

RECEIVED
SUPREME COURT
STATE OF WASHINGTON

2008 NOV -4 P 3:22

NO. 81257-8

BY RONALD R. CARPENTER

R/h
CLERK

SUPREME COURT OF THE STATE OF WASHINGTON

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

Respondents,

v.

OKANOGAN COUNTY,

Petitioner

and

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

Defendants.

**SUPPLEMENTAL BRIEF OF RESPONDENT
STATE OF WASHINGTON**

ROBERT M. MCKENNA
Attorney General

PAUL F. JAMES, WSBA 13525
Assistant Attorney General
P.O. Box 40126
Olympia, WA 98504-0126
360-586-6300

ORIGINAL

TABLE OF CONTENTS

I.	INTRODUCTION.....	1
II.	STATEMENT OF ISSUES.....	2
III.	STATEMENT OF THE CASE.....	2
IV.	ARGUMENT	6
	A. The Common Enemy Rule Precludes Liability For Dikes Which Keep Floodwaters Within The Banks Of A River	6
	B. The Watercourse Exception To The Common Enemy Rule Is Inapplicable To A Dike Which Keeps Floodwaters Within The Banks Of A River	9
	C. Fitzpatricks' Inverse Condemnation Claim Fails Because The Damage To Their Property Was Not Necessarily Incident To The Construction Of The Dike.....	14
V.	CONCLUSION.....	18

APPENDIX

TABLE OF AUTHORITIES

Cases

<i>Cass v. Dicks</i> , 14 Wash. 75, 44 P. 113 (1896)	7, 12
<i>Currens v. Sleek</i> , 138 Wn.2d 858, 983 P.2d 626 (1999).....	9
<i>Dickgieser v. State</i> , 153 Wn.2d 530, 105 P.3d 26 (2005).....	16, 17
<i>Fitzpatrick v. Okanogan County</i> , 143 Wn. App. 288, 177 P.3d 716 (2008).....	5, 6
<i>Halverson v. Skagit County</i> , 139 Wn.2d 1, 983 P.2d 643 (1999).....	passim
<i>Indian Creek Drainage Dist. 1 of Quitman, Tunica, & Panola Counties v. Garrott</i> , 123 Miss. 301, 85 So. 312 (1920).....	12, 13
<i>Lamb v. Reclamation Dist. 108</i> , 73 Cal. 125, 14 P. 625 (1887).....	11, 12, 14
<i>McCoy v. Bd. of Directors. of the Plum Bayou Levee Dist.</i> , 95 Ark. 345, 129 S.W. 1097 (1910).....	13, 14
<i>Short v. Pierce County</i> , 194 Wash. 421, 78 P.2d 610 (1938)	7, 12
<i>Singleton v. Atchison T.&S.F. Ry. Co.</i> , 67 Kan. 284, 72 P. 786 (1903).....	13
<i>Songstad v. Municipality of Metro. Seattle</i> , 2 Wn. App. 680, 472 P.2d 574 (1970).....	15, 16
<i>Sund v. Keating</i> , 43 Wn.2d 36, 259 P.2d 1113 (1953).....	10, 11

<i>Wilber v. Western Props.</i> , 14 Wn. App. 169, 540 P.2d 470 (1975).....	10
<i>Wilson v. Keytronic Corp.</i> , 40 Wn. App. 802, 701 P.2d 518 (1985).....	15
<i>Wong Kee Jun v. City of Seattle</i> , 143 Wash. 479, 255 P. 645 (1927)	16

Statutes

RCW 86.12.037	4, 5
RCW 86.16.071	4, 5

I. INTRODUCTION

Washington State is blessed with oceans, mountains, lakes and rivers. However, rivers that overflow their banks have wreaked havoc and destruction on property within their floodplains. For this reason, the common law allows landowners along a river to construct dikes without incurring liability for damages caused by their efforts to protect their properties from flooding. This rule, treating floodwaters as a “common enemy” has been recognized as a valid defense to liability in flooding cases for more than 100 years. The rule precludes liability for a flood control structure in both tort cases and inverse condemnation cases.

