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COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

INDEMNITY INSURANCE COMPANY OF NORTH AMERICA; HIGHLANDS
INSURANCE COMPANY; INDUSTRIAL UNDERWRITERS INSURANCE
COMPANY; and THE CENTRAL NATIONAL INSURANCE OF OMAHA,

Respondents,

v.

CITY OF TACOMA; TACOMA DEPARTMENT OF PUBLIC UTILITIES,

Appellants.

REPLY BRIEF OF APPELLANTS

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TABLE OF CONTENTS

TABLE OF CONTENTS.....i

TABLE OF AUTHORITIES.....iii

I. ARGUMENT..... 1

 A. TACOMA IS ENTITLED TO COVERAGE FOR THE SKOKOMISH TRIBE SETTLEMENT BECAUSE THE DEVELOPMENT OF AGGRADATION ON THE SKOKOMISH RIVER WAS AN "OCCURRENCE", AND IT UNEXPECTEDLY RESULTED IN PROPERTY DAMAGE..... 1

 1. The "Occurrence" for Which Tacoma Seeks Coverage Is the Development of Aggradation on the Skokomish River and the Resulting Overbank Flooding and Raised Groundwater, Not Construction of the Cushman Project. 1

 2. The Insurers' Argument That the Only Relevant "Occurrence" Is the Construction of the Cushman Project Is Not Supported By Their Policy Language..... 4

 3. Summary 8

 B. EVEN IF CONSTRUCTION OF THE CUSHMAN PROJECT IS THE ONLY RELEVANT "OCCURRENCE", COVERAGE EXISTS BECAUSE AGGRADATION-RELATED PROPERTY DAMAGE WAS AN UNEXPECTED RESULT OF THAT CONSTRUCTION..... 8

 1. As a Matter of Law, Tacoma Did Not Expect That Construction of the Cushman Project Would Cause Increased Flooding or Raised Groundwater Levels. 9

2.	The Insurers' "Expect Some, Expect All" Theory Is Inapplicable Because Aggradation-Related Damage Is Fundamentally Different than Any Anticipated Damage from the Cushman Project.....	11
3.	The <i>Overton</i> Case Does Not Support the Insurers' "Expect Some, Expect All" Theory or a Denial of Coverage under the Facts of Our Case.	15
4.	The Fact That Some Property Damage Might Have Been "Foreseeable" from the Cushman Project Does Not Preclude Coverage for All Property Damage of Any Kind Relating to the Cushman Project.	21
C.	EVEN UNDER THE INSURERS' THEORY, CLEAR QUESTIONS OF FACT EXIST AS TO TACOMA'S EXPECTATION OF PROPERTY DAMAGE THAT PRECLUDE SUMMARY JUDGMENT.	22
D.	THE KITSAP COUNTY CASE DOES NOT CONTROL WHETHER A "WRONGFUL EVICTION" HAS OCCURRED UNDER THE FACTS OF THIS CASE.	24
II.	CONCLUSION.....	25

TABLE OF AUTHORITIES

WASHINGTON CASES

American Nat'l Fire Ins. Co. v. B&L Trucking & Construction Co., 82 Wn. App. 646, 920 P.2d 192 (1996), *affirmed*, 134 Wn.2d 413, 951 P.2d 250 (1998)..... 18

City of Redmond v. Hartford Accident & Indemnity Ins. Co., 88 Wn. App. 1, 943 P.2d 665 (1997)..... 19-20

Kitsap County v. Allstate Ins. Co., 136 Wn.2d 567, 964 P.2d 1173 (1998)..... 24

Overton v. Consolidated Ins. Co., 145 Wn.2d 417, 38 P.3d 322 (2002) 15-18, 20

Prudential Property & Casualty Ins. Co. v. Lawrence, 45 Wn. App. 111, 724 P.2d 418 (1986)..... 7

PUD No. 1 of Klickitat Co. v. International Ins. Co., 124 Wn.2d 789, 881 P.2d 1020 (1994)..... 7

Queen City Farms, Inc. v. Central Nat'l Ins. Co. of Omaha, 126 Wn.2d 50, 882 P.2d 703 (1994)..... 23

