NOTES

Miotke v. City of Spokane: Nuisance or Inverse Condemnation—Theories for Government Environmental Liability

I. INTRODUCTION

A recent decision by the Washington State Supreme Court, Miotke v. City of Spokane,¹ may broadly affect the right to and type of recovery that will be available to persons whose property rights are infringed either by an agent of the state or by private parties.² Miotke involved the dumping of untreated sewage into a river, with the sewage flowing into a lake and interfering with lakefront property owners' enjoyment of their property. The court in Miotke faced a set of claims in property, tort, and state environmental law. The court recognized the significance of its decision and the novel issues before it,³ yet the opinion left important questions unanswered and raised new ones.⁴

The Miotke court faced several important issues in this admittedly complex case.⁵ First, when should a unit of state government be held liable for certain conduct under a tort theory rather than under an eminent domain theory?⁶ Second, when liability is based upon tort, can a common law tort provide in

2. Although the court's distinction between nuisance and eminent domain is important only in situations where a government entity is the defendant, the court's general application of nuisance law is applicable to private defendants. See infra notes 108-12.
3. Miotke, 101 Wash. 2d at 309, 678 P.2d at 805 ("This case raises a plethora of issues, many of them novel, at least in this jurisdiction.").
4. See infra text accompanying notes 80-86, 117-23 and 124-35.
5. Miotke, 101 Wash. 2d at 311, 678 P.2d at 806.
6. "Concededly the distinction between a constitutional taking and damaging and tortious conduct by the state or one of its subdivisions is not always clear." Olsen v. King County, 71 Wash. 2d 279, 284, 428 P.2d 562, 567 (1967). See also Comment, Distinguishing Eminent Domain From Police Power & Tort, 38 WASH. L. REV. 607, 619-25 (1963). The opinion did not address the defendants' argument that the governments' conduct was a noncompensable exercise of police power. Brief for Appellant City of Spokane at 33-36, Miotke, 101 Wash. 2d 307, 678 P.2d 803 (1984).
essence a private right of action for the violation of certain environmental laws that themselves provide no express right of action? Finally, are injured parties entitled to additional damages based upon a "novel theory" of tort recovery for the violation of one's "fundamental right" to a healthful environment as guaranteed by the State Environmental Policy Act (SEPA)? The Miotke court's resolution, or lack thereof, of each of these issues is likely to have far reaching effects, some of them perhaps unintended.

This Note addresses the Miotke court's choice of a statutory nuisance remedy over a constitutionally-based eminent domain theory. In addition, this Note addresses the court's potentially significant denial of additional SEPA-based damages, but suggests that the court may in the future use this SEPA-based theory to provide tort recovery.

II. BACKGROUND

A. Facts

In 1973, the Washington State Department of Ecology (DOE) ordered the City of Spokane to embark on a plan to modernize its waste treatment plant and complete the project by June 30, 1976. In an attempt to comply with the order, the City planned to increase the waste system's capacity and add secondary sewage treatment to meet state water quality standards. After completing the planning and financing arrangements, the City obtained preliminary regulatory approvals from the DOE and the Environmental Protection Agency (EPA).

7. Miotke, 101 Wash. 2d at 330, 678 P.2d at 816.
8. Id. at 333, 678 P.2d at 817.
10. Miotke, 101 Wash. 2d at 312, 678 P.2d at 807. On March 28, 1973, the DOE gave the City of Spokane until June 30, 1976, to modify its sewage treatment plant to improve the water quality of the Spokane River and Long Lake. The agency had determined that the sewage disposal caused both the lake and river to fail to meet the state regulatory water quality standards as established in WASH. ADMIN. CODE R. 173-201-070(4) and 173-201-080(105) (1983).
11. Seventy-five percent of the funding for the new plant was provided by a grant from the United States Environmental Protection Agency (EPA). Miotke, 101 Wash. 2d at 312-13, 678 P.2d at 807.
12. When participating in a project receiving federal grant funds, a municipality must prepare an Environmental Assessment Statement pursuant to the National Environmental Policy Act of 1969 (NEPA). 42 U.S.C.A. § 4332 (1977). In Washington, the State Environmental Policy Act of 1971 (SEPA) requires that local public bodies take identical environmental review action prior to proceeding on major actions that will sig-
During the period from January to October, 1974, the EPA and the DOE considered the City’s plans and the project’s potential environmental impact. In October of 1974, both the DOE and the EPA gave final approval to the plans and specifications, subject to several conditions. One of these conditions required the City to apply for a new permit if facility expansion required increased discharge. Construction began immediately. In September, 1975, construction reached the anticipated point where further work would interfere with the normal operation of the existing sewage treatment plant. The City sought approval from the DOE to bypass the plant temporarily by discharging


13. The court summarized the environmental assessment process as it pertained to this case as follows:

A draft statement was prepared in June 1973, public hearings were conducted in July 1973, and the final environmental assessment was submitted to the EPA and DOE in September 1973. The final assessment recognized that the treatment plant might have to be bypassed during reconstruction of the headworks of the treatment plant, but declared that such a bypass would occur during maximum high water, when the assimilative capacity of the river is at its peak.

On January 2, 1974, the City of Spokane filed with the EPA and the DOE a declaration that the sewage plant modification was not a ‘major action significantly affecting the quality of the environment.’ The EPA issued its negative declaration on June 10, 1974.

The next step was the granting of a Waste Discharge Permit. The Federal Water Pollution Control Act Amendments of 1972 (Pub. L. No. 92-500, 2, 86 Stat. 880 (1972)), 33 U.S.C. 1342 (1976 & Supp. 4, 1981) created the National Pollutant Discharge Elimination System (NPDES) waste discharge permit program. Under this program, the EPA has authority to issue permits allowing the discharge of pollutants into federal waters. In 1973, the EPA delegated authority to the DOE to administer the NPDES program in this state. Regulations pertaining to the administration of this permit program were adopted by the DOE in September 1973, and are contained in WAC 173-220.

In November 1973, the City of Spokane submitted an application to discharge pollutants into the waters of the United States. RCW 90.48.162. After public notice and a hearing, the permit was granted on October 25, 1974. NPDES Waste Discharge Permit WA-002447-3. Miotke, 101 Wash. 2d at 313-14, 678 P.2d at 807.

14. The general discharge permit contained several requirements, including that (1) the average effluent discharge not exceed 35 million gallons per day; (2) maintenance records be kept on any total or partial bypass; (3) a new National Pollutant Discharge Elimination System (NPDES) permit be issued whenever a facility expansion required increased discharge. Miotke, 101 Wash. 2d at 313-14, 678 P.2d at 807.

