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AUG 05 2008

SAN LUIS OBISPO SUPERIOR COURT
BY Patt Holmes
Patt Holmes, Deputy Clerk

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SUPERIOR COURT OF CALIFORNIA
COUNTY OF SAN LUIS OBISPO

WILLIAM BOOKOUT, individually and
dba OCEANO NURSERY,

Plaintiffs,

vs.

STATE OF CALIFORNIA,
DEPARTMENT OF
TRANSPORTATION; COUNTY OF
SAN LUIS OBISPO; OCEANO
COMMUNITY SERVICES DISTRICT;
UNION PACIFIC RAILROAD; PISMO
OCEANO VEGETABLE EXCHANGE,
and DOES 1-100, inclusive,

Defendants.

Case No.: CV 060384

RULING ON MOTION FOR
JUDGMENT (CCP §631.8) AND
PROPOSED STATEMENT OF
DECISION

This matter came on for trial on July 9, 2008. Numerous witnesses testified and

1 hundreds of exhibits were received in evidence. At the conclusion of Plaintiff's
2 case, Defendants, and each of them, made oral motions for judgment. After
3 hearing arguments from counsel, the Court requested supplemental briefing on the
4 issue of the statute of limitations, as well as Plaintiff's argument that Defendants
5 had acquired certain property rights under the doctrine of prescriptive easements.

6 Now, after having considered all of the evidence submitted in this matter
7 in Plaintiff's case-in-chief and, in addition, the Supplemental Declaration of
8 Plaintiff, the legal arguments of counsel, and the pre-trial and post-trial briefs filed
9 by the parties, the Court now rules as follows.

10 **DEFENDANTS' MOTIONS ARE GOVERNED BY CODE OF CIVIL**
11 **PROCEDURE SECTION 631.8.**

12 Although characterized at the time of argument as "non-suit" motions, a
13 review of the law clearly demonstrates that Defendants' motions for judgment
14 following the conclusion of Plaintiff's case-in-chief are governed by Civil Code of
15 Procedure section 631.8, which provides in pertinent part as follows:

16 "(a) After a party has completed his presentation of
17 evidence in a trial by a court, the other party, without
18 waiving his right to offer evidence in support of his
19 defense or in rebuttal in the event the motion is not
20 granted, may move for a judgment. The court as trier
21 of the facts shall weigh the evidence and may render a
22 judgment in favor of the moving party, in which case
23 the court shall make a statement of decision as
24 provided in Sections 632 and 634, or may decline to
25 render any judgment until the close of all the
26 evidence."

24 **THE STATUTE OF LIMITATIONS SET FORTH**
25 **IN CCP §338(j) APPLIES TO THIS CASE**

26 Code of Civil Procedure section 338(j) provides for a three year statute of
27 limitations for any "action to recover for physical damage to private property
28 under Section 19 of Article 1 of the California Constitution." As noted in *Patrick*

1 *Media Group, Inc. v. California Coast Commission* (1992) 9 Cal.App.4th 592,
2 607:

3 "Generally, an inverse condemnation action that is based upon
4 'damage' must be filed within 3 years of the discovery of the
5 damage [Code of Civ. Proc. §338 subd.(j)]. Actions based
6 upon a "taking" of property generally must be filed within five
years of the taking."

7 Perhaps sensing the likelihood that the Court will find that Plaintiff's claim
8 accrued more than three years before the filing of this action, Plaintiff argues for
9 application of the five year statute of limitations, based upon a "taking" of the
10 property.

11 Evidence produced at trial clearly showed that Plaintiff's property was
12 flooded on several occasions, causing damage to Plaintiff's personal property and,
13 most likely, to his building. The evidence clearly showed that this flooding
14 occurred because of extremely poor drainage at the intersection of Highway 1,
15 13th Street, and Paso Robles Street. The evidence demonstrated surface waters
16 naturally drained to this area due to the topography of the neighborhood, and that
17 the escape path for the accumulated water through a natural channel into a
18 culvert/pipe/pond system on the property owned by Defendants Union Pacific
19 Railroad and Pismo Oceano Vegetable Exchange would become clogged,
20 resulting in water backing up in front of, and ultimately into, Plaintiff's property.