Safeco Ins. Co. v. Dotts, 38 Wn. App. 382, 685 P.2d 632 (1984)..... 13

State Farm Fire & Casualty Co. v. English Cove Assoc., Inc., 121 Wn. App. 358, 88 P.3d 986 (2004)..... 7

Town of Tieton v. General Ins. Co. of America, 61 Wn.2d 716, 380 P.2d 127 (1963)..... 19

Transcontinental Ins. Co. v. WPUDUS, 111 Wn.2d 452, 760 P.2d 337 (1988)..... 6

Western Nat'l Assurance Co. v. Hecker, 43 Wn. App. 816, 719 P.2d 954 (1986)..... 12-13, 15

OTHER CASES

Boeing Co. v. Aetna Casualty & Surety Co., No.
C86-352 (W.D. Wash. 1990)13

Time Oil Co. v. Cigna Property & Casualty Ins. Co.,
743 F. Supp. 1400 (W.D. Wash. 1990)24

I. ARGUMENT

A. TACOMA IS ENTITLED TO COVERAGE FOR THE SKOKOMISH TRIBE SETTLEMENT BECAUSE THE DEVELOPMENT OF AGGRADATION ON THE SKOKOMISH RIVER WAS AN "OCCURRENCE", AND IT UNEXPECTEDLY RESULTED IN PROPERTY DAMAGE.

1. The "Occurrence" for Which Tacoma Seeks Coverage Is the Development of Aggradation on the Skokomish River and the Resulting Overbank Flooding and Raised Groundwater, Not Construction of the Cushman Project.

The Insurers' brief is remarkable because it completely ignores Tacoma's lead argument. All of the Insurers' arguments and cases address whether an event – the construction of the Cushman Project – caused some property damage that was expected. (Brief of Respondents at 13, 14, 15, 17, 20, 30). However, the definition of "occurrence" in the Insurers' policies is broad, and does not just refer to an "event". The definition also includes a "happening" and a "continuous or repeated exposure to conditions". As a result, an occurrence cannot be limited to the construction or even the operation of the Cushman Project. Under the policies' definition, the development of aggradation on the Skokomish River also qualifies as an occurrence. And there is absolutely no question that the aggradation was unexpected or that the aggradation unexpectedly resulted in flood and groundwater related damage.

One of the flaws in the Insurers' argument is that it disregards ignores the language of their own policies. The insuring agreement in these policies is simple – the policies extend coverage for Tacoma's liability on account of property damage "caused by or arising out of an occurrence". (*E.g.*, CP 1364). The definition of "occurrence" has two components: (1) there must be "an accident or a happening or event or a continuous repeated exposure to conditions", and (2) that happening must "unexpectedly and unintentionally" result in property damage. (*E.g.*, CP 1366). Under this language, if the insured's liability arises out a happening that unexpectedly results in property damage, there is coverage as a matter of law.

Tacoma's coverage claim easily falls within this definition. First, the property damage for which Tacoma is liable relates to increased overbank flooding and raising of groundwater levels. The Skokomish Tribe alleged this aggradation-related property damage in its complaint. (CP 444 at ¶ 145; CP 445 at ¶ 148). In addition, Tacoma's settlement agreement with the Tribe specifically included aggradation-related damages. (CP 1685-86, 1689-90).

Second, the property damage was caused by the development of aggradation, which clearly constitutes either a "happening" or a "continuous or repeated exposure to conditions". Significantly, the definition of occurrence in the Insurers' policies is expressed in the

disjunctive. The occurrence that triggers coverage is not limited to a single act or event, such as construction of the Cushman Project. An occurrence that will trigger coverage also includes a process, such as the development of aggradation.

Third, it is beyond dispute that aggradation on the Skokomish River "unexpectedly and unintentionally" resulted in the increased overbank flooding and raised groundwater levels that resulted in property damage to the Tribe. During the time of the Insurers' policies (1975-1985), nobody had figured out what was causing the groundwater and flooding problems. It was not until 1989 that the Tribe first raised the possibility that aggradation was causing property damage. (CP 877). And it was not until the mid-1990s that the Tribe, Tacoma and regulatory agencies even began investigating the aggradation problem. (CP 837-838).

As demonstrated in this analysis, the "occurrence" for which Tacoma is claiming coverage is the development of aggradation on the Skokomish River (the "happening" or "continuous or repeated exposure to conditions") which unexpectedly and unintentionally resulted in damage relating to increased overbank flooding and raised groundwater levels (the property damage). Tacoma's liability arose out of and was based on that occurrence.

