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IN THE SUPREME COURT OF THE STATE OF ALASKA

John C. Beeson and **Xong Chao Beeson,** Appellants, v. **City of Palmer, Alaska,** Appellee.	))))))) Supreme Court No. S-15018))

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APPELLATE COURTS OF THE STATE OF ALASKA

Superior Court No. 3PA-08-01972 CI

On Appeal from the Superior Court,
Third Judicial District at Palmer,
The Honorable Kari Kristiansen, Judge

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION

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INTRODUCTION

Pursuant to this Court's June 13, 2014, Order for Supplemental Briefing and Amicus Briefing, Pacific Legal Foundation (PLF) respectfully submits this brief amicus curiae in support of Appellants John and Xong Chao Beeson.

IDENTITY OF AMICUS

PLF was founded over forty years ago and is widely recognized as the largest and most experienced nonprofit legal foundation of its kind. PLF attorneys litigate matters affecting the public interest at all levels of state and federal courts and represent the views of thousands of supporters nationwide who believe in limited government and private property rights. PLF attorneys have participated as lead counsel or amicus curiae in several cases before the U.S. Supreme Court in defense of the right of individuals to make reasonable use of their property, and the right to obtain just compensation when that right is infringed. *See, e.g.*, *Koontz v. St. Johns River Water Management District*, 133 S. Ct. 2586 (2013); *Arkansas Game & Fish Commission v. United States*, 133 S. Ct. 511 (2012); *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001); *Suitum v. Tahoe Reg'l Planning Agency*, 520 U.S. 725 (1997); *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987). PLF's arguments based on this experience will assist the Court in understanding and deciding the important issues on review in this case.

ISSUES ADDRESSED BY AMICUS CURIAE

1. Under the Alaska and Federal Constitutions, if an existing government-owned road causes private property to flood, can the government's failure to take affirmative action to prevent the flooding be the basis for an inverse condemnation claim?

2. If a government's failure to act may be the basis for an inverse condemnation claim, must the government fail to act with any particular state of mind—negligently, intentionally, or otherwise—for inverse condemnation liability to attach under the Alaska and federal constitutions?

INTRODUCTION AND SUMMARY OF ARGUMENT

This case asks whether the Takings Clauses of the Alaska and U.S. Constitutions may obligate the government to pay just compensation when its failure to take action to prevent a foreseeable risk of flooding causes private property to become inundated, and, during that time, the government uses the land in a manner that destroys valuable property, depriving the landowner of its use.[1] They do.

Appellants John and Xong Chao Beeson own property in the City of

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[1] The Takings Clause of the Fifth Amendment to the U.S. Constitution provides, "nor shall private property be taken for public use, without just compensation." U.S. Const. amend. V. The Alaska Constitution contains a broader conception of compensable takings. According to Article I, Section 18, "[p]rivate property shall not be taken or damaged for public use without just compensation." Article VIII, Section 16 states, "[n]o person shall be involuntarily divested of his right to the use of waters, his interests in lands, or improvements affecting either, except for a superior beneficial use or public purpose and then only with just compensation and by operation of law." This Court has instructed that the Takings Clause is to be liberally interpreted in favor of the property owner. *Alsop v. State,* 586 P.2d 1236, 1239 & n. 7 (Alaska 1978).

Palmer, Alaska. In 2005, the city made improvements to a road fronting the property, but, despite being on notice that the road created an increased risk of flooding, the city did nothing to redirect runoff away from the Beesons' property. Later, the property was flooded due to a combination of factors, including runoff from the street. The Beesons sued the city for inverse condemnation. An Alaska trial court dismissed the claim on two grounds: (1) the government's failure to act could not give rise to a compensable taking as a matter of law and (2), even if the Beesons had raised a viable takings claim, the government act must be the sole cause of the damage to the property.[2]

The trial court went too far when it adopted a *per se* rule that a failure to act, by the government, can never result in a taking. That rule is inconsistent with long-standing precedent of the U.S. Supreme Court, which requires courts to consider each takings claim on its individual merits. *Amicus curiae* PLF urges this Court to reverse the trial court's decision and reaffirm that a physical invasion of private property by the government, that is foreseeable and directly interferes with the landowner's rights, will constitute a taking for which just compensation must be made.

