

No. 81257-8

IN THE SUPREME COURT FOR
THE STATE OF WASHINGTON

DON L. FITZPATRICK and PAM FITZPATRICK,
husband and wife; BRAD STURGILL and
HEATHER FITZPATRICK STURGILL, husband and wife,

Respondents,

v.

OKANAGAN COUNTY,

CLERK

Petitioner,

and

THE STATE OF WASHINGTON; JOHN L. HAYES and JANE DOE
HAYES, husband and wife; and METHOW INSTITUTE FOUNDATION,

Defendants.

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION

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IDENTITY AND INTEREST OF AMICUS

PLF is a nonprofit, tax-exempt corporation organized for the purpose of litigating matters affecting the public interest in property rights. Founded 35 years ago, PLF is the largest and most experienced legal foundation of its kind. PLF has participated as lead counsel or amicus curiae in the United States Supreme Court in several cases where individuals were unlawfully denied the ability to use their property. *See, e.g., Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528 (2005); *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687 (1999); *Suitum v. Tahoe Reg'l Planning Agency*, 520 U.S. 725 (1997); *Dolan v. City of Tigard*, 512 U.S. 374 (1994); *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987). PLF also has extensive experience regarding property rights in Washington, having participated as lead counsel or amicus curiae in several property rights and takings cases before this Court, including *Dickgieser v. State*, 153 Wn.2d 530 (2005); *Benchmark Land Co. v. City of Battle Ground*, 146 Wn.2d 685 (2002); *Manufactured Housing Communities of Washington v. State*, 142 Wn.2d 347 (2000); *Sparks v. Douglas County*, 127 Wn.2d 901 (1995); *Sintra v. City of Seattle*, 119 Wn.2d 1 (1992). PLF's arguments based on this experience will assist the Court in understanding and deciding the important issues on review in the present case.

ISSUE ADDRESSED BY AMICUS

Whether an inverse condemnation claim is properly dismissed where the damage was not contemplated by or necessarily incident to the governmental project? (Petitioner Okanogan County's Issue C.)

ARGUMENT

Inverse condemnation is a constitutional remedy permitting recovery of damages from public projects. *See* Wash. Const. art. I, § 16 (“No private property shall be taken or damaged for public or private use without just compensation having been first made”); *Dickgieser v. State*, 153 Wn.2d 530, 534-35 (2005) (where government action results in a taking or damage of private property without formally exercising eminent domain, the property owner may bring a claim for inverse condemnation). The inverse condemnation theory of recovery is distinct from tort remedies, such as negligence and trespass, because liability under the Takings Clause is not dependent on a showing of either intention or negligence. Wash. Const. art. I, § 16.

The elements of an inverse condemnation claim are: “(1) a taking or damaging (2) of private property (3) for public use (4) without just compensation being paid (5) by a governmental entity that has not instituted formal proceedings.” *Dickgieser*, 153 Wn.2d at 535 (citing *Phillips v. King*

County, 136 Wn.2d 946, 957 (1998)). Intent has never been a required element of a takings claim. See *Dickgieser*, 153 Wn.2d at 534-35. To the contrary, our courts have long held that “‘whenever property is thus taken, voluntarily or involuntarily, . . . the courts must look only to the taking, and not to the manner in which the taking was consummated.’” *Boitano v. Snohomish County*, 11 Wn.2d 664, 675 (1941) (quoting *Wong Kee Jun v. City of Seattle*, 143 Wash. 479, 505 (1927)); see also *Armstrong v. United States*, 364 U.S. 40, 48 (1960) (a taking occurs where government action destroys the value of property “whether with an intent and purpose of extinguishing [the property value] or not”); *Portsmouth Harbor Land & Hotel Co. v. United States*, 260 U.S. 327, 330 (1922) (government is liable for a taking “even if the possible legal consequences were unforeseen”).

