

**LEGAL ISSUES CONFRONTING
WATERSHED PROJECT
SPONSORS**

CAPACITY BUILDING WORKSHOP

June 25, 2003
Albuquerque, New Mexico

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General Rules of Liability

Dam ownership may carry with it significant legal responsibilities. The owner is generally responsible for maintaining the dam in a safe condition. The owner is generally liable for flood damage incurred to upstream properties by the storage of floodwaters and is responsible for the damage caused by the sudden release of stored water from a failure of the dam or the intentional rapid draining of the impoundment.

Liability may be imposed on a dam owner if the owner fails to maintain, repair or operate the dam in a safe and proper manner. This liability may extend not only to the owner, but also to any company that possesses the dam or to any person who operates or maintains the dam. Even prior defects in a dam's structure might not absolve a subsequent owner of liability if the defect was one that could have been remedied by the exercise of reasonable care by the new owner.

Types of Liability

Personal Injury

Dams and impoundments are popular places, even if located in remote places. Employees, contractors, invited visitors and trespassers may visit a dam site. The presence of these people creates the potential for personal injury to occur. Insurance will cover the first three categories of people, but the trespasser presents unique problems.

Most trespassers who are at a dam site are members of the public who wish to use the site for fishing, boating or swimming or other recreational use. While generally they

mean no harm, their unauthorized use of the site is an issue of serious concern to the dam owner.

As we said earlier, the dam owner is generally responsible for keeping the premises safe. This means that the owner must maintain the site so as not to permit conditions or conduct likely to injure any person INCLUDING trespassers. If a dam owner knows of an unsafe condition, the owner must take steps to remediate the condition and/or post warnings of the condition.

Owners are charged with greater responsibility when the trespassers are children. The theory of attractive nuisance has placed increased burdens on owners where their site becomes an attractive area for children to congregate and play. Children are presumed not to appreciate the dangers posed by the dam site and the owner is under increased responsibilities to protect children for dangerous conditions. Essentially, the owner is required to anticipate that the dam site will be attractive to children and to take steps (beyond mere signage) to protect children. This may require extensive fencing or other means of preventing unauthorized entry into the site.

Operational Injuries

Dams by their nature are designed to impound water. Consequently, the dam owner must be cognizant of the rights and obligations it has to both upstream and downstream users of the water. The major concern is the responsibility to avoid negligent flooding.

In times of high runoff, the owner must assess the effects of operation, which alter prevailing conditions. Increasing discharge may create flooding downstream. Decreasing discharge may protect downstream property, but cause flooding or other damage

upstream. The owner must always consider the maximum discharge capacity of the structure relative to prevailing hydrologic conditions and weather forecasts.

Theories of liability

Strict Liability

This theory of liability has its origins in the old English case of *Rylands v. Fletcher*. In this case, a dam and reservoir were constructed by the defendants on a parcel of property with the owner's permission. A shaft gave way and caused the impounded water to destroy the plaintiff's property. The Kings Bench in England ruled that when one brings onto his land and keeps there anything likely to do mischief, if it escapes, and it is a non-natural use of the land, he must keep it at his peril. This theory has been expanded to include situations where an owner keeps something on his land that is a dangerous instrumentality, if it escapes and does damage; the owner is strictly liable to the plaintiff for the damages incurred. The basis for this theory is the risk of harm and the potential magnitude of that harm.

Factors to be considered when applying strict liability:

- a) Degree of risk
- b) Potential gravity of the harm should the risk materialize
- c) Exercise of reasonable care
- d) Whether the action or instrumentality is of common usage
- e) The appropriateness of the activity to the locality
- f) The value of the activity to the community

Negligence

The most common theory of recovery in tort litigation. Negligence is generally defined in terms of a failure to exercise the standard of care that a reasonable person would exercise under similar circumstances. Liability is based upon a duty on the part of the owner to exercise reasonable care as well as the foreseeability of the risk to the plaintiff.

Therefore the analysis is to balance the foreseeability of the risk against the notion of how a reasonable person in similar circumstances would act, taking into account the magnitude of the risk and available alternatives.

Negligence can take the form of affirmative actions or forbearance or failure to act.