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[2] PLF's amicus brief will address the trial court's first conclusion.

ARGUMENT

I

U.S. SUPREME COURT DISFAVORS *PER SE* DEFENSES TO TAKINGS CLAIMS

There is no basis in takings law for adopting a rule that excludes all property damage caused by a government omission from the protections guaranteed by the Takings Clauses of the Alaska and U.S. Constitutions.[3] In fact, the adoption of a such a rule would conflict with the U.S. Supreme Court's takings jurisprudence, which disfavors categorical defenses:

> [N]o magic formula enables a court to judge, in every case, whether a given government interference with property is a taking. In view of the nearly infinite variety of ways in which government actions or regulations can affect property interests, the Court has recognized few invariable rules in this area.

Arkansas Game & Fish Comm'n v. United States, 133 S. Ct. 511, 518 (2012). The Court's admonition is particularly appropriate with regard to cases arising from government-induced flooding of private property, where it is "incumbent on courts to weigh carefully the relevant factors and circumstances in each case, as instructed by [the Court's] decisions." *Id.* at 521.

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[3] Because the takings provisions in the Alaska Constitution provide broader protection than the Fifth Amendment's Takings Clause (*see Vanek v. State, Bd. of Fisheries*, 193 P.3d 283, 291, n.36 (Alaska 2008)), this amicus brief will focus primarily on cases interpreting the U.S. Constitution. *See* Lawrence V. Albert, *Does the Alaska Constitution Provide Broader Protection for Taking or Damage of Property? An Analysis*, 32 Pub. Land & Resources L. Rev. 27, 92, 100 (2011) (noting that the Alaska Supreme Court "typically follows federal takings precedent in construing Alaska's constitutional article").

The U.S. Supreme Court's hostility toward invariable rules is based to two fundamental principles underlying its takings jurisprudence, which require courts to consider each case on its individual merits. First, the "Takings Clause is 'designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.' " *Id.* at 518 (quoting *Armstrong v. United States*, 364 U.S. 40, 49 (1960)). And second, " '[w]hen the government physically takes possession of an interest in property for some public purpose, it has a categorical duty to compensate the former owner.' " *Arkansas Game & Fish*, 113 S. Ct. at 518 (quoting *Tahoe–Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 535 U.S. 302, 322 (2002)).

Under those principles, the U.S. Supreme Court has long recognized that the government must compensate a landowner to the extent that it actually invades private property, thereby exercising dominion over the landowner's rights and inflicting irreparable harm thereto. *See Pumpelly v. Green Bay & Miss. Canal Co.*, 80 U.S. 166, 177-78 (1871); *see also United States v. Causby*, 328 U.S. 256, 266-68 (1946) ("[I]t is the character of the invasion that determines the question whether it is a taking."). In specific regard to government-induced flooding, the Court has held that "where real estate is actually invaded by superinduced additions of water, earth, sand, or other material, . . . so as to effectively destroy or impair its usefulness, it is a taking."

Pumpelly, 80 U.S. at 181; Jeremy Paul, *The Hidden Structure of Takings Law*, 64 S. Cal. L. Rev 1393, 1464 (1991) (Flooding that infringes on private property is a classic example of a government act that is appropriative in nature.). And, importantly, the government's liability for a physical taking may exist without regard to the reason for the invasion. *See Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 426 (1982) (public purpose irrelevant); *Preseault v. United States*, 100 F.3d 1525, 1537 (Fed. Cir. 1996) (expectations not considered in physical invasion case).