In September 1974, the City submitted a complete set of plans for the facility expansion. In January of 1975, both the DOE and the EPA approved the plans and specifications in their entirety. The City did not apply for a new permit, and the DOE did not issue one. Id. at 314, 678 P.2d at 807.
raw sewage directly into the Spokane River.\textsuperscript{15} The DOE reviewed and rejected the City's other available options\textsuperscript{16} and conditionally authorized the bypass. The DOE proceeded under the mistaken belief that it had the regulatory authority to authorize the bypass without following the procedural requirement for issuing a new waste discharge permit. The DOE apparently determined that it could avoid requiring a new permit by simply lowering the water quality standards in the waters receiving the discharges.\textsuperscript{17}

During the three and one-half days of the bypass, the City diverted over 100 million gallons of untreated sewage into the river.\textsuperscript{18} The sewage flowed down river until reaching the first dam and the artificial lake behind it, Long Lake. Property owners along the lake began litigation immediately.\textsuperscript{19} The trial court found that the bypass resulted in the denial of the plaintiffs' use and enjoyment of the lakefront property from October 5, 1975,

\textsuperscript{15} Id. at 313-14, 678 P.2d at 807-08. The final environmental assessment submitted to the EPA and DOE in September, 1973, recognized that the bypass might be necessary during reconstruction of the plant, but the plan contemplated that any bypass would take place during a maximum high water period when it would have a lesser effect on water quality.

\textsuperscript{16} Id. at 314-15, 678 P.2d at 808. On September 25, 1975, the DOE met with the City and their consultants, Bovey Engineers, to discuss the alternatives. They were: (1) storage of raw sewage until work was completed, (2) screening and chlorination of the sewage prior to discharge, (3) performance of the work while the plant was under operation, and (4) delay of the work until a higher river flow period in the spring. City officials held a press conference where they explained the nature of the diversion and its impact. Id. at 315, 678 P.2d at 808.

\textsuperscript{17} The DOE issued order DE 75-184 pursuant to WASH. Admin. Code R. 173-201, (1983) which temporarily lowered the water quality standards. One of the major issues in the case was whether the DOE order alone was sufficient to allow the city to engage in the bypass. Miotke, 101 Wash. 2d at 327, 678 P.2d at 808.

\textsuperscript{18} Miotke, 101 Wash. 2d at 315, 678 P.2d at 808. (The figure is based upon DOE estimates.).

\textsuperscript{19} The plaintiffs, who were lakefront property owners, filed two lawsuits only days after the bypass. They filed the first suit in Stevens County seeking a permanent injunction against both defendants and a declaratory judgment challenging the legality of the bypass. Miotke, 101 Wash. 2d at 315-16, 678 P.2d at 808-09. The second action was filed in Spokane County, in which the plaintiffs sought (1) an injunction against further bypasses; (2) a declaration that the October bypass was tortious for failure to file an Environmental Impact Statement, failure to obtain a new waste disposal permit, and failure to comply with the general waste disposal permit; (3) damages, under theories of negligence, nuisance, inverse condemnation, strict liability, and statutory theories; and (4) costs and attorney fees. Under stipulation, the Stevens County action was removed and joined with the Spokane County suit. The common law causes of action were dropped, but later claims for trespass, private nuisance, and strict liability were added back from the Stevens County action. Id.
through part of 1977 and to some extent into 1978.\textsuperscript{20} In addition to requesting injunctive relief,\textsuperscript{21} the plaintiffs sought damages under several theories.\textsuperscript{22} In an attempt to limit their potential liability the City and State contended that damages were available only under an inverse condemnation theory.\textsuperscript{23}

The trial court granted most of the plaintiffs' claims for damages.\textsuperscript{24} In reaching its decision, the court concluded that the defendants violated five environmental statutes: the State Environmental Policy Act of 1971 (SEPA),\textsuperscript{25} the Water Pollution Control Act (WPCA),\textsuperscript{26} the Pollution Disclosure Act of 1971 (PDA),\textsuperscript{27} the Water Resources Act of 1971 (WRA),\textsuperscript{28} and the

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\item \textsuperscript{20} The Washington Supreme Court quoted the trial court, finding that: “The [e]ffluents discharged during the October 1975 Bypass contained, \textit{inter alia}, human excreta, wastes, and offal, filth and decomposing matter, floating solids like fecal matter, toilet paper particles and prophylactics, etc., all of which was visible to the eye as slimy slicks, discoloration, plumes and aggregations of pollution which was offensive and repulsive to the senses of ordinary persons of normal sensitivity, and all of which produced rancid, noxious, as well as repulsive odors and stenches offensive to the sense of smell of ordinary persons of normal sensitivity, and which resulted in polluted and contaminated unhealthy waters . . . .”
\item \textsuperscript{21} Id. at 317, 678 P.2d at 809.
\item \textsuperscript{22} Id. On January 31, 1977, the trial court issued an injunction barring future bypasses of untreated sewage into the Spokane River. \textit{Id.}
\item \textsuperscript{23} Id. The defendants apparently assumed that eminent domain would limit recovery to the diminished value of the property. \textit{Contra} Highline School Dist. No. 401 v. Port of Seattle, 87 Wash. 2d 6, 13 n.5, 548 P.2d 1085, 1090 n.5 (1976) (suggesting that recovery under eminent domain theory should provide full and fair compensation for loss of property rights and should not be limited to a restrictive market value analysis).
\item \textsuperscript{24} Id. The court granted damages for the denial of use and enjoyment of the defendants' properties and lifestyle and for negligent infliction of emotional distress but denied plaintiffs' claims for damages and out-of-pocket expenses based upon the SEPA preamble. \textit{Miotke}, 101 Wash.2d at 320, 678 P.2d at 811.
\item \textsuperscript{25} \textit{WASH. Rev. Code} ch. 43.21 (1985). The trial court ruled that the DOE and the City violated SEPA in several ways, including insufficient environmental assessments in June and August of 1973 and a failure to conduct a full environmental review before approving the bypass in October of 1975. \textit{Brief for Appellant City of Spokane at A-6, Miotke}, 101 Wash. 2d 307, 678 P.2d 803 (1984).
\item \textsuperscript{26} \textit{WASH. Rev. Code} ch. 90.48 (1985).
\item \textsuperscript{27} \textit{WASH. Rev. Code} ch. 90.52 (1985).
\item \textsuperscript{28} \textit{WASH. Rev. Code} ch. 90.54 (1985).
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Shoreline Management Act of 1971 (SMA). Although the specific computational basis for the award is unclear, the court granted a total of $245,000 in damages. In addition to the damages award, the trial court awarded attorney’s fees.

B. Issues and Holding

On appeal, the Washington State Supreme Court addressed several issues, explicitly and implicitly. The court identified the most important issues as “whether any cause of action lies against governmental units for injuries allegedly caused by their actions taken in violation of various environmental laws,” and if so, under what theory such action should lie. The court determined that governmental units are liable for damage caused by their violation of environmental laws, and that this liability arose under Washington’s nuisance statute rather than under an inverse condemnation theory.

In deciding that the plaintiffs’ cause of action arose from nuisance rather than eminent domain law, the court applied

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29. Wash. Rev. Code ch. 90.58 (1985). The trial court found that the City violated the act by “(1) failing to control pollution and prevent damages to the natural environment and (2) failing to minimize insofar as practical any resultant damage to the ecology and environment of the shorelines of the state of Washington and interference with the peoples’ use of the waters.” Brief for Appellant City of Spokane at A-6, Miotke, 101 Wash. 2d 307, 678 P.2d 803 (1984).