AS TO THE FEDS

Federal Tort Claims Act: 28 USC § 1346(b)(1)

Subject to the provisions of chapter 171 of this title, the district courts. . . shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

Case law

Because the basic purpose of the Federal Tort Claims Act is to subject the United States to tort liability under state law to the same extent as private individuals, state law thus governs both creation of liability and effect under FTCA of purported release of liability. *Reo v. U.S. Postal Service* 98 F.3d 73 (3d Cir. 1996)

United States cannot be held strictly liable under FTCA. *Duff v. U.S. by and through U.S. Air Force* 829 F. Sup.. 299 (D. ND 1992)

See Also: *Chicago & Northwestern Railway Company v. Tyler* 482 F.2d 1007 (8th Cir. 1973)

On the night of 6/9/71 the area affected suffered an extremely heavy downpour of rain. It was characterized by one person as a hundred year event. As a result, there was widespread flooding in the area, including flooding from the Tyler dam which was breached. This was a private dam build for the purpose of controlling erosion. A jury verdict for the defendant was appealed.

Railroad argued that there was absolute liability on defendants part under the theory of *Rylands v. Fletcher* 3 H.&C. 774, 159 Eng. Rep. 737 (1865). That one who keeps upon his premises a dangerous instrumentality such as was involved in this case, in such a location that it could and in all probability would, in some instances, get out of his control and cause damages,. Is absolutely liable therefore, and that he must so use his own property and instrumentalities as not to damage others, and failing to do so, he becomes liable for all damages ensuing such failure, or in this instance breach of the dam.

The Court denied the argument that the rule in *Rylands* applied to Tyler relying on *Turner v. Big Lake Oil Co.* 96 SW 2d 221 (1936) storage of water in an area of sparse rainfall is a natural or necessary and common use of the land and therefore not unreasonably dangerous.

The same theories of liability prevail in New Mexico, but there is an additional area on consideration when imposing liability on governmental entities.

New Mexico Tort Claims Act

I. The Tort Claims Act applies ONLY to governmental entities. [Analyze whether you are a governmental entity.]

41-4-3. Definitions.

As used in the Tort Claims Act [41-4-1 to 41-4-27 NMSA 1978]:

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B. "governmental entity" means the state or any local public body as defined in Subsections C and H of this section;

C. "local public body" means all political subdivisions of the state and their agencies, instrumentalities and institutions and all water and natural gas associations organized pursuant to Chapter 3, Article 28 NMSA 1978; [3-28-1 to 3-28-22]

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F. "public employee" means any officer, employee or servant of a governmental entity, excluding independent contractors except for individuals defined in Paragraphs (7), (8), (10) and (14) of this subsection, or of a corporation organized pursuant to the Educational Assistance Act [21-21A-1 to 21-21A-23 NMSA 1978] or the Mortgage Finance Authority Act [Chapter 58, Article 18 NMSA 1978] and including:

(1) elected or appointed officials;

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(3) persons acting on behalf or in service of a governmental entity in any official capacity, whether with or without compensation;

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G. "scope of duties" means performing any duties that a public employee is requested, required or authorized to perform by the governmental entity, regardless of the time and place of performance; and

H. "state" or "state agency" means the state of New Mexico or any of its branches, agencies, departments, boards, instrumentalities or institutions.

II. General Rule of Immunity

41-4-4. Granting immunity from tort liability; authorizing exceptions.

A. A governmental entity and any public employee while acting within the scope of duty **are granted immunity from liability for any tort except as waived by the New Mexico Religious Freedom Restoration Act [28-22-1 to 28-22-5 NMSA 1978] and by Sections 41-4-5 through 41-4-12 NMSA 1978.** Waiver of this immunity shall be limited to and governed by the provisions of Sections 41-4-13 through 41-4-25 NMSA 1978, but the waiver of immunity provided in those sections does not waive immunity granted pursuant to the Governmental Immunity Act [41-13-1 to 41-13-3 NMSA 1978].