21 In *Lyles v. State of California* (2007) 157 Cal.App.4th 281, the court held
22 that an inverse condemnation claim for physical damage to private property
23 resulting from flooding (similarly due to a clogged culvert) was subject to the
24 three year statute of limitations. Plaintiff, however, argues that in this case a
25 physical taking of Plaintiff's property occurred as a result of these flooding
26 incidents, which calls for application of the five year statute of limitations, citing
27 *Frustuck v. Fairfax* (1963) 212 Cal.App.2^d 345.

28 Although *Frustuck* involved a discharge of drainage waters onto the

1 plaintiff's property in that case, the facts are substantially different. As pointed
2 out by Defendants, the allegations in *Frustuck* included claims that the defendants
3 therein actually entered onto the plaintiff's property without consent and
4 physically constructed and installed improvements on the plaintiff's property (by
5 enlarging an existing ditch and constructing dirt and rock berms). Such
6 allegations are missing here. In this case, there was no evidence that Defendants
7 entered into or possessed Plaintiff's property, or that they constructed any physical
8 improvements on Plaintiff's property.

9 In addition, *Frustuck* was decided prior to the amendment of CCP §338,
10 effective January, 1990. In that regard, Miller & Starr make the following
11 observation:

12 **"Comment:** Prior to the amendment of the applicable
13 statute effective January 1990, it was held that in the
14 absence of physical damage, and where the "taking" is
15 not caused by government regulations, such as where there
16 may be merely a trespass or nuisance which constitutes a
17 "taking," the five-year statute for adverse possession may be
18 applicable." Miller & Starr, California Real Estate (3rd ed.),
19 Inverse Condemnation, Section 30:15, p. 30-74.

18 In fact, both Miller & Starr and Witkin note that the three year statute of
19 limitations applies in cases involving property damage, and that the five year
20 statute of limitations applies only where property is taken. Miller & Starr, supra;
21 3 Witkin California Procedure (4th ed.), Actions, Section 556. Witkin cites three
22 cases illustrative of the rule that the five year limitation applies when property is
23 taken, including *Ocean Shore R. Co. v. Santa Cruz* (1961) 198 Cal.App.2^d 267,
24 270; *Frustuck v. Fairfax*, supra; and *Garden Water Corp. v. Fambrough* (1966)
25 245 Cal.App.2^d 324, 327. In the *Ocean Shore R. Co.* case, the plaintiff alleged
26 that the defendants entered onto plaintiff's property and constructed a public street
27 on that property. In *Garden Water Corp.*, supra, the allegation was made that the
28 defendant therein took over possession of water system improvements which had

1 been previously been constructed by a subdivision developer. The facts of
2 *Frustruck* are discussed above, and include claims of physical entry and
3 construction of physical improvements on the plaintiff's property. This Court is
4 unaware of any authority for the proposition that claims for damages based upon
5 periodic floodings, even where repeated, invokes the five year statute of
6 limitations.

7 Plaintiff next argues that the Court has considerable discretion in
8 determining when the cause of action accrued, noting that courts have generally
9 used the "date of stabilization" approach. The application of this principle is
10 illustrated in the case of *Lee v. Los Angeles County Metropolitan Transportation*
11 *Authority* (2003) 107 Cal.App.4th 848. The plaintiff in that case claimed that her
12 property was damaged by construction of the Metro Rail Red Line underneath
13 Hollywood Boulevard. Among other things, she complained that water had
14 accumulated on or around her property, that the sidewalks and street directly in
15 front of her property had buckled, and that soil under and adjacent to her building
16 had subsided and settled. The court first determined that the three year statute of
17 limitations would apply to her complaint, holding as follows:

18 "We agree with the parties that the applicable statute of
19 limitations is Code of Civil Procedure section 338,
20 subdivision (j), because the basis of the inverse condemnation
21 claim is damage to the property (as opposed to taking). (See
22 3 Witkin, Cal. Procedure (4th ed. 1996) Actions, §556,
23 p. 710 [Code Civ. Proc. §338, subd.(j) codifies three-year
24 rule stated in *Smith v. City of Los Angeles* (1944) 66 Cal.
25 App.2^d 562, 586])" *Id.* at page 855.