30. In determining the damage award, the trial court took notice of the project’s ultimate benefit to the plaintiffs, but did not indicate how much this fact reduced the award of damages. Miotke, 101 Wash. 2d at 320, 678 P.2d at 811.

31. The trial court granted attorney fees based on equitable grounds in connection with the injunction phase of the litigation. It was the trial court’s opinion that the injunction performed a substantial public benefit. Id. For a review of the equitable grounds upon which an award of attorney fees may be made, see PUD v. Kottisch, 86 Wash. 2d 388, 545 P.2d 1 (1976).

32. Miotke, 101 Wash. 2d at 309, 678 P.2d at 805.

33. Id.

34. Id. at 331, 678 P.2d at 816-17.

35. Id.; The terms eminent domain and inverse condemnation are interchangeable because they refer to the same legal theory. They are, in essence, different sides of the same coin. It has been said, Eminent domain is defined generally as the power of the nation or state, or authorized public agency, to take or to authorize the taking of private property for a public use without the owner’s consent, conditioned upon the payment of just compensation. . . . Inverse condemnation has been characterized as an action or eminent domain proceeding initiated by the property owner rather than the condemnor, and has been deemed to be available where private property has been actually taken [or damaged] for public use without formal condemnation proceedings. . . .

Krambeck v. City of Gretna, 198 Neb. 608, 612, 254 N.W.2d 691, 694 (1977)).
what can be called a "permanence of the interference" test.\textsuperscript{36} Under the test, if the damage is permanent or long term, then the interference constitutes inverse condemnation, but if the injury is only temporary, the interference is tortious.\textsuperscript{37} Applying this test to the Miotke facts, the court had no alternative but to find that the interference was temporary and that nuisance law controlled because the sewage had dissipated long before the case reached the court.\textsuperscript{38}

In analyzing the case under the nuisance statutes, however, the court may have modified its traditional analysis. The court apparently read the statutes\textsuperscript{39} to permit recovery when a plaintiff shows only that (1) the defendant "unlawfully [did] any act,"\textsuperscript{40} and (2) that act "essentially interfer[ed] with the comfortable enjoyment of the life and property" of the plaintiffs.\textsuperscript{41} This test appears to ignore a traditional consideration of nuisance analysis: the reasonableness of the interference.\textsuperscript{42}

The court easily found the City and State liable under the

\textsuperscript{36} Id. at 334, 678 P.2d at 818. See also Wilson v. Key Tronic Corp., 40 Wash. App. 802, 816, 701 P.2d 518, 527 (1985) (suggesting that planned action was necessary in addition to permanent interference).

\textsuperscript{37} Miotke, 101 Wash. 2d at 334, 678 P.2d at 818.

\textsuperscript{38} Id. at 319, 678 P.2d at 810.

\textsuperscript{39} The court, in finding a nuisance, read two of Washington's nuisance statutes together. Wash. Rev. Code § 7.48.120 (1985) provides:

Nuisance consists of unlawfully doing an act, or omitting to perform a duty, which act or omission either annoys, injures or endangers the comfort, repose, health or safety of others, offends decency, or unlawfully interferes with, obstructs or tends to obstruct, or render dangerous for passage, any lake or navigable river, bay, stream, canal or basin or any public park, square, street or highway; or in any way renders other persons insecure in life, or in the use of property.

(emphasis added). Wash. Rev. Code § 7.48.010 (1985) provides:

The obstruction of any highway or the closing of the channel of any stream used for boating or rafting logs, lumber or timber, or whatever is injurious to health or indecent or offensive to the senses, or an obstruction to the free use of property, so as to essentially interfere with the comfortable enjoyment of the life and property, is a nuisance and the subject of an action for damages and other and further relief.

\textsuperscript{40} Wash. Rev. Code § 7.48.120 (1985).


\textsuperscript{42} Miotke, 101 Wash. 2d at 319, 678 P.2d at 810. Although in its recital of the trial court findings the court acknowledged that the trial court found unreasonable interference, nowhere in the discussion of nuisance liability did the Miotke court consider the reasonableness of the interference. Certainly, the defendants could validly argue that the public interest reasons for adding secondary treatment under the adopted schedule outweighed the potential short-term injury to the plaintiffs, especially since the plaintiffs, as property owners on or near the river, would be particularly benefited in the long-run by the cleaner river water.
posed nuisance test. First, the "unlawful act" requirement was satisfied by the defendants' violation of the waste discharge permit. Second, the "interference with property" portion of the test was satisfied by the interruption in the plaintiffs' full use and enjoyment of their lakefront properties and lifestyle.

After finding that the plaintiffs had satisfied their burden of proving these two nuisance requirements, the court faced two other statutory hurdles. First, the court had to determine whether the nuisance was public or private. The court held that the nuisance was public in nature, but a remedy nonetheless was available because the plaintiffs were especially injured. Second, the court had to address the statutory defense that nothing done or maintained under the express authority of a statute can be deemed a nuisance. The defendants' actions, the court held, were not protected by this provision because the dumping was a wrongful act in violation of a statute.

In the past, the court has liberally construed the statutory nuisance defense to the benefit of government entities who act under broad statutory authority as in Miotke. But the court

43. See supra note 40.
44. Miotke, 101 Wash. 2d at 329, 678 P.2d at 815.
45. Id. at 331, 678 P.2d at 817.
46. Id. A public nuisance is "one which affects equally the right of an entire community or neighborhood, although the extent of the damage may be unequal." WASH. REV. CODE § 7.48.130 (1985).
47. Miotke, 101 Wash. 2d at 331, 678 P.2d at 817.
48. Id. WASH. REV. CODE § 7.48.160 (1985) provides: "Nothing which is done or maintained under express authority of a statute can be deemed a nuisance." WASH. REV. CODE § 7.48.210 (1985), (a private person may maintain a civil action for a public nuisance if it is specially injurious to himself but not otherwise and ownership of the property interfered with is sufficient to meet the special injury requirement). See Park v. Stolzheise, 24 Wash. 2d 781, 167 P.2d 412 (1946) (holding that a diminution in property value caused by a zoning violation is sufficient to constitute special injury); Anderson v. Nichols, 152 Wash. 315, 278 P. 161 (1929) (where city permitted abutting landowner to erect building on street for private gain, the surrounding abutting owners suffered added inconvenience by being denied free access to their property, and sustained special injury); Ingersoll v. Rousseau, 35 Wash. 92, 76 P. 513 (1904) (finding a special injury where neighbor was compelled to witness indecent conduct of the residents of a house of prostitution and to listen to the loud, boisterous, and indecent noises made by them).
49. Miotke, 101 Wash. 2d at 331, 678 P.2d at 817.
50. The court reasoned that the dumping could not have been "under the express authorization of a statute" if it in fact was in violation of both WASH. REV. CODE ch. 90.48 (1985) and the nuisance statute itself, WASH. REV. CODE § 7.48.120 (1985). Miotke, 101 Wash. 2d at 331, 678 P.2d at 817.
51. The City had statutory authority to construct and operate a municipal sewage collection and treatment system. WASH. REV. CODE § 35.67.020 (1985). For examples of the liberal application of the statutory nuisance defense, see Deaconess Hospital v.
reasoned that this statute could not shelter the defendants’ conduct in *Miotke* because there was a blatant violation of law. After this issue was resolved in the plaintiffs’ favor, their burden under the nuisance statute was met.

