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No. 73528-4-I

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

HOLDEN-McDANIEL PARTNERS, LLC,

Appellant,

v.

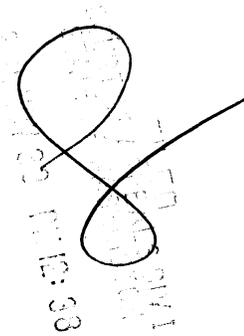
CITY OF ARLINGTON, et al.,

Respondents,

**RESPONSE BRIEF OF RESPONDENT
BNSF RAILWAY COMPANY**

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A handwritten signature in black ink is written over a circular stamp. The stamp contains the text "FILED" at the top, "17" on the right side, and "11:15:58" at the bottom. The signature is a large, stylized loop.

TABLE OF CONTENTS

	<u>Page</u>
I. INTRODUCTION	1
II. STATEMENT OF THE CASE	2
A. Factual Background.	2
1. Holden-McDaniel’s and BNSF’s Properties.....	2
2. Gleneagle Development.....	4
3. Flooding and Berm	5
B. Procedural Background.....	5
III. SUMMARY OF ARGUMENT	7
IV. ARGUMENT.....	8
A. The standard of Review is <i>de novo</i>	8
B. BNSF has no duty to maintain the ditch for Holden-McDaniel’s benefit.....	9
C. Holden-McDaniel’s claims are barred by the common enemy doctrine and none of the exceptions apply.	12
1. The common enemy doctrine applies.	12
2. None of the common enemy doctrine exceptions apply.....	13
D. Holden-McDaniel’s alleged damages from flooding from the BNSF ditch are barred by the statute of limitations.	17
E. BNSF is entitled to an award of its costs on appeal.....	18
V. CONCLUSION	19

TABLE OF AUTHORITIES

	<u>Page</u>
STATE CASES	
<i>Borden v. City of Olympia</i> , 113 Wn. App. 359, 53 P.3d 1020 (2002).....	12
<i>Bratton v. Welp</i> , 145 Wn.2d 572, 39 P.3d 959 (2002).....	9
<i>Cass v. Dicks</i> , 14 Wash. 75, 44 P. 113 (1896).....	10
<i>Cheney v. Mountlake Terrace</i> , 87 Wn.2d 338, 552 P.2d 184 (1976).....	8
<i>Colella v. King County</i> , 72 Wn.2d 386, 433 P.2d 154 (1967).....	9
<i>Currens v. Sleek</i> , 138 Wn.2d 858, 983 P.2d 626 (1999)	9, 12, 13, 15, 16
<i>Gaines v. Pierce County</i> , 66 Wn. App. 715, 834 P.2d 631, (1992).....	9
<i>King County v. Boeing Co.</i> , 62 Wn.2d 545, 384 P.2d 122 (1963).....	13,14
<i>Phillips v. King County</i> , 136 Wn.2d 946, 968 P.2d 871 (1998).....	11
<i>Roger Crane & Associates v. Felice</i> , 74 Wn. App. 769, 875 P.2d 705 (1994).....	8
<i>Rothweiler v. Clark County</i> , 108 Wn. App. 91, 29 P.3d 758 (2001).....	9, 11, 12, 13, 14, 15, 16, 17
<i>Sprague v. Sumitomo Forestry Co.</i> , 104 Wn.2d 751, 709 P.2d 1200 (1985).....	8
<i>Strickland v. City of Seattle</i> , 62 Wn.2d 912, 385 P.2d 33 (1963).....	16

<i>Wallace v. Lewis Cnty.</i> , 134 Wn. App. 1, 137 P.3d 101 (2006).....	17
<i>Wilber Dev. Corp. v. Les Rowland Constr. Inc.</i> , 83 Wn.2d 871, 523 P.2d 186 (1974).....	15
<i>Woldson v. Woodhead</i> , 159 Wn.2d 215, 149 P.3d 361 (2006).....	18
<i>Wood v. City of Tacoma</i> , 66 Wash. 266, 119 P. 859 (1911).....	16

COURT RULES

Rule of Appellate Procedure 14.2.....	18
---------------------------------------	----

MISCELLANEOUS

Restatement (Second) of Torts § 364 (1965).....	10
Restatement (Second) of Torts § 365 (1965).....	10

I. INTRODUCTION

Appellant Holden-McDaniel Partners, LLC (“Holden-McDaniel”) filed meritless claims against BNSF Railway Company (“BNSF”). The trial court properly dismissed Holden-McDaniel’s claims after reviewing all of the evidence in the light most favorable to Holden-McDaniel.

