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Last week, the California Earthquake Authority (“CEA”) released a major new report titled [Enhancing California’s Resiliency to Natural Catastrophes](#). The legislatively-mandated report, [which I wrote about earlier](#), provides recommendations to address the unsustainable financial losses faced by electric utilities, insurance companies, and the public, as climate change-driven wildfires cause catastrophic damage across the state. It offers a comprehensive assessment of California’s ongoing climate-wildfire crisis.

One of the key concepts addressed in the report is inverse condemnation, a legal doctrine with a unique California interpretation that has exposed investor-owned utilities to so much liability that policymakers now believe a nearly \$40 billion state-created Wildfire Fund may be insufficient to cover it all. As a result, the report devotes an entire [section](#) to discussing the doctrine and recommends eliminating it as it applies to the state’s electric and gas utilities ([Option 2.2.1](#)).

So what exactly is the inverse condemnation doctrine, and how does it impact your electric bill? The answer, it turns out, involves a court case for \$75,000 in damages and a dead bird.

Inverse Condemnation

The concept of government condemnation of private property through eminent domain is generally understood, and at least grudgingly accepted. Sometimes, the government needs to take private property for public use. If the government decides it needs to build a freeway, or widen a road, or construct a train station, then it may have limited options for where exactly it can put those things. So, for example, if your backyard shed happens to be in the way of the extra freeway lane that will (finally!) solve traffic gridlock, the government can begin a condemnation proceeding that seizes your property while paying you just compensation.

But what happens if the government doesn't actually take your property and instead damages it? Take the backyard shed example. What if they don't actually bulldoze and build over your shed, but the freeway they expanded next to your property causes the soil to erode underneath the shed, and it collapses? You still own the property, but the government has damaged it. Article 1, Section 19 of the California Constitution provides that if a public entity destroys private property, the property owner may bring an inverse condemnation lawsuit against the government to recover those damages. Importantly, the private property owner does not need to show any negligence or other breach of care by the government. Under inverse condemnation's strict liability standard, the government must compensate the owner for any physical damages it causes to property through the deliberate construction of a public improvement, regardless of whether it acted negligently.

California's Unique Application to Utilities and Wildfires

Over the years, California courts expanded the reach of inverse condemnation to apply to privately owned utilities. Two appellate level decisions, both involving Southern California Edison ("SCE"), drove this expansion:

Barnham v. Southern Cal. Edison Co. (1999) 74 Cal. App. 4th 744.

In October 1993, strong Santa Ana winds in San Bernardino caused a section of SCE's 12kv power lines to snap and come into contact with a 33kv line. That caused extra voltage to travel down the smaller line to a pole three-quarters of a mile away. A piece of equipment on the pole exploded and started a brush fire fed by 20-30 mph winds. Named the Mill Creek [fire](#), it burned 4,860 acres and destroyed about half a dozen homes. (The fire occurred on the same day as the devastating [Laguna Hills fire](#), which burned over 16,000 acres, destroyed 366 homes, and

caused \$528 million in property loss.)

A jury in the trial leading to the *Barnham* appeal found SCE was negligent and awarded Virgil and Alice Barnham \$400,500. However, while part of the judgment on negligence stood, the trial court rejected the Barnhams' inverse condemnation cause of action. On appeal, California's Fourth District overturned the trial court's inverse condemnation decision. The Appellate Court determined that since the Public Utilities Code gave SCE the power to condemn property necessary for electric service, then it was essentially acting as a public agency. "[W]e must conclude that the transmission of electric power through the facilities that caused the damage to the Barnhams' property was for the benefit of the public. Thus, the Barnhams' property was 'taken or damaged' for public use." *Barnham* at 754 (internal citations omitted).

Barnham established the precedent that a private electric utility company could be held to the same standard as a public agency in some instances. Interestingly, the jury had already found SCE negligent in the case, which on its own would have been enough for a damages judgement. However, the application of inverse condemnation on appeal opened the door for future cases of liability regardless of negligence.

