No. 96798-9

SUPREME COURT
OF THE STATE OF WASHINGTON

No. 76376-8-1

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

GREGORY REGELBRUGGE et al.,

Appellants/Petitioners,

vs.

SNOHOMISH COUNTY,

Defendant/Respondent.

PETITION FOR REVIEW

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A. Identity of Petitioners and Court of Appeals Decision.

The Petitioners are Gregory Regelbrugge, the personal representative of the Estates of Commander John and Kris Regelbrugge; Ronald Slauson, the personal representative of the Estate of Lon Slauson; Mark Christoph, the personal representative of the Estates of Stephen and Theresa Harris; and Davis and Ruth Hargrave, survivors of family members who were killed on March 22, 2014, in the Oso Landslide. They seek review of the Court of Appeals' published decision that, while recognizing respondent Snohomish County's active participation in changing the course of the Stillaquamish River contributed to the Oso tragedy, nonetheless affirmed the trial court's dismissal of the County based on fish enhancement project immunity. Division One relied upon a new riparian theory advanced on appeal which had no factual basis. *Regelbrugge v. Snohomish County*, No. 76376-8-I, 432 P.3d 859 (December 31, 2018) (Appendix A).

B. Issues Presented for Review.

1. Does statutory immunity for fish enhancement projects extend to the County's involvement in rerouting the Stillaguamish River, a project intended to mitigate landslides as well as improve fish habitat, in the absence of compliance with statutory requirements for assessing the project's public safety impacts?

2. Does riparian law apply to Petitioners' wrongful death claims where three Petitioners owned adjacent river property and the

fourth suffered wrongful death from the slurry caused by rerouting the River?

C. Statement of the Case.

Snohomish County set in motion the Oso Landslide when in 2006 it participated in building a cribwall and moving the Stillaguamish River ("River") to the base of an active landslide, whose base contained three stories of landslide debris. The landslide debris would combine with the River's energy and water from a sediment pond to become a 35-mph three-story slurry that devastated the Steelhead Haven community. The County participated in this project without performing, or requiring the State of Washington to perform, any public safety evaluation required for a project of this size and scale.

The courts below bestowed broad immunity upon Snohomish County for all claims arising from the Oso Landslide, including those based on the strict liability of riparian law and hazardous conditions. *Regelbrugge* at 13-16, 18. The Court of Appeals held the County immune under RCW 36.70.982, reasoning that the County's cribwall project met all the requirements of RCW 77.55.180 as a fish enhancement project. The Court of Appeals also held that Petitioners, whose upland properties were rendered worthless by the changed course of the River, were nonetheless not riparian owners – a new theory advanced by the County for the first time on appeal.

D. Argument Why This Court Should Grant Review.

This case presents two significant issues of first impression. RAP 13.4(b)(4). *See Schmidt v. Coogan*, 181 Wn.2d 661, 670, 335 P.3d 424 (2014) (issues of first impression are the province of the Supreme Court). No court has analyzed the immunity afforded to counties for fish habitat enhancement projects under RCW 36.70.982. No riparian/landslide case in Washington has included a claim for wrongful death caused by rerouting a river.

Division One ignored both the plain language and intent of the Legislature's fish enhancement immunity statute, which was never intended to apply to a massive project to ameliorate landslides and in the absence of any review of the project's scale and scope on public safety. Its decision denying a remedy to the victims of the River's modification is at odds with this Court's decision in *Fitzpatrick v. Okanagan County,* 169 Wn.2d 598, 239 P.3d 1129 (2010) and *Richert v. Tacoma*, 179 Wn. App. 694, 319 P.3d 882, *rev. denied* 181 Wn.2d 1021, 337 P.3d 326 (2014). RAP 13.4(b) 1,2.

1. Division One Applied An Overly Broad Analysis of Immunity, Violated the Rules of Statutory Construction and Ignored Sound Public Policy.

a. Immunities are to be strictly construed, the County's active involvement went beyond merely permitting.

Statutory immunities are to be strictly construed. *Michaels v. CH2M Hill, Inc.*, 171 Wn.2d 587, 600, 257 P.3d 532 (2011) ("Statutory grants of immunity in derogation of the common law

are strictly construed."); *Plano v. City of Renton*, 103 Wn. App. 910, 911, 14 P.3d 871 (2000) ("The statutory grant of immunity is to be strictly construed."). For example, in *Michaels,* this Court rejected industrial insurance immunity for design professionals working on a "construction project" under RCW 51.24.035, where the negligence occurred in a building in which no construction activity was taking place. 171 Wn.2d at 600.

Division One correctly held that "[w]hether the County's involvement in building the cribwall was sufficient to give rise to liability may be a factual issue." *Regelbrugge*, at 13, *citing Phillips v. King County,* 136 Wn.2d 946, 967-68, 968 P.2d 871 (1998); *Borden v. Olympia,* 113 Wn. App. 359, 369-70, 53 P.3d 1020(2002), *rev. denied* 149 Wn.2d 1021, 72 P.3d 761 (2002). It then erred in granting the County immunity under RCW 36.70.982, because counties are only extended immunity if they have no involvement in the permitting process and do not become a participant in the project as occurred in *Phillips* and *Borden*.[1]

This project was authorized under the streamlined process for fish enhancement projects, through use of a Joint Aquatic Permit Application ("JARPA"). Only the State has permitting

[1] *Phillips* and *Borden* are Public Duty Doctrine cases where the municipalities did have regulatory authority, however, they strayed beyond their regulatory role and became participants in the projects. Involvement as a participant takes away the protection of the Public Duty Doctrine in the same manner that participating in this project nullifies any fish project immunity.

jurisdiction; counties do not. Streamlined projects are not subject to any of the statutes that counties administer such as the State Environmental Protection Act ("SEPA") and the Shoreline Management Act ("SMA"). CP 1445. Here, it is for the jury to decide if the County went beyond its regulatory authority and became an actual participant in building the cribwall project. As the extent of the County's participation is a disputed issue of fact, the trial court erred in granting immunity.

b. Violation of the "plain meaning rule."

RCW 36.70.982 states: "A county is not liable for adverse impacts resulting from a fish enhancement project that meets the criteria of RCW 77.55.181[2] **and** has been permitted by the department of fish and wildlife." (emphasis added). Division One

[2]RCW 77.55.181 provides, in pertinent part:

> (1)(a) In order to receive the permit review and approval process created in this section, a fish habitat enhancement project must meet the criteria under this section and must be a project to accomplish one or more of the following tasks:
>
> (i) Elimination of human-made or caused fish passage barriers, including culvert repair and replacement;
>
> (ii) Restoration of an eroded or unstable stream bank employing the principle of bioengineering, including limited use of rock as a stabilization only at the toe of the bank, and with primary emphasis on using native vegetation to control the erosive forces of flowing water; or
>
> (iii) Placement of woody debris or other instream structures that benefit naturally reproducing fish stocks.
>
> (b) The department shall develop size or scale threshold tests to determine if projects accomplishing any of these tasks should be evaluated under the process created in this section or under other project review and approval processes. A project proposal shall not be reviewed under the process created in this section if the department determines that the scale of the project raises concerns regarding public health and safety.

read the word "and" out of the statute, treating the requirement as disjunctive not conjunctive. All words in a statute must be given meaning and cannot be read in a manner that defeats legislative intent. *State v. Lilyblad*, 163 Wn.2d 1, 9, 177 P.3d 686 (2008). When a statute incorporates another statute, the entire text of that statute must also be given effect. *See C.J.C. v. Corp. of Catholic Bishop of Yakima*, 138 Wn.2d 699, 708, 985 P.2d 262 (1999).

The statute awarding immunity incorporates RCW 77.55.181, which mandates that "a fish habitat enhancement project **must** meet the criteria under this section **and must** be a project to accomplish one or more of the following tasks." RCW 77.55.181(1)(a) (*emphasis added*). The "tasks" are set out in subsection (1)(a): (i) culvert replacement; (ii) restoration of eroded stream banks and (iii) placement of woody debris. *Id*. The next subsection (1)(b) sets out mandatory criteria: "The department **shall** develop size or scale threshold tests …. A project **shall not** be reviewed under the process created in this section if the department determines that the scale of the project raises concerns regarding public health and safety." RCW 77.51.181(1)(b) (*emphasis added*). The mandatory word "shall" is used in this statute twice. The statute requires that a fish enhancement project accomplish at least one of three tasks and that it must also have a determination under the "threshold tests" promulgated by the department as to its "size or scale" assuring that it raises no public health and safety

concerns.

The State never adopted any size and scale tests. The State's Regional Habitat Program Manager admitted that from 1998 to 2015 the department did not adopt size or scale tests as required by the legislature. AOB p.19 *citing* CP 2711. Without any tests, a project could not be reviewed "under the process created under this section." RCW 77.55.181(1)(b). The statute goes on to use the disjunctive word "or" extending the size and scale evaluation for public safety to "other project review and approval processes." *Id*.

It was undisputed that no one did an evaluation of size and scale as mandated by the statute. The Program Manager testified it was the fish biologist's job to do the evaluation; the biologist testified it was the Program Manager's job to do the evaluation. AOB pp. 20-21 *citing* CP 2743; 3272-4. In order for the County to avail itself of fish enhancement project immunity, RCW 36.70.982, it had to ensure that there was compliance with RCW 77.55.181.[3]

Division One acknowledged that the "department had not yet adopted the size and scale thresholds tests required by the statute," (Op. 14), but held the State's approval of the project was itself sufficient for purposes of immunity:

> Even if no size or scale tests were in place at the time the Tribe applied for a permit, the department reviewed the cribwall as a fish habitat enhancement

[3] In its Answer, the County cross-claimed against the State (§8.7) and therefore has recourse for the State's failure to respond to the Legislature's directive.

> project and approved it. The approval of the permit indicates that, in the department's view, the scale of the cribwall project did not make it potentially threatening to public health or safety.