Holden-McDaniel claims BNSF is liable for trespass and nuisance because BNSF failed to maintain the ditches on its property to accept more water from upstream developments so that Holden-McDaniel’s property would be free of flooding from those upstream developments. BNSF, however, owes no duty to Holden-McDaniel. BNSF is an innocent, downslope property owner. Its property is downslope of both Holden-McDaniel and the other defendants in this action. As a downslope landowner, BNSF has no duty to transform its property for Holden-McDaniel’s benefit and has no duty to manage additional surface water runoff from upstream developments. Even if BNSF owed any duty, any claims against it are barred by the applicable statute of limitations.

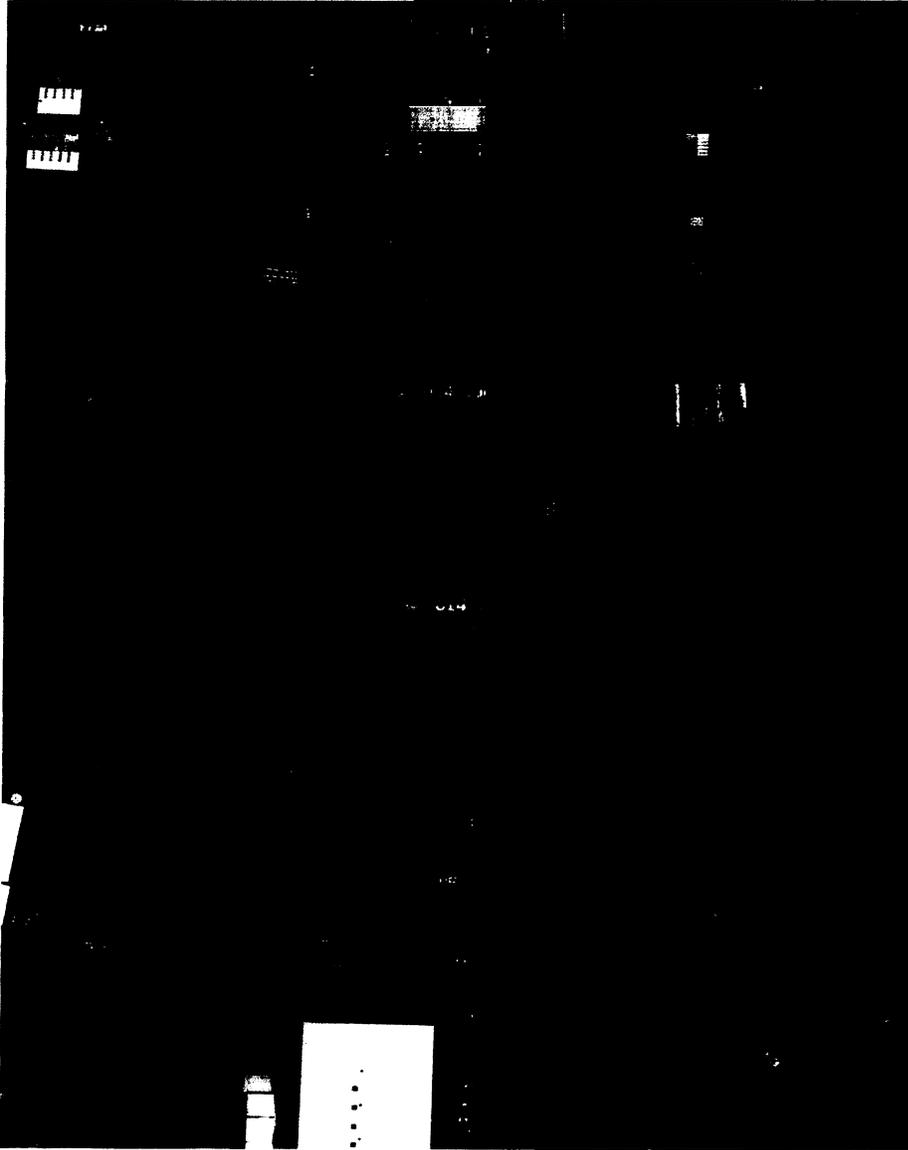
This Court should affirm dismissal of Holden-McDaniel’s claims against BNSF because such claims are unsupported by the law and the undisputed facts of this case.