The reason why the U.S. Supreme Court requires that physical invasion cases be determined on their merits is because, once the government invades or occupies private property, the owner's rights in his land are irreparably harmed and the owner must be compensated.[4] *United States v. General Motors Corp.*, 323 U.S. 373, 378 (1945) (Upon a physical invasion, the owner's rights are more limited and circumscribed nature than they were before the intrusion); *see also Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 539 (2005) (A physical invasion will always effect a taking because it eviscerates the owner's right to exclude others from entering upon and using

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[4] When the government causes water to overflow private property in a manner that directly interferes with the landowner's rights to possess, use, exclude others, and/or dispose of his or her property, it appropriates a flowage easement over the land and its actions constitute a taking for which compensation is due. *Pumpelly*, 80 U.S. at 181; *United States v. Virginia Electric & Power Co.*, 365 U.S. 624, 627 (1961).

his or her property, which is "perhaps the most fundamental of all property interests."). An invasion resulting from a government omission that causes substantial harm to the property is no different in kind than an invasion caused by an affirmative act: both have the effect of appropriating an owner's rights in his or her land for a public benefit. And, under the principles discussed above, both circumstances should require payment of just compensation.

II

A PHYSICAL INVASION THAT DEPRIVES A LANDOWNER OF HIS OR HER PROPERTY RIGHTS MAY CONSTITUTE A TAKING REGARDLESS OF WHETHER THE GOVERNMENT ACT CAN BE CHARACTERIZED AS AN OMISSION

A takings claim predicated on a government omission should be treated no differently than other takings claims. Over the years, appellate and trial courts across the nation have devised tests for determining when a government invasion of private property may give rise to a compensable taking. The Federal Circuit Court of Appeals, for example, developed a test for physical takings that is particularly effective for determining whether a government's failure to act gives rise to a taking. The test requires the court to consider the "character of the invasion" and other relevant information to determine (1) whether the government intended to invade a protected property interest ***or*** whether the asserted invasion was the direct, natural, or probable result of government activity (this first prong is disjunctive), and (2) whether the

interference was substantial enough to rise to the level of a taking.[5] *See, e.g.*, *Ridge Line, Inc. v. United States*, 346 F.3d 1346, 1356 (Fed. Cir. 2003) (favorably cited by *Arkansas Game & Fish*, 133 S. Ct. at 522). This test has been consistently applied to a wide range of claims alleging a physical invasion taking, including flooding cases. *See Ridge Line*, 346 F.3d at 1354-55; *Cooper v. United States*, 827 F.2d 762, 763-64 (Fed. Cir. 1987). But, most importantly, courts have applied this and similar tests to determine whether a failure to act by the government will give rise to takings liability. *See, e.g.*, *Fromm v. Vill. of Lake Delton*, 847 N.W.2d 845, 853-54 (Wisc. Ct. App. 2014) (recognizing that some omissions may give rise to takings liability, but holding that "the type of failure to act alleged here" cannot give rise to a taking); *Nicholson v. United States*, 77 Fed. Cl. 605, 617-20 (Fed. Cl. 2007) (failure to act did not give rise to a taking); *Illinois v. United States*, 19 Cl. Ct. 180, 186 (1989) (holding that a government failure to act effected a taking).

A series of decisions illustrate how a case-specific inquiry can distinguish an omission that may give rise to a taking from one that will not. In *Illinois v. United States*, for example, the state and federal government were engaged in protracted litigation regarding the terms of transfer of certain bridges, roadways, and culverts from the federal government to the state. 19

[5] For an exhaustive history of this test, *see Hansen v. United States*, 65 Fed. Cl. 76, 95 (2005).

Cl. Ct. at 182-83. During the litigation, the federal government stopped maintaining bridges, and several of them fell into considerable disrepair. *Id.* at 183. Illinois agreed to make emergency repairs to those bridges without waiving its rights in the pending lawsuit. *Id.* The court ruled that the federal government had an obligation to maintain the bridges in working condition until they were transferred to the state. *Id.* Thereafter, Illinois filed a lawsuit with the Court of Federal Claims, alleging in part that the federal government's refusal to repair the bridges or reimburse the state's emergency expenditures effected a taking. *Id.* The court ruled in favor of Illinois, concluding that the federal government's failure to maintain the bridges effected a taking of the property. *Id.* at 186 ("Failure to respect [the terms of transfer] resulted in a taking since the entity deprived of its land was no longer compensated for its relinquished property.").

