

Should North Carolina Adopt California's Unique Inverse Condemnation Law?

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I. Introduction

Since the year 2000, an annual average of over 70,000 wildfires have burned an average of 7.0 million acres nationwide, a doubling of the burn rate in the 1990s.¹ The 2018 Camp Fire, perhaps the worst wildfire in California history, burned more than 150,000 acres and caused eighty-five confirmed casualties.² Although unusually arid and hot conditions played a role, the fire was ultimately started by Pacific Gas & Electric's ("PG&E") faulty electric transmission lines.³ Shortly thereafter, PG&E would file for bankruptcy, incurring liability expenses over 30 billion dollars.⁴ In 2021 alone, approximately 23,000 wildfires burned about 6.2 million acres in the West.⁵ In addition to these staggering burn figures, wildfires routinely lead to issues in the electricity sector. Not only can wildfires directly damage utility infrastructure, but the threat of wildfires may lead to preventative blackouts.⁶ During 2021 wildfires, PG&E was forced to shut off power to almost 50,000 customers in response to dangerous wildfire conditions.⁷

Unfortunately, the risk to energy infrastructure from climate change is broad. Extreme conditions such as high temperatures and strong winds can increase the frequency and severity of wildfires, thus posing increased risks to several categories of utility assets, including those of the

¹ Katie Hoover and Laura A. Hanson, CONG. RSCH. SERV., WILDFIRE RSCH. (Dec. 2, 2022) <https://crsreports.congress.gov/product/pdf/IF/IF10244/65>.

² *Cal Fire Investigators Determine Cause of the Camp Fire*, CAL. DEP'T FORESTRY FIRE PROT. (May 15, 2019) https://www.fire.ca.gov/media/5121/campfire_cause.pdf.

³ *Id.*

⁴ Eric Westervelt & Matthew S. Schwartz, *California Power Provider PG&E Files for Bankruptcy in Wake of Fire Lawsuits*, NPR (Jan. 29, 2019), <https://www.npr.org/2019/01/29/689591066/1alifornia-power-provider-pg-e-files-for-bankruptcy-in-wake-of-fire-lawsuits>.

⁵ The west includes Alaska, Arizona, California, Colorado, Idaho, Montana, New Mexico, Nevada, Oregon, Utah, Washington, and Wyoming. Hoover & Hanson, *supra* note 1.

⁶ Tori B. Powell, *PG&E Briefly Shut Off Power To 48,000 Residents as Wildfires Continue to Threaten California's Power Grid*, CBS NEWS (Aug. 18, 2021), <https://www.cbsnews.com/news/california-fire-power-outages-shutoffs-wildfire/>.

⁷ *Id.*

electric sector.⁸ Climate change is not a problem that will be solved any time soon, and the conditions that spawn “wildfire seasons” may only become more significant.⁹ At the heart of this discourse is California. The state represents nearly half of the West’s acreage burn figure and is often at the center of discussions regarding the prevention and management of wildfires.¹⁰ Conversely, California is also at the center of discussions regarding responsibility and subsequent implementation of liability on utility companies.

The Golden State employs “inverse condemnation” against utility companies in the event of the companies’ equipment causing a wildfire.¹¹ Inverse condemnation is a legal concept that entitles property owners to just compensation if their property is damaged by a public use.¹² A private citizen may pursue remedy when a taking has occurred without just compensation.¹³ In California, this liability rule has applied to all government agencies, as well as utilities. After a wildfire, inverse condemnation is the way that victims of fires such as residents, businesses, and local agencies may recover their costs.¹⁴ However, California is rather unique in that the state not only extends this principle to certain private entities, such as investor-owned utilities, but also applies a standard of strict liability against them.¹⁵ Strict liability, as applied here, would hold utility companies liable regardless of their intention or fault.

⁸ John J. MacWilliams, *Out of Control: The Impact of Wildfires on our Power Sector and the Environment*, COLUM. SIPA CTR. (Jan. 28, 2020), https://www.energypolicy.columbia.edu/research/testimony/out-control-impact-wildfires-our-power-sector-and-environment#_ftn11.

⁹ *Id.*; See also *Climate Change Widespread, Rapid, and Intensifying*, INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE (Aug. 9, 2021), <https://www.ipcc.ch/2021/08/09/ar6-wg1-20210809-pr/>.

¹⁰ Hoover and Hanson, *supra* note 1.