Op. 15. Division One's analysis not only fails to construe the evidence in a light favorable to Petitioners, it wholly ignores the unrebutted testimony of the State's Program Manager and biologist.

RCW 36.70.982 requires compliance with the "criteria" of RCW 77.55.181, which is set out in subsection (1)(b), as a condition for immunity. Division One confused the size and scale criteria of RCW 77.55.181(1)(b) with the enumerated tasks of subsection (1)(a), finding compliance with the entire statute because the JARPA permit recited two of the tasks in subsection (1)(a): "it was aimed at restoring 'an eroded or unstable stream bank using bioengineering techniques' and plac[ed] 'woody debris.'" *Id.* Because the State failed to assess the project's impacts on health and safety, the County was not entitled to immunity.

c. Violation of statutory context and legislative intent.

Division One also erred in holding that the statute "does not foreclose eligibility for a project that accomplishes one of the identified tasks, such as fish habitat restoration, and also serves some other purpose, such as landslide prevention." *Id.* In fact, the project moved the River to the new streambank it created and the River began eroding that bank. The eroded and unstable stream bank was a humanly created problem. The cribwall did not restore

the newly created streambank, but allowed very small flooding events to continuously saturate the landslide debris at its base. CP 3115.

At the bottom of the very same JARPA page where the two tasks have checkmarks, there is a warning that "only" fish habitat enhancements are to be covered. CP 245 at 3. But the Program Manager testified that with the dual purpose of the project, fish enhancement and landslide remediation, the cribwall project did not qualify for streamlined permitting under RCW 77.55.181. AOB p. 19 *citing* CP 2726.[4]

This Court, in employing the "plain meaning rule" has looked at the context of the legislation to give effect to the legislature's intent and purpose. *State Department of Ecology v. Campbell & Gwinn LLC,* 146 Wn. 2d 1, 11-12, 43 P.3d 4 (2002). Division One did not examine the context or the purpose of the size and scale requirements and the mandatory nature of the legislature's directive to the State that it "shall" promulgate tests to ascertain if the "project raises concerns regarding public health and safety."

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[4] Division One, in effect, added words to both statutes. *State v. Hennings*, 129 Wn.2d 512, 524, 919 P.2d 580 (1996) (words may not be added to statute unless omitted language creates "a contradiction in the statute that render[s] the statute absurd and undermine[s] its sole purpose"). Wherever the words "fish enhancement project" were used, one would have to add "and landslide remediation project" or "and flooding project" or "and whatever other purposes." Division One violated the "plain meaning rule."

RCW 77.55.181(1)(b). It ignored the reason that fish enhancement projects were to be streamlined – to address cross-culverts that were blocking fish passage. AOB pp. 18-19.

This legislation was intended to address a specific problem – the State maintained cross-culverts that damaged fish – a longstanding problem that was recently addressed by the United States Supreme Court.[5] The purpose section of the statute is clear: "the legislature finds that there are over two thousand barriers to fish passage at road crossings throughout the state…," which should be removed with a minimum of expense and delay. CP 763. The sponsor of the bill, stated that it was for "small scale driveway culverts and the placement of a few pieces of large woody debris." CP 2752. The plain purpose of the statute was to avoid the expense of SEPA and SMA review for each of the two thousand damaging cross-culverts identified by the State.

The use of the word "shall" in RCW 36.70.982 is significant when viewing the discussion of county immunity in this context— "to continue the improvement of culverts which are barriers to fish passage." CP 1470. The March 2, 1998 Senate Bill Report, 2SHB, states that the State "must develop size and scale thresholds," and discusses County immunity with regard to "fish passage barriers."

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[5] *See U.S. v. Washington,* 853 F.3d 946 (9th Cir. 2017), *aff'd. by equally divided court* ___U.S.___, 138 S.Ct. 735 (2018). The cross-culverts must be replaced by the State.

CP 1468-69. Testimony supports the intent of the bill to facilitate minor projects, but major projects would "still require the normal approval process." CP 1470.

d. Division One's analysis violates public policy.

The paramount purpose of government is to protect public health and safety. *Norco Const., Inc. v. King County*, 97 Wn.2d 680, 685, 649 P.2d 103 (1982) ("governments exist to provide necessary public services to those living within their borders and to avoid harms in their protection of the public's health, safety, and general welfare"). The Legislature specifically wrote its concern for public health and safety into the RCW 77.55.181(b). The cribwall project, held out as a remediation measure for landslides, had no geotechnical review – either before the 2006 landslide or afterwards. CP 3132-3139; 3124. The County's landslide remediation project, which included siting a pond with 6.5 million gallons of water at the base of an already notorious landslide, proceeded with no in-house or out-of-house geotechnical engineering review.[6] *Id*. Despite moving the River, there was no hydraulic analysis or modeling for the channel changes due to the cribwall – before or after it began to sink. CP 3118; 1093, 1089. Had the Program Manager or the fish biologist conducted a review, they would have

[6] The pond and its size was never described in the JARPA. It only referred to a "storage area" for sediments. CP 251.

lacked the geotechnical or fluvial expertise to evaluate the project as "also serv[ing] some other purpose, such as landslide prevention." (Op. 15). Division One's expansion of fish enhancement project immunity whenever there is a dual purpose violates public policy because it places fish biologists in an untenable position to evaluate public safety impacts of projects that go far beyond their expertise.

e. The cribwall project was clearly of a size and scale that it violated public health and safety.

At the time of its permitting, the Program Manager testified that the cribwall was the largest project in the State. CP 2750. The JARPA described it as 1,500 feet long and 15 feet high. CP 249. By the time it was completed, the height had grown to 25 feet, or two and a half stories.[7] CP 44. The five acres of trees that were ripped out by their roots were the equivalent of a parking lot able to hold 2,500 full-sized automobiles.[8] CP 3068. The capacity of the sedimentation pond was twenty-acre feet. CP 48. The River was moved approximately 300 feet and 10 million gallons of its water would be entrained or absorbed into the landslide. CP 3085. Even without any guidelines, the project was a monstrosity. The County

[7] The Washington State Archive building on Washington Street is three stories high.

[8] As of 2009, the West Campus of the Capital Campus, which includes the Temple Lot of 111 automobile spaces, has a total of only 1,766 spaces. *See* Washington State Capital Campus Study, April 2009, Shea, Carr & Jewell Inc., p. 9.

received and reviewed the JARPA detailing its size and scale. CP 2723;1446.

By 2012, there still were no adopted guidelines, although three versions existed. CP 3244. A State fish biologist warned the Program Manager that the more lenient 2012 guidelines carried too much risk for landowners and the river. *Id.* She stated it was especially true if the project contained "100 pieces of wood or remove[d]1000 cubic feet of sediment." *Id.* It was "clear" to her that Snohomish County and the tribes "are the groups pushing for these revised [2012] guidelines because they have tried to get around their own SEPA/grading fees under our process." *Id.* She stated that it is "ill-advised" to allow "large scale projects to be squeezed into a process designed for small scale projects with minimal impact to surrounding resources." *Id.*[9] The cribwall project required ripping five acres of trees out by their roots (App. B 2), which conservatively would equal 653,000 square feet of sediment.[10] The size and scale of the cribwall project violated public health and safety and resulted in 43 fatalities.

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[9] The cribwall project contained hundreds of pieces of wood. App. B 1 (five construction photographs). Two photographs have men in them (CP 41; CP 1402) which we have highlighted to provide the scale of the project.

[10] Division One erroneously referred to this work as "clear cutting." (Op. 16). The trees were removed with their rootballs intact in order to encourage their growth elsewhere. Rootballs are several feet deep in the soil. An acre has 43,560 square feet multiplied by 5 acres is 217,800 square feet. Conservatively assuming a three-foot depth for the rootballs, the tree removal resulted in 653,000 cubic feet of sediment removal.

2. Three of the Petitioner Families Were Riparian Owners and the County Recognized the Project's Hazardous Conditions.

Division One did not analyze or discuss whether riparian law can apply in a wrongful death case involving the rerouting of a river. AOB, pp. 28-37. Its analysis was procedurally and substantively flawed because it erroneously held the evidence insufficient to prove all four of the Appellants were "riparian owners," (Op. 17), and adopted an argument advanced by the County for the first time on appeal. *White v. Kent Medical Ctr. Inc.,* 61 Wn. App. 163, 810 P.2d 4 (1999). [11] The County's own map shows three of the families were on the River with only the Regelbrugges' property inland. App. B 3 (CP 2272). The Complaint identifies all of the Appellants' tax parcels. Those adjacent to the River are irrefutably riparian owners. CP 2954-2956. Riparian law applies for at least three of the four Appellants.

The trial court held riparian law did not apply, the claims of all the Appellants would proceed under negligence but then clarified they were barred by immunity. CP 2936-7. However, it is anomalous to have the wrongful deaths of Commander and Mrs. Regelbrugge governed by negligence law because they were not adjacent to the River. The artificially moved River was enveloped creating the slurry that killed everyone. The slurry did not

[11] In the trial court, the County primarily argued that riparian strict liability could not apply in a wrongful death case and that no rights existed because of the water appropriation Codes of 1917 and 1932. CP 2130-4.

recognize any boundary lines or stay within the properties adjacent to the River.

