

64247-2

64247-2

No. 64247-2-I

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.

BRIEF OF APPELLANTS

GORDON THOMAS HONEYWELL LLP
Attorneys for Appellants

BRADLEY A. MAXA
WSBA No. 15198

1201 Pacific Avenue, Suite 2100
P.O. Box 1157
Tacoma, WA 98401-1157
(253) 620-6500

2010 JAN 19 PM 4:57

FILED
COURT OF APPEALS, DIV. I
STATE OF WASHINGTON

TABLE OF CONTENTS

TABLE OF CONTENTS.....i

TABLE OF AUTHORITIES.....iii

I. INTRODUCTION..... 1

II. ASSIGNMENTS OF ERROR..... 4

III. STATEMENT OF CASE..... 5

IV. ARGUMENT.....14

 A. STANDARD OF REVIEW14

 B. THE RELEVANT "HAPPENING" UNDER THE INSURERS' DEFINITION OF OCCURRENCE IS AGGRADATION OF THE SKOKOMISH RIVER, AND THAT HAPPENING UNEXPECTEDLY RESULTED IN PROPERTY DAMAGE.....15

 C. THE RELEVANT PROPERTY DAMAGE FOR DETERMINING TACOMA'S EXPECTATION IS AGGRADATION-RELATED OVERBANK FLOODING AND RAISED GROUNDWATER LEVELS, NOT SOME OTHER POTENTIAL DAMAGE THAT DID NOT RESULT IN ANY LIABILITY FOR TACOMA.18

 1. Whether Tacoma Expected Property Damage Is Determined Based on a Subjective, "Substantial Probability" Standard.....19

 2. Concerns in the 1920s about Flooding if the Dams Failed and Lowered Groundwater Levels Cannot Preclude Coverage because that Anticipated Damage Never Materialized and Could Not Give Rise to Tacoma's Alleged Liability.....21

 3. The Alleged Damage to the Tribe's Fishing, Hunting and Shellfish Gathering Rights Cannot Preclude Coverage for Unexpected Aggradation-Related Property Damage.31

4.	Tacoma's Condemnation of Riparian Rights before the Cushman Project Was Constructed Cannot Affect Coverage for Aggradation-Related Property Damage.....	39
D.	TACOMA'S DISPOSSESSION OF THE TRIBE'S PROPERTY CONSTITUTED A "WRONGFUL EVICTION" IS USED IN THE INSURERS' POLICIES, AND THEREFORE TACOMA IS ENTITLED TO PERSONAL INJURY COVERAGE UNDER THOSE POLICIES.....	40
1.	The Skokomish Tribe Alleged "Wrongful Eviction".....	40
2.	<i>Kitsap County</i> Can Be Distinguished and Does Not Control the Decision in this Case.....	42
3.	The Tribe Alleged "Wrongful Eviction" During the Insurers' Policy Periods.....	46
E.	TACOMA IS ENTITLED TO RECOVER ITS ATTORNEY FEES IN THIS ACTION UNDER <i>OLYMPIC STEAMSHIP</i>	48
V.	CONCLUSION.....	49

TABLE OF AUTHORITIES

WASHINGTON CASES

<i>American Continental Ins. Co. v. Steen</i> , 151 Wn.2d 512, 91 P.3d 864 (2004)	27
<i>American Nat'l Fire Ins. Co. v. B&L Trucking & Construction Co.</i> , 82 Wn. App. 646, 920 P.2d 192 (1996), <i>aff'd</i> , 134 Wn.2d 413, 951 P.2d 250 (1998).....	25-27, 29, 30
<i>Black v. Barto</i> , 65 Wash. 502, 118 P. 623 (1911).....	44
<i>City of Tacoma v. State</i> , 121 Wash. 448, 209 P. 700 (1922).....	33, 34
<i>Cle Elum Bowl, Inc. v. North Pacific Ins. Co.</i> , 96 Wn. App. 698, 981 P.2d 872 (1999).....	20
<i>Cline v. Altose</i> , 158 Wash. 119, 290 P. 809 (1930).....	43
<i>Crawford v. City of Seattle</i> , 97 Wash. 70, 165 P. 1070 (1917)	44
<i>Foley v. Smith</i> , 14 Wn. App. 285, 539 P.2d 874 (1975).....	44-45
<i>Hisle v. Todd Pacific Shipyards Corp.</i> , 151 Wn.2d 853, 93 P.3d 108 (2004)	14
<i>Hoyt v. Rothe</i> , 95 Wash. 369, 163 P. 925 (1917).....	44
<i>Kitsap County v. Allstate Ins. Co.</i> , 136 Wn.2d 567, 964 P.2d 1173 (1998).....	42-44, 46, 50
<i>North Pacific Ins. Co. v. Christensen</i> , 143 Wn.2d 43, 48, 17 P.3d 596 (2001).....	14, 41
<i>Olympic Steamship Co. v. Centennial Ins. Co.</i> , 117 Wn.2d 37, 52-53, 811 P.2d 673 (1991).....	48

<i>Overton v. Consolidated Ins. Co.</i> , 145 Wn.2d 417, 38 P.3d 322 (2002)	19-21, 25, 27, 29-30, 31
<i>PUD No. 1 of Klickitat County v. International Ins. Co.</i> , 124 Wn.2d 789, 881 P.2d 1020 (1994)	27-28
<i>Queen City Farms, Inc. v. Central Nat'l Ins. Co. of Omaha</i> , 126 Wn.2d 50, 882 P.2d 703 (1994)	14, 19
<i>Scottsdale Ins. Co. v. International Protective Agency, Inc.</i> , 105 Wn. App. 244, 249, 19 P.3d 1058 (2001)	32
<i>Transcontinental Ins. Co. v. WPUDUS</i> , 111 Wn.2d 452, 760 P.2d 337 (1988).....	16-17
<i>West Coast Mfg. & Inv. Co. v. West Coast Improvement Co.</i> , 25 Wash. 627, 66 P. 97 (1901).....	44
<i>Western Nat'l Assurance Co. v. Hecker</i> , 43 Wn. App. 816, 719 P.2d 954 (1986).....	18-19
<i>Weyerhaeuser Co. v. Commercial Union Ins. Co.</i> , 142 Wn.2d 654, 15 P.3d 115 (2000)	16
<i>Whatcom Timber Co. v. Wright</i> , 102 Wash. 566, 173 P. 724 (1918)	44
<i>Woo v. Fireman's Fund Ins. Co.</i> , 161 Wn.2d 43, 164 P.3d 454 (2007)	28
 <u><i>OTHER CASES</i></u>	
<i>Outboard Marine Corp. v. Liberty Mutual Ins. Co.</i> , 154 Ill. 2d 90, 607 N.E.2d 1204 (1992).....	29
<i>Smith v. Hughes Aircraft Co.</i> , 22 F.3d 1432, 1439-40 (9th Cir. 1994)	28-29
<i>Time Oil Co. v. Cigna Property & Casualty Ins. Co.</i> , 743 F. Supp. 1400 (W.D. Wash. 1990)	21

I. INTRODUCTION

This case involves insurance coverage for a lawsuit the Skokomish Indian Tribe ("Tribe") filed against the Tacoma Department of Public Utilities, the City of Tacoma and certain DPU Board members (collectively "Tacoma") in November 1999 (hereinafter "Skokomish Lawsuit"). This lawsuit involved the "Cushman Project", two dams and hydroelectric facilities that Tacoma built on the North Fork of the Skokomish River in the 1920s. The Tribe alleged that Tacoma's construction, operation and maintenance of the Cushman Project had caused billions of dollars of ongoing damages to the Tribe.

Although the Skokomish Lawsuit asserted dozens of causes of action against Tacoma, one of the major issues in the litigation was the Tribe's allegation that by reducing the flow of water in the Skokomish River, the Cushman Project had caused a process called "aggradation" - the gradual buildup of sediments on the river bed. The Tribe alleged that the aggradation reduced the water-carrying capacity of the river, which resulted in increased overbank flooding and the raising of groundwater levels. The flooding and raised groundwater caused damage to property on the Skokomish Reservation.