The Fitzpatricks claim to meet an exception to the common enemy rule applicable where a dam, dike or other obstruction blocks the flow of a natural river or watercourse. The reasoning for the exception is that when water finds a natural drainage or watercourse it cannot be obstructed and must be allowed to carry water into streams and lakes. The Fitzpatricks, however, did not offer evidence that a watercourse was blocked; they offered evidence that a dike prevented floodwaters from finding their way into normally dry “side channels” outside the river bank.

One hundred years of precedent holds that the watercourse exception is not applicable to a dike that keeps floodwaters from overflowing the banks of a river, even if such floodwaters might move

into side channels or sloughs in those exceptional conditions. Instead, the common enemy rule applies and precludes the Fitzpatrick's claim. This Court should therefore reverse the court of appeals and affirm the summary judgment of the superior court.

II. STATEMENT OF ISSUES

1. Whether the watercourse exception to the common enemy rule applies where a dike prevents floodwaters from overflowing a river and finding their way into side channels.

2. Whether an inverse condemnation claim fails when the damage to property is neither contemplated by the plan of work nor considered to be a necessary incident of the maintenance of the property for a public purpose.

III. STATEMENT OF THE CASE

In 1974, in order to protect their properties from flooding, private landowners constructed a dike along the Methow River near Mazama in Okanogan County. CP at 48. In 1975, the Washington State Department of Highways entered into an agreement with Okanogan County regarding the construction of improvements to the protective dike. CP at 54. The State does not own the dike. Moreover, the State did not plan, construct,

operate, maintain or design the dike. CP at 54.¹ The State's participation was limited to its payment of 30 percent of the cost of improvements up to a maximum of \$4,000. CP at 54. The purpose of the project was to protect the property of adjacent private property owners and State Highway 20 from flood damage. CP at 54. Over the next 20 years, the Washington State Department of Transportation (WSDOT) shared costs on dike modification projects and/or reimbursed private landowners for work already completed on the dike. CP at 49.

In late June 1999, Okanogan County sought approval to perform repairs on the dike and to remove a log jam immediately adjacent to the dike. On June 24, 1999, Okanogan County approved an application for Shoreline Exemption submitted by the Methow Irrigation District. CP at 57. A Joint Aquatic Resource Permit Application (JARPA) was submitted and a Hydraulic Project Approval (HPA) was sought from the Washington Department of Fish and Wildlife (WDFW). CP at 60. On June 29, 1999, WDFW issued a HPA allowing repair work, but did not grant approval to remove the log jam. CP at 71.

¹ At the court of appeals, the State observed that the plaintiffs could not demonstrate that the State had any proprietary interest in the dike in question that would make it liable. The court of appeals found evidence sufficient to survive summary judgment on this point. The State, however, does not concede that it has any proprietary interest or control over the dike that could make it liable under the theories advanced by plaintiffs. If there were a remand, the State reserves its rights to establish its non-ownership of the dike.

On June 16, 2002, the Fitzpatricks' home was destroyed when a log jam broke up near the dike and the Methow River abandoned its meandering course upriver from the Fitzpatricks' property in favor of a newly formed avulsion alignment located at their property. CP at 148. The Fitzpatricks' home, located nearly a half-mile downstream of the dike, was washed away in the flood.

In June 2005, the Fitzpatricks sued Okanogan County, the State of Washington, John Hayes, and the Methow Institute Foundation, alleging that the defendants should be liable for damages to their home on two types of theories-negligence and inverse condemnation. CP at 1-6. The defendants filed motions for summary judgment for dismissal of Fitzpatricks' claims arguing that they are protected from liability by the common enemy rule; and by the provisions of RCW 86.16.071 and 86.12.037;² and by Fitzpatricks' failure to establish the necessary elements of their claims.

In addition, the State sought summary judgment dismissal based on this Court's holding in *Halverson v. Skagit County*, 139 Wn.2d 1, 13, 983 P.2d 643 (1999), that helping another entity to maintain, repair and improve a dike on a river does not give rise to inverse condemnation

² RCW 86.16.071 provides that the State's exercise of regulatory authority over flood control projects does not give rise to any liability. Likewise, RCW 86.12.037 prohibits any action against a county for actions related to flood control measures on rivers. All statutes have been provided in the attached appendix.

liability. Before liability can attach in an inverse condemnation case, an active, proprietary participation must be shown. *Id.*

On March 7, 2006, the Honorable John Hotchkiss granted the defendants' motions for summary judgment. CP at 232-34. The Fitzpatricks appealed to the Washington Court of Appeals, Division III.

