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NO. 25161-6-III
COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

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

Appellants,

v.

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

Respondents.

BRIEF OF RESPONDENT OKANOGAN COUNTY

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I. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

Okanogan County believes that the issues pertaining to the assignments of error may best be stated as follows:

A. Whether a governmental entity which participates in construction of a dike to keep floodwaters from overflowing the banks of a river is protected from liability by the common enemy doctrine.

B. Whether a county is further protected under such circumstances by RCW 86.12.037.

C. Whether inverse condemnation claims are properly dismissed where the damage was not contemplated by nor necessarily incident to the governmental project.

II. STATEMENT OF THE CASE

A. Factual Background.

Plaintiffs/Respondents Fitzpatrick and Sturgill (hereinafter "Fitzpatrick") are current and former owners of a residential lot on the Methow River near Mazama in Okanogan County. The land was purchased by Fitzpatrick in the early 1980s. (CP 89). A home was built on the property in the mid-1980s.

On June 16, 2002, Fitzpatrick's home was swept away in a significant flood event on the Methow River.¹ He contends in this

¹ Fitzpatrick makes the curious assertion that this was not really a flood, stating that there is "no evidence of flooding." (Brief, p. 4). Yet this argument is contradicted by the plaintiffs' own allegations and evidence. Fitzpatrick alleged in the Complaint that his property was "flooded" by the Methow River. (CP 4). Additionally, his expert described the channels allegedly blocked by the dike as in the

lawsuit that the damage to the property and loss of the home was caused by the presence of a dike on the river, in combination with a log jam which had formed several years earlier upstream from his property. (CP 5). The dike in question is known as the Sloan-Witchert Slough Dike (the "dike"). It is located on the other side of the Methow River from the Fitzpatrick property. At the time of its construction, the dike was approximately 1/2 mile upstream from the property subsequently purchased by Fitzpatrick. (CP 152).

A dike in this location was originally installed by private landowners prior to 1970. In the mid-1970s, Okanogan County sought approval from the State of Washington and the U.S. government to construct/improve the dike so as to provide protection against a washout of Washington State Highway 20 and other property. (CP 3, 93-94). The proposal was evaluated by the Washington Department of Fisheries, which issued a Hydraulic Project Approval (HPA). The improvement of the dike went forward in 1975.

In the late 1990s, Okanogan County sought permission to repair the dike, and also to remove a log jam which had formed in the river. A Hydraulic Project Approval (HPA) was sought from the Washington Department of Fish and Wildlife. WDFW evaluated the proposal and granted permission, on or about June 29, 1999, to make limited repairs

"flood plain." (CP 132, 133). Moreover, the flood data submitted by plaintiffs from the Mazama gauge show that this was a 3.3-year storm event. (CP 144).

to the dike. (CP 94). However, the HPA denied permission to remove the log jam in the river because it was felt that the presence of the large woody debris in the river provided important fish habitat.

A flood event in July 1999 resulted in the partial breach of the dike, before the County could undertake the approved repairs. Instead, the Army Corps of Engineers performed emergency repairs. (CP 94; 146-147).

On or about June 16, 2002, rapid melting of snowpack in the North Cascades resulted in a high water flood event in the Methow. During this storm, the Methow River current avulsed (changed course). The Fitzpatrick home was washed away in the flood.

B. Procedural Background.

In June 2005, Fitzpatrick sued Okanogan County, the State of Washington, John Hayes and the Methow Institute Foundation in Douglas County Superior Court, alleging that the defendants should be liable for construction of the dike and for failure to remove the log jam. (CP 1-6). The defendants filed a motion for summary judgment on or about February 1, 2006. They argued that under settled Washington law, they are protected from liability by the Common Enemy Rule; and by RCW 86.12.037 and RCW 86.16.071; and by Fitzpatrick's failure to establish the necessary elements of his claims.

The summary judgment motion was heard by the Honorable John Hotchkiss on March 7, 2006. After reviewing the briefing of the

parties, the declarations and other evidence and considering the argument of counsel, Judge Hotchkiss granted the defendants' motion for summary judgment. (CP 232-234). On or about March 15, 2006, Fitzpatrick filed a motion for reconsideration. The motion for reconsideration was denied by the trial court on or about April 13, 2006. (CP 272-273). This appeal followed.