Identifying aggradation as the relevant occurrence is especially significant in this case because it renders immaterial the Insurers' argument (discussed below) that Tacoma's expectation of "some" property damage from construction of the Cushman Project eliminates all coverage. If the focus is on aggradation, whether or not Tacoma expected some property damage from the construction of the Cushman Project makes no difference. Clearly, Tacoma did not expect "some" property damage from aggradation – or even the aggradation itself – until after the Insurers' policies had expired. Therefore, if the relevant occurrence is the development of aggradation, the Insurers "expect some, expect all" theory is inapplicable.

2. The Insurers' Argument That the Only Relevant "Occurrence" Is the Construction of the Cushman Project Is Not Supported By Their Policy Language.

The Insurers argue that the Court should focus on the larger event that set the damage-causing process in motion – construction of the Cushman Project – rather than the specific happening or repeated exposure to conditions that actually caused the damage. But the Insurers never explain how the definition of "occurrence" in their policies would apply only to construction of the Cushman Project, and not to the development of aggradation. As discussed above, the Insurers' focus on an "event" is misguided. Under the policy definition, the only question this Court must answer is whether the development

of aggradation on the Skokomish River is "an accident or a happening or event or a continuous or repeated exposure to conditions". If so, that aggradation must be treated as an occurrence. The policy language does not support any other result.

The Insurers point out that the construction and operation of the Cushman Project caused the aggradation - *i.e.*, "but for" the construction and operation of the Cushman Project, the aggradation would not have occurred. However, the policy language does not attribute any significance to that fact. The Insurers' policies do not provide that the only occurrence that can trigger coverage is the general event that sets into motion a damage-causing happening or even the predominant cause of that happening. The policy language focuses on the particular happening that unexpectedly causes damage.

A simple example illustrates that principle. Consider an incident where someone spills a drink in the concourse of Safeco Field, and another person slips in the spill and falls. That injury arose out of the construction of Safeco Field - but for the construction of Safeco Field, the injury never would have occurred. However, it would be nonsense to suggest that the only "occurrence" for this incident was the construction of Safeco Field. The occurrence was the spilling of the drink and/or the failure to clean it up. As long as that occurrence

unexpectedly resulted in bodily injury, there would be coverage under the language of the Insurers' policies.

The policy language also does not support the Insurers' implication that there can only be a single occurrence that triggers coverage. The insuring agreement states that coverage exists for property damage caused by an occurrence. Under this language, there is no reason that both the development of aggradation and construction of the Cushman Project could constitute occurrences. In fact, Washington law recognizes that particular harm can arise from multiple occurrences. *See, e.g., Transcontinental Ins. Co. v. WPUDUS*, 111 Wn.2d 452, 466-67, 760 P.2d 337 (1988). In this case, it is easy to see that there may be many occurrences arising out of the construction and maintenance of the Cushman project. The Insurers' policies provide that coverage exists for liability arising out of any one of those occurrences, if it unexpectedly results in property damage.

Finally, the Insurers argue that the Tribe asserted other claims and theories of liability that have nothing to do with aggradation-related property damage. Tacoma certainly agrees. Further, Tacoma recognizes that there may be certain events or happenings where the resulting property damage was expected, and therefore no coverage exists for those events or happenings. However, the fact that Tacoma may not be able to claim coverage for all occurrences relating to the

Cushman Project makes no difference because Tacoma is not requesting coverage for all such occurrences. Tacoma is requesting coverage for a single occurrence – the development of aggradation on the Skokomish River, and the resulting, unexpected damage.

Further, the fact that there may be no coverage for certain property damage relating to the Cushman Project does not preclude coverage for unexpected, aggradation-related property damage. It is not unusual that a settlement or a judgment involves both covered and uncovered claims. Under Washington law, if the covered and uncovered claims arise out of the "same factual core", no allocation of a settlement or judgment is required and the insurer is liable for the entire amount. *PUD No. 1 of Klickitat Co. v. International Ins. Co.*, 124 Wn.2d 789, 810, 881 P.2d 1020 (1994). That is the situation in our case. Even if the claims do not arise out of the same factual core, the solution is to allocate any settlement or judgment between the covered and uncovered claims if there is a reasonable basis for allocation. *See State Farm Fire & Casualty Co. v. English Cove Assoc., Inc.*, 121 Wn. App. 358, 370-71, 88 P.3d 986 (2004). And the insurer has the burden of proof with regard to any allocation. *See Prudential Property & Casualty Ins. Co. v. Lawrence*, 45 Wn. App. 111, 120-21, 724 P.2d 418 (1986).

