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NO. 642472-1

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COURT OF APPEALS, DIVISION I  
OF THE STATE OF WASHINGTON

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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

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COURT OF APPEALS  
DIVISION I  
CLERK OF COURT

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**BRIEF OF RESPONDENTS**

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## I. INTRODUCTION

Respondents Indemnity Insurance Company of North America; Highlands Insurance Company; Industrial Underwriters Insurance Company and The Central National Insurance Company of Omaha (collectively “Respondents”) respectfully request this Court to affirm the trial court’s summary judgment ruling that found Respondents had no duty to indemnify the City of Tacoma and the Tacoma Department Of Public Utilities (collectively “the City”) for any portion of the settlement between the City and the Skokomish Tribe (“the Tribe”) with regard to claims arising from the Cushman Dam Project, because:

- (A) Under the language of Respondents’ policies and Washington law, no occurrence exists when the City expects damage, as it did with the Cushman Dam Project, prior to the inception of the policy periods; and
- (B) Personal injury liability coverage does not apply because the Tribe’s underlying complaint does not contain any allegations of “wrongful eviction,” and there is no alleged “wrongful eviction” that could have occurred during the Respondents’ policy periods.

## II. ISSUES PRESENTED

1. Whether an “occurrence” exists when the insured had notice of property damage prior to the inception of the policy period under the language of the Respondents’ policies and Washington law.
2. Whether there is coverage for the City for “personal injury” under the Respondents’ policies for the Tribe’s claims when there is no allegation of “wrongful eviction” in the underlying Complaint and no “wrongful eviction” for which the City could be held legally liable that occurred during the Respondents’ policy periods.

## III. COUNTER-STATEMENT OF THE CASE

### A. The Underlying Site

The City operates the “Cushman Project” which covers about 4700 acres of property in Mason County, Washington. CP 1167 at ¶ 40. The Project consists of: (1) an upper dam (“Dam No. 1”) built in 1926 and located approximately 19 river miles from the mouth of the Skokomish River; (2) Lake Cushman, located behind Dam No. 1 and capable of storing 450,000 acre feet of water; (3) a powerhouse (“Powerhouse No. 1”) capable of generating 50,000 horsepower; (4) a lower dam (“Dam No. 2”), built in 1930, located about two river miles downstream from Dam No. 1; (5) Lake Kokanee, capable of storing 7,300 acre feet of water; (6) a power tunnel surge tank and penstock; (7) a second powerhouse (“Powerhouse No. 2”) located on the shore of Hood Canal, capable of generating 90,000 horsepower; (8) a 37-mile transmission line, with

towers, extending from the powerhouses to Tacoma; and (9) other appurtenances. *Id.*

From the outset of its operations, the City was put on notice that Cushman Project would harm and did harm interests of the Skokomish Tribe (the “Tribe”). As early as January 20, 1920, even before the dams were built, the Special Agent of the Tribe stated the following in a letter addressing the City’s petition to divert water from the Skokomish River:

[Y]ou are advised that the Indians on the Skokomish Indian Reservation are all united in their claims that the project would cause their lands to depreciate to one-half their present value. In fact, prospective purchasers of Indian lands offered for sale, upon learning of the proposed project, looked elsewhere for farmland.

CP 1258. The predicted harm and injuries did indeed occur. The following summarizes the clerk’s papers that identify notice of known harm to the Tribe flowing from the City’s construction, operation and maintenance of the Cushman Project, consistent with the allegations found in Tribe’s underlying complaint against the City:

| Category of Harm                                   | Summary of Notice to City of Harm  |
|--|--|
| (1) Diversion of North Fork of the Skokomish River | <p>1920: City files <u>Funk</u> condemnation action in conjunction with its plan to divert the North Fork, including attendant damage by taking of riparian rights, deprivation of groundwater, inundation of land, changes in alluvial deposits. CP 492 – CP 588.</p> <p>1921: City files condemnation action against the State of Washington “to take all of the</p> |

| Category of Harm                     | Summary of Notice to City of Harm  |
|--------------------------------------|--|
|                                      | <p>water of the North Fork.” CP 631 – CP 663.</p> <p>1930: Tribal members complain of North Fork’s diversion in <u>Adams</u> lawsuit. CP 665 – CP 720.</p> <p>1957: City representatives present at public meeting where tribal members complained of flooding. CP 167 – CP 186.</p>   |
| (2) Damage to fish supplies.         | <p>1930: Tribe in <u>Adams</u> litigation complains that diversion of North Fork would destroy salmon runs. CP 665 – CP 730.</p> <p>1917-1962: Washington State Fisheries Board and Supervisor of Fisheries and Game in numerous written discussions with the City, the Project’s destruction of fish stocks. CP 98 – CP 146.</p> <p>1948-1996 : Tribe in <u>France</u> lawsuit asserts right to title to tidelands based on traditional fishing rights which were interfered with by construction of the dams. CP 191 – CP 357.</p> |
| (3) Damage to shellfish supplies     | <p>1948-1962: In <u>France</u>, the Tribe asserted ownership of the tidelands based on their right to harvest shellfish, and complained of loss of shellfish harvest. CP 191 – CP 281; CP 301 – CP 304.</p>  |
| (4) Damage to hunting and gathering. | <p>1948-1962: Tribe in <u>France</u> asserts the Project interfered with its use of the tidelands for water fowl, game, roots and berries. CP 306 – CP 331.</p>  |
| (5) Improper condemnation.           | <p>1948-1962: The validity of the <u>Funk</u> condemnation was raised in the <u>France</u> litigation. CP 212 – CP 281.</p>  |

More specifically, the City was aware and had notice that the Cushman Project could and did alter the water tables and flow of water in

the Skokomish Watershed, adversely effecting Tribal property interests. This notice applies directly to the City's "aggradation" position. For example, the Federal Power Commission, recognizing the Project's effect on groundwater flows in 1931, required the City to install groundwater gauging wells on the Skokomish Reservation. CP 160. The City also was also involved with public discussions on flood control. CP 162 – CP 165. By at least 1957, the City was aware that the Tribe was claiming damages from flooding. CP 167 – CP 171. Similarly, in 1958, the City participated in a field examination of the Skokomish River watershed, which noted "some changes in the runoff characteristics of Skokomish River by the construction of a large power reservoir on North Fork." CP 174.

Without question, the City's construction, operation and maintenance of the Cushman Project resulted in the expected reduction and/or elimination of water to the Skokomish Watershed. The City was also aware that these intended activities would result in injuries to Tribal resources, including increased flooding, and the loss of property values and natural assets. This awareness occurred long before the institution of Respondent's insurance policies in the 1970s.

