

No. 81257-8

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

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

Respondents,

OKANOGAN COUNTY,

Petitioner,

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

Defendants.

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**SUPPLEMENTAL BRIEF OF RESPONDENT,
FITZPATRICK**

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ORIGINAL

Table of Contents

INTRODUCTION 1

STATEMENT OF FACTS 2

ARGUMENT 5

I. HALVERSON V. SKAGIT COUNTY SUPPORTS
FITZPATRICK AND THE COURT OF APPEALS’
DECISION 5

II. THE EXCEPTION TO THE COMMON ENEMY DOCTRINE
APPLIES TO BOTH UPSTREAM AND DOWNSTREAM
OWNERS 10

III. A TAKING DOES NOT REQUIRE THAT IT BE
“CONTEMPLATED” 12

CONCLUSION 199

Table of Authorities

CASES

<i>Cass v. Dicks</i> , 14 Wash. 75, 44 P. 113 (1896)	8, 9
<i>Currens v. Sleek</i> , 138 Wn.2d 858, 983 P.2d 626 (1999)	9, 10, 11
<i>Dickgieser v. State</i> , 153 Wn.2d 530, 105 P.3d 26 (2005)	16, 17
<i>Fell v. Spokane Transit Authority</i> , 128 Wn.2d 618, 911 P.2d 1319 (1996)	2
<i>Fitzpatrick v. Okanogan County</i> , 143 Wn. App. 288, 177 P.3d 716 (2008)	10, 12
<i>Halverson v. Skagit County</i> , 139 Wn.2d 1, 983 P.2d 643 (1999)	<i>passim</i>
<i>Highline District v. Port of Seattle</i> , 87 Wn.2d 6 (1976).....	18
<i>Island County v. Mackie</i> , 36 Wn. App. 385, 675 P.2d 607 (1984)	11
<i>Jorguson v. City of Seattle</i> , 80 Wash. 126, 141 P. 334 (1914).....	14, 16
<i>Lambier v. City of Kennewick</i> , 56 Wn. App. 275, 783 P.2d 569 (1989)	13, 14
<i>Olson v. King County</i> , 71 Wn.2d 279, 428 P.2d 562 (1967)	15, 16
<i>Phillips v. King County</i> , 136 Wn.2d 946, 968 P.2d 871 (1988)	12
<i>Seal v. Naches-Selah Irrigation District</i> , 51 Wn. App. 1, 751 P.2d 873 (1988)	13, 14
<i>Snohomish County v. Postema</i> , 95 Wn. App. 817, 978 P.2d 1101, <i>rev. denied</i> , 139 Wn.2d 1011 (1998)	11
<i>Songstad v. Municipality of Metropolitan Seattle</i> , 2 Wn. App. 680, 472 P.2d 574 (1970)	13, 14

<i>Sund v. Keating</i> , 43 Wn.2d 36, 259 P.2d 1113 (1953)	8, 9, 10
<i>Wilbur v. Western Properties</i> , 14 Wn. App. 169, 540 P.2d 470 (1975).....	11
<i>Wong Kee Jun v. Seattle</i> , 143 Wash. 479, 255 P. 645 (1927).....	14, 15
<i>United States v. Causby</i> , 328 U.S. 256 (1946)	17

OTHER AUTHORITIES

Barer, Distinguishing Eminent Domain From Police Power And Tort, 38 WASH. L. REV. 607 (1963).....	15
------------------------------------------------------------------------------------------------------	----

INTRODUCTION

This case presents two issues for decision. The first concerns the proper application of the “common enemy” defense, which generally allows a landowner to repel diffuse surface water without liability for damage to other landowners. Okanogan County and the State of Washington (the “government entities”) argue that when a dike is constructed along the banks of a river, the dike builder/owner is protected by the common enemy doctrine *even where the dike blocks off a natural and defined watercourse*. This point is the core of the case.

The Court of Appeals carefully reviewed this Court’s precedents and correctly ruled that while the common enemy defense is very broad in allowing actions that repel surface waters, it does not excuse actions that block the drainage of waters through naturally defined channels and watercourses. In other words, someone may protect their own property, and repel invading surface waters, but someone may not dam up a natural stream.

The second issue involves the elements of an inverse condemnation case. The government entities argue that before liability can be imposed for a “taking” of property in an inverse condemnation case, the taking must have been “contemplated” or “necessarily incident” to the government action. The government entities offer very little as to what might qualify as a taking that is actually “contemplated” or “necessarily incident” to the government action.

