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Arreola v. County of Monterey, 122 Cal. Rptr. 2d 38 (Cal. Ct. App. 2002)

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bringing the regulations within the definition of a rule. ADEM's procedures constituted a rule because they implemented the state's antidegradation policy, proscribed Alabama's pollution policy, and described the application procedure and requirements for discharge permits. Second, ADEM's procedures did not fit within an exception to the definition of a rule because they were not specifically required by statute, by existing rule, or by federal policy.

While the FAP imposes minimum requirements, or maximum pollution levels, it does not specifically mandate what pollution levels Alabama allows. It merely states that if Alabama allows pollution, the allowable levels must not exceed those stated in the federal requirements; Alabama must decide and promulgate allowable levels and must establish criteria for discharge permits.

The Environmental Protection Agency ("EPA") likewise did not require Alabama adopt specific procedures, forms, or economic analyses. The EPA only required ADEM to adopt implementation procedures within federal parameters.

Since the court found ADEM's procedures to be rules within the meaning of the AAPA and the AEMA, ADEM violated the rulemaking provisions of the AAPA and the AEMA. Thus, the court reversed summary judgment in favor of ADEM and remanded for further proceedings.

Rachel M. Sobrero

CALIFORNIA

Arreola v. County of Monterey, 122 Cal. Rptr. 2d 38 (Cal. Ct. App. 2002) (allowing recovery when flood control project failed due to counties' deliberate act of non-maintenance and state's deliberate obstruction of floodplain).

James Arreola and approximately 300 property owners (Arreola") sued in inverse condemnation and tort when the Pajaro River broke through its levee during a storm, causing massive property damage. Arreola brought his claim against the County of Santa Cruz, Santa Cruz County Flood Control and Water Conservation District, the County of Monterey, the Monterey County Water Resources Agency ("counties") and the State of California.

Both the counties and the state appealed from a trial court ruling in favor of Arreola. The counties appealed on whether: (1) the trial court properly analyzed the reasonableness of the counties' actions; (2) inadequate maintenance of a public project can support an inverse condemnation claim; (3) the trial court erred in defining "design capacity" of a flood control project; (4) there was sufficient evidence to support the findings of liability; and (5) the trial court erred in relying

heavily on Arreola's draft in writing its Statement of Decision. The state appealed on the following issues: whether (1) the state's liability for an inverse condemnation claim required a showing of unreasonableness when claim arose neither from a flood control project, nor from surface water discharge; (2) the state had a duty to avoid obstructing a floodplain; (3) Government Code section 830.6 provided immunity for the state; and (4) the counties' actions were a superseding cause. The Court of Appeal for the Sixth District of California heard the case.

In 1947, the counties signed a resolution giving their assurance to conform to federal maintenance guidelines for a flood control project within their jurisdictions. The Army Corps of Engineers ("Corps") completed the project in 1949. The Corps designed the project to have a capacity of at least 19,000 cubic feet per second ("c.f.s."), with some evidence that the project could accommodate up to 23,000 c.f.s. for brief periods of time. Canal maintenance required regular mechanized clearing of vegetation and sandbars. The counties regularly undertook mechanized clearing until 1972, when conflicts with the California Department of Fish and Game caused the counties to cut back to only sporadic mechanized clearings. Officials from the counties and the state made many complaints and warnings that the project's flood control capacity was deteriorating, and the project required mechanized clearing. The state built a highway overpass, utilizing an earthen embankment containing two forty-eight-inch culverts to accommodate flows of ninety-eight c.f.s. In March 1995, a storm overwhelmed the project, and the river broke through the levee. When the waters reached the highway embankment, the culverts could not accommodate the flows, and the embankment dammed the flow, exacerbating the flood area, and causing ponding and sediment deposit.

The court began its analysis with a background on inverse condemnation. The court reiterated that the *Albers v. County of Los Angeles* court held the constitutional requirement of just compensation revolves around whether the owner of the damaged property would contribute more than his proper share to the public undertaking if left uncompensated. Generally, a public entity is strictly liable when its action proximately causes an injury to real property. However, the court noted an exception to the *Albers* general rule of strict liability. The so-called *Archer* exception arose under water law doctrines, and held that landowners had the right to inflict damage upon others' property in situations of flood control (the common enemy doctrine) and discharge of surface water in a natural watercourse (the natural watercourse rule). The court noted the *Archer* immunity and the constitutional takings doctrine created a tension between competing interests.