In *United Nuclear Corp. v. United States*, the plaintiff leased land on the Navajo Reservation to conduct uranium mining. 912 F.2d 1432, 1433 (Fed. Cir. 1990). Upon discovering "valuable uranium deposits" on the land, plaintiff prepared a mining plan that it submitted to the Secretary of the Interior for the required approval. *Id.* "Although [the plaintiff]'s mining plan satisfied all of the requirements of the Secretary's regulations, the Secretary refused to approve it without tribal approval." *Id.* The Federal Circuit held that the Secretary's refusal to approve, without tribal consent, a fully compliant

mining plan constituted a taking. *Id.* Further, even though the Federal Circuit reversed the Claims Court's merits ruling, *id.* at 1438, it did not take issue with the Claims Court's pronouncement that "[g]overnmental regulatory inaction can also constitute a taking." *See United Nuclear Corp. v. United States*, 17 Cl. Ct. 768, 774 (1989), *rev'd on other grounds*, 912 F.2d at 1432.

Application of a case-specific analysis can also demonstrate circumstances where a government's failure to act will not support a takings claim. In *Mountain States Legal Foundation v. Hodel*, 799 F.2d 1423 (10th Cir. 1986), ranchers brought an action against the Bureau of Land Management (BLM), arguing that the agency's failure to prevent wild horses from trespassing and eating forage on a ranch constituted a taking. The Tenth Circuit rejected the plaintiffs' argument, in part, because wild horses and burros are not "instrumentalities of the government whose presence constitutes a permanent governmental occupation" of the plaintiffs' property. *Id.* at 1428; *see also Alves v. United States*, 133 F.3d 1454, 1458 (Fed. Cir. 1998) (finding no government action relating to cattle trespass where the government had no control over another person's livestock). Notably, the fact that the ranchers' takings claim was predicated on government inaction was not a factor in the court's resolution of the case. *Mountain States Legal Foundation*, 799 F.2d at 1428. Indeed, the Tenth Circuit sitting en banc in a related case concluded that the government could be liable under the Fifth Amendment for its failure

to regulate animals if the animals are under its regulatory control. *Alves*, 133 F.3d at 1457-58.

In *Nicholson*, the plaintiffs alleged that the "Government's failure to adequately design, build, or maintain certain levees in New Orleans before and after Hurricane Katrina[ ] result[ed] in a permanent loss of value to their properties." 77 Fed. Cl. at 605. The United States moved for summary judgment, arguing that a failure to act can never give rise a taking. *Id.* at 613-14. The trial court analyzed the merits of the plaintiffs' allegations under the *Ridge Line* test, concluding that flooding due to Hurricane Katrina was not a foreseeable and direct result of the government's failure to build adequate floodwalls and, therefore, dismissed the takings claim.[6] *Id.* at 617-19; *see also id.* at 622 (Explaining that "[p]laintiffs' case would be stronger if the

[6] The trial court did not end its discussion there. Instead, it proceeded to discuss whether "omissions, oversights, or bad decisions" can ever result in takings as an alternative basis for dismissing the lawsuit. *Id.* at 620-21. The value of its discussion, however, is marred by the court's acknowledgment that it was uncertain whether the property owners had alleged an affirmative act (inadequate or defective design) or a failure to act (failure to construct adequate floodwalls). *Id.* at 620. First, addressing the lawsuit as alleging a defective design, the court concluded that the allegation raised a tort claim, not a taking. *Id.* at 620-21. Next, addressing the lawsuit as alleging an omission, the trial court declined to follow multiple out-of-jurisdiction cases supporting plaintiffs' claims as "non-binding" and "not even on point." *Id.* at 621 (the cases discussed government-induced flooding, not hurricanes). Without any analysis, the court incorrectly stated that the Court of Federal Claims "has consistently required that an affirmative action on the part of the Government form the basis of the alleged taking." *Id.* at 620-21. That observation is refuted by cases cited in this amicus brief.

floodwalls *as designed,* channeled the flood waters toward their property or had a net effect of increasing the level of flooding."); *see also Fromm*, 847 N.W.2d at 853-54 (applying the reasoning of *Nicholson* to "the type of failure to act alleged here"—recognizing that some omissions may give rise to takings liability).

