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OPINION	:	No. 81-1208
of	:	MARCH 3, 1982
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THE HONORABLE RONALD B. ROBIE, DIRECTOR OF THE DEPARTMENT OF WATER RESOURCES, has requested an opinion on the following question:

Is the Department of Water Resources authorized to reimburse the Santa Clara Valley Water District for the cost of acquiring flowage easements downstream from the Uvas-Carnadero Creek Unit of the Pajaro River Flood Control Project?

CONCLUSION

The Department of Water Resources is not authorized to reimburse the Santa Clara Valley Water District for the cost of acquiring flowage easements downstream from the Uvas-Carnadero Creek Unit of the Pajaro River Flood Control Project.

ANALYSIS

In 1944 the United States Congress authorized the construction of the Pajaro River Flood Control Project. The project consisted of two phases: (1) levees along both banks of the lower Pajaro River and its tributaries near Watsonville and (2) levees along the Uvas Creek and Carnadero Creek tributaries of the Pajaro River near Gilroy.

For various reasons, construction of the Uvas-Carnadero Creek Unit was delayed for many years but is now underway by the United States Corp of Engineers (hereafter "Corp"). The Corp is requesting that the Santa Clara Valley Water District (hereafter "District") obtain "flowage easements"[1] over approximately 2,600 acres downstream from the construction area.

The 2,600 acres is presently subject to flooding from overflow by the two creeks. Studies show that construction of the levees along the banks of these two tributaries will increase the depth of flooding by an average of three inches, since more water will be flowing downstream.

The question presented for analysis is whether the Department of Water Resources (hereafter "Department") is authorized to reimburse the District for the cost of obtaining the flowage easements over the 2,600 acres, thereby expressly allowing the increased downstream flooding. We conclude that it is not.

For several decades the federal, state, and local governments have cooperated in providing flood control public works in California. In general, the Corp has constructed the projects, while the local governments have been responsible for their operation and maintenance, and the state has contributed funds to the local governments for acquiring the property upon which the projects have been built. (See 24 Ops.Cal.Atty.Gen. 259, 262-263 (1955); 19 Ops.Cal.Atty.Gen. 21, 21-22 (1952); 15 Ops.Cal.Atty.Gen. 84, 85-86 (1950); 11 Ops.Cal.Atty.Gen. 93, 93-94 (1948); 8 Ops.Cal.Atty.Gen. 275, 276-278 (1946).)

In 1945 the Legislature adopted and authorized the Pajaro River Flood Control Project for state financial assistance. (Water Code, § 12685.)[2] Under section 12583, the

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[1] An "easement" constitutes an intangible right to use, or to prevent the use of, land belonging to another. (Rest., Property, 450; *Wright* v. *Best* (1942) 19 Cal.2d 368, 381; *Frahm* v. *Briggs* (1970) 12 Cal.App.3d 441, 445; 10 Hagman & Maxwell, Cal. Real Estate Practice (1981) § 343.02, p. 343:5; 3 Miller & Starr, Current Law of Cal. Real Estate (1977) § 18.4, p. 252.) "The right of flooding land" (Civ. Code, § 801, subd. (10)) is one type of easement. (See *Security Pac. Nat. Bank* v. *City of San Diego* (1971) 19 Cal.App.3d 421, 428; *Nelson* v. *Robinson* (1941) 47 Cal.App.2d 520, 526.) The creation, transfer, and termination of easements are subject to essentially the same rules as are applicable to other interests in real property. (See *Gerhard* v. *Stephens* (1968) 68 Cal.2d 864, 881; *Johnson* v. *Ocean Shore Railroad Co.* (1971) 16 Cal.App.3d 429, 434.)

[2] All section references hereafter are to the Water Code.