The court then described the two cases that devised a solution to the competing doctrines. The *Belair v. Riverside County Flood Control Dist.* court held an injured plaintiff could recover under inverse

condemnation when a public agency's unreasonable design, construction or maintenance was a substantial cause of the plaintiff's damages. *Locklin v. City of Lafayette* fleshed out a six-part test to determine: (1) the overall public purpose of the project; (2) the extent to which reciprocal benefits offset plaintiff's loss; (3) the availability of feasible, lower-risk alternatives; (4) the severity of plaintiff's damage in relation to plaintiff's risk-bearing ability; (5) the extent to which damage was a normal risk; and (6) the degree to which damage is distributed over wide group of beneficiaries. The court held the trial court correctly applied the *Locklin* factors in determining that the counties acted unreasonably.

The court denied the counties' assertion that the trial court erroneously applied the *Locklin* balancing test. The counties argued the relevant public action was not the substandard maintenance of the project, but rather the initial plan of maintenance the counties adopted in 1947. The court examined the question of whether lack of maintenance could be the basis for liability in inverse condemnation. Relying primarily on *Bauer v. County of Ventura*, the court found lack of maintenance was grounds for an inverse condemnation claim so long as there was a deliberate act to undertake the particular plan or manner of maintenance. The court found factual evidence that the counties' lack of maintenance was a deliberate act. The court concluded by noting that under a *Locklin* analysis, the lack of maintenance was unreasonable, and therefore it was appropriate to assess liability to the counties.

The court then denied the counties' arguments that the trial court erroneously defined the project's design capacity. The counties argued that any additional capacity over 19,000 c.f.s. was not part of the project's design capacity, and failure as a result of flows over 19,000 c.f.s. did not create liability against them. The court found this argument inapposite. It found that in fact, the Corps designed the project to continuously accommodate 19,000 c.f.s. with temporary capacity of 23,000 c.f.s. Therefore, the trial court did not err in defining the design capacity as 19,000 c.f.s. with an additional 4,000 c.f.s. of temporary capacity.

The court also found no merit in the counties' argument that flows exceeded project capacity. The jury found the flood did not exceed the project's capacity. The court applied a deferential standard of substantial evidence review and found substantial evidence to support such a finding.

Finally, the court turned to Arreola's claim against the state. The state contended the trial court did not use the proper reasonableness standard. The court found no standard of reasonableness applied to claims against the state. The reasonableness requirement stems from water law principles of flood control and surface water discharge. In this case, the action of the state that caused damage was neither flood control nor surface water discharge. It was the construction of a public highway that caused the damage. Without the water law

privilege, the state was strictly liable for inverse condemnation and tort damages. Affirming the trial court's decision, the court found that if not compensated, Arreola would contribute more than his proper share to the public undertaking of highway construction.

Moreover, the court found the state had a duty to avoid obstructing the floodplain, and the state violated that duty. It used foreseeability to determine duty, and found facts supporting the conclusion that the highway's obstruction of floodwater was not only foreseeable, but was foreseen. The state was aware of reports from the Corps that a hundred-year storm could generate 43,500 c.f.s. and overwhelm the project. Additionally, it was also aware the culverts could not handle the resulting flood. Since the damage was foreseeable and foreseen, the state had a duty to avoid the damage, and breached that duty when it built the highway to inferior standards.

The court continued its analysis by holding that Government Code section 830.6 was not a defense for the state. In order to have immunity under section 830.6, the state needed to show that its design was reasonable. The court found that state's design of the highway with ninety-eight c.f.s. culverts was unreasonable given the state's awareness that a hundred-year flood could generate up to 43,500 c.f.s., far over the project's capacity.

The court finished its analysis by denying the state's argument that failure of the project was a superseding cause. The court reasoned in order for cause to be superseding, it must be unforeseeable. In this case, the failure of the project was not only foreseeable, but also foreseen. Therefore failure of the project could not be a superseding cause.

James Parrot

California v. Murrison, 124 Cal. Rptr. 2d 68 (Cal. Ct. App. 2002)

(holding that notification to the Department of the Fish and Game is required where a diversion of water occurs).

Scott Edgar Murrison ("Murrison") placed rocks and gravel across Big Creek, a small creek in Trinity County, to divert ninety-five percent of the water flow from the creek to a diversion ditch. The Fish and Game Code ("Code") stated that it was unlawful for any person to substantially divert or obstruct the natural flow or substantially change the bed, channel, or bank of any river, stream, or lake without first notifying the Department of the Fish and Game ("DFG") of the activity. The State of California brought suit against Murrison for violation of the Code. The Superior Court of Trinity County found that Murrison substantially altered the creek without complying with the Code, enjoining Murrison from further diversion, and assessing civil penalties. Murrison appealed to the Court of Appeals of California, claiming his water right could not be limited by the Code,