II. STATEMENT OF THE CASE

A. Factual Background.

1. Holden-McDaniel's and BNSF's Properties

Holden-McDaniel owns property located at 18510 67th Avenue NE Arlington, Washington. CP 2032 ¶ 9. BNSF owns a railroad right-of-way for its North/South railway track in Arlington, Washington, a portion of which track is adjacent to and downslope from the western side of Holden-McDaniel's property. CP 2593. A ditch on BNSF's property runs parallel to the train tracks. *Id.* On the next page is a current aerial view of Holden-McDaniel's industrial property, showing the BNSF tracks and ditch to the immediate west.



Id. BNSF has owned its tracks since the 1890s, long before commercial development of Holden-McDaniel's property or surrounding areas. CP 2596.

Over time, Holden-McDaniel's property was developed from an orchard to industrial use and it is now covered with impervious surfaces and buildings. See CP 2598-2610. Holden-McDaniel replaced the open ditch with an underground culvert, which drained into the ditch alongside BNSF's track. *Id.*

2. Gleneagle Development

The upslope property on the *east* side of Holden-McDaniel's property has undergone significant development since 1981. The Gleneagle golf course and residential housing development were created, doubling the size of the City of Arlington. CP 1290. The other (remaining) defendants are the developers of the Gleneagle development and the City of Arlington. CP 2031 ¶¶ 2-3; Opening Brief.

The large upslope Gleneagle development has naturally increased some of the stormwater runoff towards Holden-McDaniel's and BNSF's properties. CP 2032 ¶¶ 11-12; CP 2033 ¶¶ 16-18; CP 2627. BNSF has no agreement to accept stormwater runoff from Holden-McDaniel's property or from the Gleneagle development. The only agreement BNSF has entered into regarding use of its ditches was a lease from BNSF to J.H. Baxter and Company in 1975 for the portion of the ditch on the *west* side (non-Holden-McDaniel side) of BNSF's tracks. CP 2611-13. That drainage ditch lease was assigned to the City of Arlington in 1985 but was

terminated in 1990. CP 2615-21; CP 2623-24. While BNSF and the City of Arlington entered into a Pipe Line License in 1998, that license does not include any rights to BNSF's drainage ditches. *See* CP 769-777. No other drainage rights to BNSF's ditches exist.

3. Flooding and Berm

Holden-McDaniel alleges increased stormwater runoff from the upslope Gleneagle golf course and residential community development has caused flooding on Holden-McDaniel's property. *See generally* CP 2030-2036. Holden-McDaniel blames the flooding on an inadequate stormwater conveyance system put in place by the City of Arlington and the developers of Gleneagle. *See id.*

In January 2009, Holden-McDaniel's property flooded from both the east and west sides. CP 2634-2647. After that event, Holden-McDaniel constructed a berm on the west side of its property to prevent backflow flooding from the upstream developments that ran under Holden-McDaniel's property and into the BNSF ditch. CP 2629-2640. The berm abated all flooding from BNSF's ditch ever after. CP 2634-2647.

B. Procedural Background.

Holden-McDaniel filed this action in January 2011 against numerous entities connected with the creation and maintenance of the Gleneagle stormwater system. *See* CP 2126-2132. Holden-McDaniel did

not include BNSF in its Complaint. *Id.* Holden-McDaniel claimed millions of dollars in damages based on negligent design of Gleneagle and its stormwater systems, lack of maintenance, negligence, and trespass. *Id.*

In May 2012, over 16 months after Holden-McDaniel initiated this lawsuit, Holden-McDaniel amended its complaint naming BNSF as a defendant for the first time. CP 2030-36. Holden-McDaniel claimed “BNSF has failed to maintain portions of the stormwater system on its property in a manner that assures that it does not cause the flooding of upstream property, including the Holden-McDaniel Property.” CP 2033-34 ¶ 23.