III. LEGAL ARGUMENT

A. Introductory Summary.

In this appeal, Fitzpatrick has effectively conceded that his tort claims against the County and the state are foreclosed by the statutory immunity provided by RCW 86.12.037 and RCW 86.16.071, respectively. Fitzpatrick has not sought to overturn the dismissal of the tort claims.

Fitzpatrick has also acknowledged that there can be no liability for the County's failure to remove a log jam in the river, which he had alleged in the Complaint was a proximate cause of the washout of his home. (CP 3-5). In addition, Fitzpatrick has dropped his claims against defendants John Hayes and the Methow Institute Foundation. (See Appellants' Opening Brief, page 6 and footnotes 3, 4 and 5).

As explained in his Opening Brief, Fitzpatrick seeks review only with respect to the inverse condemnation claim arising from construction of the Sloan-Witchert Dike. Yet there are several fundamental grounds warranting dismissal of the inverse condemnation claims: The

defendants are protected by the common enemy rule, and by statutory immunity. Moreover, inverse condemnation is not a viable theory because the washout of the Fitzpatrick property in 2002 was not necessarily incident to nor contemplated by the County's dike construction project.

Okanogan County asks that the Court of Appeals affirm the dismissal of this action.

B. Fitzpatrick's Claims are Barred by the Common Enemy Rule.

1. The Common Enemy Rule Precludes Liability for Dikes Which Keep Floodwaters Within the Banks of a River.

Fitzpatrick contends that Okanogan County and the State of Washington should be liable for flood damage to his property which he alleges was caused in part by the construction of the Sloan-Witchert Slough Dike. According to the Complaint, the construction or improvement of the dike in the mid-1970s created a condition which resulted, nearly 30 years later, in floodwaters suddenly entering Fitzpatrick's downstream property and destroying his home.

Yet as the Washington Supreme Court has consistently held, a local government which constructs or maintains a dike to keep floodwaters from leaving the banks of a river is protected from liability to nearby property owners by the "common enemy rule." The common enemy rule has been recognized as a valid defense to liability in flooding cases for more than 100 years. The rule provides that "surface water is

an outlaw and a common enemy against which anyone may defend himself, even though by so doing injury may result to others.” Cass v. Dicks, 14 Wash. 75, 78, 44 Pac. 113 (1896).

Many of the leading cases upholding the common enemy rule involve the construction and maintenance of dikes and levees designed to prevent floodwaters from escaping the banks of the river. In Cass, the Washington Supreme Court held that owners of land along a river were not liable for damages caused by their construction of a dike to protect their properties against flooding. Similar rulings were made in Harvey v. Northern Pac. Rwy. Co., 63 Wash. 669, 676-77, 116 Pac. 464 (1911) and Morton v. Hines, 112 Wash. 612, 192 Pac. 1016 (1920).

In a recent case with facts similar to the present controversy, the Washington Supreme Court reaffirmed the continuing viability of the common enemy doctrine in the context of a challenge to a river dike. In Halvorson v. Skagit County, 139 Wn.2d 1, 983 P.2d 643 (1999), the plaintiffs’ properties along the Skagit River were damaged in storm events. They sued Skagit County on the theory that the flood damage was more severe than it would have been had there been no levees constructed along the Skagit River. The trial court found Skagit County liable for damages attributable to the levees but the Supreme Court reversed, on two independently valid grounds: First, that the County did not own and control the levees; and second, that even if the County

could be seen as responsible for the levees, it would be absolutely protected from liability by the common enemy rule:

If the County had been legally responsible for the existence of the levees, then the County should have been able to raise the common enemy doctrine as a defense to this action. We find the defense controlling.

139 Wn.2d at 13-14. The Supreme Court stressed in Halvorson that dikes and levees are designed to prevent floodwaters from leaving the channel of a river during high water events. As such, they fall squarely within the protection of the common enemy rule, and thus parties responsible for the construction of dikes and levees are not liable for flood damage to nearby properties caused by the existence of the structures:

Under longstanding Washington law, waters escaping from the banks of a river at times of flood are surface waters, and are waters that an owner of land may lawfully protect against by dikes and fills on his property, even though the effect is to cause an increased flow of water on the lands of another to the damage of his lands.

