police power exception is of negligible significance." *Id.* at 447.

[95] *See id.* at 446–47.

[96] Holtz v. Superior Ct., 475 P.2d 441, 446 (Cal. 1970) (quoting House v. L.A. Flood Control Dist., 153 P.2d 950, 953 (Cal. 1944)).

[97] *See, e.g.*, Rapid City v. Boland, 271 N.W.2d 60, 60–67 (N.D. 1978) (collecting cases and ruling the public necessity privilege applies where destruction or damage was necessary to prevent impending or imminent public disaster from fire, flood, disease, or riot); *House*, 153 P.2d at 953 (describing instances of public necessity as including "demolition of all or parts of buildings to prevent the spread of conflagration, or the destruction of diseased animals, or rotten fruit, or infected trees where life or health is jeopardized); Lee*, supra* note

the exception applies only in "emergency" situations.[98] In addition, what constitutes the requisite "emergency" is narrowly circumscribed.[99] Moreover, although the common law exception, when established, provided complete immunity from liability, more recent cases suggest that the public entity may still be liable for negligence.

In *Customer Co. v. City of Sacramento*,[100] the California Supreme Court relied on the "police power" exception in an atypical inverse condemnation context. The plaintiff company, which owned and operated a liquor store, sued the defendants, the City and County of Sacramento, alleging numerous causes of action, including inverse condemnation and negligence.[101] The plaintiff alleged that police officers and deputy sheriffs caused a criminal suspect, reputed to be armed and extremely dangerous, to take refuge in the plaintiff's liquor store, where the suspect refused to surrender.[102] In the course of apprehending the suspect, the police fired tear gas into the store, causing extensive property damage to the store and its contents.[103] The *Customer* court addressed the issue of whether the store owner may bring an action for inverse condemnation against the public entities that employed the law enforcement officers, on the theory that the damage caused by the officers constituted a taking or damaging of private property for public use within the meaning of the "just compensation" clause of the California Constitution.[104]

The *Customer* court held that the facts did not support an inverse condemnation claim under the California Constitution.[105]

88, at 399–401) (discussing examples of emergency takings with respect to criminal activity, disease, and floods).

98 *See Boland*, 271 N.W.2d at 66 (observing that to fall within the privilege there must be a necessity that is "extreme, imperative, and overwhelming," but that "mere expediency, or public good, or utility" is insufficient); *House,* 153 P.2d at 391–92 (finding no emergency that would preclude the district from being held liable for damage resulting from inadequate planning, construction, and maintenance of its flood control project).

99 *See Holtz*, 475 P.2d at 446–47; Van Alstyne, *Inverse Condemnation, supra* note 89, at 446; cases cited *supra* note 88.

100 895 P.2d 900 (Cal. 1995).

101 *See id.* at 900–01.

102 *See id.* at 902–04.

103 *See id.* at 904–05.

104 *See id.* at 901.

105 *See id.*

Under these circumstances, the court explained, "the public entities involved may be held liable, if at all, only in a tort action."[106] The court relied on the general rule that damage caused by the negligent conduct of public employees does not fall under the aegis of the "just compensation" clause.[107] The court reviewed several cases interpreting the "emergency" exception that concluded that an action for inverse condemnation does not lie to recover damages caused by law enforcement officers in the course of performing their duties.[108] Based on all these authorities, the court concluded the governmental conduct in the present case did not give rise to an inverse condemnation action.[109] Instead, the defendants' potential liability should be evaluated under the provisions of California's Government (Tort) Claims Act.[110]

The *Customer* court observed that the case before it was not one in which law enforcement officials "commandeered a citizen's automobile to chase a fleeing suspect, or appropriate ammunition from a private gun shop to replenish an inadequate supply."[111] "Conceivably," the court opined, "such unusual actions might constitute an exercise of eminent domain, because private property would be taken for public use."[112] Unfortunately, the court offered no real explanation as to why these hypothetical governmental actions might require just compensation but not the actions in the actual case, further adding to the lack of coherent analysis regarding proper limits to inverse condemnation.[113] As another court noted, the police power exception is "clear in theory but often cloudy in application."[114] When applied in the context of inverse

106 *Id.*

107 *See id.* at 908–09.

108 *See Id.* at 909–14.

109 *See id.* at 913.

110 *See id.* at 913–14. The *Customer* Court acknowledged that the California courts had yet to resolve the issue of whether selection of the means employed to effectuate an arrest is a "basic policy decision" to which sovereign immunity applies under the "discretionary" act provision of the California Torts Claim Act. *See id*. at 915–16.

111 *Customer Co.*, 895 P.2d at 913.

112 *Id.*

113 A concurring opinion noted that the majority did "not set forth a coherent and consistent analysis of the limits of just compensation that explains why there is no right to compensation in this case." *Id.* at 917 (Kennard, J., concurring).

114 Eck v. City of Bismarck, 283 N.W.2d 193, 198 (N.D. 1979).

condemnation, the terms "police power" and "emergency" are inherently ambiguous.[115]

Even the policy behind the police power exception seems suspect. Courts rarely explain why compensation is unavailable where one person's private property is damaged or destroyed to protect the property of others. This result seems directly contrary to the loss-distribution policy behind inverse condemnation.[116] This concern was raised, albeit obliquely, by a member of the North Dakota Supreme Court in the recent case of *Irwin v. City of Minot*.[117] In *Irwin*, the defendant City acted to combat a river flood by constructing emergency earthen dikes running along municipal streets.[118] The City contracted with one of the plaintiffs' neighbors, whose property bordered the plaintiffs' property, for removal of clay to construct the dikes.[119] Although the City had not obtained permission to remove clay from the plaintiffs' property, when the contractors entered the plaintiffs' property to assess the neighbor's property, they removed clay and topsoil from both properties and used these materials to construct the emergency dike.[120] In the process, the contractors damaged plaintiffs' property.[121] After the City refused to pay compensation for the removal of the clay, the plaintiffs commenced an inverse condemnation action.[122] The trial court found that the City acted under its police power in an emergency which did not require compensation, rather than under the power of eminent domain, and granted summary judgment for the City.[123] The North Dakota Supreme Court, after noting the troublesome nature of the police power doctrine, reversed on the grounds that an issue of fact existed as to whether the imminent danger facing the City gave rise to an actual necessity to take the

115 *See* Van Alstyne, *supra* note 89, at 442–46 (discussing cases and observing that the term "police power" is "inherently undefinable").

116 *See* Lynda L. Butler, *The Governance Function of Constitutional Property*, 48 U.C. DAVIS L. REV. 1687, 1749–57 (2015) (discussing public necessity and emergency takings cases); Lee, *supra* note 88, at 392–95, 412–13, 416–19, 453 (explaining the police power doctrine constitutes an uncompensated taking).

117 *See generally* 860 N.W.2d 849 (N.D. 2015).

118 *See id.* at 851.

119 *See id.*

120 *See id.*

121 *See id.*

122 *See id.*

123 *See id*.

plaintiffs' property.[124] One Justice wrote a separate concurring opinion to note that on remand, the trial court in the first instance "must review the framework of its analysis," and posed the following unanswered questions:

> Perhaps in a genuine emergency, prior court-related action may not be possible. But even if that is the case, does it follow that because it is not possible to comply with all of a constitutional provision, government does not need to comply with any of the constitutional provision? Usually, the emergency takings doctrine is applied to property that must be taken because of its location in a case of flooding or fire. Here, clay was needed and could have been taken from many locations, but it was taken from the plaintiff's property. Does it make sense that the one property owner should have to bear the entire burden? If the city needed lumber because of the emergency, could it just have gone and taken lumber from one lumber yard without paying? Could the City have decided to get the lumber by randomly tearing down someone's house and then refusing to compensate the owner?[125]

These questions strike at the heart of the basis for the "police power" exception. There is little justification for a doctrine that is directly counter to the loss-spreading goal of inverse condemnation. The facts in cases like *Irwin*, and even in *Customer*, involve a taking of private property for public benefit. The only difference between the facts in those cases—as opposed to a more typical inverse condemnation case—is the amount of time available to the public entity to deliberate before acting. From the property owner's perspective, the result is the same in both cases—private property is taken or damaged for a public purpose. The "police power" concept makes sense as a justification for taking or damaging property without first resorting to an eminent domain proceeding, but not as a substantive limit on liability and compensation.[126]

4. Causation and Foreseeability

In order to recover on an inverse condemnation cause of action, a plaintiff must prove that the damage to his or her property was

[124] *See id.* at 852–53.

[125] *Id.* at 854 (Sandstrom, J., concurring).

[126] *See generally* Lee, *supra* note 88 (arguing that the main justifications for the necessity or emergency exception to compensation are unpersuasive).

"caused" by a public improvement as designed and constructed.[127] Precisely what causation means in this context is unclear.[128] Some courts state that the damage to property must be both a "direct, natural, or probable result," and a "reasonably foreseeable consequence" of the public project.[129] Others use "proximate cause," the familiar terminology of tort doctrine.[130] Each of these formulations, however, incorporates a notion of "foreseeability" that may be misleading in strict liability jurisdictions, such as California, where inverse condemnation liability is appropriate even if damage to property was unexpected and unforeseeable at the time of the public improvement.[131]

After addressing the causation requirement on several occasions, the California courts have developed a more precise and workable standard.[132] What has evolved is sometimes referred to as the "substantial causation" test:

> [I]n order to establish a causal connection between the public improvement and the plaintiff's damages, there must be a showing of "a substantial cause-and-effect relationship excluding the probability that other forces *alone* produced the injury."[133]

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[127] *See, e.g*., Van Alstyne, *Inverse Condemnation, supra* note 89, at 433–38 (discussing causation in the context of inverse condemnation); Mandelker, *supra* note 10, at 52–54 (discussing the factual-cause test for inverse condemnation).