All parties filed cross-motions for summary judgment. BNSF’s summary judgment motion sought dismissal of Holden-McDaniel’s claims against it. CP 2648-63. On April 24, 2015, the trial court entered an Omnibus Order deciding the summary judgment motions. CP 41-62. In that Order, the trial court dismissed Holden-McDaniel’s claims against BNSF in their entirety. CP 55 ¶ XI. The trial court ordered that the “claims against BNSF are time-barred” and that “BNSF owed no statutory or common law duty to accept water from upstream entities in its ditch.” *Id.* The trial court also granted the other defendants’ summary judgment motions and dismissed the lawsuit with prejudice. CP 38-40; CP 36-37. Holden-McDaniel appealed.

III. SUMMARY OF ARGUMENT

Holden McDaniel's claims against BNSF fail for any one of three independent reasons: 1) as a downslope landowner, BNSF owes no duty to Holden-McDaniel; 2) the common enemy doctrine applies, barring the claims against BNSF; and 3) the statute of limitations bars any claims against BNSF.

BNSF is uniquely situated from the other defendants: it is the only defendant that owns property downslope and to the west of Holden-McDaniel's property. On BNSF's property is a railroad track and a ditch running alongside the track. Water naturally flows into BNSF's ditch from upslope developments. Holden-McDaniel claims that in 2009, water in BNSF's ditch overflowed, contributing to flooding onto Holden-McDaniel's property from the Gleneagle development. Shortly thereafter, Holden-McDaniel built a berm on the west side of its property and water from BNSF's ditches has not overtopped onto Holden-McDaniel's property ever again.

Holden-McDaniel's claims against BNSF fail as a matter of law because BNSF has no duty to convey added surface water from upstream developments and has no obligation to maintain the ditch for Holden-McDaniel's benefit. Additionally, the statute of limitations bars Holden-McDaniel's claims against BNSF. Holden-McDaniel did not add BNSF to

this case until May 2012. Any damages it claims are barred; BNSF cannot be liable for damages from alleged nuisance and trespass after the construction of the berm.

The trial court in this action considered all of the parties' arguments and determined that Holden-McDaniel had no legally supportable basis to recover damages from downslope BNSF for stormwater flooding to Holden-McDaniel's property. The trial court properly dismissed all claims against BNSF and this Court should affirm the dismissal.

IV. ARGUMENT

A. The standard of Review is *de novo*.

Summary judgments are reviewed *de novo*; the appellate court engages in the same analysis as the trial court. *See e.g., Roger Crane & Associates v. Felice*, 74 Wn. App. 769, 773, 875 P.2d 705 (1994). The judgment of the trial court will not be reversed when it can be sustained on any theory, although different from that indicated in the decision of the trial judge. *Sprague v. Sumitomo Forestry Co.*, 104 Wn.2d 751, 758, 709 P.2d 1200, 1204 (1985) (citing *Cheney v. Mountlake Terrace*, 87 Wn.2d 338, 552 P.2d 184 (1976)).

B. BNSF has no duty to maintain the ditch for Holden-McDaniel's benefit.

The first independent reason to affirm dismissal of the claims against BNSF is that BNSF owes no duty to Holden-McDaniel.

A trespass or nuisance claim committed negligently requires the elements of negligence to be proven. *Gaines v. Pierce County*, 66 Wn. App. 715, 719, 834 P.2d 631, 633 (1992). “The first hurdle in any negligence action is establishing a duty.” *Bratton v. Welp*, 145 Wn.2d 572, 576, 39 P.3d 959, 961 (2002). There is no common law duty to drain surface waters. *Rothweiler v. Clark County*, 108 Wn. App. 91, 98, 29 P.3d 758 (2001) (citing *Colella v. King County*, 72 Wn.2d 386, 391, 433 P.2d 154 (1967)). In Washington, landowners may dispose of unwanted surface water in any way they see fit without liability for resulting damage to neighboring properties. *Currens v. Sleek*, 138 Wn.2d 858, 861, 983 P.2d 626 (1999). No law in Washington requires a party to maintain a stormwater ditch for the benefit of a neighbor.

