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NO. 25161-6-III

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**COURT OF APPEALS, DIVISION III  
OF THE STATE OF WASHINGTON**

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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.

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**BRIEF OF RESPONDENT STATE OF WASHINGTON**

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## I. SUMMARY OF ARGUMENT

The plaintiffs are the current and former owners of riverfront property located on the Methow River in Okanogan County near Winthrop. CP 2. The plaintiffs' claim for inverse condemnation arises as the result of a change in course (avulsion) of the Methow River on June 16, 2002. CP 3. This avulsion occurred during a high water flood event resulting from rapid melting of snowpack in the North Cascades. CP 145. This, combined with the breakup of a log jam, caused the Methow River to abandon its meandering course upriver from plaintiffs' property. CP 147. Instead, the river assumed a new alignment so that it flowed directly at their property causing rapid bank erosion and the subsequent collapse of their home into the river. CP 3.

The plaintiffs claim that the construction of a dike sometime around 1975 by Okanogan County blocked the flow of natural side channels and drainways causing the Methow River to change course some 27 years later resulting in a taking of their property. CP 133. Plaintiffs have sued the State of Washington despite the undisputed facts that the State did not own, plan, construct, operate, maintain or design the dike. CP 179-80. The State's participation was limited to cost sharing construction and improvements to the dike, along with Okanogan County, the purpose

of which was to protect adjacent properties and State Highway 20 from flood damage. *Id.*

In their brief, plaintiffs argue that the common enemy defense does not apply to a party that obstructs the flow of floodwaters from escaping the banks of a river into side channels. Br. Appellant at 15. However, the case law upon which the plaintiffs rely does not support the watercourse obstruction exception in the context of the construction of a dike. Plaintiffs' reference to such authority is misplaced and their application of the watercourse exception in the case of a dike constructed to protect properties from flooding is incorrect.

The lack of any ownership or control of the dike precludes any liability against the State in this case. Moreover, even if the lack of any proprietary interest on the State's part were not reason enough to affirm the trial court's summary judgment dismissal, the common enemy doctrine precludes any liability against the State for its participation in the construction of a dike designed to keep floodwaters within the banks of the Methow River. On either basis, this Court should affirm the trial court's granting of the State's summary judgment motion.

## **II. RESPONSE TO STATEMENT OF THE CASE**

Plaintiffs do not tell the entire story in their statement of facts. They fail to mention the limited involvement that the State has had in the

construction and subsequent improvements to the Sloan Witchert Slough Dike. The State's participation in the original construction of the dike was the result of its regulatory authority over local flood control projects pursuant to Chapter 86.16 RCW and consisted of paying a portion of the costs of construction. CP 179-180. Likewise, the State's participation in improvements to the dike over the next 20 years was limited to the sharing of construction costs, along with Okanogan County, in an effort to protect adjacent properties and State Highway 20 from flood damage. CP 173-177.

Moreover, plaintiffs fail to mention that prior to constructing the dike, the Methow River had a history of overflowing its banks causing damage to adjacent properties, irrigation canals and the newly constructed Highway 20. CP 146. There were concerns that the river would find a new channel and threaten the new highway and a downstream bridge. *Id.* In response to this damage, the Sloan Witchert Slough Dike was constructed in 1975. *Id.*

In addition, plaintiffs omit the fact that a log jam located near the dike played a significant role in creating the avulsion that caused the damage to their property. As their expert noted:

During the bankfull event in June 2002, the combination of the dike and an undocumented log jam located across the downstream end of the dike caused a constraint in the flow path of the river. A localized backwater effect occurred such that the constriction caused water to back up upstream of the constriction and once the pressure became high enough, the log jam broke and water flooded straight across the meander bend creating the avulsion path (Reference 14). This path was directed at the Fitzpatrick property.

CP 147.