B. Unless an insurance carrier provides a defense, a governmental entity shall provide a defense, including costs and attorney fees, for any public employee when liability is sought for:

- (1) any tort alleged to have been committed by the public employee while acting within the scope of his duty; or
- (2) any violation of property rights or any rights, privileges or immunities secured by the constitution and laws of the United States or the constitution and laws of New Mexico when alleged to have been committed by the public employee while acting within the scope of his duty. [Civil Rights claims]

C. A governmental entity shall pay any award for punitive or exemplary damages awarded against a public employee under the substantive law of a jurisdiction other than New Mexico, including other states, territories and possessions and the United States of America, if the public employee was acting within the scope of his duty.

D. A governmental entity shall pay any settlement or any final judgment entered against a public employee for:

- (1) any tort that was committed by the public employee while acting within the scope of his duty; or
- (2) a violation of property rights or any rights, privileges or immunities secured by the constitution and laws of the United States or the constitution and laws of New Mexico that occurred while the public employee was acting within the scope of his duty.

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F. Nothing in Subsections B, C and D of this section shall be construed as a waiver of the immunity from liability granted by Subsection A of this section or as a waiver of the state's immunity from suit in federal court under the eleventh amendment to the United States constitution.

The Judicial power to the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

G. The duty to defend as provided in Subsection B of this section shall continue after employment with the governmental entity has been terminated if the occurrence for which damages are sought happened while the public employee was acting within the scope of duty while the public employee was in the employ of the governmental entity.

H. The duty to pay any settlement or any final judgment entered against a public employee as provided in this section shall continue after employment with the governmental entity has terminated if the occurrence for which liability has been imposed

happened while the public employee was acting within the scope of his duty while in the employ of the governmental entity.

III. Other grants of Immunity

All community ditches or acequias and all associations created pursuant to the Sanitary Projects Act [Chapter 3, Article 29 NMSA 1978] are hereby excluded from the waiver of immunity of liability under Sections 41-4-6 through 41-4-12 NMSA 1978.

IV. Exceptions to Immunity

41-4-6. Liability; buildings, public parks, machinery, equipment and furnishings.

The immunity granted pursuant to Subsection A of Section 41-4-4 NMSA 1978 does not apply to liability for damages resulting from bodily injury, wrongful death or property damage caused by the negligence of public employees while acting within the scope of their duties in the operation or maintenance of any building, public park, machinery, equipment or furnishings. Nothing in this section shall be construed as granting waiver of immunity for any damages arising out of the operation or maintenance of works used for diversion or storage of water.

41-4-8. Liability; public utilities.

A. The immunity granted pursuant to Subsection A of Section 4 [41-4-4 NMSA 1978] of the Tort Claims Act does not apply to liability for damages resulting from bodily injury, wrongful death or property damage caused by the negligence of public employees while acting within the scope of their duties in the operation of the following public utilities and services: gas; electricity; water; solid or liquid waste collection or disposal; heating; and ground transportation.

B. The liability imposed pursuant to Subsection A of this section shall not include liability for damages resulting from bodily injury, wrongful death or property damage:

- (1) caused by a failure to provide an adequate supply of gas, water, electricity or services as described in Subsection A of this section; or
- (2) arising out of the discharge, dispersal, release or escape of smoke, vapors, soot, fumes, acids, alkalis, toxic chemicals, liquids or gases, waste materials or other irritants, contaminants or pollutants into or upon land, the atmosphere or any watercourse or body of water.

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***City of Albuquerque v. Redding* 93 N.M. 757, 605 P.2d 1156 (1980)----- [§41-4-8]**

Redding sued the City for injuries sustained when her bicycle tire slipped through a drain grate located in the road throwing her from her bike. The City moved for summary judgment alleging it was immune from suit. Court on its own raised the immunity issue under §41-4-8 that provides a waiver of immunity for the operation of solid or liquid waste collection systems. The court held that the storm sewer grate served no other purpose than to afford disposal of waste water, silt and debris from the roadbed of the street, and therefore was part of a solid or liquid waste collection system for which immunity was waived.

This remained the law for 15 years

***Noriega v. Stahman Farms and Elephant Butte Irrigation District*, 113 N.M. 441 827 P.2d 156 (Ct. App. 1992)-----[§41-4-6]**

Plaintiffs brought suit alleging personal injuries to their son as a result of falling into an irrigation ditch that was partially obscured by an overgrowth of vegetation, and for failing to install warning signs and/or fencing around defendant's facilities. Trial court dismissed [case against EBID] on the grounds of sovereign immunity.