Okanogan County’s petition for review arises from a Court of Appeals decision concluding that the Fitzpatricks satisfied their burden of demonstrating genuine issues of material facts in support of their takings claim. *Fitzpatrick v. Okanogan County*, 143 Wn. App. 288, 302-03 (2008). The Court concluded that the Fitzpatricks demonstrated that government entities modified the natural watercourses of the Methow River by constructing a dike along the river bank as part of a public project to protect a highway and other properties. *Id.* at 293, 302-03. And the Fitzpatricks

demonstrated proximate causation by providing expert evidence that the dike blocked natural flood channels, resulting in avulsion and the destruction of their property. *Id.* at 302-03.

The County does not dispute that the Fitzpatricks satisfied their burden of providing evidence on each of the five elements of inverse condemnation. *See* Okanogan County's Petition for Review. Instead, the County seeks to have this Court add "intent to condemn" as a sixth element of inverse condemnation. *See* Okanogan County's Petition for Review at 15; Okanogan County's Supp. Br. at 13-14. The County argues that unless the Fitzpatricks could demonstrate that it had actually contemplated the resulting damage to the property when the County constructed the dike, there could be no taking and the Fitzpatricks should have been limited to tort remedies.¹ *See* Okanogan County's Petition for Review at 15; Okanogan County's Supp. Br. at 13-14. While the County seeks a profound change to the law of inverse condemnation, it provides only a superficial analysis of relevant case law. In fact, the County ignores altogether the modern approach to distinguishing a

¹ The Court of Appeals rejected this argument. *Fitzpatrick*, 143 Wn. App. at 301 ("The governmental entities incorrectly assert that because the landowners claim that the entities negligently constructed the dike in the wrong location, their takings action is actually a tort action, to which it is immune The landowners' claim is for blocking a natural drainway or flood channel. Negligence is not an issue.").

taking from a tort, including this Court's seminal tort-takings case, *Wong Kee Jun v. City of Seattle*, 143 Wash. at 480-81. The County's argument is contrary to Washington's constitution and case law, and must fail.

I

THE COURTS OF WASHINGTON AND OTHER STATES RECOGNIZE THAT INTENT IS IMMATERIAL TO AN INVERSE CONDEMNATION CLAIM

While not every government action resulting in damage to private property constitutes a taking,² every taking that involves invasion or destruction of property is by definition tortious. *See, e.g., Richards v. Washington Terminal Co.*, 233 U.S. 546, 551 (1914) (“[I]t is sufficiently obvious that the acts done by defendant, if done without legislative sanction, would form the subject of an action by plaintiff to recover damages as for a private nuisance.”).³ As a result, the distinction between what constitutes a tort and what constitutes a taking “is not always clear.” *Olson*, 71 Wn.2d at 284; *Wong Kee Jun*, 143 Wash. at 480-81 (recognizing that Washington's

² *See Dickgieser*, 153 Wn.2d at 541 (“[G]overnmental torts do not become takings simply because the alleged tortfeasor is the government.”); *Olson v. King County*, 71 Wn.2d 279, 285 (1967).

³ *See also Palm v. United States*, 835 F. Supp. 512, 516 (N.D. Cal. 1993) (“The cluster of facts that constitute a claim for an unconstitutional taking and those that indicate the torts of nuisance or trespass are similar in many respects. Both involve situations of unlawful entry onto an owner's property or infringement of an owner's right to use and enjoyment of her property.”).

courts struggled to devise a workable and meaningful method to distinguish between government torts and takings).

Okanogan County argues that proof of an intent to condemn should be the line distinguishing a taking from a tort. *See* Okanogan County's Petition for Review at 15; Okanogan County's Supp. Br. at 13-14. But for more than 80 years, our courts have held the government's intent is immaterial, focusing instead on the nature of the damage to private property that was caused by government action:

[W]henver property is thus taken, voluntarily or involuntarily, by the sovereign state . . . , the courts must look only to the taking, and not the manner in which the taking was consummated.