**B. The Underlying Litigation**

On or about November 19, 1999, the City was sued by the Tribe, seeking "declaratory relief and damages relating to the construction,

operation and maintenance of the Cushman Project . . . .” CP 1159 at ¶ 1. The Tribal Complaint alleged that the City “first began injuring Plaintiffs’ property and other legal interests” in 1926, and that “[t]he Cushman Project has had, and continues to have, a destructive effect on Plaintiffs’ property and other legal interests as described herein.” CP 1167 at ¶ 41. The “construction, operation and maintenance” of the Cushman Project was cited as the source of all the Tribe’s damages. *Id.* The specific “impacts” or damages fell within five general categories, as noted in the prior table:<sup>1</sup>

- Diversion of Skokomish River Water. (CP 1167 – CP 1171 at ¶¶ 41.a., 41.b., 41.d., 41.j., 41.l., 41.m., 41.o., 41.; CP 1196 at ¶ 148; CP 1213 – CP 1214 at ¶¶ 216-221; CP 1219 at ¶¶ 242-246.)
- Harm to Fish Supply. (CP 1167 – CP 1171 at ¶¶ 41.a.-41.d., 41.g.-41.h., 41.m.; CP 1194 – CP 1196 at ¶¶ 139, 142, 143, 145-147, 149.)
- Harm to Shellfish Supply. (CP 1169 at ¶¶ 41.e., 41.f.; CP 1194 at ¶ 142.)
- Harm to Hunting and Gathering. (CP 1169 – CP 1170 at ¶¶ 41.g., 41.i., 41.j., 41.m.; CP 1194 at ¶ 140; CP 1195 at ¶ 145.)

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<sup>1</sup> Many of the Tribe’s separate allegations are variants of the same harm. For example, the Tribe’s allegations about deprivation of water rights overlap the Tribe’s complaints of decreased fish and shellfish. *Compare* CP 1213 – CP 1214 at ¶¶ 216-221 (re: unlawful taking of water rights implied as part of the Tribe’s treaty rights to fish and shellfish), with CP 1214 – CP 1215 at ¶¶ 222-227 (re: unlawful interference with treaty rights to fish and shellfish), and with CP 1219 at ¶¶ 242-246 (28 U.S.C. § 1983 claim for taking of water rights).

- Improper Condemnation of Easements. (CP 1170 – CP 1171 at ¶¶ 41.k., 41.p.; CP 1194 at ¶142.)

Of significance, neither the specific phrase nor the tort of “wrongful eviction” is found within the Tribe’s complaint. CP 1158 – CP 1240.

In 2001, at the trial level, U.S. District Court Judge Franklin Burgess ruled that Tacoma properly licensed the dams and the statute of limitations had expired on other claims made by the Skokomish Tribe. The Tribe ultimately appealed the matter to the 9<sup>th</sup> U.S. Circuit Court of Appeals. In 2003, the 9<sup>th</sup> Circuit rejected the Tribe’s claim after a three-judge panel voted 2-1 to uphold the trial courts ruling. The 9<sup>th</sup> Circuit then granted *en banc* review of the case (a panel of 11 circuit court judges, rather than the usual three), and the panel upheld summary judgment. The Tribe then appealed to the U.S. Supreme Court in early January 2006; however certiorari was denied.

In February, 2006, the Tribe moved to “reopen” their case in front of Judge Burgess to add “federal common law claims for infringement of the rights to fisheries, water and Reservation lands, including illegal occupation of the five allotments.” The “five allotments” refers to a prior ruling by the 9<sup>th</sup> Circuit that the City’s condemnation of certain allotment lands in the 1920s was void for jurisdictional reasons. *United States v.*

*City of Tacoma*, 332 F.3d 574 (9<sup>th</sup> Cir. 2003). Judge Burgess denied the Tribe’s request, and the Tribe again appealed.

The 9<sup>th</sup> Circuit required mediation. As noted previously, the Tribe’s then present claims were limited to the Cushman Project’s infringement of fishing and water rights and trespass on allotments—all other claims were dismissed.

Thereafter the City and the Tribe reached a settlement, including the payment of \$1.6 million for alleged trespass damages, which, per the terms of the agreement, arose out of “the construction, operation, maintenance and/or existence of Project transmission lines on Allotment Parcels.” CP 1318 – CP 1319. The Settlement Agreement also resolved all “Claims,” which included:

[A]ny and all rights, demands, actions, causes of action, suites, judgments, liabilities, obligations, losses, damages, penalties, compensation, costs, attorneys’ fee or any other expenses whatsoever, of whatever kind or nature, in law, equity or otherwise, without any limitation as to the amount *pertaining to the construction, maintenance, operation and/or existence of the Project, . . .*

CP 1310 (emphasis added). The Settlement Agreement thus addressed and concluded all of the City’s potential liability to the Tribe that arose out of the construction, maintenance, and operation of the Cushman Project.

**C. The Respondents' Policies**

The Central National policies, policy numbers CNU 12-35-34, CNS 9 49 26, CNU 00-78-23, CNU 00-79-82, and CNS 13-26-43, Highlands policy number HU 10-23-33, Century Indemnity Company policies, policy numbers CIS 43 06 84 and CIU 55-03-73, and Industrial Underwriters Insurance Company policy number JL 884-3446 (collectively the "Respondents' policies") were issued to the City for the following policy periods:

- CNU 12-35-34 – September 30, 1975 to September 30, 1978 (CP 1347);
- HU 10-23-33 – September 30, 1978 to September 30, 1981 (CP 1436);
- CNS 9 49 26 – September 30, 1980 to September 30, 1981 (CP 1363);
- CNU 00 -78-23 – September 30, 1981 to September 30, 1982 (CP 1386);
- CNU 00-79-82 – September 30, 1982 to September 30, 1983 (CP 1398);
- CNS 13-26-43 – September 30, 1982 to September 30, 1983 (CP 1411);
- CIS 43-06-84 – September 30, 1984 to September 30, 1985 (CP 1458);
- CIU 55-03-73 – September 30, 1984 to September 30, 1985 (CP 1485);
- JL 884-3446 – October 1, 1984 to October 1, 1985 (CP 1503).

The Respondents' policies provide, in pertinent part:

The company hereby agrees, subject to the limitations, terms and conditions hereafter mentioned, to indemnify the Insured for all sums which the Insured shall be obligated to pay by reason of liability (a) imposed upon

the insured by law . . . . for damages, direct or consequential and expenses, all as more fully defined by the term “ultimate net loss” on account of: (1) personal injuries, including death at any time resulting therefrom . . . . caused by or arising out of each occurrence happening anywhere in the world.

CP 1348; CP 1364; CP 1387; CP 1399; CP 1412; CP 1437; CP 1460; CP 1486; CP 1508. The Respondents’ policies define “personal injuries” as:

2. PERSONAL INJURIES. The term “personal injuries” means bodily injury, mental injury, mental anguish, shock, sickness, disease, disability, false arrest, false imprisonment, wrongful eviction, detention, malicious prosecution, discrimination, humiliation, also libel, slander or defamation of character or invasion of rights of privacy, except that which arises out of any advertising activities.

