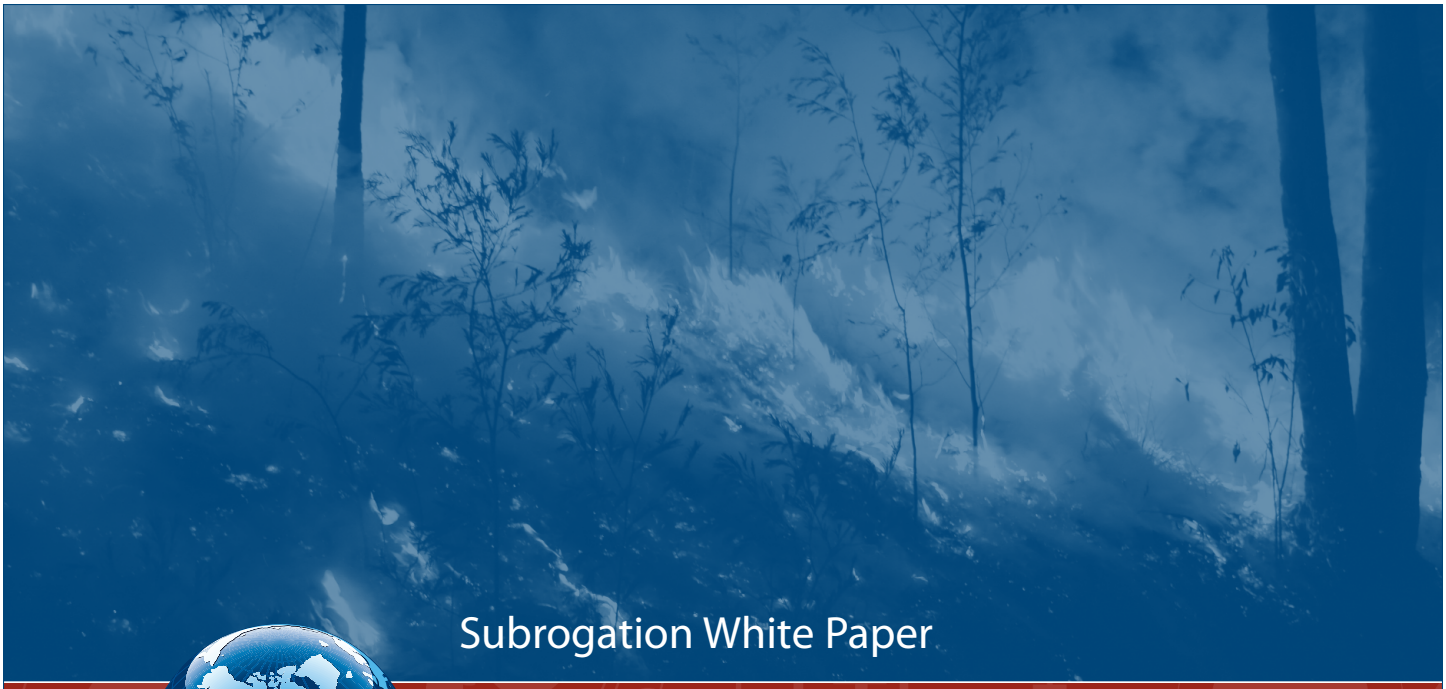

Subrogation White Paper

2008 SOUTHERN CALIFORNIA WILDFIRES:

Analysis of Recovery Issues

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INTRODUCTION

In a swiftly moving catastrophe that seemed only too familiar, Southern California once again was besieged by flames in mid-November of 2008 from Orange County to Santa Barbara, with hundreds of homes consumed by three major wind-driven fires, including one of the most devastating blazes ever to strike the city of Los Angeles. The first to erupt was the Montecito **Tea Fire**, which began on Thursday, November 13, 2008, destroying 210 homes in the cities of Montecito and Santa Barbara, California. The fire started at a Mar Y Cel historic structure called the "Tea House" above Mountain Drive, giving the fire its name. Spreading rapidly, it was fanned by offshore winds, known as Sundowners, that blew down the Santa Ynez Mountains, gusting up to 70 mph. These winds caused the fire to spread into the city of Santa Barbara.