[128] *See* Van Alstyne, *Inverse Condemnation, supra* note 89, at 435–38 (explaining the term "proximate cause" has a special meaning in the context of inverse condemnation).

[129] *E.g.*, Trinity Broad. of Denver, Inc. v City of Westminster, 848 P.2d 916, 921–22 (Colo. 1993); Lea Co. v. N.C. Bd. of Transp., 304 S.E.2d 164, 174–76 (N.C. 1983) ("foreseeable direct result").

[130] *E.g.*, Beeson v. City of Palmer, 370 P.3d 1084, 1089–90 (Alaska 2016); Halverson v. Skagit County, 983 P.2d 643, 648–50 (Wash. 1999); Steuban v. City of Lincoln, 543 N.W.2d 161, 163–64 (Neb. 1996).

[131] In adopting a strict liability standard for inverse condemnation, the California Supreme Court observed "any actual physical injury to real property proximately caused by [a public] improvement as deliberately designed and constructed is compensable under [the California] Constitution *whether foreseeable or not*." Albers v. County of Los Angeles, 398 P.2d 129, 137 (Cal. 1965) (emphasis added); *see* Van Alstyne, *Inverse Condemnation, supra* note 89, at 436–38 (discussing causation in the context of inverse condemnation).

[132] *See* Belair v. Riverside Cnty. Flood Control Dist., 764 P.2d 1070, 1074–77 (Cal. 1988) (analyzing various inverse condemnation decisions defining causation).

[133] *Belair*, 764 P.2d at 1075 (quoting Souza v. Silver Dev. Co, 210 Cal. Rptr. 146, 149 (Ct. App. 1985)).

Under this test, the public improvement need not be the *sole* cause of the property damage, so long as it is a *substantial concurring cause* of the damage.[134] However, a public improvement would cease to be a substantial contributing factor where there is "an intervening cause which supersedes the public improvement in the chain of causation."[135] Two California cases, *Skoumbas v. City of Orinda*[136] and *Belair v. Riverside County Flood Control District*,[137] illustrate how this test is applied.

In *Belair*, the California Supreme Court discussed the "substantial causation" test in the context of an inverse condemnation action for property damage when a levee gave way after several days of heavy rains, flooding plaintiffs' property.[138] The plaintiffs had established that the breach was not caused by volumes, speeds, or heights of water beyond the design capacity of the levee, and the defendants failed to show that there had been an extraordinary event, such as a rainstorm, that exceeded the levee's design capacity, which would have caused damage even if the levee had operated perfectly.[139] Such an extraordinary storm would have constituted "an intervening cause which supersedes the public improvement in the chain of causation," but no such extraordinary storm occurred.[140] Therefore, the court concluded that, notwithstanding the heavy storms which preceded the breach, "the

134 *See Belair*, 764 P.2d at 1075; Ullery v. County of Contra Costa, 248 Cal. Rptr. 727, 733 (Ct. App. 1988).

135 *Belair*, 764 P.2d at 1075; Biron v. City of Redding, 170 Cal. Rptr. 3d 848, 858–60 (Ct. App. 2014) (concluding nature was a superseding cause of flooding where project operated perfectly but storm exceeded project's design capacity). In some cases, causation will not be an issue because the facts clearly indicate that the damage to property only occurred because of the public improvement. In other cases, the cause of the damage may not be self-evident. In such circumstances, expert testimony may be the only way to prove the necessary causal connection. *E.g.*, Hayman v. Paulding County, 825 S.E.2d 482, 486 (Ga. Ct. App. 2019)*;* Dina v. People *ex rel.* Dep't of Transp., 60 Cal. Rptr. 3d. 559, 574–75 (Ct. App. 2007); Cal. State Auto. Ass'n v. City of Palo Alto, 41 Cal. Rptr. 3d 503, 508 (Ct. App. 2006).

136 *See* 81 Cal. Rptr. 3d 242 (Ct. App. 2008).

137 *See* 764 P.2d 1070 (Cal. 1988).

138 *See id.* at 1075.

139 *See id.*

140 *Id.*

levee's failure to function as intended constituted a substantial concurring—or proximate—cause of the damages."[141]

The defendant flood control district also argued that the levee was not the "proximate cause of the damages, because the plaintiffs' property was subject to flooding *prior* to construction of the levee, and because the property would have flooded even in the *absence* of the levee."[142] The *Belair* court rejected this reasoning, observing that the plaintiffs made substantial improvements to their property in reliance on the levee functioning as intended. The court then ruled that "inverse condemnation liability for failure of a flood control projects is not predicated upon proof that the public improvement made a preexisting hazard *worse*."[143]

In *Skoumbas v. City of Orinda*, the plaintiffs sued the defendant, City of Orinda, for substantial erosion of their property caused by water discharged from a storm drain system.[144] The City constructed a catch basin uphill from the plaintiffs' property, which collected surface waters and directed the flow into a storm drainpipe that discharged the waters onto the plaintiffs' property.[145] The City owned the first forty feet of the drainpipe, but the rest of the pipe was privately owned.[146] The trial court dismissed plaintiffs' inverse condemnation claim because there was no evidence that the entire drainage system was a public improvement owned by the City.[147] The court of appeal reversed, concluding that the critical inquiry was not whether the entire system was a public improvement, but whether the City acted reasonably in its maintenance and control over the portions of the system it did own.[148]

The *Skoumbas* court ruled that the City's lack of ownership or involvement in the development of the lower portion of the drainage system is not a complete defense to inverse condemnation liability.[149] The proper inquiry is whether the City's ownership, operation, or control of the catch basin and forty foot pipe was "a

141 *Id.*; *see* Beeson v. City of Palmer, 370 P.3d 1084, 1089–90 (Alaska 2016) (adopting *Belair*'s substantial cause approach for inverse condemnation).
142 *Belair*, 764 P.2d at 1075 (emphasis in original).
143 *Id.* at 1076.
144 *See* 81 Cal. Rptr. 3d 242, 244 (Ct. App. 2008).
145 *See id.* at 244–45.
146 *See id.* at 245.
147 *See id.* at 246–47.
148 *See id*. at 250.
149 *See id.* at 247–48.

substantial cause of the damage to plaintiffs' property."[150] Quoting *Belair*, the Court concluded that the "City may be liable in inverse condemnation if the City-owned improvements have a 'substantial cause-and-effect relationship' to plaintiffs' damage, provided that no other forces alone produced the injury."[151] In other words, the City would be liable if its portion of the drainage system was at least a concurrent cause, along with the privately-owned section, of the damage to plaintiffs' property.

Recently, in *City of Oroville v. Superior Ct.*, the California Supreme Court refined the "substantial causation" test by holding that "damage to private property must be substantially caused by an inherent risk presented by the deliberate design, construction, or maintenance of the public improvement."[152] The meaning of the court's "inherent risk" concept is best explained by an examination of the facts of that case. The plaintiffs owned an office building that was damaged when raw sewage backed up in a sewer main and flowed into their building.[153] Plaintiffs filed an inverse condemnation action against the City, which had designed, constructed, and maintained the sewer system.[154] The City argued that the deliberate design, construction, and maintenance of the sewer system were not the cause of the damages to plaintiffs' property.[155] Instead, it argued that the damages were caused by the plaintiffs' failure to install and maintain a legally-required backwater valve that would have prevented sewage from entering their building in the event of a sewer main backup.[156] The court found that the City was not liable in inverse condemnation because the plaintiffs did not show that the damage to their property was a necessary and unavoidable consequence of any inherent risk posed by the sewer system as designed, constructed, or maintained by the City.[157]

It is not clear whether the *City of Oroville* court's "inherent risk" analysis constitutes a significant change to *Belair*'s

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150 *Id.* at 250 (quoting Locklin v. City of Lafayette, 613 P.2d 724, 749 (Cal. 1994)).

151 *Skoumbas,* 81 Cal. Rptr. 3d at 250 (quoting *Belair,* 764 P.2d at 1075).

152 City of Oroville v. Superior Ct., 446 P.3d 304, 312 (Cal. 2019).

153 *See id.* at 307.

154 *See id.* at 307–09.

155 *See id.* at 309.

156 *See id*.

157 *See id*. at 315–16.

"substantial cause" standard. After all, the court's conclusion that the damage to plaintiffs' property was caused by the plaintiffs' failure to install a legally required backwater valve could be viewed as an example of "an intervening cause which supersedes the public improvement in the chain of causation."[158] What the court did make clear, however, is that the "inherent risk" inquiry is designed to ensure that "not all private property damage bearing some causal relationship to a public improvement results in liability."[159]

Sometimes courts focus on another requirement, separate from the "inherent risk" test: whether the plaintiffs suffered a direct, substantial, and "peculiar burden" on their property as a result of the public improvement.[160] Under this rule, inverse condemnation recovery is unavailable where the plaintiffs suffered injuries "common to all property in the neighborhood."[161] A vestige of the tort law of private and public nuisance,[162] this special injury requirement is often applied in inverse condemnation cases where the conduct of a public entity results in intangible intrusion onto, as opposed to physical damage to, private property.[163] Such cases include claims for excessive noise and dust generated by the operation of a freeway, jet aircraft noise due to operation of a municipal airport, or offensive odors from a sewage treatment plant.[164]

This special injury rule makes little sense in the flood water and fire damage contexts. When a levee, dam, storm drain, or other water diversion project results in widespread flooding, the fact that more than one property suffers extensive physical damages would

158 *Belair,* 764 P. 2d at 1075.

159 *City of Oroville*, 446 P.3d at 312–13.