139 Wn.2d at 15. The Supreme Court dismissed all claims against Skagit County as a matter of law.

The same rule applies in this case. To the extent that Fitzpatrick's property damage was caused by the existence of the Sloan-

Witchert Slough dike, the County and the state are protected from liability by the common enemy doctrine.²

2. The Exception to the Common Enemy Rule Cited by Fitzpatrick is Inapplicable.

Fitzpatrick concedes that the common enemy rule generally protects landowners who erect dikes to protect property against unwanted waters leaving the banks of rivers during high water events. Nevertheless, Fitzpatrick argues that the common enemy rule should not apply to this case, citing the exception for obstructing the flow of a natural watercourse. But the caselaw upon which Fitzpatrick relies does not support application of the “watercourse obstruction” exception in the context of dike construction. Indeed, the cases cited by Fitzpatrick do not even arise in the context of dikes along rivers. His citations to authority are misplaced and his interpretation of the “natural watercourse obstruction” exception is incorrect.

It is true that an exception to the common enemy rule applies where a dam or other obstruction blocks the flow of a natural river or watercourse. However, as the caselaw makes clear, this exception applies where a downstream property owner dams or blocks a river, causing it to back up onto an upstream owner’s property. Wilber v. Western Properties, 14 Wn. App. 169, 173, 540 P.2d 470 (1975). It

² It is ironic that, after the washout, Fitzpatrick placed riprap on his side of the river (effectively a dike), to protect his own property from further flooding! (Deposition of Brad Sturgill, pp. 30-31.)

does not apply to a dike parallel to a river which keeps floodwaters from flowing out of the main channel into the floodplain.

The principal case upon which Fitzpatrick relies is Sund v. Keating, 43 Wn.2d 36, 259 P.2d 1113 (1953). Importantly, Sund did not involve a dike or levee, but rather involved the **excavation and removal** of a portion of the stream bank, which directed water onto the plaintiffs' property. Id. at 38-39. Indeed, the trial court in Sund determined that the defendant **should have built a dike** to prevent the discharge of river waters onto their property:

Following a trial without a jury, the court found, in substance, that the appellants had removed a portion of the north bank of Clark Creek . . . that the appellants had refused to take the precautions suggested to them by appellants, such as building a bulkhead to retain the banks of a stream, that because of the flood, waters were diverted onto respondents' land.

43 Wn.2d at 39-40.

Thus, Sund is wholly inapposite to the issues raised in this case. Indeed, contrary to the suggestion in Fitzpatrick's brief, the Washington Supreme Court in Halvorson distinguished Sund v. Keating, noting its very different factual background:

Sund held that floodwaters **still flowing** within a defined "flood channel" cannot be **diverted out** of the channel without incurring liability for resulting damages. . . . While Sund narrows the concept of surface waters, it **does not change the rule that landowners seeking to protect against surface waters can build levees without incurring liability for damages, even when those levees keep floodwaters within the confines of a stream.**

139 Wn.2d at 15-16. (Emphasis added.)

The other cases upon which Fitzpatrick relies are similarly inapposite. Fitzpatrick attempts to support his argument by citing Currens v. Sleek, 138 Wn.2d 858, 983 P.2d 626 (1999). Yet Currens did not involve a dike or levee or, for that matter, any obstruction on a river. Rather, Currens involved an upland property owner who denuded the slopes of a forested hillside, causing water to run with greater velocity and intensity downhill onto plaintiffs' land. 138 Wn.2d at 860. The suggestion by Fitzpatrick that Currens provides meaningful authority in this context is misplaced.

Finally, Fitzpatrick relies on Snohomish County v. Postema, 95 Wn. App. 817, 978 P.2d 1101 (1999), rev. denied, 139 Wn.2d 1011. But here again, Postema did not involve erection of a dike along a river. Inexplicably, Fitzpatrick argues that in Postema "there was a factual question of whether the upstream owner blocked a natural watercourse or surface water." (Opening Brief, pp. 22-23). Yet this statement is simply false. In reality, Postema involved damage caused by the clearing and draining of a wetland, and the discharge of water and mud through ditches onto plaintiffs' property:

. . . John Postema cleared 4.4 acres of the property, filled 1.1 acres of wetland, and built two drainage ditches to drain wetlands through a swale into Evans Creek. . . . A civil engineer concluded that it was Postema's activity that caused a significant amount of sediment to erode from the

upstream property down through Evans Creek into Smith's Pond.

Id. at 819. In other words, Postema involved the artificial collection and discharge of water and sediment onto a lower property owner. Postema provides no guidance with respect to liability arising from construction of a dike along the banks of a river.