Division One's decision undermines this Court's analysis of the natural watercourse rule in *Fitzpatrick v. Okanogan,* 169 Wn.2d 598, which led to liability from projects over the decades that changed the river and led to the destruction of the plaintiffs' house. The *Fitzpatrick* Court properly focused on the unnatural changes to a river that led to and caused property damage because side channels were blocked causing additional velocities and the quantity of water in the main channel leading to the demise of the house. *Fitzpatrick,* at 611. [12]

Here, Division One did not analyze the unnatural changes to the River and the damages it caused. It mistakenly focused on what it characterized as "clear cutting" on the County's lots as the basis for the claims. It failed to grasp that five acres of trees were uprooted and the River itself was artificially moved and its water and energy were relocated to the base of the landslide making it available to be entrained or absorbed. CP 3068. Petitioners' geologist testified the stand of trees would have withstood the River

[12] Had there been children in the *Fitzpatrick* house who died as it was swept away, riparian law would apply to their wrongful death claims. CP 2680. Another Washington riparian case involved a threat of injury to young children who could have died but escaped as a river that had been altered flooded their house. *Ronkosky v. Tacoma,* 71 Wash. 148, 128 P. 2 (1912). Other states have addressed wrongful death claims under riparian law. *In re Flood Litigation,* 216 W. Va. 534, 607 S.E. 3d 863 (2004); *Kennecott Copper Corp. v. McDowell,* 100 Ariz. 276, 413 P.2d 749 (1966).

for decades. *Id.* Keeping the River away from the toe of the landslide was beneficial, as documented by a "period of relative quiescence for two decades following the 1967 [landslide] event, during which time the toe was insulated from the river by landslide debris." CP 91. Prior to the 2006 landslide, the cribwall project moved the River **away** from the toe of the landslide, placing the cribwall at the end of 500 feet with flat ground to allow for run-out storage. CP 1160-61.

The County allowed the River to be forced into an unnatural ninety-degree turn. As is depicted through aerials dated 1947 through 1995, the River always assumed a rounded horseshoe shape at the landslide complex. CP 99.[13] Creating a hard-ninety-degree turn and the smoothness of the cribwall, combined to increase the River's velocity, (CP 3083) eventually, opening a hole in the cribwall and sinking it by 12 to 14 feet. CP 3127. The sunken cribwall allowed the River flows to breach the cribwall in small flood flows saturating the landslide debris at its base. CP 3115. Moving the River changed its natural regime and very location, creating hazardous conditions that would ripen into a deadly slurry.

In the trial court, the County admitted that petitioners Harrises and Hargraves owned property "adjacent to the river," but claimed they were unaffected by the River's "movement." (CP 2133).

[13] A copy of this page can be found in Appendix B. 4.

The County admitted Petitioner Lon Slauson owned property adjacent to the river but cited boundary line law to argue that he is not a riparian owner. *Id.* On appeal, the County argued that the Harris and Hargrave properties were "upstream" and that they "did not flood or erode." BOR p. 36. *Id.*

In *Fitzpatrick,* this Court held that there is no persuasive support for rejecting riparian law based on a distinction between upstream and downstream owners. *Fitzpatrick* at 607, fn. 3. On the facts here, the County attempts this very distinction, ignoring that the Harrises were both killed by the slurry and the Hargraves lost all their property to it. Ron Slausen was also killed by the slurry and is named in the JARPA as a property owner adjacent to the River. CP 253. While the Regelbrugges were somewhat inland, they also were killed by the slurry. After the Oso Landslide, the River is still out of its channel and has formed a lake — nothing remains of Steelhead Haven and the people who lived there. App. B 5 (Post-Oso photograph) *compare with* App. B 4 (CP 2272 showing lots).

Division One acknowledged that riparian owners have the "right to have water flow past the owner's property in its natural condition" but then ignored the River's changes here. Op. at 16, *citing Richert v. Tacoma,*179 Wn. App. 694. The diverted river flows, through a chain of causation, harmed non-riparians as in *Richert,* where owners of lands that were not along the river sustained flood damage. The Court identified these plaintiffs as

owners of "[t]wenty-two additional parcels [which] are included in the superior court case but are not included in the 88 Type Two parcels relevant to this appeal, because the twenty-two parcels were not involved in" the original condemnation of property owners adjacent to the river. *Richert*, 179 Wn. App. at 700, fn. 2. See App. B 6 (illustrative map).

Division One further impermissibly narrowed a riparian defendant's strict liability by requiring that the County have actual or constructive knowledge that the Tribe's removal of the trees created a hazardous condition. Op. 17-18, *citing Albin v. National Bank of Commerce,* 60 Wn.2d 745, 375 P.2d 487 (1962); *Price v. Seattle*, 106 Wn. App. 647, 24 P.3d 1098, *rev. denied* 145 Wn. 2d 1011, 37 P.3d 291 (2001). The County's lots, once containing a vegetative buffer against the River, were totally submerged when it allowed the River to be artificially moved to the landslide. CP 847.[14] The ninety-degree turn created higher velocities at the County's lots. *Id.* If a jury finds the County was a participant in the cribwall project, it is a participant in the entire project, not just the tree removal. *See Phillips,* 136 Wn.2d at 968 ("If it is proven at trial that the County participated in creation of the problem, it may participate in the solution.").

In any event, the County's negligence is an issue of fact. The

[14] A copy of the County's lots and their locations before and after the River's relocation is at App. B 7.

County had actual notice of the plan to move the River **away** from the landslide complex. It reviewed the JARPA with the redesigned project which described ripping out trees by the roots in order to artificially move the River to the landslide's base. CP 261. The ninety-degree turn is obvious in its River modeling. App. B 8 (CP 1365; 1367). The County's Chief Engineering Officer acknowledged a ninety-degree bend is not natural, is known to create higher velocities and the velocities were right in the location of the cribwall. CP 1594. A supervising engineer for the County was so concerned about the project that he asked what the "confidence level" was in the "design and liabilities." CP1273. Finally, the County took photographs of the hazardous conditions and sent them to the State. CP 1277-81. These facts are a far cry from the constructive knowledge that defeated summary judgment in *Albin* where the bank knew it had hired loggers to clear cut its land. [15]

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[15] Petitioners, who were part of the consolidated motions below, rely upon and incorporate the briefing of the *Pzonka* petitioners on the failure to warn issue with one caveat. Division One quoted petitioner Davis Hargraves, who attended the March 11, 2006 meeting. *Regelbrugge* at 21 ("One of them testified, "The meeting didn't affect me much in any way except I know some people later talked about getting flood insurance. I don't – I don't recall anything but discussion about flooding, possible flooding."). Division One invaded the province of the jury by ignoring this testimony.

Division One did not address petitioners' motion to strike the County's "act of God" defense. *Regelbrugge* at 26; AOB pp. 39-44. The trial court's decision is misplaced and allows apportionment of damages to a "force of nature." *Hume v. Fritz Construction Co.,* 125 Wn. App. 477, 491 105 P.3d 1000 (2005). If this Court accepts review, it should address this issue and reverse the trial court, or, alternatively, remand the issue to Division One pursuant to RAP 13.7(b).

E. Conclusion.

There are two issues of first impression presented to this Court on the facts of Oso: no appellate court has interpreted the fish enhancement project statutes, let alone expanded their scope beyond a fish enhancement project that has been permitted after no review for public safety. This Court should hold that the cribwall was not properly streamlined, particularly when the State to this day has not promulgated size and scale threshold tests required by the statute. This Court should grant review, hold that riparian law applies in a claim for wrongful death alleging liability for rerouting a river, reverse the Court of Appeals published decision, and remand Petitioners' claims against the County for trial. RAP 13.4 (b)(1), (4).

Dated this 30th day of January, 2019.

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Appendix A

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

GREGORY REGELBRUGGE, as the Personal Representative of the Estates of L. John Regelbrugge III and Molley (Kris) Regelbrugge; RON SLAUSON, Individually and as the Personal Representative of the Estate of Lon E. Slauson; KRISTINA HARRIS, Individually and as the Personal Representative of the Estate of Stephen Harris and Theresa Harris; HENRIETTA A. OTTERSEN, Individually; DAVIS HARGRAVE and RUTH HARGRAVE, individually and through their marital community; and IRVIN WOOD and JUDITH WOOD, Individually and through their marital community, Appellants/Cross Respondents, v. STATE OF WASHINGTON; GRANDY LAKE FOREST ASSOCIATES, LLC, a Washington Limited Liability Company; and SNOHOMISH COUNTY, Respondent/Cross Appellants.	No. 76376-8-I DIVISION ONE PUBLISHED OPINION
RYAN M. PSZONKA as personal representative of the ESTATES OF SHANE RUTHVEN, KATIE RUTHVEN, HUNTER RUTHVEN, and WYATT RUTHVEN; AMY S. THOMPSON as personal representative of the ESTATES OF LEWIS VANDENBURG and JUDEE VANDENBERG; SONJA M. REW as personal representative of the ESTATE OF GLORIA HALSTEAD; STEVEN L. HALSTEAD as personal	Linked with No. 77787-4-I FILED: December 31, 2018

representative of the ESTATE OF JERRY HALSTEAD; and JAMIE A. LENNICK as personal representative of the ESTATE OF AMANDA LENNICK,

Appellants,

v.

SNOHOMISH COUNTY and WASHINGTON STATE DEPARTMENT OF NATURAL RESOURCES,

Respondents.

TIM WARD, individually and as the personal representative of the estate of BRANDY WARD; GERALD F. FARNES, individually and as the personal representative of ESTATES OF JULIE FARNES and ADAM FARNES; DAYN BRUNNER and JASON BRUNNER, as personal representatives of the ESTATE OF SUMMER RAFFO; DEBORAH L. DURNELL, individually and as the personal representative of the ESTATE OF THOMAS P. DURNELL; MARALEE HALL, individually and as the personal representative of the ESTATE OF JOSEPH R. MILLER; SETH JEFFERDS, individually and as the personal representative of the ESTATE OF CHRISTINA ANNETTE JEFFERDS; BRENDA NEAL, Individually and as the personal Representative of the ESTATE OF STEPHEN NEAL; MINDI PEAKE, individually and as the personal representative of the ESTATE OF MARK GUSTAFSON; JONIELLE SPILLERS, individually and as the ESTATES OF BILLY LEE SPILLERS, KAYLEE B. SPILLERS, BROOKE SPILLERS, and JOVON MANGUAL;

JONIELLE SPILLERS as guardian of JACOB SPILLERS; and ABBIE PEARSON, individually and as the personal representative of the ESTATE OF MICHAEL PEARSON,

Plaintiffs,

v.