Holden-McDaniel has no property interest in the BNSF ditch. Holden-McDaniel is not claiming any encroachment on its property by BNSF except for surface water in 2009. The trial court correctly ruled that under Washington law, no duty exists for BNSF to maintain its ditch to avoid surface water backflow onto Holden-McDaniel's property.

Holden-McDaniel admits that BNSF has no duty to accept water from upstream entities but claims BNSF “assumed” a duty by allowing an artificial condition to arise on its property. Opening Brief at 45. The legal basis for Holden-McDaniel’s argument is the Restatement (Second) of Torts, §§ 364 and 365. Washington has not adopted either of these sections. No statute or Washington authority even discuss Section 364 or 365’s applicability to Washington common law, let alone rely on them to create independent and additional duty for landowners.

The Court should not adopt Restatement (Second) of Torts, §§ 364 and 365 at the urging of Holden-McDaniel because the common enemy doctrine (discussed *infra*) governs the rights of property owners to deal with surface water runoff and has been the governing authority since statehood. *Cass v. Dicks*, 14 Wash. 75, 78, 44 P. 113 (1896). Holden-McDaniel states no basis to adopt Sections 364 and 365 where they would conflict with long-standing Washington common law. Even if the Court decided to adopt Sections 364 and 365, they do not apply under the facts in the record. Section 365 addresses liability for the disrepair of structures or artificial conditions, including “dilapidations.” Restatement (Second) of Torts § 365 (1965). Section 364 addresses conditions on property created by third parties at the owner’s consent. Restatement (Second) of Torts § 364 (1965). Neither applies here where BNSF owns and operates its own

ditches and there are no artificial conditions on its property or consent to conditions created by third parties on its property.

Holden-McDaniel argues *Phillips v. King County*, 136 Wn.2d 946, 968 P.2d 871 (1998), creates a duty where none otherwise exists. That case cannot support reversal of the trial court's judgment. *Phillips* addressed whether a municipality could be liable for inverse condemnation when it allowed its land to be used by the developer. *Id.* at 967. The determinative issue was whether proximate cause for a "taking" could be shown if the municipality directly participated in the stormwater drainage system design which was blamed for flooding its neighbor's property. *Id.* at 966-968. Such is not the case here. It is undisputed that BNSF had no involvement in the design, creation, or maintenance of Gleneagle's stormwater system. *Phillips* creates no duty that BNSF owes to Holden-McDaniel.

Holden-McDaniel also relies on *Rothweiler*, 108 Wn. App. 91. Again, Holden-McDaniel's interpretation of *Rothweiler* is misplaced. *Rothweiler* held that despite the application of the common enemy doctrine, a municipality can *affirmatively undertake an extraordinary duty* when it constructs a stormwater drain and if it does so, the municipality must exercise reasonable care to maintain the drain's original efficiency. *Id.* at 104. BNSF is not a municipality. No evidence reflects a municipality

constructed the ditch on BNSF's property. No evidence exists that the BNSF ditch does not maintain its original efficiency when it was constructed over a half a century ago. Moreover, BNSF's ditch cannot expose it to liability unless a recognized exception to the common enemy doctrine applies. *See id.* at 103. No such exception applies (*see infra*). Therefore, *Rothweiler* creates no duty and no liability for BNSF.

In short, BNSF owes no duty to Holden-McDaniel. Without duty, there is no negligence. The trial court's judgment should be affirmed on this basis alone.

C. Holden-McDaniel's claims are barred by the common enemy doctrine and none of the exceptions apply.

The second independent reason to affirm the trial court's judgment is because Holden-McDaniel's claims are controlled by the common enemy doctrine.