After years of litigation, Tacoma and the Tribe finally settled the Skokomish Lawsuit in early 2009. In exchange for the Tribe's release

of claims, Tacoma provided a settlement package worth millions of dollars in cash, property and other benefits. The settlement agreement expressly states that the settlement payments relate in part to aggradation-related damages. Tacoma now is seeking insurance coverage for the Skokomish settlement from the respondent insurers (collectively "Insurers").

The primary issue on appeal is whether the Skokomish lawsuit alleges an "occurrence", which is a requirement for coverage under the property damage portion of the Insurers' policies. All the policies define occurrence as "an accident or happening or event or a continuous or repeated exposure to conditions which unexpectedly and unintentionally results in . . . property damage . . . during the policy period."

Tacoma asserts that the aggradation on the Skokomish River and the resulting property damage constitutes an occurrence as a matter of law. It is undisputed that until the late 1980s, nobody – not the Tribe and not Tacoma – realized that aggradation was causing the flooding and groundwater problems that had existed on the Skokomish Reservation for many years. In the language of the Insurers' policies, the aggradation constituted a "happening" and a "continuous or repeated exposure to conditions", and the aggradation "unexpectedly and unintentionally" resulted in property damage.

The Insurers argue that the building of the Cushman Project itself is the "event" referenced in their policies, and Tacoma knew in the 1920s that the Cushman Project would interfere with the Tribe's fishing rights and cause other problems. The Insurers argue that even though aggradation-related property damage was unexpected, the alleged fact that Tacoma expected the Cushman Project to cause some damage was enough to preclude coverage. Back in 2002 the trial court agreed with this argument (in a motion filed by another insurer) and ruled as a matter of law that Tacoma could not claim property damage coverage for any portion of the Skokomish Lawsuit. The trial court made the same ruling in 2009 with regard to the Insurers' policies, even though those policies contained a different definition of "occurrence" than the other insurer's policy.

The discussion below demonstrates that the trial court erred in granting the Insurers' motion for summary judgment, and in ruling as a matter of law that the aggradation-related property damage did not constitute an occurrence as defined in the Insurers' policies.

A second issue on appeal is whether Tacoma is entitled to "personal injury" coverage under the Insurers' policies. The policies define personal injury to include "wrongful eviction". The Skokomish Lawsuit alleged that Tacoma had wrongfully dispossessed the Tribe of

certain property, and Tacoma asserts that these allegations fall within the ambiguous meaning of wrongful eviction in the Insurers' policies.

II. ASSIGNMENTS OF ERROR

Assignments of Error

1. The trial court erred in entering the Order Granting in Part and Denying in Part Defendant Great American Insurance Company's Motion for Partial Summary Judgment Re: Duty to Indemnify and Duty to Defend, filed on June 19, 2002 (CP 1144).

2. The trial court erred in entering the Order Granting Plaintiffs' Motions for Summary Judgment Re: (1) No Occurrence and (2) Personal Injury Liability Coverage - Wrongful Eviction, filed on September 17, 2009 (CP 1794).

Issues Pertaining to Assignments of Error

1. Whether the Skokomish Tribe's lawsuit against Tacoma alleging that aggradation on the Skokomish River had unexpectedly caused property damage alleged an "occurrence" as defined in the Insurers' insurance policies, thereby triggering property damage coverage for those allegations. (Assignments of Error 1-2).

2. Whether the Skokomish Tribe's lawsuit against Tacoma alleging that the Tribe had been wrongfully dispossessed from the property constituted "wrongful eviction" under the Insurers' insurance

policies, thereby triggering "personal injury" coverage under those policies. (Assignment of Error 2).

III. STATEMENT OF CASE

Skokomish Lawsuit

In November 1999 the Skokomish Tribe filed a class action lawsuit against Tacoma (as well as against the United States) relating to the construction, operation and maintenance of the Cushman Project. (CP 407-489). The Tribe's 82-page complaint outlines 16 areas of damages (CP 416-420), and alleges 35 causes of action against Tacoma. (CP 462-486).

One significant claim asserted by the Tribe was for property damage resulting from aggradation on the Skokomish River. The complaint alleged that the Cushman Project was constructed, operated, and maintained so that it:

Damaged the economic viability, habitability, and enjoyment of the Skokomish Indian Reservation by increasing the incidence of overbank flooding on the reservation and causing a significant rise in groundwater levels beneath the reservation, which reduced the amount of habitable and agricultural land on the reservation, and degraded operation of septic systems during much of the year.

(CP 419 at ¶ 41(l)). The Complaint related this property damage to aggradation:

The reduction in flows to the mainstem Skokomish that flows through the reservation has resulted in aggradation of the river channel causing flooding and contamination of domestic water supplies upon the reservation.

(CP 444 at ¶ 145).

Channel aggradation (4.5 feet on average) caused by the reduced in-stream flows results in more frequent and severe flooding. As a result of the aggradation, the groundwater table in the lower mainstem has risen and has caused septic drainfields to fail. The failure of the septic drainfields has contaminated shallow drinking water wells

(CP 445 at ¶ 148).

The Tribe's Ninth Circuit brief elaborated on this property damage claim:

Other effects were insidious and silent. Diverting the North Fork, by sending it out-of-watershed to Hood Canal, dewater the mainstem by 40%. Cutting off water flow in a major tributary like the North Fork has had a domino effect. Less water is then delivered to the mainstem, which in turn becomes less able to carry sediment and deposits it earlier, upriver. Simply put, the Skokomish River drops its load when it runs out of steam.

This process, known as aggradation, means that the mainstem's floor builds up higher and higher over time through sediment deposit. Aggradation is a slow process and, under natural conditions, is often relatively difficult to detect. Aggradation feeds on itself, meaning that its rate exponentially increases over time.

Aggradation has raised mainstem beds that lie both within and outside the Reservation at least 4.5 feet over the last 40 years, which is far, far faster than normal aggradation rates on Puget Sound rivers. This rate is usually seen, if at all, over geologic time, and not over decades. The mainstem channel's ability to hold water has shrunk by at

least one-third. The North Fork is no longer navigable, and the mainstem's navigability has seriously deteriorated.

Aggradation has also caused about one-third of the Reservation to now have a nearly permanent high water table, meaning that land that was once able to sustain crops is now a swampy mess. Many of these swamplands are individual Skokomish members' allotments. Tribal members' orchards and pastures are ruined, and family fishing eddies and shellfish beaches have silted over. Rising water tables have caused failing septic systems and contaminated water wells. Aggradation has also increased the frequency and severity of annual flooding from the mainstem.

(CP 835-836).

Unexpected Aggradation-Related Damage

Although the Tribe alleged that aggradation-related property damage had been occurring for decades, it is undisputed that nobody was aware of a connection between the Cushman Project and that damage until the late 1980s at the earliest. (CP 876). The first official "notice" that the Cushman Project might be causing aggradation and flooding was a 1989 letter from a former Skokomish Tribal attorney to the Washington Department of Ecology. (CP 877). It was not until a few years later that the existence and cause of aggradation even was explored.

One reason that aggradation-related property damage remained unexpected was that the connection between the Cushman Project and any flooding/groundwater problems was counterintuitive. It is

commonly understood that dams help prevent flooding on downstream property because river flows are reduced. The Skokomish Lawsuit ultimately alleged the opposite. Further, the Skokomish Reservation land at issue is over 25 miles below the Cushman Project. Why would anyone expect that the Cushman Project could have such devastating effects so far away?