In short, in an effort to find authority to support his argument, Fitzpatrick has been forced to rely on cases with factual patterns that are wholly dissimilar to the present controversy. Indeed, he studiously avoids the holdings of the numerous Washington cases which have consistently concluded that a government is not liable for damage caused by construction or maintenance of dikes along the banks of a river, e.g., Cass v. Dicks, supra, 14 Wash. at 78 (1896); Halvorson v. Skagit County, supra, 139 Wn.2d at 13-14 (1999).

3. Fitzpatrick Possessed No Riparian Rights as to the Flood Channels.

In essence, Fitzpatrick argues that there were dry flood channels which were blocked by the Sloan Witchert Slough Dike, and therefore this case should be taken out of the context of the common enemy rule, which applies to surface waters. Citing Sund v. Keating, supra, Fitzpatrick argues that the analysis of liability should be under "the law governing riparian rights." (Opening Brief, page 12 and page 13). The defendants deny that the "watercourse obstruction" exception applies. But even if one were to accept that premise, and analyze the case under

the rubric of riparian rights, this would still not afford Fitzpatrick relief in this case. This is because Fitzpatrick does not hold riparian rights relative to the alleged blocked flood channels, and thus he has no standing to seek recovery against the defendants based on the riparian rights doctrine.

The term “riparian” is defined as “of or relating to or living or located on the banks of a watercourse.” Webster’s Third International Dictionary (1981). It is settled that riparian rights are possessed only by landowners whose property borders on the natural watercourse in question:

Riparian right: The right of a land owner whose property borders on a body of water or watercourse.

Black’s Law Dictionary (8th ed. 2004). It follows that one who does not own or occupy property along an obstructed watercourse has no standing to claim injury to a riparian right:

Subject to certain exceptions hereinafter noted, riparian rights subsist only for riparian proprietors, and those who do not own or control riparian land cannot claim them.

78 Am. Jur.2d Waters § 42 (2002). This rule has been recognized by the Washington courts:

Riparian rights, where they exist, derive from the ownership of land contiguous to or traversed by a water course.

Dept. of Ecology v. Abbott, 103 Wn.2d 686, 689, 694 P.2d 1071 (1985).

One claiming damage to riparian rights as a result of obstruction of a watercourse, therefore, must own land along that obstructed watercourse. Judson v. Tide Water Lumber Co., 51 Wash. 164, 169, 98 P.377 (1908). Because Fitzpatrick owns no land bordering the alleged blocked watercourses, he has no legal standing based on violation of riparian rights. Fitzpatrick's land does not border the flood channels identified by Jeffrey Bradley. To the contrary, those old abandoned flood channels flowed south from the west bank of the Methow, nowhere near Fitzpatrick's property. (CP 152-155). Because Fitzpatrick did not own riparian land on the flood channels which was damaged by a blockage of the channels, he cannot rely on the "watercourse obstruction" exception to the common enemy doctrine.

The cases which have found the "watercourse obstruction" exception applicable have involved blockage of a stream (with water still flowing in it) by a downstream property owner, which caused a backup onto the land of an upstream owner along the blocked stream. See, e.g., Dahlgren v. Chicago M&P.S.R. Co. 85 Wash. 395, 402, 148 Pac. 567 (1915); Island County v. Mackie, 36 Wn. App. 385, 387, 391, 675 P.2d 607 (1984). The applicability of the rule to blockage by downstream landowners is explicit in several Washington cases (with emphasis added):

A natural drainway must be kept open to carry water into streams and lakes, and a **lower proprietor** cannot obstruct

surface water when it is running in a natural drainage channel or depression.

Currens v. Sleek, 138 Wn.2d 858, 862, 983 P.2d 626 (1999). The rule was described by the Washington Court of Appeals as follows in Wilber v. Western Properties, *supra*:

A **lower landowner** who would impede or obstruct the flow of water through a natural drainway must provide adequate drainage to accommodate the flow during times of ordinary high water. If the obstruction does not accommodate that amount of flow, it has been negligently and wrongfully constructed **as to the upland owner** whose land becomes flooded.

14 Wn. App. at 173. The rule was recently reaffirmed in Colwell v. Etzell, 119 Wn. App. 432, 81 P.3d 895 (2003):

. . . even though a **downhill landowner** can lawfully repel surface water from his or her land, it must be done without blocking a natural water course or drainway.

