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STATE OF WASHINGTON

Case No. 30270-9-III

COURT OF APPEALS, STATE OF WASHINGTON
DIVISION III

JACKASS MT. RANCH, INC., and
DAVID and AMI MacHUGH, d/b/a
JACKASS MT. RANCH,

Appellants,

vs.

SOUTH COLUMBIA BASIN IRRIGATION DISTRICT,
et al.,

Respondents.

BRIEF OF RESPONDENT

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TABLE OF CONTENTS

	<u>Page</u>
I. INTRODUCTION	1
II. RESPONDENTS' STATEMENT OF THE CASE	2
A. The Creation, Design, Construction, and Ownership of the Columbia Basin Project	2
B. Repayment Contract	4
C. Red Zone	6
D. Drainage Responsibilities and Federal Response to Address Raises In Groundwater	7
E. 2006 Landslide	8
F. The Appellants Failed to Present a Scintilla of Evidence to Support Their Claim That the Respondent Was Negligent	8
III. ARGUMENT	10
A. Inverse Condemnation	10
B. Appellant's Claim Against SCBID For Inverse Condemnation as Related to the "Creation/Construction" of the Irrigation System Must be Denied	14
C. Appellant's Claim Against SCBID For Inverse Condemnation as Related to the "Operation and Maintenance" of the Irrigation System Must Be Denied	19

	<u>Page</u>
D. As a Subsequent Purchaser Appellants' Claim is Barred Because SCBID Did Not Undertake Any New Action Causing a Measurable Decline in Market Value	30
E. The Proper Forum For this Claim is in the U.S. Court of Federal Claims	40
F. Res Ipsa Loquitur	44
G. Negligence	50
H.. Nuisance and Trespass	56
I. The Operation of an Irrigation District is Not an Ultra-Hazardous Activity Giving Rise to a Claim of Strict Liability Under Washington Law	62
IV. CONCLUSION	62

TABLE OF AUTHORITIES

Table of Cases

Washington Cases:	<u>Page</u>
<u>Bodin v. City of Stanwood</u> , 79 Wn. App. 313, 318, 901 P.2d 1065, 79 Wn. App. 313, 901 P.2d 1065 (1995)	18, 57
<u>Boitano v. Snohomish County, et al.</u> , 11 Wn.2d 664, 120 P.2d 490 (1941)	13, 19
<u>Borden v. City of Olympia</u> , 113 Wn. App. 359, 373, 53 P.3d 1020 (2002)	59
<u>Clark v. Icicle Irrigation Dist.</u> , 72 Wn.2d 202, 432 P.2d 541 (1967)	51, 59
<u>Coverly v. W. Tank Lines</u> , 36 Wn.2d 381, 218 P.2d 322 (1950)	44
<u>Curtis v. Lein</u> , 169 Wn.2d 884, 894, 239 P.3d 1078 (2010)	47
<u>Dalton v. Selah Water Users' Ass'n</u> , 67 Wash. 589, 122 Pac. 4 (1912)	51, 59
<u>Douglas v. Bussabarger</u> , 73 Wn.2d 476, 482, 438 P.2d 829 (1967)	44
<u>Gaines v. Pierce County</u> , 66 Wn. App. 715, 726, 834 P.2d 631 (1992)	21, 25, 28
<u>Halverson v. Skagit County</u> , 139 Wn.2d 1, 983 P.2d 643 (1999)	21, 22, 24, 25, 28
<u>Highline School Dist. No. 401 v. Port of Seattle</u> , 87 Wn.2d 6, 548 P.2d 1085 (1976)	13, 36, 58

Washington Cases (con't):	<u>Page</u>
<u>Hogland v. Klein</u> , 49 Wn.2d 216, 219, 298 P.2d 1099 (1956)	44
<u>Hoover v. Pierce County</u> , 79 Wn. App. 427, 903 P.2d 464 (1995)	13, 14, 31, 32, 36
<u>Horner v. N. Pac. Beneficial Ass'n Hosps., Inc.</u> , 62 Wn.2d 351, 359, 382 P.2d 518 (1963)	46
<u>Kemalyan v. Henderson</u> , 45 Wn.2d 693, 702, 277 P.2d 372 (1954)	44
<u>Kitsap County v. Allstate Ins. Co.</u> , 136 Wn.2d 567, 592, 964 P.2d 1173 (1998)	57
<u>Lambier v. City of Kennewick</u> , 56 Wn. App. 275, 783 P.2d 596 (1989)	12, 14
<u>Longmire v. Yelm Irrigation Dist.</u> , 114 Wash. 619, 195 Pac. 1014 (1921)	51, 54, 59
<u>Martin v. Port of Seattle</u> , 64 Wn.2d 309, 320, 391 P.2d 540 (1964), <i>cert denied</i> , 379 U.S. 989, 85 S. Ct. 701, 13 L.Ed.2d 610 (1965)	11
<u>Miller v. Kennedy</u> , 91 Wn.2d 155, 159-60, 558 P.2d 734 (1978)	44
<u>Morin v. Johnson</u> , 49 Wn.2d 275, 281, 300 P.2d 569 (1956)	58
<u>Morner v. Union Pac. R.R. Co.</u> , 31 Wn.2d 282, 196 P.2d 744 (1948)	45, 47, 50
<u>Pacheco v. Ames</u> , 149 Wn.2d 431, 69 P.3d 324 (2003)	44

Washington Cases (con't):	<u>Page</u>
<u>Paulson v. Pierce County</u> , 99 Wn.2d 645, 654-655, 664 P.2d 1202 (1982)	25
<u>Petersen v. Port of Seattle</u> , 94 Wn.2d 479, 483, 618 P.2d 1085 (1976)	36
<u>Phillips v. King County</u> , 136 Wn.2d 946, 968 P.2d 871 (1998)	13, 17, 18, 23, 24
<u>Rains v. Washington Dept. of Fisheries</u> , 89 Wn.2d 740, 743-44, 575 P.2d 1057 (1978)	17
<u>Riblet v. Spokane-Portland Cement Co.</u> , 41 Wn.2d 249, 254, 248 P.2d 380 (1952)	58
<u>Robillard v. Selah-Moxee Irrigation District</u> , 54 Wn.2d 582, 343 P.2d 565 (1959)	51, 58, 59
<u>Seal v. Naches-Selah Irrigation Dist.</u> , 51 Wn. App. 1, 751 P.2d 873 (1888)	58, 59, 60
<u>State v. Sherrill</u> , 13 Wn. App. 250, 257, 534 P.2d 598, <i>review denied</i> , 86 Wn.2d 1002 (1995)	31, 35
<u>State of Washington v. Williams</u> , 12 Wn.2d 1, 120 P.2d 496 (1941)	12, 14
<u>Stephens v. Omni Insurance Co.</u> , 138 Wn. App. 151, 183, 159 P.3d 10 (Div. 1, 2007)	26
<u>Tinder v. Nordstrom, Inc.</u> , 84 Wn. App. 787, 792, 929 P.2d 1209 (1997)	50
<u>Walla Walla v. Conkey</u> , 6 Wn. App. 6, 17, 492 P.2d 589 (1971), <i>review denied</i> , 80 Wn.2d 1007 (1972)	32, 39

Washington Cases (con't):	<u>Page</u>
<u>Wong Kee Jun v. City of Seattle</u> , 143 Wash. 479, 255 Pac. 645, 52 A.L.R. 625 (1927)	12, 14
<u>Zukowsky v. Brown</u> , 79 Wn.2d 586, 592 488 P.2d 269 (1971)	44, 46

Other Jurisdictions:

<u>Barnes v. United States</u> , 210 Ct. Cl. 467, 538 F.2d 865 (1976)	43
<u>Nahl v. Alta Irrigation District</u> , 23 Cal. App. 333, 137 Pac. 1080	51
<u>North Sterling Irrigation District v. Dickman</u> , 59 Colo. 169, 149 Pac.97, Ann. Cas. 1916, 973	51
<u>Richards v. United States v. Stone Corral Irrigation Dist.</u> , 282 P.2d 901, 152 Ct. Cl. 225 (1960)	40
<u>Riddock v. City of Helena</u> , 212 Mont. 390, 687 P.2d 1386 (1984)	31
<u>United States v. Kansas City Life Ins. Co.</u> , 339 U.S. 799, S. Ct. 885, 94 L.2d 1277 (1950)	43

Statutes

RCW 89.12.050(2)	10
RCW 7.48.120	57
RCW 7.48.160	57

Other Authorities

	<u>Page</u>
30 C.J.S., <i>Eminent Domain</i> § 390 (ed. 1965)	31
29A C.J.S., <i>Eminent Domain</i> , § 383 (ed. 1992)	31
Const. art. 1, § 16 (amend. 9)	11
<u>Nichols on Eminent Domain</u> , § 5.01[4] (ed. 1995)	31
<u>Restatement (2d) of Torts</u> , § 8A (1965)	60
W. Prosser, <i>Torts</i> § 42 at 244 (4 th ed. 1971)	18

I. INTRODUCTION

In their Brief seeking a reversal of the well-reasoned opinion of the Honorable Judge Mitchell, the Appellants set forth the written factual portion of the trial court verbatim, and then rather than provide this Court with a “fair statement of the facts,” as required by RAP 10.3(a)(5), chose to cherry pick singular facts and present them out of context to the record presented to the trial court. In addition, the Appellants have inappropriately impregnated their Statement of Facts with what can only be described as Argument of Counsel and raised numerous arguments never presented to the trial court. In short, the Respondent would respectfully submit that the Appellants have distorted the record, made innumerable assumptions, and then represented those assumptions as fact in hopes of misdirecting this Court to an erroneous decision that an illusory question of material fact does exist warranting a reversal and trial in this matter.

In response, the Respondent will present a summary of the entire record from which the trial court drew its findings of fact and from which it based its application of the prevailing law of this state. Due to restraints on length, the Respondent would incorporate its Statement of Facts contained in its Memorandum of Authorities in Support of Summary Judgment and its Reply Memorandum of

Authorities; both containing an exhaustive discussion of all material facts.