On appeal, the Fitzpatricks conceded that their tort claims against Okanogan County and the State are foreclosed by the statutory immunity provided by RCW 86.12.037 and 86.16.071. In addition, the Fitzpatricks dropped their claims against defendants John Hayes and the Methow Institute Foundation. The Fitzpatricks therefore sought review only with respect to dismissal of the inverse condemnation claim against Okanogan County and the State. This was a theory that the dike had taken their private property for public use and necessity.

The court of appeals reversed the trial court with regard to the inverse condemnation claims. To reach this conclusion, the court ruled that the defendants are not protected by the common enemy rule. The court, citing an affidavit of Fitzpatricks' expert witness, concluded that there was evidence "the avulsion was caused by the dike's blockage of natural side channels, which would have relieved the flow of water in the river and prevented the landowners' loss." *Fitzpatrick v. Okanogan County*, 143 Wn. App. 288, 293, 177 P.3d 716 (2008). The court found

the “side channel drainways” constituted flood channels which “cannot be blocked as surface water because it is part of the waterway.” *Id.* at 299.

On the issue of whether the State had an ownership interest in the dike, the court of appeals found that the Fitzpatricks had presented evidence regarding the State and County’s roles in the construction, improvement and maintenance of the dike in which they shared an ownership interest, which created an issue of fact precluding summary judgment. *Id.* at 303. As noted above, footnote 1, the State respectfully disagrees with the court of appeals evaluation of the record on summary judgment. The State, however, has reserved this issue if remand is necessary.

IV. ARGUMENT

A. **The Common Enemy Rule Precludes Liability For Dikes Which Keep Floodwaters Within The Banks Of A River**

The court of appeals erred in failing to apply the common enemy rule as a defense to the Fitzpatricks’ inverse condemnation claims. The decision is inconsistent with and would effectively nullify over a century of Washington case law protecting governmental entities as well as private landowners who build dikes to protect their properties from flood damage.

The common enemy rule provides that water “escaping from running streams and rivers is regarded as an outlaw and a common enemy

which anyone may defend himself even though by so doing injury may result to others.” *Cass v. Dicks*, 14 Wash. 75, 78, 44 P. 113 (1896). In *Cass*, this Court held that landowners adjacent to a river were not liable for damages caused by their construction of a dike to protect their properties against flooding.

A similar holding encouraging measures to protect property from flood damage was made by this Court in *Short v. Pierce County*, 194 Wash. 421, 78 P.2d 610 (1938). In *Short*, Pierce and King Counties constructed a number of improvements along the Puyallup River including concrete bulkheads that lessened the danger of flooding. When a break in a bulkhead washed away two acres of his property, plaintiff sued under a theory of inverse condemnation. In upholding the trial court’s dismissal of plaintiff’s claim, this Court stated that in meeting an emergency such as fire, flood or pestilence, “public officials and private citizens may employ almost any means in an endeavor to control the danger.” *Short*, 194 Wash. at 432. The Court added that if the effort to defend against flooding causes the washing away of downstream property, the downstream owner has no right of recovery. *Short*, 194 Wash. at 430.

In a more recent case, this Court reaffirmed the policy favoring efforts to control flood damage in *Halverson*, 139 Wn.2d 1. In *Halverson*, plaintiffs’ properties along the Skagit River were damaged by flooding.

They sued under a theory of inverse condemnation claiming that flood damage was more severe than it would have been had there been no levees constructed along the river. In reversing a jury verdict in favor of the plaintiffs, this Court found that dikes and levees designed to prevent floodwaters from leaving the banks of a river are entitled to the protection of the common enemy rule and parties responsible for their construction are not liable to nearby property owners for damages caused by these flood control structures.

Under long standing Washington law, “[w]aters escaping from the banks of a river at times of flood are surface waters, and are waters which 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.”