Wong Kee Jun, 143 Wash. at 505; *Dickgieser*, 153 Wn.2d at 541; *Boitano v. Snohomish County*, 11 Wn.2d at 675; *Lambier v. City of Kennewick*, 56 Wn. App. 275, 283 (1989), *review denied* 114 Wn. 2d 1016 (1990).⁴ The Fitzpatrick's satisfied the tort-takings inquiry by demonstrating that the government's construction of an upstream dike proximately caused avulsion

⁴ *See also* Alan Romero, *Takings by Floodwaters*, 76 N.D. L. Rev. 785, 815 (2000) ("When the government causes water to invade private land, the government's inanimate agent physically enters and occupies the land. . . . It makes no difference that . . . the government might not have intended to take the land.").

and the destruction of their home and property. *Fitzpatrick*, 143 Wn. App. at 302-03.

A. Washington’s Supreme Court Rejected Intent as a Determinative Factor in Distinguishing a Taking from a Tort

Wong Kee Jun is the seminal Washington case addressing the tort/inverse condemnation distinction. In that case, the City of Seattle removed lateral support while regrading certain streets. *Wong Kee Jun*, 143 Wash. at 480. Years later, the City’s work caused a slide that damaged the plaintiff’s property. *Id.* at 480. The property owner was awarded damages for inverse condemnation, and the City appealed. *Id.* The City argued that its actions constituted a tort; the property owners argued that its actions constituted inverse condemnation. *Id.* The *Wong Kee June* Court reviewed these decisions and established “a rule by which litigants and trial courts may in the future determine into which class a given case may fall.” *Id.* at 480-81.

The *Wong Kee Jun* Court first noted that our courts have long held that incidental damages resulting from government projects may be compensable under an inverse condemnation claim. *Id.* at 481-82 (citing *Peterson v. Smith*, 6 Wash. 163 (1893); *Askam v. King County*, 9 Wash. 1 (1894); *State ex rel. Smith v. Superior Court*, 26 Wash. 278 (1901)). However, between 1913 and 1918, the Court issued a series of confusing

decisions addressing whether a claim seeking compensation for incidental property damage resulting from government projects sounded in tort or inverse condemnation. *Id.* at 480-90. The Court reviewed four cases that were particularly significant in the development of Washington's inverse condemnation law.

First, in *Kincaid v. City of Seattle*, 74 Wash. 617 (1913), the grading of a street caused fill to extend onto the abutting property owner's private property. *Id.* at 618. The city contended that the damage to the private property sounded in tort and therefore was subject to statutory tort claim notice requirements. *Id.* Rejecting the city's claim, the Court held that the city "cannot put on the cloak of a tort-feasor" and "plead a willful wrong to defeat a just claim." *Id.* at 620, *quoted in Wong Kee Jun*, 143 Wash. at 486. "Whether we call the taking a tort, or say the claimant can waive the tort and sue on an implied contract, it makes no difference; the law is the same. The constitutional right to compensation cannot be taken away" *Id.* at 626, *quoted in Wong Kee Jun*, 143 Wash. at 486.

The second key case was *Casassa v. City of Seattle*, 75 Wash. 367 (1913), issued one month after *Kincaid*. The property damaged in that case arose from a slide caused by removing lateral support in the re-grading of certain streets in Seattle. *Id.* at 368. Rather than a taking, however, this case

was characterized as a tort, “[t]he gist of the holding seems to be that the city was negligent in not having adopted an adequate, safe and proper plan for doing the work, and that seems to be the theory differentiating it from the *Kincaid* Case.” *Wong Kee Jun*, 143 Wash. at 488; *see Casassa*, 75 Wash. at 370 (damages resulted from “inadequacy of the plan of the improvement to protect the remaining property from sliding”).

The third key case was *Jorguson v. City of Seattle*, 80 Wash. 126 (1914). This was another slide damage case based on “the inadequacy of the city’s plan.” *Wong Kee Jun*, 143 Wash. at 489. Following *Casassa*, the Court distinguished the case from *Kincaid* and other takings cases. The *Jorguson* Court wrote:

The [Takings Clause] was never intended to apply to consequential or resultant damages not anticipated in, nor a part of, the plan of a public work. It was never intended to apply to damages resulting to private property from the negligent or wrongful use of public property. As to such damages, tortious in their very inception, the injured person is remitted to his remedy on the case, as in other cases of tortious taking or injury.