The **Sayre Fire**, also known as the Sylmar fire, was reported on Friday evening, November 14, 2008, in the Sylmar community within the City of Los Angeles. Initially, 100 acres burned, launching area fire agencies to send a total of over 400 fire personnel. By 6 p.m. the next day, the fire had spread to approximately 8,000 acres, threatening 7,500 homes. On November 20, 2008, the fire was fully contained and had burned 11,262 acres and destroyed more than 600 structures, including 480 mobile homes, nine single-family homes, 104 outbuildings and 10 commercial buildings. The number of homes lost in this fire exceeded the 1961 Bel Air fire which resulted in the loss of 484 homes

Finally, the **Freeway Complex Fire**, also known as the Triangle Complex Fire or Corona Fire, started on Saturday morning, November 15, 2008, along the 91 Freeway in the riverbed of the Santa Ana River located in Corona, California. The fire spread west and north into the hillsides of Yorba Linda and south into Anaheim Hills, where multiple businesses and residences were destroyed. It also burned homes in Olinda Ranch along Carbon Canyon Road in Brea, spread through much of Chino Hills, then extended north into Diamond Bar.

The **Landfill Fire**, also known as the "**Brea Fire**," started at 10:43 a.m., on Saturday November 15, 2008, in the 1900 block of Valencia Avenue in Brea just south of the Olinda Landfill. It quickly spread west and eventually jumped the 57 Freeway. The Landfill Fire merged with the Freeway Fire at 3:30 a.m., November 16, 2008.

Insured losses from the three wildfires already top $104 million, with ultimate losses estimated to be between $300 million and $500 million. Cozen O'Connor has prepared this overview of subrogation and recovery issues to summarize presently known information concerning the investigation of the fires and to address possible theories of recovery.

INVESTIGATIONS

Both public and private sector investigations of the three wildfires are ongoing. Although an "official" cause has been determined for only one of these fires, significant information is available through witness accounts, news reports, and other information obtained through public and private investigators. From what is currently known, it appears that the Tea Fire and the Sayre Fire have potential for recovery of insured losses.

THE CAUSE OF THE TEA FIRE INVOLVED NEGLIGENT HUMAN ACTIONS

Santa Barbara Sheriff's investigators announced that the Tea Fire was caused by a group of ten college students, age 18 to 22, who had gone to the abandoned Tea House on the night of Wednesday, November 12 and held a bonfire party at the location, through the early morning hours of Thursday, November 13.

The students told fire investigators that they thought the bonfire was out when they left early Thursday morning. But embers continued to smolder for more than 12 hours and were reignited by Santa Ana-type winds that evening, authorities said. The names of these suspects have not been released but we know that nine of the ten young adults were students at Santa Barbara City College.

Although no criminal charges have been filed, these 10 individuals were apparently responsible for causing the Tea Fire. The students negligently failed to extinguish their bonfire, which smoldered and eventually caused the destruction of 200 homes.

NO OFFICIAL CAUSE OR LIKELY RECOVERY FOR FREEWAY COMPLEX FIRE

A cause has yet to be officially determined for the Freeway Complex Fire, but it has been widely reported that this fire was the result of an automobile fire. Investigators believe that a catalytic converter fire, which occurred on an unidentified vehicle, accidentally sparked the fire in Corona. The cause of the separate Brea fire, which later merged with this fire, is also unknown but again widely believed to be the result of human actions.

SAYRE FIRE LIKELY INVOLVED POWER LINES AND IS THE CLAIM OF GREATEST INTEREST

An investigative team is asking for the public's assistance to help establish the cause of the Sayre Wildland Fire which started on November 14, 2008. Investigators have spoken to witnesses, but still are seeking additional information that may assist with the ongoing investigation.

The Sayre fire is believed to have started in the foothills on November 14 at around 10:30 p.m. near the northeast corner of Veterans Memorial Park located at 13000 Sayre Street in Sylmar, California. An investigator hired by Cozen O' Connor has learned that the investigation of this fire is now focused on Southern California Edison power lines as the ignition source. These power lines were located on United States Forest Service property, and are the likely cause of the Sayre Fire. The California Department of Forestry and Fire Protection, in conjunction with the U.S. Forest Service and local agencies, is leading the investigation. Investigators are still gathering evidence at the scene, and will be publishing a full report.