II. RESPONDENT'S STATEMENT OF THE CASE

A. The Creation, Design, Construction and Ownership of the Columbia Basin Project. The Columbia Basin Project is located in central Washington and was constructed for the purpose of providing water for agricultural irrigation onto 1,029,000 acres of semiarid land (CP 1129-1143). Its creation can be traced to the enactment of the Rivers and Harbors Act of August 30, 1935 (49 Stat. 1028, 33 U.S.C. 540), the Act of 1943 (57 Stat. 14, 16 U.S.C. 835 *et seq.*), which provided that the Project would be governed by the Reclamation Act of 1902 (43 U.S.C. 371 *et seq.*). The Project is divided into three irrigation districts charged with the responsibility of operating and maintaining the Bureau of Reclamation facilities as designed and constructed by the United States; one of which is the South Columbia Irrigation District (CP 427-436).

To more fully appreciate the exclusive role of the United States in the creation , design, and construction of the project, one must examine the 1945 Feasibility Study (CP 1136-1143). This report demonstrated to Congress the economic feasibility related to the expenditure of funds by the United States would be repaid to the

government by the irrigators and power revenues (33 U.S.C. 540; CP 312-412).

As part of its original design, the United States constructed the Ringold Wasteway to carry emergency and operational water from the Potholes Canal to a location on the edge of the White Bluffs where it was returned to the Columbia River down a 350-foot box flume (CP 473-478, CP 249-277). The Bureau designed and constructed this flume on the south edge of an ancient landslide that became reactivated shortly after water was introduced into the system by the United States, and prior to the transfer of O&M responsibilities to the Respondent (CP 474, CP 428-429).

In response, the United States unilaterally made the decision to dike the Ringold Wasteway at its west end, redesign it, and re-contour its gravitational flow back to the east away from the river (CP 249-247, CP 267). The United States entered into a private contract and exclusively oversaw the construction; again prior to entering into the repayment contract with the Respondent (CP 428-429).

The Ringold Wasteway, as redesigned and reconstructed, was subsequently included as a "transferred work" as defined in the Repayment Contract, which meant the United States retained

ownership and unrestricted authority to inspect, continuously evaluate O&M procedures of the Respondent, and authority to modify the wasteway's design as the United States deemed necessary (CP 312-412). At no time since the execution of the Repayment Contract has the United States ever determined that the Respondent has failed to meet its O&M standards, including the total elimination of unpreventable seepage under the Bureau's design (CP 475).

B. Repayment Contract. No single document is more instructive as to the legal issues presented for review than the Repayment Contract between the United States and the SCBID. The Respondent cannot overemphasize the need for this Court to review the entire contract with special focus on the Articles cited by both Appellants and Respondent (CP 312-412). Within the four corners of this contract, this Court will be educated on the legal rights, duties, and the true relationship between the United States and the SCBID; one which is unilateral and not a joint venture as argued by Appellants.

The Repayment Contract confirms that it was the United States who created the land classification system, determined which land would receive water, and the amount of water that each unit would be entitled to (CP 322, 324, CP 333-338). As to drainage, which was a

recognized concern of the Bureau, it was its responsibility to determine whether drainage works were necessary or economically feasible, and if both criteria were present, to be exclusively responsible for the design and construction of drainage systems (CP 325-330). This is precisely what took place adjacent to the Ringold Wasteway (CP 429-430). The contract provides that not only does title to the transferred works stay with the United States, but in addition thereto, the United States retained ownership over all waters delivered to the farmers, return flows, and recharging groundwater supplies deposited in the Columbia River (CP 429-430, CP 435-436; CP 360-362).

Pursuant to Sections 16(a) through 18(a), the United States transferred responsibility for O&M to the SCBID, retaining exclusive title to each of the facilities; including the Ringold Wasteway (CP 435). Should the United States ever find the Respondent was not meeting the government's standard of care for O&M, it had authority to reassume responsibility for O&M (CP 475).

As it relates to the water service contract pursuant to which landowners purchased water directly from the United States, the Respondent was only responsible for the administrative function of

delivering the water (CP 374). Only the Secretary of the Interior can alter the water contract administered by the SCBID (*Id*).

C. **The Red Zone**. From the inception of the project, the United States was aware of the soil composition, erosion characteristics, and danger of landslides in the White Bluffs, including the land of the Appellants (CP 414-418). In response, the Bureau created what was to become known as the Red Zone which was divided into three sections (CP 414-423). This land was designated not suitable for irrigation, including that where the Ringold Wasteway was constructed, Mr. Conrad's property, and the site where the subject landslide occurred (CP 373-374). For reasons assumed to be both political and economic, the United States adjusted the lines of the Red Zone, and with full knowledge of the risk of landslides, determined it would provide water through its system to landowners adjacent to the White Bluffs (CP 312-412).

In their Brief to the Court, the Appellants suggest for the first time that the Repayment Contract created a joint venture between the United States and the SCBID. This total mischaracterization is evidenced by additional provisions of the contract. Under Article 48, Accomplishment of Addition Work, the federal government has sole discretion to determine and control any modification, alteration, or

construction beyond those listed in the transfer report (CP 396). While the government is to “discuss” changes with the District, it is in no way bound by the District’s input. Note also Appellants made no effort to support this assertion with any form of discovery.

In addition, under Article 18, Care of Works Transferred, the United States retained exclusive control over any final decision to modify the transferred facilities (CP 352). Under Article 58, Administration, the contract provides for “consultation” but not a relinquishment of final decision making authority (CP 402).

D. Drainage Responsibilities and Federal Response to Address Raises in Groundwater. As noted above, all problems and decisions related to drainage were addressed solely by the United States prior to the execution of the Repayment Contract (CP 438-441). This included the movement of water by way of seepage, which was recognized as inevitable (CP 442, CP 443-44-460, CP 475-478).

Respondent would direct this Court to Article 7, Drainage Works, Section 7(a) which states that this responsibility is retained exclusively by the United States (CP 330). Additionally, one must remain mindful of the undisputed fact that the United States retained control and ownership over all wastewater, seepage, and return Flows into the Columbia River (CP 462). Therefore, any seepage from the

Ringold Wasteway is the property of the United States (*Id.*). Moving on, under Article 25, Delivery of Water, it is the United States and not the Respondent who is authorized to determine who gets water and how much (CP 462-463). The Respondent has a legal duty to deliver that water to the land as pre-determined by the United States (*Id.*). Again, to keep all of these provisions in context, title to the transferred works has never left the United States (CP 400-401).

E. 2006 Landslide. On June 20, 2006, a landslide occurred depositing soil onto land owned by the Appellants below the White Bluffs and the land farmed by Conrad which lay to the north of the Ringold Wasteway (CP 464). Critical to the legal analysis which follows is the fact that in 1996, prior to the Appellants purchasing this land, a landslide occurred damaging the same property; then owned by Mr. McInturf (CP 462-463). At the time of purchase, McInturf's "Disclosure Statement" identified landslides as a known risk (CP 462-463).

F. The Appellants Failed to Present a Scintilla of Evidence to Support Their Claim That the Respondent Was Negligent. In accordance with the trial court's Case Scheduling Order, Respondent disclosed Robert Montgomery as its designated expert on all issues related to the standard of care for reasonable

O&M practices (CP 577-580). Commensurate with its disclosure duties, Respondent produced Mr. Montgomery's report, and later his affidavit in support of Respondent's Motion for Summary Judgment. In response, the Appellants made no effort to depose this expert, never designated an expert on this subject, made no effort to continue the motion to allow for additional discovery under CR 56(f), and never filed a motion challenging Mr. Montgomery's affidavit. The Appellants now argue that this uncontested expert affidavit is conclusory and that he fails to identify the standard of care (Appellants' Brief at p. 31). Given their total failure to address this obvious issue with retainage of an expert, a deposition, or at least a motion challenging the affidavit, this contention is disingenuous at best.

Mr. Montgomery's affidavit sets forth his educational qualifications, his 28 years of experience as a senior water resources engineer in the field of O&M for water-containing structures, and his vast experience in working with not less than 20 irrigation districts; many of which perform O&M functions pursuant to a repayment contract with the United States (CP 474). Prior to the landslide in question, he had undertaken a complete review of all facilities maintained and operated by the SCBID, and after being retained, revisited and reevaluated the Respondent's practices with special

focus on the Ringold Wasteway (CP 475-476). His analysis included analyzing seepage rates experienced by the Ringold Wasteway as compared to similar structures operated by other districts; particularly those owned by the Bureau, thereby establishing the standard (*Id*). His affidavit unequivocally established that the SCBID's operation and maintenance of the Ringold Wasteway with regards to seepage is less than any other Reclamation facility and even less than those privately owned and operated (CP 476-477).

In summary fashion, Mr. Montgomery opines that seepage is inevitable and unpreventable at some level, the Respondent exceeds the standard of care for irrigators and federally owned projects, that Respondent's practices permit less seepage than that experienced when it took over O&M, and that the seepage effects of farmers' own irrigation practices is double that compared to those facilities operated and maintained by the Respondent (*Id*).

III. ARGUMENT

A. Inverse Condemnation. To begin, tantamount to a proper analysis of this case is the statutory authority contained in RCW 89.12.050(2), which states:

(2) A District may enter into a contract with the United States for the transfer of operations and maintenance of the works of a federal reclamation project, but the contract does not impute to the District

negligence for design or construction defects or deficiencies of the transferred works.

This statutory provision dictates that no liability can be attached to SCBID arising out of the design or construction or other deficiencies of the Ringold Wasteway, including the United States' selection of the type of lining (earthen versus manmade material) by virtue of the District accepting responsibility for the operation and maintenance of the federally owned irrigation system. Additionally, the law governing a claim for inverse condemnation is well settled within Washington State. As has been previously argued and accepted by both sides, "no private property shall be taken or damaged for public or private use without just compensation having been first made . . ." Const. art. 1, § 16 (amend. 9). Thus, a "taking" occurs when government conduct interferes with the use and enjoyment of private property, with a subsequent decline in market value. Martin v. Port of Seattle, 64 Wn.2d 309, 320, 391 P.2d 540 (1964), *cert denied*, 379 U.S. 989, 85 S. Ct. 701, 13 L.Ed.2d 610 (1965).