Nevertheless, the government entities seek to insert this element into inverse condemnation cases. The Court of Appeals wisely rejected the invitation to create new law.

STATEMENT OF FACTS

This case was decided on summary judgment granted to the government entities. As the nonmoving party, the Fitzpatricks are entitled to have the facts considered in the light most favorable to them. *Fell v. Spokane Transit Authority*, 128 Wn.2d 618, 625, 911 P.2d 1319 (1996).

Very briefly, this case arose because the Methow River suddenly avulsed, or changed course, and thereby swept away the Fitzpatrick's private residence and much of their land.

The Fitzpatricks hired an expert, Jeffrey B. Bradley, Ph.D. in Civil Engineering – Hydraulics, to investigate what caused the avulsion. Dr. Bradley has exceedingly high qualifications (CP 136-42) and the government did not question his credentials in any respect. As a result of his investigation, Dr. Bradley concluded that the change in the river's course was caused by a dike that blocked off several well-defined natural watercourses that were side channels to the main stem of the river. By cutting off those side channels, the water could no longer flow through its natural watercourses and thereby caused the avulsion. Dr. Bradley explained:

[T]here are several **naturally defined side channels, or watercourses**, in the right floodplain of the Methow River in the vicinity of the dike. These side channels relieve flow from the main channel as the water level rises during a high flow event.

CP 132-133.¹ Allowing access to the side channels would have reduced the energy, velocity, flow and erosive power of the main channel. *Id.* Dr.

Bradley's testimony concludes:

By allowing the river to access these natural side channels, it would have been able to meander more naturally and the **avulsion** that occurred in 2002 **would not have occurred**.

CP 133. Accordingly, the undisputed evidence establishes the causation between the dike and the destruction of Plaintiffs' property.

This evidence was also corroborated by the hydrogeologist for the Washington State Department of Ecology. A memorandum dated November 30, 1999, prepared by Al Wald, states:

This road and dike work has impacted the Methow River by **cutting off** at least three **natural overflow channels** in the floodplain, thereby compressing more flood flow into the main channel and reducing the natural flood conveyance capacity of the river. Overall this work has cut off about a mile of overflow channels. Additional velocity and quantities of high flows compressed into the main channel during floods are disrupting the natural bed form of the river and causing additional erosion and scour of the main channel downstream.

¹ A copy of Dr. Bradley's Declaration and exhibits is also attached to the Opening Brief filed with the Court of Appeals.

CP 254-255 (emphasis added).

Indeed, the blocking of these channels also wiped out the fish rearing habitat that these side channels provided. CP 266.

The County's Petition and briefing below repeatedly characterize the avulsion as occurring during a "flood" event. *See, e.g.*, Pet. at 2-3. However, **there was no flood**. This was simply a period of high water precipitated by the rapid melting of snowpack in the North Cascades. CP 145. Although this was a spring time high water event, there is no evidence that supports the County's "flood" characterization. CP 76.

The Court should also understand that the waters that were affected by the dike were **not** diffuse surface waters. Rather, they were waters that would otherwise have been flowing in the natural side channels during this time of spring high water. The County presented no evidence that the dike repelled surface waters. The County cannot point to a shred of evidence that the dike blocked waters on June 16, 2002 that would have become diffused surface waters. To the contrary, the only evidence was that the waters held back by the dike were riparian waters that would have otherwise flowed through natural side channels. CP 133.

Finally, the County points out that the dike was built in 1975, and the avulsion occurred in 2002, a span of 27 years. The County ignores that after the initial construction in 1975, the dike was subsequently extended/repared

in 1978, 1983, 1987, and 1999. CP 176-177, CP 179-180; CP 182-184; CP 186-195; CP 197; and CP 199. As the dike was extended over these years, the side channels “one by one” were cut off. Dr. Bradley continued:

In this section of the Methow River, it is clear that one by one the side channels in the right floodplain were blocked off with the construction of the dikes beginning in 1975 through the 1999 COE flood fight.

CP at 133. The implication that the dike remained unchanged from 1975 until the avulsion event is not correct.

ARGUMENT

I.

HALVERSON V. SKAGIT COUNTY SUPPORTS FITZPATRICK AND THE COURT OF APPEALS' DECISION

The government relies heavily upon *Halverson v. Skagit County*, 139 Wn.2d 1, 983 P.2d 643 (1999) to argue that the common enemy doctrine precludes liability for dikes. However, the Court of Appeals correctly recognized that *Halverson* is not applicable because *Halverson* did not involve blocking a natural watercourse. *Id.* at 719, ¶ 14.

