Volume 14, Number 7
April 2004

CALIFORNIA WATER™
LAW & POLICY Reporter

FEATURE ARTICLE

CALIFORNIA WATER NEWS

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Robert Schuster, Executive Editor
P.O. Box 1425, Foresthill, CA 95631
530-367-3844
schuster@argentco.com

California Water Law and Policy Reporter is published monthly (except September) for $447.50 a year by Argent Communications Group; P.O. Box 1425; Foresthill, CA 95631; (530)367-3844. Argent Communications Group is a division of Argent & Schuster, Inc.: President, Gala Argent; Vice-President and Secretary, Robert M. Schuster, Esq.

Subscription Rate: 1 year (11 issues) $447.50. Price subject to change without notice. Circulation and Subscription Offices: Argent Communications Group; P.O. Box 1425; Foresthill, CA 95631; (530)367-3844 or 1-800-419-2741.

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FEATURE ARTICLE

WILL NEW FLOOD CASE MEAN A FLOOD OF DAMAGES PAID TO A FLOOD OF PLAINTIFFS? SUPREME COURT DENIES REVIEW OF *PATERNO* DECISION

By Scott Shapiro

The recent decision by the California Supreme Court to deny review of *Paterno v. State of California* (Case No. S121713, March 17, 2004) holds not much good news for flood control agencies. The Supreme Court has declined to review a decision by the Third District Court of Appeal finding the State of California liable for damages to hundreds of plaintiffs injured when the Linda Levee collapsed in 1986 (*Paterno v. State of California*, 113 Cal.App.4th 998 (2003). *See* 14 *Cal. Water L. & Pol'y Rptr.* 123 (Jan. 2004); 13 *Cal. Land Use L. & Pol'y Rptr.* 102 (Jan. 2004). The Court of Appeal gives great lip service to the notion that flood control agencies are not insurers for the landowners within the agencies' boundaries. However, the Court of Appeal's language and analysis suggests exactly the opposite when it found that individual landowners were unfairly bearing the burden of flood control agencies' decisions in regard to the construction and maintenance of flood control projects.

The Court of Appeal's Decision

On November 26, 2003, the Third Appellate District Court of Appeal issued a decision in the *Peter Paterno v. State of California* case (Case No. C040553). This is the latest appeal in the 1986 lawsuit regarding the failure of the Linda levee. Following the failure of the levee in 1986, several hundred plaintiffs brought a lawsuit against Reclamation District 784 and the State of California alleging negligence in regard to the construction and maintenance of the levee and also alleging a taking of their property under the constitutional cause of action called inverse condemnation. After a lengthy trial, the trial court ultimately found that liability under the theory of inverse condemnation did exist as against the reclamation district and the state. The reclamation district and the state both appealed resulting in the 1999 decision entitled *Paterno v. State of California*, 74 Cal.App.4th 687 (1999) (*Paterno I*). In *Paterno I*, the court held that the plaintiffs had not proven liability under the inverse condemnation theory because they had failed to allege and properly identify an "unreasonable plan" which caused their damages. The court explained that the plaintiffs had the obligation to demonstrate an unreasonable plan which was more than an act by an employee of one of the defendants. The court stated, "to repeat, 'deliberate action' involves taking liability, where, and only where, the deliberation is *by a public entity*, not by an employee." In regard to the test of whether the plan was unreasonable, the court harkened back to the various factors established in the previous flood control inverse condemnation cases decided by the courts. Finally, the court remanded the case back to the trial court for the trial court to make express determinations as to the presence of a plan and as to whether the identified plan was unreasonable.

On remand, Judge John Golden, sitting by special assignment, found that there was no liability on the part of Reclamation District 784 or the State of California. Judge Golden was not able to identify a particularized plan which constituted deliberate and deliberative action on the part of a public agency.

Judge Golden's examinations included allegations that the levee had been aligned improperly so as to overlie an old riverbed channel, that an abandoned pipeline had run through the levee at its point of failure resulting in a weakened levee at that location, that nearby borrow pits and mining pits had been approved by the reclamation district and the state and had resulted in the weakening of the levee, that the reclamation district and the state had an inadequate maintenance plan for the destruction of rodents, and finally that the reclamation district and the state had an inadequate plan in regard to controlling seepage and patrolling levees during flood events. Having found the presence of no plan that satisfied the requirements of the Court of Appeal's decision in *Paterno I*, Judge Golden did not consider whether the relevant plans were or were not unreasonable. Following Judge Golden's decision, the plaintiffs appealed back to the Court of Appeal.