CP 1348; CP 1366; CP 1387; CP 1399; CP 1414; CP 1437; CP 1460; CP 1486; CP 1517.

“Occurrence” is defined in the Respondents’ policies as:

The term ‘occurrence’ means an accident or 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.

CP 1348; CP 1366; CP 1387; CP 1399; CP 1414; CP 1437; CP 1460; CP 1486; and CP 1518.

#### **D. The Coverage Litigation**

On June 7, 2002, now Chief Judge Dean Lum held that there was no coverage to the City for the Tribe’s claims under insurance policies

issued by Great American Insurance Company because the City expected property damage. CP 1250 at lines 4-9. The ruling applied to Great American's policies that were issued between September 1969 and September 1980. CP 1247. Respondents' insurance policies were first issued to the City in 1975, almost six years after the first Great American policy. Specifically, Judge Lum held:

- “In our case, as early as 1921, the tribes recognized that their land and water rights would be significantly and negatively impacted by the Cushman Dam project, and brought suit to stop the project. The City of Tacoma acknowledged that the project would deprive the neighboring landowners of their Riparian rights and that the adjoining land would be damaged in several possible ways. Complex and involved litigation with state and federal governments and plaintiffs occurred as early as the 1930s. The record clearly establishes that Tacoma was not only on notice of property damage in the form of groundwater impact and property devaluation in the 1930s, but it actually knew and admitted that the Cushman Dam project had caused this damage.”
- “Tacoma conceded that it was well aware of these problems prior to the Great American policy period, but argues that it did not expect the property damage in question to occur in the specific hydrogeologic manner in which it did. Neither Washington law nor the Great American policy language requires such scientific specificity. In order for there to be an occurrence, property damage must be neither expected nor intended.”
- “Because property damage from the Cushman Dam project was expected by the policy holder well before the Great American policy period, there could be no coverage under the occurrence portion of the Great American policies, and summary judgment must be granted as to those portions of the policies.”

CP 1247 – CP 1249.

In 2009, after the City entered into its settlement with the Tribe, Respondents filed a partial motion for summary judgment on “expected property damage,” relying, in part, on the court’s prior ruling. At that second hearing, Judge Lum reviewed the occurrence definition found in Respondents’ insuring agreements and found that summary judgment was proper. The court also granted Respondents’ motion for partial summary judgment on “personal injury” liability coverage.

#### IV. COUNTER-ARGUMENT

##### A. Standard of Review

Because the insurance policy issues presented here were decided by motion for summary judgment, review is *de novo*. *Mid-Century Ins. Co. v. Henault*, 128 Wn.2d 207, 212, 905 P.2d 379 (1995) and *Weyerhaeuser Co. v. Commercial Union Ins. Co.*, 142 Wn.2d 654, 664, 15 P.3d 115 (2000). The United States Supreme Court held that summary judgment should be denied only “if the evidence is such that a reasonable jury could return a verdict for the nonmoving party.” *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 251, 106 S. Ct. 2505, 2511, 91 L.Ed.2d 202 (1986) (emphasis added), *cited with approval in Young v. Key Pharmaceuticals, Inc.*, 112 Wn.2d 216, 770 P.2d 182 (1989). This is especially true where, as here, the non-moving party bears the burden of proving that the underlying claims are initially covered by the terms of the

policy. See *Queen City Farms, Inc. v. Aetna Cas. & Sur. Co.*, 126 Wn.2d 50, 70, 882 P.2d 703 (1994); *E-Z Loader Boat Trailers, Inc. v. Travelers Indem. Co.*, 106 Wn.2d 901, 906, 726 P.2d 439 (1986).

**B. The City’s Knowledge of Expected Property Damage Flowing From the Cushman Project Does Not Qualify as an “Occurrence” Under Respondents’ Insurance Policies.**

1. Respondents’ “occurrence” definition is not ambiguous and has a well settled meaning under Washington law.

The City’s initial arguments center on the interpretation and application of the “occurrence” definition to the underlying Tribal claims, and how Respondents’ “occurrence” definition is ambiguous, thus favoring coverage. Well settled principles of Washington law, however, contradict the City’s positions and directly support the trial court’s decision in this matter.

Washington courts have consistently held: “An insurance policy is a contract whereby the insurer undertakes to indemnify the insured against loss, damage or liability arising from a contingent or unknown event.” *Okanogan v. Cities Ins. Ass’n.*, 72 Wn. App. 697, 701, 865 P.2d 576 (1994)(quoting *Time Oil Co. v. CIGNA Property & Cas. Ins. Co.*, 743 F.Supp. 1400, 1412 (W.D. Wash. 1990)). This “event” is called an “occurrence” in most liability policies when damages result or are discovered during the policy’s coverage. *Id.*, *Gruol Constr. Co., v.*

*Insurance Co.*, 11 Wn. App. 632, 633, 524 P.2d 427, *rev. denied*, 84 Wn.2d 1014 (1974). “However, if an event causing loss is not contingent or unknown prior to the effective date of the policy, there is no coverage.” *Okanogan*, 72 Wn. App. at 701.

These same principles are incorporated into the language of Respondents’ insuring agreements, wherein “occurrence” is defined as:

The term ‘occurrence’ means an accident or 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.

CP 1348; CP 1366; CP 1387; CP 1399; CP 1414; CP 1437; CP 1460; CP 1486; and CP 1518.

Contrary to the City’s position, this definition is not ambiguous. The Washington Supreme Court, when analyzing this exact policy language in *Queen City Farms*, stated: “To satisfy the ‘occurrence’ definition, and to come within the coverage provision, it must be established that the harm was unexpected or unintended. There is never coverage where the harm is expected or intended” *Queen City Farms v. Cent. Nat’l Ins. Co.*, 126 Wn.2d 50, 70, 882 P.2d 703 (1994). The Court later cited to this same language and analysis in *Overton* and found: “In other words, property damage that is expected or intended by the insured does not warrant coverage. *Queen City Farms, Inc.*, 126 Wn.2d at 70-71.”

*Overton v. Consolidated Ins. Co.*, 145 Wn.2d 417, 425, 38 P.3d 322 (2002). “To be an ‘occurrence’ a harmful event must be ‘neither expected or intended from the standpoint of the insured.’” *Id.*

*Queen City Farms* and *Overton* both defeat the City’s ambiguity arguments. Simply stated, there is no Washington case law that supports a finding that the phrase, “accident or happening or event or a continuous or repeated exposure to conditions” language is ambiguous. The occurrence analysis focuses upon the nature and consequential damage of “the event causing physical injury or destruction of property.” *Overton v. Consolidated Ins. Co.*, 145 Wn.2d 417, 38 P.3d 322 (2002); *Boeing Co. v Aetna Cas. & Sur. Co.*, 113 Wn.2d 869, 886, 784 P.2d 507 (1990). This is consistent with the term “happening,” which requires a lack of “foreseeability.” *Safeco Ins. Co. v. Butler*, 118 Wn.2d 383, 401, 823 P.2d 499 (1992).