Halverson, 139 Wn.2d at 15.

The Fitzpatrick’s inverse condemnation theory is based on the same premise rejected by this Court in *Halverson*, that the property damage was caused, in part, by the dike located upriver from them. The defendants are therefore protected from liability by the common enemy rule. The court of appeals erred by failing to apply this well settled law encouraging landowners to protect their properties from flood damage by building dikes and levees designed to prevent waters escaping from the banks of a river.

B. The Watercourse Exception To The Common Enemy Rule Is Inapplicable To A Dike Which Keeps Floodwaters Within The Banks Of A River

The court of appeals erred because it applied the watercourse exception to a dike built to keep floodwaters from overflowing the banks of a river. Neither the case law cited by the court or appeals, nor the case law from other jurisdictions, support the application of the watercourse exception in the context of a dike which by its effective operation obstructs waters from overflowing the banks of a river and finding its way into otherwise dry “side channels” in times of flood.³ This vastly expands the watercourse exception to include amorphous channels on flooded uplands. Such a rule completely undermines the purpose of the common enemy rule—to prevent damage to property from floodwaters.

Proper application of the watercourse exception is in cases involving a blockage of a stream with water actually flowing in it.

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). As emphasized by Okanogan County in its petition for review, the exception clearly applies where a downstream property owner dams or blocks an

³ Fitzpatrick's expert, Dr. Bradley, concedes that these “side channels” only carry water during a “high flow event”. CP at 148.

existing watercourse, causing it to back up onto an upstream owner's property. *Wilber v. Western Props.*, 14 Wn. App. 169, 173, 540 P.2d 470 (1975).

No Washington case applies the watercourse exception to a dike or levee that blocks floodwaters from *overflowing* the banks of a river. It is one thing to say that waters already within a flood channel or stream cannot be blocked by structures placed in their beds. Blocking a natural watercourse causes water to back up into a lake. Under these circumstances, a dam builder must pay for lands flooded by a lake that forms behind a dam. It is quite another thing to say that a landowner cannot protect his property from flood damage when doing so blocks floodwaters from overflowing the banks of a river and preventing them from finding their way into dry "side channels". Where a dike protects property from overflowing floodwaters, the common enemy rule applies. *See Halverson*, 139 Wn.2d 1.

The court of appeals' decision relies on *Sund v. Keating*, 43 Wn.2d 36, 259 P.2d 1113 (1953), but that case offers no support for the decision. *Sund* did not involve a dike or levee, or floodwaters overflowing the banks of a stream. It dealt with an excavation and removal of a stream bank that diverted water out of the main channel of the stream onto an adjoining landowners' property. In *Halverson*, this Court distinguished

Sund while, at the same time, reaffirming the continuing validity of the common enemy rule by stating:

Sund held that floodwaters still flowing within a defined “flood channel” cannot be diverted out of the channel without incurring liability for resulting damages, thus, partially limiting those earlier cases which classified *any* floodwaters as surface waters. . . . 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.**

Halverson, 139 Wn.2d at 15-16 (emphasis added). Thus, *Halverson* reaffirms the non-liability for damage caused by a dike or levee which effectively keeps floodwaters from overflowing the banks of a river.

The court of appeals ruling, moreover, contradicts well established case law and the long-held expectations allowing for protection of land from floodwaters. In *Lamb v. Reclamation Dist. 108*, 73 Cal. 125, 14 P. 625 (1887), the plaintiff’s property along the Sacramento River was damaged by flooding. He sued claiming that his flood damage was caused by the defendant Reclamation District’s having built a dam and levee which prevented floodwaters from overflowing the banks of the river and finding their way into a slough which served as a side channel allowing the water to drain back into the river. In denying plaintiff’s inverse condemnation claim, the California Supreme Court noted that if the

floodwaters could not be blocked from overflowing the river, the entire levee system was subject to removal:

Wilkins' Slough is not a channel or fork, continuously carrying a large part, or any part, of the waters of the Sacramento River. It carries no water at all except "in times of flood," and then the amount which it carries, when compared with the volume of water in the river, is insignificant. In fact, it has no original water of its own at all, but is simply a conduit by which occasionally some of the floodwater of the river escapes into the lower lands adjoining. This same office is performed by every other low place along the bank; and every other part of the levee could be removed as a nuisance if that part of it which is at Wilkins' Slough can be so removed.