¹¹ *Inverse Condemnation Fact Sheet*, LEAGUE OF CAL. CITIES (Jan. 4, 2022), https://www.counties.org/sites/main/files/file-attachments/inverse_condemnation_fact_sheet_league__csac.pdf.

¹² *Id.*

¹³ Takings are the government’s power to take private property and use said property for public purposes. *Eminent Domain*, CORNELL L. SCH. LEGAL INFORMATION INST., https://www.law.cornell.edu/wex/eminent_domain.

¹⁴ *Id.*

¹⁵ See *Albers v. County of Los Angeles*, 62 Cal. 2d 250 (1965).

Recently, California courts slightly shifted the legal standard. The Supreme Court of California held in the *City of Oroville v. The Superior Court of Butte County* that to succeed on an inverse condemnation claim, the plaintiff must show more than just a causal link between the damage incurred and the public improvement.¹⁶ Here, damages resulted from raw sewage backing up into the plaintiff's building. The plaintiffs argued that this was caused by the public sewer system's failure to function as intended, thus creating a legal obligation to compensate.¹⁷ The property owners raised this argument despite failing to install a legally required backwater valve that would have siphoned away the waste.¹⁸ Instead, the court found that there must be a demonstration that "the property damage was the probable result or necessary effect of an inherent risk associated with the design, construction, or maintenance of the relevant public improvement."¹⁹ In rejecting the plaintiff's claims, the court incorporated an "inherent risk" standard.²⁰

Though not a complete departure from existing law, the court required the plaintiff to show the damage was an "inherent risk" of the public improvement, and an "inescapable or unavoidable consequence" of the public improvement as planned and constructed."²¹ In devising this revised standard, the court did not implement a standard of reasonableness to shield companies from liability but instead added an additional requirement to the causation analysis. The shift in standard may represent concerns over the current stress faced by utility companies, especially with PG&E's recent filing for bankruptcy.

¹⁶ *City of Oroville v. Super. Ct.*, 7 Cal. 5th 1091, 1102-1111 (2019).

¹⁷ *Id.* at 1107-1101.

¹⁸ *Id.*

¹⁹ *Id.* at 1111.

²⁰ *Id.* at 1101-1111

²¹ *Id.*

Among the states, California has often been viewed as a pioneer for environmental policies. This paper will explore the constitutionality of California's inverse condemnation law and argue for North Carolina's adoption of California's new standard.

II. Constitutionality

California has imposed a strict liability standard on investor-owned utility companies. Strict liability is a legal concept applied in criminal and tort law, although under heavy scrutiny, whereby the defendant will be held liable regardless of their mental state.²² Here, regardless of fault, utility companies in California are liable for any damages caused by their activities or equipment.²³ Unlike negligence suits, there is no requirement that the plaintiff shows the defendant to have possessed a duty, and to have breached that duty. In further contrast, this damage need not be foreseeable,²⁴ nor is there a discussion of reasonable care.²⁵

Inverse condemnation originates from the Fifth Amendment's Takings Clause and the principle of Eminent Domain.²⁶ Eminent Domain refers to the government's power to take private property for public purposes. However, such taking may not occur without "just compensation" being given to the owner of the property.²⁷ Traditionally, this compensation involves an evaluation of the property's fair market value.²⁸ Though similar in principle, eminent

²² *Strict Liability*, CORNELL L. SCH. LEGAL INFORMATION INST., https://www.law.cornell.edu/wex/strict_liability#:~:text=Overview,examples%20of%20strict%20liability%20offenses (last visited Jan. 18, 2023).

²³ *See Albers*, 62 Cal. 2d at 256 (1965).

²⁴ Foreseeability considers how "likely it was that a person could have anticipated the potential or actual results of their actions." *Foreseeability*, CORNELL L. SCH. LEGAL INFO. INST. (last visited Jan. 18, 2023), <https://www.law.cornell.edu/wex/foreseeability#:~:text=Foreseeability%20asks%20how%20likely%20it,in%20contract%20and%20tort%20law>.

²⁵ *Reasonable*, CORNELL L. SCH. LEGAL INFO. INST. (last visited Jan. 18, 2023), <https://www.law.cornell.edu/wex/reasonable> ("Just, rational, appropriate, ordinary, or usual in the circumstances.").

²⁶ *Eminent Domain*, CORNELL L. SCH. LEGAL INFO. INST. (last visited Jan. 18, 2023), https://www.law.cornell.edu/wex/eminent_domain.