There is no disagreement as to the definition or technical requirements governing a claim for inverse condemnation. However, what is disputed is whether, based on the specific facts before this Court, the doctrine should apply and liability be imposed against SCBID. Respondent argues that the fact that the U.S. Government

designed, created, constructed, and owns the Columbia Basin Project, including all water and seepage, is central to a proper analysis of this issue. Specifically, the Respondent argues that it should not be held liable for the Ringold Wasteway simply because it accepted the system after construction in order to provide proper maintenance and operation of the irrigation district. Appellants' effort to stretch their claim to allege damage resulting from the maintenance and operation of the irrigation district is nothing more than a red herring; a feeble attempt to draw this Court's attention away from the indisputable fact that any government action which resulted in damage was solely the action of the U.S. Government and cannot be attributed to the SCBID.

Traditionally, inverse condemnation claims have come out of two different fact patterns; either damage and/or injury resulting from design/construction defects (see, Wong Kee Jun v. City of Seattle, 143 Wash. 479, 255 Pac. 645, 52 A.L.R. 625 (1927) (city in its re-grade of streets removed lateral support causing a slide to damage plaintiff's property); State of Washington v. Williams, 12 Wn.2d 1, 120 P.2d 496 (1941) (damage caused by removal of lateral supports causing resulting slide onto plaintiff's property); Lambier v. City of Kennewick, 56 Wn. App. 275, 783 P.2d 596 (1989) (defects in design

and construction of road widening project caused damages to plaintiff's property); Hoover v. Pierce County, 79 Wn. App. 427, 903 P.2d 464 (1995) (county's construction of road and culvert resulted in question of inverse condemnation), or damage and/or injury resulting from operation and maintenance Boitano v. Snohomish County, et al., 11 Wn.2d 664, 120 P.2d 490 (1941) (the constitutional provision applied to damages resulting from the operation of the gravel pit); Highline School Dist. No. 401 v. Port of Seattle, 87 Wn.2d 6, 548 P.2d 1085 (1976) (complaint alleges interference caused by operation of the facility as a whole); Phillips v. King County, 136 Wn.2d 946, 968 P.2d 871 (1998) (county's approval of private development and acceptance of ownership and maintenance does not make county liable for design defect after county accepted project after construction).

Here, the Appellants pled in their amended complaint, filed on July 5, 2007, that damage to the Appellants' property resulted from a landslide which was the "direct and proximate result of the **creation** and **maintenance** of a waterway, to wit: irrigation canal/lagoon, by the South Columbia Irrigation District. . . ." (CP 594.) Thus, for purposes of this inverse condemnation analysis, the proper question is whether a "taking" occurred by SCBID via either

(1) “creation/construction” of the irrigation system; or (2) via SCBID’s “maintenance/operation” of the Ringold Wasteway. Pursuant to the foregoing arguments, SCBID cannot be held liable under the doctrine of inverse condemnation because (1) SCBID did not design/create/construct the irrigation system in question, including the Ringold Wasteway; (2) SCBID’s maintenance and operation of the Ringold Wasteway does not rise to the level of active, proprietary, participation necessary to establish a “taking” under Phillips; and (3) as a subsequent purchaser, the Appellants’ claim is barred because SCBID did not undertake any new actions causing a measurable decline in market value.

B. Appellant’s Claim Against SCBID for Inverse Condemnation as Related to the “Creation/Construction” of the Irrigation System Must be Denied. As noted above, a “taking” can occur and liability may be assessed where the government’s actions via its design/creation/construction results in damage or injury to personal property. See, Wong Kee Jun v. City of Seattle, *supra*; State of Washington v. Williams, *supra*; Lambier v. City of Kennewick, *supra*; Hoover v. Pierce County, *supra*. However, the necessary prerequisite for holding SCBID liable is grossly missing under our

facts; namely, that SCBID designed, constructed, or created the irrigation system in question.

The brief of Appellants contains a “factual background” in which they quote from the trial court’s memorandum and includes the following:

The Columbia Basin Project was established by Congress As originally planned, designed, engineered and constructed **by BuRec** the system operated by SCBID returned water to the Columbia River via what is known as the Ringold Wasteway.

(CP15-16; 473-478.) Appellants’ own recitation of the history of the Ringold Wasteway also highlights the fact that in 1969, the end of the Ringold Wasteway, which emptied out over the White Bluffs and into the Columbia River, was destroyed by a massive landslide. (Appellants’ Brief, p. 4.) In response to this landslide, the federal government, acting through the Bureau of Reclamation, built a dike at the end of the Ringold Wasteway to prevent any future landslides (CP 474). The Bureau of Reclamation also redesigned the wasteway to cause the water to flow back in an easterly direction, away from the bluff, and into a separate facility designated as the PE46A Wasteway. (CP 473-478.) In 1973, the Bureau of Reclamation awarded a contract to J. J. Johnson, Inc., to construct the newly configured Ringold Wasteway (CP 485).

These facts, conceded by the Appellants, demonstrate that the Ringold Wasteway caused a “massive slide” *prior* to SCBID’s involvement with the irrigation system. Thus, it is clear that the proximate cause of the 1969 slide cannot be subscribed to any actions on the part of SCBID. Rather, the sliding was due to the initial plans, designs, engineering, and construction of the irrigation system which was admittedly conducted, in its entirety, by the Bureau of Reclamation. Appellants have even stated that the proximate cause of the 2006 landslide at issue here was “the landslide problem *caused* by the Ringold Wasteway.” (Appellants’ Brief, p. 14.) However, what Appellants have failed to do is present even a scintilla of evidence that the Respondent was responsible for the design/creation/construction of the Ringold Wasteway. This element is necessary to prove that a “taking” occurred for purposes of an inverse condemnation claim. Because Appellants cannot make this showing, Appellants argue, by implication, that SCBID’s acceptance, *i.e.*, “approval” of the Ringold Wasteway, after completion of construction, for purposes of maintenance and operation, somehow creates liability on the part of SCBID for the faulty design and construction of the system as a whole.

Appellants' argument is not unlike that made in Phillips v. King County, 136 Wn.2d 946, 968 P.2d 871 (1998). In Phillips, the plaintiffs tried to argue that the county's approval of a private development made the county liable for the developer's inadequate and defective design of a drainage system which caused damage to landowners. *Id.* at 960. Additionally, Phillips argued that the county's acceptance of ownership and maintenance of the drainage system gave rise to an action for inverse condemnation; however, that argument will be taken up below in the next subsection.

In Phillips, the Washington State Supreme Court refused to extend an action for inverse condemnation where a county 'only regulates development and requires compliance with restrictions. *Id.* at 962. In reaching this decision, the court focused on the fact that each of the cases relied upon by the plaintiffs involved fact patterns where the "municipality was the actor." *Id.* at 964. The court adeptly noted, "[t]he question of when legal liability attaches to one's acts is a policy question, and legal liability is always determined upon the facts of each case upon mixed considerations of logic, common sense, justice, policy, and precedent." *Id.* at 964-65; *citing* Rains v. Washington Dept. of Fisheries, 89 Wn.2d 740, 743-44, 575 P.2d 1057 (1978); *quoting* King v. Seattle, 84 Wn.2d 239, 250, 525 P.2d 228,

235 (1974); see also, W. Prosser, Torts § 42 at 244 (4th ed. 1971). The Supreme Court also noted, “a governmental entity does not become a surety for every governmental enterprise involving an element of risk.” Phillips, 136 Wn.2d at 965, 968 P.2d 871; citing Bodin v. City of Stanwood, 130 Wn.2d 240 (1996).

Instead, the court focused on the ultimate questions of **who is the actor** causing the damage which resulted in the “taking.” *Id.* at 964-65. And, what is the **affirmative action** alleged to have been taken by the actor resulting in the “taking.” *Id.* at 964-65. Here, like in Phillips, the Respondent took no affirmative action which can be said to have “caused” the damage which resulted in the alleged “taking.” The Ringold Wasteway was causing sliding long before the Respondent assumed the operation and maintenance of the irrigation district. The actor responsible for the design/creation/construction and reconstruction of the Ringold Wasteway is the Bureau of Reclamation. Appellants have failed to provide any evidence on the part of SCBID which would establish Appellants’ claim that as “a direct and proximate result of the **creation** . . . of a waterway, to wit: irrigation canal/lagoon, by the South Columbia Irrigation District” their property was damaged and resulted in a “taking.” Appellants have failed to establish that SCBID “created” the Ringold Wasteway which

Appellants allege was the cause of the landslide that damaged their property. Therefore, Appellants' inverse condemnation claim as related to the "creation" of the waterway must be denied.

C. Appellant's Claim Against SCBID For Inverse Condemnation as Related to the "Operation and Maintenance" of the Irrigation System Must Be Denied. While Appellants pled in their amended complaint "creation" of the waterway as a basis for liability, it would appear that even the Appellants came to realize this argument lacked merit; in their briefing before this Court the Appellants state "the MacHughs' claim for inverse condemnation against SCBID is a case based on operation and maintenance, *not* construction or design." (Appellants' Brief, p. 24-25.) Appellants, now recognizing that they are unable to make the necessary showing for an inverse condemnation claim related to faulty design/creation/construction, seek to focus their argument for inverse condemnation via "operation" and "maintenance." While it is true that inverse condemnation has been found in instances involving "operation" and/or "maintenance," the cases cited by Appellants are not applicable under our facts.

The Appellants cite to Boitano v. Snohomish County, 11 Wn.2d 664, 120 P.2d 490 (1941) for the proposition that the Washington

State Supreme Court found a “taking by the County’s operation of a gravel pit.” Thus, the Appellants argue the Respondent’s operation and/or maintenance of the Ringold Wasteway supports recovery by the MacHughs. However, Appellants have previously alleged that the proximate cause of their damages is “seepage” from the wasteway which caused the landslide that ultimately damaged their property. (Appellants’ Brief, p. 28.) Assuming this to be true, seepage from the Ringold Wasteway was occurring long before SCBID took over operations and maintenance. As Robert Montgomery states in his affidavit, “seepage” occurs in all canals from the moment water is introduced (CP 473-478). Thus, the key question is whether the operator limits that “seepage”; a task at which the Respondent excelled (CP 475-478). Therefore, logic, common sense, and justice leads to but one conclusion; SCBID’s operation and maintenance cannot be blamed for the seepage from the Ringold Wasteway.