Lamb, 73 Cal. at 134-35.⁴

Like the California Supreme Court in *Lamb*, other jurisdictions have declined to impose liability for the construction of dikes and levees that block floodwaters from accessing side channels. In *Indian Creek Drainage Dist. 1 of Quitman, Tunica, & Panola Counties v. Garrott*, 123 Miss. 301, 85 So. 312 (1920), the Mississippi Supreme Court reversed an order granting an injunction against the drainage district whose levee system blocked bayous, sloughs and depressions that were conduits for floodwaters that traveled several miles before reconnecting with the river. The court noted:

⁴ This Court cited to *Lamb* in both the *Cass*, 14 Wash. at 80, and *Short*, 194 Wash. at 430, decisions which both support the viability of the common enemy doctrine as a defense to liability arising from a challenge to a river dike.

The most that can be said is that these outlets were mere conduits or passageways, with no regular flowing waters, except rain or surface waters, and passed those waters caused by unusual floods of the Coldwater River. Gullys and ditches which are ordinarily dry may be termed natural water courses whose own natural waters could not be obstructed and diverted to the injury of another, . . . yet where they are obstructed solely to protect against vagrant floodwaters which infrequently pass back out through them from another overflowed stream the rule is different.

Indian Creek, 85 So. at 320.

Likewise, in *Singleton v. Atchison T.&S.F. Ry. Co.*, 67 Kan. 284, 72 P. 786 (1903), the Kansas Supreme Court affirmed a trial court ruling in favor of a defendant whose railroad embankment blocked depressions in the land which acted as channels for water which *left* its accustomed channel and sought a different route to the same river lower down. The court stated:

Here the obstruction interposed is to the flow from its accustomed course **under extraordinary circumstances**. Hence, we are of the opinion that . . . the case must be ruled by the principles applicable to the rights of the owner of property near a river to throw up levees or fence against the overflow from the river.

Singleton, 72 P. at 788 (emphasis added). The Fitzpatricks' evidence similarly relies on where water would flow under extraordinary circumstances.

Also, in *McCoy v. Bd. of Directors. of the Plum Bayou Levee Dist.*, 95 Ark. 345, 129 S.W. 1097 (1910), the Arkansas Supreme Court held that

a levee district had a right to construct and maintain a levee along or near the Arkansas river that obstructed the natural outlet of floodwater through a slough and bayou. Citing *Lamb*, the Arkansas court refused to find the levee district liable for damage caused by water that had risen at least six feet higher on neighboring properties than it would have risen if the escape of water through the slough and bayou not been obstructed. *McCoy*, 95 Ark. at 352.

As shown by this review of state and national case law, the well established application of the common enemy rule should apply in this case. The court of appeals erred by misapplying and thus expanding the watercourse exception to the common enemy rule to apply to the construction of a dike designed to protect properties from floodwaters overflowing the bank of a river. The Court should affirm that the common enemy rule protects landowners from liability even where their flood control devices block the overflow of vagrant floodwaters from finding their way into side channels.

C. Fitzpatricks' 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 course of the Methow River upstream from the Fitzpatricks' property did not change. The course of the river did not

change in 1999 during a 10-year flood event. CP at 147-48. However, it did change suddenly in 2002 during a two-year flood event 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. CP at 148. Once the pressure caused by the log jam became high enough, the log jam broke and the backed up water flooded straight across the river's meander bend creating an avulsion path directly at the Fitzpatrick's property. CP at 148.

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). In *Songstad v. Municipality of Metro. 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.

Songstad, 2 Wn. App at 682.

The Fitzpatrick's cite *Wong Kee Jun v. City of 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. CP at 123. 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 this 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. There is no evidence in the record to demonstrate that Okanogan County's construction of the dike would necessarily and incidentally flood the Fitzpatrick's property during a high water event aided by a log jam some 27 years later. At the time the dike was constructed, there would have been no basis to condemn the Fitzpatrick's property located a half-mile downstream under a theory that the damage was contemplated by the plan of work or considered to be a necessary incident to the construction of the dike. Indeed, Fitzpatrick's own expert claims only that Okanogan County was negligent in locating the dike where it blocked the flow of waters into side channels.

