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IN THE SUPREME COURT  
OF THE STATE OF WASHINGTON

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Supreme Court No. 90405-7

GERALD G. RICHERT, et al.,

Plaintiffs/Respondents

v.

CITY OF TACOMA,

Defendant/Appellant.

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Washington State Supreme Court

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ON PETITION FOR REVIEW FROM DIVISION II OF THE  
WASHINGTON STATE COURT OF APPEALS

Court Of Appeals No. 43825-9-II

AMICUS CURIAE MEMORANDUM IN SUPPORT OF REVIEW OF  
NORTHWEST HYDROELECTRIC ASSOCIATION, PUBLIC UTILITY  
DISTRICT NO. 1 OF SNOHOMISH COUNTY, WASHINGTON, AND  
THE CITY OF SEATTLE

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 ORIGINAL

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**I. INTRODUCTION AND INTEREST OF AMICUS CURIAE**

The Northwest Hydroelectric Association (“NWHHA”), the City of Seattle (“Seattle”), and the Public Utility District No. 1 of Snohomish County, Washington (“Snohomish”) (together “Hydropower *Amici*”) represent hydropower project owners and operators from the State of Washington, as well as others who rely on such projects and other riparian facilities that may be affected by the Court of Appeals’ decision in this case. Hydropower *Amici* respectfully urge this Court to accept review of the Court of Appeals’ decision for two fundamental reasons.

*First*, by allowing the Richerts to pursue damages for alleged invasions of the *same real property rights* City of Tacoma (“Tacoma”) condemned in *Funk*, the decision below places a cloud on long-established property rights acquired by other utilities.

*Second*, by *limiting riparian rights* to mere water usage, the Court of Appeals has introduced uncertainty and confusion into an important and broad area of Washington law.

NWHHA is a non-profit trade association that represents and advocates on behalf of the Northwest hydroelectric industry.<sup>1</sup> NWHHA is dedicated to the promotion of the Northwest region’s waterpower as a clean, efficient energy source while protecting the fisheries and environmental quality that characterize the region.

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<sup>1</sup> Members include Public Utility District No. 1 of Chelan County, Public Utility District No. 1 of Douglas County, Public Utility District No. 2 of Grant County, Public Utility District No. 1 of Lewis County, Public Utility District No. 1 of Okanogan County, Public Utility District No. 1 of Pend Oreille County, Seattle, Snohomish, and Tacoma.

Seattle is a municipal corporation organized as a first class city under the laws of the State of Washington. Seattle City Light, a department of Seattle, owns or is a licensee for several hydro projects, including the Skagit River Hydroelectric Project (combined generating capacity of 689 megawatt (“MW”)), the Boundary Hydroelectric Project (generating capacity of 1,022 MW), and several smaller hydro projects. These projects enable Seattle to provide electric power to over 408,000 customers in the city of Seattle and eight adjacent jurisdictions.

Snohomish is a municipal corporation of the State of Washington, formed for the purpose of providing electric and/or water utility service. Snohomish is the second largest consumer-owned electric utility in Washington State. Snohomish owns and operates several hydro projects in the State of Washington, including the Federal Energy Regulatory Commission (“FERC”) -licensed 112 MW Jackson Hydroelectric Project, has constructed the first new hydropower project built in Washington in the last 20 years, and is in the process of developing and assessing several additional small hydropower sites in the next five to 10 years. The collective energy output from Snohomish’s hydropower projects serve tens of thousands of Snohomish customers.

This appeal involves both the scope of riparian rights and the finality of judgments involving real property generally. Before constructing its hydropower project on the North Fork of the Skokomish River, as part of the 1921 *City of Tacoma v. Funk* condemnation proceeding, Tacoma acquired all of the riparian rights attached to the land

of downstream property owners. *See* CP 2894, 2900 (*Funk* Decree of Appropriation). These riparian rights are an important part of hydropower project operations because they allow the rights holder to vary the water flow past downstream property without further compensation or liability.

As representatives of developers, owners, and operators of hydropower, Hydropower *Amici* are deeply concerned about the ramifications of the Court of Appeal's decision. Hydropower *Amici* fear that, if not corrected, the decision has the potential to disturb settled property-rights expectations for operators of hydropower projects (and other riparian infrastructure) throughout the State of Washington. Further, by characterizing the scope of riparian rights as limited to the right to use water, the Court of Appeals' decision conflicts with established Washington law that *amici* have relied upon for decades. Hydropower *Amici* therefore urge this Court to accept review.