An early example of the application of these principles is found in *Town of Tieton v. General Ins. Co.*, 61 Wn.2d 716, 380 P.2d 127 (1963), which involved groundwater contaminated by a sewage lagoon. The lagoon was designed and constructed by professional engineers and “it was operated precisely in the manner planned, expected, desired and intended, and in the same manner as numerous other sewage lagoon similarly designed and planned have operated.” *Id.* at 720. Prior to

construction, however, the town's consulting engineers advised that there was a "very slight" possibility that plaintiff's well would become contaminated. *Id.*

The insurance policy at issue provided coverage for property damage "caused by accident." The trial court found that the well contamination was "unusual, unexpected, and unforeseen, and that the damage was caused by accident." *Id.*, at 722. The Washington Supreme Court reversed the trial court and found:

No one contends that the contamination of the well was intended. Yet, the lack of such intent does not by itself compel us to conclude that such result was "caused by accident." The element of foreseeability cannot be ignored. The evidence most favorable to respondent suggests no more than a finding that respondent took a calculated business risk that [plaintiff's property] would not be damaged. From a business standpoint, it may have been wise to have taken this calculated risk and to have proceeded with the construction of the lagoon . . . . But, when, under the facts of this case, the possibility of contamination became a reality, it cannot be said that the result was "unusual, unexpected and unforeseen."

*Id.* Based on the foregoing, the court held that the well contamination was not "caused by accident," and denied coverage.

The same holding applies here. The City admittedly knew that the construction and operation of the Cushman Project would damage and did injure the Tribe. When the damage became a reality, it "cannot be said

that the result was ‘unusual, unexpected and unforeseen.’” *Tieton*, 61 Wn.2d at 722.

A more recent example of these principles is found in *City of Redmond v. Hartford Acc. & Indem. Ins. Co.*, 88 Wn. App. 1, 943 P.2d 665 (1997), *rev. denied*, 134 Wn.2d 1001 (1998). That case involved two occurrence definitions which the court found to be “virtually the same”: either “an accident, including continuous or repeated exposure to conditions, . . .” or “an event including continuous or repeated exposure to conditions.” *Id.* 88 Wn. App. at 6-7. The policyholder in that case discharged acidic waste into a public sewer system, even though it had been repeatedly warned that it would be held responsible for any damage. As expected, the sewer district found damage to the pipes, and held the insured responsible for repair. The insured then sought coverage for the damage. In response to the insurer’s motion for summary judgment, the policyholder argued that until it was informed by the City of actual damage to the pipe, a question of fact existed on the expected/intended property damage issue. The trial court and the Court of Appeals found otherwise.

Initially, the Court of Appeals defined “expected” to mean “to look for as likely to occur or appear; look forward to; anticipate.” *Id.* at 8 (citing Webster’s New World Dictionary 492 (2d ed. 1984)). The Court

went further to hold that: “Expectation, in other words, is forward-looking and does not require that the damage have already occurred . . . . [I]t was not necessary that [the insured] be informed that there was actual damage in order for it to have known that damage was likely to result if it continued to discharge highly acidic wastes.” *Id.* The Court then found there was no defense or indemnity obligation for the sewer claims:

Once Metro notified [the insured] that sewer damage could occur from acidic discharges, [the insured] had sufficient information to allow it to anticipate that sewer damage was likely to occur if it continued to discharge heavily acidic waste into Redmond’s sewers. For this reason, the damage to Redmond’s sewer pipes cannot reasonably be said to have been unexpected. It was therefore not an “occurrence” within the meaning of the various policies.

*Id.*, at 8-9 (emphasis added).

The same “notice” standard discussed in *City of Redmond* was also used by the Washington Supreme Court in the *pièce de résistance* of the occurrence analysis, *Overton v. Consolidated Ins. Co.*, 145 Wn.2d 417, 38 P.3d 322 (2002). In *Overton*, the insured owned and operated an electrical transformer business that used various “hazardous materials” in its operations. *Id.*, 145 Wn.2d at 421. Overton was informed by the Department of Ecology (“DOE”) in 1976 that a single EPA test showed elevated levels of PCBs in soils at the site. According to the DOE report of the visit, “Overton’s position was that there was no problem and that,

even if the soil were contaminated, it was not his responsibility to clean it up.” *Id.*, at 422. The insured purchased a CGL insurance policy in 1977, without informing the insurance carriers of the EPA test results. In 1981, after Overton had ceased operations, the new owners of the site were required to remediate the property, and subsequently filed suit against Overton for the cleanup costs. Overton tendered the defense to his insurance carriers, who rejected the tender.

Coverage litigation ensued. The trial court granted the insurer’s motion for summary judgment on defense and indemnity, and held that the property damage was not unexpected/unintended and, therefore, there was no occurrence that triggered coverage under the policy. The Court of Appeals reversed the trial court on this issue, holding that questions of fact existed as to whether the insured expected to be held liable for the property damage.

The Washington Supreme Court reversed the Court of Appeals. The Court held that the proper analytical focus of the occurrence definition is whether *property damage* was expected or intended by the insured, not liability. The court found that “for purposes of determining whether the property damage is expected by the insured, the insured merely must be put on notice.” *Id.*, at 426. The court then concluded that there was no genuine issue of material fact and that the insured had notice

of some soil contamination on his property prior to the purchase of the policy, and thus there was no occurrence. It was immaterial, for purposes of the coverage analysis, that Overton claimed that there was “no problem” with the site in 1976 or that it was not his responsibility to clean up the site.

The analysis used by the Washington Supreme Court in *Overton* was not new. *Overton* simply summarized, clarified and applied the principles enunciated in prior decisions that “occurrence” based policies do not provide coverage for expected property damage. *See, e.g., Queen City Farms v. Central Nat’l Ins.*, 126 Wn.2d 50, 77, 882 P.2d 703 (1994); *Boeing v. Aetna Casualty and Surety Co.*, 113 Wn.2d 869, 784 P.2d 507 (1990), *Okanogan v. Cities Ins. Ass’n*, 72 Wn. App. 697, 865 P.2d 576 (1994); *Time Oil Co. v. CIGNA Prop. & Cas. Ins. Co.*, 743 F. Supp. 1400, 1420 (W.D. Wash. 1990) (all cited in *Overton*).