In June 2005, plaintiffs sued the State, Okanogan County, John Hayes and the Methow Institute Foundation in Douglas County Superior Court alleging that the defendants should be liable for the damage to their property caused by the construction of the dike and for their failure to remove the log jam. CP 1-6. Thereafter, the defendants filed a motion for summary judgment, which was granted on March 7, 2006, after the trial court found that the common enemy doctrine precludes any liability for the construction of a dike designed to keep floodwaters within the banks of the Methow River. CP 232-234. Plaintiffs' subsequent motion for reconsideration was denied and this appeal followed. CP 272-273.

Plaintiffs seek review only of the trial court's dismissal of their inverse condemnation claim. They do not seek review of the trial court's dismissal of their tort claims against the State and Okanogan County or the dismissal of their claims against defendants John Hayes and the Methow Institute Foundation. Br. Appellant at 6. Moreover, plaintiffs concede

there can be no liability for any failure to remove the log jam which they alleged in their Complaint was a proximate cause of the damage to their property. The State asks this Court to affirm the trial court's dismissal of plaintiffs' inverse condemnation claim.

### III. RESPONSE TO ARGUMENTS

#### A. **The State Lacks a Sufficient Proprietary Interest In the Sloan Witchert Slough Dike to Be Held Liable Under a Theory of Inverse Condemnation.**

In addition to reaffirming the continuing validity of the common enemy doctrine in the context of the construction of a dike, in *Halverson v. Skagit County*, 139 Wn.2d 1, 983 P.2d 643 (1999), the Washington Supreme Court rejected plaintiffs' claims for inverse condemnation on a theory that the county acted in concert with local independent diking districts by performing repairs and improvements to levees. The Court noted that the county did not build, own or manage the levees or the property upon which they were built. The Court held:

The County's repairs or improvements, even if in a concerted effort with the independent diking districts, do not, as a matter of law, render them liable for the mere existence of those levees.

139 Wn.2d at 13. Before liability can attach in an inverse condemnation case, an active, proprietary participation without which the alleged taking or damaging would not have occurred is required to be shown. *Id.*

Like *Halverson*, the State did not own or control the Sloan Witchert Slough Dike. Plaintiffs offer no evidence to the contrary. Instead, they rely upon *Boitano v. Snohomish County*, 11 Wn.2d 664, 120 P.2d 490 (1941). In that case, Snohomish County owned a tract of land on which it operated a gravel pit from which seepage and drainage found its way onto plaintiffs' property. Unlike *Boitanos*, there is no evidence in the record to demonstrate any proprietary interest in the dike by the State.

Plaintiffs also rely on *Ulery v. Kitsap County*, 188 Wash. 519, 63 P.2d 352 (1936). In that case, Kitsap County owned a right of way over respondents' land on which it constructed a highway to the damage of their property. In *Ulery*, as in *Boitanos*, liability was premised upon the governmental entities ownership of a proprietary interest that caused plaintiffs' damage. In this case, summary judgment in favor of the State was proper because the existence of any ownership or control of the Sloan Witchert Slough Dike by the State is absent.

**B. The Common Enemy Doctrine Precludes Any Liability Against the State for Its Participation in the Construction of a Dike to Prevent Flooding of Adjacent Properties.**

The common enemy doctrine has been recognized as a valid defense in flooding cases for more than 100 years. It holds that surface water "is regarded as an outlaw and a common enemy against which anyone may defend himself, though by so doing injury may result to

others.” *Cass v. Dicks*, 14 Wash. 75, 78, 44 P. 113 (1896). Under this general rule, liability should not be imposed upon individuals or entities for the construction of dikes and levees designed to prevent floodwaters from escaping the banks of a river. *Cass*, 114, Wash. at 81; *Harvey v. Northern Pac. Rwy. Co.*, 63 Wash. 669, 676-77, 116 P. 464 (1911); *Morton v. Hines*, 112 Wash. 612, 617, 192 P. 1016 (1920).

In *Halverson v. Skagit County*, 139 Wn.2d 1, 983 P.2d 643 (1999), plaintiffs whose properties lied adjacent to the Skagit River sued the county on the theory that their flood damage was more severe than it would have been had no levees been constructed along the river. The Supreme Court reversed the trial court’s decision finding the county not liable for two reasons. First, the county did not own or control the levees and second, that even if the county acted in a “concerted effort” along with the independent diking districts in undertaking repairs or improvements to the levees, it was absolutely protected from liability by the common enemy doctrine. *Id.* at 13-14.