## II. STATEMENT OF THE CASE

Hydropower *Amici* adopt the Statement of the Case set forth in Tacoma's Petition for Review.

## III. ARGUMENT IN SUPPORT OF GRANTING REVIEW

### A. **This Court Should Grant Review to Protect the Ability of Project Owners and Operators to Rely upon Acquired Property Rights.**

Hydropower projects are an important source of electric power, producing approximately 75 percent of the electricity in Washington State each year.<sup>2</sup> In addition to generating electricity, hydropower projects help

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<sup>2</sup> *See* Washington Department of Fish & Wildlife, Energy Development Technical Assistance, *available at*

maintain the national electric system's stability, speed recovery when the electric grid is disrupted, and provide valuable base load and peaking power—thereby avoiding the need for additional power plants that rely on coal, natural gas, oil, nuclear, and other fuels. Moreover, hydropower is particularly well suited to integrating other renewable resources such as wind and solar power into the grid, and can help utilities meet their renewable resource portfolio requirements. Hydropower projects also “provide public benefits such as managed water supply, recreation, economic development and flood control while minimizing adverse impacts on environmental resources.”<sup>3</sup>

Almost all non-federally-owned hydropower projects are subject to the Federal Power Act's (“FPA”) comprehensive regulatory and licensing framework. Congress enacted the FPA (and its predecessor statute, the Federal Water Power Act of 1920) in order “to secure a comprehensive development of national resources.” *First Iowa Hydro-Elec. Coop. v. F.P.C.*, 328 U.S. 152, 180-81 (1946). Under the FPA, FERC has exclusive authority to issue licenses authorizing the construction, operation, and maintenance of new and existing hydroelectric projects.<sup>4</sup> See 16 U.S.C. §§ 797(e), 808, 817 (2006). To attract the enormous amount of capital

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<http://wdfw.wa.gov/conservation/habitat/planning/energy/hydro.html>. Washington has 1141 dams, located in all 39 counties, which include numerous hydropower projects potentially affected by a ruling here. See *Washington Department of Ecology, Inventory of Dams* (June 2014), <https://fortress.wa.gov/ecy/publications/publications/94016.pdf>.

<sup>3</sup> FERC, *Annual Report 2008* at 18, available at [http://www.ferc.gov/about/strat-docs/annual\\_rep.asp](http://www.ferc.gov/about/strat-docs/annual_rep.asp).

<sup>4</sup> Federally-operated projects, such as those operated by the Tennessee Valley Authority, Army Corps of Engineers, and the Bureau of Reclamation, are not licensed by FERC.



required to develop the nation's hydropower potential, Congress included safeguards in the FPA to help ensure positive returns on investments. For example, section 15 requires that licenses be issued on reasonable terms. *Id.* § 808(a)(1). Under section 6, FERC is authorized to issue licenses with terms of up to 50 years and is prohibited from amending licenses, once they are accepted, without the consent of the licensee. *Id.* § 799; *Pac. Gas & Elec. Co. v. FERC*, 720 F.2d 78, 83-84 (D.C. Cir. 1983). Section 28 restricts Congressional authority to alter license terms, or otherwise impair the rights of the licensee, once a license has been issued. 16 U.S.C. § 822.

The Court of Appeals' decision undercuts a foundational policy of the FPA "favoring the protection of licensees' expectations." *City of Seattle v. FERC*, 883 F.2d 1084, 1088 (D.C. Cir. 1989). The FPA contemplates that landowners will be compensated for use of their lands by licensees—generally through a one-time, up-front payment either to acquire fee title to rights attached to non-federal lands or to obtain a permanent easement to burden those rights. The underlying assumption of the statute is that the prospective licensee has the opportunity at the outset of construction or licensing—before investment commitments are made—to evaluate, negotiate for, or condemn whatever land rights may be necessary for the operation of the project. Having the ability to make reasonably accurate evaluations of the economic risks associated with hydropower facilities is essential to encourage investment in and maintenance of these important infrastructure projects.