SAYRE FIRE FACTS

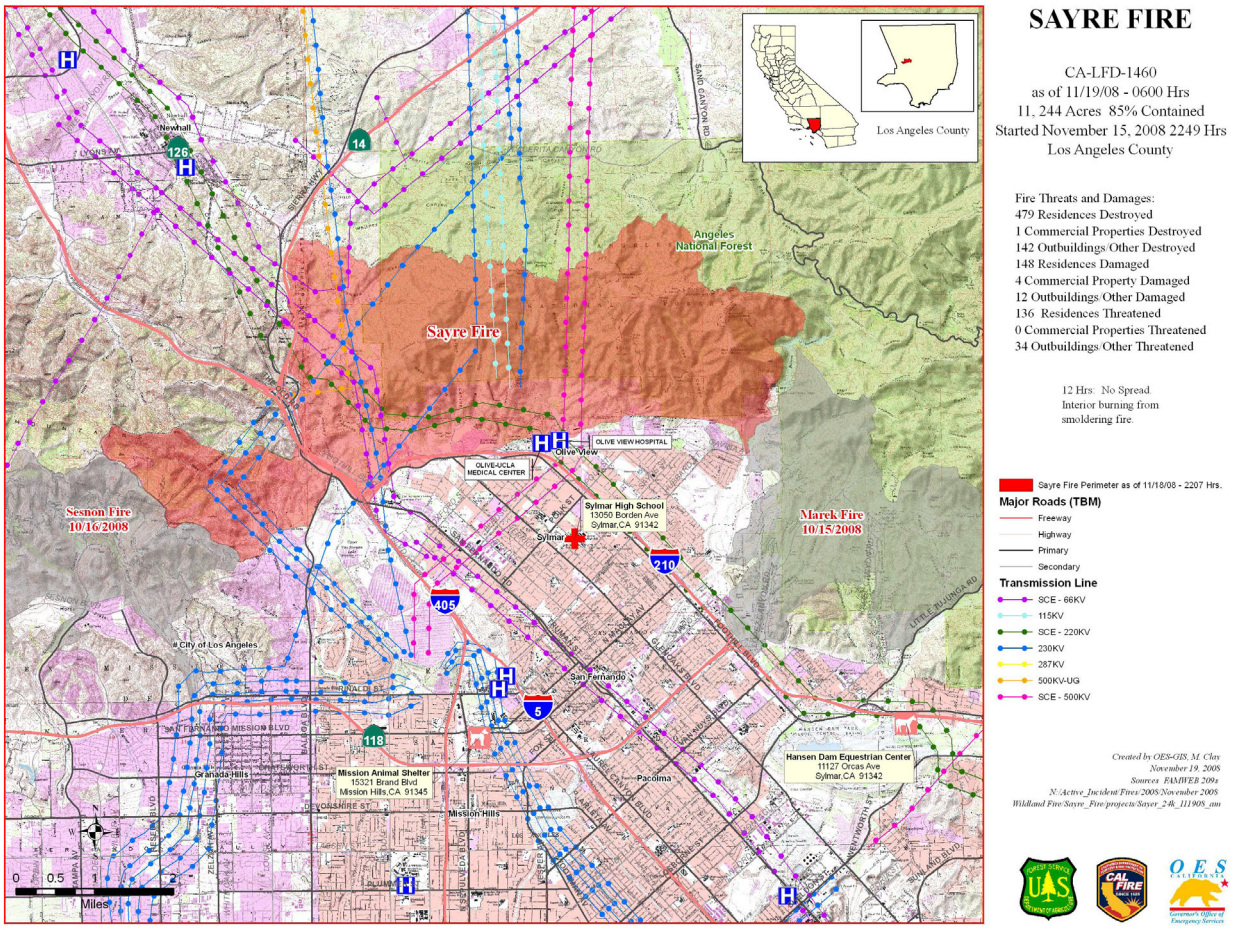
One day after the wind-swept "Tea Fire" destroyed more than 200 homes in Montecito and Santa Barbara, the Sayre Fire was reported in the 13000 block of Sayre Street in Sylmar, just north of the 210 Freeway near Veterans Memorial County Park. It spread rapidly as it was fanned by strong Santa Ana winds with near hurricane-force gusts estimated at between 50 mph and 80 mph .

The Sayre Fire swept through the Oakridge Mobile Home Park, parts of which had burned after the 1994 Northridge earthquake. The toll appeared to be the largest number of housing units lost to fire in the city of Los Angeles, surpassing the 484 residences destroyed in the 1961 Bel-Air fire. On Saturday, Oakridge was a broad panorama of ash and twisted metal. Broken water lines gushed and sprayed like artesian wells.

Some 10,000 people were evacuated overnight, and late Saturday morning their worst fears were realized during a briefing at Sylmar High School by the Los Angeles Fire Department: The fire had begun at 10:29 p.m. Friday, cause

unknown. It had spread over some 3,000 acres. There was no containment, due, in part, to wind gusts of about 50 mph.