The land area involved in *Halverson* was the Skagit River delta floodplain. This is an 11 mile long by 19 mile wide flood plain that had historically been subjected to repeated flooding. 139 Wn.2d at 4. To combat the flooding, landowners began building dikes as far back as 1863. *Id.*

The particular dikes at issue in *Halverson* were constructed on both sides of the Skagit River. The dikes, however, were built between 50 feet and 1000 feet from the River's banks. *Id.* at 5. As pointed out by the Court,

The river waters do not come into contact with the levees until the waters leave the banks of the river channel.

Id. The Court further clarified that the waters repelled by the dikes were **surface waters**.

[T]he waters against which the diking districts built dikes *were* surface waters, because without those dikes the waters were no longer subject to the current of the Skagit River and would have fanned out throughout the entire flood plain.

Id. at 17 (italics by the Court). To drive home the point that the dikes in *Halverson* repelled flooding surface waters, the Court noted:

Historically, the Skagit River's floodwaters have not only fanned out over the entire Skagit River Valley, but have actually departed from the Skagit River basin and moved into drainage basins of entirely different rivers.

Id. at 17-18.

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

Id. at 18.

Against this background, the plaintiffs in *Halverson* argued that the effect of the levees was to increase the degree of flooding that occurred on

their own lands. Unlike the other landowners who organized, created the diking districts, and taxed themselves to build dikes to protect their lands, the plaintiffs in the Nookachamps area never built protective dikes.

Landowners of the Nookachamps area have never utilized the statutory process for creating a diking district in their own area. As a result, the portion of the south side of the Skagit River along the Nookachamps area is unprotected from floodwaters.

Id. at 5. Accordingly, the plaintiffs' theory in *Halvorson* was that the levees increased the amount of flooding that occurred on their unprotected properties.

At trial, Plaintiffs' case was based solely on the theory that their properties were flooded more severely than they would have been *had there been no levees along the Skagit River*.

Id. at 6 (italics by the Court).

Of course, this Court ruled that the common enemy doctrine provided a complete defense. There can be no doubt that the common enemy doctrine in *Halvorson* was properly applied because the levees were clearly protecting landowners from invading **surface waters**. While repelling surface water away from one area often increases flooding in another area, everyone is entitled to protect against this common enemy.

In sharp contrast, the undisputed evidence in the Fitzpatrick's case shows that the levee did not repel surface waters, but rather, cut off the

natural flow of high waters through defined side channels. These waters are not diffused surface waters spreading out over a broad area, but are riparian waters that otherwise would have been confined within the natural watercourse. By blocking those channels, the river hydraulics changed and the avulsion occurred.

Significantly, *Halverson* carefully recognizes this very distinction in footnote 14. The Court noted that “waters escaping the banks of a river and flowing *into a defined flood channel* are not surface waters.” *Halverson*, 139 Wn.2d at 14 n.14 (citing *Sund v. Keating*, 43 Wn.2d 36, 42-46, 259 P.2d 1113 (1953) (italics by the Court)). This Court distinguished the facts in *Halverson* because

there is **no evidence in the record** that the overbank floodwaters flowed within a defined flood channel. To the contrary, even Plaintiffs’ expert testified that, absent these levees, the floodwaters would have diffused over the entire floodplain, escaping into an entirely separate river drainage basin.

Id. (emphasis added).

This distinction in *Halverson* is settled Washington law. In *Sund v. Keating*, 43 Wn.2d 36, for example, this Court acknowledged the general proposition that waters overflowing from a river in flood time **may** often be surface waters. *Id.* at 41. However, the Court clarified that this is not always the case. Indeed, with respect to *Cass v. Dicks*, 14 Wash. 75, 44 P. 113 (1896)

the Court explained:

Because the flood waters involved in the *Cass* case were not confined within the channel of a natural watercourse, we assumed, without discussion, that the case was governed by the law of surface waters.

Id. This Court in *Sund* followed the “weight of the authority” recognizing that

[T]he law of surface waters is applicable, **once the facts show** that the waters have become ‘diffused surface waters’ as opposed to surface waters flowing within a watercourse. The logical underpinning for the majority view is that a stream must be viewed as consisting of its normal banks and what is termed its ‘flood channel.’ *So long as the waters remain within this flood channel*, the waters are properly classifiable as **riparian waters**.

