The Unconstitutionality and Impracticality of the Governor's Proposal on Wildfire Liability

I. The Constitution

Article I, Section 19 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."

a. "Only When"

The Constitution allows IOUs to damage property for a public use ***only*** when the property owner is ***compensated***. Thus, under current inverse condemnation, the Constitution requires compensation where damages result from the intended use and design of the electrical infrastructure.

However, under the Governor's Proposal, compensation is not required, because the court must first determine "whether the utility acted reasonably in that instance." The Proposal's "reasonableness" threshold can serve as a complete bar to compensation, thereby violating the constitutional requirement of compensation when property is damaged for a public use.

b. "Just Compensation… to the Owner"

The Constitution requires that the compensation be "just," or in other words, the *fair market value* of the property damaged. Thus, inverse condemnation not only requires compensation, but compensation based on the full and fair market value of the damaged property—often the subject of inverse condemnation trials. Moreover, the Constitution requires that just compensation be paid *to the owner* of the property.

However, under the Governor's Proposal, *just compensation to the owner* is not protected because the court can *reduce* the damages below the fair market value by determining "proportionate fault." By re-allocating some percentage of fault, the owner is in a position to collect *less than fair market value*, thus the compensation is no longer "just," and violative of the constitutional requirements.

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c. "Ascertained by a Jury"

The Constitution protects the *right to a jury* to ascertain the amount of the "just compensation" to the owner. Any property owner whose property is damaged for a public use has a constitutional right for a jury to determine the fair market value.

However, under the Governor's Proposal, the right to a jury is completely eliminated on the face of the language. First, "the court," *rather than a jury*, makes the above-mentioned threshold determination for reasonableness. This, alone, violates the right to a jury in Article I, Section 19. Then, "the court," *rather than a jury*, determines an "award of compensation" based on proportionate fault. This too violates the constitutionally protected right for a jury to ascertain the amount of the just compensation.

II. The Impracticality of the Threshold "Balancing" Test and of the "Locklin-Type" Factors

a. Newly Fabricated Locklin-Type Factors

First and foremost, the factors created in subsection (b) are not the same as in the *Locklin* case—these are newly fabricated factors, untested by any court. Thus, the argument that the Governor's Proposal applies the *Locklin* factors is false. The Proposal's factors have never been approved by any California court.

b. "Balancing the Public Benefit" and *Locklin* Misapplied

Secondly, "balancing the public benefit" of an electrical infrastructure with the consequence of fire is a misapplication of the *Locklin* case. In *Locklin*, the plaintiffs' injury was the exact thing that the defendant Flood Control District intended to protect against—flooding. *Locklin* was intended, and is strictly limited to, only Flood Control cases where the injury is flooding. The Court recognized that where a governmental entity is formed to prevent and redirect flooding waters of an area historically prone to flooding, that a certain and particular set of factors should apply to weigh the tough decisions made in preventing and redirecting the natural flooding waters of an area. The court applied a set of factors—different than those proposed now—to accommodate for the tough decisions required to redirect naturally flooding waters. Here, such factors—even if they were the same—do not apply because the injury is fire damage, but IOUs are not Fire Prevention Districts. Rather, they are electricity delivery companies—they were not formed to make tough decisions about redirecting naturally occurring fires.

Despite the suggestion to the contrary, the *Locklin* factors have not been applied to any other factual circumstance. Time and time again, California courts have been asked to apply the *Locklin* factors to electrical delivery cases, and each and every time California trial and appellate courts have *rejected* the application because the policy supporting the *Locklin* factors do not exist in electrical delivery cases. In fact, even in *water* delivery cases where flooding is the injury, the *Locklin* factors do not apply.

Moreover, there exists an inherent incongruence between balancing the public benefit of delivering electricity with the consequence of burning down homes. This is very unlike balancing the public benefit of redirecting natural flood waters with the consequence of flooding. What is the metric for delivering electricity versus the metric for a completely destroyed house—how does the court compare the two?