119 Wn. App. at 441.

Significantly, plaintiffs cite no case in which a dike or levee parallel to a river, designed to prevent flooding outside of the river channel, was held to fall within the “watercourse obstruction” exception to the common enemy rule.³ To the contrary, Washington case law consistently applies the common enemy rule of non-liability to damage caused by a dike or levee along the mainstem of a river. Cass v. Dicks,

³ Indeed, the only case cited by Fitzpatrick for the proposition that an upstream owner can be liable for an obstruction is Snohomish County v. Postema, *supra*, which had nothing at all to do with an obstruction.

supra; Harvey v. Northern Pacific Railway Co., supra; Morton v. Hines, supra; Halvorson v. Skagit County, supra.

As the Washington Supreme Court held in Morton v. Hines, and reaffirmed in Halvorson v. Skagit County, waters which escape the banks of a river at times of flood are surface waters which may be protected against by means of dikes and levees. 139 Wn.2d at 15. The Supreme Court stressed in Halvorson that the County was protected from liability because the purpose of the dikes was to prevent waters from flowing out of the main channel of the Skagit River in high water events:

The purpose of the dikes is to control escaping floodwaters and not to have any effect on nonflooding river water.

Given these facts, the overbank floodwaters guarded against by these levees qualify as surface water.

139 Wn. 2d at 18.

Similarly, in this case the Sloan-Witchert Slough Dike was built to prevent waters from escaping the Methow River and flooding nearby farms and roads, as Fitzpatrick has conceded. (CP 3, 89-90). Any incidental “blocking” of old flood channels (with no water flowing in them) did not cause damage to an upstream “riparian” landowner. Thus, the “watercourse obstruction” exception to the common enemy rule is inapplicable, and the general rule of nonliability applies.

4. The “Obstruction” Argument Advanced by Fitzpatrick Would Eviscerate the Common Enemy Doctrine.

As the trial court properly noted in his oral remarks, the protection of the common enemy doctrine should not be eviscerated in dike cases, simply because floodwaters escaping from the banks of a river will find low ground and tend to flow in channels or depressions. If such an exception were recognized, it would devour the general rule. Instead, the rule cited in Sund v. Keating is that when water is **flowing** in a natural watercourse, it cannot be dammed or diverted out of that watercourse to the detriment of other riparian owners. (“*So long as the waters remain within the flood channel, the waters are properly classifiable as riparian waters.*” 42 Wn.2d at 42-43. Emphasis by court).

Thus, to create liability for a stream obstruction under the rubric of riparian rights, there must be water currently flowing in the stream which is blocked and backed up, to the detriment of an upstream riparian landowner. Otherwise, the general common enemy rule of non-liability applies.

The fact that overtopping waters may temporarily flow in channels and swales does not change the result. The Washington courts have recognized, as they consistently sustain the common enemy defense in diking cases, that the ground in a floodplain (or indeed anywhere in the real world) is not perfectly smooth like a billiard table. Especially in

a forested area like the Methow riparian corridor, the ground is always uneven to some degree. Thus, when water escapes the banks of a river, it will naturally flow first to those areas which are depressions in the ground surface. It is only as flood levels rise further that floodwater spreads out across the entire floodplain. But this simple principle of physics surely does not warrant overthrowing the well-settled common enemy defense.

Fitzpatrick points to the Declaration of Jeffrey B. Bradley and argues that, because floodwaters overtopping the banks of the Methow River have tended to flow through forests and farms in depressions or swales, that this prevents the application of the common enemy rule to dikes or levees. No Washington case has so held.

It is important to remember that Sund v. Keating, upon which Fitzpatrick principally relies, has critical differences which distinguish it from the present controversy: First, the watercourse in Sund was a named creek (Clark Creek) which was 20 feet wide and 18 inches deep, and which carried water in a normal flow during at least half of the year. Id. at 38. In contrast, the old channels identified by Bradley carried water only in rare high water flood events. Significantly, there is no water in any of the “watercourses” on any of the aerial photos attached to Bradley’s declaration, including those taken before the dike was built. Indeed, most would be invisible but for Bradley’s sketching them in with

colored pen. (CP 152-155). That is because these “watercourses” are merely depressions in the floodplain which had previously carried water escaping from the banks of the Methow River only in rare flood events. The County’s action did not divert water flowing in existing watercourses, but rather kept the floodwater within the banks of the Methow.

Moreover, in Sund, the plaintiff lived along the watercourse which the defendant had altered. There was no question that he possessed riparian rights which the plaintiff had damaged (although not by damming or obstructing the creek, but rather by diverting water from it). Id. at 39-40. Here, Fitzpatrick did not own property on any flood channel which the dike allegedly blocked.