26 The court next addressed the accrual date for the cause of action. In that
27 regard, the court reversed the trial court's sustaining of the demurrer to plaintiff's
28 complaint without leave to amend, because the trial court erred in finding that the
cause of action had accrued at the time that plaintiff had first observed the
damage. Instead, using the "date of stabilization" approach, the court found that

1 the action had timely been filed because the construction activities were still on-
2 going, so that the extent of the damages which would be caused upon completion
3 of the project could not be readily determined.

4 The "date of stabilization" approach does not apply in this case. The
5 evidence showed that the last improvements made to the drainage systems were
6 constructed by Pismo Oceano Vegetable Exchange ("POVE") in the late 1970s.
7 Further, the evidence demonstrated that the flooding problem was relatively
8 consistent and static for several years prior to the date that Plaintiff purchased his
9 property.

10 Finally, Plaintiff may argue that his property has been "taken" for public
11 use as a de facto retention basin. There are several problems with this argument.
12 First, this argument could be made any time that a property owner seeks damages
13 caused by floodwaters which invade his property. Second, this argument assumes
14 that Highway 1 has also been "taken" as a retention basin, since Highway 1 floods
15 before Plaintiff's property is inundated (and is flooded to a greater extent). Third,
16 no legal authority has been cited or located for this principle.

17 Accordingly, the Court finds that section 338(j) applies to Plaintiff's
18 lawsuit.

19 **PLAINTIFF'S CAUSE OF ACTION FOR**
20 **INVERSE CONDEMNATION ACCRUED SOMETIME**
21 **PRIOR TO MID-2002**

22 Plaintiff filed his lawsuit on May 2, 2006. Accordingly, this action is
23 untimely if the cause of action accrued before May 2, 2003. The evidence clearly
24 demonstrated that it did.

25 Although Plaintiff strenuously and repeatedly argues that his property was
26 not flooded prior to 2004, the evidence to the contrary is overwhelming. Most
27 significant are those comments set forth in Plaintiff's own hand writing on Exhibit
28 579, whereby Plaintiff asserted, in 2002, that he had observed and suffered

1 damage to his property "once a year" from flood waters exceeding one foot in
2 depth, causing damage to his business inventory as a result. Although Plaintiff
3 testified at trial that he was referring to water flowing from the ally behind his
4 property, his own hand written comments clearly attribute causation to the lack of
5 "adequate drainage on Hwy 1 under the train tracks."

6 Plaintiff again attempts to escape the damning inferences from this
7 evidence in his Supplemental Declaration filed after the trial, asserting that
8 reference to flood waters in excess of one foot actually referred to water off of his
9 property and across the street, combined with water spray damage from passing
10 vehicles to his outdoor inventory. The Court finds that these statements, made
11 after trial and after the opportunity for further reflection, are lacking in credibility.

12 In addition, however, there is substantial evidence which contradicts
13 Plaintiff's late proffered explanation. For example, substantial evidence was
14 introduced by Plaintiff that this flooding problem had existed at this location for
15 decades, going back at least to the 1980s. Further, the fact that Plaintiff took
16 photographs of the culvert and culvert inlet in 2002 demonstrate an active and
17 serious concern by Plaintiff with drainage problems at the culvert long before he
18 allegedly suffered any damage to his property. *See*, for example, Exhibits 1278,
19 1337, and 1338.

20 In addition, Mr. Davis testified that Plaintiff had a history of complaining
21 about flooding prior to December 20, 2002, when he met the Plaintiff on site and
22 cut the Oceano Community Services District ("OCSD") drainage pipe in the
23 vicinity of the culvert.