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 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

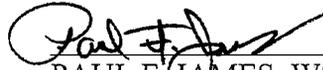
the flooding of plaintiffs' property in conjunction with a log jam some 27 years later.

V. CONCLUSION

The State of Washington respectfully requests the Court to reverse the decision of the court of appeals and dismiss it from this case based on the court of appeal's error in reversing the trial court's summary judgment dismissal of Fitzpatrick's inverse condemnation claim.

RESPECTFULLY SUBMITTED this 4th day of November, 2008.

ROBERT M. MCKENNA
Attorney General



PAUL F. JAMES, WSBA #13525
Assistant Attorney General
Attorneys for Defendant State

RECEIVED
SUPREME COURT
STATE OF WASHINGTON

CERTIFICATE OF SERVICE 2008 NOV -4 P 3: 22

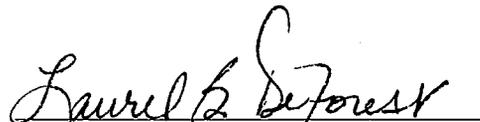
I hereby certify that on the 4th day of November, 2008, I caused to ~~be~~ BY RONALD B. CARPENTER

be served a copy of the Supplemental Brief of Respondent ~~State~~ of
Washington by electronic mail and a paper copy by United States Mail,
first-class, postage-prepaid, via Consolidated Mail Services, on the
following:

Attorneys for Petitioner:
Mark R. Johnsen
Karr Tuttle Campbell
1201 Third Avenue, Suite 2900
Seattle, WA 98101
(206) 223-1313
Email: mjohnsen@karrtuttle.com

Attorneys for Respondents:
John M. Groen
Groen Stephenson & Klinge
11100 NE 8th Street, Suite 750
Bellevue, WA 98004
Email: Groen@GSKlegal.pro

DATED this 4th day of November, 2008, at Tumwater,
Washington.


LAUREL B. DeFOREST

APPENDIX

may deem necessary or advisable, but not to exceed twenty-five cents per thousand dollars of assessed value upon all taxable property in such county, for the purpose of creating a fund to be known as "river improvement fund." There is hereby created in each such river improvement fund an account to be known as the "flood control maintenance account." [1973 1st ex.s. c 195 § 129; 1941 c 204 § 8; 1907 c 66 § 1; Rem. Supp. 1941 § 9625. FORMER PART OF SECTION: 1907 c 66 § 4, now codified as RCW 86.12.033.]

Severability—Effective dates and termination dates—Construction—1973 1st ex.s. c 195: See notes following RCW 84.52.043.

Limitation on levies: State Constitution Art. 7 § 2 (Amendments 55 and 59); chapter 84.52 RCW.

86.12.020 Authority to make improvements—Condemnation. Said fund shall be expended for the purposes in this chapter provided. Any county, for the control of waters subject to flood conditions from streams, tidal or other bodies of water affecting such county, may inside or outside the boundaries of such county, construct, operate and maintain dams and impounding basins and dikes, levees, revetments, bulkheads, rip-rap or other protection; may remove bars, logs, snags and debris from and clear, deepen, widen, straighten, change, relocate or otherwise improve and maintain stream channels, main or overflow; may acquire any real or personal property or rights and interest therein for the prosecution of such works or to preserve any flood plain or regular or intermittent stream channels from any interference to the free or natural flow of flood or storm water; and may construct, operate and maintain any and all other works, structures and improvements necessary for such control; and for any such purpose may purchase, condemn or otherwise acquire land, property or rights, including beds of nonnavigable waters and state, county and school lands and property and may damage any land or other property for any such purpose, and may condemn land and other property and rights and interests therein and damage the same for any other public use after just compensation having been first made or paid into court for the owner in the manner prescribed in this chapter. The purposes in this chapter specified are hereby declared to be county purposes. [1970 ex.s. c 30 § 10; 1941 c 204 § 9; 1935 c 162 § 1; 1919 c 109 § 1; 1907 c 66 § 2; Rem. Supp. 1941 § 9626.]