Jorguson, 80 Wash. at 130-31, *quoted in Wong Kee Jun*, 143 Wash. at 490.

The fourth key case reviewed in *Wong Kee Jun* was *Great Northern Railway Co. v. State*, 102 Wash. 348 (1918). In that case, the construction of a state highway caused slides which obstructed and greatly damaged the abutting railroad company’s track. *Id.* at 349. This time, returning to a

Kincaid analysis, the *Great Northern* Court viewed the damage to the private property as a taking requiring compensation: “To deprive one of the use of his property is depriving him of his property; and the private injury is thereby as completely effected as if the property itself were physically taken. Accordingly,” the court held, “any use of land for a public purpose which inflicts an injury upon adjacent land, such as would have been actionable if caused by a private owner, is a taking and damaging within the meaning of the Constitution.” *Id.* at 351-52, *quoted in Wong Kee Jun*, 143 Wash. at 497. Significantly, the analysis rested in part on the view that since the government could have condemned the railroad track and thereby freely inflicted damage to the track, the destruction must have been compensable for public use:

It is contended by the state that a suit against it to recover for damages will not lie, and that the damage herein involved is not for a public use, within the meaning of the constitutional provision requiring compensation. We cannot accede to this contention; for, if the state could have condemned the right to inflict the necessary damage or invade plaintiff's property, its failure to so condemn is not an excuse to deny plaintiff's recovery.

Great Northern, 102 Wash. at 352-53, *quoted in Wong Kee Jun*, 143 Wash. at 497-98.

1. *Wong Kee Jun* Sets Out the Modern Test for Distinguishing a Taking from a Tort

With this background of conflicting cases in mind, *Wong Kee Jun* set out a rule to be applied in future cases. First, the Court overruled its earlier attempts to draw a distinction between tort and inverse condemnation in *Casassa* and *Jorguson*: “In the beginning [*Casassa* and *Jorguson*] were a not unjustified attempt to draw a distinction which does exist, but the line drawn was too fine, and the results show that it leads to confusion. So far as out of harmony with what is here said, those cases are overruled.” *Wong Kee Jun*, 143 Wash. at 505.⁵ Then, in place of the rejected “intent” test, the *Wong Kee Jun* Court held that courts must look to the taking itself to determine whether it constituted a taking or tort: “[T]he courts must look only to the taking, and not to the manner in which the taking was consummated.” *Id.* at 505. Thus, *Wong Kee Jun* ended any consideration of the government’s intent as being determinative of a takings claim. *See Boitano*, 11 Wn.2d at 675; *see also State v. Williams*, 12 Wn.2d 1, 12-14 (1941) (recognizing that *Casassa* and

⁵ The County attempts to circumvent the fact that *Casassa* and *Jorguson* were overruled by citing two appellate decisions that adopt the language of *Jorguson* without recognizing that the very proposition cited had been abandoned by this Court over 80 years ago. *See Okanogan County’s Petition for Review* at 15 (citing *Seal v. Naches-Selah Irrigation Dist.*, 51 Wn. App. 1 (1988); *Songstad v. Municipality of Metro. Seattle*, 2 Wn. App. 680 (1970)); *Okanogan County’s Supp. Br.* at 13-14 (same); *see also State of Washington Supp. Br.* at 14-18.

Jorguson were overruled); *Lambier*, 56 Wn. App. at 281 (recognizing that *Casassa* and *Jorguson* were overruled).