The Tribe's Ninth Circuit brief described the emergence of the aggradation issue in the 1990s:

By the late 1970's and 1980's, scientists had still not connected aggradation-related damage to the Cushman project. The lower dam, Cushman 2, is located more than 16 miles upstream from the North and South Fork confluence, and the confluence is about 10 miles upstream from the Reservation. Not until the mid-1990's did the Tribe, Tacoma and regulatory agencies begin to look closely at the severe aggradation, its cause, and its on-Reservation effects. In the 1990's, Tacoma began conducting aggradation studies required for the licensing process, and then zigzagged as to the primary cause of mainstem aggradation (in 1993, attributing about half of the mainstem's average aggradation to the Cushman project, but the very next year reversing course and placing an increasingly larger share of the blame on South Fork timber harvesting activities). In 1995, the U.S. Forest Service and Simpson Timber Company separately published two studies of the South Fork watershed that added to the ongoing debate and confusion over whether the cause of aggradation was primarily South Fork logging or the Cushman project. In about 1992, the Tribe began retaining its own experts to explore Tacoma's aggradation theory.

Tacoma's initial "minor part" license expired in 1974. It applied for relicensing. In 1996 and 1997, as part of the licensing process, the Department of the Interior contracted

for three independent studies on aggradation to quell the debate, which determined the existence of a scientifically-defensible link between the Cushman project and mainstem and delta aggradation damage.

(CP 837-838).

The Tribe's position was that although aggradation-related damage has been occurring for decades, the link between the damage of the Cushman Project had been discovered only recently.

The parties submitted a mass of evidence showing that aggradation and its effects (rising water tables, increased flooding, destructive effect on mainstem fisheries, and the delta) work in slow, complicated and silent ways; that it took decades after the Cushman project's construction for aggradation-related damage to make itself known on the Reservation; and that it took still more decades for the Tribe to discover evidence linking the damage to the Cushman project.

(CP 840).

Skokomish Settlement

After close to 10 years of litigation in the trial and appellate courts (*see* CP 1681), the Tribe and Tacoma entered into a settlement agreement dated January 12, 2009 to resolve all outstanding damages claims. (CP 1679-1718). Tacoma agreed to compensate the Tribe through lump sum cash payments, transfer of property and annual cash payments based on a certain percentage of the value of the electric production from the Cushman Project. (CP 1685-1691). One \$5 million payment specifically pertained to aggradation-related

flooding, and the agreement provided that "[t]his payment shall be used by the Tribe for projects or actions related to the mitigation of flooding impacts on the Skokomish Indian Reservation, the Tribe, or its members." (CP 1685 at ¶ 4.1.2). The other compensation provisions expressly stated that payments represented partial compensation for the Tribe's damages, "including aggradation-related damages". (CP 1685-1686, 1689-1690 at ¶ 4.1.1, ¶ 4.1.3, ¶ 4.1.10).

Insurance Policies

The Insurers issued a number of primary and excess policies to the Tacoma Department of Public Utilities. The following are the applicable primary policies:

1. Central National – (9/30/80-82) (CP 1363-1384),
2. Central National – (9/30/82-84) (CP 1411-1434),
3. Century Indemnity – (9/30/84-85) (CP 1503-1531).

The following are the applicable excess policies:

1. Central National – (9/30/75-78) (CP 1347-1360),
2. Highlands – (9/30/78-81) (CP 1436-1456),
3. Central National – (9/30/81-82) (CP 1386-1396),
4. Central National – (9/30/82-84) (CP 1398-1409),
5. Century Indemnity – (9/30/84-85) (CP 1485-1501).

Although the Insurers issued multiple policies, the applicable language of all these policies is the same. The Insurers agreed to pay

"all sums which the Insured shall be obligated to pay" by reason of liability imposed upon the Insured by law on account of personal injury or property damage "caused by or arising out of an occurrence". (*E.g.*, CP 1364). The policies define "occurrence" as follows:

The term "occurrence" means an accident or a happening or event or a continuous or repeated exposure to conditions which unexpectedly and unintentionally results in personal injury, property damage or advertising liability during the policy period.

(*E.g.*, CP 1366) (emphasis added). The policies define "personal injury" to include "wrongful eviction". (*E.g.*, CP 1366), but do not define that term.

Procedural History

Shortly after the Skokomish Lawsuit was filed the Insurers sued Tacoma and Tacoma's other insurers, seeking a declaration that no coverage existed for any of the allegations in the lawsuit. The primary argument of all the insurance companies was that the Skokomish Lawsuit did not arise from an "occurrence" because Tacoma expected that building the Cushman Project would cause some damage.

In 2002 Great American Insurance Company, one of the defendants, filed a summary judgment motion on the occurrence issue. Great American relied on documents primarily from the 1920s and 1930s reflecting the Tribe's concerns about the impact of the Cushman Project, and a series of lawsuits the Tribe or Tribal members

filed to stop construction of the project. Great American argued that this evidence showed that the Tribe had made allegations in the 1920s that the Cushman Project would cause flooding and groundwater problems.

In fact, all the evidence reflected was that the Tribe had early concerns that its land would be inundated with water if the dams breached. (CP 580-581). It is undisputed that this concern never materialized – the dams have never failed. Further, the Tribe had initial concerns that their property would be damaged by the lowering of groundwater levels – that their property would be turned into a dry wasteland – once the North Fork of the Skokomish River was dewatered. (CP 549, 580, 582). Once again, these concerns did not materialize and ultimately the opposite occurred.

The Great American policies contained a definition of "occurrence" that was more narrow than the Insurers' definition. Under the Great American policies, occurrence was defined as "an accident, including repeated exposure to conditions, that results in . . . property damage neither expected nor intended from the standpoint of the insured." (*E.g.*, CP 810).

The trial court granted Great American's summary judgment motion. It ruled that the concerns about the possibility of catastrophic flooding if the dam failed and the lowering of groundwater levels were

enough to show that Tacoma expected the Cushman Project to cause some property damage. The trial court did not find it significant that Tacoma did not expect aggradation-related damage. Instead, the trial court ruled that it did not matter that the damage occurred in a different "hydrogeologic manner" than anticipated. (CP 1249).

Several years later, the Insurers filed a summary judgment motion based on the occurrence requirement, arguing that the 2002 ruling was dispositive. Tacoma pointed out that the Insurers' definition of occurrence was quite different than Great American's definition, and the broader definition required the court to focus on whether Tacoma expected the aggradation-related property damage rather than some unrelated damage. The trial court followed its 2002 ruling, and granted summary judgment in favor of the Insurers on the expected issue. (CP 1794).

The Insurers also moved for summary judgment on "personal injury" coverage, arguing that Tacoma dispossession of the Tribe's property did not constitute a "wrongful eviction". The trial court granted summary judgment on this issue as well. (CP 1794).

Tacoma filed a timely notice of appeal of both the 2002 order (because it apparently formed the basis of the trial court's subsequent ruling) and the 2009 order. (CP 1799).

IV. ARGUMENT

A. STANDARD OF REVIEW

An appellate court reviews summary judgment orders de novo, performing the same inquiry as the trial court. In conducting this inquiry, the Court must view all facts and reasonable inferences in the light most favorable to the non-moving party. *E.g., Hisle v. Todd Pacific Shipyards Corp.*, 151 Wn.2d 853, 860-61, 93 P.3d 108 (2004).

The interpretation of insurance policy language is a question of law. The policy should be given a "fair, reasonable, and sensible construction, as would be given to the contract by an average insurance purchaser." *North Pacific Ins. Co. v. Christensen*, 143 Wn.2d 43, 48, 17 P.3d 596 (2001). Accordingly, how the Insurers' definition of "occurrence" should be interpreted is for this Court to decide.

Once the Court interprets the policy language, whether that language applies in a particular case generally is a question of fact. Accordingly, in this case whether a happening resulted in "unexpected" property damage must be left for the jury unless reasonable minds could not differ as to whether the property damage was expected. *See, e.g., Queen City Farms, Inc. v. Central Nat'l Ins. Co. of Omaha*, 126 Wn.2d 50, 70, 882 P.2d 703 (1994).

B. THE RELEVANT "HAPPENING" UNDER THE INSURERS' DEFINITION OF OCCURRENCE IS AGGRADATION OF THE SKOKOMISH RIVER, AND THAT HAPPENING UNEXPECTEDLY RESULTED IN PROPERTY DAMAGE.

