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California to Finally Tackle Inverse Condemnation Reform for Wildfires? - Nossaman

In Governor Gavin Newsom's first [State of the State address](#), he called for the creation of a strike force charged with developing a comprehensive strategy to address the destabilizing effect of catastrophic wildfires on the State. On April 12, 2019, Governor Newsom [announced](#) the results of that dedicated effort, in the form of a report titled "[Wildfires and Climate Change: California's Energy Future](#)" ("Strike Force Report"). Governor Newsom also summarized the findings of the Strike Force Report in a press conference that can be viewed [here](#).

The Strike Force Report first sets out steps the State must take to reduce the incidence and severity of wildfires, including the significant wildfire mitigation and resiliency efforts the Governor has previously proposed. Recognizing that climate change is a core driver of heightened wildfire risk, the Strike Force Report also outlines the Governor's vision for clean energy policies to reduce the impacts of climate change on wildfire risk. The Strike Force Report concludes that wildfires are an issue that must be tackled by numerous stakeholders, including the State, local agencies, and private property owners, to address a variety of contributors to wildfires, including improving vegetation management and fire suppression, incentivizing private owners to mitigate risks, building safer communities and stricter land use controls, and improving emergency response.

With respect to a potential change in the law, the Strike Force Report suggests that shareholders (not customers) should continue to be responsible where a utility fails to operate safely, but otherwise, "[a]ny real plan must allocate costs resulting from wildfires in a manner that shares the burden broadly among stakeholders including utilities (ratepayers and investors), insurance companies, local governments, and attorneys." The Strike Force Report also provides a brief overview of California's unique doctrine of inverse condemnation and notes that the combination of strict liability and statutory attorney's fees exposes California utilities to significant potential liability which needs to be more broadly apportioned.

The Strike Force Report identifies three concepts to address catastrophic wildfire risk, which are proposed for further consideration and development:

1. **Liquidity-Only Fund.** This concept would (i) create a fund to provide liquidity for utilities to pay wildfire damage claims pending a California Public Utilities Commission ("CPUC") determination of whether or not those claims are appropriate for cost recovery, and (ii) potentially broaden utilities' ability to recover wildfire-related costs from ratepayers. The liquidity-only fund could be capitalized by utility investors and ratepayers and would then be available to provide funds for utilities to pay claims after a determination of cause and before a determination of cost recovery by the CPUC. The idea here is to provide financing to bridge the potentially lengthy gap between the time utilities must pay wildfire liability claims and when the CPUC makes a decision on cost recovery.
2. **Changing Strict Liability to a Fault-Based Standard.** This concept would involve modification of California's strict liability standard under inverse condemnation to one based on fault to balance the need for public improvements with private harm to individuals. The Strike Force

Report argues that moving to a fault-based standard for inverse condemnation claims would shift the risk of property loss to insurance companies and uninsured or underinsured property owners in cases where the utility was not a bad actor. However, where the utility acted negligently, recklessly, or with intentional misconduct, it would still be responsible for paying damages, including possible punitive damages. Notably, the Strike Force Report does not outline what such a law would look like or how such a change would be accomplished, although Governor Newsom hinted at addressing wildfire liability under the “common enemy doctrine,” which has typically been limited to inverse condemnation flooding claims against flood control districts. Governor Brown’s original proposed legislation that ultimately became [Senate Bill 901](#) (Dodd, 2018) (“SB 901”) last year had a somewhat similar concept to move away from the strict liability standard for wildfire-related inverse condemnation claims, but there was significant push-back and the concept was ultimately abandoned. There are also questions about whether such legislation would be constitutional without going through the process of a constitutional amendment.

3. **Wildfire Fund.** This concept would create a wildfire fund coupled with a revised cost recovery standard to spread the cost of catastrophic wildfires more broadly among stakeholders. The Strike Force Report explains that the wildfire fund would create a buffer to absorb a significant portion of the wildfire liability costs that might otherwise be passed on to ratepayers under existing law while providing time for mitigation efforts to be advanced. The wildfire fund would also provide the utilities a source of immediate funding for the claims asserted against them for catastrophic wildfire damages, and would ensure prompt payment of those claims in exchange for a cap on recovery by impacted property owners or their insurers. As proposed in the Strike Force Report, the wildfire fund would include pooled capital from investor-owned electrical utilities, and municipally-owned utilities may participate at their option.

Additionally, the Strike Force Report argues that the current structure of the CPUC does not allow it to effectively address wildfire safety and be nimble in today’s changing energy market. Therefore, the Strike Force Report proposes the following recommendations aimed at strengthening utility regulation at the CPUC:

1. **Expand safety expertise** by improving the CPUC’s ability to review wildfire mitigation plans, conduct inspections and audits, and enforce safety standards at investor-owned utilities.
2. **Clarify cost recovery standards** by setting clear guidelines for when utilities can pass on the costs of claims from wildfire damage to ratepayers.
3. **Improve decision-making** by overhauling procedures, delegating more decisions to technical staff so that judges and commissioners focus on core questions of rate-setting, and improving enforcement.
4. **Review high-risk industry regulatory models** and explore options for incorporating the latest climate impact research, in concert with the Governor’s Office of Planning & Research, as well as academic and industry experts in risk reduction.

In parallel with the Governor’s strike force, the [Commission on Catastrophic Wildfire Cost and Recovery](#), has also been analyzing issues relating to catastrophic wildfires and is expected to build upon the Strike Force Report and issue its own set of recommendations to the Governor and the Legislature by July 1, 2019. The Commission on Catastrophic Wildfire Cost and Recovery was established last year in SB 901 and recently put out a [Request for Comment](#) on various wildfire-related topics in advance of its upcoming April 29, 2019 meeting.

The Strike Force Report announces several immediate next steps across a broad range of state agencies, reflecting the far-reaching consequences of catastrophic wildfires. The Commission on Catastrophic Wildfire Cost and Recovery, the Legislature, and the Governor’s strike force will continue working over the next few months to develop a solution for consideration by the Governor

and the Legislature that most effectively addresses wildfire liability.

California Eminent Domain Report

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