In addition to analyzing the case under inverse condemnation and nuisance theory, the court examined the plaintiffs’ claim for additional damages premised upon a SEPA-based tort theory. The court denied the claim, at least in part because adequate damages were available under “established theories.”

III. *Nuisance or Inverse Condemnation?*

A. Background

The Washington courts have long struggled to distinguish cases of inverse condemnation from those of tortious conduct but have never adequately resolved the conflict. The test that courts have previously used but that was ignored in *Miotke* distinguished inverse condemnation from nuisance based on whether the injury was necessary to the operation or maintenance of some property devoted to public use. If the infringe-

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Washington State Highway Comm'n, 66 Wash. 2d 378, 408, 403 P.2d 54, 72 (1965) (construction of a highway under general statutory authority to engage in such activities prevented a proposed highway from being held a nuisance); Carlson v. City of Wenatchee, 56 Wash. 2d 932, 935-36, 350 P.2d 457, 460 (1960) (general statutory authority of a municipality to place and maintain traffic devices prevented a finding that a particular traffic control box constituted a nuisance); Judd v. Bernhard, 49 Wash. 2d 619, 621, 304 P.2d 1046, 1048 (1956) (express legislative authorization to a game director to engage in fish kills prevented that activity from being termed a nuisance); Mola v. Metropolitan Park Dist., 181 Wash. 177, 181, 42 P.2d 435, 437 (1935) (the general statutory authority of a park district to obtain and hold property was sufficient to prevent a finding that a park bathing pool was a nuisance); Aubol v. City of Tacoma, 167 Wash. 442, 455, 9 P.2d 780, 781 (1932) (plaintiffs owning property in the shadow of a legislatively authorized dam could not recover for nuisance); Jacobs v. City of Seattle, 93 Wash. 171, 178, 160 P. 299, 302 (1916) (general statutory authority to operate a garbage disposal plant barred suit in tort but not under a theory of inverse condemnation); see generally Note, *Nuisance and Legislative Authorization*, 52 COLUM. L. REV. 781 (1952).

52. *Miotke*, 101 Wash. 2d at 331, 678 P.2d at 817.
53. Id. at 333, 678 P.2d at 817.
54. See supra note 6.
55. See infra text accompanying notes 70-71.
56. See Comment, supra note 6 at 623-24 (1963); Comment, *Inverse Condemnation in Washington State: A Survey of Judicial History Defining Public Rights in Property*, 16 GONZ. L. REV., 385, 409-13 (1981); see also Peterson v. King County, 41 Wash. 2d 907, 915 252 P.2d 797, 801 (1953) (A landowner's property was damaged when the county failed to properly maintain a bulkhead that was installed adjacent to a county road. The court held that eminent domain principles did not apply because the bulkhead was intended to protect property owners and not for the maintenance and operation of the
ment was necessary, inverse condemnation principles applied; if not, the conduct was tortious.

For example, in Boitano v. Snohomish County,\textsuperscript{57} the county had diverted water over a property owner’s land after a spring was discovered during excavation of a public gravel pit. The court found that the diversion was necessary to the operation and maintenance of the gravel pit, so eminent domain principles applied.\textsuperscript{58} In contrast, in Peterson v. King County,\textsuperscript{59} a landowner’s property was damaged when the county failed to properly maintain a bulkhead that was installed adjacent to a county road. The court held that nuisance principles applied because the bulkhead was intended to protect property owners and not to maintain and operate the public road.\textsuperscript{60} The court’s characterization of the purpose of the activity as benefiting either the municipality or the property owner thus determined the resolution of the issue of whether the conduct was “necessary.”\textsuperscript{61}

Several cases with facts nearly identical to those in Miotke have been analyzed under the prior test and held to constitute inverse condemnation takings. In Snavely v. Goldendale,\textsuperscript{62} the owners of dairy land downstream from a municipal sewage outfall sued a municipality for the pollution of a stream. The discharge of raw sewage polluted the water, “rendering it unfit for domestic use and deleterious to health.”\textsuperscript{63} The court concluded that “[w]hile polluting a stream is generally held to be tortious, . . . it may assume the character of a taking or damaging of property in contemplation of the constitutional generosity when a municipal corporation does it on such a scale as to create a public nuisance.”\textsuperscript{64} These types of cases, the Snavely court

\textsuperscript{57} 11 Wash. 2d 664, 120 P.2d 490 (1941).
\textsuperscript{58} Id. at 668, 120 P.2d at 493.
\textsuperscript{59} 41 Wash. 2d 907, 252 P.2d 797 (1953).
\textsuperscript{60} Id. at 915, 252 P.2d at 801.
\textsuperscript{61} See supra note 56 and accompanying text; see also Olson v. King County, 71 Wash. 2d 279, 284-85, 428 P.2d 562, 567 (1967).
\textsuperscript{62} 10 Wash. 2d 453, 117 P.2d 221 (1941).
\textsuperscript{63} Id. at 454-55, 117 P.2d at 222.
\textsuperscript{64} Id. at 455-56, 117 P.2d at 222 (citations omitted).
held, constitute inverse condemnation because the damage is "necessary" to the maintenance of the disposal plants. 66

Similarly, in Walla Walla v. Conkley 66, the court of appeals explicitly reaffirmed a land owner's right to assert a constitutional taking or damaging for the disposal of sewage that causes pollution of a stream. 67 In Conkley, property owners sued the City of Walla Walla for damages resulting from the discharge of pollutants into a stream traversing the plaintiff's property. The court found that the pollution prevented all social activity on the land for a portion of each year and made irrigation sprinklers unusable. 68 The court specifically upheld inverse condemnation as the appropriate theory for recovery, even though the interference was likely to be temporary. 69

Rather than rely upon the prior test, the court in Miotke employed a "permanence of the interference" test. 70 The court rejected the defendants' contention that the Conkley analysis controlled, suggesting that Conkley and similar cases represented situations where the interference was permanent or long term, rather than temporary. 71 The court quoted Northern Pacific Railway v. Sunnyside Valley Irrigation District 72 as a statement of the applicable rule:

Plaintiff cites many cases holding that an invasion of private lands constitutes an unconstitutional taking. These cases, however, almost uniformly involve permanent or recurring damage inherent in some plan of work. The major decisions of this court considering the difficult distinction between a constitutional taking . . . and a mere tortious interference, are in agreement that a constitutional taking is a permanent (or recurring) invasion of private property. 73

Thus, because the results of the bypass were temporary, there

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65. Id. at 456-57, 117 P.2d at 222-23.
66. 6 Wash. App. 6, 492 P.2d 589 (1971).
67. Id. at 11, 492 P.2d at 592. See text accompanying note 64.
68. Id. at 10, 492 P.2d at 592.
69. Id. at 14-15, 492 P.2d at 594.
70. See supra text accompanying notes 36-37; see also Wilson v. Key Tronic Corp., 40 Wash. App. 802, 816, 701 P.2d 518, 527 (1985) (court cited Miotke for this test but also suggested that the element of planned action was necessary).
71. Miotke, 101 Wash. 2d at 333-34, 678 P.2d at 818.
72. 85 Wash. 2d 920, 540 P.2d 1387 (1975).
73. Miotke, 101 Wash. 2d at 334, 678 P.2d at 818 (quoting Northern Pacific Railway v. Sunnyside Vly. Irrig. Dist., 85 Wash. 2d 920, 924, 540 P.2d 1387, 1390 (1975)).
was no constitutional taking.\textsuperscript{74}

