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of the independent action of the Corps in awarding a construction permit which was not fairly traceable to any of the defendants in this action, the City, the Commonwealth, or the Board.

Without ruling on whether the land in question was subject to the Treaty at Middle Plantation, the court viewed the issue of violation of the Treaty with respect to part one of the standing test. There was no actual or imminent injury to any of the Tribes' alleged property rights because any harm would be the result of the Corps issuing a construction permit, not the Board issuing a VMPP.

The court then summarily dismissed the Tribes' Title VI claim as being without merit. The court pointed out that Title VI has the same standing requirements and that the Tribe had failed to meet them. The court added no discussion as to any possible validity to the claim outside of the standing issue.

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Currens v. Sleek, No. 66830-2, 1999 Wash. LEXIS 883 (Wash. Sept. 9, 1999) (holding that the common enemy doctrine shielded a landowner from liability for surface water flooding only if the landowner exercised due care in preventing unnecessary injury to neighboring properties).

The Currenses sought review of an unpublished appeals court decision affirming the summary judgment dismissal of their complaint against Irene Sleek and Dennis Stephenson Logging ("Logging"). At issue was whether liability may arise for property damage caused by an increased flow of surface water onto the Currenses' property after Sleek clear-cut and graded her land.

The Currenses and Ms. Sleek owned neighboring property in Clark County. Water from a portion of the Sleek property naturally seeped into a forested, low-lying sink area on the Currenses' property. In 1993, Sleek decided to clear-cut her property in order to develop four home sites. As required by the State Environmental Policy Act of 1971, Sleek submitted an environmental checklist to the Department of Natural Resources, which provided that Sleek would plant trees to enhance vegetation on the property and would install dry wells to mitigate storm water impacts. Utilizing Logging, Sleek clear-cut and graded her property in 1994; however, she took no action to revegetate the land or to reduce the flow of surface water over the sites. Sleek also never installed the required dry wells. The following year, the natural sink area in the Currenses' property flooded causing eleven trees to fall, and the Currenses removed an additional twenty trees in order to ensure the safety of their home.

The common enemy doctrine governed the issues on appeal, because it had directed the law of surface water in Washington since 1896. In its strictest form, the common enemy doctrine allowed landowners to dispose of unwanted surface water in any way they see fit, without liability for

resulting damage to one's neighbor. Because a strict application of the rule was widely regarded as inequitable, this court adopted several exceptions to the common enemy doctrine over the years.

The first exception provided 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. A natural drainway must be kept open to carry water into streams and lakes, and a lower proprietor cannot obstruct surface water when it runs in a natural drainage channel or depression.

Another exception prevented landowners from collecting water and channeling it onto their neighbors' land. This rule prohibited a landowner from creating an unnatural conduit, but allowed him or her to direct diffuse surface waters into pre-existing natural waterways and drainways. Thus, the court stated the common enemy doctrine in Washington allows landowners to alter the flow of surface water to the detriment of their neighbors, so long as they do not block a watercourse or natural drainway, nor collect and discharge water onto their neighbors' land in quantities greater than, or in a manner different from, its natural flow.

The main concern on appeal was whether Washington courts should consider the reasonableness of a landowner's actions in determining liability for damaged caused by excess surface water. Sleek and Logging argued that the common enemy doctrine in Washington did not permit a court to consider the reasonableness of a landowner's actions in determining liability. The Currenses asserted that Washington already recognized that the common enemy doctrine shielded only reasonable conduct; thus, a landowner that acts unreasonably may be liable for damages caused by surface water flooding.

The court found that although Washington had not explicitly adopted a due care exception to its common enemy doctrine, language in past cases indicated that landowner negligence was a relevant factor in the decision-making process. The court held that under Washington's common enemy jurisprudence, landowners who altered the flow of surface water on their property must have exercised their rights with due care by acting in good faith and by avoiding unnecessary damage to the property of others.

The Washington Environmental Council submitted an amicus brief and urged the court to reject the common enemy jurisprudence entirely and adopt the reasonable use rule instead. The critical difference between the two approaches was that the common enemy doctrine did not require any inquiry into the utility of the particular project. When determining liability under the common enemy doctrine, the due care exception required the court to look only to whether the landowner exercised due care in improving his or her land. Unlike the reasonable use rule, a landowner's duty under the common enemy doctrine was not determined by weighing the nature and importance of the improvements against the damage caused to one's neighbor. Rather, a landowner has an unqualified right to embark on any improvements of the land allowed by law, but must limit the harm caused by changes in the flow of surface water to those that are reasonably necessary. Since adopting a rule that required parties to litigate the importance of a particular project in order to apportion liability was

inconsistent with the state's historic deference to property rights, the court declined to abandon its common enemy jurisprudence in favor of the reasonable use rule.

The court reversed the summary judgment ruling and remanded to determine whether the third, due care, exception applied allowing the Currenses to bring suit.

Melody Divine

Halverson v. Skagit County, 983 P.2d 643 (Wash. 1999) (holding that the flood damage to landowner's properties did not support an inverse condemnation claim against Skagit County because it did not actually or proximately cause the levees to come into existence and the common enemy doctrine protected Skagit County from liability).

The Skagit River delta floodplain was located in Skagit County, Washington just before the Skagit River empties into the Skagit Bay on the Puget Sound. The floodplain was approximately eleven miles by nineteen miles and covers about 90,000 acres of property. The Nookachamps area was located upstream from Mt. Vernon, Washington and across the river from Burlington, Washington. This area has historically been subject to flooding. In fact, there are records of numerous severe floods during the 1800s and the Skagit River reached flood stage an average of once every 2.2 years between 1900 and 1991. Beginning in 1863, landowners built dikes to combat the flooding. The legislature passed legislation allowing the creation and organization of public diking districts in 1895. The legislature made these diking districts independent of the government and they have the power of eminent domain, the power to assess taxes, and the power to issue bonds. Sixteen diking districts currently exist and they maintain about fifty-six miles of levees and thirty-nine miles of sea dikes in the delta.

Severe flooding occurred twice in November 1990 and the Halversons and the other property owners in the Nookachamps area (together "Halversons") sued both Skagit County ("County") and the two diking districts they felt were at fault for the flooding. The diking districts were voluntarily dismissed; however, the Halversons pursued the suit against the County. The Halversons alleged that the County acted in concert with the diking districts in the maintenance, improvement, and operation of the diking system, and thus it's actions caused an increase in the amount of flooding on the land. They further allege that this increased flooding constituted an inverse condemnation under the Washington State Constitution. The County also brought a contribution and indemnity claim against the State of Washington ("State").

In the lower court the Halversons argued that the levees flooded their property more severely than it would have been had there been no levees along the river. The County countered that it was not liable for the construction and operation of the levees because the independent diking districts owned them. The County continued stating that if it was