By Saturday afternoon, residents were returning to survey the damage by trudging down a dusty trail and peering over a four-foot wall into the mobile home park. The fire affected electrical transmission lines carrying power over the Newhall Pass. For about 45 minutes Saturday morning, the Los Angeles Department of Water and Power imposed rolling blackouts through portions of the city to cope with a reduced electrical supply.



Earlier, Olive View-UCLA Medical Center in Sylmar, which sustained some fire damage, suffered a crippling power shortage that forced the hospital to quickly evacuate 18 critically ill infants and nine other patients. Olive View relies on three sources of power -- the main line from DWP, an on-site power plant and a backup generator. All of them failed in quick succession, for apparently unrelated reasons, beginning about 2 a.m. The fire caused no damage to the hospital's main building, but some surrounding property was destroyed, including a garage, two ambulances, and several trailers housing medical and finance records.

More than 1,100 firefighters worked the fire with 12 water-dropping helicopters and some fixed-wing aircraft, said Los Angeles County Fire Inspector Darryl Jacobs. Police and sheriff's deputies increased staffing and dedicated patrols to the areas affected by the fire to prevent looting. Los Angeles police arrested five people Saturday on suspicion of looting in the Sylmar area, where many streets lacked electricity due to burned lines.

County fire officials reported on November 19, 2008 that the Sayre Fire had destroyed more than 600 structures, including 480 mobile homes, nine single-family homes, 104 outbuildings and 10 commercial buildings. While the immediate concern following the fire was loss of homes, the Sayre fire also caused extensive damage to nine

parks, including Stetson Ranch, El Cariso and Wilson Canyon Park in Sylmar, Placerita Canyon Nature Center, Whitney Canyon Park and Elsmere Canyon in Newhall, and O'Melveny Park in Granada Hills. Veterans Memorial Park in Sylmar suffered severe fire damage, including destruction of a 2,000-square-foot administration building and a cactus garden.

In the early morning hours of November 15, 2008, officials ordered the mandatory evacuation of residents north of the 210 Freeway in the Sylmar area. The evacuation area was expanded to cover more than 10,000 people living in the far north end of the San Fernando Valley from Sylmar in the east to Granada Hills in the west. Evacuation centers and shelters were established at Sylmar High School, San Fernando High School, Chatsworth High School and Kennedy High School. By the afternoon of November 16, 2008, all of the evacuation centers except for Sylmar High School had been closed. Large animal evacuation centers were established at Pierce College and at the Hansen Dam Equestrian Center.

The fire resulted in temporary closure of several of the San Fernando Valley's major freeways, including the Golden State Freeway (Interstate 5) at the Newhall Pass, the Foothill Freeway (Interstate 210) from I-5 through Sylmar, the Simi Valley-San Fernando Valley Freeway (California State Route 118), the San Diego Freeway (Interstate 405) at Route 118 and the Antelope Valley Freeway (California State Route 14) from south Santa Clarita to the Newhall Pass. By the late afternoon on November 15, 2008, the California Highway Patrol announced the re-opening of the freeways closed due to the Sayre fire.

ISSUES ASSOCIATED WITH MOBILE HOMES

The Sayre Fire that destroyed most of Oakridge Mobile Home Park in Sylmar has prompted investigations into whether tougher standards are needed to protect residents of manufactured housing in fire-prone areas. Because many elderly people live in mobile home parks, state regulators and elected officials plan to explore the adequacy of evacuation plans and emergency procedures, which have been lacking at parks throughout the state.

State and county officials say they also will research policies on the spacing of mobile homes, the number of dwellings per acre, the removal of brush and flammable debris and the amount of flame-retardant building materials required in a mobile home. Advocates for mobile home owners say that much needs to be done, from improving fire hydrants to better code enforcement by the state Department of Housing and Community Development, which regulates manufactured dwellings.

In the wake of this month's devastation, Gov. Schwarzenegger called for a review of building standards and emergency procedures for mobile homes to bring them into line with many of the requirements for conventional dwellings. He noted that the 487 Oakridge residences lost in the fire went up “like matches.”

RECOVERY

Theories of recovery exist for both the Tea Fire and the Sayre Fire. As noted in Section 2A above, the Tea Fire involved negligent human actions. Liability likely can be established against the ten students who set the bonfire for negligently failing to extinguish it. However, it is not yet known whether these students have applicable liability coverage. Generally, a student’s legal residence is considered to be the residence of his or her parents, as opposed to the college residence. As such, students generally are deemed additional insureds under their parents’ homeowners policies. We will need to ascertain whether these students have such applicable coverage, and/or other substantial recoverable assets. It is unlikely that these students possess sufficient assets or insurance in the aggregate to recover hundreds of millions of dollars in losses, but there still may be potential for significant recoveries.