These cases demonstrate that any attempt to draw a *uniform* distinction between acts and omissions—without regard to case-specific facts—will be both impractical and unhelpful. *See* Lisa E. Heinzerling, *Actionable Inaction: Section 1983 Liability for Failure to Act,* 53 U. Chi. L. Rev. 1048, 1057-63 (1986) (criticizing the entire act/omission analysis in the context of governmental responsibilities under the Constitution). Certainly, there will be circumstances where a failure to act will result in unforeseeable and unintended consequences, thereby failing to satisfy *Ridge Line*'s threshold inquiry. But, just as certainly, there will be situations where an omission will directly bring about a foreseeable and/or intended outcome. And in that situation, there is no meaningful distinction between an act and an omission beyond the fact that the former is an active way of achieving a goal and the latter is the passive approach. *See The State Bar of Texas v. Gomez*, 891 S.W.2d 243, 252 (Tex. 1994) ("[T]he difference between acts and omissions in this highly unusual context seems semantic."); *see also* David A. Fischer, *Causation in Fact in Omission Cases*, 1992 Utah L. Rev. 1335, 1339 (1992)

("[A]s a matter of semantics, any omission can be characterized as part of a larger encompassing act.").

Indeed, trying to draw a distinction between "action" and "inaction" is often a meaningless endeavor because "it is possible to restate most actions and corresponding inactions with the same effect." *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2622 (2012) (Ginsburg, J., concur (quoting *Archie v. Racine*, 847 F.2d 1211, 1213 (7th Cir. 1988) (en banc))). Take, for example, a city's refusal to maintain a deteriorating sewer system. If courts were to adopt an invariable rule excluding government omissions from the protections of Takings Clause, the city could ignore the problem and watch as the deteriorating system damaged private property without risking constitutional liability. Such a result would make no sense because the city's deliberative choice not to address the problems with its sewer system could be characterized as an affirmative act, just as its failure to fix the problem could be characterized as inaction. Neither characterization, standing alone, speaks to any of the case-specific factors required by *Ridge Line* and *Arkansas Game & Fish*, and therefore cannot be determinative of whether or not a taking has occurred.

It is not surprising, therefore, that numerous state and federal courts have determined—albeit, without extended analysis—that government inaction

may give rise to a taking in a variety of circumstances.[7] *See Bakke v. State*, 744 P.2d 655, 656 (Alaska 1987) (stating, in passing, that "an act or omission" can cause damage to property in an inverse condemnation case); *see also Knutson v. City of Fargo*, 600 F.3d 992, 996 (8th Cir. 2010) (allegation that a city's "action (or inaction)" damaged private property stated a claim for a taking); *Arreola v. County of Monterey*, 99 Cal. App. 4th 722, 744, 122 Cal. Rptr. 2d 38, 55 (Cal. Ct. App. 2002) (government may be liable for inverse condemnation where it "deliberately chose a course of action—or inaction—in the face of that known risk"); *Urbanizadora Versalles, Inc. v. Rivera Rios*, 701 F.2d 993, 997 (1st Cir. 1983) (freezing of property owner's land for fourteen years, without actually condemning land, amounted to an unconstitutional deprivation of property); *Amen v. City of Dearborn*, 718 F.2d 789, 797 (6th Cir. 1983) (a city's refusal to exercise eminent domain after identifying property for future condemnation can effect a taking).