The key to this case is the broad definition of "occurrence" in the Insurers' policies. Many insurers – like Great American did – define occurrence with reference to a single "accident". The Insurers' policies expanded the definition to include not only an accident but also "a happening or event or a continuous or repeated exposure to conditions". The threshold determination under this definition – and the controlling issue in this case – is determining the relevant "happening" under this definition.

The Insurers emphasize on the term "event" in the occurrence definition, and argue that the focus must be on the initial construction of the Cushman Project itself. And that interpretation is not completely unreasonable – building the Cushman Project was an "event". However, focusing on the original building construction of the Cushman Project is not the only reasonable interpretation of the occurrence definition.

Tacoma focuses on the terms "happening" and "continuous or repeated exposure to conditions". These terms make it clear that an occurrence is not limited to a single event, but can involve a process. Tacoma submits that the occurrence is the development of **aggradation** because of the ongoing operation of the Cushman Project.

The plain language of the policy supports this interpretation. The development of aggradation clearly is a "happening". The development of aggradation clearly is a "continuous or repeated exposure to conditions". The Insurers cannot dispute that Tacoma's interpretation of the occurrence definition also is reasonable.

Under these circumstances, the Court is required to adopt Tacoma's position in determining whether "a happening or event or a continuous or repeated exposure to conditions" unexpectedly resulted in property damage. First, the fact that there are two reasonable interpretations of what constitutes the relevant "happening" means that the occurrence definition under these facts is ambiguous. "A clause is ambiguous when, on its face, it is fairly susceptible to two different interpretations, both of which are reasonable." *Weyerhaeuser Co. v. Commercial Union Ins. Co.*, 142 Wn.2d 654, 666, 15 P.3d 115 (2000). Ambiguities in insurance policies must be resolved in favor of the insured and in favor of coverage. *Id.*

Second, there is no reason that the Court cannot adopt both interpretations of the occurrence definition. The Insurers' policies do not preclude the possibility that an insured's liability may result from more than one occurrence. On the contrary, Washington law recognizes that an Insured's liability may result 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, there may be two related but separate happenings, events and repeated exposures to conditions – the original construction of the Cushman Project, and aggradation of the Skokomish River arising from the ongoing operation of the Cushman Project.

Once it is properly determined that the relevant "happening or event or repeated exposure to conditions" is the development of aggradation as a result of the ongoing operation of the Skokomish Project, there is no question that the property damage alleged in the Skokomish Complaint was unexpected. The undisputed evidence is that the development of aggradation and the fact that aggradation was causing flooding and groundwater problems was completely unexpected until at least the late 1980s, and neither Great American nor the Insurers even attempted to argue otherwise in the trial court. And because aggradation did not even begin until at least the 1950s, what Tacoma "expected" in the 1920s is immaterial. As a result, Tacoma is entitled to coverage as a matter of law for all claims arising out of the aggradation-related property damage.

C. THE RELEVANT PROPERTY DAMAGE FOR DETERMINING TACOMA'S EXPECTATION IS AGGRADATION-RELATED OVERBANK FLOODING AND RAISED GROUNDWATER LEVELS, NOT SOME OTHER POTENTIAL DAMAGE THAT DID NOT RESULT IN ANY LIABILITY FOR TACOMA.

If the "happening" in this case was the development of aggradation, Tacoma prevails on the occurrence requirement as a matter of law. If the Court for some reason determines that the original construction of the Cushman Project is the "happening", the next issue is identifying the relevant property damage for the occurrence analysis; i.e., what property damage must be unexpected for Tacoma to obtain coverage?

The Skokomish Complaint alleged that Tacoma was liable for aggradation-related overbank flooding and raised groundwater levels. As discussed above, nobody has produced any evidence that any aggradation-related property damage was an expected result of construction of the Cushman Project. In other words, construction of the Cushman Project unexpectedly and unintentionally resulted in aggradation-related property damage during the policy period. Accordingly, the Skokomish Complaint did allege an "occurrence".

However, the Insurers argue and the trial court held that there can be no occurrence if Tacoma expected the Cushman Project to cause some damage, even if aggradation-related damage was unexpected. The trial court relied on *Western Nat'l Assurance Co. v.*

Hecker, 43 Wn. App. 816, 719 P.2d 954 (1986), which held that if some damage is expected, there is no coverage under the occurrence requirement even if the "character and magnitude" of the damage is different than expected. The trial court ruled as a matter of law that Tacoma did expect some property damage in the 1920s and 1930s, and precluded coverage under this "expect some, expect all" principle.

The trial court's analysis is misguided on both legal and factual grounds. First, the property damage Tacoma allegedly expected in the 1920s and 1930s cannot as a matter of law qualify as the type of expected damage that precludes coverage under the occurrence definition. Second, clear questions of fact exist as to whether Tacoma subjectively expected with substantial probability the damage relied upon by the court.

1. **Whether Tacoma Expected Property Damage Is Determined Based on a Subjective, "Substantial Probability" Standard.**

After an extensive analysis, the court in *Queen City Farms, Inc. v. Central Nat'l Ins. Co. of Omaha*, 126 Wn.2d 50, 64-69, 882 P.2d 703 (1994), determined that whether an insured expects property damage must be analyzed using a subjective standard, not an objective one. The court in *Overton v. Consolidated Ins. Co.*, 145 Wn.2d 417, 425, 38 P.3d 322 (2002), confirmed that the occurrence definition focuses on "the subjective state of mind of the insured with

respect to the property damage". As a result, summary judgment on the occurrence issue is inappropriate unless the insurer produces direct evidence of the insured's state of mind. *See Cle Elum Bowl, Inc. v. North Pacific Ins. Co.*, 96 Wn. App. 698, 704, 981 P.2d 872 (1999).

The test for expectation of property damage is strict. The court in *Overton* stated that the insured must know with "substantial probability" that the property damage has occurred. 145 Wn.2d at 425. This means that the Insurers are entitled to summary judgment only if they can show the absence of a genuine issue of fact that Tacoma had a subjective expectation of a substantial probability that property damage had occurred.

The Insurers may attempt to rely on an excerpt from *Overton* stating that "for purposes of determining whether the property damage is expected by the insured, the insured merely must be put on notice." 145 Wn.2d at 426. However, taken in context the statement clearly does not affect the subjective expectation and substantial probability standards.

The court in *Overton* made the "mere notice" statement in addressing a narrow and specific ruling by the Court of Appeals - that receipt of an official EPA notice was a prerequisite to finding that the insured expected environmental property damage. *Id.* at 425-26. The court disagreed, stating that "[t]he dispositive issue is not *how* the

insured was notified of property damage, but *whether* the insured had such notice prior to purchasing the property”. *Id.* at 426 (italics in original). In other words, the court was stating that a formal EPA notice was not required – the insured “merely must be put on notice” in some manner. The court’s statement must be limited to this context.

Further, the suggestion that the “mere notice” statement in *Overton* somehow alters the standards for applying the occurrence definition makes no sense given the placement of the statement within the court’s opinion. Two paragraphs before the statement the court acknowledged that the focus of the occurrence definition was the insured’s “subjective state of mind”. *Id.* at 425. One paragraph before the statement the court adopted the holding in *Time Oil Co. v. Cigna Property & Casualty Ins. Co.*, 743 F. Supp. 1400, 1414-15 (W.D. Wash. 1990), that the issue was whether the insured had received notice indicating a “substantial probability” that the loss would occur. 145 Wn.2d at 425. Certainly the court would not overrule itself in the space of a few paragraphs.

2. **Concerns in the 1920s about Flooding if the Dams Failed and Lowered Groundwater Levels Cannot Preclude Coverage because that Anticipated Damage Never Materialized and Could Not Give Rise to Tacoma's Alleged Liability.**

a. **Early Flooding/Groundwater Concerns**

Great American submitted evidence that the Tribe in the 1920s anticipated problems with flooding and groundwater. However, the anticipated problems were the opposite of the aggradation-related property damage that ultimately did develop. The Tribe's concern about flooding in the 1920s was that their property value would be diminished because of the fear of a catastrophic breach of the dams, not that the Cushman Project would increase the frequency of seasonal flooding.