Presently, the most promising theories of recovery pertain to the Sayre Fire, which was likely caused by Southern California Edison power lines. With regard to this fire, potential theories of liability include inverse condemnation, negligence, and negligence *per se.* Issues which may affect recovery include whether the strong Santa Ana winds constitute an “act of God”, and whether there were measures that could have been taken by the public utilities to avoid the involvement of their power lines in igniting the fires.

INVERSE CONDEMNATION

The California Constitution, Article I, §19 provides: "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." In the typical condemnation case, the public entity has instituted an action for the taking of private property to be used for a public purpose. An "inverse" condemnation action occurs when a private property owner files an action against a public entity to obtain just compensation where the public entity has taken or damaged private property for a public use. In the landmark case of *Albers v. County of Los Angeles* (1965) 62 Cal. 2d 250, the California Supreme Court interpreted this constitutional provision to mean that "any actual physical injury to real property proximately caused by the [public] improvement as deliberately designed and constructed is compensable . . . whether foreseeable or not." (*Albers, supra,* at 263-264).

The *Albers* decision has been interpreted as imposing liability without fault when the failure of a public improvement proximately causes damage to private property. (*Marshall v. Department of Water and Power of the City of Los Angeles* (1990) 219 Cal. App. 3d 1124 ; *Holtz v. Superior Court* (1970) 3 Cal. 3d 296, 302-304.) In *Holtz*, the Supreme Court explained its holding in the *Albers* case, stating: . . . "[T]he right assured to the owner by this provision of the constitution is not restricted to the case where he is entitled to recover as for a tort at common law. If he is consequently damaged by the work done, whether it is done carefully and with skill or not, he is still entitled to compensation under this provision." (*Holtz, supra,* at 303, quoting *Reardon v. City and County of San Francisco* (1885) 66 Cal. 492, 505).

In *Marshall v. Department of Water and Power of the City of Los Angeles, supra*, a fire occurred as a result of downed power lines which ignited dry vegetation in the area of origin. The *Marshall* court held that "in order to establish an actionable 'taking,' the plaintiff must demonstrate a causal relationship between the governmental activity and the property loss complained of." (*Marshall, supra,* 219 Cal. App. 3d at p.1139 (quoting *Souza v. Silver Development Co.* (1985) 164 Cal. App. 3d 165, 171.)) Typically, this element is referred to as "proximate cause." Unlike the corresponding element in negligence cases, however, foreseeability is not a consideration for inverse condemnation. Instead, *a governmental entity may be held strictly liable, irrespective of fault, where a public improvement constitutes a substantial cause of the plaintiff's damages,* even if only one of several concurrent causes. (*Marshall, supra,* at p.1139 (emphasis added) (quoting *Belair v. Riverside County Flood Control Dist.* (1988) 47 Cal. 3d 550, 558-559.))

In order to establish a taking under an inverse condemnation cause of action, a plaintiff must prove the following four elements: **ownership, public use, taking or damaging, and causation**.

1. **Ownership -** The plaintiff must show that it has an ownership interest in real or personal property in order to have standing to prosecute an inverse condemnation cause of action. The insurer of a party whose property is damaged by the operation of a public improvement is entitled to bring an inverse condemnation action as a subrogee of its insured. (*McMahan's of Santa Monica v. City of Santa Monica* (1983) 146 Cal. App. 3d 683; *Aetna Life & Casualty Co. v. City of Los Angeles* (1985) 170 Cal. 3d 865.)

2. **Public Use -** In order to prevail on the cause of action for inverse condemnation, plaintiffs must prove that their property has been taken or damaged for a "public use." (*Barham v. Southern California Edison Co.* (1999) 74 Cal. App. 4th 744, 751.) The argument made in the case of power line fires is that electrical transmission/distribution lines assist and facilitate the generation, transmission or furnishing of electricity in the State of California and, as such, fall within the definition of a public use. California courts have specifically held that **"**[E]lectric power lines for the transmission and distribution of electric energy are clearly a public use of property for eminent domain purposes." (*Slemons v. Southern California Edison Co.* (1967) 252 Cal. 2d 1022, 1026 (emphasis added); *PG&E v. Parachini* (1972) 29 Cal. 3d 159, 164.)