3. Summary

The Insurers cannot refute Tacoma's assertion – based on the plain language of the Insurers' own policies – that the aggradation of the Skokomish River and the resulting unexpected property damage constitutes an "occurrence". As a result, there is coverage for Tacoma's liability relating to that aggradation-related property damage as a matter of law. And because construction of the Cushman Project is not the relevant occurrence, whether or not Tacoma expected "some" damage from that construction is completely irrelevant.

B. EVEN IF CONSTRUCTION OF THE CUSHMAN PROJECT IS THE ONLY RELEVANT "OCCURRENCE", COVERAGE EXISTS BECAUSE AGGRADATION-RELATED PROPERTY DAMAGE WAS AN UNEXPECTED RESULT OF THAT CONSTRUCTION.

Even if the Court for some reason determines that construction of the Cushman Project is the only possible occurrence, Tacoma still is entitled to coverage under the facts of this case. There is no genuine issue of material fact that Tacoma did not expect the construction or operation of the Cushman Project would result in aggradation, or would result in the increased overbank flooding and raised groundwater levels that led to Tacoma's liability. Further, the fact that Tacoma may have expected some property damage relating to the Cushman Project that is completely different from the damage giving rise to Tacoma's liability is not enough to preclude coverage.

1. As a Matter of Law, Tacoma Did Not Expect That Construction of the Cushman Project Would Cause Increased Flooding or Raised Groundwater Levels.

The Insurers make a half-hearted attempt to argue that Tacoma did expect that the Cushman Project would cause flooding and groundwater problems. However, the Insurers' "evidence" is so lacking that it does not even create a material question of fact as to Tacoma's expectation regarding flooding and raised groundwater levels.

The only evidence the Insurers' submit regarding flooding is that in the 1950s Tacoma was involved in public discussions on flood control and the Tribe was claiming damages from flooding. (Brief of Respondents at 5). Their citation for this argument is CP 162-165 and CP 167-171.

Even a cursory review of the Insurers' citations and related materials demonstrates that the discussion in the 1950s related to seasonal flooding of the Skokomish River, and nobody ever contended that the Cushman Project was responsible for the flooding. In fact, a summary document drafted in 1958 demonstrated that the Cushman Project had been operated to prevent seasonal flooding.

A small measure of flood control has been achieved incidental to the development of power on the North Fork of the Skokomish. Included in this power system constructed by the City of Tacoma is a 275 foot high concrete arch dam which created a 440,000 acre foot reservoir Although this reservoir is primarily for power purposes it has been the practice to hold the water level about 10 feet below

maximum capacity during the flood season. This practice which is entirely voluntary has reduced the amount of flood water coming down the North Fork.

(CP 184-185) (emphasis added).

With regard to groundwater, the only "evidence" the Insurers submit is that the Federal Power Commission in 1931 required the City to install groundwater gauging wells on the Skokomish Reservation, cited in CP 160. However, this document – which simply requests permission to install groundwater wells on the Reservation – does not suggest that the Cushman Project was raising groundwater levels or causing any other groundwater problems. There are a number of reasons why the government might require monitoring of groundwater conditions.

The Insurers also quote from the trial court's oral ruling in the Great American summary judgment motion, which stated that Tacoma "admitted" that the Cushman Project had caused "property damage in the form of ground water impact" in the 1930s. (CP 1249). The trial judge's ruling does not constitute evidence, and the court's comments are immaterial because the standard of review is de novo. In addition, the trial court did not explain where it obtained the notion that groundwater-related damage was occurring in the 1930s or that Tacoma admitted that the Cushman Project had caused this damage. There is nothing in the record to support this finding, and it is incorrect.