The Supreme Court stressed in *Halverson* 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 scope of the common enemy doctrine, and 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 damages of his lands.

*Id.* at 15.

The same reasoning applies in this case. To the extent that plaintiffs' property damage was caused by the existence of the Sloan Witchert Slough Dike, the State and Okanogan County are protected from liability by the common enemy doctrine. Thus, even if the plaintiffs' could prove that the State was legally responsible for the dike upriver from their property, the State is nevertheless protected from liability by the common enemy doctrine.

**1. Plaintiffs Do Not Fall Within the Watercourse Exception to the Common Enemy Doctrine.**

In their brief, plaintiffs argue that the common enemy doctrine should not apply to the facts in this case. Plaintiffs claim they fall within the exception relating to the obstructing of a natural watercourse. However, the cases cited by plaintiffs in support of the exception do not pertain to the situation in this case involving the construction of a dike designed to prevent flood waters from leaving the banks of a river.

For example, the principal case relied upon by plaintiffs is *Sund v. Keating*, 43 Wn.2d 36, 259 P.2d 1113 (1953). However, *Sund* did not involve a dike or levee. Instead, it involved the excavation of a stream bank on Clark's Creek which directed water onto the plaintiffs' property. *Id.* at 38-39. In fact, the plaintiffs in *Sund* contended that the defendant should have built a dike to prevent the discharge of river waters onto their property. *Id.* at 39-40.

Moreover, the Washington Supreme Court in *Halverson* distinguished *Sund* by noting:

*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.

Like *Sund*, the other cases relied upon by plaintiffs are not applicable to a case involving the construction of a dike designed to keep flood waters from leaving the banks of a river. For example, plaintiffs cite *Currens v. Sleek*, 138 Wn2d 858, 983 P.2d 626 (1999) to support their argument that they fall within the watercourse exception to the common enemy doctrine. However, *Currens* did not involve a dike or levee, nor did

it involve an obstruction of a natural watercourse. Instead, the case involved an upland property owner who stripped the slopes of a forested hillside, causing water to run with greater velocity and intensity downhill onto plaintiffs' property.

Equally puzzling is plaintiffs' reliance on *Snohomish County v. Postema*, 95 Wn. App. 817, 978 P.2d 1101 (1998), *review denied*, 139 Wn.2d 1011 (1999). Like *Sund* and *Currens*, *Postema* does not involve the construction of a dike. Rather, it involved the clearing and draining of a wetland by an upstream property owner that caused a significant amount of sediment to erode into a downstream property owner's pond.

Plaintiffs correctly point out that an exception to the common enemy doctrine applies in the situation where a dam or other obstruction blocks the flow of a river or natural watercourse. However, plaintiffs fail to mention that this exception applies where a downstream owner dams or blocks a river, causing it to back up onto the upstream owner's property. It does not apply to a dike parallel to a river designed to prevent floodwaters from flowing out of channel onto the floodplain. Several cases illustrate the point. In *Currens*, 138 Wn.2d at 862, the court described the reasoning behind the exception as follows:

Under this exception, a landowner who dams up a stream, gully or drainway will not be shielded from liability under the common enemy doctrine. 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.

(Emphasis added).

Likewise in *Wilber v. Western Properties*, 14 Wn. App. 169, 173, 540 P.2d 470 (1975) the court reasoned:

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.

(Emphasis added).

Plaintiffs do not cite any authority that has applied the obstruction exception to the common enemy doctrine to a lower proprietor whose property was damaged by a dike or levee designed to prevent floodwaters from flowing outside of a river channel. On the contrary, Washington case law supports the application of the common enemy doctrine in situations where damage has been caused by a dike or levee. *Halverson v. Skagit County*, 139 Wn.2d at 13-14.

**2. Plaintiffs Have No Standing to Claim a Violation of Their Riparian Rights.**

In their brief, plaintiffs urge this Court to analyze this case under the law governing riparian rights. Plaintiffs contend that the dike blocked water from escaping into defined side channels that relieved flow from the main channel during flooding. This, plaintiffs contend, caused the river to change course some 27 years after construction of the dike resulting in the damage to their property.