Id. at 42-43 (bold and italics added).

In other cases, the Court has referred to blockage of water within a natural watercourse as being an “exception” to the common enemy defense.

The first exception [to the common enemy defense] provides that, although landowners may block the flow of diffuse surface water onto their land, they may **not** inhibit the flow of a **watercourse** or **natural drainway**. Under this exception, a landowner who dams up a stream, gully, or drainway will not be shielded from liability under the common enemy doctrine.

Currens v. Sleek, 138 Wn.2d 858, 862, 983 P.2d 626 (1999). This Court’s precedent could not be any clearer. The Court of Appeals correctly understood and applied this jurisprudence and therefore reversed summary

judgment. The Court of Appeals summarized this case as follows:

The common enemy rule, which allows landowners to repel surface waters to the detriment of their neighbors, does not apply when the landowner obstructs a watercourse or natural drainway or when the landowner obstructs riparian water from entering a flood channel. *Currens v. Sleek*, 138 Wash.2d 858, 862-63, 983 P.2d 626, 993 P.2d 900 (1999); *Sund v. Keating*, 43 Wash.2d 36, 42-43, 259 P.2d 1113 (1953)... The landowners presented evidence that the dike caused high waters flowing down the river to change the course of the channel and swept their land and home down the river. We conclude that they have presented material issues of fact that preclude summary judgment.

Fitzpatrick v. Okanogan County, 143 Wn. App. 288, 292, 177 P.3d 716, 717-18, ¶ 1, (2008). The Court of Appeals' decision should be affirmed.

II.

THE EXCEPTION TO THE COMMON ENEMY DOCTRINE APPLIES TO BOTH UPSTREAM AND DOWNSTREAM OWNERS

The County argues that the exception to the common enemy doctrine for blocking the flow of a natural watercourse only applies when a *downstream* property owner obstructs the flow to cause damage to an *upstream* owner's property. In other words, the downstream action causes the waters to back up and damage the upstream owner. While this may be a typical fact pattern, there is **no basis** in case law, nor any reasonable rationale, for this distinction.

In support of the upstream/downstream distinction, the County cites *Wilbur v. Western Properties*, 14 Wn. App. 169, 173, 540 P.2d 470 (1975). That case does follow the typical fact pattern where an upstream owner was damaged by backing up water. However, the case says nothing to support the County's argument claiming a distinction between upstream and downstream damage.

The County also cites *Island County v. Mackie*, 36 Wn. App. 385, 675 P.2d 607 (1984). Again, a review of the case reveals no discussion that tends to support the County's position. Rather, the case expressly recognizes that the common enemy defense applies to diffuse surface waters but does not apply to blockage of a natural drainway. *Id.* at 388.

Although less frequent, various other cases do have factual scenarios where the upper landowner caused damage to a downstream property owner. *See e.g. Snohomish County v. Postema*, 95 Wn. App. 817, 978 P.2d 1101, *rev. denied*, 139 Wn.2d 1011 (1998). Another example is *Currens v. Sleek*, cited above, where an upland property owner caused damage to a lower landowner. If the County's position was correct, this Court should not have analyzed that case under the common enemy doctrine.

In short, there is no principled basis for limiting the exception to damaged owners who happen to be upstream from the blockage. There is no basis in the common enemy doctrine, or its exception, for distinguishing

damages that occur downstream from those that occur upstream. The grant of summary judgment to the government cannot be upheld on this basis.

III.

A TAKING DOES NOT REQUIRE THAT IT BE “CONTEMPLATED”

The Fitzpatrick's have pled a case in inverse condemnation. As noted by the Court of Appeals, the elements of inverse condemnation are: “(1) a taking or damaging (2) of private property (3) for public use (4) without just compensation being paid (5) by a governmental entity that has not instituted formal proceedings.” *Fitzpatrick*, 143 Wn. App. at 302-03, ¶ 36 (citing *Phillips v. King County*, 136 Wn.2d 946, 957, 968 P.2d 871 (1988)). Even a cursory review of the elements of this cause of action demonstrate that proving intent is unnecessary.

The government argues that for a taking to occur, the damage must have been the result of a planned action, rather than mere negligence. Of course, the building of this dike was a planned action. Likewise, the later extensions of the dike were planned. Those actions did not happen by chance, but were public works actions of the government entities. The County and State do not contend otherwise. Moreover, the dike worked exactly as it was intended to work, *i.e.* it cut off the flow of water through the natural side channels.