The burden to establish proximate cause under an “operation” and “maintenance” analysis is no different than that in a faulty design/creation/construction action. Both require participation on the part of a governmental actor “participation *without which the alleged taking or damaging would not have occurred* – which is required under Phillips before liability can attach in this inverse condemnation

action.” Halverson v. Skagit County, 139 Wn.2d 1, 983 P.2d 643 (1999); see, Gaines v. Pierce County, 66 Wn. App. 715, 726, 834 P.2d 631 (1992). The fatal flaw in Appellants’ argument is the total lack of evidence demonstrating any actions on the part of SCBID’s operation and/or maintenance which were the proximate cause of Appellants’ damages. Appellants’ arguments are nothing more than their refusal to accept the reality that the “seepage” from the Ringold Wasteway is not now, and never was, proximately caused by SCBID.

To begin, the record clearly establishes that any “seepage” coming from the Ringold Wasteway is the sole property of the federal government (CP 362). Thus, any of the federally owned “seepage” coming from the Ringold Wasteway is due to the construction of the facility as a whole; a facility the Appellants concede was planned, designed, engineered, constructed, and reconstructed by the federal government. Therefore, it is clear that any “seepage” coming from the Ringold Wasteway pre-dated SCBID’s involvement. Appellants are clearly aware of this fact. Thus, in a feeble attempt to create shared liability for the “seepage” coming from the federally owned Ringold Wasteway, the Appellants seek to *infer* joint “ownership” of the water causing their damages. This argument should be seen for what it is; nothing more than Appellants’ effort to create liability where none can

exist. This concept of “joint and several” liability which the Appellants are trying to covertly get this Court to apply has been clearly rejected by the Washington State Supreme Court in Halverson v. Skagit County, 139 Wn.2d 1, 983 P.2d 643 (1999).

In Halverson, the Supreme Court was faced with a question nearly identical to ours; whether a governmental agency should be jointly and severally liable due to the county’s maintenance and operation of levees which were owned by independent dike districts and which ultimately flooded, causing damage to landowners. *Id.* at 7.

In Halverson, the plaintiffs claimed inverse condemnation and that the county “acted in concert with the diking districts in the maintenance, improvement, and operation of the diking system.” *Id.* at 7-8. Plaintiffs’ expert reviewed the county’s activities on the levee project in the 1980s and 1990s and “concluded that Skagit County performed virtually **every** aspect of the improvement projects, from developing, planning, surveying, preparing grant applications, contracting, paying and assisting in permits.” *Id.* at 10. This involvement by the county the plaintiffs argued was “instrumental in improving the levee system.” *Id.* at 10. However, the Supreme Court was astute enough to recognize that the plaintiffs disguised their

cause of action as one related to maintenance and operation, when in reality their claim rested solely on the theory “that their properties were flooded more severely than they would have been had there been no levees” *Id.* at 10.

In refusing to extend the doctrine of inverse condemnation and liability to the county, the Supreme Court noted that the plaintiffs’ argument was “contrary to established inverse condemnation law recently discussed in Phillips v. King County, *supra*. Relying on Phillips, the Supreme Court reaffirmed their position that the mere approval of a private developer’s drainage plan did not give rise to a cause of action for inverse condemnation due to the lack of affirmative action on the part of the county. *Id.* at 8. Analyzing Phillips, the court reexamined the question of whether assumption of ownership of a development, upon completion of development for purposes of operation and maintenance, creates liability. *Id.* at 9. Again, quoting from Phillips, the Supreme Court noted:

[T]he County and amici cites argue they should not be liable for a design defect in a developer’s system simply because they accept the system after construction in order to provide proper maintenance in the future. We agree. To have a taking some governmental activity must have been the direct or proximate cause of the landowner’s loss.

Id. at 9. Resting on the law developed in Phillips, the Supreme Court reasoned, “[I]t is undisputed that the levee system in this case existed in some form for this entire century. There was no proof in this case that the County designed the levee system.” *Id.* at 9. Thus, the Supreme Court refused to extend the doctrine of inverse condemnation. The Supreme Court was clear that the county’s acceptance of the system after completion of the creation of the levee system did not create liability for the county’s subsequent operation and maintenance of that system. As the Supreme Court stated, “[T]he County’s repairs or improvements, even if a concerted effort with the independent diking districts, do not, as a matter of law, render them liable for the *mere existence* of those levees.” *Id.* at 13. However, the plaintiffs in Halverson, in an effort to get around their “proximate cause dilemma” sought a “novel approach, borrowing a theory of joint and several liability from tort law.” *Id.* at 10-11. This game of semantics was quickly rejected by the Supreme Court. In refusing to apply a tort theory to an inverse condemnation action, the Court said, “[F]urthermore, Plaintiffs’ ‘acting in concert’ theory is entirely inapplicable to this inverse condemnation action. As a result, Plaintiffs fail to state a valid legal theory for imposing liability against the County.” *Id.* at 13. The court reasoned that “acting in concert” tort

theory did not state the correct standard for liability in an inverse condemnation action, as set forth in Phillips. *Id.* at 12-13. Thus, the court held the “‘acting in concert’ standard clearly falls short of the active, proprietary participation – participation *without which the alleged taking or damaging would not have occurred* – which is required under Phillips before liability can attach in this inverse condemnation action.” Halverson, *supra* (emphasis in the original); *citing*, Gaines, 66 Wn. App. at 726, 834 P.2d 631. The court found that even though the county made repairs and improvements as part of its operation and maintenance, and even if in a concerted effort, that did not render it liable. This was because, in essence, the plaintiff’s claim rested on the mere existence of the levees which were owned by an independent party.

Appellants’ argument for a “joint venture” also fails to satisfy the legal requirements necessary for application of a “joint venture” analysis. Specifically, under Washington State case law, “the elements of a joint venture are (1) a contract, express or implied, (2) a common purpose, (3) a community of interest, (4) an equal right to a voice, accompanied by an equal right to control.” Paulson v. Pierce County, 99 Wn.2d 645, 654-655, 664 P.2d 1202 (1982). Under a control theory of vicarious liability, “the right to control is

indispensable.” Stephens v. Omni Insurance Co., 138 Wn. App. 151, 183, 159 P.3d 10 (Div. 1, 2007). Under the Repayment Contract between the United States and SCBID, there are numerous provisions that support the contention that the right to control the transferred works is **not equal** but rather the rights of the United States Government are paramount and the rights of SCBID are subordinate.

Article 48 - Accomplishment of Work (CP 396) establishes that it is within the sole discretion of the United States to determine that works are to be modified, improved, replaced, or constructed beyond those listed in the transfer report. While the United States is obligated to “discuss” this activity with the District, it is not required to agree or otherwise coordinate its decision with the District.

Article 18 – Care of Works Transferred (CP 352) establishes that the District has no independent authority or equal authority with the United States to modify the irrigation works that are transferred to it for care, operation and maintenance.

Article 19 – Keeping Transferred Works in Repair (CP 352-353) demonstrates the United States’ ultimate control over repairs. Article 20 (CP 353) demonstrates the United States’ ultimate control over maintenance, and Article 21 (CP 354-355) authorizes the federal

government to declare the Respondent to be in default if its standards are not met.

The forgoing Articles regarding operation and maintenance clearly show that SCBID is subordinate to the United States relating to the operation and maintenance by the District and any resulting change is within the sole discretion of the United States. Further, any argument related to "Administrative" issues or rules and regulations governing or controlling the maintenance and operation are governed according Article 58 (CP 462) of the Repayment Contract which compels the Respondent to follow the Secretary's rules and regulations. Appellants' argument that the Repayment Contract created a "joint venture" between the Bureau of Reclamation and SCBID via the maintenance and operation of the irrigation and drainage works is not supported in either law or fact. Instead, the 1968 Repayment Contract entered into between the Bureau of Reclamation and SCBID clearly demonstrates that SCBID's position was subordinate to that of the Bureau. Clearly, there is not an equal right to "control" and without that there is no "joint venture."

When one examines the arguments of the Appellants one is left with the same fundamental argument made by the plaintiffs in Halverson. Because the Appellants are unable to make the necessary

showing for an inverse condemnation claim under a design/creation/construction claim, they seek to use the guise of “maintenance and operation.” Unfortunately for the Appellants, what they have either failed to recognize, or refuse to accept, is that the burden to establish proximate cause under an “operation” and “maintenance” analysis is no different than that in a faulty design/creation/construction action. Both require participation on the part of a governmental actor “participation *without which the alleged taking or damaging would not have occurred* – which is required under Phillips before liability can attach in this inverse condemnation action.” Halverson v. Skagit County, 139 Wn.2d 1, 983 P.2d 643 (1999); see, Gaines, 66 Wn. App. at 726, 834 P.2d 631. Here, there is no evidence that SCBID’s operation and maintenance caused, nor increased, the “seepage” which occurred from the time water was first introduced in the irrigation system, and which the Appellants argue caused the landslide and their damages. The seepage and landslides were occurring as far back as 1969, and pre-dates SCBID’s operation and maintenance of the Ringold Wasteway.

Appellants’ “maintenance and operation” argument, like that of the plaintiffs in Halverson, is in essence nothing more than an argument against the mere **existence** of the Ringold Wasteway. The

reality is that the proximate cause of Appellants' damages is the existence of the Ringold Wasteway. For if the Ringold Wasteway did not exist, there would be no "seepage" and it is this "seepage" which allegedly caused the landslide that damaged Appellants' property. Appellants concede this point throughout their lengthy recitation of the history of the Ringold Wasteway which they characterize as "controversial." The reason for the "controversy" as described by the Appellants, "[T]he Ringold Wasteway has a controversial history, ***especially with regard to its impact and effect*** on the surrounding Ringold Formation and the White Bluffs area . . ." (emphasis added). It is not the maintenance and operation of the Ringold Wasteway which is "controversial." Nor is it SCBID's maintenance and operation that impacted and affected the Ringold Formation; rather, it is the "seepage problems" which are caused from the mere existence of the Ringold Wasteway.