In a somewhat surprising decision, the Court of Appeal found that inverse condemnation liability did exist on the part of the State of California, did not exist on the part of Reclamation District 784, and the court remanded the decision back to the trial court to determine appropriate damages to be awarded to the plaintiffs (*Paterno II*). In short, in reviewing Judge Golden's statement of decision, the Court of Appeal found adequate evidence to support that the levee had failed because a stretch of the levee accepted by the state into the Sacramento River Flood Control Project had been improperly constructed years before out of sandy materials. The court found that acceptance of that stretch of levee constituted a plan which, after application of the various factors, the court found to be unreasonable. The court found that as Reclamation District 784 did not have any part in the construction or acceptance of the faulty levee, no liability should exist for Reclamation District 784.

The problems in regard to the *Paterno II* decision of the Court of Appeal are many. Perhaps most important is the apparent ease with which the court, with very little impartial consideration, and with language that appears to be result driven, concludes that the plaintiffs, if uncompensated, would contribute more than their proper share to the public undertaking. The remainder of this article analyzes the four main categories of issues that affect this conclusion and the potential impact of the decision on the state and on flood control agencies.

The Issues at Hand

The Requirements of a Plan and the Finding of Unreasonableness

The Court of Appeal's discussion of the requirements for an unreasonable plan raises two issues: first, does the identified plan meet the requirements previously identified by the Court of Appeal for a plan, and second was the plan unreasonable. As noted below, the Court of Appeal here finds the existence of plan which would not have met the test enunciated in *Paterno I*. It also finds the identified plan to be unreasonable, despite evidence that at the time a decision was made on the plan, the plan was a reasonable decision.

The Court of Appeal in *Paterno II* first carefully outlines the requirements for a plan as previously identified in *Paterno I*. The court begins by quoting from Judge Golden's Statement of Decision to demonstrate that the levee failed as a result of the incorporation of levees constructed out of sand in the 1940s by Yuba County. The Court of Appeal describes the decision to incorporate existing levees as follows:

> It was a central cost-saving feature of the early report (which evolved into the SRFCP) to use existing levees, but there was never any effort to test those levees (or at least, the Linda Levee) for structural soundness. The global plan assumed the levee met engineering standards. . ..

Paterno II.

While one might argue that the decision to incorporate pre-existing levees into a levee system should constitute a "plan," the same court's language in *Paterno I* suggested that a plan cannot exist absent actual deliberation over policy choices which a public agency might make. In other words, under inverse condemnation law public agencies can be held liable when they make board level decisions or choices which affect landowners, but they cannot be held constitutionally liable for inverse condemnation if there was no actual board level decision which results in the taking of property. Despite this previous requirement, and the lack of evidence that an agency board or the California Legislature made this decision, the court still found there to be a plan.

The Court of Appeal then found the plan to be unreasonable, despite the lack of evidence to support that finding. In *Paterno II*, there was no evidence that the state was aware of the structural problems with the Linda Levee as of the time that it made its decision to incorporate the Linda Levee into the overall levee plan. Thus, there can be no proof that the state choose to construct the project "on the cheap," risking the property of the very landowners for whom the project was to offer protection. In other words, there may be a plan, but there is no evidence that it was unreasonable at the time made. The *Paterno II* court does identify evidence that demonstrates that the state had some awareness of the structural problems with the Linda Levee *after* the incorporation of the Linda Levee into the levee system. However, such evidence should be irrelevant if the plan has been defined as the decision (with whatever knowledge the state then had) to incorporate the levee into the overall levee system in the first place.

Thus, the *Paterno II* court's decision is internally inconsistent: if the state had no awareness of the unreasonableness of using the Linda Levee at the time that it incorporated the Linda Levee, there is no way in which its plan to incorporate the levee could be unreasonable; conversely, if the state had knowledge of the structural problems after the incorporation, and hence the decision to continue to use the Linda Levee was unreasonable, then that unreasonableness can have no relationship back to the original plan to incorporate the Linda Levee.

Determination of Unreasonableness

Beginning with the *Locklin* case, the courts have required that before liability may be found for inverse condemnation as a result of flooding, the courts must find that the public agency acted unreasonably. Having identified a relevant plan, the *Paterno II* court then moved to determine if the plan was unreasonable. The *Paterno II* court made the decision to proceed to the reasonableness analysis, despite the fact that the trial court did not balance the reasonableness factors from *Locklin*, and thus did not make findings of fact that went to the issue of unreasonableness. This decision is suspect because it means that the *Paterno II* court did not have the benefit of the trial court's view of what evidence would be relevant to the various factors.