2. The Manner in Which Property Is Taken or Damaged Is Immaterial to the Question of Whether the Government Is Liable for Inverse Condemnation

Since *Wong Kee Jun*, this Court has consistently held that the manner in which government damages property is immaterial in determining whether damage to private property caused by a public works project constitutes a taking or a tort. For example, in 1941, the state attempted to avoid inverse condemnation liability by arguing that landslide damage to private property was caused by the negligent work of its contractors on a public highway project involving up-slope excavation, and therefore was not contemplated as part of the public work. The Court rejected this argument concluding that “it is immaterial whether the damaging was voluntary or involuntary, or a damaging which necessarily and unavoidably resulted from the construction of the improvement.” *Williams*, 12 Wn.2d at 13;⁶ *see also Dickgieser*, 153 Wn.2d at 534, 541 (While negligence and inverse condemnation are distinct

⁶ The Court also rejected the state’s argument that its inverse condemnation liability was limited to only those damages that were foreseeable at the time that it undertook the public project: an inverse condemnation plaintiff “is not limited to damages which could have been foreseen, but may recover all damages which come within the provision of Art. I, § 16, of the constitution[.]” *Williams*, 12 Wn.2d at 7.

legal claims, they often overlap and evidence of negligence will not necessarily preclude an inverse condemnation claim.); *Lambier*, 56 Wn. App. at 281 (“The unintended results of a governmental act may constitute a ‘taking.’”); see also *Highline Sch. Dist. No. 401 v. Port of Seattle*, 87 Wn.2d 6, 14-16 (1976) (unintended damages caused by vibrations from airport traffic noise constituted a taking); *Martin v. Port of Seattle*, 64 Wn.2d 309, 310-15 (1964) (noise related damage caused by low-altitude overflights constituted a taking); *Ulery v. Kitsap County*, 188 Wash. 519, 523 (1936) (construction of a highway that caused surface water to flow onto and damage plaintiff’s property constituted a taking).

B. California Courts Hold That Intent Is an Artificial and Legally Irrelevant Distinction in an Inverse Condemnation Case

Like Washington, the California Supreme Court has interpreted the Takings Clause of the California Constitution⁷ to hold a government entity liable for “any actual physical injury to real property proximately caused by the improvement as deliberately designed and constructed is compensable . . .

⁷ Because the Takings Clause of the California Constitution was a model for Washington’s, our Courts will look to California courts’ interpretation of this clause for guidance. *Eggleston v. Pierce County*, 148 Wn.2d 760, 772 n.8 (2003) (citing Robert F. Utter & Hugh D. Spitzer, *The Washington State Constitution: A Reference Guide* 30 (2002); Cal. Const. art. I, § 19 (“Private property may be taken or damaged for public use only when just compensation . . . has first been paid.”)).

whether foreseeable or not.”⁸ *Albers v. County of Los Angeles*, 62 Cal. 2d 250, 263-64, 398 P.2d 129 (1965). Tort concepts like fault and negligence are not applicable. *Bunch v. Coachella Valley Water Dist.*, 15 Cal. 4th 432, 436, 935 P.2d 796 (1997). The California courts focus on the nature of the damage and whether the government action caused the damage as the touchstones distinguishing a taking from a tort.

So as not to confuse inverse condemnation with tort concepts such as foreseeability, the California courts developed a “substantial cause” standard. *See Belair v. Riverside County Flood Control Dist.*, 47 Cal. 3d 550, 559, 764 P.2d 1070 (1988); Arvo Van Alstyne, *Inverse Condemnation: Unintended Physical Damage*, 20 Hastings L.J. 431, 435-38 (1968-1969) (warning that constitutional cause should not be confused with the tort concept of proximate cause). Under this standard, the landowner must demonstrate ““a substantial cause-and-effect relationship excluding the probability that other forces *alone* produced the injury.”” *Belair*, 47 Cal.3d at 559 (citations