160 *See e.g.*, Long v. State, 904 N.W.2d 502, 515–16 (S.D. 2017); San Diego Gas & Elec. Co. v. Superior Ct., 920 P.2d 669, 698 (Cal. 1996); Dina v. People *ex rel.* Dep't of Transp., 60 Cal. Rptr. 3d 559, 577 (Ct. App. 2007); Williams v. Moulton Niguel Water Dist., 232 Cal. Rptr. 3d 356, 365-66 (Ct. App. 2018).

161 *Dina*, 60 Cal. Rptr. 3d at 576 (quoting Friends of H Street v. City of Sacramento, 24 Cal. Rptr. 2d 607, 616 (Cal. Ct. App. 1993)).

162 *See* Brady, *supra* note 20, at 382–88, 391–95 (citing Rigney v. City of Chicago, 102 Ill. 64, 80–81 (1882)) (explaining how in some jurisdictions nuisance law was imported into constitutional condemnation law).

163 *See e.g.*, *San Diego Gas & Elec.*, 920 P.2d at 697–98; *Dina*, 60 Cal. Rptr. 3d at 574–76; *see also* Brady, *supra* note 20, at 391 n.255 (collecting cases).

164 *See, e.g.*, *San Diego Gas & Elec.*, 920 P.2d at 698 (discussing various cases involving intangible intrusions); *Dina*, 60 Cal. Rptr. 3d at 576–77 (discussing freeway cases); Brady, *supra* note 20, at 391 n.255 (collecting cases).

seem to be irrelevant. The same is true in wildfire cases. Fire damage caused by a utility project should be compensable when it is unfair to require each landowner to bear a financial burden that should be assumed by society, regardless of whether the fire destroys one or several structures.[165] In such circumstances, each property suffers physical damage and each property owner is entitled to compensation, assuming the other requirements of inverse condemnation are satisfied. Consequently, there is little justification for a *stand-alone*, "peculiar burden" prerequisite in water and fire damage cases.[166]

Causation is an important limitation on inverse condemnation liability, requiring that a causal connection exist between the property damage and the public improvement. Although some courts have struggled when defining what causation means in this context, the California courts have developed a clear and workable standard: the failure of the public improvement to function as intended must constitute a substantial concurring cause of the injury to property. This "substantial causation" test avoids open-ended inverse condemnation liability by ensuring that such "liability is imposed only in instances where there is a sufficiently meaningful causal relationship between the damage to private property and the inherent risks posed by the public improvement as designed, constructed, or maintained."[167]

II. WATER DAMAGE CLAIMS: MODERN APPLICATIONS AND MODERN ISSUES

A. *Inverse Condemnation, Strict Liability, and Reasonableness*

In water damage cases, one of the most important legal issues involves the determination of the proper standard of inverse condemnation liability. This issue is complicated by the influence

[165] This is consistent with the "loss distribution" or "cost spreading" policy basis for an inverse condemnation cause of action. *See supra* notes 8–13 and accompanying text.

[166] However, the extent to which a plaintiff has suffered a peculiar burden is also part of the multi-factored "reasonableness" standard that applies in some inverse condemnation cases involving a public flood control project that fails to function as intended. *See infra* notes 195–217 and accompanying text. The use of this factor in the "reasonableness" context will be examined later. *See infra* Part II.

[167] *City of Oroville*, 446 P.3d at 314.

of several traditional water law doctrines developed and applied by the courts in litigation between private parties. With respect to inverse condemnation cases generally, most jurisdictions have endorsed a strict liability standard as the fairest method of vindicating the relevant loss-distribution and deterrence policies. However, in cases seeking compensation for damage caused by certain flood improvement projects, the courts have recognized other, competing policy concerns. As will be discussed below, these concerns induced courts to adopt a multi-factored "reasonableness" standard specific to certain, but not all, water damage cases.

To a large degree, the standard of liability applied by a court will determine the outcome of inverse condemnation litigation. The strict liability standard usually means that a public entity will be adjudged liable for damage to private property. In contrast, the "reasonableness" standard, as applied by the courts in flood improvement cases, tends to shield the public entity from inverse condemnation liability. Although the "reasonableness" test may preclude loss distribution, it is intended to encourage and promote the construction of flood control projects. Such a project constitutes an important means to manage flood risks and is increasingly relevant for adapting to increased flooding driven by climate change. The discussion below examines the propriety of strict liability in inverse condemnation cases generally, the judicial development of the "reasonableness" test in flood improvement cases, and whether the "reasonableness" rule should apply in all water damage cases or retain the more narrow application it has today. This analysis will often focus on California authorities but draws upon sources from other jurisdictions as relevant.

1. Strict Liability

Over fifty years ago, Professor Daniel Mandelker concluded that "an absolute liability standard accompanied by a before-and-after test of factual causation" was the fairest method of determining inverse condemnation liability.[168] At the time, a few states had already applied strict liability to inverse condemnation cases.[169]

[168] Mandelker, *supra* note 10, at 57. Professor Mandelker did recognize a potential role for policy limits on available recovery under such a scheme. *See id.*

[169] *See, e.g.*, Lubin v. Iowa City, 131 N.W.2d 765, 768, 771 (Iowa 1964) (discussing cases in other jurisdictions and applying strict liability to broken water mains); Mandelker, *supra* note 10, at 32–39 (discussing inverse condemnation

Since then, most states have implicitly adopted liability without fault for an inverse condemnation claim by requiring only some deliberate act, as opposed to a negligent one.[170] The California Supreme Court has not only explicitly adopted the strict liability standard, but through a series of inverse condemnation decisions, has also frequently applied and refined it. These decisions merit further analysis.

The first California Supreme Court decision to explicitly adopt strict liability for inverse condemnation cases is *Albers v. County of Los Angeles*,[171] decided in 1965. Prior to *Albers*, the California courts, like the courts in other states, analyzed inverse condemnation liability by analogy to traditional tort, property, and water law principles.[172] The *Albers* Court shifted the focus in inverse condemnation cases from these common law doctrines to the constitutional requirement of just compensation.[173] Under the California Constitution, the *Albers* Court concluded that any physical injury to real property proximately caused by a public improvement as deliberately designed and constructed is compensable "whether foreseeable or not."[174]

However, the *Albers* Court recognized two historical exceptions to its strict liability inverse condemnation rule.[175] The first involved damages caused by a public entity in the proper exercise of its "police power."[176] As discussed previously, this exception is narrowly applied today.[177] *Albers*'s second exception to strict liability emanated from the "complex and unique province of water law," under which upper riparian private landowners had a

decisions in California, Washington, and Oregon); Van Alstyne, *Inverse Condemnation, supra* note 89, at 432–38 (discussing California cases).

170 *See supra* Part I.C.2.

171 *See generally* 398 P.2d 129 (Cal. 1965).

172 *See* Belair v. Riverside Cnty. Flood Control Dist., 764 P.2d 1070, 1077 (Cal. 1988) (citing cases); Mandelker, *supra* note 10, at 6–9; Van Alstyne, *Inverse Condemnation, supra* note 89, at 440–42.

173 *See Albers*, 398 P.2d at 136–37; *see Belair*, 764 P.2d at 1077 (discussing *Albers*); Bunch v. Coachella Valley Water Dist., 935 P.2d 796, 800 (Cal. 1997) (discussing *Albers*).

174 *Albers*, 398 P.2d at 137.

175 *See id.* at 137.

176 *See id.* at 135–37 (discussing Gray v. Reclamation Dist. No. 1500, 163 P. 1024 (Cal. 1917)).

177 *See supra* Part I.C.3.

common law privilege to defend themselves against the "common enemy" of floodwaters.[178]

Under the "common enemy" doctrine, an owner of land that is subject to flooding has the right to erect improvements, such as defensive barriers, and any injury caused to lower landowners by those improvements—for example, as a result of increased discharge or velocity of water—is considered *damnum absque injuria* (*i.e.,* damage without injury).[179] The *Albers* court extended the same privilege to public entities that undertake flood control measures.[180] However, subsequent decisions recognized that *public* flood control measures should not be afforded the same immunity as *private* ones.[181] This recognition eventually led the California Supreme Court, in *Belair v. Riverside County Flood Control District*, to disapprove of absolute common enemy immunity and replace it with a "reasonableness" test for inverse condemnation cases involving damage to property caused by the failure of a public flood control improvement.[182]

2. The Reasonableness Rule

In *Belair v. Riverside County Flood Control District*, several landowners brought inverse condemnation actions against a public flood control district and the State seeking compensation for property damage when a river levee gave way after several days of heavy storms.[183] The district had constructed the levee along a

[178] *Bunch,* 935 P.2d at 800–01 (discussing *Albers* and Archer v. City of Los Angeles, 119 P.2d 1 (Cal. 1941)).

[179] *See, e.g.*, DiBlasi v. City of Seattle, 969 P.2d 10, 14–17 (Wash. 1998) (discussing Washington's common enemy doctrine); Keys v. Romley, 412 P.2d 529, 531–32 (Cal. 1966) (discussing the common enemy rule in California and other states); Van Alstyne, *Inverse Condemnation, supra* note 89, at 454–57 (discussing the common law privilege generally).

[180] *Albers*, 398 P.2d at 137*; see Bunch*, 935 P.2d at 800–01 (explaining that *Albers* recognized the common enemy and police power exceptions to inverse condemnation's strict liability doctrine).

[181] *See* Belair v. Riverside Cnty. Flood Control Dist., 764 P.2d 1070, 1078–81 (Cal. 1988); Locklin v. City of Lafayette, 867 P.2d 724, 748–49 (Cal. 1994); *Bunch*, 935 P.2d at 801–02.