In the absence of any evidence from the Insurers, as a matter of law the construction and maintenance of the Cushman Project "unexpectedly" resulted in aggradation-related flooding and groundwater problems. As a result, under the plain language of the Insurers' policies, the construction and maintenance of the Cushman Project do constitute an occurrence that triggers coverage for Tacoma's liability arising from this unexpected damage.

2. The Insurers' "Expect Some, Expect All" Theory Is Inapplicable Because Aggradation-Related Damage Is Fundamentally Different than Any Anticipated Damage from the Cushman Project.

The Insurers' primary argument – and the argument adopted by the trial court – is that if Tacoma expected the Cushman Project to cause "some" property damage, coverage is precluded for all property damage related in any way to the Cushman Project. This is the so-called "expect some, expect all" theory. This concept finds some support in Washington case law, but only when the magnitude of damage is greater than expected. Washington law does not support the position that expectation of one type of property damage can preclude coverage for a completely different type of unexpected damage.

a. *Hecker* "Rule"

The Insurers make it seem like their "expect some, expect all" theory represents well-settled Washington law. In fact, this theory derives from a single sentence in a single case – *Western Nat'l Assurance Co. v. Hecker*, 43 Wn. App. 816, 719 P.2d 954 (1986). In *Hecker*, the claimant sued the insured for injuries caused by a deliberate act of anal intercourse. In seeking coverage, the insured argued that he did not intend to cause any significant injury. The court stated: "Once intent to cause injury is found, it is immaterial that the actual injury caused is of a different character or magnitude than that intended." *Id.* at 825.

The Insurers cite to a few other cases that reference *Hecker*, but these cases involve intent rather than to elaborate on the "different character or magnitude" comment. No Washington case has cited or followed this "rule" from *Hecker*. And no Washington case has applied this "rule" to expected injury – *Hecker* involved intentional injury.

b. Different Magnitude Than Expected

Tacoma generally agrees with the principle expressed in *Hecker* that if some property damage is expected, coverage cannot exist for the same type of property damage even if the magnitude of the harm is greater than expected. For instance, if Tacoma had expected some aggradation-related flooding, it could not claim coverage just because

the flooding was worse than expected. This was the rule stated in *Boeing Co. v. Aetna Casualty & Surety Co.*, No. C86-352 (W.D. Wash. 1990) in an unpublished jury instruction the Insurers cite at page 25 of their brief. The jury instruction adopted in that case reads as follows:

If the insured expects or intends some degree of damage to occur, it is deemed to have expected or intended the damage that did occur even if the actual damage proves to be more serious, more widespread, or longer-lasting than the damage the insured expected or intended.

(Brief of Respondents at 25) (emphasis added). A similar concept was acknowledged in *Safeco Ins. Co. v. Dotts*, 38 Wn. App. 382, 685 P.2d 632 (1984), where the court found no coverage when the insured intended to harm the claimant by slapping him in the face but the harm – unexpected death – was greater in magnitude.

The "different magnitude" aspect of the *Hecker* "rule" is inapplicable here. As discussed above, Tacoma did not expect any increased overbank flooding or any raised groundwater levels as a result of the construction and operation of the Cushman Project.

c. Different Type of Damage

The Insurers focus on the "different character" aspect of *Hecker*. However, the court in *Hecker* did not explain what it meant by "different character". And no other Washington case has applied or even cited to this aspect of *Hecker*.

The Insurers argue that the expectation of any type of damage at all relating to the Cushman Project precludes coverage in perpetuity for any and all other damage related in any way to the Cushman Project, no matter how different the types of damage. This is an aggressive, radical position. A boat is damaged by dam operations? No coverage. A visitor slips and falls on the Cushman Project premises? No coverage. A power line running from the Cushman Project malfunctions and starts a fire? No coverage. All because in the 1920s Tacoma thought that building the Cushman Project might cause some completely unrelated harm.

Tacoma submits that precluding coverage for one type of damage because of the insureds' expectation of a completely different type of damage would be absurd. The only rule that makes sense is to limit the "expect some, expect all" approach to the same type of damages and to the magnitude of such damage.