24 Mr. Sutton testified to personal observations of flooding at this location on
25 numerous occasions, and added that he spoke with Plaintiff about the flood
26 problem shortly after Plaintiff opened his nursery (which Plaintiff testified
27 occurred in 2000). He also testified that Plaintiff asked him about the mechanisms
28 of the drainage systems no later than the 2002-2003 time period. He further noted

1 that he had observed flooding on the Plaintiff's property since approximately 1996
2 when he arrived in Oceano.

3 Mr. Brebes, who retired from Cal Trans in 2002, testified that he met with
4 Plaintiff more than once, and that Plaintiff described flooding on his property and
5 damage to his inventory, all prior to the time of his retirement in 2002.

6 Accordingly, the Court finds that Plaintiff's cause of action for inverse
7 condemnation against Defendants, and each of them, is barred by the statute of
8 limitations.

9 **THE EVIDENCE FAILS TO SUPPORT**
10 **A BASIS FOR LIABILITY BY UNION**
11 **PACIFIC RAILROAD**

12 The evidence presented in this case demonstrated the existence of drainage
13 obstacles existing somewhere between the drainage inlet on the Union Pacific
14 Railroad's property and the pond on the POVE property. The evidence would
15 allow for different interpretations of the extent to which drainage improvements
16 by POVE and/or the Railroad contributed to the problem. The culvert under the
17 Railroad was described as undersized and unprotected from the accumulation of
18 debris. The conditions described on the POVE property more clearly
19 demonstrated drainage obstacles, including the poorly designed junction box with
20 its right angle turn, and the allegedly undersized and lengthy drainage pipe
21 running from the junction box to the POVE pond, which may have also been
22 undersized and inadequately drained.

23 The evidence demonstrated that the culvert under the Railroad had existed
24 for decades, and may have been adequate to meet drainage needs when originally
25 installed. Apparently after installation of the culvert under the railroad tracks,
26 while POVE was a tenant of Union Pacific Railroad, additional physical
27 improvements were added to the property by POVE, including the junction box,
28 piping, and the pond. The latest of these improvements was made in the 1970s.

1 There was, however, no competent evidence that the Railroad designed or
2 approved of those improvements by POVE, or had the power to alter the design of
3 those improvements.

4 This Court finds that this case is governed by *Cantu v. Pacific Gas and*
5 *Electric Company* (1987) 189 Cal.App.3rd 160. In that case, the court held that
6 there would be no liability in inverse condemnation of a public utility based upon
7 damages caused by construction or extension of private facilities on private land,
8 at least where the public utility does not exercise eminent domain powers to
9 construct or extend those facilities.

10 In this case, the evidence demonstrated that Union Pacific Railroad
11 acquired its property by grant deed more than 100 years ago, and that the drainage
12 facilities in question are or were constructed on private property, without resort to,
13 or invoking, powers of eminent domain. Plaintiff seeks to distinguish *Cantu*,
14 *supra*, by citation to *Breidert v. Southern Pacific Company* (1964) 61 Cal.2^d 659.
15 However, in that case an allegation was made that the railroad "actively
16 participated" in closing a public street which crossed its tracks, thereby causing
17 damages for lack of access to private property. Under those limited
18 circumstances, the California Supreme Court allowed the inverse condemnation
19 claim to proceed. Those facts are substantially different from the facts in this case
20 where, at most, the Railroad negligently acted by omission by failing to enlarge a
21 culvert or by failing to require (if that was possible) that its tenant do so.

22 Accordingly, Judgment shall be entered in favor of Union Pacific Railroad
23 and against Plaintiff on the cause of action for inverse condemnation.

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1 **PLAINTIFF HAS FAILED TO PROVE THAT DEFENDANTS**
2 **HAVE ACQUIRED A PRESCRIPTIVE EASEMENT OVER**
3 **PRIVATE PROPERTY**

4 In oral argument, Plaintiff argued that the public entity defendants
5 acquired prescriptive easement rights over and across the drainage channel on the
6 Railroad's property. Setting aside the question of whether Plaintiff has standing to
7 argue in support of a prescriptive easement right held by third party public
8 entities, the evidence does not support this theory.