SNOHOMISH COUNTY; STATE OF WASHINGTON; and the GRANDY LAKE FOREST ASSOCIATES, LLC, a Washington Limited Liability Company,

Defendants.

RANDI LESTER, individually, and as Personal Representative for the Estate of DENVER HARRIS; ROBIN YOUNGBLOOD, individually; and MARK LAMBERT,

Appellants,

v.

SNOHOMISH COUNTY; STATE OF WASHINGTON, DEPARTMENT OF NATURAL RESOURCES; and GRANDY LAKE FOREST ASSOCIATES, LLC, a Washington Limited Liability Company,

Respondents.

BECKER, J. — These linked appeals were brought by survivors of the 2014 Oso Landslide and representatives of those who died. They challenge summary judgment orders by which the trial court dismissed their tort claims against Snohomish County. We conclude that the trial court reached the correct result. It is beyond question that appellants suffered terrible losses, but their theories

and evidence do not establish a basis for holding the County liable for those losses. Accordingly, we affirm.

FACTS

The site of the Oso Landslide is a hill alongside the North Fork of the Stillaguamish River. Landslides have occurred there for decades. In 1967, a major slide destroyed cabins in the area and pushed the river channel southward 700 feet. The river gradually moved back to the base of the hill in later years.

The area was the subject of considerable research. In a 1999 report, geologist Daniel Miller explained that the interaction between the river and the "landslide toe" caused erosion and instability. Miller said he "had no basis for estimating the probable rate or timing of future landslide activity." He said, "The primary conclusion to be drawn is that mass wasting activity will persist for as long as the river remains at the toe of the landslide." Miller's report discussed protection of the toe as a means of slope stabilization, but noted concern about the potential for another landslide that would overrun the diversion structure, as occurred in the 1967 event. He described a model that estimated "the volume that could be mobilized in a large, catastrophic slump" as producing a debris runout of 880 feet, comparable to the area affected in 1967. Miller explained that this analysis did "not account for progressive failure that may occur as landsliding alters slope geometry." The report included an illustration showing even larger volumes that "could be mobilized by further destabilization," although Miller explained that such "results are largely speculative." In this illustration, according

to Miller's report, the estimated volumes "increase by an order of magnitude." Miller's report ultimately recommended diverting the river away from the toe:

> Diversion of the mainstem will act both to stabilize the landslide (by protecting the toe) and add storage area for sediment shed from the landslide, which will reduce delivery of sediment to the river. The simple analysis presented above suggests that the diversion should be located to direct the channel course at least 900 feet, at its farthest extent, from the current base of the landslide to accommodate runout of landslide debris.

The Stillaguamish Tribe of Indians, in collaboration with the United States Army Corps of Engineers, commissioned additional reports on the landslide. In a report completed in 2000, engineer Tracy Drury proposed building a "series of revetments" that "would eliminate toe cutting of the slide and create setting ponds for fine materials delivered to the mainstem from the multiple streams that drain the slide area." In another report, completed in 2001, Drury cited Miller's estimation that the current runout potential of the slide was around 900 feet. The 2001 report explained that slides harmed the river ecosystem and posed "a significant risk to human lives and private property." The neighborhood of Steelhead Haven, home to many full-time residents, lay directly across the river. The report identified various options for mitigating the slide risks. The recommended option was construction of "wood revetments" on state-owned land between the river and the base of the hill. According to the report, this structure would reduce erosion of the landslide toe and capture sediment that would otherwise travel downstream and destroy fish habitat. The Tribe decided to undertake a project to carry out Drury's recommendation. The parties call this project the "revetment" or "cribwall."

In February 2004, the County enacted an ordinance adopting a "Comprehensive Flood Hazard Management Plan" concerning the Stillaguamish River. Counties are granted authority to enact flood hazard management plans by RCW 86.12.200. The County's plan stated "recommended actions." These included, "Implement Steelhead Haven Landslide stabilization project to meet public safety goals." The plan explained that there were proposals under development by tribal, state, and federal agencies, with estimated costs "between 1 million to 10 million depending on which alternative is selected." Another section recommended that the County should implement a stabilization project through the authority of the Corps "that meets public safety and environmental restoration goals of this plan." The plan stated, "As part of this project, the landslide and flood risk to residents can also be reduced or eliminated."

The County and the Tribe were co-coordinators of the "Stillaguamish River Salmon Recovery Lead Entity," and they had been for several years at the time the cribwall project was conceptualized. A state publication describes lead entities as "community-based groups that develop salmon habitat restoration strategies and recruit organizations to implement projects." Lead entities are required by statute to "establish a committee that consists of representative interests of counties, cities, conservation districts, tribes, environmental groups, business interests, landowners, citizens, volunteer groups, regional fish enhancement groups, and other habitat interests." RCW 77.85.050(1)(b). "The

purpose of the committee is to provide a citizen-based evaluation of the projects proposed to promote salmon habitat." RCW 77.85.050(1)(b).

Consistent with these requirements, the Stillaguamish River Salmon Recovery Lead Entity included the Stillaguamish Implementation Review Committee, established in 1990. Each year, the Committee created a list of prioritized projects to submit to the Salmon Recovery Funding Board, a body that administers state and federal funds for salmon recovery efforts. The Committee included the cribwall project on the list sent to the Board in 2004. The Board agreed to grant funding for the project. The Tribe obtained additional funding through other sources.

In January 2006, before construction of the cribwall began, another large slide occurred at the site. The runout was approximately 700 feet. Debris blocked the river channel. The Snohomish County Department of Emergency Management worked to protect Steelhead Haven from flooding. This work involved creating a new river channel to the south of the old channel. County workers also placed sand bags near residences.

The Snohomish County Department of Public Works decided to hold a community meeting in March 2006, one month after the slide, to apprise Steelhead Haven residents of future flood and landslide risks. One claim asserted by the plaintiffs is that the information provided at this meeting did not alert them to the extent of the landslide danger, and instead it lulled them into a false sense of security.

The cribwall was constructed later in 2006 after the Tribe obtained permitting required by the State Department of Fish and Wildlife.

The catastrophic Oso Landslide occurred eight years later, on March 22, 2014. It was a clear day during a period of heavy rainfall. The slide was unprecedented in its size and mobility. Debris quickly traveled 3,000 feet, burying Steelhead Haven and a nearby highway, SR 530. The slide killed 43 people, injured others, and destroyed the property in its path. It was among the most destructive landslides in United States history.

Lawsuits followed. Survivors of the slide and personal representatives of the estates of decedents sued Snohomish County, the State of Washington, and a timber company that owned property above the landslide area. Four suits, each involving numerous plaintiffs, were consolidated for trial. The plaintiffs remained in four groups—"Regelbrugge," "Pszonka," "Ward," and "Lester"—each with separate counsel. The gravamen of their complaints was that the defendants contributed to and could have prevented the devastation of the slide. They alleged that the timber company increased the slide risk by harvesting trees in the landslide area. They asserted the State was negligent for granting permits to the timber company and for allowing construction of the cribwall, which, plaintiffs alleged, was faulty and not an appropriate remediation measure. Other claims included that the State negligently investigated conditions after the 2006 slide and failed to warn community members about future slide risks. Against the County, the plaintiffs asserted negligence and strict liability claims based

primarily on the 2004 flood plan, the 2006 community meeting, and the construction of the cribwall.

In a series of summary judgment orders issued in 2015 and 2016, the trial court dismissed virtually all claims of County liability. The court facilitated immediate appeal by entering judgments under CR 54(b) on September 14 and September 23, 2016.

The Pszonka, Ward, and Lester groups (hereinafter "Pszonka") challenged orders dismissing claims against the County in a motion for review filed in the Supreme Court. Meanwhile, the plaintiffs' claims against the State and the timber company were resolved by settlements. The Supreme Court transferred the Pszonka appeal to this court. We linked it with an appeal filed in this court by the Regelbrugge group. We address both appeals in this opinion.

Issues resolved on summary judgment are reviewed de novo. Osborn v. Mason County, 157 Wn.2d 18, 22, 134 P.3d 197 (2006). We consider the evidence in the light most favorable to the party who opposed summary judgment. We will affirm only if there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. CR 56(c); Folsom v. Burger King, 135 Wn.2d 658, 663, 958 P.2d 301 (1998). The aim is to avoid a useless trial. Preston v. Duncan, 55 Wn.2d 678, 681, 349 P.2d 605 (1960). Trial is not useless but absolutely necessary when there are issues for a jury to resolve. Preston, 55 Wn.2d at 681.

> "Summary judgment procedure is not a catch penny contrivance to take unwary litigants into its toils and deprive them of a trial, it is a liberal measure, liberally designed for arriving at the truth. Its purpose is not to cut litigants off from their right of trial by jury if *they*

> *really have evidence which they will offer on a trial*, it is to carefully test this out, in advance of trial *by inquiring and determining whether such evidence exists.*"

Preston, 55 Wn.2d at 683, quoting Whitaker v. Coleman, 115 F.2d 305, 307 (5th Cir. 1940). Applying this standard, we conclude Snohomish County is entitled to judgment as a matter of law.

ANALYSIS

1. The County's adoption of the flood control plan is immunized.

Pszonka challenges the trial court's dismissal of claims that were based on the "Flood Hazard Management Plan" adopted by the County in 2004. The plan identified the cribwall project as a means of achieving certain environmental and safety objectives. Pszonka contends that the County undertook a "legislative duty to warn" and that "the County's duty to protect Steelhead Haven through construction of a cribwall, necessarily included the duty to warn the community of the danger it faced until such protective construction occurred."

The trial court determined that claims based on the flood plan were barred by former RCW 86.12.037 (2004). The statute precludes suits against counties for acts or omissions "relating to the improvement, protection, regulation and control for flood prevention":

> No action shall be brought or maintained against any county alone or when acting jointly with any other county under any law, its or their agents, officers or employees, for any noncontractual acts or omissions of such county or counties, its or their agents, officers or employees, relating to the improvement, protection, regulation and control for flood prevention and navigation purposes of any river or its tributaries and the beds, banks, and waters thereof: PROVIDED, That nothing contained in this section shall apply to or

> affect any action now pending or begun prior to the passage of this section.[1]

This statute was enacted "to shield counties from liability for their efforts to protect the public from flood damage." Paulson v. Pierce County, 99 Wn.2d 645, 649, 664 P.2d 1202 (1983), citing Short v. Pierce County, 94 Wash. 421, 430-31, 78 P.2d 610 (1938).