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[7] Admittedly, there are a handful of cases holding that the government must engage in an "affirmative" act in order to give rise to a compensable taking, but those cases simply state a rule without meaningful analysis. *See, e.g., Nicholson v. United States*, 77 Fed. Cl. 605, 620 (2007); *Last Chance Mining Co. v. United States*, 12 Cl. Ct. 551, 556-57 (1987); *B & G Enter., Ltd. v. United States*, 43 Fed. Cl. 523, 526-27 (1999); *Pendleton v. United States*, 47 Fed. Cl. 480, 485 (2000).

III

THE GOVERNMENT'S INTENT IS IRRELEVANT WHERE A PHYSICAL INVASION IS A FORESEEABLE RESULT OF A GOVERNMENT ACT

There is simply no basis in modern takings law to require a plaintiff to prove that the government acted with an appropriative intent when it physically invaded or occupied private property.[8] *See Hansen v. United States*, 65 Fed. Cl. 76, 81 (2005) (The Takings Clause "contains no state of mind requirement."). Indeed, the first U.S. Supreme Court opinion addressing inverse condemnation focused on the irrelevance of intent to the takings analysis. *See Pumpelly*, 80 U.S. at 177-78. In *Pumpelly*, the government's construction of a dam caused a lake to flood, which almost completely destroyed the plaintiff's property. *Id.* at 177. The government argued that it

[8] Some early takings cases (*e.g.*, *Portsmouth Harbor Land & Hotel Co. v United States*, 260 U.S. 327 (1922)) discuss the government's intent as a basis for finding takings liability. These cases, however, arise from a period of time when the Claims Court lacked the authority to consider direct constitutional claims. *Hansen*, 65 Fed. Cl. at 106 n.41 (citing Act of February 24, 1855, ch. 122, 10 Stat. 612 (1855)). And, as a result, the court considered takings claims as claims for assumpsit based on a breach of implied contract theory. *See id.* at 107 (citing cases). A plaintiff asserting a claim under implied contract theory argued that the Takings Clause constituted a governmental promise to compensate property owners for damage to his or her private property. *See id.* at 107-08. Thus, cases from that period extended the takings inquiry to consider intent as a distinguishing characteristic of compensable takings under an implied contract theory. *See Klebe v. United States*, 263 U.S. 188, 191-92 (1923); *United States v. N. Am. Transp. & Trading Co.*, 253 U.S. 330, 333-34 (1920); *Tempel v. United States*, 248 U.S. 121, 130-31 (1918). For a full discussion of this issue, *see Hansen*, 65 Fed. Cl. at 96, 106-10.

could not be held liable for a taking because the damage was collateral to the government project, and there was no intent to appropriate the plaintiff's property. *Id.* at 167-68. The *Pumpelly* Court rejected this argument, holding that collateral and unintended damage to private property resulting from a government project can result in a taking:

> It would be a very curious and unsatisfactory result, if in construing a provision of constitutional law, always understood to have been adopted for protection and security to the rights of the individual as against the government, . . . it shall be held that if the government refrains from the absolute conversion of real property to uses of the public it can destroy its value entirely, can inflict irreparable and permanent injury to any extent, can, in effect, subject it to total destruction without making any compensation, because, in the narrowest sense of that word, it is not taken for the public use. Such a construction would pervert the constitutional provision into a restriction upon the rights of the citizen, as those rights stood at the common law, instead of the government, and make it an authority for invasion of private rights under the pretext of the public good, which had no warrant in the laws or practices of our ancestors.

Id. at 177-78; *see also Portsmouth Harbor Land & Hotel Co. v. United States*, 260 U.S. 327, 329-30 (1922) (When the government imposes a servitude on private property, compensation should be made, regardless of the fact that it did not intend to appropriate plaintiff's property.).