- The Tribe alleged that “they are damaged by reason of the depreciation of the market value of their property due to the apprehension of floods on account of the existence of the dam and the danger of the impounded waters breaking through and flooding their lands.” (CP 580-581).

- “[I]f you find from all the evidence in the case that there is an appreciable and imminent danger from floods caused by the loosening of the impounded waters from the dam, such danger may be considered by you in estimating the damages to the land insofar as the market value of said land is thereby depreciated” (CP 581).

Flooding because of a dam failure never occurred, did not result in any liability for Tacoma, and was not even mentioned in the Skokomish Complaint. Accordingly, concerns about that damage cannot preclude coverage.

Similarly, Great American's argument that Tacoma expected damage caused by high groundwater levels was based exclusively on early concerns that the Cushman Project would lower groundwater levels.

- Tribal members complained that "the sub-irrigation of their lands, the same being agricultural lands, will be greatly deteriorated . . . by virtue of the fact that they will be devoid of a large amount of moisture that will be due to the diversion of the waters of the North Fork of the said Skokomish River." (CP 549) (emphasis added).

- The Tribe alleged that "they are also damaged by reason of the sub-irrigation to their lands which is furnished by the waters of the Skokomish River as they now flow and which they allege will be diminished by reason of the completion of this project" (CP 580) (emphasis added).

- "You are further instructed that if by the erection of its dam and the removal of any portion of the waters of the Skokomish River the height of the stream is lowered, with a consequent effect of reducing or lowering the water line [such damages shall be awarded]." (CP 582) (emphasis added).

Like the catastrophic flooding, the concern that groundwater would be diminished because of the Cushman Project never

materialized, did not result in liability for Tacoma, and was never mentioned in the Skokomish Complaint.

b. **"Expected" Property Damage Must Actually Give Rise to Liability to Preclude Coverage.**

Concerns about catastrophic flooding and lowering groundwater levels are completely immaterial to the occurrence analysis. Both the language of the Insurers' policies and the applicable case law compel the conclusion that the expectation of property damage that does not result in the insured's alleged liability does not preclude coverage.

First, the policy language unambiguously provides that the "property damage" that must be unexpected is the same "property damage" giving rise to the insured's alleged liability. The Insurers' policies provide coverage for "all sums which the Insured shall be obligated to pay" on account of "property damage" caused by an occurrence. The policies define occurrence as an accident, happening, event or repeated exposure to conditions which unexpectedly and unintentionally results in "property damage". The only logical reading of these two provisions is that the property damage giving rise to the insured's obligation to pay is the same property damage that must be unexpected.

The trial court apparently concluded that the "property damage" in the insuring agreement is different than the "property damage" in

the occurrence definition. This conclusion is inescapable because the trial court found that the expectation of property damage that never materialized and never resulted in any liability – catastrophic flooding caused by dam failure and lowering of groundwater – was enough to preclude coverage. However, this is an unreasonable reading of the policy language. The Insurers' policies do not state or even hint that the insured can lose coverage because it expected some property damage not alleged in the complaint and for which it will never be liable. At the very least, the policy language is ambiguous. And as discussed above, any ambiguities in policy language must be strictly construed against the insurer and in favor of coverage.

Second, Washington cases hold that coverage is precluded under the occurrence requirement only if the insured expects the property damage that actually gives rise to the insured's liability. *Overton v. Consolidated Ins. Co.*, 145 Wn.2d at 417, 428-29, 38 P.3d 322 (2002); *American Nat'l Fire Ins. Co. v. B&L Trucking & Construction Co.*, 82 Wn. App. 646, 659-60, 920 P.2d 192 (1996), *aff'd*, 134 Wn.2d 413, 951 P.2d 250 (1998).¹

B&L Trucking is controlling. In that case, the insured operated a landfill where it deposited woodwaste mixed with Asarco slag.

¹ Supreme Court review in *B&L Trucking* was sought and accepted only on the allocation issue. 134 Wn.2d at 418.

Arsenic leached from the slag and caused property damage. In a lawsuit filed by Asarco, the trial court held that slag rather than woodwaste caused the contamination, and that the insured was responsible for a certain percentage of cleanup costs. In the subsequent coverage case, the trial court instructed the jury to determine when the insured expected arsenic contamination, as opposed to woodwaste contamination. The insurer argued that the expectation of any contamination – and specifically the expectation of contamination resulting solely from woodwaste – also should preclude coverage. *Id.* at 659.

The trial court rejected the insurer's argument, and the Court of Appeals agreed:

[U]nder the policies, Northern agreed to pay for damages for which Fjetland was "legally obligated." In the CERCLA trial, Fjetland was found liable to pay for the clean-up of damages relating to arsenic leaching from slag, expressly not woodwaste leaching. Fjetland cites a number of environmental cases where the courts have noted the issue as whether the insured "expected" the contamination in which resulted in legal liability to support its argument that potential woodwaste contamination was irrelevant.

Fjetland has the better of the two arguments. Legally, pursuant to the CERCLA judgment, Fjetland is obligated to pay for the clean up of arsenic contamination at the landfill. Factually, there is no evidence woodwaste was the cause of the arsenic contamination at the landfill.

Id. at 659-60. Accordingly, expectation of property damage for which the insured was not held liable was immaterial.

The court in *Overton* also was careful to limit the inquiry to the insured's expectation of the liability-causing property damage. "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 [claimants'] property." 145 Wn.2d at 428 (italics in original, 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 cleanup costs to the [claimants]." *Id.* at 429 (emphasis added). *See also American Continental Ins. Co. v. Steen*, 151 Wn.2d 512, 521, 91 P.3d 864 (2004) ("an 'occurrence' is an event that gives rise to the legal liability of the insured for which the insurance contract provides coverage").

The court in *PUD No. 1 of Klickitat County v. International Ins. Co.*, 124 Wn.2d 789, 881 P.2d 1020 (1994), issued a similar ruling with regard to the known loss doctrine. In that case, it was undisputed that the insureds knew of the possibility of lawsuits and losses arising from the termination of two WPPSS power plants before they purchased insurance. However, they did not know they might be sued by bondholders for securities violations. In a coverage action involving

bondholder claims, the insurer argued that coverage should be precluded if an insured has knowledge of any potential liability when the policy is issued. The court disagreed, holding that the known loss doctrine applied only if the insured knew that it could be subject to the same type of liability that eventually occurred. *Id.* at 806-808.

Finally, most recently in *Woo v. Fireman's Fund Ins. Co.*, 161 Wn.2d 43, 164 P.3d 454 (2007), the court addressed a definition of "occurrence" that required the event or happening itself to be unexpected. *Id.* at 62-63. The case involved a wacky event in which a dentist photographed an employee with boar tusk flippers in her mouth while she was under anesthetic. The complaint also alleged other conduct that resulted in emotional distress. The court found a potential for coverage:

[B]ased on the language of Woo's policy, he had to have "expected or intended" the specific "event or happening" alleged in the complaint. Thus, he would have to have intended not only the "event or happening" of photographing her with the boar tusk flippers in her mouth but also the "event or happening" that caused Alberts to sustain the specific injuries she alleged in her complaint.

Id. at 64.

The few courts in other jurisdictions that have addressed this issue agree with the Washington cases. In *Smith v. Hughes Aircraft Co.*, 22 F.3d 1432, 1439-40 (9th Cir. 1994), the 9th Circuit (applying Arizona law) refused to consider expectation of contamination that did

not give rise to the insured's liability. Similarly, in *Outboard Marine Corp. v. Liberty Mutual Ins. Co.*, 154 Ill. 2d 90, 607 N.E.2d 1204 (1992), the court rejected the insurers' argument that the expected or intended release of any waste material precluded coverage. The court stated: "The relevant consideration here is whether the insured expected and intended to discharge *the particular toxic it is alleged to have discharged and for which it now seeks coverage.*" *Id.* at 1222 (italics in original).