Consider again the Safeco Field example. Assume that in order to improve sight lines the Mariners decided to reduce the coverage of screens behind home plate, fully knowing that this action would result in people being injured by foul balls. In that respect, it could be argued that the Mariners could not claim coverage for "expected" injuries caused by foul balls in the areas where the screens were removed. But under those circumstances, it obviously would make no sense to

also preclude coverage when someone slips on a spilled drink and is injured. For that matter, it would make no sense to preclude coverage for a fan injured by a home run ball in an area on the opposite side of the stadium from the removed screens. Regardless of whether the Mariners would expect injuries behind home plate, they certainly would not expect the other, completely different injuries.

3. The *Overton* Case Does Not Support the Insurers' "Expect Some, Expect All" Theory or a Denial of Coverage under the Facts of Our Case.

The Insurers claim that *Overton v. Consolidated Ins. Co.*, 145 Wn.2d 417, 38 P.3d 322 (2002), supports application of its "expect some, expect all" theory. However, the court in *Overton* did not hold or even suggest that the expectation of some property damage can preclude coverage for a completely different type of unexpected property damage. *Overton* does support the "different magnitude" aspect discussed in *Hecker* – once an insured has notice that property damage is occurring, it cannot claim coverage for that property damage even if it turns out to be worse than expected. But *Overton* actually supports Tacoma's argument that it is only the expectation of the property damage for which the insured is liable that will preclude coverage and not the expectation of some property damage unrelated to the insured's liability.

Overton has nothing to do with the Insurers' argument in this case is that the expectation of any type of property damage relating to the Cushman Project precludes coverage for all other property damage in any way connected with the Cushman Project, no matter how different. Instead, the facts of *Overton* present a simple scenario where the insured had notice of property damage and then later was held liable for that exact same damage. As a result, *Overton* cannot support the Insurers' argument in this case.

In *Overton*, the insured operated an electrical transformer manufacturing and repair facility which used various hazardous materials, including PCBs. 145 Wn.2d at 421. In 1976 the EPA took a soil sample from the insured's property that revealed elevated levels of PCB contamination. WDOE regulators informed the insured of the test results, but he denied there was a problem and took the position that it was not his responsibility to clean up the soil even if it was contaminated. *Id.* at 422. After receiving this notice, the insured purchased the insurance policy at issue. *Id.* Years later, the then-owner of the property discovered the presence of PCBs and sued the insured. *Id.* at 422-23.

The court recognized that whether an insured "expects" property damage is based on a subjective standard. *Id.* at 425. Further, it noted that coverage is precluded only after the insured knew with

"substantial probability" that the property damage had occurred. *Id.* However, the court rejected the notion that the insured had to receive some "official notification" of liability under state law. *Id.* at 425-26. Instead, it was enough that the insured received actual notice of the property damage. The court concluded: "The dispositive issue is not *how* the insured was notified of property damage, but *whether* the insured has such notice prior to purchasing the policy." *Id.* at 426 (italics in original).

Based on this standard, the court had little trouble finding that the insured expected property damage. The EPA specifically notified the insured of the presence of PCBs, and produced authenticated reports to support this notice. *Id.* at 429. The fact that the liability did not arise until years later was insignificant. Once the insured received notice of PCB contamination, that contamination was not unexpected. *Id.* at 431.

Overton would apply to our case if Tacoma had received actual notice even back in the 1920s that construction of the Cushman project would cause aggradation that would increase overbank flooding and raised groundwater levels. However, Tacoma received no such notice. There is no evidence that aggradation or aggradation-related damages were expected by anybody until the late 1980s.

The facts in *Overton* would be similar to the facts of our case if the insured received notice of PCB contamination and then years later was sued because somebody tripped and fell on his property. But there is nothing in the *Overton* decision that even hints that notice of PCB contamination would have precluded coverage for a completely different type of injury arising out of the property.

In fact, the court in *Overton* made it clear that in order to preclude coverage, the property damage which the insured expected must be the same property damage for which the insured subsequently was held liable. The court twice included this limitation in framing the case issues.

Under the language of the policy, the proper question is whether [the insured] expected the property damage that eventually resulted in the cost of cleaning up the [plaintiffs'] property.

145 Wn.2d at 428 (emphasis added).

The starting point is whether there was an "occurrence." This is in turn determined by whether [the insured] expected or intended the "property damage" that eventually resulted in damages in the form of clean up costs to the [plaintiffs].

