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SUPREME COURT
STATE OF WASHINGTON
2009 MAY 14 A 10:57

NO. 81257-8 BY RONALD R. CARPENTER

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SUPREME COURT OF THE STATE OF WASHINGTON

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

Respondents,

v.

OKANOGAN COUNTY,

Petitioner

and

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

Defendants.

**STATE'S JOINDER IN OKANOGAN COUNTY'S ANSWER TO
PACIFIC LEGAL FOUNDATION AMICUS BRIEF**

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**I. THE STATE JOINS THE BRIEF OF OKANOGAN COUNTY
IN RESPONSE TO THE AMICUS**

The State of Washington (State) joins in the answer of Okanogan County to the amicus brief submitted by Pacific Legal Foundation (PLF) in this appeal. The State will not repeat the County's argument, but writes separately to summarize the State's position.

A. The Common Enemy Doctrine Decides This Case

Notably, the PLF's amicus brief does not address the primary basis for the trial court's summary judgment ruling that the Common Enemy Doctrine precludes liability for dikes which keep floodwaters within the banks of a river. The Court may properly resolve this case on the basis of the Common Enemy Doctrine without reaching the alternative basis for dismissal addressed by the PLF; whether an inverse condemnation claim exists based on evidence of damage to plaintiffs' property 27 years after the construction of a dike where the damages were neither reasonably contemplated by the plan of work nor necessarily incident to the proper construction or operation of the dike.

**B. Amicus PLF Does Not Properly Apply The Elements Of
Inverse Condemnation Distinguishing Government Taking and
Damaging From Tort Liability**

The PLF's amicus brief fails to address Washington's law of inverse condemnation by focusing on whether the government "intended"

to damage the plaintiffs' property. As explained in the County's brief, the County and State do not claim that inverse condemnation liability can be avoided based on a lack of government intent to damage private property. Summary judgment was proper here, however, because the damage to plaintiffs' property in 2002 was not reasonably contemplated nor was it necessarily incident to the construction of the dike or its proper operation.

More recent cases than *Wong Kee Jun v. City of Seattle*, 143 Wash. 479, 255 P. 645 (1927), confirm the continuing viability of the "reasonably contemplated or necessarily incident to" standard when a person seeks an inverse condemnation for damages to private property. In *Dickgieser v. State*, 153 Wn.2d 530, 542, 105 P.3d 26 (2005), this Court held that a factual question existed whether the damage to Dickgieser's property was "reasonably necessary in order for the Department to log its land". *Dickgieser*, 153 Wn.2d at 542. In so ruling, this Court relied on evidence showing that the flooding damage which occurred shortly after the DNR logging project was not only necessarily incident to that project, it was reasonably necessary to the project. *Id.*

However, where the damage to property is remote in time, this Court has not hesitated to dismiss an inverse condemnation claim as failing to satisfy the requirements that the damage must be reasonably contemplated by the plan of work or necessarily incident to the

governmental project. In *Olson v. King County*, 71 Wn.2d 279, 482 P.2d 462 (1967), this court dismissed an inverse condemnation claim after concluding that damage to property 27 years after road work was neither contemplated by the plan of work nor a necessary incident to the project. *Olson*, 71 Wn.2d at 284-85.

II. CONCLUSION

If the Court reaches the alternative basis for affirming dismissal, it should apply the precedent established by *Dickgieser* and *Olson* decisions. An inverse condemnation claim is not available where evidence on summary judgment does not show that the damage was reasonably contemplated by or necessarily incident to the dike.

RESPECTFULLY SUBMITTED this 13th day of May, 2009.

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CERTIFICATE OF SERVICE

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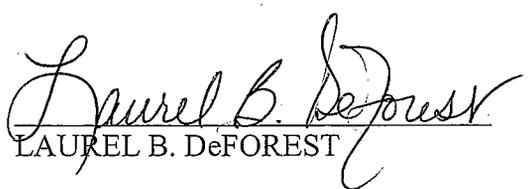
I hereby certify that on the 13th day of May, 2009, I caused to be served a copy of the State's Joinder In Okanogan County's Answer To Pacific Legal Foundation Amicus Brief by electronic mail and a paper copy by ABC Legal Messengers, on the following:

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DATED this 13th day of May, 2009, at Tumwater, Washington.


LAUREL B. DeFOREST