Respondent urges this Court to recognize Appellants' argument for what it is and, as the Supreme Court astutely pointed out in Halverson, "plaintiff's theory of the case is fatally flawed by the total lack of proximate cause." Here, like in Halverson, the Appellants have done nothing more than to dress their claim up in the guise of a "maintenance and operation" claim. In reality, the gravamen of

Appellants' claim is an argument against the mere existence of the Ringold Wasteway. However, the existence of the Ringold Wasteway is not an action attributable to SCBID. And the "seepage" coming from the Ringold Wasteway is not an action attributable to SCBID. Appellants have failed to carry their burden to establish proximate cause under an "operation" and "maintenance" analysis. Appellants' argument falls short of establishing, on the part of SCBID, any active, proprietary participation – participation *without which the alleged taking or damaging would not have occurred* – which is required under Phillips before liability can attach in this inverse condemnation action.

D. As a Subsequent Purchaser Appellants' Claim is Barred Because SCBID Did Not Undertake Any New Action Causing a Measurable Decline in Market Value. In the alternative, should this Court decide to find that SCBID's "maintenance and operation" of the Ringold Wasteway resulted in a "taking" sufficient to invoke the doctrine of inverse condemnation, which Respondent disputes, Respondent argues that Appellants' claim is barred because, as a subsequent purchaser, Appellants have failed to establish that SCBID undertook any new action which caused a measurable decline in the market value of Appellants' property.

Washington case law holds, “[O]rdinarily, a grantee or purchaser cannot sue for a taking or injury occurring prior to its acquisition of title, but he may sue for any new taking or injury.” Hoover v. Pierce County, 79 Wn. App. 427, 433, 903 P.2d 464 (1995); *citing*, State v. Sherrill, 13 Wn. App. 250, 257, n. 1, 534 P.2d 598, *review denied*, 86 Wn.2d 1002 (1995) (quoting, 30 C.J.S., *Eminent Domain* § 390, p. 461 (ed. 1965) (footnotes omitted). As pointed out in Hoover, “treatise commentary and case law from other jurisdictions agree with this rule. ‘The general rule . . . is that where property is taken or injured under the exercise of eminent domain, the owner thereof at the time of the taking or injury is the proper person to initiate proceedings or sue therefore.’” Hoover, 79 Wn. App. at 433, 903 P.2d 464; *citing*, 29A C.J.S., *Eminent Domain*, § 383, p. 757 (ed. 1992); *see also*, Nichols on Eminent Domain, § 5.01[4] (ed. 1995); Riddock v. City of Helena, 212 Mont. 390, 687 P.2d 1386 (1984) (property owner could not maintain inverse condemnation action for construction that occurred on land then owned by predecessor in interest). Additionally, the courts have found that “no taking damages should be awarded to plaintiffs who acquired property for a price commensurate with its diminished value.” Hoover, 79 Wn. App.

at 434, 903 P.2d 464; *citing*, Walla Walla v. Conkey, 6 Wn. App. 6, 17, 492 P.2d 589 (1971), *review denied*, 80 Wn.2d 1007 (1972).

In Hoover, the plaintiffs brought an inverse condemnation action against Pierce County, alleging that a county roadway diverted surface waters onto their property causing damage. Hoover, 79 Wn. App. at 428. The trial court ordered a directed verdict against the county and the jury determined damages. *Id.* at 428. The county appealed and the Court of Appeals, Division II, reversed the trial court holding that the Hoovers “may not recover damages based on inverse condemnation by the County because any taking the County occurred before they purchased the property.” *Id.* at 428.

In 1925, the residents of Horsehead Bay petitioned the county to construct a road accessing their properties. *Id.* at 428. In 1928, the county completed construction of the road, Horsehead Bay Drive. *Id.* at 428. The road extended north for a quarter of a mile along Horsehead Bay, and terminated just south of the property owned by the plaintiffs. *Id.* at 428. The plaintiff’s property consisted of three lots located adjacent to one another. *Id.* at 428. They purchased the northern two lots in 1988 from Marcella Kester. *Id.* at 428. Kester had owned the lots since 1950. Horsehead Bay Drive gradually slopes downhill, with the low point located at the end of the county right-of-

way. In 1972, a culvert was installed in the low point to allow draining water to flow under the roadway. *Id.* at 429. Water from a nine acre drainage area would naturally flow across the low areas of the two northern lots. *Id.* at 429. The road, however, channeled water from an additional twelve acre drainage area down the slope and across the two lots. *Id.* at 429. Without the road, the water from these twelve acres would have drained directly into the bay. *Id.* at 429.

In November of 1990 and April of 1991, two storms caused flooding and damage on the two lots purchased from Kester. *Id.* at 429. The plaintiffs' expert testified that the "flooding was caused by the diversion of water from the twelve additional acres onto the Hoovers' property." *Id.* at 429. However, these floods were not the first ones to occur on the northern two lots. *Id.* at 429. Kester testified that a storm had washed out part of the road near her property before the culvert was installed. *Id.* at 429. Additionally, in 1986, Kester wrote a letter to the county that a storm had nearly taken her storage shed off its foundation and dug a six foot trench on her beach. *Id.* at 429. Kester also had to have her driveway graveled every few years because of the constant water drainage damage. *Id.* at 429. Sometime around 1978, prior to selling her lots to the Hoovers, Kester attempted to short plat her property. *Id.* at 429. During this attempt,

draining and flooding problems were noted on the plat filed with the County Auditor's Office. *Id.* at 429. At trial, testimony was provided that the language on the plat would diminish the value of the property. *Id.* at 430. Furthermore, it was disclosed that a real estate agent may be held liable for failure to disclose this information to a prospective purchaser of the property. *Id.* at 430. The Hoovers filed the action against the county for damage to the northern two lots caused by the flooding in 1990 and 1991, alleging that the county's actions in channeling and discharging the surface water onto their property amounted to an inverse condemnation and a taking or damaging of their property. *Id.* at 430.

The Court of Appeals, Division II, began their analysis by deciding that the county's action had resulted in an inverse condemnation of the Hoovers' northern two lots. *Id.* at 432. However, the Court of Appeals did not stop with that determination. Instead, the court considered whether the Hoovers' status as a "subsequent purchaser" relieved the county of any liability associated with the "taking." *Id.* at 433. The county argued that the "taking" had occurred either when the road was constructed in 1928, or when the culvert was installed in 1972. *Id.* at 433. Under either theory, the county argued, the Hoovers lacked standing to sue for the flooding damage

because they were the subsequent purchasers of the two northern lots. *Id.* at 433. The Hoovers argued that each flood, both the one in 1990 and 1991, causing damage resulted in a “new” taking action and that therefore they were not subsequent purchasers. *Id.* at 433.

In agreeing with the county and refusing to adopt the Hoovers’ argument, the court focused on the fact that the “flooding problems caused by the county road were evident well before the Hoovers bought the two lots in 1988.” *Id.* at 434. Moreover, the Court of Appeals found the language contained on the face of the plat which was recorded with the County Auditor, enough notice that the land’s propensity for flooding would reduce its value. *Id.* at 434. Thus, the court reasoned, “the purchase price of the property, therefore, either did reflect or should have reflected the diminished value of the land caused by its propensity to flood.” *Id.* at 434. The court acknowledged that while “purchasers may not recover for a prior taking, they may sue for any new taking that occur after acquiring the property.” *Id.* at 434; *citing*, Sherrill, 13 Wn. App at 257, n. 1, 534 P.2d 598; 29A C.J.S., *Eminent Domain*, § 384, p. 758-59 (ed. 1992). Thus, the key question before the court was whether “the flooding which occurred in 1990 and 1991, after the Hoovers purchased the property, gave rise to a new cause of action.” *Id.* at 434.

In answering this question, the court referenced Highline School Dist. 401 v. Port of Seattle, 87 Wn.2d 6, 15, 548 P.2d 1085 (1976) where the Washington State Supreme Court stated, “[A] new taking cause of action accrues with each measurable or provable decline in market value of the property.” Hoover, 79 Wn. App. at 434. Additionally, the Court of Appeals sought instruction from Petersen v. Port of Seattle, 94 Wn.2d 479, 483, 618 P.2d 1085 (1976) wherein the Supreme Court indicated that “additional activity, following a judgment for a damaging, that causes further damaging is compensable as a taking.” Hoover, 79 Wn. App. at 434-35. Both Highline and Petersen were decisions which came out of the gradual expansion and development of Sea-Tac Airport where the courts found that a new cause of action accrued where the intensity of the interference had increased over time. *Id.* at 435. Comparing the airport cases with “surface water flood cases” also supported the position that under Washington law “a new taking cause of action arises when **additional** government action occurs.” *Id.* at 435.

In reaching their holding, the Court of Appeals focused on the facts that the Hoovers did “not claim that there was any additional government action by Pierce County since the installation of the culvert in 1972.” *Id.* at 435-36. Rather, the Hoovers contended that a

new taking cause of action was created with each flood. *Id.* at 435-36. A position to which the Court of Appeals responded, “[W]e reject this contention.” *Id.* at 436. The Court of Appeals pointed out that the Hoovers’ argument failed to produce any “authority for their position” and that “such a contention runs contrary to the principle contained in, not only the Sea-Tac Airport cases, but also Buxel and Cereghino” a decision out of Oregon. *Id.* at 436. Instead, the court held that “a new taking cause of action required additional governmental action causing a measurable decline in market value.” *Id.* at 436. Thus, because the county did not undertake any “new action since the installation of the roadway culvert in 1972; thus, no new taking cause of action has arisen, and the Hoovers, as subsequent purchasers, may not recover for a taking that occurred prior to their ownership.” *Id.* at 428.

Here, there is no dispute that the construction of the Ringold Wasteway and the “seepage” allegedly emanating from the Ringold Wasteway were both occurring prior to the Appellants’ purchase of their property. Furthermore, the alleged “seepage” had already caused “sliding” prior to the Appellants’ purchase of their property. As articulated in Appellants’ lengthy historical recitation the “controversial” history of the Ringold Wasteway was due to the

facility's "impact and effect on the surrounding Ringold Formation and the White Bluffs area . . ." In detailing the history of each prior slide, the Appellants fail to appreciate that these historical facts only further demonstrate that the sliding problems caused by the "seepage" from the Ringold Wasteway was clearly evident well before the Appellants bought their property. And even more telling is the fact that the Appellants admit that they were made aware of prior landslides on their property, prior to purchase. Specifically, the Appellant was asked about the seller's disclosures made prior to his purchase of the property at issue (CP 462-463). Specifically, on the face of the Seller's Disclosure Statement there is a notation which states, "Has there been any settling, slippage, or sliding of the property or its improvements?" to which the seller wrote "**landslide from irrigation at top of hill.**" (CP 664.) Under the "General" disclosures, again, the question was asked "Is there any material damage to the property from fire, wind, floods, beach movement, earthquake, expansive soils, or landscapes?" (CP 665.) Again, the seller noted, "hillside slide." (CP 665.) Appellant was deposed and asked whether he saw the notations in the seller's disclosure and Appellant stated that he had (CP 462-463). He was also asked whether this was cause for concern to him, and he stated "No." (CP 462-463.) Thus, it is as in Hoover,

“the purchase price of the property, therefore, either did reflect or should have reflected the diminished value of the land” caused by its propensity to slide. This is because, as the courts have previously held, “no taking damages should be awarded to plaintiffs who acquired property for a price commensurate with its diminished value.” Walla Walla v. Conkey, *supra*.