²⁷ *Id.*

²⁸ *Id.*

domain prevents a public entity from pursuing a taking without first ensuring compensation, a proactive approach in contrast to the retroactive nature of inverse condemnation.

In determining constitutionality, the first concern is whether such damage to a property constitutes a taking. The Constitution reads “nor shall private property be taken for public use, without just compensation.”²⁹ By itself, “taken” is a rather ambiguous term but federal courts have devised parameters to define the word.³⁰ A “taking” may come in the form of physically seizing the property or by restricting certain uses of or on the property. When taking the form of a regulatory taking, the government’s actions restrict the owner’s rights such that it is functionally equivalent to a physical seizure.

Over the years, the Supreme Court has established several tests to determine whether a regulation constitutes a taking. “[W]hen the owner of real property has been called upon to sacrifice all economically beneficial uses in the name of the common good . . . he has suffered a taking.”³¹ Furthermore, the extent to which the regulation has interfered with the owner’s reasonable investment-backed expectations for the parcel as a whole is essential to the analysis.³² Through a stretch of regulatory takings doctrine, one could understandably see how the destruction of property (to the degree that wildfires often cause), could amount to a loss suffered by the property such that it warrants a taking. Notably, the Supreme Court has stated that a temporary interference with property can constitute a taking, and that length and severity are factors to consider.³³

²⁹ U.S. Const. amend. V.

³⁰ *Eminent Domain supra*, note 25.

³¹ *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1019 (1992).

³² *See Penn Central Transp. Comp. v. City of N.Y.*, 98 S.Ct. 607 (1977).

³³ *See Arkansas Game & Fish Commission*, 568 U.S. 23 (2012).

A wildfire interferes with use both during active burning and from lost use after. Nonetheless, this analysis would be unnecessary if burning can be deemed a physical encroachment. California expressly codifies around this issue. Article One, Section 19 of the California Constitution reads “private property may be taken or damaged for a public use and only when just compensation, ascertained by a jury unless waived, has first been paid to, or into court for, the owner.”³⁴ Notably, California removes ambiguity by expressly including damage to property (a “damagings clause”), in addition to actual seizure of property, as grounds for a taking. In 1885, the California Supreme Court held that this clause granted property owners the right to compensation when a public improvement does not physically seize or purchase a property, but rather causes tangible harm to the property resulting in the property owner suffering losses.³⁵ Similar to how a restriction of use may constitute a taking, damage from a wildfire, which often results in a total or significant deprivation of use, may similarly serve as a taking. While the California Tort Claims Act was enacted by the state legislature to immunize the state from liability in various personal injury situations, inverse condemnation is an important exception to this rule, allowing a property owner to recover damages.³⁶

Naturally, this all raises the question of what role utility companies play in takings and inverse condemnation. In 1979, the California Supreme Court held that an investor-owned utility was more like a government entity than a private employer, citing close regulation by the California Public Utilities Commission (also known as CPUC) as a key factor.³⁷ The court opined that “the nature of the California regulatory scheme demonstrates that the state generally

³⁴ CA. Const. art. I, § 19.

³⁵ *Reardon v. City and County of San Francisco*, 66 Cal. 492, 504-506 (1885).

³⁶ *See Pacific Bell v. City of San Diego*, 81 Cal. App. 4th 596 (2000).

³⁷ *Gay Law Students Ass’n v. Pac. Tel. & Tel. Co.*, 595 P.2d 592 (Cal. 1979).

expects a public utility to conduct its affairs more like a governmental entity than like a private corporation.”³⁸

This was affirmed in 1999, when the California Supreme Court held an investor-owned utility liable for damages caused from a wildfire started by its powerlines under inverse condemnation.³⁹ In the decision, the court cited the ability to condemn property through eminent domain as a key factor in its finding that there was no significant difference between a public entity and privately owned electric utility for inverse condemnation.⁴⁰ The Court was “not convinced that any significant differences exist regarding the operation of publicly versus privately owned electric utilities as applied to the facts in this case and find there is no rational basis upon which to find such a distinction.”⁴¹ Rather, it concluded that the Southern California Edison Company “may be liable in inverse condemnation as a public entity.”⁴² Furthermore, Article I, section 19 of the California Constitution and the cases which interpret it focus on the concept of public use, as opposed to the nature of the entity appropriating the property.⁴³ Ultimately, the Court determined that the primary focus was on the public nature of the use, particularly as the costs could be spread amongst the consumers. However, a plaintiff must demonstrate that the government entity substantially “participated in planning approval, construction or operation of the public project or improvement which proximately caused injury to plaintiff’s property.”⁴⁴

Is there ample justification to extend law intended to apply to public entities, to investor-owned-utility companies? California courts have argued that investor-owned utility companies

³⁸ *Id.* at 599.