9 There are several required elements which are essential to proof of the
10 creation of an easement by prescription. Among other things, it must be
11 determined whether the property use was adverse or permissive, whether the
12 owner of the servient tenement had notice of the adversity and of the user's claim
13 of right, and whether the use has been continuous for the required period of time.
14 See, generally, Miller & Starr, California Real Estate (3rd ed.) Prescription,
15 §15.29, et seq.

16 In this case, none of the public entities claim a prescriptive right. Further,
17 the evidence failed to demonstrate whether any of the public entities intended to
18 act, or did act, in a hostile or adverse manner. When questioned, various
19 witnesses testified that they did not know whether consent or permission had been
20 obtained for use of the Railroad's property. Mr. Priddy testified that the County
21 had no plans to exercise control over this channel, or to maintain the channel. Mr.
22 Davis testified that although the Oceano Community Services District placed a
23 pipe over a portion of the Railroad's property, he had no knowledge of whether or
24 not consent had been obtained. There was no evidence offered that the Railroad
25 objected to any uses that were made of its property. Mr. Fry testified that any
26 work undertaken by Cal Trans employees in the channel to help clear the channel
27 were most likely undertaken solely as a "good neighbor" practice by a
28 "conscientious employee."

1 Accordingly, the evidence was insufficient to establish prescription
2 easement rights held by any of the public entities in the drainage channel.

3 **THERE WAS INSUFFICIENT EVIDENCE**
4 **TO HOLD OCEANO COMMUNITY SERVICES DISTRICT**
5 **LIABLE FOR INVERSE CONDEMNATION**

6 At the conclusion of trial, Defendants argued that there was insufficient
7 evidence to prove a causation connection between their conduct and Plaintiff's
8 damages.

9 In the case of OCSD, the evidence largely consisted of the construction of
10 the drainage outfall from Well No. 8 in the vicinity of the culvert. While there
11 was evidence of substantial amounts of water being discharged from Well No. 8,
12 there was an absence of evidence that such discharges occurred
13 contemporaneously with heavy rains and flooding problems.

14 Plaintiff also alleged that OCSD should be liable because its outfall pipe
15 acted as a dam to capture debris in times of flooding, and/or that at times of
16 discharge from its outfall pipe, debris may have been pushed into the culvert.

17 In each of these cases, the Court finds that the evidence is too speculative
18 to support liability for inverse condemnation. No studies were undertaken or
19 evidence provided showing the effect, if any, of either of these factors during
20 times of flooding.

21 Finally, Plaintiff contends that OCSD is liable because, as a governmental
22 entity, it has improved real property in the watershed and has therefore
23 contributed to the amount of impervious surface in that watershed. Again,
24 however, the Court finds that the evidence is too speculative with regards to
25 causation, as the Court is left to speculate as to whether the additional square
26 footage of improved real property resulted in any meaningful contribution to those
27 flood waters which invaded Plaintiff's property when the drainage systems on the
28 Railroad and POVE property backed up.

1 This is particularly true when one considers the impact of what is most
2 arguably the real culprit, i.e. the inadequate drainage facilities on private property.
3 Under the circumstances, Plaintiff has failed to prove that OCSD's conduct has a
4 "substantial cause-and-effect relationship" to Plaintiff's property damage,
5 especially given the likelihood that "other forces alone produced the injury."
6 *Skoumas v. City of Orinda* 2008 DJDAR 12042, quoting from *Belair v. Riverside*
7 *County Flood Control District* (1988) 47 Cal.3^d 550, 559.

8 **THERE WAS INSUFFICIENT EVIDENCE**
9 **TO HOLD THE COUNTY OF SAN LUIS OBISPO**
10 **LIABLE FOR INVERSE CONDEMNATION**

11 Plaintiff claims that the County of San Luis Obispo, through its acts and
12 omissions, caused damage to Plaintiff's property because its system of streets,
13 gutters and sidewalks created impervious surfaces which directed water to the low
14 point in the watershed area, where it was to drain through the channel and the
15 drainage facilities on the Railroad and POVE properties. In addition, Plaintiff
16 seeks to impose liability upon the County based upon the fact that the County,
17 through the issuance of building and developmental permits, allowed the
18 construction of numerous improvements which increased the amount of
19 impervious surface area.

