



August 6, 2018

TO: Members of the California State Senate & Assembly

FROM: California State Association of Counties (CSAC)  
Rural County Representatives of California (RCRC)  
League of California Cities (LCC)

RE: **Governor's Proposal on Utility Liability for Wildfires**

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The California State Association of Counties (CSAC), the Rural County Representatives of California (RCRC) and the League of California Cities (LCC) would like to share with you our legal counsel's opinion on the constitutionality of the proposal provided by the Governor to the Conference Committee on Wildfire Preparedness and Response.

In brief, we believe that the Governor's proposal on inverse condemnation is likely unconstitutional and we strongly urge you to reject this proposal. The attached memo outlines our specific legal rationale. We are committed to working with the Conference Committee and the Legislature on other issues that address critical safety, and prevention measures that lessen the impact of catastrophic wildfire and protect our communities and infrastructure.

Should you have any questions regarding this memo please contact Darby Kernan, CSAC Deputy Executive Director for Legislative Services at 916-650-8104.



## MEMORANDUM

**To:** Carolyn Coleman, LCC Executive Director  
Graham Knaus, CSAC Executive Director  
Greg Norton, RCRC President & CEO

**From:** Patrick Whitnell, LCC General Counsel  
Jennifer Henning, CSAC Litigation Counsel  
Arthur Wylene, RCRC Governmental Affairs Counsel

**Date:** August 6, 2018

**Re:** Governor's Proposal on Inverse Condemnation Claims Against Electrical Corporations and Local Publicly Owned Electric Utilities

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You have asked for our opinion on the constitutionality of the proposal provided by the Governor to the Conference Committee on Wildfire Preparedness and Response. Specifically, you have inquired whether a proposed addition to the Code of Civil Procedure that would require a court to consider several factors and assign proportionate fault in certain inverse condemnation actions against electric utilities would be constitutional.

**Brief Answer:** It is our conclusion that the Governor's proposal on inverse condemnation is likely unconstitutional.

**Background:** Article I, section 19 of the California Constitution states: "Private property may be taken or damaged for public use only when just compensation, ascertained by a jury unless waived, has first been paid to, or into court for, the owner." This provision requires just compensation both for taking property through eminent domain, and for damaging property as an unintended result of the design, construction, maintenance or operation of a public project, also known as inverse condemnation.<sup>1</sup> Since investor-owned electrical utilities have the power of eminent domain, they are subject to the just compensation requirements of the California Constitution.<sup>2</sup>

Under current law, with limited exceptions, the courts have found that strict liability applies in inverse condemnation claims.<sup>3</sup> Imposing strict liability ensures that property owners receive the just compensation they are constitutionally entitled to for damaged property, and prevents individual property owners from bearing a disproportionate share of the costs of the public project.<sup>4</sup> In contrast to tort claims, comparative negligence is not a valid defense to an inverse condemnation claim,<sup>5</sup> and governmental immunities are not applicable.<sup>6</sup>

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<sup>1</sup> *Bunch v. Coachella Valley Water Dist.* (1997) 15 Cal.4th 432.

<sup>2</sup> *Barham v. Southern Cal. Edison Co.* (1999) 74 Cal.App.4th 744.

<sup>3</sup> *Albers v. County of Los Angeles* (1965) 62 Cal.2d 250; *Blau v. City of Los Angeles* (1973) 32 Cal.App.3d 77.

<sup>4</sup> *Holtz v. Superior Court* (1970) 3 Cal.3d 296.

<sup>5</sup> *Blau v. City of Los Angeles* (1973) 32 Cal.App.3d 77.

<sup>6</sup> *Pacific Bell v. City of San Diego* (2000) 81 Cal.App.4th 596.

The Governor's proposal would change this existing law in two critical ways. First, it would eliminate strict liability for inverse condemnation claims against publicly owned electric utilities, and would instead direct the courts to consider a number of factors related to the utility's conduct and the harm to the property. Second, it would limit an award of compensation in inverse condemnation to the utility's proportionate fault. Taken together, the proposal would change inverse condemnation from a system that provides just compensation (i.e., typically market value) to a property owner to one that strongly resembles a tort claim in which comparative fault of the utility determines the damages award.

### Analysis: The Governor's Inverse Condemnation Proposal is Likely Unconstitutional

Though the Legislature does not require specific authority from the constitution to act, its actions may nevertheless be prohibited by constitutional provisions.<sup>7</sup> Such limitations on the Legislature's power need not appear in the state Constitution expressly, but may exist by necessary implication.<sup>8</sup>

Such an implication appears to be present here. As noted above, providing just compensation for damage to property caused by public projects, including investor owned and public electrical utilities, through inverse condemnation actions is a constitutionally-guaranteed property protection. Decades of case law define the fundamental character of inverse condemnation claims, which includes strict liability and prohibits consideration of the reasonableness of the governmental action or comparative fault.

The court has developed only one exemption to this general rule in the limited context of flood control, in which the courts have attempted to reconcile over a century of water law allowing the government to damage property to prevent even worse flood damage.<sup>9</sup> But the courts have also been quite clear that the rules for inverse condemnation claims related to flood control projects are not intended to replace strict liability outside of the flood control context.<sup>10</sup>

The Governor's proposal would fundamentally change the nature of the constitutional protection against property damage provided through inverse condemnation, and would reduce or deny compensation in circumstances where the California Constitution, as interpreted by the courts, requires full just compensation.

It has been suggested that the Legislature may have the power to interpret Article I, section 19 to establish new rules of decision for this specific class of inverse condemnation actions. However, it is well settled that the Legislature does not have the power to "interpret" the constitution *contrary to established judicial precedent*. Similar attempts have been repeatedly struck down.<sup>11</sup> Moreover, the courts have been particularly cautious of "legislative interpretation" where individual rights are concerned, emphasizing that such legislation "must not in any particular attempt to narrow or embarrass" the individual right.<sup>12</sup> The courts have specifically not hesitated to strike down legislation purporting to narrow the constitutional right to just compensation.<sup>13</sup>

For these reasons, whatever power the Legislature may have, if any, to legislate on the issue of inverse condemnation, we believe this proposal exceeds it.

Please do not hesitate to contact us if we can be of any further assistance on this issue.

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<sup>7</sup> *County of Riverside v. Superior Court* (2003) 30 Cal.4th 278.

<sup>8</sup> *Methodist Hospital of Sacramento v. Saylor* (1971) 5 Cal.3d 685.

<sup>9</sup> *Belair v. Riverside County Flood Control Dist.* (1988) 47 Cal.3d 550.

<sup>10</sup> *Pacific Bell v. S. California Edison Co.* (2012) 208 Cal.App.4th 1400.

<sup>11</sup> *C&C Construction, Inc. v. Sacramento Municipal Utility Dist.* (2004) 122 Cal.App.4th 284; *Vallerga v. Department of Alcoholic Beverage Control* (1959) 53 Cal.2d 313; *Lucas v. County of Monterey* (1977) 65 Cal.App.3d 947.

<sup>12</sup> *Hale v. Bohannon* (1952) 38 Cal.2d 458.

<sup>13</sup> *Citizens Utilities Co. v. Superior Court* (1963) 59 Cal.2d 805.