Additionally, like the plaintiffs in Hoover, the Appellants have failed to demonstrate, nor do they claim, that there was any additional government action by SCBID which resulted in a measurable decline in market value. All actions which might have led to a “taking” occurred prior to the Appellants’ purchase of the property. The creation/construction of the Ringold Wasteway and any subsequent “seepage” all occurred before the Appellants purchased the property. And any “maintenance and operation” also occurred prior to the purchase of the property by the Appellants. As noted in their briefing before this Court “from an operation and maintenance point of view, the Ringold Wasteway has continued to operate the same way it always has” (CP 13.) Thus, any “seepage” which might arguably be related to the “operation/maintenance” of the Ringold Wasteway occurred prior to the Appellants’ purchase of their property and thus, as a subsequent purchaser, the Appellants lack standing to bring this

claim. SCBID has not undertaken any new government action since it took over the operation/maintenance of the Ringold Wasteway in 1969; thus, no new government action has occurred subsequent to the Appellants' purchase of their property. Appellants, as subsequent purchasers, may not recover for a taking that occurred prior to their ownership.

E. The Proper Forum For this Claim is in the U.S. Court of Federal Claims. The Appellants have been put on notice since the filing of this claim that if a valid claim for compensation existed, it was against the Bureau of Reclamation. This was the subject of both correspondence and numerous telephone calls. However, for reasons known only to the Appellants, they waited until after they filed this appeal to institute such a claim. This Court can take judicial notice that on April 30, 2012, the Appellants in this action filed a claim in the United States Court of Federal Claims alleging the same causes of action, JAM Ranch, Inc., v. Bureau of Reclamation Dept. of the Interior, Co.# 12-273 C. Appellants appear to have accepted the reality that the proper party from which they should seek compensation is the federal government. This deduction is also supported in law. In Richards v. United States v. Stone Corral Irrigation Dist., 282 P.2d 901, 152 Ct. Cl. 225 (1960), the owners of

a fruit orchard brought an action for inverse condemnation against the United States in the Federal Court of Claims for damages allegedly arising out of an allegation that the government's negligent construction and operation of its canal had raised the groundwater, thereby damaging their trees. *Id.* The United States joined the irrigation district claiming indemnification rights under the repayment contract (a provision not contained in the contract between the United States and SCBID). Similar to the case at bar, the United States acknowledged that it owned the system and owned the water. *Id.* The rise in water table was alleged to have occurred due to "seepage" from the canal. *Id.*

The trial court found that the "seepage" from the canal was a substantial and controlling cause of the increase in the watertable. *Id.* at 903. Specifically, in Richards, the trial court found that at the time of construction:

The Bureau of Reclamation, however, anticipated canal seepage. Its contract with the Stone Corral Irrigation District specifically provided that it anticipated seepage of approximately 2,400-acre feet per year. It cautioned the District to keep a constant check on the groundwater level, and to use the groundwater for irrigation purposes whenever possible.

Id. at 903. Based on this finding, the court held that the taking was a known and probable consequence of the design and construction of

the canal by the United States and that an action for inverse condemnation was appropriate. As to the third-party claim against the irrigation district, the court dismissed the same on the basis that “seepage” is a natural and probable consequence of delivering water through an irrigation system, the amount of which is a consequence of the construction. Therefore, the irrigation district could not be held liable for the acts and ownership of the United States.

In the instant case, the record is undisputed that “seepage” at some level is a natural consequence of any irrigation system. Furthermore, the seepage from the Ringold Wasteway and all canals operated by the SCBID is substantially lower than reasonable and expected amounts (CP 475-478). Additionally, the United States, having concerns about “seepage” and the level of the water table, installed a drainage monitoring system adjacent to the Ringold Wasteway which SCBID regularly monitored. At no time did the drainage monitoring system reflect excessive seepage. If this system was insufficient or in some way faulty, again, the fault lies with the owner (the United States Bureau of Reclamation) and not with the District who operates and maintains the system. It is for this reason that an action for inverse condemnation can only exist against the

United States and must be filed and prosecuted in the United States Court of Claims.

The proper action and the proper court were reiterated in the case of Barnes v. United States, 210 Ct. Cl. 467, 538 F.2d 865 (1976), when a riparian landowner filed for inverse condemnation against the United States in the Court of Claims alleging the taking of their land as a result of frequent and recurring flooding which was the natural consequence of the government's control of the flow of a river through dams. That court acknowledged that "generally speaking, property may be taken by the invasion of water where subjected to intermittent, but inevitable recurring, inundation due to authorized government action." *Id.* at 870. That court, consistent with the Richard v. United States case, held that the claimant did have a right to proceed against the United States for inverse condemnation since the just compensation clause of the Fifth Amendment applies to cases of percolation or rising groundwater. *Id.* See also, United States v. Kansas City Life Ins. Co., 339 U.S. 799, S. Ct. 885, 94 L.2d 1277 (1950).

Here, Appellants' recent filing in federal court suggests that they finally conceded to Respondent's argument that the proper jurisdiction for Appellants' claim of inverse condemnation is in United

States Court of Federal Claims. This recent filing and the position of SCBID as presented, compels the dismissal of this claim for inverse condemnation against SCBID.

F. **Res Ipsa Loquitur**. The doctrine of res ipsa loquitur spares a plaintiff the requirement of proving specific acts of negligence in cases where a plaintiff asserts that he or she suffered injury, the cause of which **cannot** be fully explained, and the injury is of a type that would not ordinarily result if the defendant were not negligent. Pacheco v. Ames, 149 Wn.2d 431, 69 P.3d 324 (2003) (emphasis added). In such cases the jury is permitted to infer negligence. *Id.* at 326, 69 P.3d 324, *citing*, Miller v. Kennedy, 91 Wn.2d 155, 159-60, 558 P.2d 734 (1978); Douglas v. Bussabarger, 73 Wn.2d 476, 482, 438 P.2d 829 (1967); Kemalyan v. Henderson, 45 Wn.2d 693, 702, 277 P.2d 372 (1954). The doctrine permits the inference of negligence on the basis that **the evidence of the cause of the injury is practically accessible to the defendant but inaccessible to the injured person**. Coverly v. W. Tank Lines, 36 Wn.2d 381, 218 P.2d 322 (1950); *see also*, Hogland v. Klein, 49 Wn.2d 216, 219, 298 P.2d 1099 (1956). Whether the doctrine of res ipsa is applicable to a particular case is a question of law. Zukowsky v. Brown, 79 Wn.2d 586, 592 488 P.2d 269 (1971);

Morner v. Union Pac. R.R. Co., 31 Wn.2d 282, 196 P.2d 744 (1948). Here, as will be explained below, the alleged damage causing instrumentality, *i.e.*, the Ringold Wasteway was and is available for inspection. It is still in existence, as it has been since the day it was constructed. If Appellants wanted to examine, test, observe, or inspect the Ringold Wasteway, they have had ample opportunity to do so since the filing of this lawsuit. Additionally, Appellants could have retained the services of an operation and maintenance expert. Again, Appellants chose not to do so, and instead have relied solely on the testimony of Mr. Vinson who is not a maintenance and operation expert. And, third, the Appellants knew the specific act of alleged negligence which caused their damages, *i.e.*, "seepage" from the Ringold Wasteway as testified via their expert, Mr. Vinson (CP 994, 979). Respondent's expert, Mr. Montgomery, provided a lengthy explanation in his report as to the Respondent's explanation for the cause of the Appellants damages (CP 475-478). Appellants chose not to even depose Mr. Montgomery or to strike his affidavit. Thus, Mr. Montgomery's expert opinion is the **only** evidence before this Court as to SCBID's maintenance and operation. Appellants' argument for invoking the doctrine of *res ipsa loquitur* hides

Appellants' failure to fully conduct discovery and offends the very purpose of discovery, fundamental fairness and justice.

The Washington State Supreme Court in Zukowsky, stated that the doctrine is only applicable when the evidence shows:

(1) The accident or occurrence producing the injury is of a kind which ordinarily does not happen in the absence of someone's negligence, (2) the injuries are caused by an agency or instrumentality within the exclusive control of the defendant, and (3) the injury-causing accident or occurrence is not due to any voluntary action or contribution on the part of the plaintiff.

Zukowsky, 79 Wn.2d at 593, 488 P.2d 269 (*quoting*, Horner v. N. Pac. Beneficial Ass'n Hosps., Inc., 62 Wn.2d 351, 359, 382 P.2d 518 (1963)). Plaintiff's burden to establish that a defendant had "exclusive control" over the instrumentality which actually caused the alleged damage is premised on principles of fundamental fairness and justice, as explained by the Washington Supreme Court:

The reason for the prerequisite of exclusive control of the offending instrumentality is that the purpose of the rule is to require the defendant to produce evidence explanatory of the physical cause of an injury which cannot be explained by the plaintiff. If the defendant does not have exclusive control of the instrumentality producing the injury, he cannot offer a complete explanation, and it would work an injustice upon him to presume negligence on his part and thus in practice demand of him an explanation when the facts indicate such is beyond his ability.