[182] *See Belair,* 764 P.2d. at 1078–81. Summarizing *Belair*, the court in *Locklin* noted that the absolute common enemy privilege "survived only vestigally [sic] in the limitation of inverse condemnation liability for public flood control projects in natural watercourses to damage resulting from a public entity's *unreasonable* conduct." *Locklin,* 867 P.2d at 748.

[183] *See* 764 P.2d at 1071–73.

natural drainage course in an attempt to protect property in an area historically subject to flooding.[184] The levee failed to function within its design capacity and therefore constituted a substantial cause of the plaintiffs' property damage.[185] With these findings as background, the *Belair* court addressed the question of whether strict inverse condemnation liability was appropriate with respect to the failure of defendants' flood control measures.[186] After considering the *Albers* exceptions and rejecting a direct application of the "common enemy" doctrine, which would have absolved the defendants, the *Belair* court further concluded that strict liability is not the appropriate standard.[187] Instead, the plaintiffs must prove that their property damage was attributable to some "unreasonable" conduct on the part of the defendant public entities.[188]

The *Belair* court observed that "the fact that a dam bursts or a levee fails is not sufficient, standing alone, to impose liability."[189] "However," the court explained, "where the public agency's design, construction or maintenance of the flood control project is shown to have posed an unreasonable risk of harm to the plaintiffs, and such unreasonable design, construction or maintenance constituted a substantial cause of the damages, plaintiffs may recover regardless of the fact that the project's purpose is to contain the 'common enemy' of floodwaters."[190] In other words, instead of a strict liability rule, damage must be attributable to some unreasonable conduct on the part of the public entity, "with reasonableness determined by balancing the public benefit and private damage in each case."[191]

In adopting the reasonableness rule, the *Belair* court recognized the unique problems created when determining liability in flood control litigation: "On the one hand, a public agency that undertakes to construct or operate a flood control project clearly must not be made the absolute insurer of those lands provided protection. On the other hand, the damage potential of a defective public flood control project is clearly enormous."[192] *Belair* concluded that these

184 *See id.* at 1072–73.
185 *See id.* at 1077–81.
186 *See id.* at 1074–77.
187 *See id.* at 1077–81.
188 *See id.*
189 *Id.* at 1079.
190 *Id.*
191 *Locklin*, 867 P.2d at 750 (discussing *Belair*, 764 P.2d at 1079).
192 *Belair*, 764 P.2d at 1079.

competing policy concerns "were best served in the flood control context by a rule of 'reasonableness.'"[193] *Belair* also emphasized that its reasonableness rule "would not discourage beneficial flood control projects, but would allow compensation for property that those projects unfairly damaged, creating a proper balance in constitutional takings jurisprudence."[194]

The holding in *Belair* is significant for two reasons. First, *Belair* replaces the strict liability standard, which applies in all other inverse condemnation cases, with a reasonableness rule if damage is caused by the failure of certain flood control improvements. Under the reasonableness rule adopted in *Belair*, the damage must be attributable to some unreasonable conduct on the part of a public entity. Second, *Belair* emphasized that in flood control cases, inverse condemnation liability is based on constitutional principles rather than the traditional common law rules of water law, meaning that the common enemy doctrine does not shield public entities from liability where damage is caused by their unreasonable conduct.

In adopting the reasonableness rule, the California Supreme Court was greatly influenced by Professor Arvo Van Alstyne's writings regarding risk analysis and inverse condemnation liability.[195] Van Alstyne observed that a government decision to proceed with a flood control project, even though the possibility of some property damage is foreseeable, may represent a rational balancing of risk against the practicality of risk avoidance:

> [I]f 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 the 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

193 *Id.*

194 Bunch v. Coachella Valley Water Dist., 935 P.2d 796, 802 (Cal. 1997) (discussing *Belair,* 764 P.2d at 1079).

195 *See* Van Alstyne, *Inverse Condemnation, supra* note 89, at 489–92; *Belair,* 764 P.2d at 1079 (quoting Van Alstyne, *Inverse Condemnation, supra* note 89, at 455).

> 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).[196]

Van Alstyne linked the risk analysis to a reasonableness rule: "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."[197]

What does "unreasonableness" mean in this risk analysis context? The *Belair* opinion is short on specifics, stating generally that the reasonableness of a public entity's conduct "must be determined on the facts of each individual case, taking into consideration the public benefit and the private damages in each instance."[198] A few years later in *Locklin v. City of Lafayette*, the California Supreme Court provided lower courts with more specific guidelines for applying the reasonableness rule.[199] With respect to flood control projects, *Locklin* identified several relevant factors which, in essence, require an ad hoc and fact-dependent inquiry into the "reasonableness" of the public entity's conduct:

> (1) The overall public purpose being served by the improvement project; (2) the degree to which the plaintiff's loss is offset by reciprocal benefits; (3) the availability to the public entity of feasible alternatives with lower risks; (4) the severity of the plaintiff's damage in relation to risk-bearing capabilities; (5) the extent to which damage of the kind the plaintiff sustained is generally considered as a normal risk of land ownership; and (6) the degree to which similar damage is distributed at large over other beneficiaries of the project or is peculiar only to the plaintiff.[200]

In a subsequent decision, *Bunch v. Coachella Valley Water District*, the California Supreme Court extended the reasonableness rule to an inverse condemnation action against a water district, when

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196 Van Alstyne, *Inverse Condemnation, supra* note 89, at 492.

197 *Id*. at 493.

198 Belair v. Riverside Cnty. Flood Control Dist., 764 P.2d 1070, 1079 (Cal. 1988).

199 *See generally* 867 P.2d 724 (Cal. 1994).

200 *Id.* at 750.

the plaintiffs sought compensation for flood damage to their property, suffered when the water district's project to divert water from a potentially dangerous natural watercourse failed during a severe rainstorm.[201] The court concluded that the reasonableness rule, not strict liability, "applied to all cases involving unintentional water runoff, whether they involved facilities designed to keep water within its natural course or designed to divert water safely away from a potentially dangerous natural flow."[202] According to the court in *Bunch*, the rule of reasonableness was deemed to best serve the competing concerns in the flood control context: "On the one hand, a public agency that undertakes to construct or operate a flood control project clearly must not be made the absolute insurer of those lands provided protection. On the other hand, the damage potential of a defective public flood control project is clearly enormous."[203]

In applying the reasonableness rule, the *Bunch* court endorsed the six-factor test identified in *Locklin*. In addition, the court observed that evidence of a public entity's limited financial resources and its allocation of funds among all its activities is relevant and admissible.[204] In making this observation, the court relied on Professor Van Alstyne's risk analysis, which discusses fiscal constraints as an important consideration in determining reasonableness.[205] Although fiscal constraints alone are not determinative of the public entity's reasonableness in its flood control measures, the *Bunch* court explained, "they are a relevant consideration in the overall balancing test and the reasonableness determination."[206]

3. Applying the Reasonableness Rule

The reasonableness rule requires a court to weigh the factors set forth in *Locklin* and *Bunch* in order to balance "the public need against the gravity of private harm."[207] This is essentially an ad hoc,

201 *See* 935 P.2d 796, 796 (Cal. 1997).
202 *Id.* at 799.
203 *Id.* at 802–03 (discussing and quoting *Belair,* 764 P.2d at 1079–80).
204 *See id.* at 808.
205 *See id.* ("[F]iscal constraints are part of the careful balancing of the public and private interests involved in the initial determination of the government's reasonableness in its shifting the risk of loss from flooding to private resources.").
206 *Id.* at 809.
207 *Id.* at 808.

fact-dependent inquiry into a variety of related factors. To date, a few lower court cases have applied these factors, often with little in the way of analysis.[208] Given the fact-specific nature of these factors, and the relatively small number of reported decisions, it is difficult to formulate generalizations regarding their application, however, some patterns emerge.

Courts tend to weigh *Locklin's* reasonableness factors in a manner that favors public entities over private landowners. By preventing some, even if not all, flooding, flood control projects usually satisfy the "overall public purpose" factor, as there was some public benefit.[209] Likewise, plaintiffs are viewed as having received some benefit from the improvement even if it failed to protect them from all flooding.[210] A court will readily find the public entity had no feasible alternatives in light of the expense required to prevent all flooding, particularly where the entity explains that it must prioritize how it allocates its limited financial resources.[211] Also, courts often conclude that plaintiffs could have taken steps to mitigate the risk of flooding, such as erecting physical barriers and purchasing flood insurance, which would not impose an enormous burden, especially as compared to the cost of upgrading the flood control project.[212] If the plaintiffs' land is adjacent to the flood improvement, flood damage is generally considered a normal risk of land ownership.[213] Finally, plaintiffs are not viewed as suffering damage that is peculiar to them so long as the public entity did not make a conscious decision to flood their property in order to spare other properties.[214]

All of the California lower court decisions applying the *Locklin* factors as the *ratio decidendi* of the case have concluded that the public entity acted reasonably in constructing and operating the

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[208] *See e.g.*, Contra Costa v. Pinole Point Props., LLC, 186 Cal. Rptr. 3d 109, 128–29 (Ct. App. 2015); Biron v. City of Redding, 170 Cal. Rptr. 3d 857–58 (Ct. App. 2014); Gutierrez v. County of San Bernardino, 130 Cal. Rptr. 3d 482, 493–95 (Ct. App. 2011); Hauselt v. County of Butte, 91 Cal. Rptr. 3d 343, 348–49 (Ct. App. 2009).

[209] *See e.g.*, *Biron*, 170 Cal. Rptr. 3d at 857–58; *Gutierrez*, 130 Cal. Rptr. 3d at 494–95; *Contra Costa*, 186 Cal. Rptr. 3d at 127–29.

[210] *See Biron*, 170 Cal. Rptr. 3d at 858; *Gutierrez*, 130 Cal. Rptr. 3d at 849.