Whether or not the government entities intended to cause an avulsion is not relevant. As held in *Lambier v. City of Kennewick*, 56 Wn. App. 275, 783 P.2d 569 (1989), *review denied*, 114 Wn.2d 1016 (1990):

The unintended results of a governmental act may constitute a “taking.”

Id. at 281.

Two of the cases relied upon by the government entities are *Seal v. Naches-Selah Irrigation District*, 51 Wn. App. 1, 751 P.2d 873 (1988) and *Songstad v. Municipality of Metropolitan Seattle*, 2 Wn. App. 680, 472 P.2d 574 (1970). However, those cases are factually distinguishable. The *Lambier* decision noted that in *Seal*, there was not an affirmative act of construction which resulted in damage to property. 56 Wn. App. at 279-80. Rather, there was merely leakage from an irrigation canal that damaged a cherry orchard. Without an affirmative act of construction, the case sounded more in tort. Obviously, this same distinction applies to the Fitzpatrick case where there was affirmative construction of a public project, *i.e.* the dike.

The *Lambier* Court also distinguished *Songstad* on the fact that the damages there were not permanent, but were merely a temporary interference with their property interests. *Id.* Again, the Fitzpatrick damage is not temporary, but is a permanent destruction of their house and land.

Lambier also went on to recognize that both *Seal* and *Songstad* mistakenly rely on *Jorguson v. City of Seattle*, 80 Wash. 126, 141 P. 334 (1914). *Lambier*, 56 Wn. App. at 281. The problem with relying upon *Jorguson* and the subsequent cases that follow it is that it has been effectively overruled by *Wong Kee Jun v. Seattle*, 143 Wash. 479, 255 P. 645 (1927).

In *Wong Kee Jun*, this Court reviewed numerous prior cases for the purpose of establishing “a rule by which litigants and trial courts may in the future determine into which class a given case may fall.” *Id.* at 480-481. The Court noted that previous decisions had created confusion. *Id.* at 480. The Court set out the rule to be applied in future cases

[T]he only inharmony arises from the *Casassa* and *Jorguson* case and those which attempt to follow them. In the beginning they were a not unjustified attempt to draw a distinction which does exist, but the line drawn was too fine, and the results show that it leads to confusion. So far as out of harmony with what is here said, those cases are **overruled**.

Id. at 505 (emphasis added). Rather than following the negligence or “inadequate plan” analysis, the Court established the rule as follows:

[T]he courts must look only to the taking, and not to the manner in which the taking was consummated. A mere **temporary interference** with a private property right in the progress of the work, especially such as might have been avoided by due care, **would probably be tortious only**. ... [B]ut the removal of lateral support, causing slides or any **permanent** invasion of private

property, must be held to come within the constitutional inhibition.

Id. (emphasis added).

In other words, where the government interference is temporary, tort remedies such as trespass and negligence may be the only available relief. But permanent damage and invasion must be viewed as the equivalent of taking the property and must be compensated. The notion that a negligent plan in constructing or carrying out a public project can insulate the government from takings liability is no longer the law. *Id.*; see also Barer, Distinguishing Eminent Domain From Police Power And Tort, 38 WASH. L. REV. 607, 622 (1963) (“[B]oth the ‘negligent plan’ rationale and the ‘not necessarily anticipated by the plan’ approach were put to rest with the decision in *Wong Kee Jun v. City of Seattle*.”).

The County looks to *Olson v. King County*, 71 Wn.2d 279, 428 P.2d 562 (1967) for support because the property damage there was found to be the result of tortious conduct. Contrary to any implied suggestion by the County, *Olson* affirmed the principles of *Wong Kee Jun*.

Concededly this distinction between a constitutional taking and damaging and tortious conduct by the state or one of its subdivisions is not always clear. But subsequent to our comprehensive analysis of our cases by Judge Tolman in *Wong Kee Jun v. City of Seattle*, supplemented by Judge Steinert’s scholarly discussion in *Boitano v. Snohomish County*, we have adhered fairly closely to the principles enunciated in those cases.

71 Wn.2d at 284.

In short, *Olson* does not resurrect the negligence distinction or inadequate plan rule of *Casassa* and *Jorguson*. It simply recognizes that in some situations, a government may act negligently and cause temporary interference and damage without resulting in a taking of the land. However, the *Olson* case provides no legitimate basis for the government to contend that **permanent** destruction of the Fitzpatrick's home and property, as a direct result of its construction of the dike, is not a compensable taking. *Olson* does not support the government's position.