³⁹ *Barham v. S. Cal. Edison Co.*, 88 Cal. Rptr. 2d 424, 429-432 (1999).

⁴⁰ *Id.* at 430.

⁴¹ *Id.*

⁴² *Id.*

⁴³ *See id.*

⁴⁴ *DiMartino v. City of Orinda*, 80 Cal. App. 4th 329, 336 (2000).

operate so similarly to a public entity, that they ought to be treated as one. The service or benefit provided by companies such as PG&E are inherent to both the individual's and society's ability to function such that it is both a public use and a necessity. Accordingly, California courts have extended constitutional doctrine to these private companies. Especially when considering the requirement that a governmental entity be directly involved with the commission of public improvement, which is the case with public utilities, the extension to private utilities presented here is reasonable within constitutional parameters.

Conversely, others have argued that inverse condemnation suits should be handled under tort law. After all, where damages do not amount to a taking, barring the presence of sovereign immunity, such claims would fall under tortious jurisdiction. Even if one were to accept this argument, strict liability is reserved for inherently dangerous activities, and one could argue that given the risks electric utilities must undertake to provide their service, such conduct should fall under this classification. Nonetheless, inverse condemnation is a constitutional remedy and should be governed as such. Wildfires have such an impact that, through serious damage and loss of use, their effects amount to a taking. As a result, a standard of reasonableness would be unconstitutional if it were seen to violate an individual's right to just compensation. The revised common law displayed in *City of Oroville v. The Superior Court of Butte County*, where the traditional strict liability standard was reexamined to incorporate "inherent risk," does not introduce an express standard of reasonableness. Therefore, it will not violate any constitutionality.

Having established constitutionality both federally and in California, the question turns to whether the North Carolina Constitution would permit such laws. Per North Carolina law, "No

person shall be. . . in any manner deprived of his . . . property [] but by the law of the land.⁴⁵ Furthermore, “The right to take private property for public use, the power of eminent domain, is one of the prerogatives of a sovereign state. The right is inherent in sovereignty; it is not conferred by constitutions.”⁴⁶ Additionally, “Private Condemners” namely, “Corporations, bodies politic or persons have the power of eminent domain for the construction . . . power generating facilities . . .” are given the power of eminent domain.⁴⁷ Accordingly, North Carolina could institute either the traditional or revised California inverse condemnation law without being in violation of either federal or state constitutions. State courts could follow in California’s footsteps and find that private utilities operate similarly to private entities and should accordingly be party to inverse condemnation suits. However, it would be best for the state to incorporate a “damagings clause” like California, as that would remove any uncertainty.

III. Broad Applicability

Constitutionality aside, inverse condemnation exists under the belief that these damages are best spread across the wider public rather than the few individuals. As Justice Black noted in *Armstrong v. United States*, the Takings Clause “was designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.”⁴⁸ Furthermore, such law greatly reduces the burden of the individual to recover and recoup losses. Especially when considering the public use or improvement requirement in inverse condemnation claims, it would violate the principles of equity and fairness for the individual to bear this burden. In essence, the costs are spread amongst the

⁴⁵ N.C. Const. art. I, § 19.

⁴⁶ *State v. Core Banks Club Properties, Inc.*, 167 S.E.2d 385, 388 (N.C. 1969).

⁴⁷ N.C. Gen. Stat. §40A-3 (2006).

⁴⁸ *Armstrong v. United States*, 364 U.S. 40, 49 (1960).

community that reaps benefits from this public use, rather than being disproportionately burdened upon a few citizens.