[211] *See Biron*, 170 Cal. Rptr. 3d at 858.

[212] *See e.g.*, *id.*; *Contra Costa*, 186 Cal. Rptr. 3d at 127–29.

[213] *See e.g.*, *Biron*, 170 Cal. Rptr. 3d at 858; *Gutierrez*, 130 Cal. Rptr. 3d at 494–95.

[214] *See Biron*, 170 Cal. Rptr. 3d at 858.

flood control project under scrutiny.[215] This is not surprising, given the relevant factors as formulated in *Locklin* and *Bunch*, which rely heavily on the limited financial resources of the public entity, but this reliance seems inconsistent with the cost spreading and loss distribution policies behind inverse condemnation liability. Moreover, it seems particularly improper to focus concern on the limited financial resources of a public entity, which often has the power to raise revenue through taxation or fees, but largely ignore the far more limited resources of most private landowners.

The suggestion that property owners may protect themselves by purchasing flood insurance not only assumes that such insurance is available and affordable, but also that the insurance company is solvent. Even if those assumptions are empirically correct, reliance on private insurance for compensation is inconsistent with the fundamental loss-spreading policy underlying inverse condemnation and therefore constitutes an inappropriate distribution of financial burdens.[216] Simply put, private insurance is not an adequate substitute for public compensation.[217]

B. *Contextual Limitations on the Reasonableness Rule*

As discussed above, the reasonableness rule applies to some, but not all, causes of action for inverse condemnation in the water damage context. Strict liability applies to the others, assuming there exists a cause of action for inverse condemnation. This gives rise to an important question: in what types of cases, and under what circumstances, will the reasonableness rule apply instead of strict liability? The boundary line between when one standard applies and not the other is less than clear, mostly because the cases applying the reasonableness test appear to base its use on several factual prerequisites. Courts often state that the reasonableness rule applies

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[215] *See* cases cited *supra* note 208. However, in one case, Pac. Shores Prop. Owners Ass'n v. Dep't of Fish & Wildlife, 198 Cal. Rptr. 3d 72, 101–05 (Ct. App. 2016), the court concluded that the public entity acted unreasonably in its breaching of a sandbar to flood plaintiff's property. The court first held that strict liability applied because the factual prerequisites to the reasonableness rule were not present, but in dicta also discussed and applied the reasonableness factors. *See id.* at 96–105.

[216] *See* cases cited *supra* notes 8–13 and accompanying text.

[217] *See* Lee, *supra* note 88, at 430–35.

in the "narrow and unique context of flood control litigation."[218] This appears to be the case; in fact, all of the California Supreme Court cases developing and applying the reasonableness test involved damage to property caused by certain flood control projects.[219]

Even when deciding whether to apply the reasonableness rule in a flood control case, courts repeatedly mention other factual qualifications. One is that the reasonableness rule applies where flood control measures have caused damage to properties "historically subject to flooding."[220] The *Bunch* court specifically declined to decide whether the reasonableness standard applies when flood control measures cause flood damage to land that was *not* historically subject to flooding.[221] However, the court did note that a public entity's diversion or damming of natural waters that permanently submerges previous dry private land constitutes a compensable taking no matter how reasonable the entity's conduct.[222]

Second, each of the California Supreme Court cases applying the reasonableness standard involved either drainage of surface waters from improved public property into a "natural watercourse" or improvements in or alterations to a natural watercourse for the purpose of improving such drainage.[223] A natural watercourse "is a channel with defined bed and banks made and habitually used by water passing down as a collected body or stream in those seasons

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[218] Bunch v. Coachella Valley Water Dist., 935 P.2d 796, 797 (Cal. 1997). *See also*, *e.g.*, Pac. Bell v. City of San Diego, 96 Cal. Rptr. 2d 897, 913 (Ct. App. 2000) (observing that the *Belair*, *Locklin*, and *Bunch* reasonableness approach "was decided in the narrow and unique context of water law").

[219] *See* Belair v. Riverside Cnty. Flood Control Dist., 764 P.2d 1070, 1079 (Cal. 1988); Locklin v. City of Lafayette, 867 P.2d 724, 724 (Cal. 1994); *Bunch,* 935 P.2d at 802.

[220] *E.g.*, *Bunch*, 935 P.2d at 797 n.1; *Belair*, 764 P.2d at 1079. *See* Akins v. State, 71 Cal. Rptr. 2d 314, 331–34 (Ct. App. 1998) (reviewing California Supreme Court decisions and concluding that "an intentional diversion of water which floods private property not historically subject to flooding subjects flood control agencies to inverse condemnation liability without proof of unreasonable conduct"); *Pac. Bell*, 96 Cal. Rptr. 2d at 912–13 (holding strict liability, not the reasonableness rule, applies to failure of water delivery system due to inadequate maintenance plan because injury from flooding was not a risk the plaintiffs would be exposed to in the absence of the water pipe).

[221] *See Bunch*, 935 P.2d at 797 n.1.

[222] *See id.*

[223] *See generally* cases cited *supra* note 219.

of the year and at those times when the streams in region are accustomed to flow."[224] This definition is not always easy to apply. A "natural watercourse" does not include, for example, "water flowing in the hollows or ravines in land, which is mere surface water from rain or melting snow, and is discharged from a higher to a lower level, but which at other times are destitute of water."[225] But, ironically, it may include a channel originally constructed artificially, where the channel has existed for a long period of time and has all the attributes of a watercourse.[226]

This factual prerequisite has its roots in the common law "natural watercourse rule," under which an upstream property owner had "immunity for any damage to downstream riparian property caused by discharge of surface water runoff into a natural watercourse."[227] Historically, this immunity applied to public entities as well as private landowners.[228] The purpose of this natural watercourse rule was to facilitate upstream development.[229] However, with the adoption of the reasonableness rule, this common law privilege no longer applies in public entity flood control cases.[230] Instead, inverse condemnation liability is available where an upstream flood control project damages downstream property as a result of a public entity's unreasonable conduct in the use or alteration of a natural watercourse.[231]

Another frequently mentioned factual prerequisite for applying the reasonableness rule, in addition to the two discussed above, is that the damage to private property for which inverse condemnation compensation is sought must have been caused by the *failure* of a

[224] *Locklin*, 867 P.2d at 734 (quoting San Gabriel Valley Country Club v. County of Los Angeles, 188 P. 554, 556 (Cal. 1920)).

[225] Steiger v. City of San Diego, 329 P.2d 94, 97 (Cal. Ct. App. 1958) (quoting L.A. Cemetery Ass'n v. City of Los Angeles, 37 P. 375, 376 (Cal. 1894)).

[226] *See* Chowchilla Farms, Inc. v. Martin, 25 P.2d 435, 440–42 (Cal. 1933) (discussing the doctrine in several jurisdictions, including California); *San Gabriel Valley Country Club*, 188 P. at 556; Contra Costa County v. Pinole Point Props., LLC, 186 Cal. Rptr. 3d 109, 119–20 (Ct. App. 2015).

[227] *Locklin*, 867 P.2d at 734.

[228] *See* Archer v. City of Los Angeles, 119 P.2d 1, 22 (Cal. 1941).

[229] *See Locklin*, 867 P.2d at 748–49.

[230] *See generally* Belair v. Riverside Cnty. Flood Control Dist., 764 P.2d 1070 (Cal. 1988); *Locklin*, 867 P.2d 724; Bunch v. Coachella Valley Water Dist., 935 P.2d 796 (Cal. 1997).

[231] *See Belair*, 764 P.2d at 1079–80; *Locklin*, 867 P.2d at 748–50; *Bunch*, 935 P.2d at 803–04.

flood control improvement.[232] In this context, "failure" means that the flood control measure did not function as intended and thereby caused the very damage it was designed to prevent.[233] In other words, the damage caused to private property was an unintended consequence of the design, construction, operation, or maintenance of the flood control improvement.[234]

The "failure" factual prerequisite makes sense. When a public project is *designed* to flood private property and causes the damage it intended to cause, the policy reasons for the reasonableness rule no longer apply. A public entity that intentionally diverts water and floods private property not historically subject to flooding in order to protect other property from flooding creates a risk that would not otherwise exist.[235] Where one private landowner's property is flooded to protect others from flooding, by definition that landowner has been forced to contribute a compensable "disproportionate" share of the public undertaking.[236] Strict inverse condemnation liability better addresses the interests and policies involved in that situation than a standard of reasonableness.[237]

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[232] *See e.g.*, *Bunch*, 935 P.2d at 807–09; *Belair*, 764 P.2d at 1080; Pac. Shores Prop. Owners Ass'n v. Dep't of Fish & Wildlife, 198 Cal. Rptr. 3d 72, 100–01 (Ct. App. 2016); Akins v. State, 71 Cal. Rptr. 2d 314, 331–34 (Ct. App. 1998). However, outside the flood control context, the failure of a public improvement to function as intended may not be sufficient to establish inverse condemnation liability unless the resulting damage to private property was "the direct and necessary effect of the inherent risks posed by the public improvement as deliberately designed, constructed, or maintained." City of Oroville v. Superior Ct., 446 P.3d 304, 315 (Cal. 2019).

[233] *See Bunch*, 935 P.2d at 799–800, 806–07; *Pac. Shores Prop. Owners Ass'n*,198 Cal. Rptr. 3d at 100.

[234] *See Bunch*, 935 P.2d at 799; *Belair*, 764 P.2d at 1079–80; *Pac. Shores Prop. Owners Ass'n*, 198 Cal. Rptr. 3d at 102.