This "permanence of the interference" test originated in \textit{Northern Pacific Railway}, in which the court cited several "major decisions"\textsuperscript{75} as authority for the test.\textsuperscript{76} The cases cited in \textit{Northern Pacific Railway}, however, do not directly support the test,\textsuperscript{77} and a careful review of the issues and holdings in the cases suggests an ulterior motive.\textsuperscript{78} Certainly the \textit{Northern Pacific Railway} decision was a break from prior law that looked to the public necessity of the injurious act,\textsuperscript{79} and the \textit{Miotke} court should have dismissed \textit{Northern Pacific Railway} as an anomaly.

The current test is problematic for several reasons. First, the court's determination of whether the interference is temporary or permanent is imprecise and thus subject to substantial

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\textsuperscript{74} \textit{Miotke}, 101 Wash. 2d at 334, 678 P.2d at 818.
\textsuperscript{75} 85 Wash. 2d at 924, 540 P.2d at 1390 (citing Wong Kee Jun v. Seattle, 143 Wash. 479, 255 P. 645 (1927); Boitano v. Snohomish County, 11 Wash. 2d 664, 120 P.2d 490 (1941); Olson v. King County, 71 Wash. 2d 279, 428 P.2d 562 (1967)).
\textsuperscript{76} \textit{See supra} text accompanying notes 35-37.
\textsuperscript{77} Each of the cases cited cannot be relied upon as establishing the "permanence of the interference" test. In Wong Kee Jun v. Seattle, 143 Wash. 479, 255 P. 645 (1927), the court applied tort law instead of inverse condemnation, where a property owner suffered slide damage to land caused by the city's removal of lateral support. The court did not adopt a "permanence" test but instead looked at the relationship between the purpose of the conduct and the injury. "[The] constitution was never intended to apply to consequential or resultant damages not anticipated in, nor a part of, the plan of a public work." Id. at 490, 141 P. at 649 (quoting Jorguson v. Seattle, 80 Wash. 126, 141 P. 334 (1914)). The Wong Kee Jun decision appeared to rely on the lack of a plan that included the interference, rather than the permanence of the injury.

In Boitano v. Snohomish County, 11 Wash. 2d 664, 120 P.2d 490 (1941), the court found a constitutional taking where the county caused water to flow onto the plaintiff's land when the interference was necessary to the operation and maintenance of public property. Id. at 668, 120 P.2d at 492. The court did not rely upon a permanence of the interference analysis.

In Olson v. King County, 71 Wash. 2d 279, 428 P.2d 562 (1967), the court denied a taking claim when debris was cast upon an owner's land because of the County's negligence in maintaining a road culvert. In denying the claim of a constitutional taking, the court relied on a finding that the invasion neither was contemplated by the plan nor was necessary to the building or maintenance of the road. The court did not rely on the permanence of the invasion. Id. at 285, 428 P.2d at 567.

\textsuperscript{78} A vigorous dissent by Justice Rosellini disputed the "permanence" test and questioned the majority's underlying reason for the holding. He stated: "[I]n attaching so much importance to the niceties of theory, I fear the court has not paid sufficient attention to the question of justice between the parties. Observing the fastidious mood of the majority, I suspect some flaw would have been found in the plaintiff's case regardless of the doctrine upon which it relied." Northern Pac. Ry. v. Sunnyside Irrig. Dist., 85 Wash. 2d at 925, 540 P.2d at 1391. (Rosellini, J., dissenting).
\textsuperscript{79} \textit{See supra} text accompanying note 56.
\end{flushleft}
judicial manipulation. The supreme court has never adequately defined the term "permanent", 80 a judge's freedom to characterize an injury as either temporary or permanent could allow the judge to dictate the result of the suit. For example, in instances such as Miotke, landowners do not want their claim to be brought within the "taking" clause because under current "taking" damages theory, recovery will be allowed only for the decline in the market value of their property. 81 This limitation would, in effect, bar recovery for substantial interference with the use and enjoyment of land when the market value of the property did not decline. 82 In these situations, courts would be inclined to characterize the interference as temporary in order to permit the expanded damages available under a nuisance claim. 83

The Miotke case almost provided another example of a court that would be tempted to characterize the interference as "permanent" or "recurring." Washington law requires that a claim for damages arising from tortious conduct by the state or a subdivision be made to an administrative body before suit com-

80. The court has not addressed the question of what period of time must elapse before an unrestored condition is considered permanent, although the court has said that damages are permanent if the property cannot be restored to its original condition. Northern Pac. Ry., 85 Wash. 2d at 924, 540 P.2d at 1390 (citing Collella v. King County, 72 Wash. 2d 386, 433 P.2d 154 (1967)).

81. Normally, damages for inverse condemnation or eminent domain are limited to payment for the loss in market value or rental value of the property in question. Martin v. Port of Seattle, 64 Wash. 2d 309, 318-19, 391 P.2d 540, 547 (1964), cert. denied, 379 U.S. 989 (1965) (landowner claiming compensation for injuries caused by aircraft flights into a municipal airport). But see Highline School Dist. No. 401 v. Port of Seattle, 87 Wash. 2d 6, 13 n.5, 548 P.2d 1085, 1090 n.5 (1976) (suggesting that recovery under eminent domain theory should provide full and fair compensation for loss of property rights and should not be limited to a restrictive market value analysis).

82. This is exactly the situation that existed in Miotke. The Miotke majority, in fact, stated that this limitation was the only reason for the defendants' argument that eminent domain principles should apply.

[T]hese rules, the defendant city argues, limit damages to the extent to which the market value of plaintiffs' property was impaired by the acts of the defendants. (This argument is advanced apparently because the record contains undisputed testimony that property values on Long Lake have been consistently increasing since 1973. Damages under a market value theory would therefore be nominal at best.).

Miotke, 101 Wash. 2d at 333, 678 P.2d at 818.

mences. Failure to file this claim could lead to the dismissal of the case unless, as in Miotke, the court were to find that this defense had been waived. A sympathetic court could avoid this obstacle to recovery by characterizing the interference as "permanent" or "recurring" because constitutional claims of "takings" have no administrative filing requirements.

B. An Alternative Approach

Rather than follow the permanence of the interference approach, the Washington Supreme Court could return to a modified version of the prior analysis: whether the act was necessary for a public use. The prior test was more logical because determination that a "taking" or "damaging" has occurred should depend upon the nature of the entity's action and not upon the type or longevity of the injury inflicted. Nonpermanent takings or damages should be held compensable under the state constitution. Washington courts previously have found temporary constitutional takings or damagings, and this approach has been recognized by other states under their constitutions. In addition, the United States Supreme Court has intimated that nonpermanent takings are compensable under the taking clause of the federal constitution in the regulatory setting.