The government entities also cite *Dickgieser v. State*, 153 Wn.2d 530, 105 P.3d 26 (2005). Contrary to the County's assertions, *Dickgieser* actually supports Fitzpatrick's inverse condemnation action.

Dickgieser involved logging of state owned property by the Washington Department of Natural Resources (DNR). By removing large quantities of mature timber, the natural drainage of surface water from the area was significantly altered. As a result of that logging operation, a stream subsequently overflowed its banks and destroyed three homes on Dickgieser's land. Dickgieser brought an action against DNR, including an inverse condemnation claim, contending that the DNR logging operation that destroyed his property constituted a "taking" for which compensation was due under Article 1, section 16 of the Washington Constitution. The State

argued that DNR's logging operation was negligently implemented (*i.e.* tortious conduct), but the resulting damage was not a taking under Article 1, section 16.²

The County's reliance on *Dickgieser* ignores the holding in the case. This Court rightfully rejected the State's argument that the action sounded in tort and held that government action did amount to a "public use" and that the permanent destruction of Mr. Dickgieser's home states a case in inverse condemnation.

Of course, many decisions implicitly recognize that takings can occur as an unintended consequence of government projects and thereby give rise to inverse condemnation claims. For example, in *United States v. Causby*, 328 U.S. 256 (1946), the federal government had engaged in regular flights of military aircraft at low altitudes over the plaintiff's chicken ranch. Although nobody intended to cause the chickens to fly into the henhouse walls, that is what occurred.

As a result of the noise, respondents had to give up their chicken business. As many as six to ten of their chickens were killed in one day by flying into the walls from fright. The total chickens lost in that manner was about 150. Production also fell off. The result was the

² The State's motive in *Dickgieser* for attempting to characterize DNR's logging project as resulting in a tort, rather than a taking of private property, was to avoid liability since the statute of limitation had passed on the tort claims. *Id.* at 533-34.

destruction of the use of the property as a commercial chicken farm.

Id. at 259. Of course, the United States Supreme Court ruled that the invasion of the air space in such close proximity was “in the same category as invasions of the surface.” *Id.* at 265. Despite the unforeseen consequence of “flying chickens in the barnyard”, an inverse condemnation claim was properly stated. *Id.* at 265-66.

In one of Washington’s airport noise cases, this Court recognized that it was not necessary to look to tort theories when the airport was operated by a governmental entity.

In this jurisdiction the evolution of inverse condemnation actions in airport cases has made reliance on traditional tort theories unnecessary when, as here, the airport is owned and operated by a governmental entity and the recovery sought is only for loss of property rights, not personal or other injuries.

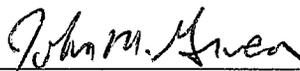
Highline District v. Port of Seattle, 87 Wn.2d 6, 17 (1976). Of course, the Fitzpatrick’s seek only compensation for the destruction of their property. They do not seek other damages as in tort actions. An inverse condemnation claim is properly stated and the matter should be remanded for trial.

CONCLUSION

The uncontested evidence below is that the cause of Fitzpatrick's loss (permanent destruction of their home and land) was due to a dike completed as a public project along the Methow River. In order for the summary judgment motion to be upheld on appeal based on the common enemy defense, the trial court must have had before it undisputed evidence that the waters blocked by the dike would have been surface waters. However, there was no such evidence in this case. To the contrary, the only evidence was expert testimony that the waters held back by the dike were riparian waters that would have otherwise flowed through the natural side channels. Granting summary judgment was contrary to the law. The Court of Appeals correctly reversed the trial court. Accordingly, it is respectfully requested that the Court of Appeals' decision be affirmed.

RESPECTFULLY submitted this 4th day of November, 2008.

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DECLARATION OF SERVICE

I, Linda Hall, declare:

I am not a party in this action. I reside in the State of Washington and am employed by Groen Stephens & Klinge LLP in Bellevue, Washington.

On November 4, 2008 a true copy of the foregoing Supplemental Brief of Respondent, Fitzpatrick was placed in envelopes, which envelopes with postage thereon fully prepaid was then sealed and deposited in a mailbox regularly maintained by the United States Postal Service in Bellevue, Washington, addressed to the following persons:

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I declare under penalty of perjury that the foregoing is true and correct and that this declaration was executed this 4th day of November, 2008 at Bellevue, Washington.



Linda Hall