Third, a natural corollary to this rule is that expectation of some property damage can preclude coverage only if that expected damage actually takes place. Once again *B & L Trucking* is controlling. The insurer argued that the insured expected the release of woodwaste leachate from the insured's landfill, and that expectation should preclude coverage for arsenic contamination at the landfill. The court stated:

[T]he Supreme Court in *Queen City Farms* instructs us that the insured must establish that "damage" was neither expected nor intended. There was no testimony that even if there was leachate from woodwaste that it was harmful. The "damage" was from the arsenic contamination alone.

82 Wn. App. at 660.

The trial court erred because the "expect some, expect all" rule must be applied in conjunction with the rule stated in *B & L Trucking* and *Overton* that the insured must expect the property damage it

actually gives rise to the insured's liability before coverage will be precluded. In other words, if the insured expects some property damage that gives rise to liability, coverage might be excluded for all similar liability-causing property damage even if the character and magnitude is different. But if the property damage the insured expects does not give rise to any liability or does not even materialize, it would be absurd and inconsistent with *B & L Trucking* and *Overton* to preclude coverage for unexpected property damage that does result in the insured's liability.

c. No Evidence of Expectation

Even if concerns about lower groundwater levels or the catastrophic failure of the dam were relevant to the coverage determination, those concerns would not preclude coverage because no evidence exists that Tacoma actually expected the Cushman Project to lower groundwater levels or cause catastrophic flooding.

The Insurers must show that Tacoma subjectively expected, based on a substantial probability standard, that the Cushman Project to cause lower groundwater levels or catastrophic flooding. However, there is no indication in the historical records that Tacoma had any such expectation (CP 878), and there certainly would have been no such expectation in the late 1970s and early 1980s while Insurers' policies were in effect.

As noted above, the Insurers may point to the language in *Overton* that “mere notice” is enough. However, in that case there was a clear finding of property damage (PCB contamination), and the insured never disputed the existence of that damage. In that scenario, notice clearly is enough. However, because the standard is a subjective one, if the existence of property damage is disputed, notice necessarily cannot be enough to support a finding that the insured expected the disputed property damage. This is particularly true in our case, where the alleged damage not only was disputed, but never occurred.

3. **The Alleged Damage to the Tribe’s Fishing, Hunting and Shellfish Gathering Rights Cannot Preclude Coverage for Unexpected Aggradation-Related Property Damage.**
 - a. Damage to Intangible Rights Is Not “Property Damage”.

Great American also argued that Tacoma expected that the Cushman Project would damage the Tribe’s fishing, hunting and shellfish gathering rights, and that this expectation should preclude coverage. The Insurers may attempt the same argument. However, this argument is inconsistent with the language of the Insurers’ policies.

The Insurers’ policies state that coverage exists if a happening results in “property damage”. The converse is that coverage is

precluded for “property damage” that the insured expects. This provision necessarily only applies, however, to “property damage”. If a happening causes damage that does not fall within the definition of “property damage”, it cannot affect the occurrence determination.

All of Insurers' policies define property damage as damage or loss to “tangible” property. (*E.g.*, CP 1366). The court in *Scottsdale Ins. Co. v. International Protective Agency, Inc.*, 105 Wn. App. 244, 249, 19 P.3d 1058 (2001), defined tangible property as property that “has physical form and substance” and that “may be felt or touched”. The Tribe’s fishing, hunting and shellfish gathering rights are intangible and do not fall within this definition, and therefore those rights cannot constitute “property damage”.

Because the Tribe’s intangible rights do not constitute tangible property, Tacoma cannot claim coverage for the Tribe’s claims of damage to these rights. At the same time, however, Great American cannot argue that Tacoma’s alleged expectation that these rights would be damaged can affect coverage for damage that does fall within the policy provisions.

b. No “Expected” Damage to Fishing, Hunting and Shellfish Rights.

Even if alleged damage to the Tribe’s intangible rights can affect Tacoma’s coverage for aggradation-related property damage,

clear questions of fact exist as to whether Tacoma subsequently expected that the Cushman Project would damage the Tribe's fishing, hunting and shellfish gathering rights. These questions of fact preclude summary judgment.

Great American focused primarily on fishing rights, referencing a number of documents that suggest or allege that the Cushman Project damaged fish runs by dewatering the North Fork of the Skokomish River. However, from Tacoma's perspective there always has been significant debate about whether the Tribe's fishing rights were actually damaged.

In October 1922 the Washington Supreme Court addressed the diversion of the Skokomish River in the context of Tacoma's condemnation action against the State of Washington. The court found as follows:

The contention that the diversion of the waters will destroy or serious damage the propagation of food fish, we cannot find to be sustained by a preponderance of the evidence.

City of Tacoma v. State, 121 Wash. 448, 453, 209 P. 700 (1922). A month later the Washington Supervisor of Hydraulics, in considering Tacoma's application for permits, found that "the use of waters of said stream, contemplated in said applications, under the condition specified in the permits will not impair or conflict with existing rights or be detrimental to the public welfare." (CP 844). Similarly, in 1924 the

Federal Power Commission found that “the license will not interfere or be inconsistent with the purpose for which any reservation affected thereby was created or acquired”. (CP 847).

In 1931 the U.S. Attorney General’s Office looked into the possibility that the Cushman Project was damaging the Skokomish Reservation. The author quoted the finding in *City of Tacoma v. State* that diversion of the water would not damage the propagation of fish, and then stated as follows:

It appears from your letter above referred to that the flow of water will be seriously lessened if both forks of the river are diverted with a resulted reduction in the quantity of fish available. But the fact is that only one fork has been diverted, and I have no facts as to the damage therefrom except the case above referenced to wherein it was held that the diversion did no serious damage.

The author concluded “[I]t would seem to follow that the reservation will suffer little damage from the diversion of the one fork of the river.” (CP 855-856) (underlining in original).

The most revealing document from this time period is a letter from J. Charles Dennis, the U.S. Attorney for the Western District of Washington, to the U.S. Attorney General regarding whether the government should bring suit against Tacoma for damage to fishing rights. Mr. Dennis had been “corporation counsel” for Tacoma from 1920 until 1933 and had handled a number of lawsuits involving the Cushman Project. Mr. Dennis made the following statements:

- A fish eyeing station on the North Fork “was abandoned [in 1899] because of the fact that there were no fish in the North Fork of the Skokomish River.”

- “North Fork was to a great extent fished out, long prior to 1920.”

- “In the trial of the case of the *City of Tacoma v. State of Washington* . . . the City established conclusively by experienced hatcheryman who knew the North Fork of the Skokomish River, that the erection of the dam by the City of Tacoma, instead of being a detriment to the river, would be a positive benefit from the standpoint of propagation of fish.”

- “[T]oday, with the reservoir of the City of Tacoma fully stocked, there is better fishing on the river itself than there was prior to the erection”.

- “[N]one of the witnesses [in prior hearings] testified that fishing was successful to any extent on the North Fork during the ten years prior to the actual erection of the dam.”

(CP 858-862).

Finally, in 1935 a superintendent with the Taholah Indian Agency (which had jurisdiction over the Skokomish Reservation) responded to the question of bringing suit to determine “whether diversion of water from the north fork of the Skokomish River would

damage or destroy the fishing rights of the Indians.” The letter concluded:

Mr. Beaulieu discussed this case with these Indians from the standpoint of evidence that they could submit to support their contention that there had been damage done. These Indians agreed that their evidence would necessarily be very indefinite and, after discussing the matter with him, felt that it would **probably be impossible** for them to establish any definite damages and that there would be no reasonable prospect of there being awarded any damages and that nothing should be done.

(CP 864) (emphasis added).