84. WASH. REV. CODE § 4.92.110 (1985) provides: "No action shall be commenced against the state for damages arising out of tortious conduct until a claim has first been presented to and filed with the director of financial management . . . ." WASH. REV. CODE § 4.96.010 (1985) provides a similar requirement for claims against a political subdivision of the state.

85. Miotke, 101 Wash. 2d at 333, 678 P.2d at 817.

86. Constitutional takings under WASH. CONST. art. I, § 16, amend. IX are not tortious acts and are thus not subject to filing requirements. See supra note 84; Olson v. King County, 71 Wash. 2d 279, 284, 428 P.2d 562, 567 (1967) (court recognized that a failure by a plaintiff to timely file a claim might influence a court to find a constitutional taking where it might otherwise apply tort law).

87. See supra text accompanying note 56.

88. WASH. CONST. art. I, § 16, amend. IX reads in part: "No private property shall be taken or damaged for public or private use without just compensation having been first made . . . ." (emphasis added).


91. San Diego Gas & Electric Co. v. San Diego, 450 U.S. 621 (1981) (Brennan, J., dissenting). The City of San Diego rezoned part of a piece of property, changing it from industrial to agriculture, and designated it open space. The property owner sued, claiming a constitutional taking. The majority by a 5 to 4 vote did not reach the merits of the case because it held that no final judgment had been rendered by the state court. Justice
The frequently cited dissent of Justice Brennan in *San Diego Gas and Electric Co. v. San Diego* speaks to the issue of temporary regulatory takings and appears to express the opinion of the Court that temporary takings are compensable takings within the Just Compensation Clause of the fifth amendment of the United States Constitution.

The fact that a "taking" may be temporary, by virtue of the government's power to rescind or omit the regulation, does not make it any less of a constitutional "taking". Nothing in the Just Compensation Clause suggests that "takings" must be permanent and irrevocable. Nor does the temporary reversible quality of a . . . regulatory "taking" render compensation for the time of "taking" any less obligatory. This Court more than once has recognized that temporary reversible "takings" should be analyzed according to the same constitutional framework applied to permanent irreversible "takings." 

According to the *San Diego* dissent, any government action that "destroy[s] the use and enjoyment of property in order to promote the public good" is a "taking" within the meaning of the fifth amendment. Justice Brennan said:

> It is only logical, then, that government action other than acquisition of title, occupancy, or physical invasion can be a "taking," and therefore a defacto exercise of the power of eminent domain, where the effects completely deprive the owner of all or most of his interest in the property.

Property rights are divisible and the taking of one of those rights—temporarily or permanently—by a sovereign body should entitle the property owner to a constitutionally-based recovery. The Washington Supreme Court previously has stated that "property in a thing consists not merely in its owner-
ship and possession, but in the unrestricted right of use, enjoyment and disposal. Anything which destroys any of these elements of the property, to that extent destroys the property itself. 97 Washington's constitutional provision was intended to protect all essential elements of ownership that make property valuable, 98 and use of property is one such element.

In conjunction with adopting the concept of temporary takings, the Washington court would have to expand the currently recognized limit on damages. 99 An expanded "taking" theory, as suggested here, would require that compensation be awarded for the loss of use and enjoyment of the property, regardless of the effect on market value. 100 Recovery thus would be provided for actual damages sustained and for the loss of use estimated by the imputed rental value over the period of the interference. 101

97. In re Seattle, 81 Wash. 2d 652, 656, 504 P.2d 292, 294, (1972) (emphasis deleted) (citing Span v. Dallas, 111 Tex. 350, 355, 235 S.W. 513, 514-15 (1921). In In re Seattle the court held that a property owner is entitled to interest on a court-determined compensation award in lieu of damages for interference by the condemnor with the unrestricted right of use of a condemnee's property. See also Comment, supra note 56, at 385-87.

98. Great Northern Ry. Co. v. State, 102 Wash. 348, 351, 173 P. 40, 42 (1918)
Among these elements is fundamentally the right of use ... A physical interference with the land which substantially obstructs this right, takes the plaintiff's property to just so great an extent as it is thereby deprived of its right. To deprive one of the use of his property is to deprive him of his property; and the private injury is thereby as completely effected as if the property itself were physically taken. Accordingly, it has been held that any use of land for a public purpose, which inflicts an injury upon adjacent land such as would have been actionable if caused by a private owner, is a taking or damaging within the meaning of the constitution.
Id. at 351-52, 173 P. at 42. See also Lange v. State, 86 Wash. 2d 585, 590, 547 P.2d 282, 285 (1976) (stating that the constitution was intended to protect all essential elements of ownership which make property valuable).

99. See supra notes 81-83 and accompanying text.

100. Although the Miotke court appeared to accept at face value the defendants' assertion that taking damages are limited to the reduction in market value of the property, see supra note 81, the court on several occasions has suggested a broader grant of damages. In Lange v. State, 86 Wash. 2d 585, 547 P.2d 282 (1976), the court stated that "[i]t is well established that the condemnee is entitled to be put in the same position monetarily as he would have occupied had his property not been taken." Id. at 589, 547 P.2d at 285. See also Papac v. Montesano, 49 Wash. 2d 484, 303 P.2d 654 (1956) (in temporary damage cases, the measure of damages generally is the cost of reconstruction, with compensation for loss of use in proper cases); Anderson v. Port of Seattle, 49 Wash. 2d 578, 304 P.2d 706 (1956) (measure of compensation for taking or damaging of land for public use is dependent upon the nature of the injury, whether it is permanent or temporary).

101. The substitution of the constitutionally based inverse condemnation theory for the nuisance application would not affect potential recovery for additional damages under other tort theories such as the negligent infliction of emotional distress, which was
The mere expansion of the "taking or damaging" claim to include temporary takings does not solve the problem of distinguishing instances of eminent domain from tort. The problem could be solved if the court would reassert its method of analyzing the nature of the injurious act. As stated, property necessary to the taking or maintenance of property for public use is, if damaged, done so for public use and thus falls within the ambit of inverse condemnation.102 If the injurious action is necessary to public use, then the property owner must be compensated for that purpose under inverse condemnation. This rule is not without difficulties,103 but the use of common sense in determining whether an injurious act was necessary to a public purpose or property is an appropriate method by which to distinguish inverse condemnation from tort.

IV. REMAINING ISSUES

A. Nuisance

Because the Miotke majority felt constrained by, or simply chose to follow, the "permanence of the interference" test,104 it rejected the defendants' inverse condemnation theory and turned to tort.105 The court held that Washington's statutory nuisance provision created a private right of action not directly provided by the environmental statutes.106

By one reading of the decision, although not the only reading,107 the court interpreted the statutory nuisance provision to exclude an "unreasonableness" requirement that previously had been read into the statute.108 According to the court, the statute consists of a two-part test that requires only (1) an unlawful

awarded in Miotke.
102. See supra text accompanying note 56.
103. One difficulty identified with the prior test is the uncertainty involved in defining an act that is "necessary" to a public use. See supra text accompanying notes 56-69. However, a solution to the interpretation problems associated with this ambiguous term is to define "necessary" as requiring only a coincidental relationship to the public use benefited. Such a broad interpretation would conform to the courts previously enunciated interpretations. See supra note 98 and accompanying text; see also Comment, supra note 6, at 623-24.
104. See supra text accompanying 70-74.
105. Miotke, 101 Wash. 2d at 332, 678 P.2d at 818.
106. Id. at 330, 678 P.2d at 816.
107. See supra notes 39-42 and accompanying text.
108. See infra notes 112-116 and accompanying text.
act that (2) "essentially interfere[s] with the comfortable enjoyment of the life and property of the plaintiffs"; traditional nuisance law, in contrast, requires both a substantial and an unreasonable interference with property.