The Court of Appeal first analyzed six factors taken from a seminal law review article written by Professor Van Alstyne (Arvo Van Alstyne, *Inverse Condemnation: Unintended Physical Damage*, 20 Hastings L.J. 431 (1969)). The first factor is to examine the purpose served by the project. This factor is designed to help the court put the failure in a larger context. In regard to this factor, the Court of Appeal properly notes that the Linda Levee was part of the an overall state project which was designed to provide flood control along the lengths of the Sacramento River and its tributaries.

The second factor examined is to determine what offsetting reciprocal benefits were received by those allegedly harmed by the flood. Previous articles have suggested that this factor is pro-flood control agency, in that it requires a court to determine what sort of benefits the flood victim may have received, and suggests that these benefits may mitigate liability. For example, if the levee was constructed in 1940, a court examining this factor would determine that the flood victim received over 45 years of flood control benefits. The 45 years of protection from flooding would be put in perspective as compared to a single flood event in which the plaintiff was damaged. But in a perverse bit of logic the Court of Appeal, after examining the factor, states, "Paterno received no offsetting benefit due to the defective levee." Here, the Court of Appeal ignores the decades of protection received.

The third factor considered by the *Paterno II* court was whether there were feasible alternatives to the facility which failed, resulting in flooding. The *Paterno II* court found explicit reference in the statement of decision that there were technological alternatives which could have prevented the levee failure. However, the *Paterno II* court noted that the statement of decision did not include any discussion of the costs of those measures and whether those costs would have been reasonable in light of the state's budgets in the relevant years. Despite this acknowledgment that the *Paterno II* court did not have the facts necessary to properly and completely consider this factor (suggesting that the court should have remanded the decision for the trial court to make these determinations) the Court of Appeal continued by stating:

> although the Statement of Decision does not recite the cost of seepage controls in the 1930's or 1940's, or at any other time, the tenor of the Statement of Decision indicates the [trial] Court found the curative measures were fiscally feasible and the State makes no contrary claim on appeal.

Thus, the Court of Appeal simply identifies that the tone of the statement of decision supports the court's view on how the factor should be considered.

The fourth factor examined is the risk-bearing capability of the plaintiff. Published articles had suggested that this factor would require examination of whether the plaintiff could have protected himself or herself through some other means such as the elevation of the plaintiff's home, the purchase of flood insurance, or other flood control measures. The *Paterno II* court, however, rejects out of hand the idea that either flood control insurance or secondary protective systems were measures that the plaintiff should have employed, leaving unanswered the question of what this factor means if one is not to consider insurance and secondary systems. Thus, as with other factors discussed above, the court's treatment of this factor has the effect of making it pro-plaintiff.

The fifth factor is whether damage from flooding is a normal risk of this type of land ownership. Once again, this factor would suggest that the court should look at a plaintiff's damage in the context of whether flooding is a normal result of the ownership of land in this area. However, this Court of Appeal again turns a factor on its head stating that, "over time artificial works become the natural condition and parties are generally entitled to rely on them." *Paterno II* at 38. Again in a perverse bit of logic, by applying the factor in this way, the Court of Appeal in essence found that land which required a levee in order to be habitable was not normally subject to a risk of flooding. The Court of Appeal's language suggests that this factor could only help a defendant if the levee failed shortly after being put into use.

While the Court of Appeal continued on to examine six additional factors, only one deserves note at this time. The court considered the factor of the likelihood of construction of new public works not being engaged in because of unforeseeable direct damage to property. In short, this factor requires the court to consider the effect that findings of liability would have on the construction of future projects. While one would believe that a finding of liability in this case, which could result in hundreds of millions of dollars of damages, could lead to a determination of not constructing projects in the future, the Court of Appeal approached it from exactly the opposite direction, finding yet another factor that suggests unreasonableness. The court stated:

> The SRFCP, of which the Linda Levee is but one small component, would have been built regardless because even despite its isolated failures, it has saved many lives and billions of dollars by preventing floods, and it has opened or improved thousands of acres of land to productive use throughout the Sacramento Valley. Liability here would not likely deter future beneficial public works.

As an aside, this quoted language might suggest that liability should not be found here (after all, look at all of the benefit from this project).

In short, the Court of Appeal applied the various reasonableness factors and made a determination that the state's plan was unreasonable. Careful examination of the Court of Appeal's reasoning on each of these factors, however, appears to indicate that the court was predisposed towards a finding of unreasonableness. Such a conclusion is inescapable when the Court of Appeal applies the law to a limited set of facts before it, declines to remand the case back to the trial court to make findings based on the full set of facts, and interprets a number of the factors so as to make them *de facto* findings in favor of the plaintiff.