   In *Barham,* the court held that a privately owned public utility may be liable in inverse condemnation as a public entity under article I, section 19 of the California Constitution. The *Barham* court stated that the principal focus is the concept of "public use", as opposed to the nature of the entity appropriating the property (*Barham, supra,* 74 Cal. App. 4th at 753). *Barham* involved Southern California Edison Company's (SCE) responsibility for a wildfire known as the Mill Creek fire, which started as a result of a failure of SCE's overhead electric transmission lines. Specifically, the fire was alleged to have resulted from strong Santa Ana wind conditions which caused a section of SCE's 12,000 volt power line to break. When superheated components fell

to the ground, a brush fire was ignited. In *Barham,* defendant SCE claimed that inverse condemnation principles should not apply because SCE was a privately owned utility, not a public entity. The *Barham* court stated that ". . . 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." *Barham, supra,* at p.430 (quoting *Gay Law Students Assn. v. Pacific Tel. & Tel. Co.* (1979) 24 Cal. 3d 458, 459).

The *Barham* court concluded that no significant differences exist between the operation of publicly versus privately owned utilities and there is no rational basis upon which to find such a distinction. Accordingly, the court held that a privately owned utility may be liable in inverse condemnation as a public entity. Specifically, the court stated:

> We are 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 found [sic] such a distinction. We conclude under the factual scenario here present, SCE may be liable in inverse condemnation as a public entity. Further, article I, section 19 of the California Constitution and cases which interpret and apply it have as their principal focus the concept of public use, as opposed to the nature of the entity appropriating the property. (*Barham, supra,* at p. 753).

The *Barham* court specifically found that the transmission of electric power to the public was a public use and concluded that the transmission of electric power through the facilities that caused damage to plaintiff's property was for the benefit of the public (*Barham, supra,* at p. 754, citing *Slemons, supra,* 252 Cal. 2d at 1026). Under proper circumstances, where the defendant is a public utility with limited eminent domain powers, it may appropriate or "take" private property when necessary to further a public use. (*CCP §§1240.010, 1240.030; Public Utilities Code §612; Pacific Gas & Electric Co. v. Hay* (1977) 68 Cal. App. 3d 905*; Pacific Gas & Electric Co v. Parachini* (1972) 29 Cal. 3d 159, 164-165). For this reason, the same analysis applied by the *Barham* court could apply to a privately owned utility.

Other cases have found that the plaintiff does not need to prove that the defendant had the power of eminent domain in order to prove liability for inverse condemnation. In *Baker v. Burbank-Glendale-Pasadena Airport Authority* (1985) 39 Cal. 3d 862, plaintiff homeowners sued the Airport authority, (a public entity which did not possess condemnation power) for inverse condemnation caused by noise, smoke and vibrations from airplane flights over their homes. The California Supreme Court explained that the focus of inverse condemnation is not on the statutory condemnation power but on the constitutional proscription against the taking or damaging of property for public use without just compensation. The court stated, "[A]ll that is necessary to show is that the damage resulted from an exercise of governmental power while seeking to promote the general interest in its relation to any legitimate object of government." (*Baker, supra,* at 867). The issue of "public use" is defined as "a use which concerns the whole community or promotes the general interest in its relation to any legitimate object of government." (*Bauer v. Ventura County* (1955) 45 Cal.2d 276, 284.) The condemnation of private property to install lines for the transmission and distribution of electricity is a public use, to which inverse liability principles apply. (*Cantu v. Pacific Gas & Electric Co.* (1987) 189 Cal. 3d 160, 164.)

3. **Taking or damaging -** Plaintiff must show that his or her property has been taken or damaged, thereby suffering a diminution in property value. A taking can occur when a governmental agency causes physical damage to the property or where there is physical invasion of the property, (e.g., *Albers, supra,* [landslide]*; Bauer, supra,* [floodwaters]; *Marshall, supra,* [fire]).

4. **Causation -** Finally, a plaintiff must establish that the State's acts or omissions proximately caused the taking or damage. In order to prove causation, the activities of a public entity need not be the sole cause of the plaintiff's damages. Rather, the entity will be held strictly liable if the operation of the public improvement constitutes a "substantial cause" of the plaintiff's damages, even if only one of several concurrent causes. (*Marshall v. Department of Water and Power of the City of Los Angeles* (1990) 219 Cal App 3rd 1124, 1139.) The proper test of proximate cause is stated in *Belair v. Riverside County Flood Control District* (1988) 47 Cal. 3d 550, which held that proximate cause is established where "*the public improvement constitutes a substantial concurring cause of the injury,* i.e., where the injury occurred in substantial part because the improvement failed to function as it

was intended." *Belair* at 559-560; see also *California State Automobile Association v. City of Palo Alto* (2006) 138 CA 4th 474, 508.