Severability—1970 ex.s. c 30: See RCW 36.89.911.

Authority and power of counties are supplemental: RCW 36.89.062.

Storm water control facilities, county powers and authority: Chapter 36.89 RCW.

86.12.030 Eminent domain, how exercised. The taking and damaging of land, property or rights therein or thereto by any county, either inside or outside of such county, for flood control purposes of the county is hereby declared to be for a public use. Such eminent domain proceedings shall be in the name of the county, shall be had in the county where the property is situated, and may unite in a single action proceedings to condemn for county use property held by separate owners; the jury to return separate verdicts for the several lots, tracts or parcels of land, or interest therein, so taken or damaged. The proceedings may conform to the provisions of sections 921 to 926, inclusive, of Remington's Revised Statutes, or to any general law now or hereafter enacted govern-

(2006 Ed.)

ing eminent domain proceedings by counties. The title so acquired by the county shall be the fee simple title or such lesser estate as shall be designated in the decree of appropriation. The awards in and costs of such proceedings shall be payable out of the river improvement fund. [1941 c 204 § 10; 1907 c 66 § 3; Rem. Supp. 1941 § 9627.]

***Reviser's note:** "Sections 921 to 926, inclusive, of Remington's Revised Statutes" (except for section 923) are codified as RCW 8.20.010 through 8.20.080. Section 923 was repealed by 1935 c 115 § 1 but compare the first paragraph of RCW 8.28.010 relating to the same subject matter as the repealed section.

86.12.033 Expenses to be paid out of river improvement fund. All expenses to be incurred in accomplishing the objects authorized by this act shall be paid out of said river improvement fund and which fund shall be used for no other purpose than the purposes contemplated by this chapter. [1907 c 66 § 4; RRS § 9628. Formerly RCW 86.12.010, part.]

86.12.034 County entitled to abandoned channels, beds, and banks. Whenever a county of this state, acting pursuant to RCW 86.12.010 through 86.12.033, shall make an improvement in connection with the course, channel or flow of a navigable river, thereby causing it to abandon its existing channel, bed, bank or banks for the entire distance covered by said improvement, or for any part or portion thereof, or by said improvement shall prevent a river from resuming at a future time an ancient or abandoned channel or bed, or shall construct improvements intended so to do, all the right, title and interest of the state of Washington in and to said abandoned channel or channels, bed or beds, bank or banks, up to and including the line of ordinary high water, shall be and the same is hereby given, granted and conveyed to the county making such improvement: PROVIDED, HOWEVER, That any such gift, grant or conveyance shall be subject to any right, easement or interest heretofore given, granted or conveyed to any agency of the state. [1963 c 90 § 1.]

IMMUNITY FROM LIABILITY

86.12.037 Liability of county or counties to others. 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 non-contractual 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 beds, banks and waters thereof: PROVIDED, That nothing contained in this section shall apply to or affect any action now pending or begun prior to the passage of this section. [1921 c 185 § 1; RRS § 9663. Formerly RCW 87.12.180.]

COMPREHENSIVE FLOOD CONTROL MANAGEMENT PLANS

86.12.200 Comprehensive flood control management plan—Elements. The county legislative authority of any county may adopt a comprehensive flood control manage-

(i) All other utilities and connections to public utilities are designed, constructed, and located to eliminate or minimize flood damage.

(4) For all substantially damaged residential structures other than farmhouses that are located in a designated floodway, the department, at the request of the town, city, or county with land use authority over the structure, is authorized to assess the risk of harm to life and property posed by the specific conditions of the floodway, and, based upon scientific analysis of depth, velocity, and flood-related erosion, may exercise best professional judgment in recommending to the permitting authority, repair, replacement, or relocation of such damaged structures. The effect of the department's recommendation, with the town, city, or county's concurrence, to allow repair or replacement of a substantially damaged residential structure within the designated floodway is a waiver of the floodway prohibition.

(5) The department shall develop a rule or rule amendment guiding the assessment procedures and criteria described in subsections (3) and (4) of this section no later than December 31, 2000.