However, the case law upon which plaintiffs rely holds that floodwaters still flowing within a defined flood channel cannot be diverted out of the channel without incurring liability for resulting damages to adjoining riparian land owners. *Sund v. Keating*, 43 Wn.2d at 42. The problem with plaintiffs' riparian rights analysis is the fact that they do not own riparian land on the defined side channels. Their property is located down river from the side channels. Thus, they have no standing based on a violation of their riparian rights to complain about a dike that diverted floodwaters from flowing into defined side channels. As a result, plaintiffs cannot rely on the watercourse exception to the common enemy doctrine.

**3. Plaintiffs' Proposed Watercourse Exception Would Eliminate the Common Enemy Doctrine.**

Plaintiffs propose an expansion of the watercourse exception that would devour the common enemy doctrine. Under plaintiff's analysis,

anytime floodwaters escape from the banks of a river finding low ground, depressions or channels in which to flow an individual or entity would no longer be protected from liability for its participation in the construction of a dike or levee designed to keep those floodwaters within the banks of a river.<sup>1</sup>

Plaintiff's proposed expansion of the watercourse exception is a far cry from the rule cited in *Sund v. Keating* that when water is flowing in a seasonal creek, it cannot be dammed or diverted out of that watercourse to the detriment of other riparian owners. 43 Wn.2d at 42. The seasonal creek in *Sund* was 20 feet wide and 18 inches deep, and carried water in a normal flow during at least half of the year. *Id.* at 38.

In contrast, the side channels identified by plaintiffs' expert are merely depressions in the floodplain that carry water only in high water events. CP 147. An old dry channel is not a natural watercourse where it is shown that water only flows in it when the ground is frozen and snows melted in the late winter or early spring. *Thorpe v. Spokane*, 78 Wash. 488, 489, 139 P. 221 (1914).

The construction of the Sloan Witchert Slough Dike did not divert water flowing in an existing watercourse. Rather, it kept floodwaters

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<sup>1</sup> Plaintiffs' expert, Dr. Bradley, documents the history of surface water flooding along the Sloan Witchert Slough Dike noting that in 1999, during a 10 year flood event, the flood waters were so high above the banks of the Methow River, the dike was overtopped causing a portion of it break apart. CP 146-147.

within the banks of the Methow River. The common enemy doctrine encourages the State and counties to undertake flood control measures by removing the risk of liability exposure. Exposing the State and Okanogan County to liability by expanding the watercourse exception in the manner proposed by plaintiffs would discourage flood control measures designed to protect property owners and others from flood damage.

**C. The State is Immune From Plaintiffs' Claims of Tortious or Negligent Actions.**

The legislature has specifically provided that the State's exercise of regulatory authority over flood control projects does not give rise to any liability. RCW 86.16.071 specifically provides:

The exercise by the state of the authority, duties, and responsibilities as provided in this chapter shall not imply or create any liability for any damages against the state.

Furthermore, RCW 86.16.120 defines damages to include harmful inundation, water erosion of soil, stream banks and beds, stream channel shifting and changes which are exactly the type of damages that plaintiffs allege in their lawsuit.

In an attempt to avoid the immunity provided by RCW 86.16.071, plaintiffs, in addition to their tort claims, sued the State for inverse condemnation, a constitutional taking of property for public use that requires just compensation. Plaintiffs cite *Halverson v. Skagit County* in

which the Supreme Court held that the statutory immunity of RCW 86.12.037 may be inapplicable when there is a claim based solely on constitutional grounds. 139 Wn.2d at 12. However, in this case, plaintiffs sought recovery not only under an inverse condemnation theory, but also based on negligence and trespass. Moreover, in their brief, plaintiffs' expert continues to argue that the defendants negligently selected the wrong location to construct the dike. Wherever the plaintiffs have characterized the violation not solely based on constitutional grounds, the State is immune from liability under RCW 86.16.071.