NEGLIGENCE CLAIMS AGAINST A PUBLIC UTILITY

In addition to inverse condemnation, theories of negligence and negligence *per se* may also be applicable to the public utilities' actions.

A public utility is subject to a high standard of care with respect to the construction, maintenance, and operation of its electrical facilities. *Polk v. City of Los Angeles* (1945) 26 Cal.2d 519. Electrical transmission lines have been characterized in several cases as dangerous instrumentalities. *See, Anstead vs. Pacific Gas and Electric Company* (1928) 203 Cal. 634; *Dunn v. Pacific Gas and Electric Company* (1954) 43 Cal.2d 265, 275.

Commensurate with the danger inherent in transmission of electrical power, California Courts have imposed a standard of care of the highest order, just short of strict liability:

> On the subject of negligence, the standard of care is that one maintaining wires carrying electricity is required to exercise the care that a person of ordinary prudence would exercise under the circumstances.
>
> Among the circumstances are the well-known dangerous character of electricity and the inherent risk of injury to person or property if it escapes. Hence, the care must be commensurate with and proportionate to that danger . . . Specific application of that standard requires that wires carrying electricity must be carefully and properly insulated by those maintaining them at all places where there is a reasonable probability of injury to persons or property therefrom . . . . Upon those controlling such instrumentality and force is imposed the duty of reasonable and prompt inspection of the wires and appliances and to be diligent therein . . . and, in the places where there is a probability of injury, they must not only make the wires safe by proper installation, but . . . keep them so by vigilant oversight and repair.

Polk vs. City of Los Angeles, 26 Cal.2d at 525. *See also Lozano vs. Pacific Gas and Electric Company* (1945) 70 Cal.App.2d 415, 422 – 424.

RULES AND ORDERS PERTAINING TO UTILITIES

Any claim of negligence will require establishing a breach of the standard of care held by the public utility. At a minimum, whether the public utility breached any standard of care will be measured by its compliance with the applicable rules and orders that govern their operations.

The California Public Utilities Commission has promulgated specific regulations pertaining to the construction and maintenance of overhead power lines. These rules are contained within P.U.C. General Order 95. Additionally, the California Public Resources Code ("PRC") contains provisions pertaining to clearance requirements for power line equipment. To the extent that a violation of any of these provisions can be established, a negligence *per se* claim may be pursued.

Violation of a statute, ordinance, or regulation gives rise to negligence *per se,* if the persons harmed by the violation are within the class of persons for whose protection the statute was adopted, and the harm suffered is of the type the legislation was intended to prevent. California Evidence Code § 669; *Stafford v. United Farm Workers* (1983) 33 Cal.3d 319, 324. The injuries suffered must have been proximately caused by the hazardous condition or the violation of statute, *Casey vs. Russell* (1982) 138 Cal.App.3d 379, 383, but proximate causation exists as long as there is reason to believe that the absence of the condition or compliance with the statute would have prevented or lessened the likelihood of injury to the plaintiff's property. *City of Los Angeles v. Shpegel-Dimsey, Inc.* (1988) 198 Cal.App.3d 1009, 1023.

General Order 95 contains approximately 115 rules with corresponding diagrams and tables, setting out the minimum standards for construction and maintenance of power lines. These include rules pertaining to trimming and maintaining distance between trees and power lines (Rule 35), spacing between conductors (Rule 38), and construction of poles and other structures supporting power lines (Rule 43). They contain numerous tables and diagrams which designate the requirements, depending on the location, size, elevation, temperatures, and type of

lines that are involved. For example, Rule 38 establishes the minimum vertical, horizontal and radial clearances of wires from other wires given a temperature of 60 degrees Fahrenheit and no wind. (see, Table 2) Rule 43 mandates certain "loading" factors for the strength required of poles, towers, structures and all parts thereof at different elevations. Specifically, Rule 43 applies a "heavy loading" standard to all parts of the State of California where the elevation exceeds 3000 ft. above sea level, and a "light loading" standard applies to elevations that are 3000 ft or less above sea level.

Additionally, PRC sections 4292 through 4296 establish the minimum clearance requirements for power line equipment. These California statutes mandate a 4 to 10 foot clearance of vegetation, depending on the particular type of equipment and amount of voltage running through it and also require that any dead or damaged trees that could affect the operation of the power lines be removed.