1. The common enemy doctrine applies.

The common enemy doctrine shields a landowner from liability for damage to a neighbor from the disposal of unwanted surface water on one's property. *Currens*, 138 Wn.2d at 861.¹ Surface waters are defined as diffused waters produced by rain, melting snow, or springs. *Rothweiler*, 108 Wn. App. at 98-101. This case deals only with surface waters, thus

¹ Courts make no distinction in the application of the common enemy doctrine between municipalities and private landowners. *Borden v. City of Olympia*, 113 Wn. App. 359, 371, 53 P.3d 1020, 1026 (2002).

BNSF is shielded from liability to Holden-McDaniel under the common enemy doctrine.

2. None of the common enemy doctrine exceptions apply.

Three exceptions to the common enemy doctrine exist. They are where a landowner: 1) inhibited the flow of a watercourse or natural drainway; 2) artificially collected and discharged water onto plaintiff's property in quantities greater than, or in a manner different from its natural flow; or 3) altered the flow of surface water on its property and exercised its rights in bad faith or failed to avoid unnecessary damage to plaintiff's property. *Currens*, 138 Wn.2d at 861. Here, no watercourse has been inhibited, BNSF has not artificially collected and discharged water onto Holden-McDaniel's property, and BNSF has not modified its property to alter the flow of water on its property. Therefore, the common enemy exceptions do not apply and BNSF has no liability to Holden-McDaniel.

a. There is no natural watercourse or natural drainway.

Where a watercourse or drainway is man-made and not a drain formed by nature, the landowner may dispose of the surface waters flowing to his property as he sees fit and is shielded from liability. *Rothweiler*, 108 Wn. App. at 98. A natural watercourse is defined as a channel, having a bed, banks or sides, and a current in which waters, with some regularity, run in a certain direction. *King County v. Boeing Co.*, 62

Wn.2d 545, 550, 384 P.2d 122 (1963). A natural drain is that course, formed by nature, which water naturally and normally follow in draining from higher to lower lands. *Id.* Holden-McDaniel claims the flooding on its property is caused by excess stormwater; it does not claim the flooding is caused by the back-up of a natural watercourse or natural drain. The watercourse/drainway exception does not apply if the water causing the damage is surface water flowing through a system of catch basins and drainage ditches. *Rothweiler*, 108 Wn. App. at 99. Even if the drainage in pipes and catch basins generally follow the path that surface water would have naturally flowed above ground, such a system cannot be a natural drainway or watercourse. *Id.*

The man-made ditch system that routed surface water to the BNSF ditch has been in place since the 1960s. CP 2595-2610. Even if this ditch system followed the path that surface water would have naturally flowed, the transformation into a man-made system negates the application of the natural watercourse exception. *See Rothweiler*, 108 Wn. App. at 99. No evidence exists that BNSF's ditch inhibited the flow of a waterway or natural drain.

- b. There is no artificial collection and discharge different from the water's natural flow.

A landowner cannot artificially collect and channel surface water upon adjoining lands in quantities greater than or in a manner different from the natural flow thereof. *Currens*, 138 Wn.2d at 862 (citing *Wilber Dev. Corp. v. Les Rowland Constr. Inc.*, 83 Wn.2d 871, 875, 523 P.2d 186 (1974)). Landowners may direct and diffuse surface waters into preexisting natural waterways and drainways so long as they do not create an unnatural conduit that channels water to their neighbors' land. *Id.* "The rule prohibits a landowner from *creating* an unnatural conduit, but allows him or her to direct diffuse surface waters into preexisting natural waterways and drainways." *Currens*, 138 Wn.2d at 862 (emphasis added).

BNSF's ditch pre-dated Holden-McDaniel's development of its property and the Gleneagle development. A landowner is not liable for the increased flow of surface water that results from construction of off-site improvements that prevent surface water from percolating into the ground. *Rothweiler*, 108 Wn. App. at 99. BNSF's ditch did not channel water onto Holden-McDaniel's property. It did the opposite. It collected and diffused surface water in a *greater* manner than natural diffusion of the water table. The ditch was not created after Holden-McDaniel's development and did

not channel water towards Holden-McDaniel's property. The second exception cannot apply.

- c. BNSF has not altered its property in a manner that impacts the flow of water onto a neighbor's property.