In contrast to the policies underlying the FPA, the Court of Appeals' decision undermines the ability of hydropower owners and operators to rely upon settled expectations regarding the scope of acquired property rights. Although a condemnation judgment does not bar a subsequent claim "to take or damage a *distinct and separate property right* which was not specifically included in the condemnation proceedings," a condemnor who has paid for the right to "take and damage the specifically described property" cannot be compelled to pay additional compensation for damage to the same property right. *Great N. Ry. Co. v. City of Seattle*, 180 Wash. 368, 373, 39 P.2d 999 (1935) (emphasis added). Here, Tacoma condemned all of the riparian rights from downstream property owners along the North Fork of the Skokomish River. *See, e.g.*, CP 2894, 2900. Under these acquired rights, Tacoma is authorized to vary the quantity of water released from its hydropower project, including for maintenance, operation, or to comply with the terms and conditions of its license. *See* discussion *infra* part III.B; *see also Drainage Dist. No. 2 v. City of Everett*, 171 Wash. 471, 480-81, 18 P.2d 53 (1933) (downstream property owners cannot require a dam owner to continue dam operations unchanged for their benefit). But after the Court of Appeals' decision, potentially no condemnation decree will ever be res judicata regarding a dam operator's liability for property damage resulting from the diversion of water for public purposes.

Respondents attempt to minimize the significance of the Court of Appeals' decision by characterizing Tacoma's project as a unique

situation. Resp't Answer at 3, 12. But the interests in finality and in delineating the scope of riparian rights are not limited to projects that only involve hydropower operation, the FPA relicensing process, the Endangered Species Act, or certain river conditions. *See id.* Contrary to Respondents' contentions, the Court of Appeals' decision implicates *all* facilities, including dams, hydropower, irrigation, water supply, flood control, stormwater management, and other riparian projects, that involve the release or diversion of water. Accordingly, all of these projects are potentially subject to new lawsuits each time their license or operating requirements change, with claimants potentially seeking additional compensation for alleged damage to property interests previously condemned or acquired.

Without the ability to rely upon the finality of judgments involving real property interests, hydropower and other riparian project owners and operators will potentially lose any certainty with regards to their investment expectations. In addition, through exposure to subsequent lawsuits, these owners and operators will be subject to burdensome and time-consuming litigation for every change in operating or license condition that another party believes affects his or her property interest. These unanticipated impacts could undermine existing investment in and maintenance of hydropower and other projects, could discourage future investment in such projects, and could potentially cause certain projects to become uneconomic to continue to operate.

**B. This Court Should Grant Review to Correct the Court of Appeals' Misinterpretation of the Scope of Riparian Rights.**

By characterizing riparian rights as limited to water *use*, the Court of Appeals' ruling conflicts with case law establishing the broader scope of these rights.<sup>5</sup> As this Court has explained:

at common law every riparian proprietor is entitled to the natural flow of the water of a running stream through or along his land, in its accustomed channel, undiminished in quantity and unimpaired in quality, except as the accustomed flow may be changed by the act of God, and except as may be occasioned by the reasonable use of the stream by other like proprietors.

*Wallace v. Weitman*, 52 Wn.2d 585, 588, 328 P.2d 157 (1958). In addition to the *use* of water, riparian property owners have the right to have “the stream flow to and over their land as it is wont to flow by nature, without substantial change in quality or diminution in quantity.” *Mally v. Weidensteiner*, 88 Wash. 398, 405, 153 P. 342 (1915). Thus, riparian owners have a right not to have the level of a natural watercourse lowered and a right not to have it raised. *De Ruwe v. Morrison*, 28 Wn.2d 797, 805, 184 P.2d 273 (1947); *see also Mood v. Banchemo*, 67 Wn.2d 835, 840, 410 P.2d 776 (1966) (“riparian rights” include authority to open outlet, “thereby lowering the lake level to its natural level”). Contrary to the Court of Appeals' conclusion, riparian rights include more than water use, and also include the right to certain quantities of water flow.