There was no actual evidence in the trial court that Tacoma **subjectively expected** that the Cushman Project was damaging the Tribe’s fishing rights. Tacoma’s position always has been that the Cushman Project has had a positive impact on fish runs. (CP 878-879). Even after the Tribe alleged in the Skokomish Complaint that fishing rights had been damaged, Tacoma has continued to dispute that allegation. Dr. Gregory Ruggerone, Tacoma’s expert in the Skokomish litigation, concluded that actual fish harvests from 1926 through 1998 met or exceeded likely harvests if the Cushman Project had not been built. (CP 866-874). At the very least, questions of fact exist as to Tacoma’s subjective expectation.

Similarly, there is no evidence that Tacoma **subjectively expected** damage to hunting rights. Until the Skokomish Complaint,

the Tribe had never alleged that the Cushman Project had damaged its hunting rights. There is no indication in any of the documents that Tacoma “expected” or even considered that the Tribe’s hunting rights might be damaged. (CP 879). At the very least, questions of fact exist as to Tacoma’s subjective expectation.

There also was no evidence suggesting that Tacoma expected damage to the Tribe’s shellfish gathering rights. Great American referenced the *Skokomish Indian Tribe v. France* lawsuit, but that case involved whether the Tribe had treaty rights to the tidelands for purposes of fishing and gathering shellfish. That case did not involve allegations that the Cushman Project had somehow damaged shellfish gathering rights. There is no indication in any of the historical records that Tacoma “expected” that the Cushman Project would affect the gathering of shellfish some 30 miles below Tacoma’s dams. (CP 879-880). At the very least, questions of fact exist as to Tacoma’s subjective expectation.

c. "Expect Some, Expect All" Rule Inapplicable

Even if alleged damage to the Tribe’s intangible fishing, hunting, and shellfish gathering rights constitute “property damage” (which it does not) and even if Tacoma expected that property damage (which it did not), coverage for the aggradation-related property damage still would not be excluded. The trial court’s ruling relied on a faulty

premise – that expectation of one category of damage can preclude coverage for a completely different category of unexpected damage.

As discussed above, the trial court relied on the notion that once some damage is expected, there is no coverage even if the “character and magnitude” of the actual damage is different than expected. This rule would apply and Tacoma could not claim coverage for unexpected damage to trout runs, for instance, if Tacoma had expected damage to salmon runs. In that situation, the damage would be different in “character” but still similar enough to preclude coverage. This rule also would apply and Tacoma could not claim coverage for a 75% reduction of fish runs, for instance, even though only a 10% reduction was expected. In that situation, the damage would only be different in “magnitude” but still the exact same damage that was expected.

In our case, aggradation-related real property damage is so fundamentally different than damage to fishing and other tangible rights that the “expect some, expect all” rule is inapplicable. These claims involve different causes of action, require different supporting evidence, involve injury to different types of “property”, involve different types of injury, and allow for the recovery of different types of damages. The Insurers can cite to no authority suggesting that expectation of one category of damage can allow the insurance

company to preclude coverage for all other categories of drastically different damage.

4. Tacoma's Condemnation of Riparian Rights before the Cushman Project Was Constructed Cannot Affect Coverage for Aggradation-Related Property Damage.

The trial court referenced Tacoma's condemnation of the riparian rights of property owners below the dam in *City of Tacoma v. Funk*, implying that this condemnation was proof that Tacoma expected damage to those rights. However, the fact that those rights had been condemned and purchased before the Cushman Project was constructed clearly shows that Tacoma could not have expected construction of the Cushman Project to damage any third person's riparian rights.

If Tacoma had constructed the dam without any condemnation proceedings, there may have been some expectation that riparian rights would be damaged. However, Tacoma eliminated the possibility of such damage by purchasing – for court-established compensation – all of those rights before construction. This means that when the dam was constructed, it was not anticipated that any additional riparian rights to be damaged. The rights that Tacoma had anticipated impacting had been bought and paid for.

Because of the condemnation proceedings, by the time the Insurers' policies were issued Tacoma clearly had no expectation that

the Tribe could have suffered any damage to riparian rights because of the Cushman Project. As far as Tacoma was concerned, Tacoma already had paid compensation for that damage. It was a complete surprise when the Tribe alleged in the Skokomish lawsuit that it had a cause of action for damage to riparian rights. At the very least, questions of fact exist as to Tacoma's subjective expectation.

In addition, as discussed above, the Insurers cannot claim that expectation of damage to riparian rights can preclude coverage for all other categories of damages. Once again, damage to riparian rights is so fundamentally different than aggradation-related real property damage that the "expect some, expect all" rule is inapplicable.

D. TACOMA'S DISPOSSESSION OF THE TRIBE'S PROPERTY CONSTITUTED A "WRONGFUL EVICTION" IS USED IN THE INSURERS' POLICIES, AND THEREFORE TACOMA IS ENTITLED TO PERSONAL INJURY COVERAGE UNDER THOSE POLICIES.

1. The Skokomish Tribe Alleged "Wrongful Eviction".

The Insurers' policies provide coverage for "personal injury", which is defined to include "wrongful eviction". The Insurers argue that no personal injury coverage exists because the Skokomish Lawsuit does not allege "wrongful eviction".

The term "wrongful eviction" is not defined in the Insurers' policies. Under Washington law, undefined terms must be understood in their plain, ordinary meaning as would be given by an average

insurance purchaser. *E.g., North Pacific Ins. Co. v. Christensen*, 143 Wn.2d 43, 48, 17 P.3d 596 (2001). The ordinary meaning of "wrongful eviction" is to wrongfully dispossess someone of their property.

The Skokomish Complaint contains a number of allegations that address what would commonly be understood as wrongful eviction:

- Paragraph 41(d) - Inundated, blocked access to . . . treaty-protected usual and accustomed fishing grounds and stations" and access easements thereto. (CP 417-418).

- Paragraph 41(g) - Blocked access to "usual and accustomed estuarine fishing, hunting, and gathering places". (CP 418).

- Paragraph 41(i) - Blocked access to hunting grounds. (CP 419).

- Paragraph 41(k) - "Expropriated and occupied limited prime usable land and air space within the Skokomish Indian reservation". (CP 419).

- Paragraph 41(m) - "[L]oss of access to riverfront property and to usual and accustomed fishing stations". (CP 419).

- Paragraph 41(p) - "Destroyed, occupied, or otherwise damaged Insurers' rights to fee and trust lands within the Skokomish River watershed". (CP 420).

All of these allegations should trigger wrongful eviction coverage.

2. *Kitsap County* Can Be Distinguished and Does Not Control the Decision in this Case.

Despite what would seem to be clear coverage for wrongful eviction, the Insurers argue that the holding in *Kitsap County v. Allstate Ins. Co.*, 136 Wn.2d 567, 964 P.2d 1173 (1998), precludes wrongful eviction coverage as a matter of law. At first glance, it appears that *Kitsap County* does defeat Tacoma's coverage claim. However, a careful analysis suggests that this case can be distinguished.

In *Kitsap County*, owners of property near waste disposal sites sued for damages relating to contaminants and odors emanating from the sites. *Id.* at 571-72. The court found that the alleged damages constituted "wrongful entry" and "invasion of the right of private occupancy", which were included in the definition of personal injury in certain policies. *Id.* at 586-592. However, the court found that the allegations did not constitute a "wrongful eviction" under policies similar to the Insurers' policies, which limited personal injury coverage to wrongful eviction. *Id.* at 592-94.

The primary basis of the court's holding was the fact that none of the Insurers alleged that Kitsap County had wrongfully evicted them. The court noted that the lawsuit sought only damages for injury to person and property, and there was no assertion that they had been

"ousted" from their property. The court quoted *Cline v. Altose*, 158 Wash. 119, 127, 290 P. 809 (1930), where the court held that an "eviction" requires a "physical ouster". *Id.* at 593.

Because there was no evidence of an actual eviction, the court next examined whether there had been a "constructive" eviction. The court pointed out that a constructive eviction requires a landlord-tenant relationship in which the landlord deprives the tenant of the enjoyment of the tenant's property. 136 Wn.2d at 593-94. Similarly, the court noted that a requirement of constructive eviction is that the tenant gave the landlord notice of the condition at issue. *Id.* at 594.