⁸ The phrase “deliberately designed and constructed” has been interpreted by the California courts to mean that at the time of the failure, the public improvement was operating as originally intended. *See Belair v. Riverside County Flood Control Dist.*, 47 Cal. 3d 550, 764 P.2d 1070 (1988). This inquiry does not require an intent to cause the damage. *Yee v. City of Sausalito*, 141 Cal. App. 3d 917, 921 (1983) (“[The government] draws an artificial, and for our purposes, legally irrelevant distinction between the intended use of the public improvements and the unintended or unforeseeable damage which necessarily resulted from the use of the storm drainage system.”).

omitted) (government may avoid liability upon showing that the damage was caused solely by an unforeseen and supervening cause). This is the same standard that this Court applied in *Dickgieser*, 153 Wn.2d at 541-42. Thus, where a landowner has demonstrated cause, the question of whether or not the government contemplated the resulting damage when it made the public improvement is immaterial.

II

THE FEDERAL COURTS AGREE THAT INTENT IS IMMATERIAL TO AN INVERSE CONDEMNATION CLAIM WHERE THERE IS PROOF OF CAUSATION

Although the federal courts have developed a unique approach to distinguishing takings from torts, they too hold that intent is not a necessary element to an inverse condemnation claim. *Hansen v. United States*, 65 Fed. Cl. 76, 81 (2005) (The Takings Clause “contains no state of mind requirement.”). The federal courts apply a disjunctive analysis for distinguishing takings from torts, whereby property loss may constitute a compensable taking if the government intended to invade the property interest *or* the damage was caused by the government activity. *Ridge Line, Inc. v. United States*, 346 F.3d 1346, 1355 (Fed. Cir. 2003). The history of this analysis is informative because it demonstrates that the “damage caused by a government act” test arose from case law interpreting the Takings

Clause; whereas, the “intent” inquiry arose from a “jurisdictional quirk” in how takings claims were pleaded to the Court of Claims for a period of time when the court did not have direct jurisdiction over constitutional claims. *Hansen*, 65 Fed. Cl. at 96, 106-10.

A. The U.S. Supreme Court and Other Federal Tribunals Have Long Identified Damage Caused by a Government Act, Not Intent, as the Key to Takings Liability

Similar to Washington and California, the early federal takings cases addressing the tort-taking distinction focused on the irrelevance of intent to the takings analysis. *See, e.g., Pumpelly v. Green Bay Co.*, 80 U.S. 166, 177-78 (1871). In *Pumpelly*, the government’s construction of a dam caused a lake to flood which almost completely destroyed the plaintiff’s property. *Id.* at 177. The damage was collateral to the government project, and there was no intent to appropriate the plaintiff’s property. *Id.* at 167-68. The government argued that its actions did not constitute a taking because the damage was a “consequential result” of an otherwise valid exercise of government power. *Id.* at 177. The *Pumpelly* Court rejected this argument, holding that collateral and unintended damage to private property resulting from a government project can result in a taking:

It would be a very curious and unsatisfactory result, if in construing a provision of constitutional law, always understood to have been adopted for protection and security

to the rights of the individual as against the government, . . . it shall be held that if the government refrains from the absolute conversion of real property to uses of the public it can destroy its value entirely, can inflict irreparable and permanent injury to any extent, can, in effect, subject it to total destruction without making any compensation, because, in the narrowest sense of that word, it is not *taken* for the public use. Such a construction would pervert the constitutional provision into a restriction upon the rights of the citizen, as those rights stood at the common law, instead of the government, and make it an authority for invasion of private rights under the pretext of the public good, which had no warrant in the laws or practices of our ancestors.

Id. at 177-78.

The “damage caused by a government act” test was further refined in *Portsmouth Harbor Land & Hotel Co. v. United States*, 260 U.S. at 330. In this case, the government had installed a battery of cannons on the top of a hill that could only be fired over the plaintiff’s property. *Id.* at 328-29. The plaintiff sued, arguing that the cumulative effect of the government’s firing of the cannons constituted a taking. *Id.* The *Portsmouth* Court agreed, concluding that evidence of successive acts of trespass would warrant a finding that the government had imposed a servitude on the plaintiff’s property for which compensation should be made, regardless of the fact that it did not intend to appropriate plaintiff’s property. *Id.* at 329-30.