The 2004 flood plan is rightly and fairly characterized as a flood control effort covered by the statute. The title was "Comprehensive Flood Hazard Management Plan." It was enacted under the authority of chapter 86.12 RCW—Flood Control by Counties. The ordinance adopting the plan states, "floods on the Stillaguamish River floodplain have historically presented serious threats to public health and safety and have caused millions of dollars worth of damage to public and private properties." It also states "the Snohomish County Department of Public Works has developed a Stillaguamish River Comprehensive Flood Hazard Management Plan, the purposes of which are to reduce the threat to public health and safety, minimize property damage from floods, and reduce costs of flood protection to the greatest extent feasible." The plan established various "goals" for addressing "flood hazards."

Pszonka contends that a project is not entitled to immunity "unless the actions are specifically and exclusively related to flood control." Pszonka asserts that the version of the cribwall project in the 2004 Flood Plan had nothing to do

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[1] We quote the version of the statute in effect in 2004, when the County adopted the flood plan. It has since been amended.

with flooding. In Pszonka's view, the project pertained solely to landslide prevention and protection of fish habitat.

The immunity statute requires that an act relate to flood control. It does not require that flood control be the exclusive purpose. It is appropriate to describe the County's adoption of the cribwall project in the flood plan as an act "relating to" flood control. The plan specifically stated that the "slide stabilization project" (i.e., the cribwall) would reduce or eliminate the "flood risk to residents." Slide and flood risks are closely related. The plan explained, for instance, that slides could "block the current flow of the river forcing the river into a new pathway, which would again threaten life and property on the south bank." This is exactly what happened in 2006—a landslide caused a flood emergency in Steelhead Haven.

Pszonka argues that immunity under the statute applies "only to the construction and maintenance of flood control devices that cause damage to private property during installation or later flood events." Pszonka contends that because the plaintiffs in this case suffered losses resulting from a landslide, not a flood, the immunity statute does not apply. We disagree. The immunity statute does not contain such a limitation.

We conclude that the County's adoption of the flood plan and its selection of the cribwall as a recommended action are acts immunized by former RCW 86.12.037 (2004). The claims arising from these acts were properly dismissed.

2. The County's actions related to constructing the cribwall are immunized.

Appellants maintain that a jury should decide whether the County is liable for its involvement in the construction of the cribwall. They contend that the cribwall project was not properly evaluated, that it was not an appropriate landslide remediation measure, and that it contributed to the devastation of the slide.

The County defends against these claims by arguing that its involvement in the cribwall project was minimal and in addition that its actions are immunized under RCW 36.70.982 because the cribwall was a "fish enhancement project."

Whether the County's involvement in building the cribwall was sufficient to give rise to liability may be a factual issue. A government entity "undertakes to act," and thereby has a duty to follow through with reasonable care, when the entity "actively participates in designing and funding" a project. Borden v. City of Olympia, 113 Wn. App. 359, 369-70, 53 P.3d 1020 (2002), review denied, 149 Wn.2d 1021, 72 P.3d 761 (2003), citing Phillips v. King County, 136 Wn.2d 946, 967-68, 968 P.2d 871 (1998). There is evidence that the Stillaguamish Implementation Review Committee—a group co-led by the County—helped the Tribe obtain funding for the cribwall and evaluated designs for the project, and that County employees were involved in the construction process.

But even if the County was sufficiently involved, it is immune from suit for that involvement. A county is "not liable for adverse impacts resulting from a fish enhancement project that meets the criteria of RCW 77.55.181 and has been permitted by the department of fish and wildlife." RCW 36.70.982. The cribwall

is a fish enhancement project. And it is undisputed that the Tribe received permitting for the cribwall under the streamlined process available through RCW 77.55.181.[2]

Appellants claim the project did not meet the criteria set forth in RCW 77.55.181(1)(b). That section requires the state to develop "size or scale threshold tests" to determine if projects should be evaluated under the process created by the statute. "A project proposal shall not be reviewed under the process created in this section if the department determines that the scale of the project raises concerns regarding public health and safety." RCW 77.55.181(1)(b). When the permit for the cribwall was issued in 2006, the department had not yet adopted the size and scale threshold tests required by the statute. Regelbrugge contends that the large cribwall—measuring 1,500 feet long, 30 feet in width, and 15 feet high—was therefore not properly evaluated with regard to size and safety. Pszonka argues, relatedly, that the permitting process available through chapter 77.55 RCW was inappropriate for large-scale projects.

These arguments do not show noncompliance with RCW 77.55.181(1)(b). Even if no size or scale tests were in place at the time the Tribe applied for a permit, the department reviewed the cribwall as a fish habitat enhancement project and approved it. The approval of the permit indicates that, in the

[2] Formerly RCW 77.55.290 (2004), recodified as RCW 77.55.181, LAWS OF 2005, ch. 146, § 1001.

department's view, the scale of the cribwall project did not make it potentially threatening to public health or safety.

Another criterion for eligibility for the streamline permit process is that a project must be designed to accomplish one or more of the tasks enumerated in the statute:

> (i) Elimination of human-made or caused fish passage barriers . . .;
> (ii) Restoration of an eroded or unstable stream bank employing the principle of bioengineering, including limited use of rock as a stabilization only at the toe of the bank, and with primary emphasis on using native vegetation to control the erosive forces of flowing water; or
> (iii) Placement of woody debris or other instream structures that benefit naturally reproducing fish stocks.

RCW 77.55.181(1)(a). The Tribe's permit application stated that the cribwall project was aimed at restoring "an eroded or unstable stream bank using bioengineering techniques" and placing "woody debris or other in-stream structures that benefit naturally reproducing fish stocks." Regelbrugge contends that the project was nonetheless ineligible for permitting because another purpose of the cribwall was landslide remediation. But the statute does not foreclose eligibility for a project that accomplishes one of the identified tasks, such as fish habitat restoration, and also serves some other purpose, such as landslide prevention.

Appellants also contend that the legislature, in crafting RCW 36.70.982, intended to protect counties only against claims arising from their inability to issue permits for fish habitat enhancement projects. RCW 77.55.181(4) removes their discretion to do so, reserving this authority to the state. This argument tries to read into the statute an intention not found there. The statute simply gives

immunity for "adverse impacts resulting from a fish enhancement project." RCW 36.70.982. Because the statute's meaning is clear based on its text, our inquiry is at an end. O.S.T. v. Regence BlueShield, 181 Wn.2d 691, 696, 335 P.3d 416 (2014). We conclude that the immunity provided by RCW 36.70.982 applies to plaintiffs' claims that are based on construction of the cribwall.

3. The strict liability claims are untenable.

Regelbrugge asks for reinstatement of two strict liability claims brought against the County in its role as a proponent of the cribwall project and as a landowner, "because it violated riparian rights and created hazardous conditions." These claims are based on Regelbrugge's assertion that during construction of the cribwall, the Tribe removed trees from property owned by the County along the river. According to Regelbrugge, the clear-cutting on the property caused a change in the river's course that contributed to the landslide.

The County disputes that it owned the property, an issue we need not resolve. Even assuming the County is the owner, Regelbrugge's strict liability claims are untenable.

Regelbrugge invokes riparian law. "Riparian rights, where they exist, derive from the ownership of land contiguous to or traversed by a watercourse." Dep't of Ecology v. Abbott, 103 Wn.2d 686, 689, 694 P.2d 1071 (1985). These rights of the owner include the right to have water flow past the owner's property in its natural condition. Richert v. Tacoma Power Utility, 179 Wn. App. 694, 703, 319 P.3d 882, review denied, 181 Wn.2d 1021, 337 P.3d 882 (2014)). See also Judson v. Tide Water Lumber Co., 51 Wash. 164, 169, 98 P. 377 (1908) (riparian

proprietors on a river "have the right to prevent the obstruction of the flow or the diversion of its waters, and to have the same continue to flow in a natural way by their lands. This is a right inseparably annexed to the soil itself"). "A riparian owner may not divert water in a natural watercourse without facing liability for damages caused to other riparian owners." Richert, 179 Wn. App. at 703, citing Fitzpatrick v. Okanogan County, 169 Wn.2d 598, 608, 238 P.3d 1129 (2010).

Regelbrugge contends that because the County allowed the Tribe to remove trees on its land, the County is liable for diverting the river and thereby contributing to the plaintiffs' damages. This theory does not depend on the plaintiffs having riparian rights. Rather, Regelbrugge contends that riparian law creates a right to recover personal injury damages caused by diversion of a river regardless of whether the plaintiffs are riparian landowners. We decline to extend riparian law in this manner. The law is clear that riparian rights derive from property ownership. Abbott, 103 Wn.2d 686. Regelbrugge asserts, in a footnote, that four plaintiffs "had property immediately adjacent to the river." But Regelbrugge does not point to evidence sufficient to prove that these plaintiffs were riparian owners, nor does Regelbrugge argue that their ownership status is the reason they are entitled to relief.

Regelbrugge also contends the County is liable because the clear-cutting created a hazardous condition about which the County knew or should have known. Regelbrugge cites Albin v. National Bank of Commerce, 60 Wn.2d 745, 375 P.2d 487 (1962) and Price v. City of Seattle, 106 Wn. App. 647, 24 P.3d 1098, review denied, 145 Wn.2d 1011, 37 P.3d 291 (2001). Those cases show

that a landowner may be liable for damage caused by a dangerous condition on the land when the owner knew or should have known about the hazard. Albin, 60 Wn.2d at 752; Price, 106 Wn. App. at 656. Regelbrugge argues that the County had "actual knowledge of the cribwall" and that the record contains "ample evidence of what the County did to increase the risk of the Oso Landslide." Regelbrugge has not shown, however, that the County had actual or constructive knowledge that the Tribe's removal of the trees created a hazardous condition.