The Insurers focus on the statement in *Kitsap County* that a landlord-tenant relationship is required for constructive eviction to apply. The Insurers correctly point out that Tacoma was not the landlord of Tribal members. However, the facts of our case are different than in *Kitsap County*. Unlike in that case, the Tribe in its lawsuit did allege "physical ouster" from certain property. This means that in our case, the Court does not have to resort to principles of constructive eviction. In our case, there was an actual eviction. As a result, the constructive eviction requirements of a landlord-tenant relationship and notice of the condition are irrelevant.

The court in *Kitsap County* did not address whether a landlord-tenant relationship was required for an actual eviction. Further, no

Washington case has specifically addressed this issue. This Court must decide this issue as a matter of first impression.

There are a number of primarily older cases where the courts described as "evictions" situations where a property owner was dispossessed by another person who was not a landlord. See *Whatcom Timber Co. v. Wright*, 102 Wash. 566, 568-69, 173 P. 724 (1918) (eviction of property owner because the property is subject to paramount title from adverse possession); *Crawford v. City of Seattle*, 97 Wash. 70, 76-77, 165 P. 1070 (1917) (partial eviction occurred when City deprived company a franchise right to operate railway); *Hoyt v. Rothe*, 95 Wash. 369, 373, 163 P. 925 (1917) (eviction may occur if land is conveyed by general warranty deed and a part of it already is in the possession of another); *Black v. Barto*, 65 Wash. 502, 502-03, 118 P. 623 (1911) (eviction of the property owner occurred through "disturbance of possession "when a decree was entered that a third party had an interest in the property); *West Coast Mfg. & Inv. Co. v. West Coast Improvement Co.*, 25 Wash. 627, 643-44, 66 P. 97 (1901) (eviction of a property owner took place when the State claimed possession under a superior title).

A more modern example of a court defining an eviction in the absence of a landlord-tenant relationship is in *Foley v. Smith*, 14 Wn. App. 285, 539 P.2d 874 (1975). In that case, Foley sold real property

Smith after having previously contracted to sell it to another. The party who had previously contracted to purchase the property from Foley brought a specific performance action against Foley and Smith, seeking to obtain title to the property. The court did order specific performance in favor of the prior purchaser. *Id.* at 287. In a subsequent lawsuit between Foley and Smith, one issue was whether the specific performance judgment divesting both parties of their interest in the property constituted a breach of Foley's covenants to Smith. *Id.* at 289.

The court concluded that "[t]he decree of specific performance obtained by the prior purchaser of the land was an eviction and constituted a breach of the covenants of warranty and quiet enjoyment in the deed." *Id.* at 290 (emphasis added). The court stated as follows:

What constitutes actual or constructive eviction can vary according to the circumstances of the eviction, who is in possession and who has actual title In the present case, either the grantor or grantee was in possession at all times and the third party was not. It is thus clear the eviction occurred here when the prior purchaser obtained the decree of specific performance divesting the Foleys and Smiths of their interest in the land, and that such eviction breached the Foley's covenants of warranty and quiet title to the Smiths.

Id. at 291-92 (emphasis added).

These cases all suggest that an actual eviction does not necessarily require a landlord-tenant relationship. Accordingly, there is no reason to preclude coverage for Tacoma in this case simply because it was not the Tribe's landlord.

In conclusion, *Kitsap County* might appear at first to control in this case, but it does not. The court in *Kitsap County* addressed a very specific situation – whether coverage for "wrongful eviction" existed when there was no physical ouster of the claimants from their property. The court's imposition of a requirement that a landlord-tenant relationship exist related only to that situation (which required a constructive eviction analysis), and not to the facts of our case where an actual physical ouster was alleged.

This Court should reverse the trial court and find personal injury coverage as a matter of law based on the existence of a "wrongful eviction".

3. The Tribe Alleged “Wrongful Eviction” During the Insurers’ Policy Periods.

The Insurers argued (in one paragraph) that even if "wrongful eviction" coverage does exist in this case, no such eviction occurred during the Insurers' policy periods. However, this argument is inconsistent with the facts in this case.

The Insurers claim that the only eviction took place in the 1920s, when the Cushman Project opened. However, the Skokomish Complaint makes it clear that Tacoma engaged in alleged wrongful conduct from the 1920s through the time the lawsuit was filed. Paragraph 1 states that the Tribe seeks declaratory relief and damages "relating to the construction, operation, and maintenance of the Cushman Project", and that the Cushman Project "continues to have" a destructive effect on the Tribe's property and other legal interests. (CP 408). Paragraph 2 states that Tacoma "had been and continued to be" in violation of the Tribe's rights, and that damages are sought for injury to property and other legal interests "for the period beginning in 1925, when Defendants first began injuring Insurers' property and other legal interests, to the present". (CP 408-409).

Many, many other allegations in the Skokomish Complaint also emphasize Tacoma's operation and maintenance of the Cushman Project through the present in a manner that had caused continuing injury to the Tribe. Reviewing the specific allegations, there is no question that the Skokomish Complaint alleges that Tacoma engaged in a continuous course of wrongful acts and it continues to "evict" the Tribe from its property.

The Insurers' only argument is that the physical act of eviction "is a singular event that occurs at a particular point in time". In other

words, the Insurers argue that there can be no continuing eviction. But, the Insurers cite no case for this proposition. Further, this argument makes no sense. If an eviction is wrongful, it continues to be wrongful throughout the entire time that the claimant is dispossessed of his/her property. There is no principled reason why an eviction cannot be a continuing offense.

Once again, the Insurers' policy is ambiguous. There certainly is nothing in the policy that suggests that a wrongful eviction can only constitute a single event. In addition, Tacoma's interpretation – that there can be a continuing eviction – is at least reasonable. As a result, this ambiguity must be resolved against the Insurers and in favor of coverage.

This Court should reverse the trial court and find personal injury coverage for a wrongful eviction. Insurers' summary judgment motion on the timing of the alleged wrongful eviction must be denied.

E. TACOMA IS ENTITLED TO RECOVER ITS ATTORNEY FEES IN THIS ACTION UNDER *OLYMPIC STEAMSHIP*.

The Supreme Court in *Olympic Steamship Co. v. Centennial Ins. Co.*, 117 Wn.2d 37, 52-53, 811 P.2d 673 (1991), held that an insured that must engage in litigation in order to recover the benefits under its insurance policy is entitled to recover its attorney fees and litigation expenses. Accordingly, Tacoma requests that this Court enter an

award of attorney fees on appeal and also award Tacoma its attorney fees incurred in the trial court.

V. CONCLUSION

Ongoing operation of the Cushman Project unexpectedly and unintentionally resulted in aggradation of the Skokomish River, which in turn unexpectedly and unintentionally resulted in increased overbank flooding and raised groundwater levels. Under the broad language of the Insurers' policies, the "happening" that constitutes an occurrence in this case is the aggradation, and the unexpected property damage is the aggradation-related flooding and groundwater problems.

Whether Tacoma expected some problems to result from the initial construction of the Cushman Project is immaterial because the initial construction is not the relevant "happening". Even if the focus was on the construction of the Cushman Project, the problems the Tribe anticipated in the 1920s and 1930s did not materialize and did not result in any liability and/or did not constitute "property damage" and therefore is immaterial to the occurrence analysis. There also is insufficient evidence that Tacoma subjectively "expected" those problems.

In addition, Tacoma's alleged dispossession of the Tribe from certain property constituted a "wrongful eviction", despite the ruling in *Kitsap County*.

For the reasons stated above, Tacoma respectfully requests that this Court reverse the trial court and rule as a matter of law that Tacoma is entitled to coverage under the Insurers' policies for aggradation-related property damage and for wrongful eviction.

Respectfully submitted this 19 day of January, 2010.

GORDON THOMAS HONEYWELL LLP
Attorneys for Appellants

By: 
BRADLEY A. MAXA
WSBA No. 15198