B. The Consideration of Governmental Intent for Takings Liability Was a Historical Anomaly Arising from Long-Outdated Jurisdictional Constraints

The federal courts' extension of the takings inquiry to consider the government's intention finds its origin in the enabling statute that limited the Court of Claims' jurisdiction. *Hansen*, 65 Fed. Cl. at 96, 106-10. For a period of time, the Court of Claims lacked the authority to consider direct constitutional claims.⁹ And as a result, the court considered takings claims as claims for assumpsit based on a breach of implied contract theory. *See id.* at 107 (citing cases). In short, a plaintiff asserting a claim under implied contract theory argued that the Takings Clause constituted a governmental promise to compensate property owners for damage to his or her private property. *See id.* at 107-08. Thus, the early takings cases from this period extended the takings inquiry to consider intent as a distinguishing characteristic of compensable takings under an implied contract theory. *See Klebe v. United States*, 263 U.S. 188, 191-92 (1923); *United States v. N. Am.*

⁹ Congress created the Court of Claims in 1855 to exercise jurisdiction over "all claims founded upon any law of Congress, or upon any regulation of an executive department, or upon any contract, express or implied, with the government of the United States." *Hansen*, 65 Fed. Cl. at 106 n.41 (citing Act of February 24, 1855, ch. 122, 10 Stat. 612 (1855)). Between its inception and the adoption of the Tucker Act, ch. 359, 24 Stat. 505 (1887), the Court of Claims interpreted its enabling statute as strictly limiting its jurisdiction and concluded that it could not exercise jurisdiction over torts or direct constitutional claims. *Hansen*, 65 Fed. Cl. at 106-07.

Transp. & Trading Co., 253 U.S. 330, 333-34 (1920); *Tempel v. United States*, 248 U.S. 121, 130-31 (1918).

C. The Divergent “Damage Caused by a Government Act” and “Intent” Analyses Are Combined To Develop the Modern Federal Tort-Takings Analysis

After the Tucker Act broadened the court’s jurisdiction to include constitutional claims, the court issued a series of decisions reconciling the divergent “damage caused by a government act” and “intent” analyses. *E.g.*, *Columbia Basin Orchard v. United States*, 132 F. Supp. 707, 709 (Ct. Cl. 1955); *see also Berenholz v. United States*, 1 Cl. Ct. 620, 627 (1982) (“An intent to appropriate may be implied from the facts of the case. The facts need only demonstrate that the invasion of property rights was the result of acts the natural and probable consequences of which were to effect such an enduring invasion.” (citations omitted)). Like Washington, this test holds that evidence of the government’s intent is immaterial where the landowner has demonstrated that a public works project caused damage to private property. *Ridge Line*, 346 F.3d at 1355-56.

CONCLUSION

As demonstrated above, the real distinction between takings and torts is that intent is irrelevant in a takings context. Once a takings plaintiff demonstrates that a government act caused damage to their private property, he or she must only prove the elements of inverse condemnation. There is no justification for extending Washington's takings inquiry to consider the government's intention. For the foregoing reasons, Amicus Curiae respectfully requests that this Court affirm the Court of Appeals' decision.

DATED: April 9, 2009.

Respectfully submitted,

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DECLARATION OF SERVICE BY MAIL

I, Brian T. Hodges, declare as follows:

I am a resident of the State of Washington, residing or employed in Bellevue, Washington.

I am over the age of 18 years and am not a party to the above-entitled action.

My business address is 10940 NE 33rd Place, Suite 210, Bellevue, Washington 98004.

On April 9, 2009, true copies of BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION were placed in envelopes addressed to:

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which envelopes, with postage thereon fully prepaid, were then sealed and deposited in a mailbox regularly maintained by the United States Postal Service in Bellevue, Washington.

I declare under penalty of perjury that the foregoing is true and correct and that this declaration was executed this 9th day of April, 2009, at Bellevue, Washington.



BRIAN T. HODGES