**D. Plaintiffs' Inverse Condemnation Claim Fails Because The Damage to Their Property Was Not Necessarily Incident to the Construction of the Dike.**

The undisputed facts establish that for 26 years following the construction of the dike, the meander course of the Methow River upstream from plaintiffs' property did not change. The course of the river did not change in 1999 during a 10-year flood event. However, it did change suddenly in 2002 only after a log jam formed creating a constriction in the path of the river resulting in a localized backwater that caused water to back up upstream. Once the pressure caused by the log jam became high enough, the log jam broke and the backed up water flooded straight across the meander bend creating the avulsion path directly at the plaintiffs' property. CP 147. The breakup of the log jam in

2002, not the construction of the dike in 1975, caused the avulsion of the Methow River that resulted in the harm to plaintiffs' property.

Inverse condemnation "was designed to compensate for damages resulting from planned action rather than mere negligence." *Wilson v. Keytronic Corp.*, 40 Wn.2d 802, 815-16, 701 P.2d 518 (1985). In *Songstad v. Municipality of Metropolitan Seattle*, 2 Wn. App. 680, 472 P.2d 574 (1970) plaintiffs sought recovery for flood damage to their property caused by the construction of fill to support a pipe. Plaintiffs contended that the fill and installation of the pipe altered the existing course of water, causing their property to be flooded and the soil to become wet and marshy. The Court of Appeals examined the cases concerning whether various types of damage constitute a taking of property or simply a tortious interference therewith and held:

Under those decisions, 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. Moreover, the interference with the property must be of a permanent nature.

2 Wn. App at 682.

Plaintiffs cite *Wong Kee Jun v. Seattle*, 143 Wash. 479, 255 P. 645 (1927) for the proposition that inverse condemnation claims no longer require a showing that the damage is contemplated by the plan of work or

considered to be a necessary incident of the public project. However, *Wong Kee Jun* was one of the cases that the Court of Appeals reviewed and relied upon in rendering its decision in *Songstad* that the damage be contemplated or a necessary incident of the public project. *Songstad*, 2 Wn. App. at 682.

Any uncertainty whether the requirement that an inverse condemnation claim require a showing that damage be necessarily incident to, or contemplated by the government project was clarified by the Washington Supreme Court in *Dickgieser v. State*, 153 Wn.2d 530, 105 P.3d 26 (2005). In *Dickgieser*, owners of property adjoining state forest land sued the state for flooding their property after modifying the bed of a stream running through their property and logging timber on the state property. The Supreme Court rejected the State's argument that the plaintiffs' inverse condemnation claim was really a negligence action. However, in doing so, the Court noted that the record contained no evidence of negligent logging but did contain evidence that the runoff from the logged land on to the plaintiffs' property was an inevitable consequence of logging. *Id.* at 541-42.

The opposite is true in this case. First, there is no evidence in the record to demonstrate that Okanogan County's construction of the dike would necessarily and incidentally flood the plaintiffs' property during a

high water event aided by a log jam some 27 years later. Indeed, the plaintiffs' own expert claims only that the county was negligent in locating the dike where it blocked the flow of waters into side channels. To the extent the plaintiffs offered any evidence, they did meet the standard for an inverse condemnation claim by arguing that had the dike been located differently, then there would have been no avulsion in the river or damage to their property.

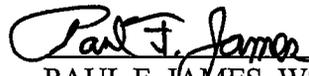
Based on the evidence in the record, plaintiffs' claim for inverse condemnation was properly dismissed by the trial court on summary judgment. This Court should affirm that decision because the State lacked the necessary proprietary interest in the dike to be held liable under a theory of inverse condemnation, because the common enemy doctrine precludes any liability against the State for its participation in the construction of the dike and because the State is immune from liability where there is no evidence in the record to suggest that the construction of the dike would necessarily and incidentally cause the flooding of plaintiffs' property in conjunction with a log jam some 27 years later.

IV. CONCLUSION

The State of Washington respectfully requests this Court to affirm the trial court's order granting the State's motion for summary judgment.

RESPECTFULLY SUBMITTED this 13<sup>th</sup> day of July, 2006.

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