Per the foregoing, Respondent’s occurrence definition is not ambiguous and has a well settled meaning and application under Washington law, as found in *Queen City Farms* and *Overton*. “To be an ‘occurrence’ a harmful event must be ‘neither expected or intended from the standpoint of the insured’.” *Overton*, 145 Wn.2d at 425. There is no coverage for expected property damage. *Id.*

2. The “occurrence” definition requires notice of property damage, not a substantial probability of damage.

The next legal issue to be addressed is the burden of proof required to show expected property damage. On this point, the City seeks to graft an improper “substantial probability” standard from the “known loss” doctrine into the occurrence definition. Initially, the City is correct that “expectation” is a subjective standard. However, the Washington Supreme Court has made it clear that this standard may be met with circumstantial evidence. *Queen City Farms v. Central Nat’l Ins.*, 126 Wn.2d 50, 882 P.2d 703 (1994). As to what level of evidence is required, one need only read *Overton* to see the Court’s distinction between the “substantial probability” standard used for expected liability (“known loss”) and the “notice” standard applicable to expected property damage.

On this issue, the *Overton* court initially cited to *Time Oil Co. v. Cigna Prop. & Cas. Co.*, 743 F.Supp. 1400, 1414-15 (W.D. Wash. 1990), for the proposition that a “risk of liability” was no longer “unknown” when the insured received notice indicating a “substantial probability” that the loss would occur. *Overton*, 145 Wn.2d at 425. This is the “known loss” or “known risk” standard applicable to known liability.<sup>2</sup> In *Time Oil*,

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<sup>2</sup> The Supreme Court in *Public Util. Dist. No. 1 v. International Ins. Co.*, 124 Wn.2d 789, 805-808, 881 P.2d 1020 (1994) (“PUD”), explained that the “known loss” doctrine applies if the insured knows there is a “substantial probability” that it will be subjected to the type of liability that eventually occurs 124 Wn.2d at

the court concluded that PRP letters issued by the EPA in May 1982 notified Time Oil that there was a “substantial probability” that it would be required to pay response costs relating to the contamination, and thus there was no coverage. *Time Oil*, 743 F.Supp. at 1415. Differentiating this standard, the *Overton* court found that there was no official notification of such liability to the *Overton* insured, and thus the standard was “not at issue.” *Overton*, 145 Wn.2d at 425-426. Instead, the court found that “for purposes of determining whether the property damage is expected by the insured, the insured merely must be put on notice.” *Id.* at 426. This is the same standard used by this court in the *City of Redmond* decision, discussed previously. The Washington Supreme Court thus found that the “merely put on notice” standard was clearly distinguishable from the “known loss” standard presently advocated by the City. Proceeding further, the *Overton* court then applied the “notice” standard and found that since the insured had “notice of the defective condition, *i.e.*, PCB contamination” prior to the purchasing of the insurance policy, there was no coverage as a matter of law. *Id.* at 427.

The facts of *Overton* evidence the practical application of the “notice” standard. In *Overton*, the EPA took two soil samples at the site,

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805. The insured need not be sure that it will be held accountable for a certain liability--all that is required is that the insured knows that there is a substantial probability it will be sued. *Id.* at 807, citing *Time Oil Co. v. Cigna Prop. & Cas. Ins. Co.*, 743 F. Supp. 1400 (W.D. Wash. 1990).

only one of which tested positive for PCBs. The policyholder was notified of the results in 1976. It was not until the 1990s, almost twenty years later, that the extent of contamination was actually determined and the policyholder held responsible to remediate the site of hazardous wastes. Arguably, the *Overton* policyholder did not know of or accept the extent or scope of the ultimate contamination or remediation in 1976. Nevertheless, the Supreme Court found that the single, 1976 soil sample was sufficient to notify the policyholder of “property damage,” and thus preclude defense and indemnity under a policy issued subsequent to the date of such notice by way of summary judgment. *Overton*, 145 Wn.2d at 430-431. It was immaterial to the coverage analysis that the policyholder may not have expected the ultimate scope of the claimed property damage liability: *Id.*

In conclusion, the evidentiary standard to be applied to this case is the same standard used by the Washington Supreme Court in *Overton* and by this court in *City of Redmond*: “[F]or purposes of determining whether the property damage is expected by the insured, the insured merely must be put on notice.” *Overton*, 145 Wn.2d at 426. The “merely put on notice” standard, not the substantial probability of liability standard advocated by the City, is the proper litmus test for the occurrence definition.

3. If an 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.

The City also takes issue with Washington law that holds that if an insured expects some degree of property damage to occur, it is deemed to have expected the damage that eventually occurred. Again, the City's position is without legal basis. Washington decisions have repeatedly held that it is immaterial to the expected/intended analysis that the actual injury caused is of a different character or magnitude than that which was intended or expected. This is the heart of the *Overton* "merely put on notice" standard. Other Washington cases are in accord. *See, e.g., Western Nat'l Assur. Co. v. Hecker*, 43 Wn. App. 816, 822-24, 719 P.2d 954 (1986) (in analyzing intentional acts exclusion, focus is on whether injury is intended, not whether liability was intended); *New York Underwriters Ins. Co. v. Doty*, 58 Wn. App. 546, 549, 794 P.2d 521 (1990) (same); *Accord, Lloyd v. First Farwest Life Ins. Co.*, 54 Wn. App. 299, 302, 773 P.2d 426 (1989) ("It is not necessary that the insured intend or expect the specific injurious consequences of her action."); *Safeco Ins. Co. v. Dotts*, 38 Wn. App. 382, 685 P.2d 632 (1984) (no insurance coverage for wrongful death resulting from a minor slap in the face).

Consistent with the foregoing, the respected Federal Judge Dwyer in *Boeing Co. v. Aetna Cas. and Sur. Co.*, No. C86-352WD specifically found that when the insured subjectively expected some damage within an environmental context, it could not then later complain that the damage was more extensive than expected. *Boeing* involved groundwater contamination flowing from an off-site landfill. Ruling on the proper “expectation” standard to be applied at trial, Judge Dwyer analyzed Washington law, and then approved the following Jury Instruction No. 16:

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. For example, if an insured expects contamination of subsoil or groundwater to result from its acts, and such contamination resulting from the same acts occurs not only where the insured expected it but also on adjoining property, the insured must be found to have expected the damage to the adjoining property. Similarly, if an insured expects contamination, and the contamination occurs after the insured acts, but starts earlier or continues longer than expected, the insured must be found to have expected the full duration of the contamination.

*Boeing Co. v. Aetna Cas. and Sur. Co.*, No. C86-352WD (*Jury Instructions* Sept. 18, 1990).

While pre-dating *Overton*, this standard is consistent with the *Overton* decision. As noted previously, the *Overton* insured not only denied liability, but claimed he had no knowledge of the extent of

contamination at his property. Nevertheless, one soil sample that showed elevated levels of PCBs was sufficient to preclude coverage based on expected property damage. This same standard applies to this case.

The City tries to skirt these cases by claiming that liability defines the extent of expectation, citing to *American Nat'l Fire Ins. Co. v. B&L Trucking*, 82 Wn. App. 646, 920 P.2d 192, *aff'd on other grounds*, 134 Wn.2d 413, 951 P.2d 250 (1998). The City then argues that the City's sole liability (and thus expectation) is limited to sediment aggradation-related damages. The City is wrong on both the facts and the law.