Courts in general, and Washington courts in particular, have long recognized that reasonable interferences are the price that citizens pay for living in an organized society, even when the interferences result in substantial injury. Although courts differ in their definitions of substantial and unreasonable interference, a substantial interference generally is one where there is significant injury, and an unreasonable interference is one where society determines that it would be unfair to allow the defendant to cause such an amount of harm without compensating the plaintiff.

The Washington Supreme Court generally has followed traditional nuisance analysis and rejected the strict reading of the nuisance statutes when it has interpreted the requirements for nuisances. Washington’s fundamental inquiry for nuisance analysis has traditionally required a balancing of the rights, interests, and convenience of the parties. In using this balancing approach, Washington courts have gone even further than most other courts and weighed the social utility of the interfering use against the gravity of the harm done to the landowner. In several previous decisions, the Washington Supreme Court has recognized the need to look at all the circumstances and

109. Wash. Rev. Code § 7.48.120 (1985) requires “unlawfully doing any act” but does not specify the type of legal requirement that must be violated. In Miotke, the court found a violation of the Waste Discharge Permit requirement and Wash. Rev. Code ch. 90.48 (1985). Miotke, 101 Wash. 2d at 331, 678 P.2d at 815. It is unclear whether the mere violation of a regulatory action would constitute an unlawful act as required by § 7.48.120.


111. "The law does not concern itself with trifles, or seek to remedy all the petty annoyances and disturbances of everyday life in a civilized community even from conduct committed with knowledge that annoyance and inconvenience will result." W. Prosser & W. Keeton, The Law of Torts § 88 (5th ed. 1984).

112. Id.

113. Id.


interests applicable to a "nuisance in fact" determination.\textsuperscript{116}

It is possible that the \textit{Miotke} court proceeded under an unarticulated assumption that the interference in \textit{Miotke} met an "unreasonableness" standard,\textsuperscript{117} or that the unlawful nature of the act\textsuperscript{118} constituted a per se finding of unreasonableness.\textsuperscript{119} If the court proceeded under the assumption that the interference was unreasonable and, therefore, that the plaintiffs should be compensated, the defendants deserved to have this conclusion articulated because the reasonableness of the interference was subject to dispute.\textsuperscript{120} If, instead, the "unlawful act" prong of the court's two-part nuisance test\textsuperscript{121} replaced the traditional requirement of an unreasonable interference, and if even a reasonable interference will support recovery, the court deviated from prior nuisance statute interpretation. The court's interest in compensating the plaintiffs, however, may have called for this new approach.

The court may have used the nuisance statute as a mere vehicle to provide the plaintiffs with a private remedy for the violation of various environmental statutes that provide no such right.\textsuperscript{122} The tortious conduct satisfying the nuisance statute's unlawful act requirement thus could simply be the violation of an environmental statute. If the court had this purpose in mind, then the apparent exclusion of an "unreasonableness" analysis is more understandable and excusable.\textsuperscript{123} Unfortunately, the court was not explicit, so we must await future cases for an indication of what the court really intended.

\textbf{B. SEPA-Based Tort}

Of the remaining questions before the court,\textsuperscript{124} the most

\begin{itemize}
\item \textsuperscript{116} Nuisances other than those termed per se are called nuisances in fact, \textit{Harden}, 89 Wash. at 325, 154 P. at 451, or nuisances per accidents, \textit{Stubblefield}, 36 Wash. 2d at 671, 220 P.2d at 309, for which the general reasonableness analysis applies. The circumstances and interests include (1) character of the neighborhood, (2) sequence of events, (3) capacity to control objectionable effect, and (4) public interests on use. Comment, \textit{Nuisance as a Modern Mode of Land Use Control}, 46 WASH. L. REV. 47, 71-75 (1970).
\item \textsuperscript{117} See supra notes 112-13 and accompanying text.
\item \textsuperscript{118} See supra note 109 and accompanying text.
\item \textsuperscript{119} See supra notes 108-13 and accompanying text.
\item \textsuperscript{120} See supra note 42.
\item \textsuperscript{121} See supra text accompanying notes 109-10.
\item \textsuperscript{122} \textit{Miotke}, 101 Wash. 2d at 336, 678 P.2d at 816.
\item \textsuperscript{123} Unreasonableness, in this case, is conclusively presumed by virtue of the unlawfulness of the act.
\item \textsuperscript{124} The court addressed three additional issues in the case. First, the court denied
\end{itemize}
interesting and possibly most significant holding was the denial of the plaintiffs' request for additional tort damages based upon SEPA.\textsuperscript{125} Although the court rejected the plaintiff's "novel theory,"\textsuperscript{126} it did leave the door open for adopting this theory in the

the defendants' claim that the City was immune from prosecution because the dumping was a discretionary act by government officials which fell within an exception to this state's statutory abolition of sovereign immunity. \textit{Miotke}, 101 Wash. 2d at 336-37, 678 P.2d at 819-20; \textit{WASH. REV. CODE} § 4.96.010 (1985). The court determined that the action failed two parts of the four-part test for immunity that the court had adopted in Evangelical United Bretheren Church v. State, 67 Wash. 2d 246, 407 P.2d 440 (1965). The dumping did not "require the exercise of basic policy evaluation, judgment and expertise on the part of the governmental agency involved," and, additionally, "the governmental agency involved [did not] possess the requisite constitutional, statutory, or lawful authority and duty to do or make the challenged act, omission, or decision." \textit{Id.} at 255, 407 P.2d at 445.

Second, the court denied defendants' claim that plaintiffs were barred by their failure to file a claim for damages as required by \textit{WASH. REV. CODE} § 4.92.110 (1985), which provides:

No action shall be commenced against the state for damages arising out of tortious conduct until a claim has first been presented to and filed with the director of financial management. The requirements of this section shall not affect the applicable period of limitations within which an action must be commenced, but such period shall begin and shall continue to run as if no claim were required.

The court held that the defendants had waived their rights to assert the defense because they waited until three years after the commencement of the action to assert it. \textit{Miotke}, 101 Wash. 2d at 337, 678 P.2d at 820.