In any event, there is another reason to dismiss claims based on the clear-cutting: they are barred by RCW 36.70.982, the statute conferring immunity for adverse effects of fish enhancement projects. There is no dispute that the Tribe removed the trees in connection with construction of the cribwall. The Tribe's permit application explains that trees "currently located between the river and the landslide will be cleared and stockpiled for use in the cribwall structures." Because the cribwall was a fish enhancement project, the immunity statute precludes claims against the County based on the removal of trees used for the cribwall.

In sum, the strict liability theories asserted by Regelbrugge do not provide a basis on which reasonable jurors could render a verdict in their favor.

4. The rescue doctrine does not provide a basis for County liability.

The rescue doctrine is an exception to the traditional rule that there is no duty to come to a stranger's aid. Folsom, 135 Wn.2d at 674. "One who undertakes, albeit gratuitously, to render aid or to warn a person in danger is

required by our law to exercise reasonable care in his efforts, however, commendable." Brown v. MacPherson's, Inc., 86 Wn.2d 293, 299, 545 P.2d 13 (1975). "If a rescuer fails to exercise such care and consequently increases the risk of harm to those he is trying to assist, he is liable for any physical damages he causes." Brown, 86 Wn.2d at 299.

Appellants contend that at the community meeting held by the County in March 2006, the County undertook a duty to warn residents that they were in danger of future landslides. They argue that the County's warning negligently downplayed the risk. They say that if the County had informed the attendees of the full extent of the danger, a jury could find that the attendees would have shared that information with other residents and the community as a whole would have "demanded action by the County." They contend the County's communications lulled those who attended the meeting into believing they were safe and that there was no need to "galvanize the Steelhead Haven community into action." They say that everyone in the community "would have assessed their risk if they had accurate information from the County."

Without deciding the issue, we will assume that by holding the meeting, the County undertook to warn the Steelhead Haven community about the danger of future landslides and consequently had a duty to use reasonable care in doing so. We conclude the appellants have not demonstrated that the County failed to act with reasonable care in a way that caused their damages.

The record does not support the allegation that the County lulled residents into believing they were safe and that there was no need to take action.

According to the meeting notice, the very purpose of the event was to "inform the community about current and future risks at the site" and to stir the community to "assess the on-going risks and to make appropriate choices on how to deal with those risks":

> Dear Landowner,
>
> Snohomish County will hold a community meeting on March 11th, 2006 at 10:00 AM at the Oso Fire Station to discuss some of the short term and long term risks to the area associated with the recent slide and to facilitate the community planning to address these issues.
>
> The intent of this meeting is to inform the community about current and future risks at the site, such as additional land slides, flooding and erosion.
>
> This was an extraordinary event and many agencies came together in a very short amount of time to clear a path for the river once it was blocked. It is now time for the community to assess the on-going risks and to make appropriate choices on how to deal with those risks.
>
> Thank you in advance and I hope to see you at the meeting.

The notice was signed by the County's Director of Public Works.

The meeting occurred as planned on March 11, 2006. According to the meeting outline, one topic was "Landslide - geology and future risks." The speaker on this topic was County geologist Jeffrey Jones. According to Jones's deposition testimony, he gave a presentation on the slide's history and geology and showed a geologic map of the area. Jones testified that his intent was to help residents make "decisions on their own, help to evaluate the risks." He recalled telling attendees that the landslide "was unpredictable and activity on the

slide could be expected in the future. As it had demonstrated in the past, it was active intermittently and that activity was likely to continue."

An individual who attended the meeting recalled hearing from Jones "that it was a landslide prone area and that landslides could be expected in the future." This person said, "I cannot recall any speaker at the meeting making assurances that there would not be any further flooding or landslide risks in the Steelhead Haven neighborhood." Another individual who attended the meeting recalled hearing "that the community could not expect the County and Army Corps of Engineers to come to the rescue in the future. They recommended that we get organized and form something like a flood control district or homeowner's association."

In response to the County's motion for summary judgment, the plaintiffs introduced testimony from other individuals who attended the 2006 meeting. They said that the cribwall project, which was discussed at the meeting, made them feel safer and that they believed the cribwall would prevent landslide activity. One of them testified, "The meeting didn't affect me much in any way except I know some people later talked about getting flood insurance. I don't -- I don't recall anything but discussion about flooding, possible flooding." Another testified that she walked away from the meeting believing that the County "had everything under control." Another attendee similarly stated, "I took away from the presentations that the County had a game plan for dealing with the risk of another slide/flood. . . . I left the meeting with the understanding that the County wanted us to know that they had looked at the reasons for the slide and flood and

that . . . the plan they outlined would prevent that situation from ever being an issue again." The attendee said, "I felt safe living in Steelhead Haven after the March 11, 2006, meeting. . . . They were building the cribwall so the river would not erode the toe of the hillside. I believed my family was safe." This evidence shows what attendees felt and believed, but it is not evidence of what the County representatives actually said. No one recalled hearing County representatives say that the risk of danger from future slides was minimal or that the cribwall was a guarantee against a catastrophic event.

Appellants contend the discussion of future risks was negligent because the County's speakers did not specifically discuss the catastrophic possibility identified in the 1999 Miller report—that a future landslide could be an order of magnitude larger than the previous one, as catastrophic and life-threatening as the Oso slide that actually occurred on March 22, 2014. Jones had read the 1999 report in which Miller mentioned the possibility of the large volumes of debris that "could be mobilized by further destabilization." According to Jones's deposition testimony, he did not talk about this portion of Miller's report at the meeting because "in Miller's paper, he described what he was able to state as being largely speculative, quote/unquote."

Jones recommended Miller's report to meeting attendees as an additional resource and offered to make copies for anyone who followed up with him. No one did. Given the voluminous amount of technical information the County was attempting to summarize and communicate to the meeting attendees in a limited amount of time, the exercise of reasonable care did not require the County to

predict a scenario that Miller regarded as speculative. Miller himself testified in deposition that he did not anticipate a slide the size of the 2014 event and that he was surprised by what occurred. He testified that nothing in his 1999 report warned of the risk of a landslide "with a runoff that would go into the Steelhead Haven neighborhood to the extent that the 2014 slide did."

And even if a jury were to find that the County in the exercise of reasonable care should have highlighted the worst case scenario imaginable, the question still remains whether the County's presentation induced reliance by anyone who heard it or heard about it. "A person who voluntarily promises to perform a service for another in need has a duty to exercise reasonable care when the promise induces reliance and causes the promisee to refrain from seeking help elsewhere." Folsom, 135 Wn.2d at 676 (emphasis added). "Even where an offer to seek or render aid is implicit and unspoken, a duty to make good on the promise has been found by most courts if it is reasonably relied upon." Brown, 86 Wn.2d at 301 (emphasis added).

Brown, the case on which the appellants primarily rely, is a close precedent factually because it involved application of the rescue doctrine to claims of loss of life and property arising from an avalanche. The avalanche occurred in January 1971 in a developed area of Stevens Pass known as Yodelin. The State of Washington was among the defendants. Plaintiffs alleged that avalanche expert Dr. Edward LaChapelle warned a Mr. Tonnon, an agent of the Real Estate Division of the Department of Licensing, that the Yodelin development was in an area of high risk for avalanches. Tonnon allegedly

"responded in a manner which led Dr. LaChapelle justifiably to believe that the division would deal with the matter and convey his warning to appellants." Brown, 86 Wn.2d at 298. The State did not pass on the warning. Tonnon met with William MacPherson, a real estate broker associated with the development, and led him "to erroneously believe that . . . no avalanche danger existed." Brown, 86 Wn.2d at 298. The plaintiffs claimed that Tonnon's omissions deprived them of the opportunity to be forewarned of their danger by either Dr. LaChappelle or MacPherson, and they were thus "unable to avoid the losses they suffered when the avalanche that had been predicted actually occurred." Brown, 86 Wn.2d at 298-99. At the trial court level, the State's motion to dismiss under CR 12(b)(6) was granted, but the Supreme Court reversed and allowed the claim against the State to go forward. The court concluded that the facts alleged in the complaint stated a claim of negligence by malfeasance and nonfeasance, both arising from the rescue doctrine. Brown, 86 Wn.2d at 299-300.

In Brown, the court characterized the rescue doctrine as arising from "promises which induce reliance, causing the promisee to refrain from seeking help elsewhere and thereby worsening his or her situation." Brown, 86 Wn.2d at 300. The court later referred to "reliance" as "the linchpin of the rescue doctrine." Osborn, 157 Wn.2d at 25. In Brown, the State's duty to act arose from "reliance by another"—by Dr. LaChappelle, who refrained from warning the plaintiffs as a result of Tonnon's promise that he would communicate the warning, and by MacPherson, who refrained from warning the plaintiffs because Tonnon told him no avalanche danger existed.

Here, appellants claim the County's duty to act arose because the County's negligent warning induced them to feel secure. They say that as a result of the County's presentation, those at the meeting refrained not only from acting to protect themselves but also from acting to warn other community members who were not in attendance.

Appellants have not shown that anything said at the meeting could reasonably be interpreted as a promise that the cribwall would confine the debris runout from future slides so that residents would be safe in their homes. The County did not deprive the attendees of the opportunity to be informed about the risks of landslides and in fact encouraged them to seek out more information. The County's warnings of the danger of future slides did not make the situation of the Steelhead Haven residents worse than if the County had not held a meeting.

Reliance is not established by asserting that residents would have escaped the path of the landslide if the County had depicted the risk in the most extreme terms possible. The County argues, "If liability could so easily be imposed for things unsaid at public safety meetings, governmental entities would cease holding meetings about natural and manmade disasters altogether, leaving communities worse off." We agree and conclude that the appellants are not entitled to relief under the rescue doctrine.