The Issue of Upgrading Versus Maintaining

The next focus of the court's opinion was a discussion of the distinctions between continued operation of the project and upgrading of the project's facilities. This discussion arose out of language from the *Paterno I* decision which stated that liability could not be based on failure of the public agency to upgrade the flood control project. Relying on that language, the State of California had argued that it had no liability in this case because it had no duty to upgrade the faulty section of levee incorporated into the levee system. The *Paterno II* court rejected this conclusion

using a simplified analysis which may create substantial issues for flood control agencies and the State in the future. In essence, the Court of Appeal found that unless a plaintiff was arguing that the flood control facilities should be able to handle more water, or the same amount of water but for a longer duration, upgrade liability was not implicated. Rather, liability may be implicated where flood control protection levels were not maintained. To that end, the Court of Appeal explicitly noted that curative measures are not necessarily upgrades:

> Nothing in *Paterno I*—or any other authority—suggests that measures required so that a project provides the planned level of protection are somehow an upgrade. Work that restores a levee's design level of protection is maintenance, not an upgrade.

Paterno II.

This casual statement by the court in *Paterno II* is likely to create tremendous problems for flood control agencies in the future, because of the ambiguity as to what was meant when the court referred to "planned levels of protection." For example, this language suggests that where a levee is constructed on soils that are settling, such as in the Delta, "curative maintenance" would be required to maintain the same level of flood protection as the levees settle. In such a circumstance, as the ground and the levees slowly sink, the flood control agency would have an obligation to build higher and stronger levees in order to ensure that the planned level of protection continues to be available. Another example is the circumstance where a series of successive heavy floods results in the U.S. Army Corps of Engineers (Corps) changing its determination of what constitutes a one-in-100-year flood. If the levee is designed to offer one in a hundred year flood protection, and the Corps subsequently changes its determination of what is a one-in-100-year flood, the language from *Paterno II* may be interpreted to suggest that the flood control agency may have an obligation to construct new and better facilities in order to protect from the design level flood of 100 years. The Court of Appeal's language, and this application of that language, suggests that the Court of Appeal may not have understand the impact of its decision on local flood control agencies. plaintiff.

The Requirement to Examine the Integrated Project

Finally, as discussed briefly above, the decision by the Court of Appeal is inconsistent with past statements of the Supreme Court in *Bunch* and *Belair*. Those statements specifically required that the trial court examine whether the flood control system, as a whole, exposed an injured landowner to an unreasonable risk of harm. The decision by the Court of Appeal did not discuss the flood control system as a whole, and did not examine whether the system as a whole compensated for any individual faulty aspect of the system.

For example, as noted above the Court of Appeal found that the State had acted unreasonably in incorporating into a new levee system an old levee which the Court of Appeal found was subsequently identified to be faulty. On appeal, the State of California argued that even if this element was unreasonable, the state's overall maintenance plan compensated for this limitation. The state specifically noted, and put into the record uncontroverted evidence that levee patrol plan for periods of high flow would be adequate to note any seepage through the levee as a result of the inadequate levee core. Ignoring these facts, the Court of Appeal's decision myopically focuses on only one aspect of the State of California's plan for providing flood control, that of design and construction, to the exclusion of operation and maintenance. This approach violates the dictates of the Supreme Court's teachings and also contravenes a common sense approach to flood control; namely, an integrated and coordinated approach which places equal value on design, construction, operation, and maintenance and which relies on strengths in one aspect of the plan to make up for any weaknesses in other aspects of the plan.

Conclusion and Implications

The analysis that the Court of Appeal engaged in when determining liability for the state is extremely troubling. The court states that it is "implementing the constitutional command that the State must compensate landowners when it damages their property." But in reality, the state provided the flood control benefit in the first place and constructed a levee system that benefited the landowner for many years. Absent the flood control system, the landowner

would not have been able to use property in the flood plain for any residential, commercial, or industrial purpose.

While the decision does not do so explicitly, both the language and the result of the decision suggests that the courts are moving steadily towards a system of stricter liability for flood control agencies. The decision of the Court of Appeal needlessly expands the scope of liability for the State of California and other flood control agencies, which neither can afford. It makes them virtual insurers of flood control protection. Such protection, though far preferable to none, cannot guarantee that flooding of the protected property will not occur. Floods, like earthquakes, are bound to happen and the courts must recognize that risk in a floodplain, as in an earthquake area, is inherent.

Scott Shapiro is a partner in the water group of the Sacramento law firm of Downey Brand, LLP. In addition to client counseling and litigation in the area of flood control, he also specializes in issues associated with federal reclamation projects, water rights, and water for development (including SB 610 and 221 issues). Scott is licensed in California and Nevada and is a former contributing editor of the *California Water Law and Policy Reporter*.