Court of Appeals held that EBID was a local public body and governmental entity as defined in the Tort Claims Act and entitled to immunity under §1-4-6. Court held that the irrigation ditch was a part of the operation and maintenance of a work for the diversion and storage of water, and that EBID was entitled to immunity from suit.

***Expander v. City of Albuquerque* 115 N.M. 241, 849 P.2d 384 (Ct. App. 1993)---
§§41-4-6 and 41-4-8**

Plaintiffs sued the city for property damage to their property caused by water that overflowed a city arroyo. City claimed immunity under §41-4-8. City claimed the arroyo was a part of a storm drainage system and was never designed or used for nor part

of a utility for liquid waste diversion or disposal. City further claims immunity under §41-4-6.

The court took the strained view [in my opinion that §41-4-6 did not apply because the second sentence of that section [which re-instates immunity] should be interpreted as preserving immunity with respect to damages arising out of the operation or maintenance of works used for diversion or storage of water **in public parks and on the grounds of public buildings**. Therefore immunity would be granted for arroyos running through city parks but not for diversion channels in general.

As to the immunity granted in §41-4-8, the court reasoned that although water is included in the word “liquids”, they believed that the word “liquid” was modified by the word “toxic” in that section, thereby granting immunity for the discharge, dispersal or release of “toxic liquids” and not storm water runoff. Furthermore, in following *Redding*, the court found that works for the collection of water runoff are part of a public utility or service for which immunity has been waived.

***Bell v. NM Interstate Stream Commission* 117 N.M. 71, 868 P.2d 1296 (Ct. App. 1993)** [§41-4-6]

Plaintiff was injured while swimming at Ute Lake State Park. Defendants argued that sovereign immunity had not been waived pursuant to §41-4-6. The lake and surrounding areas are owned by the Stream Commission. The NM Park and Recreation Division leased the park for “recreational purposes and for no other purpose.” This means, swimming, diving, boating, fishing and other recreational activities.

The immunity is not waived under §41-4-6 where damages arise out of the “operation or maintenance of works used for diversion or storage of water. The court decided that the word “used” in the statute means that the current use of the facility must be considered in determining whether immunity has been waived.

Despite the fact that the original use of the property was for the diversion or storage of water, there is no evidence to suggest that the park was used for the diversion

or storage of water at the time of the accident. The evidence shows to the contrary that at the time of the accident the park was used for swimming, diving, boating, fishing and other recreational activities.

***Allocca v. NM Department of Energy* 118 NM 668, 884 P.2d 824 (Ct. Ap.. 1994)**

[§41-4-6]

Plaintiff was injured while boating on Conchas Lake, which was formed after building Conchas Dam across the Canadian River as an irrigation and flood control project. Defendant claimed sovereign immunity for the operation of a works that was used for the diversion or storage of water. Contrary to the facts in ***Bell v. NM Interstate Stream Commission***, defendants in this case presented evidence that Conchas Lake is an irrigation and flood control project used for the diversion or storage of water. In accord with ***Espander***, Conchas Lake is a work for the diversion or storage of water which is part of a park.

***Bybee v. City of Albuquerque* 120 NM 17, 896 P.2d 1164 (Ct. App 1995)--§41-4-6**

Plaintiff was injured when he fell in a water filled drainage ditch that ran through Academy Hills Park. The purpose of the ditch was to collect runoff from the hilly regions and deliver then to a larger diversion channel. Plaintiff argued the facts of ***Espander*** that runoff was liquid waste and that the system of collecting runoff was a public utility for which immunity has been waived.

The Court reversed itself and held that surface water runoff is not liquid waste and that the system of diversion channels is not a public utility; expressly overruling ***Redding*** and ***Espander***.

Nevertheless, the court held on to the artificial requirement that the diversion or storage of water also take place within the confines of a park or building. It held that immunity would have been waived for the negligent operation of a park, but not for the negligent operation of a work for the diversion or storage of water, which is part of a park.