5. The County had no duty under the affirmative undertaking doctrine.

Pszonka invokes the affirmative act doctrine as another basis for penalizing the County's alleged failure to provide an adequate warning. Under that doctrine, an act or omission "may be negligent if the actor realizes or should

realize that it involves an unreasonable risk of harm to another person through the conduct of the other or a third person which is intended to cause harm, even though such conduct is criminal." RESTATEMENT (SECOND) OF TORTS § 302B (AM. LAW INST. 1965). For example, a bus driver's act of getting off the bus while keys were in the ignition and a visibly erratic passenger was onboard created liability to plaintiffs who were injured when the passenger took control of the bus and drove it into their car. Parrilla v. King County, 138 Wn. App. 427, 430, 157 P.3d 879 (2007).

In this case, there has been no showing that the County's act of distributing information at the community meeting exposed the residents to the risk of the coming landslide. The trial court correctly determined that the affirmative act doctrine does not apply.

Regelbrugge contends that the trial court erred by refusing to strike an "act of God" defense asserted by the County. Our conclusion that the appellants cannot proceed to trial against the County makes it unnecessary to address this issue.

Affirmed.

Becker, J.

WE CONCUR:

Andrus, J.

Appendix B

B 1. Construction photographs (5 in all) CP 44 and CP 1402 (note men for scale); "Backfilled With Woody Debris" CP46; "What the River Will See" CP 47 "Approximately 20 Acre-Feet of Storage [in Pond]" CP 48

B 2. Trees outlined in red showing extent of removal CP 1349

B 3. County Map of Appellants' Lots – 3 Riparian CP 2272

B 4. Miller's aerials of horseshoe shape of River 1947 - 1995 CP 99

B 5. Post-Oso - River outside its channel forming lake with area destroyed

B 6. Richert map of flooding Valley – red is parcels adjacent to river; green is damaged pastures, crops, and structures not adjacent to river

B 7. Five acres of trees prior to removal from County's lots and location of lots submerged at 90-degree bend #'s 00585700004000 and 00585700004001 highlighted in yellow CP 847

B 8. County River Modeling of velocities at 90-degree bend CP 1365 = 2-year flood flow; CP 1367 = 100-year flood flow

ANCHOR-DRU_00001475

CP 001402

Close up look at log jam revetment. Notice person on left for scale. SC_PDR_WARCO_000159

Backfilled With Woody Debris

ANCHOR-DRU_00001475

What the River Will See

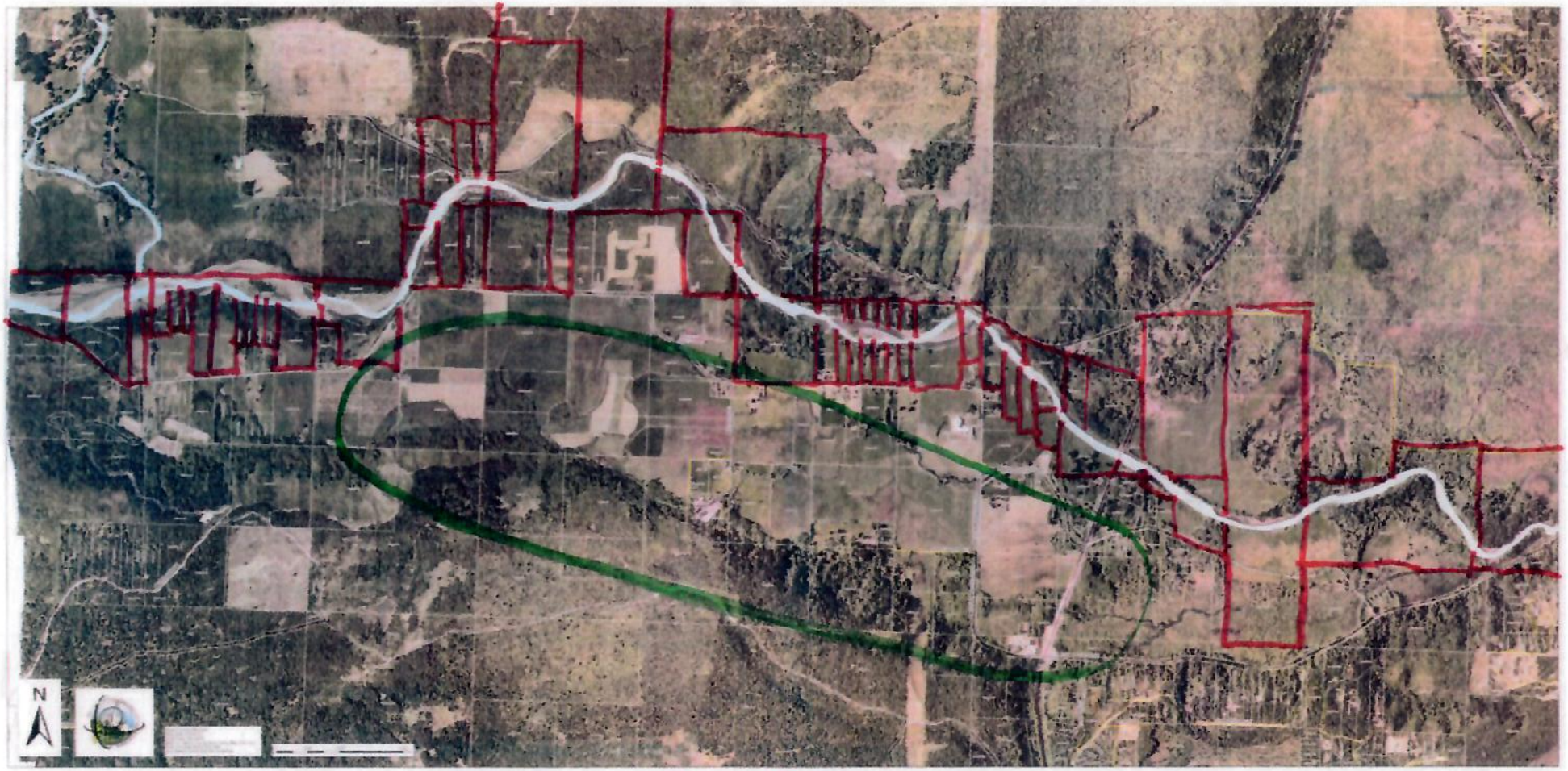
ANCHOR-DRU_00001475

Approximately 20 Acre-feet of Storage


HARRIS STEPHEN D
HARRIS STEPHEN D
YOUNGBLOOD ROBIN T
MILLER LARRY & SANDRA
LARSEN JAMES RICHARD/SHIRLEY ANN TRUST
LARSEN JAMES RICHARD/SHIRLEY ANN TRUST
LARSEN LIVING TRUST
LARSEN JAMES R
SNOHOMISH CO PROP MGMT
GUSTAFSON MARK J
GUSTAFSON MARK J
THOMPSON RONALD B & GAIL E
SATTERLEE THOM & MARIESE
SATTERLEE THOM & MARIESE
BURROWS RONALD A & CHERYL A
WARD TIMOTHY J & BRANDY L
FARNES GERALD L & JULIE A
RULE SCOTT
BURNELL THOMAS
MOORE NELLIE H
THOMPSON JOHN F
KEELER WARD
LAVENDER MOON SOCIETY
SNOHOMISH CO PROP MGMT
SUDDARTH TY
AYLESWORTH ROBERT
SMITH JOEL E & SMITH-APPLE VIRGINIA L
MCPHERSON GARY P
WASHINGTON STATE DEPT OF TRANSPORTATION
MCPHERSON GARY P

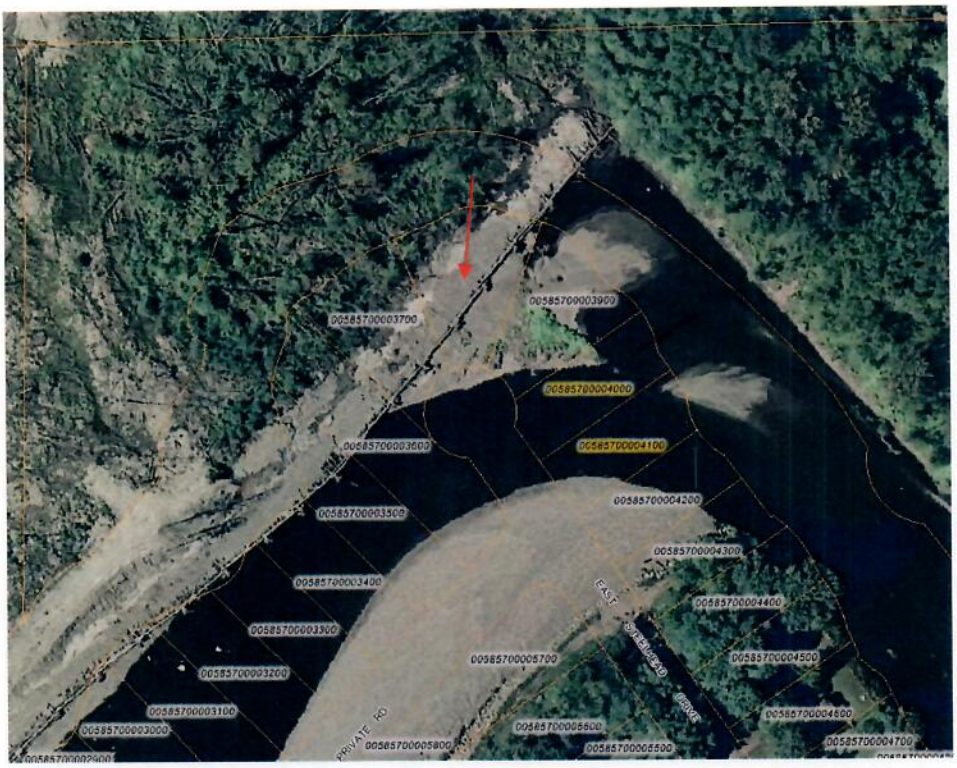
CP002272

Figure 2. Aerial photograph record for Hazel landslide.
Major events occurred in 1951, 1967, and 1988.