Id. at 429 (emphasis added). This same rule was applied in *American Nat'l Fire Ins. Co. v. B&L Trucking & Construction Co.*, 82 Wn. App. 646, 659-60, 920 P.2d 192 (1996), *affirmed*, 134 Wn.2d 413, 951 P.2d 250 (1998).

The Insurers cite to a few other cases that they claim support their position, but these cases deal with the same scenario as *Overton* – the insured has notice of the exact same property damage for which the insured was claiming coverage. In *Town of Tieton v. General Ins. Co. of America*, 61 Wn.2d 716, 380 P.2d 127 (1963), the insured was warned that construction of a sewage lagoon could contaminate a water well on adjacent property. The lagoon was constructed, and the water well did become contaminated. *Id.* at 717-20. The court found that the insured's liability did not arise from an "accident" because the exact same damage that was predicted ultimately occurred. *Id.* at 722. However, there is no indication that the court would have precluded coverage if construction of the lagoon had caused a completely different type of damage – i.e., if the lagoon had breached and flooded neighboring property.

In *City of Redmond v. Hartford Accident & Indemnity Ins. Co.*, 88 Wn. App. 1, 943 P.2d 665 (1997), the insured routinely discharged acidic waste into a municipal sewer system without treating the waste to reduce the acidity, in violation of its waste discharge permits. The sewer authority repeatedly notified the insured that if it continued to unlawfully discharge the waste it would be held liable for any sewer damage caused by the discharges. Eventually, the discharges did cause extensive damage to the sewer pipes. *Id.* at 4-5. The court

denied coverage because the damage was expected. The court found that the insured had clear knowledge that damage was likely to occur if it continued to discharge excessively acidic waste. *Id.* at 7-8. But there is no indication that the court would have denied coverage if the discharge of acidic waste had caused some completely different and unexpected damage.

Overton stands for a basic, non-controversial proposition – that once an insured received actual notice that property damage has occurred, that property damage is "expected" even if the insured does not believe it is liable for the property damage, if the liability arises years later, or if the property damage turns out to be worse than expected. *Overton* clearly is inapplicable in our case because Tacoma did not receive any type of notice that aggradation was occurring or causing property damage until after the Insurers' policies had expired.

Town of Tieton and *City of Redmond* also highlight a basic rule – that if the insured is expressly warned that a specific type of property damage will occur if the insured engages in certain conduct, the insured will be deemed to have expected property damage when it does occur. Again, these cases are inapplicable here. Tacoma was never warned until after the Insurers' policies had expired that continued operation of the Cushman Project could cause aggradation or aggradation-related property damage.

4. The Fact That Some Property Damage Might Have Been "Foreseeable" from the Cushman Project Does Not Preclude Coverage for All Property Damage of Any Kind Relating to the Cushman Project.

The Insurers make several references to foreseeability, and suggest that because some property damage may have been foreseeable if the Cushman Project was constructed, Tacoma cannot claim coverage for any property damage relating in any way to the Cushman Project. Foreseeability certainly is an element of insurance coverage, and there can be no coverage once an insured expects or knows that specific property damage is occurring. However, the notion that the mere foreseeability of some general, unspecified damage can preclude all insurance coverage is absolutely incorrect, and would turn insurance law upside down. The only reason an insured ever purchases insurance coverage is because in the abstract, some property damage or bodily injury is foreseeable. This type of foreseeability does not preclude insurance coverage. Only if a specific occurrence is expected or known can an insurer deny coverage.

A few examples illustrate this crucial distinction between the foreseeability of some damage and expectation of specific damage. For a trucking company or taxi company, it is a statistical certainty that at some point during the policy period one of the insured's vehicles will be involved in an accident and cause property damage or bodily injury. The certainty that some claim will arise is the very reason such a

company purchases insurance. Similarly, grocery stores know that at some point customers will slip and fall on spilled or dropped items and, the Mariners even known that some fans at Safeco Field will be hit with foul balls. That general foreseeability does not preclude insurance coverage. Otherwise, it would be hard to imagine an insurance policy providing any coverage at all.

That is the situation with Tacoma's construction and operation of the Cushman Project. When a major hydroelectric complex is constructed and operated, it is inevitable that some property damage or bodily injury will result. Tacoma might have suspected that at some point over an 80-year period some property damage would arise from the Cushman Project. But that type of general foreseeability cannot preclude summary judgment when some unknown, unexpected specific property damage occurs. What matters in this case is that the specific property damage giving rise to Tacoma's liability to the Tribe – aggradation-related flooding and raised groundwater levels – was completely unknown and unexpected.