Third, the trial court's award of attorney fees for the injunctive phase of the litigation was upheld because there was no constitutional majority voting against the award. Justice Pearson, writing for the court and joined by Chief Justice Williams and Justice Stafford, would have affirmed the trial court award of attorney's fees based upon the dicta supporting the private attorney general theory as set out in \textit{PUD v. Kottsick}, 86 Wash. 2d 388, 392, 545 P.2d 1, 4 (1976), where it was said: "Simply stated, this doctrine provides that a private attorney general may be awarded attorney fees whenever the successful litigant (1) incurs considerable economic expense, (2) to effectuate an important legislative policy, (3) which benefits a large class of people." \textit{Miotke}, 101 Wash. 2d at 339-40, 678 P.2d at 822-23.

The court has never adopted this exception to the general rule prohibiting attorney fee awards, but it applied the \textit{Kottsick} requirements in \textit{Miotke} and found: (1) a considerable economic expense; (2) the injunction effectuated the important legislative policy of SEPA and other environmental legislation; and (3) the prevention of further discharge protected all those who live, work, and play along the river. \textit{Miotke}, 101 Wash. 2d at 341, 678 P.2d at 822. Justice Dolliver, with Justices Utter, Brachtenbach, and Dimmick, concurring, argued that the facts of the case failed to meet any of the \textit{Kottsick} dicta requirements. \textit{Id.} at 342-43, 678 P.2d at 822. They believed that (1) the statutes were intended to serve the public-at-large and not a large class of people; (2) there was no special important legislative policy served by the litigation; and (3) $8,850 per family is not a considerable expense. \textit{Id.} J. Dolliver stated that he disapproved of the private attorney general theory under any circumstances. \textit{Id.} at 343, 678 P.2d at 823.

125. \textit{WASH. REV. CODE} ch. 43.21C (1985); \textit{Miotke}, 101 Wash. 2d at 333, 678 P.2d at 817.

126. \textit{Miotke}, 101 Wash. 2d at 333, 678 P.2d at 817.
future. According to the court, there was no need to adopt a new tort when "adequate damages [were] available under established theories." 127

The plaintiffs' theory based recovery on a violation of a "fundamental and inalienable" right to a healthful environment, which is guaranteed by the SEPA preamble, sounding in tort. 128 Although the court declined to adopt the proposed tort, it implied that it would recognize such a cause of action in the future if existing doctrines provided no remedy. 129

C. Recovery Under a SEPA-Based Tort

Given the court's reasoning and holding in Miotke and the precedents that the court drew upon and reaffirmed, there is at least one set of facts that suggests a situation where the court might resort to a SEPA-based tort. This situation can be illustrated by changing the Miotke facts slightly and hypothesizing that the City complied with the Water Pollution Control Act, the waste discharge permit requirement, and the other breached environmental statutes. 130 Under such circumstances, current law would preclude the plaintiffs from asserting an inverse condemnation claim for the same reason that the court denied it in Miotke: the injury was temporary, not permanent. 131 In addition, plaintiffs' claim under nuisance law would fail because "nothing can be a nuisance that is done or maintained under express authority of a statute." 132 Because the defendants would have acted under general authority of statute and regulation, this statutory nuisance defense would prevent nuisance recovery. 133

127. Id.

128. Wash. Rev. Code § 43.21C.020 (1985). "(3) The legislature recognizes that each person has a fundamental and inalienable right to a healthful environment and that each person has a responsibility to contribute to the preservation and enhancement of the environment."

129. Miotke, 101 Wash. 2d at 333, 678 P.2d at 817.

130. See supra notes 25-29 and accompanying text.

131. Miotke, 101 Wash. 2d at 334, 678 P.2d at 818. See also supra notes 36-39 and accompanying text.


133. See supra notes 49-52 and accompanying text. But see Comment, supra note 116, at 68 n.96, which argues that the court should probably construe this statute more strictly in private nuisance cases when governmental entities are defendants because the legislature has declared such entities to be liable for their torts; see also Bruskland v. Oak Theater, Inc., 42 Wash. 2d 346, 350-51, 254 P.2d 1035, 1037 (1953) (court indicated, in dicta, that it might strictly construe the statute in the future).
Because the property owners suffered such an obnoxious interference with their right to use their property, however, a court is likely to fashion a remedy.\textsuperscript{134} Unless the court modifies or distinguishes existing precedent under inverse condemnation or nuisance theories, it might recognize a new SEPA-based tort. The \textit{Miotke} court naturally was reluctant to adopt a new cause of action because recovery did not depend upon it.

If the court were to adopt a theory based on the broad language of the SEPA preamble, myriad issues would arise. But in spite of the reasons counseling hesitation, Washington courts have in the past interpreted SEPA in ways that broadly protect the environment.\textsuperscript{135} Therefore, given the necessity of doing so, the court might and should act to extend SEPA one step further by adopting a SEPA-based tort. Judicial reluctance to break new ground should give way when action is necessary to fully compensate an injured property owner.

\textbf{CONCLUSION}

The \textit{Miotke} court addressed several significant issues in this rather complex case.\textsuperscript{136} The court distinguished inverse condemnation from tort in a new way, although the traditional test was preferable and more likely to lead to a more expansive view of inverse condemnation takings.\textsuperscript{137} The court's application of the

\textsuperscript{134} The Washington Supreme Court has said, "In our opinion, the theory that property rights are ever to be sacrificed to public convenience or necessity without just compensation is fraught with danger, and should find no lodgment in American jurisprudence." Great Northern Ry. Co. v. State, 102 Wash. 348, 353-54, 173 P. 40, 42 (1918).

\textsuperscript{135} [W]ashington courts . . . [have] infused that statute with a potency that may have exceeded the expectations of even its most hopeful sponsors. The courts enthusiastically accept the legislature's direction that "the policies, regulations, and laws of the state of Washington shall be interpreted . . . in accordance with the policies set forth in this act." R. Settle, \textit{Washington Land Use and Environmental Law in Washington} § 5.6 at 181 (1983).

The Washington Supreme Court has stated that "the maintenance, enhancement, and restoration of the environment is the pronounced policy of this state, deserving faithful judicial interpretations." Eastlake Comm. Council v. Roanoke Assoc. Inc., 82 Wash. 2d 475, 490, 513 P.2d 36, 46 (1973). As an example of the court's broad interpretation of the Act, the court has said that the Act's policy is not only to prevent environmental degradation but also to restore environmental health. \textit{See} ASARCO, Inc. v. Air Quality Coalition, 92 Wash. 2d 685, 707, 601 P.2d 501, 515 (1979). See generally Settle, \textit{supra}, § 5.6 at 180-83 for a discussion of Washington courts' broad interpretation of SEPA.

\textsuperscript{136} Miotke, 101 Wash. 2d at 311, 678 P.2d at 805.

\textsuperscript{137} \textit{See supra} text accompanying notes 87-103.
nuisance statute to the facts in *Miotke* raises several unanswered questions, and the court failed to adequately articulate its analysis. However, the court did appear to make clear its desire to increase the availability of remedies to environmental litigants.\textsuperscript{138}

Finally, the court considered a tort premised upon the preamble of SEPA.\textsuperscript{139} The equities in future cases and the deficiencies of the common law may yet lead the court, in search of justice and in furtherance of state objectives, to grant a cause of action based upon this theory.

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\textsuperscript{138} See *supra* text accompanying notes 122-23.

\textsuperscript{139} See *supra* text accompanying notes 128-29.