See, Morner, 31 Wn.2d at 294, 196 P.2d 744; Zukowsky, 79 Wn.2d at 593, 488 P.2d 269. A plaintiff establishes the necessary “exclusive control” by providing evidence that the plaintiff is unable to prove a specific act of negligence “because he is not in a situation where he would have knowledge of that specific act.” Curtis v. Lein, 169 Wn.2d 884, 894, 239 P.3d 1078 (2010). As Justice Madsen pointed out in Curtis, in her concurring opinion, “[A] circumstance **necessary** to its application is that the injured party, from the nature of the case, is not in a position to explain the cause, while the party charged is in a position where he is, or if he has exercised reasonable care should be, able to explain and show himself free from negligence.” Curtis, 169 Wn.2d at 896, 239 P.3d 1078 (concurring opinion). In her concurrence, Justice Madsen takes exception with the court’s failure to “attach no significance to the fact that Jack and Claire Lein had the dock removed.” *Id.* at 896. The fact that the defendants had removed the dock, depriving the plaintiff of inspection, was the sole justification for application of the rule. For without that fact, as Justice Madsen concluded, “[B]ut for the removal of the dock, I would not agree that the doctrine should apply to shift the burden of establishing whether the defect in the dock was discoverable.” *Id.* at 896.

Thus, a defendant's "exclusive control" over the damage causing instrument, or the destruction/removal of the damage causing instrument, such that a plaintiff is deprived of inspection and renders the plaintiff unable to explain a specific act of negligence, satisfies the "exclusive control" element necessary to invoke *res ipsa loquitur*. Under our facts, the Appellants have had every opportunity to inspect the alleged injury causing instrumentality, *i.e.*, the Ringold Wasteway. That is because the Ringold Wasteway, which the Appellants concede and vehemently claim is the cause of the landslide which damaged their property, is still in existence, as it has been since the day it was constructed. Appellants' expert, Ted Vinson, further supports this position; his lengthy report concludes with this statement: "Nearly 100% of the water that eventually *caused* the failure was introduced (*i.e.*, not occurring naturally) into the tributary area . . . the primary source of the water with a very high degree of certainty is the Ringold Wasteway." (CP 994.)

In Mr. Vinson's "Executive Summary," he posited "five sources of water that may have contributed to the 2006 White Bluffs Landslide." (CP 979.) And, at the completion of his "Executive Summary," he states "it may be stated with a high degree of certainty that the major source of water at the time of the 2006 WBL . . . was

related to leakage from the Ringold Wasteway.” (CP 979.) Thus, Appellants have established that (1) they know and can explain the specific act of negligence causing their damages, *i.e.*, “seepage” from the Ringold Wasteway and (2) the Ringold Wasteway has been scrupulously inspected and reviewed by their expert (CP 979-994). All of the cases cited by Appellants for imposition of the *res ipsa loquitur* instruction involved fact patterns where the damage causing element was either destroyed/unavailable, or the plaintiff lacked the ability to explain the specific act of negligence. However, those cases are not applicable to the facts of the case at bar; here, Appellants’ “inverse condemnation” argument establishes, without question, that Appellants have an explanation for the damage causing instrumentality. Even more so, their expert, Ted Vinson, has been retained and his services rendered as an expert “on causation of the slide.” (CP 59.) Additionally, the Ringold Wasteway was not and never has been in the exclusive control of SCBID. Appellants cannot have it both ways, they cannot make out an inverse condemnation argument and then turn around and out of the other side of their mouth claim they do not know what caused their damages and/or that the Ringold Wasteway was in the exclusive control of SCBID.

Further, *res ipsa loquitur* is a disfavored doctrine and it is “ordinarily sparingly applied, ‘in particular and exceptional cases, and only where the facts and demands of justice make its application essential.’” Tinder v. Nordstrom, Inc., 84 Wn. App. 787, 792, 929 P.2d 1209 (1997) (*quoting*, Morner v. Union Pac. R.R. Co., 31 Wn.2d 282, 293, 196 P.2d 744 (1948)). Here, it must be conceded by the Appellants that this is not a particular or exceptional case. Appellants briefing before this Court cites to a multitude of other landslide and irrigation district cases. The damages claimed and the causes of actions are not novel or rare. Nor do the facts demand that the application of the doctrine be essential to the administration of justice. Rather, Appellants’ arguments for application of this doctrine should be seen for what they are; nothing more than their desire for a tactical legal advantage. Based on the foregoing law and argument the doctrine of *res ipsa loquitur* is inappropriate under our facts.

G. Negligence. The liability of owners of irrigation works is stated in 30 Am. Jur. Irrigation § 86 (1958):

[I]t is the prevailing view that the proprietor of an irrigation conduit is not an insurer against damage which may result from its operation, but is liable only in case he has been negligent in the construction, maintenance, or operation of his irrigation works.

This view was adopted as early as 1921 in the case of Longmire v. Yelm Irrigation Dist., 114 Wash. 619, 195 Pac. 1014 (1921); see, Dalton v. Selah Water Users' Ass'n, 67 Wash. 589, 122 Pac. 4 (1912); Robillard v. Selah-Moxee Irrigation Dist., 54 Wn.2d 582, 343 P.2d 565 (1959); cf, Clark v. Icicle Irrigation Dist., 72 Wn.2d 202, 432 P.2d 541 (1967). Therefore, "ditch owners are bound to exercise only ordinary care in the construction and maintenance of their ditches (15 Ruling Case Law, 488) and an owner of land lying below an irrigation ditch cannot recover for damages caused by seepage without showing that the ditch was negligently constructed or operated. Longmire, 114 Wn. 619 at 620-21; *citing*, North Sterling Irrigation District v. Dickman, 59 Colo. 169, 149 Pac.97, Ann. Cas. 1916, 973; Nahl v. Alta Irrigation District, 23 Cal. App. 333, 137 Pac. 1080.

Equally important to an analysis of this cause of action is RCW 89.12.050(2). This statutory provision dictates that no liability can be attached to SCBID arising out of the design or construction or other deficiencies of the Ringold Wasteway, including the United States' selection as to the type of lining (earthen versus manmade material) by virtue of the District accepting responsibility for the operation and maintenance of the federally owned irrigation system.

Thus, for purposes of this negligence analysis, SCBID must be shown have been negligent either in the construction or maintenance of the irrigation system, specifically the Ringold Wasteway. As argued above, SCBID did not construct or reconstruct the Ringold Wasteway. Appellants conceded that it was the federal government, acting through the Bureau of Reclamation, which originally planned, designed, engineered, constructed, and reconstructed the system operated by SCBID to return water to the Columbia River via the Ringold Wasteway (Appellant's Brief, p. 3-4). Thus, the narrow basis upon which this Court must conduct their negligence analysis focuses on whether SCBID was negligent in its operation or maintenance of the irrigation district, specifically the Ringold Wasteway. To begin, the testimony of Appellants' expert, Ted Vinson, when viewed in the light most favorable to the Appellants, indicates that the Appellants have failed to establish even an inference of negligence on the part of SCBID as relating to their maintenance/operation of the Ringold Wasteway. The most compelling evidence in favor of this argument is the Appellants' failure to produce any evidence demonstrating that SCBID violated the standard of care for maintenance and operation of an irrigation system. Appellant's expert, Ted Vinson, was deposed and his testimony clearly establishes that he lacks the foundation to

speak to whether SCBID was negligent in its maintenance and/or operation of the irrigation district. During Mr. Vinson's deposition, the following dialogue took place:

Q We can agree you are not an expert on the subject of operation and maintenance of an irrigation district like the SCBID; correct?

A Yes.

Q Okay. We can agree that you, as you sit here today, you cannot provide to me what the standard of care, the recognized standard of care, proper operation and maintenance of an irrigation facility is in the State of Washington; is that correct?

A I can't provide because I haven't read it.

Q Well, you understand, sir, this is the second time you've been deposed.

A Yeah.

(CP 472; *see also*, CP 171.) Furthermore, Mr. Vinson's report fails to detail either in his investigation and/or in his conclusions where or how SCBID violated the standard of care as related to the operation and maintenance of the SCBID. Therefore, Appellants have failed to produce any independent evidence on which to base their claim that SCBID was negligent in its operation and/or maintenance of the irrigation district, specifically, the Ringold Wasteway which Appellants allege to have been the proximate cause of their damages. As early

as 1921, in Longmire, the Washington State Supreme Court was clear that (1) negligence is never presumed and (2) to allow a verdict to stand in the absence of evidence of “negligent construction or operation” would be tantamount to holding that the defendant was an “insurer.” Longmire, 114 Wash. at 622. A position the Supreme Court has refused to accept.

Here, Respondent has presented the unchallenged testimony of Mr. Montgomery who explained in detail the drainage features associated with the Ringold Wasteway and how they operate (CP 475). Specifically, Mr. Montgomery analyzed the “seepage” numbers in the SCBID as compared with “seepage” numbers in other irrigation districts in Eastern and Western Washington; particularly, those which are owned and overseen by the Bureau of Reclamation and their standards (CP 476-477.) This combination of “seepage” data from other districts and the level deemed acceptable by the Bureau established the standard. Mr. Montgomery’s affidavit documents the undisputed fact that the facilities operated and maintained by SCBID, in particular the Ringold Wasteway, experience less “seepage” than any other Bureau of Reclamation facility, and even less than those privately owned and operated (CP 476-478).

Based on his investigation which included in-depth interviews and analyses, including members of the Columbia Basin Project and the Kennewick Irrigation District which is also owned by the Bureau of Reclamation, Mr. Montgomery rendered his expert opinion that the SCBID not only met the standard for operation and maintenance of an irrigation district, but in fact exceeded it (CP 475-478). Specifically, relating to “seepage,” Mr. Montgomery documented that “seepage” is inevitable from any canal, even those with the best operation and maintenance practices. However, much less water is permitted to escape, *i.e.*, “seep” from the irrigation facilities maintained by the Respondent. In fact, Respondent’s irrigation facilities had less “seepage” than any other district in Washington State and beyond, due to Respondent’s excellent practices. *Id.* Mr. Montgomery also analyzed the “seepage” effects of the farmers’ own irrigation practices and opined that this water far exceeds anything that can be traced to the water transportation facilities operated and maintained by SCBID (CP 478). More specifically, **twice** as much “seepage” occurs on-farms, as compared to SCBID-maintained facilities. *Id.* Mr. Montgomery’s opinions have been produced and documented and Appellants have failed to produce an expert opinion in rebuttal.