First the facts. The City's alleged liability, as defined by the Tribe's complaint, goes far beyond just aggradation issues. For example, the underlying complaint states that the Tribe is seeking "declaratory relief and damages relating to the construction, operation, and maintenance of the Cushman Project." CP1159 at ¶1. The Tribe alleges further:

From its inception, the Cushman Project has had, and continues to have, pervasive and destructive environmental, economic, social, cultural and other impacts on Plaintiffs' property and other legal interests, as described below, which the Defendants were aware, or reasonably should have been aware from the outset.

CP 1167 at ¶41. The Tribe then sought damages based on flooding, dewatering, lost fish and shellfish resources, lost cultural resources, etc. Later, the Settlement Agreement executed by the City and the Tribe

included the payment of cash and property by the City in return for a release of all claims “pertaining to the construction, maintenance, operation and/or existence of the Project, . . .” which included “partial compensation for the Tribe’s damages, including aggradation-related damages.” CP 1310 at ¶1.6 and CP 1312 at ¶4.1.1. Aggradation was thus but one facet of the City’s potential liability to the Tribe. To limit the City’s expectation to just aggradation damages is to simply ignore reality and the express terms of the underlying complaint and Settlement Agreement.

Second, the law. The City argues that the *B&L Trucking* decision stands for the proposition that the insured’s liability defines the relevant property damage for an expected/intended analysis. That reading of the case has not been accepted beyond the Court of Appeals decision, and was not referred to in the *Overton* decision. Assuming, *arguendo*, that this is a proper statement of Washington law (which we disagree with), the City’s alleged liabilities to the Tribe in this case are not limited to just aggradation-based damages, as noted in the prior paragraph. Accordingly, *B&L Trucking* does not limit the City’s expectation in this case to aggradation damages, but rather, all damages “relating to the construction, operation, and maintenance of the Cushman Project. . . .” CP 1159 at ¶1.

The City's citation to *Woo v. Fireman's Fund Ins. Co.*, 161 Wn.2d 43, 164 P.3d 454 (2007), also deserves some comment. The issue before the court in that case was whether a duty to defend existed based upon the allegations in a complaint, which included damages arising out of a pattern of derogatory conduct (taunts) and taking pictures of an employee with boar tusks. The Court reviewed the duty to defend standard, stating that the duty is triggered if the underlying complaint is ambiguous. *Id.* 161 Wn.2d at 64. "In short, if it is not clear that the complaint does *not* contain allegations that are not covered by the policy, the insurer has a duty to defend." *Id.* The Court then found that the insured's "taunts" and the practical joke could have been viewed as part of the insured's efforts to cultivate a friendly working relationship in the office, and thus the employee's complaint was ambiguous and deserving of a defense. *Id.* In sum, the decision stands for the proposition that an ambiguous complaint requires a defense, and not much more.

In contrast, this matter does not involve the duty to defend, so *Woo* is not on point. Instead, this case looks to the indemnity obligation, under a "merely put on notice" of property damage standard articulated in *Overton*. Of note, even the Tribe's complaint in this case states that the City was "aware" of the damage flowing from the Cushman Project from the outset. CP 1167 at ¶41). *Woo* does not change the analysis.

4. The uncontested facts show that the City expected property damage flowing from the construction, operation and maintenance of the Cushman Project.

Applying the above-noted standards to the respondents' occurrence definition, there is no question that the City had notice of and was aware of property damage flowing from the construction, operation and maintenance of the Cushman Project long before the institution of the Respondents' policies in 1975. As Judge Lum held, the City was aware prior to 1969:

- “. . . . [T]hat the project would deprive the neighboring landowners of their Riparian rights and that adjoining lands would be damaged in several possible ways.” CP 1249.
- “The record clearly establishes that Tacoma was not only on notice of property damage in the form of ground water impact and property devaluation in the 1930s, but actually knew and admitted that the Cushman Dam project had caused this damage.” CP 1249.
- “Tacoma concedes that it was well aware of these problems prior to the Great American policy period, but argues that it did not expect the property damage in question to occur in the specific hydrogeologic manner in which it did. Neither Washington law nor the Great American policy language requires such scientific specificity. CP 1249.

We respectfully request that this court affirm the trial court and well-settled Washington law and find that there was no “occurrence” for any property damage that arose out of the construction, operation and maintenance of the Cushman project.

The finding is supported by the City's opening brief. By the City's own admission, the "event causing loss" was the construction, operation and maintenance of the Project: "Tacoma submits that the occurrence is the development of aggradation because of the ongoing operation of the Cushman Project." (Emphasis added). City's Opening Brief at page 15. Stated differently, the operation of the Project (the event) "caused" the "loss" (aggradation) that is alleged to have damaged the Tribe. *Okanogan*, 72 Wn. App. at 701. All of the underlying damages flowed from the City's operation of the Cushman Project, and that is the relevant event or happening that is the focus of the respondents' occurrence definition.

It is undisputed that the City was repeatedly notified by the Tribe, State, Federal agents, and its own internal reports that natural resources were being destroyed by the City's operation of the Cushman Project. We refer the court to the summary of known damage flowing from City's operations stated on pages 3 to 4 of this brief as uncontested evidence supporting summary dismissal based on "no occurrence." Further, reports in the 1950s told the City that the Cushman Project was affecting river flows and that the Tribe was experiencing flooding. Thus, like *Overton*, there is no question of material fact that the City was "notified of property damage" long before the institution of Respondents' insurance policies beginning in 1975. *Overton*, 145 Wn.2d at 430-431.

It is also undisputed that the City took a calculated business risk and made a business decision to operate the Cushman Project in manner that would adversely impact natural resources. Following the language of *Town of Tieton*, by design, the Cushman Project restricted the flow of the Skokomish River, and the City was repeatedly put on notice of damage that would and did flow from its operations. *Town of Tieton*, 61 Wn.2d at 720-722. Like the *Tieton* policyholder, it makes no difference that the City's operations may have been reviewed and at times even approved by state and federal agencies, or at times may have been operated according to standard practice. The visible and apparent consequences of the City's operations, *i.e.*, damage to natural resources, etc., were nevertheless "foreseeable" and "expected," and thus are not considered an "accident." *Id.* Accordingly, the proper legal finding is that the City "expected" property damage, and thus there is no coverage available to the City. Summary judgment was therefore appropriate.

**C. There is No Personal Injury Liability Coverage Available to the City as There is No Wrongful Eviction Implicated by the Tribal Claims.**

1. The Tribe's Claims Do Not Constitute a "Wrongful Eviction."

The City also contends that coverage for the Tribe's trespass-based injuries are covered by the "personal injury" liability provisions of

Respondents' policies, as such injuries allegedly constitute a "wrongful eviction." Like the foregoing discussion, the City's contentions are unsupported by Washington law and the undisputed facts.