Because riparian rights are property rights, they can be acquired by condemnation. A landowner whose land bounds a river, stream, lake, or

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<sup>5</sup> In their Answer, Respondents recognize that the scope of riparian rights is broader than the mere use of water. Resp't Answer to Pet. at 2 (“[Tacoma] claims riparian rights include more than the use of water, which is correct but beside the point.”).

salt water is a “riparian” owner. *Dep’t of Ecology v. Abbott*, 103 Wn.2d 686, 689, 694 P.2d 1071 (1985) (riparian rights derive from the ownership of land “contiguous to or traversed by a watercourse”). “Riparian rights” are among the bundle of specific rights in real property that may be separately conveyed by deed or condemnation judgment. *Kalama Elec. Light & Power Co. v. Kalama Driving Co.*, 48 Wash. 612, 617, 94 P. 469 (1908) (utility seeking to vary channel flow must first condemn downstream owners’ riparian rights); *Mally*, 88 Wash. at 406 (right of the riparian proprietor cannot be unwillingly deprived without compensation).

Respondents attempt to support the Court of Appeals’ decision by mischaracterizing the scope of rights acquired in the *Funk* proceeding. Specifically, Respondents state that their predecessors “were only paid for [Tacoma’s] diversion of the flows” and that “only part of their riparian rights were [taken].” Resp’t Answer at 2, 5. This interpretation is not supported by the language of the condemnation decree,<sup>6</sup> the applicable case law, and the general requirements inherent in dam operations. For example, the amount of water released downstream from a dam will vary depending upon a variety of factors, including the volume of inflow upstream, diversion for hydropower generation, environmental

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<sup>6</sup> The *Funk* condemnation Decree of Appropriation states that Tacoma acquired “the right, at any time hereafter, to take possession of, appropriate and use all of the waters, water rights, riparian rights, easements and privileges appertaining and appurtenant to the lands, real estate and premises, hereinabove described, together with the right to divert the waters of the North Fork of the Skokomish River, and the same is hereby appropriated and granted unto, and the title shall vest in fee simple in said City of Tacoma . . . , and its successors forever; . . . .” App. to Pet. at A-57 (emphasis added). Based on the plain language of the Decree, Tacoma acquired “all” of the riparian rights in addition to the right to divert the waters of the North Fork.

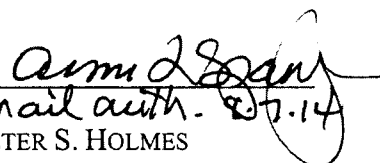
considerations, and maintenance of safe impoundment levels. Thus, as part of normal operations, dam owners and operators require the ability to release fluctuating volumes of water downstream without fear of liability every time they do so.

Accordingly, establishing the proper scope of riparian rights is essential for owners and operators of projects located in and adjacent to watercourses throughout the State. Without review and clarification by this Court, the Court of Appeals' decision introduces uncertainty and conflict with legal precedent regarding the scope of riparian rights, including what activities are included within riparian rights and potential liability associated with interference with those rights.

#### IV. CONCLUSION

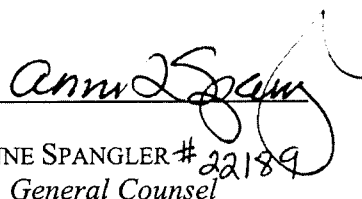
For the foregoing reasons, Hydropower *Amici* respectfully request that the Court accept review of the Court of Appeals' decision.

RESPECTFULLY SUBMITTED this 7th day of August, 2014.

By:   
per email auth. 8/7/14

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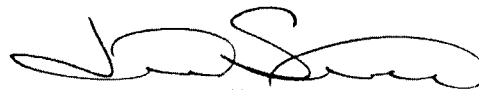
I, Jill Stelter, hereby certify that on this 7th day of August, 2014. I caused to be served via legal messenger a true and accurate copy of the foregoing upon the following parties:

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I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.



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## OFFICE RECEPTIONIST, CLERK

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**From:** OFFICE RECEPTIONIST, CLERK  
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RE: Gerald G. Richter, et al. v. City of Tacoma  
Supreme Court No. 90405-7

Dear Clerk:

Attached please find a copy of Amicus Curiae Memorandum in Support of Review of Northwest Hydroelectric Association, Public Utility District No. 1 of Snohomish County, Washington and The City of Seattle. Please file in the above referenced matter on behalf of:

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Should you have any questions, please do not hesitate to contact me.

Thank you.

Respectfully,

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