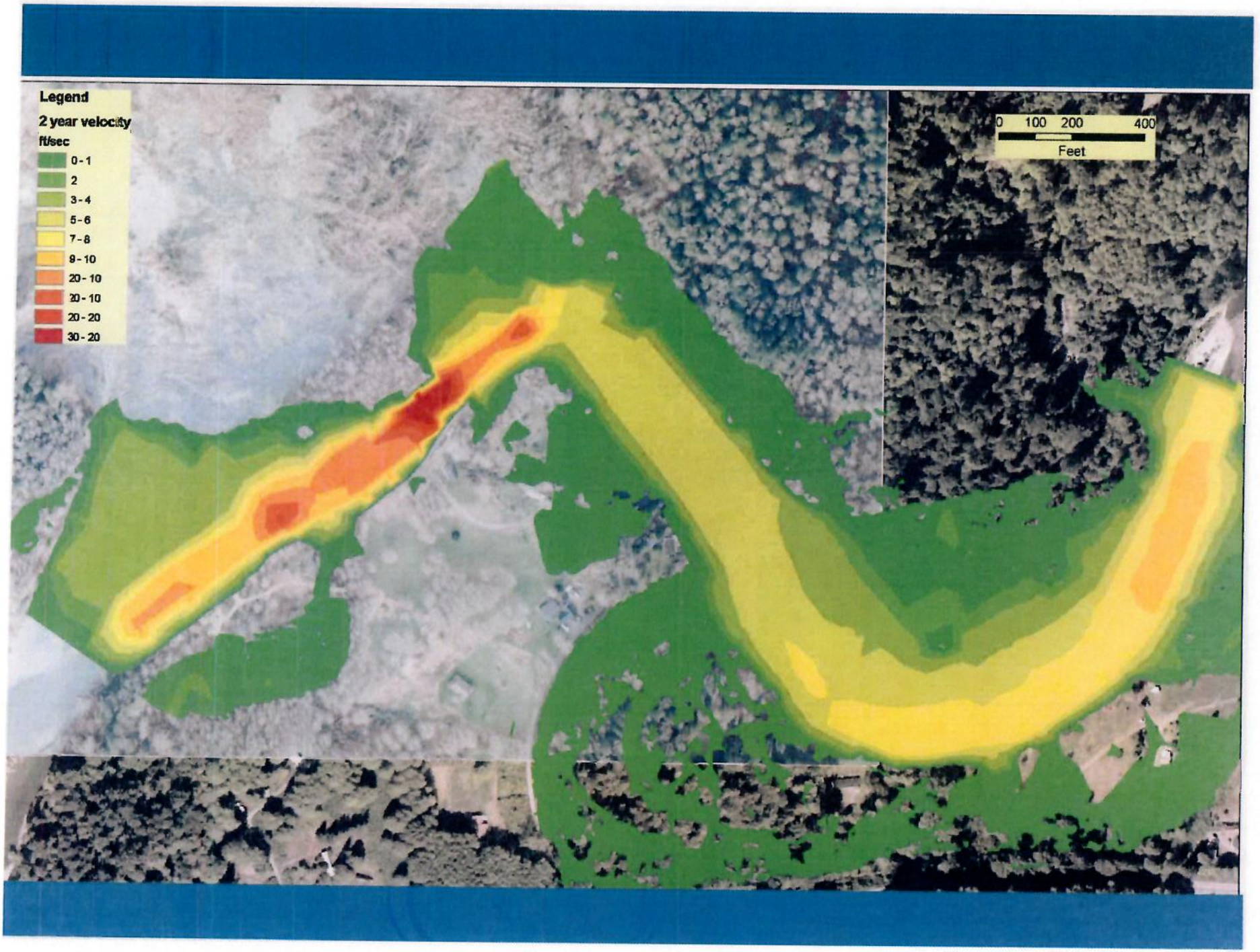
— Lots adjacent to river therefore riparian

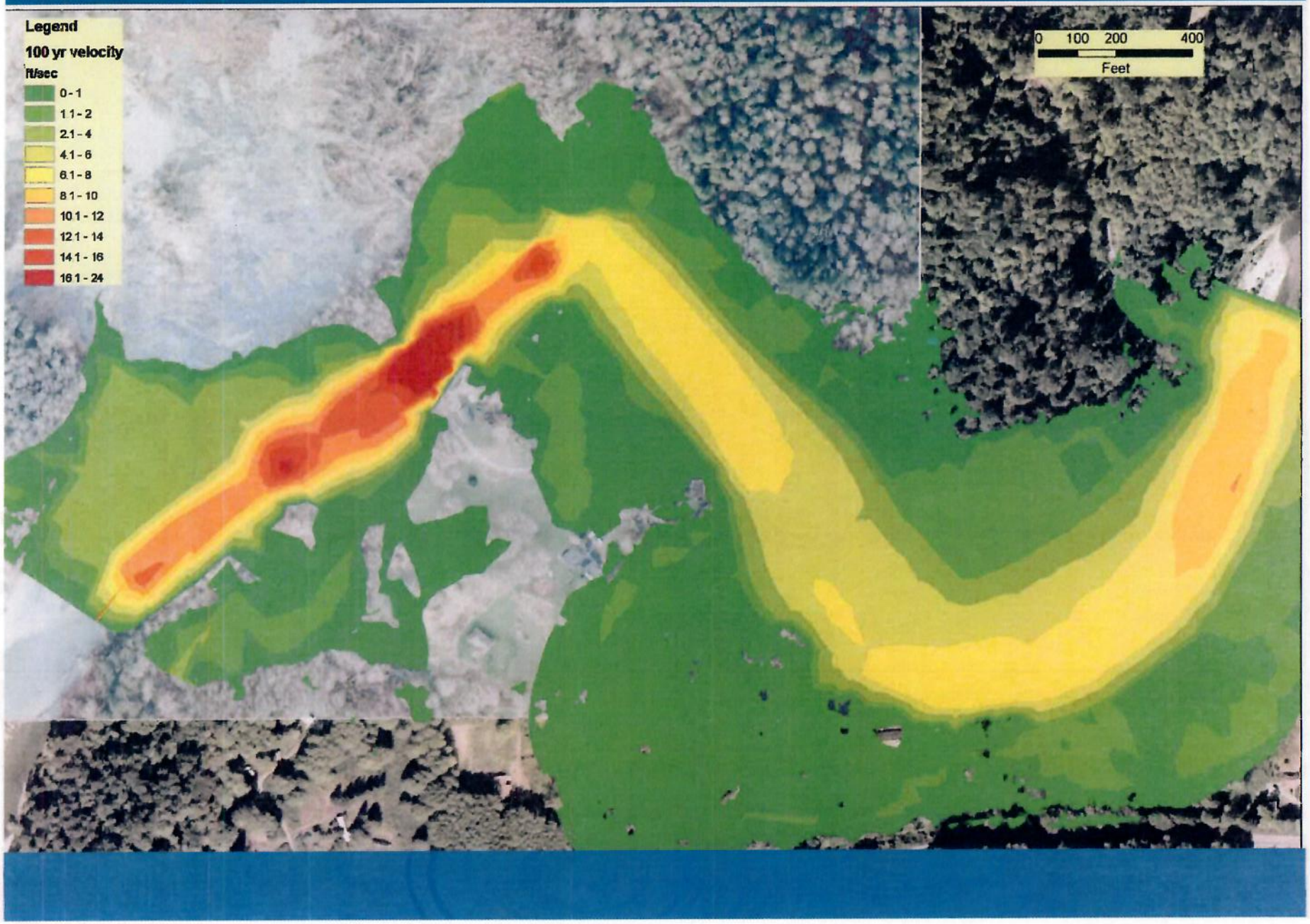
— None riparian lots with damages



Earlier photographs from August 2006 show that these trees were cut as part of constructing the revetment. Michelson Decl., Exs. 32-34. A February 2006 photo shows the pre-existing trees:

CORR CRONIN MICHELSON
BAUMGARDNER FOGG & MOORE LLP
1001 Fourth Avenue, Suite 3900
Seattle, Washington 98154-1051
Tel (206) 625-8600
Fax (206) 625-0900


Legend
2 year velocity
ft/sec
0 - 1
2
3 - 4
5 - 6
7 - 8
9 - 10
20 - 10
20 - 10
20 - 20
30 - 20
0 100 200 400
Feet


Legend
100 yr velocity
ft/sec
0 - 1
1.1 - 2
2.1 - 4
4.1 - 6
6.1 - 8
8.1 - 10
10.1 - 12
12.1 - 14
14.1 - 16
16.1 - 24
0 100 200 400
Feet

CERTIFICATE OF SERVICE

I, Michael Daudt, swear under penalty of perjury under the laws of the State of Washington to the following:

1. I am over the age of 18 and not a party to this action.

2. On February 27, 2018, I caused a copy of the foregoing document to be served on counsel of record in the following manner:

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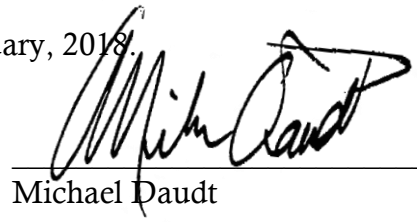
Timothy Leyh Randall Thomsen Kristin Ballinger Kellie McDonald Harrigan Leyh Farmer & Thomsen, LLP 999 3rd Ave. – Suite 4400 Seattle, WA 98104	_____ Messenger _____ US Mail _____ Facsimile __X__ Email

DATED this 30th day January, 2018.



Michael Daudt

DAUDT LAW PLLC

January 30, 2019 - 1:01 PM

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Appellate Court Case Title:	Gregory Regelbrugge, et al, Apps./X-Resps. v. Snohomish County, Resp./X-App. (763768)

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