Department may reimburse the District (see § 12829) for "long, easements, and rights of way." Section 12583 states:

> "It is the intention of the Legislature that it will be the policy of the State that the amount of financial assistance to be given by the State to each project adopted and authorized for state assistance by the Legislature pursuant to the provisions of Chapters 1 and 2 of this part, shall be limited to the cost of land, easements, and rights of way necessary in connection with the construction of any such project."[3]

"Lands, easements and rights of way" are defined in section 12573 as follows:

> "'*Lands, easements and rights of way' includes* lands and rights or interests in lands whereon channel improvements and channel rectifications are located; *lands, rights, or interests in lands necessary in connection with the construction, operation, or maintenance of such channel improvements and rectifications, including those necessary for flowage purposes,* spoil areas, borrow pits, or for access roads; and including the cost of the relocation, reconstruction, or replacement of existing improvements, structures, or utilities rendered necessary by such channel improvements and rectifications."[4] (Italics added.)

For the past 35 years, the Department (and its predecessor) has strictly construed the language of section 12573. It has administratively limited reimbursement for flowage easements to interests in land immediately adjoining the construction site. For example, a flowage easement may be required where a second "by-pass" channel is created; the easement would allow overflow from the main channel to the by-pass channel.

On the other hand, the Department has excluded from reimbursement all flowage easements downstream from flood control projects. The basis for this administrative determination has been the "common enemy" rule.

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[3] "Chapters 1 and 2 of this part" refers to sections 12570-12571, known as the State Water Resources Law of 1945 (§ 12570).

[4] A "rectification" is 'a new alignment to correct a deviation (as of a river channel or bank);" a "spoil area" is an area "composed of waste earth which has been excavated," and a "borrow pit" is "an excavated area where material (as earth) has been borrowed to be used as fill at another location." (Webster's New Internat. Dict. (3d ed. 1966) pp. 257, 1899, 2203.)

As distinguished from "stream waters"[5] and "surface waters,"[6] "flood waters"[7] may be repelled from land and forced back into a channel without liability for damage caused thereby to downstream property owners. In *Clement* v. *Reclamation Bd.* (1950) 35 Cal.2d 628, 635-636, Justice Traynor stated,

> "It is well established that the flood waters of a natural watercourse are a common enemy against which the owner of land subject to overflow by those waters may protect his land by the erection of defensive barriers, and that he is not liable for damage caused to lower and adjoining lands by the exclusion of the flood waters from his own property, even though the damage to other lands is increased thereby." (See also *LeBrun* v. *Richards*, *supra*, 210 Cal. 308, 315; *McDaniel* v. *Cummings* (1890) 83 Cal. 515, 520; *Lamb* v. *Reclamation Dist. No. 108* (1887) 73 Cal. 125, 130-131.)

The rationale for the rule has been stated to be: "Not to permit an upper landowner to protect his land against the stream would be in many instances to destroy the possibility of making the land available for improvement or settlement and condemn it to sterility and vacancy." (*San Gabriel Valley Country Club* v. *Los Angeles County* (1920) 182 Cal. 392, 401.) The construction of public improvements "for purposes of flood control is . . . essential to the public health and safety" and for that reason outweighs the private property interests at stake. (*O'Hara* v. *Los Angeles County of Flood Control Dist.* (1941) 19 Cal.2d 61, 63.) The owners of downstream lands may normally protect their own property interests under the common enemy rule and thus, theoretically, prevent any damage. (See *Beckley* v. *Reclamation Board*, *supra*, 205 Cal.App.2d 734, 745-746.)

We are informed that the Corp has not previously required a local water district to obtain downstream flowage easements.[8] While we need not speculate as to why this project is

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[5] Also known as "channel water" contained in a "natural watercourse," "stream water" is not "the gathering of errant water while passing through a low depression, swale, or gully, but a stream in the real sense, with a definite channel with bed and banks, within which it flows at those times when the streams of the region habitually flow." (*Horton* v. *Goodenough* (1920) 184 Cal. 451, 453.)

[6] "Surface water" is "diffused over the surface of the land, or contained in depressions therein, and resulting from rain, snow, or which rises to the surface in springs." (*Keys* v. *Romley* (1966) 64 Cal.2d 396, 400.)