Pacific Bell Telephone Co. v. Southern Cal. Edison Co. (2012) 208 Cal. App. 4th 1400.

On January 11, 2006, a large bird landed on a utility pole. It did not go well for the bird. Despite the fact that SCE had installed bird guards to prevent such an issue, the bird found a way, and promptly electrocuted itself. In doing so, it also managed to come into contact with telephone line equipment on the same pole, and a ground fault fried both Pac Bell's equipment and the bird. The total damage came to \$74,767.39. (The value of the bird's life was not determined.) Pac Bell won a bench trial on its inverse condemnation claim; there was no claim of negligence at trial.

On appeal, SCE challenged the trial court decision on two points: (1) *Barnham* was wrong, and a private company should not be treated as a public agency unless specific exceptions applied; and (2) even if it was liable for inverse condemnation, a reasonableness standard should apply rather than a strict liability standard. SCE lost on both arguments.

California's Second District court held that SCE's "monopolistic authority" from the

state's grant to it of an exclusive franchise was essentially a delegation of the public obligation to provide an essential public service. As such, any damage caused in providing that public service could trigger an inverse condemnation claim. The Appellate Court also rejected SCE's proposed "reasonableness standard." There was no inverse condemnation exception applicable to the operation of high voltage power lines; therefore, strict liability was the appropriate standard.

Policy Implications

And so, here we are. Two appellate court decisions from years before the current wildfire crisis found that privately owned utilities are essentially the same as public agencies when it comes to inverse condemnation. (There are of course more decisions, but those are the two primary precedents.) Utility poles and wires are a public improvement, and therefore any private property damage caused from the operation of that public improvement needs to be compensated.

The current system likely distorts socially optimal decision making. The utilities' fear of causing ignitions that may grow to large urban conflagrations leads them to spend massive amounts of money on wildfire mitigation near their own transmission and distribution systems. Even though utility equipment accounts for a minority of wildfires in the state, utilities focus their spending on minimizing ignition from their own equipment because, regardless of how safely they operate, they are on the hook for all property damage if the fire sparks from their equipment. Nearly all of this wildfire mitigation spending gets passed on to customers through rate increases.

Additionally, when fires do occur, they are of such a scale and level of destruction in our climate changed world that the liability from a single fire can push a utility into bankruptcy and drive electric rates through the roof. The \$40 billion Wildfire Fund is a stopgap that has kept the utilities financially viable in the face of this enormous liability, but everyone knows it's not a sustainable solution if more large fires continue to cause billions in damages. Moreover, utility companies and their customers split the costs for the Wildfire Fund, which means it's adding another increase to customer electric bills.

Who is responsible for this \$#!@?

The CEA report recommends a constitutional amendment and supporting legislation to eliminate the application of inverse condemnation to utility-caused wildfires.

(Insurance companies and fire survivors could still go after the utilities for tort actions.) However, the campaign for such a change would be challenging, to say the least. It's easy to imagine a well funded opposition to any ballot measure arguing that eliminating inverse condemnation would be a bailout for utilities. Regardless of the policy merits of the change, it's a big lift.

It's also possible that the California Supreme Court could weigh in on the issue. While the Supreme Court has not directly addressed the question of electric utility liability for wildfires, a 2019 case may have offered a potential solution. In *City of Oroville vs. Superior Court* (2019) 7 Cal. 5th 1091, the Supreme Court considered whether the city was responsible for inverse condemnation damages when a blocked sewer system caused raw untreated sewage to back up into a dental office. The court determined that while inverse condemnation must be considered, the causal connection between the sewage backup and the damage to the dental office broke because the dentists failed to install a backflow device. Perhaps the impacts of climate change, or defensible space requirements, or community hardening measures could provide a similar break in the causal connection between electricity service and catastrophic wildfire damage.

Then again, if the utilities (and by extension their ratepayers), don't pay for wildfire damages, then who will pay? That's the billion-dollar (or trillion-dollar) question right now that the CEA's report is trying to answer.