Washington courts limit "personal injury" coverage to specifically enumerated offenses set forth in the policy. *Kitsap County v. Allstate Ins. Co.*, 136 Wn.2d 567, 964 P.2d 1173 (1998); *General Ins. Co. v. Chopot*, 28 Wn. App. 383, 386, 623 P.2d 730 (1981). The theory underlying the claim against the insured, not the nature of the alleged injury, determines whether personal injury coverage applies. *Kitsap County*, 136 Wn.2d at 579-80; *Cle Elum Bowl, Inc. v. North Pacific Ins. Co., Inc.*, 96 Wn. App. 698, 706-708, 981 P.2d 872, 877 – 878 (1999). This is done by looking to the type of offense alleged. *Kitsap County*, 136 Wn.2d at 580; *Cle Elum Bowl*, 96 Wn. App. at 706-708.

In this case, the City alleges that the Tribe's trespass claims constitute an action for wrongful eviction. The Washington Supreme Court, however, has already rejected this argument in *Kitsap County v. Allstate Ins. Co.*, 136 Wn.2d 567, 964 P.2d 1173 (1998). In *Kitsap County*, the current and former residents of a mobile home park brought suit against the County for damages associated with its operation of a landfill. The specific allegations mirror those brought by the Tribe against the City for its operation of the Project:

- (1) Impairment of health and property.
- (2) Trespass and nuisance.
- (3) Interference with use and enjoyment of property.
- (4) Property devaluation.

*Id.*, 136 Wn.2d at 571-572; 593. There were no specific allegations of “wrongful eviction” in the underlying complaint. *Id.* at 593.

Nevertheless, the County (similar to the City) argued that that the above noted injuries constituted a “constructive eviction” that fell within the “wrongful eviction” provisions of the policy at issue. The Washington Supreme Court held otherwise, and its ruling is controlling in this instance. In particular, the Court held that a wrongful eviction only exists “when there is an intentional or injurious interference by the landlord . . . which deprives the tenant of the means or the power of beneficial enjoyment of the demised premises or any part thereof, or materially impairs such beneficial enjoyment.” *Id.* at 594. The Court also required “physical ouster” by a “landlord” for a wrongful eviction to exist. *Id.* Finally, the Court required notice from the tenant to the landlord: “a tenant must ‘give the landlord notice of the act or condition complained of and an opportunity to remove or correct the condition.’” *Id.* at 594 (citing *Pague v. Petroleum Prods., Inc.*, 77 Wn.2d 219, 221, 461 P.2d 317 (1969)). The Court then concluded:

In sum, we are satisfied that the complaints against Kitsap County for trespass, nuisance, and interference with use and

enjoyment of property do not constitute the offense of wrongful eviction.

*Id.*

The same finding applies to this case—the Tribe’s claims of trespass and interference with the use and enjoyment of their property do not constitute the offense of wrongful eviction. As admitted by the City, there is no landlord/tenant relationship, no ouster of a tenant by a landlord, and no notice from a landlord to effectuate a wrongful eviction offense under Washington law.

The City’s counter to *Kitsap County* is that it really did not address a “wrongful eviction” scenario and that the phrase “wrongful eviction” is ambiguous. The City is simply wrong.

“Wrongful eviction” is a well known tort or cause of action discussed in a number of Washington decisions. This is not an issue of “first impression.” A “wrongful eviction” involves a leasehold or contractual interest and ouster by one with superior title as is found in a landlord/tenant relationship. *See, e.g., Iverson v. Marine Bancorp.*, 86 Wn.2d 562, 546 P.2d 454 (1976); *McKennon v. Anderson*, 49 Wn.2d 55, 298 P.2d 492 (1956); *Chung v. Louie Fong Co.*, 130 Wash. 154, 226 P. 726 (1924). Indeed, every reported “wrongful eviction” case issued from a Washington state court over the past thirty years has involved a

landlord/tenant relationship.<sup>3</sup> For example, *Iverson* involved the wrongful eviction of tenant in an unlawful detainer action, even though the tenant had a letter allowing for continued occupancy. The *Iverson* court eventually awarded damages for wrongful eviction, including: “damages that reasonably flowed from the landlord’s wrongful act, including the expense of moving.” *Iverson*, 86 Wn.2d at 565.

Black’s Law Dictionary (8th ed. 2004) is in accord, wherein “wrongful eviction” is defined as: “a lawsuit brought by a former tenant or possessor of real property against one who has put the plaintiff out of possession, alleging that the eviction was illegal.” In comparison, “eviction” is defined in Black’s as: “The act or process of legally dispossessing a person of land or rental property.” Of note, the Washington Supreme Court cited Black’s in *Kitsap County* to define the terms “wrongful entry” and “trespass”, but did not feel the need to cite to it in its later discussion of “wrongful eviction.”

In spite of the foregoing, the City attempts to exorcise the word “wrongful” from “wrongful eviction” in Respondents’ policies. In so

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<sup>3</sup> See, e.g., *Carlstrom v. Hanline*, 98 Wn. App. 780, 990 P.2d 986 (2000); *Cle Elum Bowl, Inc. v. North Pac. Ins. Co., Inc.*, 96 Wn. App. 698, 981 P.2d 872 (1999); *Miller v. Yates*, 67 Wn. App. 120, 834 P.2d 36 (1992); *Olin v. Goehler*, 39 Wn. App. 688, 694 P.2d 1129 (1985); *Iverson v. Marine Bancorp.*, 86 Wn.2d 562, 546 P.2d 454 (1976); *Aro Glass & Upholstery Co. v. Munson-Smith Motors, Inc.*, 12 Wn. App. 6, 528 P.2d 502 (1974); *Keron v. Namer Inv. Corp.*, 4 Wn. App. 809, 484 P.2d 1152 (1971).

doing, the City cites to a number of 100-year old pre-*Kitsap County* cases to support its position. The attempt is unavailing. The Washington Supreme Court has repeatedly held that insurance terms may not be read out of the policy, so to remove “wrongful” from “wrongful eviction” is improper. “An insurance policy is construed as a whole, with the policy being given a fair, reasonable, and sensible construction.” *Summers v. Great Southern Life Ins. Co.*, 130 Wn. App. 209, 213, 122 P.3d 195 (2005) (citing *Weyerhaeuser Co. v. Commercial Union Ins. Co.*, 142 Wn.2d 654, 666, 15 P.3d 115 (2000)). If the policy is clear and unambiguous, courts enforce it as written and may not modify it or create ambiguity where none exists. *Weyerhaeuser Co.*, 142 Wn.2d at 666. As stated in *State Farm Fire & Cas. Co. v. English Cove Ass’n, Inc.*, 121 Wn. App. 358, 363, 88 P.3d 986 (2004): “If the plain language of the policy does not provide coverage, we will not rewrite the policy to do so.”