As a further resource pertaining to power lines and fire hazards, the California Department of Forestry and Public Utilities in California, including San Diego Gas and Electric and Southern California Edison, have created the *Power Line Fire Prevention Field Guide* which contains standards necessary to minimize wild fires that may be caused by the operation and maintenance of electrical power lines.

This Guide was last updated in 2001. The stated purpose of the Guide is to provide information to the personnel of the fire service agencies and electrical operators for minimum uniform application within the areas of their respective jurisdiction and franchise responsibilities. The Guide details fire hazard reduction maintenance procedures for certain items of hardware, and highlights applicable laws, regulations, policy and technology. For example, the Guide contains a section called "Inspection Policies," which includes a detailed explanation of PRC sections 4292 through 4296 referenced above. According to Title 14, Section 1252 of the California Code of Regulations, these clearance requirements are applicable to any mountainous, forest-covered land, brush-covered land or grass-covered land within state responsibility area unless specifically exempted.

"ACT OF GOD" DEFENSE AND THE SANTA ANA WINDS

Presently, there are no reported California cases addressing whether the "act of God" defense can be raised to avoid inverse condemnation liability. However, this defense has been used in negligence cases involving public utilities.

The "act of God" defense has been discussed with regard to a public utility's claim that it could not be liable for damages caused by a lightning strike. (*Mancuso v. Southern California Edison Company* (1991) 232 Cal. App. 3d 88.) The Court advised that the defense may be asserted "in those limited cases where an *unanticipated* natural occurrence is the *sole* cause of a plaintiff's injury or damage." (*Mancuso, supra,* at p. 103-104.) In an earlier case, the California Supreme Court discussed the "act of God" defense in the context of high winds. The Court held that such a defense could not be used in a contract dispute unless the wind "was of such unheard-of violence as to be beyond all contemplation or expectation." *Holt Mfg. Co. v. Thornton (1902) 136 Cal. 232, 235, 68 P. 708, 709*.

In another case, the California Supreme Court noted that a public utility had a duty to consider local wind conditions in inspecting and clearing vegetation from the area of their power lines. (*Ireland-Yuba Gold Quartz Mining Co., v. PG&E*, (1941) 18 C.2d 557.) The Court found that PG&E had a duty to consider local wind conditions: "It is not unreasonable to require appellant to anticipate that with high winds usually blowing in the vicinity in which the fire occurred, the tree might fall across and break one of the wires. Under the circumstances here presented, appellant was bound to anticipate the existence of a wind even of high velocity where such winds were not unusual." (*Ireland-Yuba, supra,* at p. 565 (citing *Rocca v. Tuolumne County Elec. etc. Co.,* 76 Cal. App. 569.))

These cases do not establish a "bright line" test to determine when wind velocity may be so great as to be considered an unanticipated natural occurrence. However, Santa Ana winds are regular Southern California meteorological phenomena that occur primarily in the fall. High pressure air moves into the Nevada, Utah and Arizona deserts and pushes up against the San Gabriel Mountains. Dry desert air is pushed westward through the canyons into California and the air compressed by the winds heats up. Santa Ana winds can be strong enough to uproot trees and lift roofs from houses. Given their devastating impact, the Santa Ana winds have been called "Devil's Breath" and "Satan Winds."

At one point during the Sayre Fire, the winds reached near hurricane-force gusts estimated at between 50 mph and 80 mph. The winds were reported to be stronger than the winds involved in the 2002 Cedar fire in San Diego

County, which were characterized as “moderate.” In a negligence action against a public utility, courts would likely find local Santa Ana winds are anticipated natural occurrences. Thus, an “act of God” defense would be ineffective unless the winds were beyond all reasonable contemplation or expectation.

CONCLUSION

Potential for recovery exists for losses incurred in the Tea Fire and Sayre Fire. The official cause of the Tea Fire establishes liability against a group of young adults for negligently starting and failing to extinguish a bonfire. The issue becomes whether these students have significant liability coverage under their parents’ homeowners policies, and whether they own other recoverable assets. We are investigating these issues further at this time.

While the official cause of the Sayre fire remains undetermined, all available information points to Southern California Edison power lines as the likely source of ignition. Thus, potential causes of action against the public utility may include inverse condemnation, negligence and negligence *per se.*

The discussion and concepts addressed within this White Paper provide an outline of the issues and legal analysis that may arise from consideration of recovery issues pertaining to the wildfires. The undersigned are available to confer with you regarding the specific issues of any of your claims and losses arising from these wildfires, so as to analyze whether a viable subrogation claim may be pursued.

Respectfully submitted,

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