Instead, Appellants rely on the opinions of Mr. Vinson who categorically testified that he is not an expert on the subject of maintenance and/or operation of irrigation districts. Furthermore, as noted above, if Appellants believed Mr. Montgomery's opinion to be conclusory or inaccurate, they have had multiple opportunities to depose Mr. Montgomery, obtain an expert of their own, or file a motion to strike. Appellants have opted not to do any of the foregoing; therefore, the expert opinion of Mr. Montgomery remains unchallenged and is the only expert testimony before this Court related to the standard of care for an irrigation facility.

In summation, SCBID cannot be held liable arising out of the design or construction or other deficiencies of the Ringold Wasteway. Thus, the only basis for finding negligence on the part of SCBID is for its maintenance and operation; a claim for which the Appellants have wholly failed to provide any evidence. As such Appellants' negligence claim must be dismissed. To do otherwise would be to presume negligence on the part of SCBID and would be tantamount to holding SCBID as an "insurer, " a position the Washington Supreme Court has refused to accept.

H. Nuisance and Trespass. As stated above, the only basis which is actionable against the owner of an irrigation district is

an action for negligence. As that cause of action should be properly dismissed for the reasons stated above, the following actions of nuisance and trespass are legally insufficient. Regardless of that being the case, Respondent will next analyze those separate causes of action.

1. Nuisance. To prove nuisance, a claimant must show an unreasonable interference with the use and enjoyment of property. Kitsap County v. Allstate Ins. Co., 136 Wn.2d 567, 592, 964 P.2d 1173 (1998); Bodin v. City of Stanwood, 79 Wn. App. 313, 318, n. 2, 901 P.2d 1065, 79 Wn. App. 313, 901 P.2d 1065 (1995). As previously argued, the statutory basis for a claim of nuisance is found in RCW 7.48.120 which provides:

Nuisance consists in unlawfully doing an act, or omitting to perform a duty, which...either annoys, injures or endangers the comfort, repose, health or safety of others, offends decency, or unlawfully interferes with, obstructs, or tends to obstruct, or renders dangerous for passage, any lake or navigable river, bay, stream, canal or basin, or any public park, square, street or highway; or in any way renders other persons insecure in life, or in the use of property.

However, RCW 7.48.160 further provides that “Nothing which is done or maintained under the express authority of a statute can be deemed a nuisance.” These statutes are based on the “general principal that a landowner is not permitted to use land so as to interfere

unreasonably with another's use and enjoyment of his land." Seal v. Naches-Selah Irrigation Dist., 51 Wn. App. 1, 7, 751 P.2d 873 (1988). Thus, the fundamental inquiry is "whether the use of certain land can be considered reasonable in relation to all the facts and surrounding circumstances." *Id.* at 7. See also, Highline School Dist. 401 v. Port of Seattle, 87 Wn.2d 6, 548 P.2d 1085 (1976); Riblet v. Spokane-Portland Cement Co., 41 Wn.2d 249, 254, 248 P.2d 380 (1952). Additionally, the character of the surrounding location in which a business may be located is another factor to consider in determining the reasonableness of the operation. Morin v. Johnson, 49 Wn.2d 275, 281, 300 P.2d 569 (1956).

To begin, the SCBID is a creature of statute. RCW 87.03. Additionally, as previously argued, in Robillard v. Selah-Moxee Irrigation District, 54 Wn.2d 582, 343 P.2d 565 (1959), the only Washington case concerned with whether unintentional "seepage" from an irrigation canal constitutes a nuisance, the Supreme Court was clear in its answer to this issue. In Robillard, the plaintiffs brought a similar action, asserting that "seepage" from an irrigation canal constituted "nuisance." In that case, the plaintiff's crops were allegedly damaged as a result of "seepage" from one of two conceivable sources, including the defendant's canals. The Washington State

Supreme Court was quick to note, “[W]e are not concerned with a nuisance in the instant case.” Robillard, 54 Wn.2d at 583-84. Rather, the court noted that the only viable cause of action against an irrigation district was one sounding in negligence. As argued above, this legal principle has been accepted as far back as 1921, in Longmire, and Appellants fail to present any legal justification for departing from the jurisprudence and precedent which governs this issue. As such, Appellants’ claim for “nuisance” must be dismissed.

2. Trespass. An action for trespass is equally inappropriate based on the above law which establishes that the liability of owners of irrigation districts is limited to negligence either in the construction or maintenance of the irrigation works. Longmire v. Yelm Irrigation Dist., 114 Wash. 619, 195 Pac. 1014 (1921); see, Dalton v. Selah Water Users’ Ass’n, 67 Wash. 589, 122 Pac. 4 (1912); Robillard v. Selah-Moxee Irrigation Dist., 54 Wn.2d 582, 343 P.2d 565 (1959); cf, Clark v. Icicle Irrigation Dist., 72 Wn.2d 202, 432 P.2d 541 (1967).

Additionally, an action for trespass is only viable “when there is an intentional or negligent intrusion onto or into the property of another. Borden v. City of Olympia, 113 Wn. App. 359, 373, 53 P.3d 1020 (2002); Seal v. Naches-Selah Irrigation Dist., *supra*, see also,

Restatement (2d) of Torts, § 8A (1965). A claimant cannot do that “merely by showing a ‘tortious interference’ with the use or enjoyment of property.” *Id.* at 374. The element of intent is denoted as requiring proof that the actor “desires to cause consequences of his act, or that he believes that the consequences are substantially certain to result from it. *Id.* At a minimum, this requires proof that the actor has knowledge that the consequences of his conduct are **certain, or substantially certain**, to result from his conduct, and proceeds in spite of this knowledge. *Id.*, in comment b, at 15.

In Seal, the court disposed of this cause of action by holding that evidence that the irrigation district had knowledge that “seepage” onto the plaintiff’s property was occurring was insufficient to establish a case of trespass. There the court stated:

We disagree with the Seals’ assertion under Zimmer and Bradley that the District was culpable for intentional trespass because it knew the canal was flooding their property and failure to repair such damage would cause extensive harm to their orchard. As discussed, the record discloses affirmative measures taken by the District to both prevent and alleviate seepage problems on the Seals’ property. There has been no showing by the Seals to equate the District’s conduct with a desire to allow water to seep into the orchard.

Seal, 51 Wn. App. at 875, 751 P.2d 873 (1988). Here, Appellants have failed to provide this Court with any evidence from which this Court could find that SCBID due to its operation and maintenance of

the Ringold Wasteway committed an act with the intent to increase seepage from the Ringold Wasteway which it had inherited. Neither have the Appellants established that SCBID desired to allow water held in the waterway to “seep” at an excessive rate, substantially raise the groundwater table and facilitate a landslide. To the contrary, the undisputed evidence before this Court as provided via the testimony of Mr. Montgomery establishes that much less water is permitted to escape, *i.e.*, “seep” from the irrigation facilities maintained by the Respondent. In fact, Respondent’s irrigation facilities had less “seepage” than any other district in Washington State and beyond, due to Respondent’s excellent practices (CP 477). Mr. Montgomery also analyzed the “seepage” effects of the farmers’ own irrigation practices and opined that this water far exceeds anything that can be traced to the water transportation facilities operated and maintained by SCBID (CP 478). As noted, **twice** as much “seepage” occurs on farms, as compared to SCBID-maintained facilities. *Id.* Mr. Montgomery’s opinions have been produced and documented and Appellants have failed to produce an expert opinion in rebuttal.

The only viable cause of action against an owner of an irrigation system is one sounding in negligence. Thus, the Appellants’ action for trespass is legally insufficient. Additionally, Appellants have

failed to provide any evidence from which this Court could find that SCBID due to its operation and maintenance of the Ringold Wasteway committed an act with the intent to increase seepage from the Ringold Wasteway which it had inherited. Neither have the Appellants established that SCBID desired to allow water held in the waterway to “seep” at an excessive rate, substantially raise the groundwater table and facilitate a landslide. The facts before this Court will not sustain Appellants’ claim for trespass and the trial court did not err by dismissing it.

I. **The Operation of an Irrigation District is Not an Ultra-Hazardous Activity Giving Rise to a Claim of Strict Liability Under Washington Law.** Appellants’ briefing before this Court does not assign error to the trial court’s ruling and is therefore not reviewable. However, if this Court decides to review this cause of action, Respondent incorporates, by reference, the law and argument made to the trial court (CP 505-506).

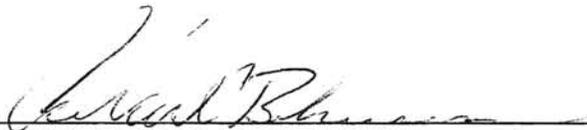
IV. CONCLUSION

Appellants’ claims against SCBID exist in form but not substance. Appellants, recognizing that their claim for inverse condemnation based on creation/construction was legally insufficient, redesigned it under the guise of one for maintenance and operation.

Unable to establish that the proximate cause of their damage was attributable to the actions of SCBID, the Appellants tried to piece together their handiwork with a feeble tale of a “joint venture.” However, the only theory recognized by law under which an irrigation district may be held liable to a property owner is negligence arising out of the maintenance and operation of the facility. Appellants have admitted they have no knowledge, expertise, or facts to support a claim that SCBID was negligent in its operation and maintenance of the water delivery system which was planned, designed, engineered, constructed, and owned by the United States. Thus, lacking any evidence of negligence on the part of SCBID, as related to its operation and maintenance, Appellants seek to **presume** negligence on the part of SCBID, a position that would be tantamount to holding SCBID as an insurer. Simply stated, by their own evidentiary production – or lack thereof, the Appellants abandoned a claim of negligence. Equally inapplicable are Appellants’ claims for res ipsa loquitur, trespass, nuisance, and strict liability. For these reasons, the decision of the trial court should be affirmed.

RESPECTFULLY SUBMITTED this 1st day of October, 2012.

LAW OFFICE OF ANDREW C. BOHRNSEN,
P.S.

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CERTIFICATE OF SERVICE

I certify that on the 1st day of October, 2012, I caused a true and correct copy of this Brief of Respondent to be served on the following in the manner indicated below:

John C. Riseborough	<input checked="" type="checkbox"/>	Hand Delivery
Vicki L. Mitchell	<input type="checkbox"/>	U.S. Mail
Paine Hamblen, LLP	<input type="checkbox"/>	Overnight Mail
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