Because these alleged flood channels were not regular streams with water flowing in them, and because Fitzpatrick did not own property along those channels, he was not a “riparian owner” who could claim that his property was damaged by blockage of the channels. The “natural watercourse obstruction” exception to the common enemy doctrine simply has no application to a diking case such as this one.

C. The County is Further Protected From Liability by RCW 86.12.037.

In addition to the common enemy defense, Okanogan County is also protected from liability in this case by a statute which expressly bars claims against counties for negligence relating to flood control activities.

The Washington legislature enacted RCW 86.12.037 to protect counties from claims such as this one, arising from alleged negligence in connection with flood control activities and structures. The statute provides that there can be no cause of action against a county for acts or omissions relating to flood prevention:

No action shall be brought or maintained against any county alone or when acting jointly with any other county under any law, its or their agents, officers or employees, **for any noncontractual acts or omissions of such county** or counties, its or their agents, officers or employees, **relating to the improvement, protection, regulation and control for flood prevention and navigation purposes of any river** or its tributaries and the bed, banks and waters thereof. (Emphasis added).

The purpose of the statute is to encourage counties to undertake flood control measures by removing the risk of liability exposure. The statute has been upheld by the Supreme Court against challenges of unconstitutionality. Paulson v. Pierce County, 99 Wn.2d 645, 664 P.2d 1202 (1983), app. dismissed, 104 S. Ct. 386. In Paulson, the Washington Supreme Court held that RCW 86.12.037 rendered Pierce County immune from liability for damages caused by the condition of a dike on the Nisqually River.

RCW 86.12.037 provides a complete defense to Fitzpatrick's claims against Okanogan County in this case. The plaintiffs seek recovery for acts or omissions by the County relative to flood protection and control on the Methow River. The Complaint specifically

acknowledges that the construction and repair of the Sloan-Witchert Slough Dike was undertaken for flood prevention purposes. (Complaint, ¶ 11). The statute provides an absolute and independent basis for dismissal of the claims against Okanogan County.

Fitzpatrick concedes that his tort claims against the defendants are barred by RCW 86.12.037 and RCW 86.16.071. He contends, nevertheless, that the statutes cannot prevent him from pursuing a claim for inverse condemnation because this would amount to legislative impairment of a constitutional right. Fitzpatrick cites Halvorson v. Skagit County for this proposition, but he misstates the holding of that case. In Halvorson, the court held that the statutory immunity of RCW 86.12.037 may in rare circumstances be inapplicable, but this is only when the violation alleged by the plaintiff is based solely on constitutional grounds:

Such immunity is inapplicable only when the alleged violation is solely based on constitutional grounds.

139 Wn. 2d at 12. A similar ruling was made by the Washington Supreme Court in Short v. Pierce County, 194 Wash. 421, 78 P.2d 610 (1938). In Short, a property owner sued Pierce County in inverse condemnation on the grounds that the county had failed to adequately construct and maintain a levee on the Puyallup River which, he contended, resulted in the washout of a portion of his land. He argued,

as Fitzpatrick does here, that the state statute could not immunize the county from liability for dikes and levees:

Plaintiffs contended before the superior court and contend here, that under Art. I, § 16, of the state constitution, the “eminent domain” section, which provides that no private property shall be taken or damaged for public or private use without just compensation having first been made, the counties forming the intercounty river improvement district are liable to them in damages; and that, if Chapter 185, Laws of 1921, supra, purports to relieve counties from such responsibility, the same is unconstitutional.

194 Wash. at 425. The Washington Supreme Court affirmed the dismissal of the claims arising from construction and maintenance of the levees based on statutory immunity:

Legislative enactments authorizing various improvements for the purpose of flood control have been upheld by this court. [Citations omitted] Many courts have held that the state or a municipal subdivision thereof, under the police power, may legally construct flood control projects; and if it appear that the authorities acted reasonably and in good faith for the benefit of the public, no liability exists for injuries caused by overflow or erosion.

Id. at 429-30.

The Supreme Court noted that the claims relating to construction and maintenance of the levee partook of both tort and inverse condemnation theories, and held those claims were statutorily barred, (allowing only a narrow inverse condemnation claim relating to the county’s planned occupation of plaintiffs’ property as a staging area for several weeks following the flood):

By the acts of 1921, the legislature declared a public policy new to this jurisdiction, and authorized counties to regulate and control the flow of waters for the purpose of preventing floods. . . . We are convinced that the work performed in improving the channel of the Puyallup River in an attempt to control the flow thereof should be held to be work performed by way of flood control and public in its nature.