Indeed, "[t]he fundamental justification for inverse [condemnation] liability is that the government, acting in furtherance of public objectives, is taking a calculated risk that private property may be damaged." *Arreola*, 122 Cal. Rptr. 2d at 55-56 (quoting *Yee v. Sausalito*, 141 Cal. App. 3d 917, 920

(1983)); *see also Harris County Flood Control Dist. v. Adam*, 56 S.W.3d 665, 669 (Tex. App. 2001). The rationale is that if an entity has "made the deliberate calculated decision to proceed with a course of conduct, in spite of known risk, just compensation will be owed." *Arreola*, 122 Cal. Rptr. 2d at 53 (quoting Van Alstyne, *Inverse Condemnation: Unintended Physical Damage*, 20 Hastings L.J. 431, 489-90 (1969)). In fact, the test set out by the Federal Circuit in *Ridge Line* "stands for the proposition that private property need not be intentionally taken . . . in order to give rise to a Fifth Amendment claim." *Nicholson*, 77 Fed. Cl. at 615-16; *see also* Alan Romero, *Takings by Floodwaters*, 76 N.D. L. Rev. 785, 815 (2000) ("When the government causes water to invade private land, the government's inanimate agent physically enters and occupies the land. . . . It makes no difference that . . . the government might not have intended to take the land.").

This discussion is not to suggest that intent plays no role whatsoever in the takings doctrine. As stated above, a taking *can* be shown by demonstrating that the government acted (or failed to act) with an intent to appropriate private property for a public use. *Ridge Line*, 346 F.3d at 1356. But a takings claimant need not prove intent where the damage to property was a direct and foreseeable consequence of the government act or omission. *Id.*

CONCLUSION

Given the diverse circumstances under which a taking can occur, it is impossible to draw an invariable rule stating that a physical invasion can never effect a taking if the government acted in a passive, rather than active, manner. Such a rule would be over broad and would result in meritorious claims being dismissed. Indeed, drawing such a line in this case would put the Beesons in the untenable position of having to suffer flood invasions and significant injuries to their land without any means to recover for the harm inflicted by the City's decisions. This Court should reject the trial court's adoption of an invariable act/omission rule for a physical takings claim.

DATED: August 27, 2014.

Respectfully submitted,

JAMES S. BURLING

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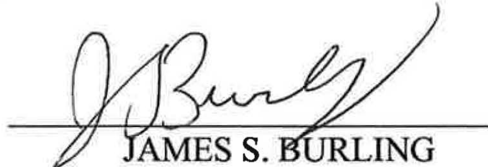
No. 8411102

Attorney for Amicus Curiae
Pacific Legal Foundation

CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing BRIEF AMICUS CURIAE is formatted pursuant to Alaska Appellate Rule 513.5(c) in 13-point Times New Roman typeface.

DATED: August 27, 2014.



JAMES S. BURLING

DECLARATION OF SERVICE BY MAIL

I, Pamela G. Spring, declare as follows:

I am a resident of the State of California, employed in Sacramento, California. I am over the age of 18 years and am not a party to the above-entitled action. My business address is 930 G Street, Sacramento, California, 95814.

On August 27, 2014, true copies of BRIEF AMICUS CURIAE were placed in envelopes addressed to:

Michael R. Gatti
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which envelopes, with postage thereon fully prepaid, were then sealed and deposited in a mailbox regularly maintained by the United States Postal Service in Sacramento, California.

I declare under penalty of perjury that the foregoing is true and correct and that this declaration was executed this 27th day of August, 2014, at Sacramento, California.

Pamela Spring

Pacific Legal Foundation

August 27, 2014

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Mindi Johnson, Deputy Clerk
Supreme Court of the State of Alaska
303 K Street
Anchorage, AK 99501-2084

Re: *Beeson v. City of Palmer*, No. S-15018
Brief Amicus Curiae in Support of Petitioner

Dear Ms. Johnson:

Enclosed for filing, please find one original and six copies of Amicus Curiae Pacific Legal Foundation's *Brief Amicus Curiae in Support of Petitioner*. Please conform the attached face sheet and return it in the prepaid self-addressed, stamped envelope at your convenience.

Should you have any questions, please do not hesitate to contact me. Thank you for your assistance.

Sincerely,

Pamela Spring
Legal Secretary

Enclosure

cc: See Declaration of Service