(6) For the purposes of this section, "farmhouse" means a single-family dwelling located on a farm site where resulting agricultural products are not produced for the primary consumption or use by the occupants and the farm owner. [2000 c 222 § 1; 1999 c 9 § 1; 1989 c 64 § 4; 1987 c 523 § 4.]

Effective date—1999 c 9: "This act is necessary for the immediate preservation of the public peace, health, or safety, or support of the state government and its existing public institutions, and takes effect immediately [April 15, 1999]." [1999 c 9 § 2.]

86.16.045 Adoption of ordinances or requirements that exceed minimum federal requirements. A county, city, or town may adopt flood plain management ordinances or requirements that exceed the minimum federal requirements of the national flood insurance program without following the procedures provided in RCW 86.16.031(8). [1989 c 64 § 6.]

86.16.051 Basis for state and local flood plain management. The basis for state and local flood plain management regulation shall be the areas designated as special flood hazard areas on the most recent maps provided by the federal emergency management agency for the national flood insurance program. Best available information shall be used if these maps are not available or sufficient. [1987 c 523 § 5.]

86.16.061 Adoption of rules. The department of ecology after consultation with the public shall adopt such rules as are necessary to implement this chapter. [1989 c 64 § 5; 1987 c 523 § 6.]

86.16.071 Chapter not to create liability for damages against the state. 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. [1987 c 523 § 7.]

86.16.081 Enforcement of chapter—Civil penalty—Review by pollution control hearings board or local legislative authority. (1) Except as provided in RCW 43.05.060

through 43.05.080 and 43.05.150, the attorney general or the attorney for the local government shall bring such injunctive, declaratory, or other actions as are necessary to ensure compliance with this chapter.

(2) Any person who fails to comply with this chapter shall also be subject to a civil penalty not to exceed one thousand dollars for each violation. Each violation or each day of noncompliance shall constitute a separate violation.

(3) The penalty provided for in this section shall be imposed by a notice in writing, either by certified mail with return receipt requested or by personal service, to the person incurring the same from the department or local government, describing the violation with reasonable particularity and ordering the act or acts constituting the violation or violations to cease and desist or, in appropriate cases, requiring necessary corrective action to be taken within a specific and reasonable time.

(4) Any penalty imposed pursuant to this section by the department shall be subject to review by the pollution control hearings board. Any penalty imposed pursuant to this section by local government shall be subject to review by the local government legislative authority. Any penalty jointly imposed by the department and local government shall be appealed to the pollution control hearings board. [1995 c 403 § 634; 1987 c 523 § 8.]

Findings—Short title—Intent—1995 c 403: See note following RCW 34.05.328.

Part headings not law—Severability—1995 c 403: See RCW 43.05.903 and 43.05.904.

86.16.110 Appeals. Any person, association, or corporation, public, municipal, or private, feeling aggrieved at any order, decision, or determination of the department or director pursuant to this chapter, affecting his or her interest, may have the same reviewed pursuant to RCW 43.21B.310. [1991 c 322 § 11. Prior: (Repealed by 1987 c 523 § 12); 1987 c 109 § 23; 1935 c 159 § 17; RRS § 9663A-17.]

Reviser's note: This section was repealed by 1987 c 523 § 12 without cognizance of its amendment by 1987 c 109 § 23, and was subsequently reenacted by 1991 c 322 § 11.

Findings—Intent—Purpose—1991 c 322: See notes following RCW 86.12.200.

Purpose—Short title—Construction—Rules—Severability—Captions—1987 c 109: See notes following RCW 43.21B.001.

86.16.120 Flood damages defined. Damages within the meaning of this chapter shall include harmful inundation, water erosion of soil, stream banks and beds, stream channel shifting and changes, harmful deposition by water of eroded and shifting soils and debris upon property or in the beds of streams or other bodies of water, damages by high water to public roads, highways, bridges, utilities and to works built for protection against floods or inundation, the interruption by floods of travel, communication and commerce, and all other high water influences and results which injuriously affect the public health and the safety of property. [1935 c 159 § 2; RRS § 9663A-2.]

86.16.130 Supervisor's other powers and duties unaffected by chapter.