As to appellants' contention that respondents are liable because they failed to repair the defect in the bulkhead or revetment a short distance above appellants' property, we find no basis for holding that appellants were entitled to go to the jury upon this question.

Id. at 430-31.

In this case, Fitzpatrick sought recovery not only under a takings theory, but also based on negligence and trespass. (CP 4-5). He continues to argue, with the support of his expert, that the defendants negligently constructed the dike in the wrong location. (CP 147; Appellants' Opening Brief, p. 19). Since plaintiffs have characterized the County's alleged violation as sounding in tort as well as a takings, Okanogan County is immune under 86.12.037.

D. There Is No Basis for an Inverse Condemnation Claim Against the County.

Even if the defenses of the common enemy rule and RCW 86.12.037 were not available, there would still be no basis for Fitzpatrick to recover under a theory of inverse condemnation against Okanogan County because the washout in 2002 was not "necessarily incident to" nor contemplated by the County's plan of construction of the dike.

Cases in which a physical taking has been found involved a governmental project where the damage was a necessary result of the project or was contemplated by the government in the plan of construction. Inverse condemnation “was designed to compensate for damages resulting from planned action rather than mere negligence.” Wilson v. Keytronic Corp., 40 Wn. App. 802, 815-16, 701 P.2d 518 (1985); Fralich v. Clark County, 22 Wn. App. 156, 162, 589 P.2d 273 (1978), rev. denied, 92 Wn.2d 1005.

Contrary to Fitzpatrick’s argument that this requirement was “overruled” by Wong Kee Jun v. Seattle, 143 Wash. 479 (1927), it has been repeatedly reaffirmed by the Washington courts over the past 60 years. See, e.g., Olson v. King County, 71 Wn.2d 279, 284-85, 482 P.2d 562 (1967). This rule has been applied specifically in the context of flooding cases. In Songstad v. Municipality of Metropolitan Seattle, 2 Wn. App. 680, 472 P.2d 574 (1970), the plaintiffs sought recovery for flood damage to their property. They contended that Metro’s construction of fill and installation of a pipe altered an existing watercourse, causing their property to become marshy. The trial court dismissed the inverse condemnation claim and the Court of Appeals affirmed, because the damage was not contemplated in the municipality’s plan of construction:

. . . an inverse condemnation has not occurred unless the damage is contemplated by the plan of work or considered

to be a necessary incident of the maintenance of the property for a public purpose.

* * *

We believe this case involves at most a tortious injury to property. The alleged damages were not contemplated in the plan of construction, nor were they necessarily incident to the construction work performed by Metro.

2 Wn. App. at 682, 684. The Court of Appeals, Division III, made a similar ruling in Seal v. Naches-Selah Irrigation Dist., 51 Wn. App. 1, 10, 751 P.2d 873 (1988), rev. den., 110 Wn.2d 1041, holding that permanent flood damage to the plaintiff's orchard which occurred several decades after construction of an irrigation canal did not give rise to an inverse condemnation claim against the irrigation district.

To support his inverse conclusion argument, Fitzpatrick relies on the opinion in Lambier v. City of Kennewick, 56 Wn. App. 275, 783 P.2d 596 (1989), rev. den., 114 Wn.2d 1016, an anomalous case that has nothing to do with a taking by flooding. Instead, Lambier involved a property owner who sued the City of Kennewick because the design and construction of a city-road was dangerous, and apparently resulted in numerous cars leaving the highway and winding up in Lambier's property. The court upheld the inverse condemnation claim in that strange context. Lambier appears to be the only inverse condemnation case in Washington in the past 60 years in which the court declined to apply the requirement that damage in inverse condemnation be

contemplated or necessarily incident to a governmental project. Lambier provides no meaningful precedent for evaluating inverse condemnation in the context of accidental flooding of property decades after the work was completed.

Moreover, any uncertainty as to the viability of the requirement that inverse condemnation damage be necessarily incident to, or contemplated by the government project was recently laid to rest by the Washington Supreme Court in Dickgieser v. State, 153 Wn.2d 530, 105 P.3d 26 (2005). In that case, the owners of property adjoining state forest land sued the state for flooding their property. The flooding occurred shortly after the state modified the bed of a stream that ran through their property and logged standing timber on the state land. The action against the state included a claim for inverse condemnation. In response to the State's summary judgment motion, the Supreme Court acknowledged the requirement in takings claims that damage be "necessarily incident" to the public project:

Citing Olson v. King County, 71 Wn.2d 279, 428 P.2d 562 (1967), the Department argues that every trespass or tortious damaging of real property does not become a constitutional taking or damaging merely because the government is involved. Rather, a taking occurs only if the state's interference with another's property is a "necessary incident" to the public use of the state's land. Id. at 285.

