



Investor-Owned Utility Liability

Inverse Condemnation and the
Prudent Manager Standard

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IMAGE:DAVID MCNEW/GETTY

Inverse Condemnation

“Private property may be taken or damaged for a public use only when just compensation. . . has first been paid to, or into the court for, the owner.”

▶ California Constitution Article I
Section 19

🔥 Taking for a Public Use

- 🔥 Causal relationship between the governmental activity and property loss.
- 🔥 Strictly liable irrespective of fault, where public improvement causes damage, even if only one of several concurrent causes.

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

- 1993 Mill Creek Fire sparked by faulty transmission lines located above SCE property.

- SCE Argued:**

- Inverse Condemnation should not apply to privately-owned public utilities.
- Since the lines were located above SCE property, the activity constituted a private use.

- Public Entity**

“The nature of the California regulatory scheme demonstrates that the State generally expects a public utility to conduct its affairs more like a governmental entity than like a private corporation.”

- Public Use**

“The transmission of electric power through the facilities that caused damage to the Barham’s property was for the benefit of the public.”

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

- ⤵ Ground fault sent electricity through several telephone cables.

- ⤵ **SCE argued:**

- ⤵ Loss-spreading rationale behind inverse condemnation should not apply because SCE taxing authority is limited by approval by CPC.
- ⤵ Flood-case exemption should apply

- ⤵ **No Rate Limitation Excuse**

- ⤵ No evidence that CPUC would prohibit cost-recovery through rates.
- ⤵ California Constitution allows for CPUC regulation of municipally owned utilities as well.

- ⤵ **No Flood-Case Exemption**

- ⤵ The reasonableness rule seeks to encourage beneficial flood control projects by only allowing compensation for property found to be unfairly damaged.
- ⤵ “It is the public improvement, not nature, that creates the risk of disaster.”

Regulatory Structure

🔥 Cal. Const. Art. XII S.3

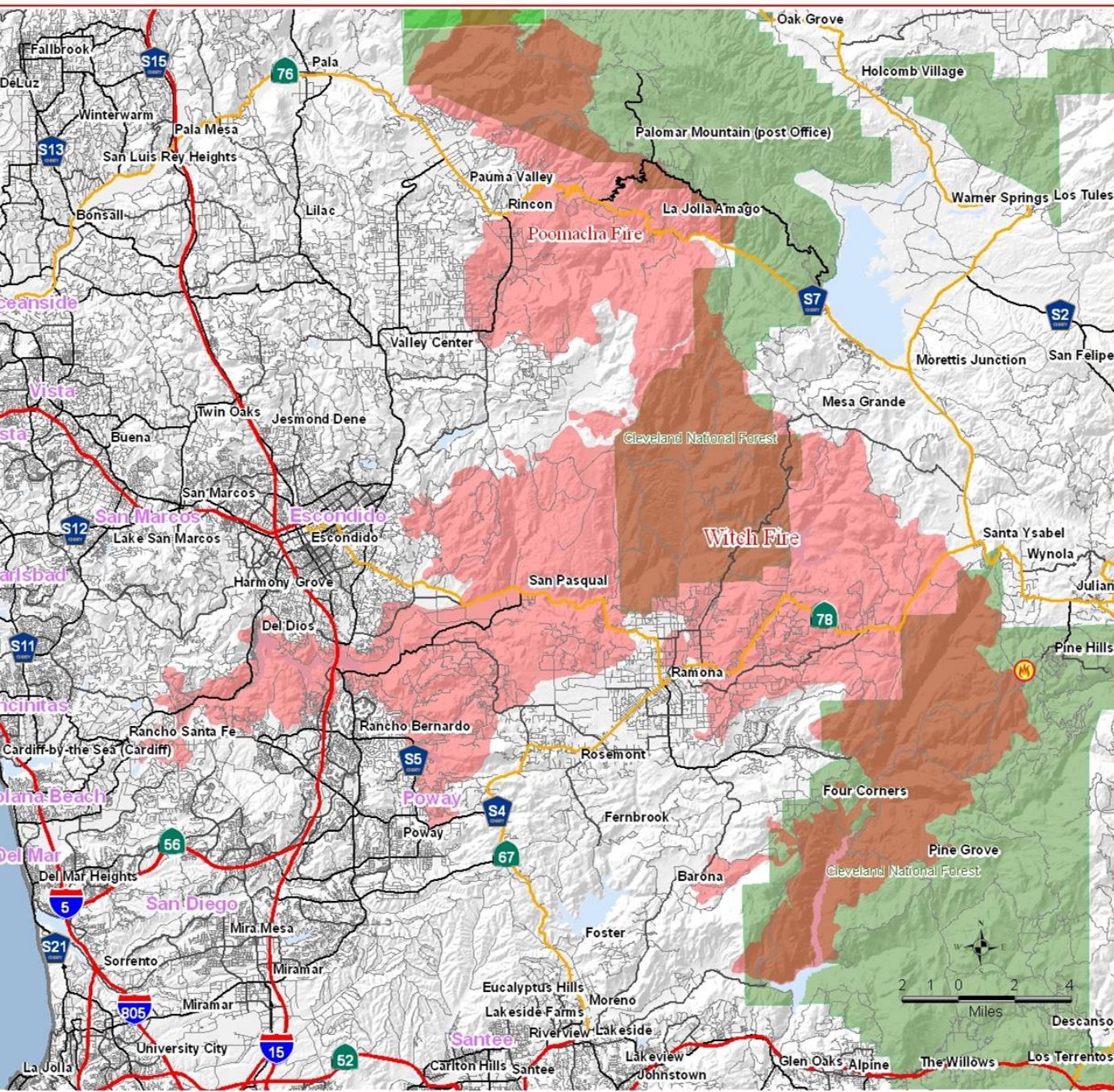
- 🔥 Private corporations that “. . . own, operate, control, or manage . . . the production, generation, transmission, or furnishing of . . . power . . . directly or indirectly to or for the public . . .” as public utilities subject to legislative control.