Unlike common law tort liability, in inverse condemnation suits, there is no discussion of duty, breach, or foreseeability (proximate or legal cause). And, under the traditional strict liability standard, there is no discussion of comparative fault or contributory negligence, defined as defenses to negligence that a defendant may assert to minimize or preclude them from liability. Without these issues at hand, utility companies are incentivized to ensure maximum safety. Strict liability rules, which require only that the plaintiff prove that they suffered harm resulting from the activity, are often regarded as “the best way to govern highly risky activities, such as environmentally dangerous production,” because they are assumed to incentivize both an efficient level of precaution as well as an efficient level of activity.⁴⁹ Electric utility companies may be increasingly incentivized to take precautionary safety measures such as burying lines. When considering the potential loss with catastrophic wildfires, such caution, even when considering the cost to these companies, may prove beneficial to the state. Furthermore, deterring companies from providing minimal or negligent care, will become increasingly important as climate change leads to more precarious conditions.

This raises concerns over unfairness to utility companies and their investors. Strict liability is heavily scrutinized and often disfavored, so why should its application so readily be favored with companies? As stated earlier, courts find a keen interest in preventing disproportionate burdens being placed on the few. However, one may also argue that these companies share an inherent responsibility. Power utilities have an immense carbon footprint and are directly responsible for a tremendous and rising amount of global greenhouse gas emissions (carbon emissions created

⁴⁹ Martin Nell & Andreas Richter, 23 INT'L REV. L. & ECON., 31-47, (2003).

by the national power sector rose by 7% in 2021).⁵⁰ It is fair to say, therefore, that presently, and even more so moving forward, electric utilities are at least partly responsible for creating the conditions that lead to wildfires.

Public utilities, after incurring significant liability, may seek to recoup their losses through implementing price hikes on the consumer. The ability to freely increase price hikes could be devastating to consumers, particularly those of a lower income bracket. This is especially true as the good provided by utility companies is an absolute necessity, and because many utility companies possess quasi-monopoly status.⁵¹ Often, consumers cannot switch utility companies in the event of a price hike. Traditionally, to mitigate this, the CPUC must give approval before a utility can recover costs in this fashion.⁵² Based on the company's behavior, using the standard of a "prudent manager", the commission would decline or approve the rate hike, a process that may take multiple years. In 2019, the California Legislature passed Assembly Bill 1054 which loosened the standard to incorporate a determination on the reasonableness of utility company's conduct.⁵³

As climate change leads to more extreme weather patterns, areas such as North Carolina that currently do not see severe wildfires may begin to see a sharp increase in such climate hazards.⁵⁴ Accordingly, it is crucial that the ease of individual property owners to recover damages be protected. While a "reasonableness test" assessment may sound simple, it will complicate

⁵⁰ *U.S. Energy-Related Carbon Dioxide Emissions, 2021*, U.S. ENERGY INFO. ADMIN. (Dec. 14, 2023), <https://www.eia.gov/environment/emissions/carbon/#:~:text=In%202021%2C%20economic%20activity%20and,24%20MMmt%2C%20below%202019%20levels>.

⁵¹ *Gay Law Students Ass'n*, 595 P.2d at 600.

⁵² *Inverse Condemnation and Utility Liability*, LEAGUE OF CAL. CITIES (Jan. 4, 2022), https://www.counties.org/sites/main/files/file-attachments/csac_issue_brief_inverse_condemnation_7-25-18.pdf.

⁵³ 2019 Cal. Legis. Serv. Ch. 79 (West) (AB 1054).

⁵⁴ *Historical Wildfire Information*, NC FOREST SERV. (Jan 4, 2023), https://www.ncforestservice.gov/fire_control/wildfire_statistics.htm (Over the years 2017-2021, North Carolina saw an average of 3871 fires and an average of 11,373 acres burned).

lawsuits for victims and bring in new parties to litigation, including local agencies. Changes would over-complicate the legal process and invite more complex and lengthy multi-party trials. These proposals open the door to allowing utilities to pass off liability to other entities or to reduce the awards victims would receive. Victims of fires have a right to receive just compensation for damage incurred. Furthermore, as North Carolina does not face the same fire risks that California does, it is unlikely that adopting the *City of Oroville* standard will bankrupt utility companies, in particular as this standard is less stringent than the traditional one.

IV. Conclusion

Ultimately, how states address liability in the event of wildfires, and perhaps climate hazards in general, will become more pressing as the effects of climate change grow globally. With greater evidence to prove the exacerbation of extreme conditions and natural disasters, the time is now for states to consider adopting California's unique law. Though it may require some interpretation by the courts in the context of North Carolina's current law (or legislative modifications), there is a strong constitutional argument to allow recovery of damages to property through inverse condemnation. The overall benefits to both society and the individual property owner greatly warrant North Carolina's adoption of the standard expressed in *City of Oroville*.