The Department is correct that governmental torts do not become takings simply because the alleged tortfeasor is the government.

153 Wn.2d at 541. The Supreme Court stressed in Dickgieser that the plaintiffs had raised an issue of material fact showing that the flooding to the plaintiff's property was the "inevitable consequence" of the recent logging and that the drainage problems were expressly anticipated and, indeed, "expected" by the state in its plan:

Moreover, the record contains evidence that the Department did not conduct its logging in a negligent manner and that the increased volume and rapid water runoff from the logged land onto the Dickgiesers' property was an inevitable consequence of logging. The declaration of Joan Dickgeiser states that the Department told her it would not address the drainage problems expected as a result of the logging if the Dickgiesers' did not sign an easement and that the Dickgiesers' property would be flooded worse than before.

Id. at 541-42.

In contrast, there is nothing to suggest that the flooding of the Fitzpatrick property was contemplated by the County or the state when the dike was built. Indeed, it would be absurd to suggest that when the dike was constructed in the mid-1970s, the County contemplated that a logjam would form and a major change in the river's course would occur 27 years later, flooding Fitzpatrick's home 1/2 mile downstream! The fact that the dike was in place for 27 years without any damage to Fitzpatrick's property belies the assertion of a constitutional taking.⁴

⁴ Fitzpatrick concedes that there was no damage to his property for 27 years following the construction of the dike. (CP 123; Opening Brief, page 24).

In considering whether damage was “contemplated by the plan of construction” and therefore potentially a taking, the courts have stressed the importance of the passage of time, and any change of conditions between the time of the governmental action and the damage. Thus, in Olson v. King County, *supra*, the Washington Supreme Court affirmed the dismissal of the inverse condemnation claim, noting that the construction of the road by King County occurred approximately 27 years before there was any damage to the plaintiffs’ property:

In the instance case, it appears that Northern Road was constructed sometime prior to 1935. The fill above the plaintiffs’ properties occasioned no damage to the properties until 1962. The inundation of the properties of the plaintiffs with rock, dirt, silt and debris in 1962 was neither contemplated by the plan of the work, nor was it a necessary incident in the building or maintenance of the road.

70 Wn.2d at 284-85.

Similarly, in Seal v. Naches-Selah Irrigation Dist., *supra*, this Court stressed the passage of time and the change of conditions, in dismissing the inverse condemnation claim:

The damage here was obviously not contemplated by the plan of construction, as the orchard was planted several decades after the canal was built.

51 Wn. App. at 10.

In this case, there was both an extensive passage of time, and changed circumstances between the construction of the dike in 1975 and the washout of the Fitzpatrick property. The washout occurred in the

context of a high runoff event in June 2002. Moreover, Fitzpatrick represented that a proximate cause of the washout was the presence of a log jam upstream of his property. (CP 3-5). This was an intervening natural event which negates any suggestion that the washout of the Fitzpatrick home in 2002 was necessarily incident to the 1975 dike construction.⁵

In view of the 27 year gap between the construction of the dike and the washout, and the intervening natural changes in the river which contributed to the alteration in the river's course, the claim of a constitutional taking of property is legally unfounded. Fitzpatrick cites no case in which an inverse condemnation has been upheld under similar facts.

Under these circumstances, Fitzpatrick could not establish the elements of inverse condemnation, even if the defenses of the common enemy rule and RCW 86.12.037 were not available.

IV. CONCLUSION

Okanogan County is protected by the common enemy rule and by RCW 86.12.037 from liability arising from the 2002 washout of the Fitzpatrick property. Moreover, even if the common enemy rule were inapplicable, recovery would be foreclosed because the washout of the Fitzpatrick property was neither necessarily incident to nor contemplated

⁵ As Fitzpatrick has now conceded, the County could have no liability – in inverse condemnation or tort – for failure to remove the log jam that formed in the late

by the government as a part of its project. The trial court's order of summary judgment should be affirmed.

DATED this 11th day of July, 2006.

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1990s. An application to remove the jam in 1999 was denied by WDFW. (CP 94).