🔥 Cal. Pub. Util. Code § 454

- 🔥 CPUC review and approval of a public utility’s proposed customer rates.
- 🔥 Permissible rates allow the utility to recover costs and expenses plus a reasonable return on the value of property devoted to public use.
So. Cal. Gas Co. v. Pub. Util. Com., 23 Cal 3d 470 (1979)

🔥 Cal. Pub. Util. Code § 451

- 🔥 “Any rate found to be unjust or unreasonable is unlawful.”
- 🔥 Prudent Manager Standard
- 🔥 Asks: Did the utility incur recoverable costs in a reasonable and prudent manner?



WITCH FIRE

CA-MVU-010432
 as of 11/01/07 - 0600 Hrs
 197,990 Acres 100% Contained
 Started October 21, 2007 1235 F
 San Diego County

Fire Threats and Damages
 1,125 Residence Destroyed
 499 Outbuilding/Other Destroyed
 77 Residence Damaged
 26 Outbuilding/Other Damaged

At Fire Peak
 5,000 Residence Threatened
 1,500 Commercial Property Threatened
 300 Outbuilding/Other Threatened
 12 Hrs: None Expected

Fire Perimeter

■ Fire Perimeter as of 10/30/07

Transportation Network

- Freeway
- Highway
- Primary
- Secondary
- Lake
- Cleveland National Forest Boundary
- Pacific Ocean
- Wilderness Area



Created by OES-GIS, D. Allen
 November 1, 2007
 Sources: FAMWEB 2009
 active_incidentfires2007/
 Southern_California_Wildfires_2007/
 projects/110107/Witch_110107_AM.mxd

**2007 Witch Fire
 in San Diego.
 SDG&E incurred
 \$2.4 billion in
 related costs**

JOINT APPLICATION TO ESTABLISH A WILDFIRE EXPENSE BALANCING ACCOUNT (WEBA)

**A. 09-08-020
(2009)**

- ↻ Record all amounts paid by the Utility arising from wildfires, reduced by payments received from third parties.
- ↻ Payments would be recoverable unless: “Results from acts or omissions intentionally engaged in directed by Utility management with an intent to cause harm or with knowledge harm was substantially certain to result.”

“The unavailability at a reasonable cost of insurance coverage for third-party claims arising from wildfires requires the adoption of a mechanism that will ensure Utilities are able to recover costs resulting from wildfires.”

DECISION DENYING APPLICATION

D.12-12-029
(2012)

↻ Denied SDG&E and SoCalGas' request to establish a Wildfire Expense Balancing Account but kept open their Wildfire Expense Memorandum Accounts.

↻ "Financial incentives for prudent risk management and safety regulation compliance are substantially undermined by the presumption of recovery from ratepayers"

"WEMA is only a tracking mechanism that requires a subsequent reasonableness review that remains in place as standard practice of rate recovery regulatory design. "

Application of SDG&E for Authorization to Recover Costs Related to the 2007 Southern California Wildfires

A.15-09-010
(2015)

↪ **\$379 million**

↪ **Reduced Total Liability (\$2.4b) by:**

- ↪ \$1.1 billion liability coverage
- ↪ \$824 million third-party settlement payments
- ↪ \$42 million voluntary contribution

↪ **Decision**

- ↪ “On balance, SDG&E failed to meet its burden to show that its operation and management of its system leading up to the 2007 Wildfires, and its immediate response at the time of the fires, was reasonable and prudent”
- ↪ Rate recovery would be unjust, unreasonable, and unlawful

“Due to the reasonable and prudent steps SDG&E undertook over the past several years to reduce wildfire costs dramatically.”

The Conflict Realized

**“Order Denying Rehearing of Decision D.17-11-033”
D.18-07-025 (2018)**

🔥 SDGE

- 🔥 **Unnecessary conflict of laws**
- 🔥 **Produced an unjust and unreasonable result**
- 🔥 **Violated Constitutional takings principles.**

🔥 CPUC

- 🔥 **§451.1 and Constitutional requirements.**
- 🔥 **Inverse condemnation had no effect on operations prior to the fire**
- 🔥 **Decision based on statutory obligations and established ratemaking practices.**

Senate Bill 901 (2018)

- ↪ Wildfire Reasonableness Standard for Wildfires after 2018 (Cal. Pub. Util. Code § 451.1)
- ↪ “Stress Test” for 2017 Wildfire Review (Cal. Pub. Util. Code § 451.2)

Assembly Bill 1054 (2019)

- ↪ \$21 billion Wildfire Fund
 - ↪ \$2.50/month retail electric utility bill surcharge
 - ↪ \$7.5 billion initial utility contribution
 - ↪ \$300 million aggregate annual contributions thereafter
- ↪ Eligibility: Valid Safety Certification and Approved Wildfire Mitigation Plans
- ↪ Conduct deemed reasonable, unless a party creates serious doubt of the utility’s conduct.



Thank you

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USD Law Class of 2020

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