[235] *See Akins*, 71 Cal. Rptr. 2d at 331–34; *see also* Hauselt v. County of Butte, 91 Cal. Rptr. 3d 343, 349 (Ct. App. 2009) (observing that the flood control context does not always invoke the application of the reasonableness rule); Biron v. City of Redding, 170 Cal. Rptr. 3d 848, 859–60 (Ct. App. 2014) (observing that "*Akins* was a quintessential inverse condemnation case because the flood control project was designed to flood properties."); Gutierrez v. County of San Bernardino, 130 Cal. Rptr. 3d 482, 495-96 (Ct. App. 2011) (distinguishing *Akins* as a case involving intentional flooding of property).

[236] *Akins,* 71 Cal. Rptr. 2d at 331–32. *Accord Biron,* 170 Cal. Rptr. 3d at 859–60.

[237] *See Pac. Shores Prop. Owners Ass'n,* 198 Cal. Rptr. 3d at 100–01; *Akins,* 71 Cal. Rptr. 2d at 334; *see also* Bunch v. Coachella Valley Water Dist., 262 Cal. Rptr. 513, 520 n.8 (Ct. App. 1989) (noting an intentional diversion of water to a

In summary, one of the most important legal issues in water damage cases involves the proper standard of inverse condemnation liability. As discussed above, most jurisdictions apply a strict liability standard in inverse condemnation cases, generally. This standard is the fairest method of vindicating the relevant loss-distribution and deterrence policies underlying inverse condemnation. However, in cases seeking compensation for damage caused by certain flood improvement projects, some courts recognized other, countervailing policy concerns. These concerns induced courts to adopt a multi-factored "reasonableness" standard specific to certain, but not all, water damage cases. This "reasonableness" test tends to shield the public entity from inverse condemnation liability. Although the "reasonableness" test may preclude loss distribution, it encourages and promotes the construction of flood control projects. Such projects constitute important climate change adaptation measures intended to reduce the potential for harm due to increased flooding. Therefore, the "reasonableness" standard not only achieves a proper balance between risk and public benefit with respect to inverse condemnation liability in certain types of flood damage cases, but also advances climate change adaptation objectives.

III. FIRE DAMAGE CLAIMS: MODERN APPLICATIONS AND MODERN ISSUES

A. *Fires Caused by a Public Utility*

Inverse condemnation in flood damage cases is complicated by the various traditional rules unique to water law. No such common law doctrines apply in fire damage cases. Instead, to date, fire damage cases are treated like other inverse condemnation cases where a public entity causes damage to private property; strict liability is the standard.[238] Fire damage is compensable if it was proximately caused by a public improvement as deliberately

particular place almost always gives rise to government liability as a matter of course).

[238] *See e.g.*, Marshall v. Dep't of Water & Power, 268 Cal. Rptr. 559 (Ct. App. 1990); Aetna Life & Casualty Co. v. City of Los Angeles, 216 Cal. Rptr. 831 (Ct. App. 1985); *see also* Pac. Bell Tel. Co. v. S. Cal. Edison Co., 146 Cal. Rptr. 3d 568, 573–76 (Ct. App. 2012) (concluding there is no indication that the California Supreme Court intended to replace strict liability with the reasonableness test outside of the flood control context).

designed, constructed, or maintained, whether or not the fire damage was foreseeable, and in the absence of fault by the public entity.[239] Wildfires can start because the design, construction, and maintenance of high voltage cables permits inter-cable contact during windy conditions, causing the wires to hit the ground and ignite a destructive wildfire.[240] Similarly, during high winds, electric power lines can swing together, arc, and send sparks into dry brush igniting a wildfire that spreads into residential areas.[241] In cases like these, where the utility is publicly-owned, plaintiffs have been able to recover using inverse condemnation claims.[242]

B. *Fires Caused by a Privately-Owned Utility*

Not all utility companies are owned by a public entity; many are privately owned. In most instances, courts treat privately-owned utilities the same as publicly-owned ones for purposes of inverse condemnation. For example, in *Barham v. Southern California Edison Co.*, the plaintiffs' home was damaged by fire after high winds caused an Edison power line to break, resulting in a wildfire.[243] Plaintiffs commenced an action against defendant Edison, alleging claims based on inverse condemnation, negligence, nuisance, and trespass. Edison, which had apparently designed and constructed its power lines on its own, argued that inverse condemnation should not apply because it is a privately-owned public utility and, as such, could only be subject to inverse condemnation liability if it was a joint participant with a public entity when damaging private property.[244]

The *Barham* court rejected Edison's argument based on several factors. First, state statutes conferred on Edison, an electrical company, the power to condemn private property necessary for the construction and maintenance of an electric plant, including

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239 *See Marshall,* 268 Cal. Rptr. at 567; *Aetna Life & Casualty Co.,* 216 Cal. Rptr. at 835–36. As in other inverse condemnation cases, fire caused by the negligent conduct of an employee in the routine operation of an adequate plan of maintenance does not support inverse condemnation liability. *See supra* notes 54–86 and accompanying text.

240 *See, e.g.*, *Marshall,* 268 Cal. Rptr. at 562–65.

241 *See, e.g.*, *Aetna Life & Casualty Co.*, 216 Cal. Rptr. at 835.

242 See cases cited *supra* note 238.

243 *See* 88 Cal. Rptr. 2d 424, 430 (Ct. App. 1999).

244 *See id.* at 427–30.

electrical transmission facilities such as poles and wires.[245] Therefore, the court reasoned that condemning private property for the transmission of electrical power is a public use and inverse condemnation applies.[246] Second, California's regulatory scheme indicates that the state generally expects a utility "to conduct its affairs more like a governmental entity than like a private corporation."[247] Third, the *Barham* Court was unwilling to differentiate between damage resulting from the operation of a utility based solely upon whether the utility is operated by a governmental entity as opposed to a privately-owned utility.[248] The court found no rational basis for such a distinction when applied to the facts of the case.[249] Further, the court observed that the California Constitution and the cases which interpret and apply it "have as their principle focus the concept of public use, as opposed to the nature of the entity appropriating the property."[250] Therefore, the *Barham* court concluded that privately-owned Edison may be liable in inverse condemnation in the same manner as a public entity.[251]

Other courts have focused on many of the same factors as in *Barham*, as well as the fact that a privately-owned utility has monopolistic or quasi-monopolistic authority derived directly from its exclusive franchise provided by the state.[252] By granting an

[245] *See id.* at 429–30. Delegation of the power of eminent domain to private entities dates back to the nineteenth century and continues today in many states. *See* Bell, *supra* note 38, at 545–46, 561 (explaining that such entities include electric companies, as well as railroads, operators of water or sewer systems, and television satellite systems—private actors that serve a "public function"); Van Alstyne*, Statutory Modification, supra* note 40, at 745 (discussing applicability of inverse condemnation to private entities, such as utilities, which condemn land for a public use).

[246] *See Barham,* 88 Cal. Rptr. 2d at 429–30.

[247] *Id*. at 430–31 (quoting Gay L. Students Ass'n. v. Pac. Tel. & Tel. Co., 595 P.2d 592, 599 (Cal. 1979)).

[248] *See id*. at 430.

[249] *See id.* (concluding the factual scenario presented in this case does not justify a distinction between a privately-owned and a government-operated utility for the purpose of inverse condemnation liability).

[250] *Id.* at 430–31.

[251] *See id.* at 430.

[252] *See e.g.*, Pac. Bell Tel. Co. v. S. Cal. Edison Co., 146 Cal. Rptr. 3d 568, 572–73 (Ct. App. 2012); *see* State *ex rel.* Wash. State Convention & Trade Ctr. v. Evans, 966 P. 2d 1252, 1257 n.3 (Wash. 1998) (noting power production is a public use); Town of Fayel v. City of Eveleth, 587 N.W.2d 524, 528 (Minn. Ct.

exclusive franchise, the government has chosen to delegate the furnishing of electricity to the privately-owned utility rather than operating the utility itself.[253] Pursuant to such delegation, the utility is acting like the state in providing an essential but potentially damaging service. Accordingly, the loss-distribution and cost-spreading rationales for inverse condemnation liability still apply.[254]

As indicated in the *Barham* decision, state constitutional provisions authorizing inverse condemnation compensation typically require that private property be taken or damaged for a "public use," not that it be taken by a public entity.[255] Contrast this language with that of other constitutional provisions requiring a governmental actor. For example, the Due Process Clause of the Fourteenth Amendment to the U.S. Constitution provides: "[N]or shall any State deprive any person of life, liberty, or property, without due process of law."[256] The Due Process Clause applies to "state action" as opposed to "private action,"[257] and therefore the relevant inquiry under the Due Process Clause is whether there is a "sufficiently close nexus" between the State and the challenged action of a privately-owned utility "so that the action of the latter may be fairly treated as that of the State itself."[258] The fact that the State conferred monopoly status upon the utility and extensively regulates its activities, and that the utility performs an essential public function, does not, alone, convert its activities into state action for purposes of the federal Due Process Clause.[259] However,

App. 1999) (observing "supplying electricity, even if provided by a quasi-public entity, is a public use"). *See generally In re* PG & E Corp., 2019 Bankr. Lexis 3671 (Bankr. N.D. Cal. Nov. 27, 2019) (ascertaining California law in bankruptcy proceeding and predicting, based on California appellate decisions and other authorities, that California's Supreme Court would apply the doctrine of inverse condemnation to a privately-owned utility company).

253 *See Pac. Bell Tel. Co.*, 146 Cal. Rptr. 3d at 572–73.

254 *See id*. at 573 (applying inverse condemnation to a privately-owned utility because "individual property owners should not have to contribute disproportionately to the risks of public improvements made to benefit the community as a whole").

255 *See* authorities cited *supra* notes 20–21.