20 As to the second point, liability can not be imposed based solely upon the
21 County's approval of subdivision maps and the issuance of development permits.
22 *Ullery v. County of Contra Costa* (1988) 202 Cal.App.3^d 562, *Ellison v. San*
23 *Buenaventura* (1976) 60 Cal.App.3^d 453. As to the first point, the evidence
24 established that the County had approved and constructed a road system in the
25 watershed many years ago, and that the streets directed surface water from higher
26 elevations to the area immediately in front of Plaintiff's property. The primary
27 source of drainage difficulties, however, was established to be the inadequate
28 drainage facilities on private property. Other than contributing to increasing

1 impervious surfaces through the issuance of development permits, there was no
2 showing of the County's responsibility for designing or maintaining the drainage
3 channel or drainage facilities immediately downstream from Plaintiff's property.

4 Accordingly, for the same reasons that Plaintiff failed to show a substantial
5 cause-and-effect relationship between OCSD's conduct and Plaintiff's damages,
6 Plaintiff has also failed to show the required connection between County's conduct
7 and Plaintiff's damages.

8 **THERE WAS INSUFFICIENT EVIDENCE**
9 **TO HOLD THE STATE OF CALIFORNIA**
10 **LIABLE FOR INVERSE CONDEMNATION**

11 The Court finds that the evidence of a causal connection between conduct
12 by the State of California and Plaintiff's damages is even more tenuous than the
13 causal connection between the County of San Luis Obispo and Plaintiff's
14 damages. In particular, the liability of the State of California is premised upon its
15 ownership and maintenance of Highway 1. Highway 1 has existed for many
16 decades in its paved (and therefore its impervious) condition. Plaintiff seeks to
17 impose liability based upon the amount of impervious surface owned by the State
18 of California, but for the reasons asserted above for the County of San Luis
19 Obispo, that is not enough. In short, there is a lack of evidence that the paved
20 roadway in that vicinity has caused flooding from the time of its construction.
21 Moreover, the evidence does not support a holding that Cal Trans was obligated to
22 maintain the drainage channel or drainage facilities on private property. Nor was
23 there substantial evidence that debris accumulated within the State's right-of-way
24 (as opposed to the debris accumulated on private property outside the boundaries
25 of the right-of-way) contributed in any meaningful way to the problems in the
26 operation of the drainage facilities on the Railroad and POVE properties.

27 Finally, the Court does not find a factual basis to impose liability based
28 upon allegedly increasing elevations of Highway 1 resulting from overlay

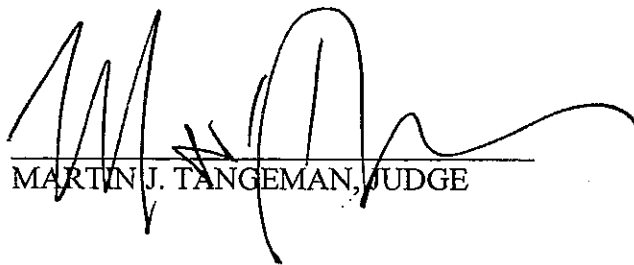
1 projects. First, the evidence was mixed at best as to whether the absolute
2 elevation of Highway 1 changed in a substantial way as a result of the "remove
3 and replace" projects. Second, the Court does not find that Plaintiff's property was
4 damaged as a result of water pooling on the east side of Highway 1, as opposed to
5 the major flooding that occurred when water from the west side of Highway 1
6 backed up over, into, and across Plaintiff's property.

7 **CONCLUSION**

8 Based upon all of the foregoing reasons, and after considering and
9 weighing the evidence presented in Plaintiff's case-in-chief, the Court finds that
10 Judgment should be entered in favor of Defendants, and each of them, and against
11 Plaintiff on the inverse condemnation cause of action.

12 Pursuant to CCP Section 631.8(b), the action may proceed as to the
13 remaining issues.

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15 DATED: August 5, 2008

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17 MARTIN J. TANGEMAN, JUDGE

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