When a landowner engages in activities that affect the flow of surface water, he must do so with due care by acting in good faith and avoiding unnecessary damage to the property of others. *Currens*, 138 Wn.2d at 865. The plaintiff bears the burden of proof to show flooding damage was the result of the defendant's bad faith. *Id.* at 867. This exception stems from case law involving landowners negligently developing or altering their land to fend off diffuse water. *Id.* (citing *Wood v. City of Tacoma*, 66 Wash. 266, 273-74, 119 P. 859 (1911)) (negligent development may take landowner outside the common enemy doctrine); *Strickland v. City of Seattle*, 62 Wn.2d 912, 916-17, 385 P.2d 33 (1963) (landowner increasing drainage of surface water into a drainway to extent it was overtaxed may create liability). For this exception to apply, the defendant must "alter the flow of surface water." *Rothweiler*, 108 Wn. App. at 103. "[F]ailing to drain naturally accumulating water does not constitute altering the flow of surface water." *Id.*

BNSF did not transform its land or engage in any alteration of the drainage. Its ditch has existed since the 1960s. The ditch operated for

BNSF's benefit to diffuse water that was channeled to its property. BNSF did not develop or alter its property to redirect the flow of water that reached its property, let alone negligently do so. Just like in *Rothweiler*, the fact that surface water would naturally accumulate at the low point of the water table at the junction of Holden-McDaniel's and BNSF's property, means that it cannot be the result of an alteration by BNSF. *See id.* Holden-McDaniel alleges negligence based on BNSF's lack of maintenance, not due to any change or alteration made on its land. The pre-existing ditch therefore cannot be an "alteration" that was negligently created to fit within the exception of the common enemy doctrine.

The common enemy doctrine applies and none of the exceptions create liability for BNSF. Therefore, the common enemy doctrine is an independent basis to affirm the trial court's judgment to Holden-McDaniel's claims against BNSF.

D. Holden-McDaniel's alleged damages from flooding from the BNSF ditch are barred by the statute of limitations.

The third independent reason Holden-McDaniel's claims against BNSF fail is because of the statute of limitations.

Holden-McDaniel's claims against BNSF for negligent injury to real property are barred by the two year statute of limitations. *See Wallace v. Lewis Cnty.*, 134 Wn. App. 1, 13, 137 P.3d 101, 107 (2006) (two year

statute of limitation for negligent injury to property). Holden-McDaniel agrees the berm built on its property in 2009 abated flooding from the BNSF ditch. Opening Brief at 43; CP 2637-38; CP 2644. Holden-McDaniel did not add BNSF as a party to this action until May 10, 2012. Any claim for damages to property before May 10, 2010 is barred. No surface water intrusion occurred since that time. CP 2626-2632; CP 2637-38; CP 2644.

Holden-McDaniel's claims for continuing trespass also are barred by the statute of limitations. Any future or prospective damages for trespass after abatement are not allowed; no damages are recoverable after the trespass is abated. *Woldson v. Woodhead*, 159 Wn.2d 215, 219, 149 P.3d 361 (2006). This law applies regardless of who abated the trespass and Holden-McDaniel offers no support to the contrary. *See id.* Because there is no record of flooding from the BNSF ditch since the berm was built in 2009, BNSF cannot be liable for any alleged damages arising thereafter.

E. BNSF is entitled to an award of its costs on appeal.

Rule of Appellate Procedure 14.2 authorizes an award of costs "to the party that substantially prevails on review." BNSF requests an award of its costs as the substantially prevailing party in this action.

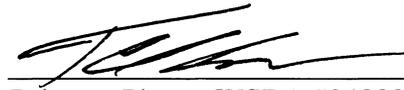
V. CONCLUSION

Holden-McDaniel has not and cannot prove that it has any legal basis to recover against downslope BNSF for flooding on Holden-McDaniel's property. This Court should affirm the trial court's dismissal of Holden-McDaniel's claims against BNSF and award BNSF its costs.

RESPECTFULLY SUBMITTED this 30th day of November, 2015.

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DECLARATION OF SERVICE

I declare under penalty of perjury under the laws of the state of Washington that on the 30th day of November, 2015, I caused to be served the foregoing document on counsel, via email & U.S. Mail, postage prepaid, at the following addresses:

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