256 U.S. CONST. amend. XIV, §1.

257 Jackson v. Metro. Edison Co., 419 U.S. 345, 349 (1974); Blum v. Yaretsky, 457 U.S. 991, 1002–03 (1982).

258 *Jackson,* 419 U.S. at 351.

259 *See id.* at 351–53. Interestingly, however, if a privately-owned utility exercises some power delegated to it by the State which is traditionally associated

the texts of *state* constitutional Takings Clauses do not require state action, so courts in fire damage cases have ruled correctly in applying inverse condemnation doctrine to privately-owned utilities.

C. *Should the Reasonableness Rule Apply to Fire Damage Cases?*

The most important issue today is whether the reasonableness rule, rather than liability without fault, should apply to an inverse condemnation cause of action in wildfire cases. This issue is perhaps most acute in California, where recent wildfires have caused billions of dollars in damages to private property.[260] Many of these fires, as well as the resultant injuries to property and person, were substantially caused by utilities.[261]

Unlike water damage cases, which often focused on the various traditional exceptions to liability unique to water law, there is no comparable common law history with respect to fire damage cases. The "common enemy" and "natural watercourse" privileges were developed and applied solely in the context of water law and flood control. No analogous immunity doctrines apply in fire damage cases.

If the policy issues that justify a reasonableness rule in flood control litigation—namely, weighing public benefit versus private costs—also apply in the wildfire context, it could justify a court adopting the reasonableness rule.[262] The policy analysis for flood control cases, however, is not readily transferrable to wildfire damage litigation. First, the government does not have a duty to provide flood control or to do so at any particular level.[263] Whether or not to construct a flood control project, and where and how to build it, is a voluntary decision. Flood improvements are beneficial even if they only prevent some, but not all, flooding in an area

with sovereignty—such as eminent domain—that activity may constitute the requisite state action. *See id.* at 353.

260 *See supra* notes 5–6 & 13 and accompanying text.

261 *See id*.

262 *See* Belair v. Riverside Cnty. Flood Control Dist., 764 P.2d 1070, 1079–80 (Cal. 1988).

263 *See, e.g.*, Tri-Chem, Inc., v. L.A. Cnty. Flood Control Dist., 132 Cal. Rptr. 142, 145 (Ct. App. 1976) (ruling the state has no duty to construct a flood control system); Wreck v. L.A. Cnty. Flood Control Dist., 181 P. 2d 935, 948 (Ct. App. 1947) (observing the flood district had "no mandatory direction to build public improvements of any particular character or design, or any improvement at all").

historically subject to flooding. In this sense, flood control improvements typically involve an inherent risk of failure but are encouraged to avoid greater likelihoods of natural damage. Applying a strict liability standard when such projects fail to prevent all flooding might well discourage a public entity from undertaking the project at all.

In contrast, utilities do have a duty to serve their customers, rendering the wildfire litigation context quite different from the more voluntary flood management context. Public and privately-owned utilities are in the business of supplying electricity to retail customers. Traditionally, in exchange for the grant of a franchise to provide electricity to consumers within their exclusive service territories, electric utilities operated under an obligation to extend service to all customers within that territory.[264] That "duty to serve" continues today, even in those states that have restructured the electricity market to promote competition at the retail level.[265] The traditional "duty to serve" was based on common law; today, in a competitive retail market it may be imposed by regulatory statutes.[266] What this means is that, unlike a public entity considering where to undertake a flood control project, an electrical utility operates under a duty to supply service to customers. Although consumers in an unregulated electricity market can choose among competing suppliers of power, the utility cannot choose to deny service to market participants.

Second, flood control projects are designed to protect land historically subject to flooding, and as mentioned, it is unreasonable

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[264] *See* Jim Rossi, *Universal Service in Competitive Retail Electric Power Markets: Whither the Duty of Serve?*, 21 ENERGY L.J. 27, 29–36 (2000) [hereinafter *Universal Service*]; Jim Rossi, *The Common Law "Duty to Serve" and Protection of Consumers in an Age of Competitive Retail Public Utility Restructuring*, 51 VAND. L. REV. 1233, 1234–39, 1242–43, 1248–50, 1252–60 (1998).

[265] *See, e.g.*, N.H. REV. STAT. ANN. § 374-F:3-V(a) (2020) ("A restructured electric utility industry should provide adequate safeguards to assure universal service"); CAL. PUB. UTIL. CODE § 330(f) (Deering 2020) ("The delivery of electricity over transmission and distribution systems is currently regulated, and will continue to be regulated to ensure system safety, reliability, environmental protection, and fair access for all market participants"); *Id.* § 386(a) ("Each local publicly owned electric utility shall ensure the following: (a) Low-income families within the utility's service territory have access to affordable electricity…."); *see also* Rossi, *Universal Service, supra* note 264, at 41–49 (discussing the obligation to provide electrical service in a restructured competitive retail market).

[266] *See* authorities cited *supra* note 264–265.

to expect the public entity to guarantee total protection against the inherent risks of flooding on these lands.[267] However, a utility that provides electricity to retail customers is not engaged in an undertaking intended to protect those customers from any pre-existing risk. Rather, if not designed, constructed, and maintained properly, the utility may be creating a potential risk of wildfires where no such risk previously existed. Also, unlike flood control projects which may involve an inherent risk of failure, supplying electricity to customers involves a negligible amount of risk that can be eliminated, or at least greatly reduced, through proper preventative measures. For example, a utility company can limit the risk of fires through preventive measures such as properly spacing and insulating wires, undergrounding wires, and upgrading poles and other infrastructure; and by preventive strategies such monitoring, inspecting, and replacing lines, and managing vegetation.

Third, the reasonableness rule in the flood control context, as articulated by Van Alstyne, derives from the "rational balancing of risk against the practicality of risk avoidance."[268] As explained above, the *Belair* court was concerned that strict liability would discourage important flood control improvements.[269] The strongest argument for applying a reasonableness standard in wildfire cases is a variant of this general policy consideration regarding the proper balance of public benefits and private damages, particularly in a restructured system that permits competition in the retail electricity market.

The primary purpose of a restructured electricity market is to create competition at the retail level so that the consumers' rates will decrease.[270] A subsidiary purpose is to encourage privately-owned

267 *See Belair,* 764 P.2d at 1079–80.

268 *See supra* notes 195–196 and accompanying text.

269 Locklin v. City of Lafayette, 867 P.2d 724, 749–50 (Cal. 1994) (analyzing *Belair*). The court in Bunch v. Coachella Valley Water Dist., 935 P.2d 796, 802 (Cal. 1997), explained that "*Belair* was careful to emphasize that its 'reasonableness' rule would not discourage beneficial flood control projects, but would allow compensation for property that those projects unfairly damaged, creating a proper balance in constitutional takings jurisprudence."

270 *See* Jonas J. Monast, *Electricity Competition and the Public Good: Rethinking Markets and Monopolies*, 90 COLO. L. REV. 699, 676 (2019) (noting many critics of regulated electric utility markets argue that competitive markets would result in lower prices and better services); FED. TRADE COMM'N, COMPETITION AND CONSUMER PROTECTION PERSPECTIVES ON ELECTRIC POWER

utilities to enter the retail market.[271] In other words, more retail electricity sellers should mean more competition, innovation, and efficiencies in supplying electricity, resulting in lower rates to consumers.[272] The prospect of strict liability may discourage new suppliers from entering the retail market whereas, arguably, liability based on a reasonableness rule would be more encouraging.[273] Consequently, the argument continues, the inverse condemnation liability standard should be a reasonableness standard so as not to discourage competition via new electricity suppliers, while recognizing the potential for catastrophic injury to persons and private property due to wildfires.

With so much at stake, the proper balance of these two competing policies is elusive at best. The number of important interests to be weighed—including private property owners, rate-paying consumers, privately-owned utilities and their investors, insurance companies, state and local taxpayers, firefighters, and police—make such a determination not only complex but, for lack of a better description, highly political. In other words, the proper balance is beyond the ability of a court to ascertain given the various policies, interests, and constituents involved.

Moreover, even if a court could justify its adoption of a reasonableness rule in wildfire cases, crafting the elements of such a rule would be equally difficult. Many of the components of the "reasonableness" test applicable in flood damage cases, such as the

REGULATORY REFORM 4–6 (Sept. 2001) (reporting that deregulation and increased competition by many states are expected to reduce retail electricity rates), https://www.ftc.gov/sites/default/files/documents/reports/competition-and-consumer-protection-perspectives-electric-power-regulatory-reform-focus-retail/electricityreport.pdf.

271 *See generally* Monast, *supra* note 270, at 674–81 (discussing traditional regulated markets and restructured markets in the retail electricity industry).

272 *See id.*

273 A possible weakness in this policy-based argument is that, unlike the flood improvement context, the relevant liability standard may be a relatively insignificant factor in deciding whether to enter a retail electricity market. Other factors include the ability to attract investors and raise capital; the stringency of the state's certification, licensing, and registration requirements; the relationship between the wholesale and retail electricity markets; and the volatility of retail prices in the relevant electricity market. On the other hand, the main consideration, even in a service area not prone to wildfires, is whether entry into the retail electricity market will be profitable. The relevant standard of liability will likely be a significant factor with respect to assessing profitability, particularly where a utility is deciding to enter the service area that is prone to wildfires.

multi-factored test adopted by the California Supreme Court in *Belair*, *Locklin*, and *Bunch*, do not readily transfer to the wildfire context.[274] Consideration of a utility's fiscal constraints in determining whether to shift the risk of loss from wildfires to private resources is particularly inappropriate, given the limited options available to those affected. For example, a privately-owned utility may limit its liability through bankruptcy,[275] but a private landowner may find adequate insurance unavailable.[276]

Perhaps ironically, though the decision about whether to adopt a reasonableness rule and determining its content is a determination most appropriate for a state legislature, the legislature will likely be precluded from making one. In most states, the legislature lacks the authority to make this determination with respect to inverse condemnation claims. As explained previously, inverse condemnation compensation is authorized by the state's constitution in nearly all states.[277] A state legislature simply does not possess the power to substantively limit this constitutional right.[278] Of course, a

[274] *See supra* notes 196–205 and accompanying text.