[7] "Flood waters" are those that "escape from a stream or other body of water and overflow the adjacent territory." (*LeBrun* v. *Richards* (1930) 210 Cal. 308, 315; see also *Everett* v. *Davis* (1941) 18 Cal.2d 389, 393; *Beckley* v. *Reclamation Board* (1962) 205 Cal.App.2d 734, 743, fn. 2.)

[8] The federal law (33 U.S.C. § 701c) has remained unchanged throughout this period [the local government is to "provide without cost to the United States all lands, easements, and rights-of-way necessary for the construction of the project . . . ."].

viewed differently, we note that (1) seldom does a flood control project merely divert water from property (see *Beckley* v. *Reclamation Board*, *supra*, 205 Cal.App.2d 734, 751-752), (2) often flood waters, stream waters, and surface waters are not easily categorized (see *Deckert* v. *County of Riverside* (1981) 115 Cal.App.3d 885, 895; *Ellison* v. *City of San Buenaventura* (1976) 60 Cal.App.3d 453, 456-457; *Tri Chem, Inc.* v. *Los Angeles County Flood Control Dist.* (1976) 60 Cal.App.3d 306, 311), (3) application of the common enemy rule to flood cases has been criticized (see Van Alstyne, *Inverse Condemnation: Unintended Physical Damage* (1969) 20 Hastings L.J. 431, 457; Comment, *California Flood Control Projects and the Common Enemy Doctrine* (1951) 3 Stan.L.Rev. 361, 365-366), and (4) the Supreme Court has somewhat recently changed the liability rules concerning surface waters (*Keys* v. *Romley*, *supra*, 64 Cal.2d 396, 409) and stream waters. (*Youngblood* v. *Los Angeles County Flood Control Dist.* (1961) 56 Cal.2d 603, 607).

The question, however, is not whether the common enemy rule should be applied to flood waters. Rather, the issue is whether downstream flowage easements come within the payment to the District by the Department for such easements would be contrary to the Legislature's declaration contained in section 12583.

The cardinal rule of statutory construction is to "ascertain the intent of the Legislature so as to effectuate the purpose of the law. (*Select Base Materials* v. *Board of Equal.* (1959) 51 Cal.2d 640, 645.) "Words must be construed in context" (*California Mfgrs. Assn.* v. *Public Utilities Com.* (1979) 24 Cal.3d 836, 844), and constructions that defy common sense or lead to mischief or absurdity are to be avoided. (*Fields* v. *Eu* (1976) 18 Cal.3d 322, 328; *Sanchez* v. *South Hoover Hospital* (1976) 18 Cal.3d 93, 98.)

Are downstream flowage easements "interests in lands necessary in connection with the construction, operation, or maintenance of such channel improvements and rectifications, including those necessary for flowage purposes" as specified in section 12573? The term "necessary" does not have a well established legal meaning. Some interpretation is required.

For the past 35 years, the Department has consistently interpreted section 12573 as excluding from reimbursement downstream flowage easements, since such the common enemy rule, they would not be "necessary" for "construction, operation, or maintenance" of a project. We believe this is a reasonable construction of the statute, given the underlying legal principle. Section 12573 is a statute that particularly requires consistent and uniform interpretation. Reimbursement claims from throughout the state must be treated with equal consideration by the Department.

Moreover, if the funding program is to be changed in any significant way, the Legislature would appear to provide the most appropriate forum to consider the issue. In this regard, it is to be noted that section 12583 is a statute that restricts the authority of the Department and does not obligate the state to pay for any "lands, easements or rights of way." The Department's 1981 appropriation of $4 million for reimbursement (Stats. 1981, ch. 99, item 386-101-001) does not, for example, cover all of the local claims that have been approved by the Department. These approved claims (of a type which the Legislature has been funding for 35

years) would be seriously affected if downstream flowage easements were now found to be "necessary."[9]

It is therefore concluded that the Department is not authorized to reimburse the District for the cost of acquiring flowage easements downstream from the Uvas-Carnadero Creek Unit of the Pajaro River Flood Control Project.

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[9] The costs of the downstream flowage easements at issue herein have been estimated by the Department to exceed $7 million