Below is a list of cases where California courts have *rejected* application of the *Locklin* factors—the actual *Locklin* factors—to inverse condemnation cases.

Of significant note is *Pac. Bell Tel. Co. v. S. California Edison Co.,* 208 Cal. App. 4th 1400, 1410, *as modified*, (Sept. 13, 2012), wherein the court specifically stated: "While Edison argues that "the Supreme Court has determined a reasonableness test should be applied in lieu of a strict liability standard to better balance the policy interests at stake," **there is no indication from these cases that the Supreme Court intended to replace the strict liability standard in inverse condemnation cases with a reasonableness test outside the flood control context."**

1) *Pac. Bell Tel. Co. v. S. California Edison Co.,* 208 Cal. App. 4th 1400, 1410, , as modified (Sept. 13, 2012)
2) *Pac. Bell v. City of San Diego,* 81 Cal. App. 4th 596, 614–15 (2000)
3) *Arreola v. Cty. of Monterey,* 99 Cal. App. 4th 722, 753 (2002), as modified on denial of reh'g (July 23, 2002)
4) *Akins v. State of California*, 61 Cal.App.4th 1 (1998)
5) *Yamagiwa v. City of Half Moon Bay*, 523 F. Supp. 2d 1036, 1093–94 (N.D. Cal. 2007)
6) *Pac. Shores Prop. Owners Assn. v. Dep't of Fish & Wildlife*, 244 Cal. App. 4th 12, 44–45 (2016)
7) *California State Auto. Assn. v. City of Palo Alto*, 138 Cal. App. 4th 474, 483, 41 Cal. Rptr. 3d 503, 509 (2006)

We will be providing a list of cases where California courts have *rejected* application of the *Locklin* factors—the actual *Locklin* factors—to electrical delivery cases.

III. Creation of New Causes of Action and Circumvention of Government Tort Immunities

a. New Causes of Action Against Parties without Eminent Domain

Subsection (5) of the Governor's Proposal requires "proportionate fault," inviting third-party cross-complaints against those not subject to inverse condemnation—or in the least inviting "empty chair" defendants to a cause of action that does not or could not apply to those defendants. In other words, the "proportionate fault" includes apportionment to those not subject to inverse condemnation under the proposed language, "other circumstances that contributed to the fire."

Inverse condemnation and eminent domain are flip sides of the same constitutional coin. Inverse condemnation applies to IOUs when injury results from the intended use and design of the public benefit. IOUs are granted with and exercise eminent domain powers in the execution of delivering that public use—electricity. When the intended use and design *causes* the injury, liability exists under inverse condemnation. The very suggestion of "proportionate fault" creates an entirely new set of legal culpability—fault under inverse condemnation assigned to third parties not subject to inverse condemnation.

b. Circumvention of Governmental Tort Immunities

The California Government Code is replete with Governmental Tort Immunities that protect State and local government from lawsuits for failure to suppress or warn of wildfire injuries, including but not limited to Government Code sections 820 and 850, et seq. These immunities prevent State and local government from being named as defendants in wildfire litigation.

However, under the application of "proportionate fault," an IOU could blame or argue for culpability against the State or local government, notwithstanding the Governmental Tort Immunities. Under subsection (5), the IOUs could argue that Cal Fire, the State, or local governments are included as "other circumstances that contributed to the fire." Subdivision developers, home builders, residents, and the

naturally-occurring, foreseeable, and predictable weather could all be considered "other circumstances that contributed to the fire."

IV. Retroactivity of Subsection (c) and the Montecito Debris Flow

Subsection (c) prescribes application as of January 1, 2018. The Montecito Debris Flow, caused by the Thomas Fire, occurred in January 2018. The current language could be used to bar the claims of those affected by the Montecito Debris Flow.

Moreover, throughout 2018, wildfires continue to burn across the country. Utility-caused wildfires are just as likely to burn today as they were in 2017 and there are no currently effective laws increasing the safety, prevention, or mitigation standards for IOUs. Why then should IOUs enjoy the effective elimination of inverse condemnation when no accompanying preventative measures exist?