[275] The large California utility company, PG&E, filed a Chapter 11 action in U.S. Bankruptcy Court seeking protection from $30 billion in wildfire claims. In June 2020, the Bankruptcy Court confirmed the debtor's and shareholders' Joint Chapter 11 Plan of Reorganization, which includes the establishment of a $13.5 billion trust fund for payment of fire victims' claims. *See In re* PG & E Corp., 617 B.R. 671 (Bankr. N. D. Cal. 2020). Also, in June 2020, PG&E pleaded guilty in a California Superior Court to eighty-four counts of involuntary manslaughter for causing the deaths of eighty-four people in the "Camp Fire," which destroyed the town of Paradise, California. *See* Ivan Penn & Peter Eavis, *PG&E Pleads Guilty to 84 Counts of Manslaughter in Camp Fire Case*, N.Y. TIMES (June 16, 2020), https://www.nytimes.com/2020/06/16/business/energy-environment/pge-camp-fire-california-wildfires.html.

[276] Insurance companies refused to insure property in wildfire-prone parts of California, prompting regulations that temporarily prohibited insurers from refusing to renew home insurance policies in such areas. *See, e.g.*, Nicole Friedman, *California Bans Insurers from Dropping Homes in Wildfire Areas*, WALL ST. J. (Dec. 5, 2019), https://www.wsj.com/articles/california-bans-insurers-from-dropping-homes-in-wildfire-areas-11575585626; Michael Hiltzik, *Where Fire Risk is High, Insurance Grows Scarce*, L.A. TIMES (Aug. 29, 2019), https://www.latimes.com/business/story/2019-08-28/hiltzik-california-fire-insurance-crisis; Joseph Serna*, California Bans Insurers from Dropping Policies in Fire-Ravaged Areas*, L.A. TIMES (Dec. 5, 2019), https://www.latimes.com/california/story/2019-12-05/california-bans-insurers-from-pulling-policies-in-fire-ravaged-areas.

[277] *See supra* notes 20–21 and accompanying text.

[278] *See, e.g.*, Holtz v. Superior Ct.*,* 475 P. 2d 441, 444 (Cal. 1970) (ruling the extent of a public entity's liability in inverse condemnation is fixed by the

legislature may attempt to accommodate the various interests involved by other means, such as establishing a "wildfire fund" to compensate private landowners and bail out utilities.[279] But a state legislature cannot accomplish this goal by imposing a reasonableness standard in circumstances where the state constitution requires liability without fault. The proper avenue for changing the inverse condemnation liability standard is through an amendment to the state constitution.

In summary, there is little justification for a court to adopt a reasonableness rule in wildfire cases; the factors that support

California Constitution and not by statutory or common law rules); Rapid City v. Boland, 271 N.W.2d 60, 68 (S.D. 1978) (observing any statute that seeks to expand the immunity of governmental entities for destruction of property based on new doctrines would violate the South Dakota Constitution); Electro-Jet Tool & Mfg. Co. v. City of Albuquerque, 845 P.2d 770, 777 (N.M. 1992) (noting state legislation cannot override the constitutional requirement of just compensation contained in the New Mexico Constitution); Drake v. Walton County, 6 So. 3d 717, 721–22 (Fla. Ct. App. 2009) (ruling county's statutory authority to act must yield to the just compensation requirements of the Florida Constitution); Robinson v. Ashdown, 783 S.W.2d 53, 56–57 (Ark. 1990) (ruling a municipality that intentionally damages private property cannot escape its constitutional obligation to compensate on the basis of statutory immunity); Williams v. Moulton Niguel Water Dist., 232 Cal. Rptr. 3d 356, 361 n.3 (Ct. App. 2018) (noting that "inverse condemnation is a constitutional right of action that cannot be preempted by a legislative act"); Pac. Bell v. City of San Diego, 96 Cal. Rptr. 2d. 897, 904 (Ct. App. 2000) (ruling the constitutional provisions for inverse condemnation override any statutory immunities).

[279] Recent California legislation established a "Wildfire Fund," funded by contributions from electrical corporations, revenues generated from ratepayers, and certain bond proceeds. *See* CAL. PUB. UTIL. CODE §§ 3284–3289 (Deering 2020). A privately or publicly owned electrical company meeting certain statutory requirements may seek payment from the fund to satisfy settled or finally adjudicated eligible claims. See *id.* §§ 3291–3297 (Deering 2020). One eligibility requirement is that the electrical company adopt and implement a wildfire mitigation plan that includes, among other things, preventive strategies to minimize the risk of its electrical lines and equipment causing wildfires, plans for vegetation management, and a description of the actions the utility will take to ensure its system will achieve the highest level of safety and reliability. *See id.* §§ 8386(c), 8387(b). Another is that an electrical corporation must maintain reasonable and appropriate insurance coverage. *See id.* § 3293. The California statutes also mandate that each electric company "shall construct, maintain, and operate its electrical lines and equipment in a manner that will minimize the risk of catastrophic wildfire posed by those electrical lines and equipment." *Id.* §§ 8386(a), 8387(a). For an overview of the Wildfire Fund legislation, *see* Madeline Orlando, *Public Utilities: Chapter 79: The Least-Worst Option for Utility Customers in the Aftermath of Devastating Wildfires*, 51 U. OF PAC. L. REV. 409, 415–18 (2020).

reasonableness in the context of flood improvement projects are not present in the wildfire context. Unless there is a change in a state's constitution—or legislation enacted pursuant to a constitutional amendment—a court should continue to apply a liability without fault standard. A strict liability standard better promotes the loss distribution and deterrence policies underlying inverse condemnation compensation than would a judge-made multi-factored reasonableness rule. Of the two standards, strict liability provides a more certain means of redressing harm caused by past wildfires. Also, strict liability informs a utility that the best way to avoid inverse condemnation liability is by taking meaningful steps to reduce the risk of wildfires. Such risk avoidance measures are important now and will be even more important as climate change increases the frequency and severity of wildfires.[280]

CONCLUSION

The most important issue in modern inverse condemnation cases concerns the appropriate standard of liability. Like ordinary condemnation, the policy consideration behind inverse condemnation is whether the owner of damaged property, if uncompensated, would bear a disproportionate share of the costs of a public improvement. Inverse condemnation also serves other essential purposes, such as encouraging risk reduction and deterring conduct likely to cause damage to private property. The very real possibility of significant financial liability instructs the government to more carefully consider the impacts of its policy choices. Therefore, the standard of liability should reflect the proper balance between public benefit and private injury.

The appropriate standard of liability varies by context. In water damage cases involving the failure of a flood control improvement, a multi-factored "reasonableness" standard applies, where the case meets several, historical, doctrinal, and factual prerequisites.

[280] *See* authorities cited *supra* notes 2, 3, & 13. *See also* Joseph Serna, *Why California's 2020 Lightning Fires Got So Big So Fast*, L.A. TIMES (Aug. 30, 2020), https://www.latimes.com/california/story/2020-08-30/why-californias-2020-lightning-fires-have-grown-bigger-and-faster-than-any-in-state-history (explaining how climate change, heat waves, and drought make megafires increasingly possible); Kendra Pierre-Louis & John Schwartz, *Why Does California Have So Many Wildfires?*, N.Y. TIMES (Aug. 21, 2020), https://www.nytimes.com/article/why-does-california-have-wildfires.html (discussing the connection between climate change and wildfires in California).

Outside of this flood control improvement context, strict liability is the proper standard of liability.

The strict liability standard provides the fairest method of vindicating the relevant loss-distribution and deterrence policies underlying inverse condemnation, particularly in wildfire cases. Whether to extend the reasonableness rule to utility-caused wildfire cases presents a difficult question. Given the complexity of finding a proper balance of all the various interests and policies involved, there is little justification for judicial, as opposed to legislative, adoption of the reasonableness rule in wildfire cases. However, as discussed previously, a state legislature may lack the authority to enact legislation that limits inverse condemnation liability in a manner contrary to the relevant state constitution. Moreover, the policy considerations that influenced courts to adopt the reasonableness rule in certain flood control cases do not apply in wildfire cases. Consequently, strict liability should remain the applicable standard in wildfire cases, as well as in water damage cases that do not involve the failure of a flood control project.

The applicable standard of liability has wide-ranging and significant impacts. It affects both the government and taxpayers because it determines whether they must pay inverse condemnation compensation if a judgment is entered against a public entity. Likewise, the standard of liability impacts utilities and their investors, ratepayers, and customers in wildfire damage cases. And, of course, the applicable standard is very important to property owners seeking financial redress though inverse condemnation litigation. Lastly, the standard of liability also implicates environmental concerns and, in that sense, the public at large.

Inverse condemnation may play an increasingly larger role in property damage litigation as climate change increases both the frequency and severity of floods and wildfires. In this regard, the standard of liability will affect current and future policy choices. For instance, the "reasonableness" standard may encourage public entities to undertake important climate change adaption measures in the form of flood control improvements. The strict liability standard may force private utilities to exercise a great deal more care to avoid paying for extensive wildfire damage. Rather than let the courts continue to balance these competing policies on a case-by-case basis, what is necessary now and for the future is comprehensive legislation that takes into account the competing policy concerns in light of a changing environment and delineates the relevant inverse

condemnation liability standard applicable in wildfire and water damage cases.