The Washington Supreme Court has already held that the phrase “wrongful eviction” is not ambiguous in *Kitsap County*, and thus City’s attempts to effectively overrule that decision and create an ambiguity where none exists are futile. Moreover, all of the old, pre-*Kitsap County* cases cited by the City do not involve the tort of “wrongful eviction,” nor do they seek damages caused by a “wrongful eviction,” but rather, they discuss various forms of “eviction” that were not deemed to constitute a

“wrongful eviction.” Indeed, in the sole old case cited by the City that even mentions wrongful eviction in *dicta*, *Crawford v. City of Seattle*, 97 Wn. 70, 165 P. 1070 (1917), the Washington Supreme Court recognized the necessity of having a landlord evicting a tenant for a wrongful eviction cause of action to exist. *Id.* 97 Wn. at 75-76.

The City’s more recent citation to *Foley v. Smith*, 14 Wn. App. 285, 539 P.2d 874 (1975), suffers from the same defect. *Foley* did not address or mention “wrongful eviction,” but rather discussed an alleged breach of a “covenant of warranty” claim. *Foley*, 14 Wn. App. at 290-91. Considering evidence of a breach, the court held: “A covenant of warranty is broken only by an actual or constructive eviction under a paramount title existing at the time of the conveyance.” *Id.* at 291. The court then found that only “reasonable attorney fees expended by the covenantees in good faith to defend their title” were recoverable as damages for the alleged breach. *Id.* at 296. “Wrongful eviction” was not discussed or mentioned in the decision, nor were “wrongful eviction” damages awarded. The decision in no way trumps or even puts into question the reasoning behind *Kitsap County*.

The City’s final position that *Kitsap County* is distinguishable because it only dealt with “constructive eviction” and not “actual eviction”

deserves but little comment. One need only refer to the Washington Supreme Court's final holding in that case:

In sum, we are satisfied that the complaints again [the County] for trespass, nuisance, and interference with use and enjoyment of property do not constitute the offense of wrongful eviction.

*Kitsap County*, 136 Wn.2d at 594. This broad statement is not ambiguous—there is no wrongful eviction coverage for trespass, nuisance and interference with use and enjoyment of property claims. Respondent's insurance policies do not provide personal injury coverage for "actual eviction" or "partial eviction," but rather "wrongful eviction." We respectfully request that this court follow *Kitsap County* and affirm Chief Judge Lum and dismiss the City's personal injury claims accordingly.

2. There are no "wrongful evictions" that occurred during respondent's policy periods.

Without citation to any authority, the City also infers that a wrongful eviction can be a continuing tort occurring during respondent's policy periods. The City's inference alone is not enough to create a cause of action that does not otherwise exist. Respondents' insurance policies require that each specifically enumerated offense occur during each policy period. CP 1348; CP 1366; CP 1387; CP 1399; CP 1414; CP 1437; CP 1460; CP 1486; and CP 1518 ("occurrence" definitions). As stated

previously, it is the theory underlying the claim against the insured, not the nature of the alleged injury that determines whether personal injury coverage or bodily injury and property damage coverage applies. *Kitsap County*, 136 Wn.2d at 579-80.

The basis for the City's position is that the Tribe has alleged that City's operation and maintenance of the Project has "caused continuing injury to the Tribe." City Opening Brief at 47. In taking this position, the City improperly looks to the injury resulting from the alleged "wrongful eviction" offense, not the theory for the offense. Looking to the theory, there must be an ouster of a tenant from property by a landlord or a party with a superior property interest for a wrongful eviction to take place. Such an eviction is a singular event that occurs at a particular point in time to a particular tenant from a particular property owned by a landlord. There is no Washington case law that says this conduct is a continuing tort. For instance, there would have to be a wrongful ouster by a landlord, a return to the tenancy, another ouster, another return to the tenancy, again an ouster, and so on over time. There is no such pattern in the Tribe's allegations.

Further, one need only look at the damages that may be afforded a victim of a wrongful eviction to see that it is not a continuing tort: "moving expenses, costs of relocation, loss of opportunity and pain and

suffering.” *Iverson*, 86 Wn.2d at 564. “Moving expenses” and “relocation expenses” involve a singular event—a move—not an on-going injury such as a trespass which may involve continuing interference with property rights. *See Bradley v. American Smelting & Ref. Co.*, 104 Wn.2d 677, 695, 709 P.2d 782 (1985).

Moreover, under Washington law, a suit for damages for a continuing tort may only “be brought for any damages occurring within the 3-year period preceding suit.” *Fradkin v. Northshore Util. Dist.*, 96 Wn. App. 118, 124, 977 P.2d 1265 (1999), *citing Bradley*, 104 Wn.2d at 695. Applied to the underlying matter, the three year period proceeding the Tribe’s suit was 1996, thus capping the City’s alleged trespass liability to post-1996 damage. The plaintiffs’ policies only cover the City’s liability imposed by law arising from an occurrence which results in personal injury during the policy period. As such, there is no personal injury coverage for liabilities and injury that post-date the Respondents’ policies.

## V. CONCLUSION

In summary, the trial court correctly ruled that there was no coverage under the Respondents’ policies for the Tribe’s claims against the City.

There is no material fact in dispute that the City expected damage from the Cushman Dam Project before the inception of the Respondents' policy periods in 1975. "To satisfy the 'occurrence' definition, and to come within the coverage provision, it must be established that the harm was unexpected or unintended. There is never coverage where the harm is expected or intended" *Queen City Farms v. Cent. Nat'l Ins. Co.*, 126 Wn.2d 50, 70, 882 P.2d 703 (1994). Because the City expected harm, there was no "occurrence", and the Tribe's claims do not fall within the insuring provisions of the Respondents' policies. Thus, there is no coverage.

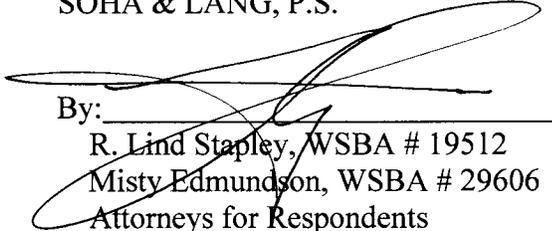
Moreover, the Tribe's complaint does not state any allegations of "personal injury" as defined by the Respondents' policies. Specifically, there was no allegation which would qualify as a "wrongful eviction" under established Washington law since there (1) the Tribe's underlying complaint does not specifically enunciate a claim for "wrongful eviction"; (2) the City was never a landlord of any Tribal properties, there was no notice of eviction, and no physical ouster by one with superior title, which are prerequisites for a "wrongful eviction" action under Washington law; (3) any "wrongful eviction" did not occur within the Respondents' policy periods; and (4) the City would have no legal liability for any "wrongful eviction" in the Respondents' policy periods. Under the express policy

language, there is no personal injury coverage afforded under the Respondents' policies for the Tribe's claims.

Accordingly, the trial court should be affirmed in all respects, and the City's request for attorneys' fees should be denied.

DATED this 19~~th~~ day of March, 2010.

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