C. EVEN UNDER THE INSURERS' THEORY, CLEAR QUESTIONS OF FACT EXIST AS TO TACOMA'S EXPECTATION OF PROPERTY DAMAGE THAT PRECLUDE SUMMARY JUDGMENT.

The discussion above has demonstrated that Tacoma is entitled to coverage as a matter of law for aggradation-related property damage. However, even if all the Insurers' legal arguments and

theories are correct, summary judgment still is not appropriate in this case. Clear questions of fact exist as to whether Tacoma had a subjective expectation of a substantial probability that property damage had occurred before expiration of the Insurers' policies.

The Insurers do not dispute that whether an insured expects property damage must be analyzed using a subjective standard. *E.g., Queen City Farms, Inc. v. Central Nat'l Ins. Co. of Omaha*, 126 Wn.2d 50, 64-69, 882 P.2d 703 (1994). The focus is on "the subjective state of mind of the insured with respect to the property damage." *Overton*, 145 Wn.2d at 425.

Tacoma presented extensive evidence in the trial court – discussed at pages 21-40 of Tacoma's original brief – that it had no subjective expectation that the Cushman Project was causing any property damage. The Tribe may have complained about the Cushman Project and even filed a number of lawsuits, but Tacoma subjectively believed that these complaints were meritless. At the very least, the evidence must be presented to a jury to determine Tacoma's "subjective state of mind".

Summary judgment is particularly inappropriate under the substantial probability standard. The Insurers try to explain away the court's adoption of this standard in *Overton*, but the plain language of that case controls. The court acknowledged that "property damage

that is expected or intended by the insured does not warrant coverage." *Id.* at 425. In the very next sentence, the court stated that "the risk of liability was no longer unknown when the insured received notice indicating a "substantial probability" the loss would occur. *Id.*, quoting *Time Oil Co. v. Cigna Property & Casualty Ins. Co.*, 743 F. Supp. 1400, 1414-15 (W.D. Wash. 1990) (emphasis added).

The Insurers argue that the court in *Overton* was referring to the standard for a "known loss" defense, not for the occurrence requirement. However, the placement of the substantial probability discussion clearly shows that the court was referring to the occurrence requirement. 145 Wn.2d at 425. Further, the court in *Time Oil* applied the substantial probability standard while analyzing the occurrence requirement, not any known loss defense. 743 F. Supp. at 1412-15.

The conclusion is inescapable that the standard for expected injury is whether the insured knew with substantial probability that property damage had occurred. The Insurers did not show the absence of any genuine material issue of fact on the issue of whether Tacoma subjectively expected with substantial probability that the Cushman Project was causing any property damage. Accordingly, summary judgment was inappropriate under any legal theory.

D. THE KITSAP COUNTY CASE DOES NOT CONTROL WHETHER A "WRONGFUL EVICTION" HAS OCCURRED UNDER THE FACTS OF THIS CASE.

The Insurers do little more than cite to *Kitsap County v. Allstate Ins. Co.*, 136 Wn.2d 567, 964 P.2d 1173 (1998), to support their argument that the Tribe's complaint did not allege any "wrongful eviction". Tacoma will not repeat the arguments in its opening brief, but *Kitsap County* can be distinguished and does not control the outcome of this case. Further, the Insurers did not define "wrongful eviction" in their policies, and the policy is at least ambiguous. Finally, the Tribe's complaint did allege facts to support a wrongful eviction during the Insurers' policy periods, which is enough to trigger coverage.

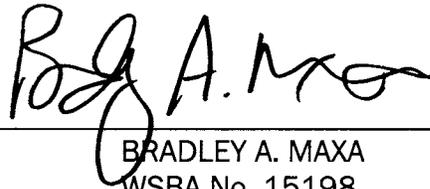
II. CONCLUSION

Appellant City of Tacoma and Tacoma Department of Public Utilities respectfully request that this Court reverse the trial court, and rule that the Insurers have an obligation to provide coverage for Tacoma's settlement of aggradation-related property damage claims.

Respectfully submitted this 10 day of May, 2010.

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