No. 101241-1
(Court of Appeals No. 37747-4-III)

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

BROCK MASLONKA and DIANE MASLONKA, a marital community,

Plaintiffs/Appellants/Cross-Respondents,

v.

PUBLIC UTILITY DISTRICT NO. 1
OF PEND OREILLE COUNTY,

Defendant/Respondent/Cross-Appellant.

ANSWER TO PETITION FOR REVIEW

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I. IDENTITY OF RESPONDENT

Brock and Diane Maslonka, ("Maslonkas"), Appellant/Cross-Respondents below, offer this Answer to Petitioner Public Utility District No. 1 of Pend Oreille County's ("PUD") Petition for Review.

II. INTRODUCTION

This is a case riddled with material questions of fact which must be decided at trial by a jury. Indeed, the PUD has not and cannot establish a governmental taking prior to the Maslonkas' purchase of the property in 1993 for the very same reasons that the PUD is unable to establish its purported prescriptive easement.[1]

Specifically, the PUD has not provided any evidence establishing, if, when, how often, or to what extent the Dam's operations **caused** the River to flood and damage the Maslonkas' property prior to 1993. The PUD's sole reliance

[1] Notably, the PUD' Petition for Review does not challenge the Court of Appeals holding finding material questions of fact related to the PUD's assertion of a prescriptive easement.

upon the Dam's existence since 1955 and river elevation logs, which do not differentiate between natural occurring elevations and those induced by the Dam's operation, does not satisfy the PUD's burden. Furthermore, as set forth below, there are material questions of fact regarding the PUD's subsequent conduct and changed operational parameters since 1993.

Thus, the Court of Appeals properly recognized the myriad of material questions of fact which must each be determined at trial.

III. STATEMENT OF THE CASE

A. The Maslonkas' Property

In 1993, the Maslonkas purchased 535 acres of property outside of Cusick, Washington. (CP 461-464). They purchased the property from Herb Cordes to use for farming. Id. The property lies east of Highway 20 and is bordered by the Pend Oreille River ("River") to the west. Id.

Since purchasing the property, the Maslonkas have continuously lived on and farmed the property. (CP 459-460,

466). They grow cash crop Timothy hay and maintain pasture lands to feed between 20 and 100 head of cattle. (CP 464-465, CP 473-474, CP 475). The Maslonkas' property includes approximately 1 mile of river frontage between River Mile 68 and 69. (CP 1123).

B. <u>Box Canyon Dam</u>

In 1952, the Federal Energy Regulatory Commission ("FERC") issued the original operating license for Box Canyon Dam ("the Dam"). (CP 199). The original FERC license required the PUD to compensate private land owners for any damage caused by the Dam's operation. (CP 1754). In 1955, the PUD completed construction of the Dam. (CP 74). Prior to the Dam's construction, the River's "*natural high water mark (as measured at the town of Cusick)* [was] *2,028 feet msl*." (CP 1151 n.22).

The Dam now "*impounds about 55 miles of the Pend Oreille River to create Box Canyon reservoir, which crosses into Idaho about two miles below Albeni Falls dam*." (CP

1147). The Dam's general operations are explained in the following excerpt:

> *The normal elevation of the water surface at Box Canyon Dam is El. 2030.6. The water surface is controlled by raising the spillway gates whenever the flow in the river exceeds the Project hydraulic capacity of 29,200 cfs. The backwater caused by Box Canyon Dam is also affected by lowering or raising the spillway gates. "Backwater" is the difference between the natural water surfaces elevation (without the dam) and the raised water surface elevation caused by the dam. There is a pronounced backwater effect in the river near the dam and less effect further away from the dam. The river water surface (backwater) can be raised or lowered by controlling the release of water at the dam with either turbine and/or spillway gates. Generally, the spillway gates at Box Canyon Dam are raised when the river flowrate increases, and lowered (put back in place) when the flowrate decreases.*
>
> *The spillway gates at Box Canyon Dam are operated to meet two constraints for backwater. The first constraint requires that the water surface elevation at Cusick (RM 70.1) not exceed El. 2041.0. The second constraint requires that the encroachment (backwater) on the tailwater of Albeni Falls Dam Hydroelectric Project not exceed 2 feet above natural levels at that point. (Note: Prior to March 1963, the allowable encroachment was 1 foot.) At the calculated flow of 68,000 cubic feet per second (cfs), both*

constraints are simultaneously at their limit. For flows less than 68,000 cfs, a 2-foot encroachment at Albeni Falls is maintained with a water surface at Cusick less than El. 2041.0. When flows exceed 68,000 cfs the backwater encroachment at Albeni Falls is reduced below 2 feet to maintain a water surface at Cusick of El. 2041.0. These constraints are met by either removing (raising) or lowering (putting back in place) the spillway gates, which also decreases or increases the water surface elevation at the dam. With all spillway gates completely removed, the water surface at Cusick reaches its limit of El. 2041.0 when the flow in the river reaches about 90,000 cfs. At flows greater than 90,000 cfs, the river becomes regulated by a natural-occurring narrow entrance to Box Canyon located about one-half mile upstream from the dam, and there is no longer any backwater effect due to the project. The canyon's entrance is simply not wide enough to pass all of the flow greater than 90,000 cfs without backing up water. Whenever river flows are at or above 90,000 cfs with the spillway gates completely removed, upstream water levels are the same as before the dam was constructed, and the water elevation at Cusick exceeds El. 2041.0. Thus, the waterline at a river flow of 90,000 cfs establishes the Box Canyon Project boundary line.

(CP 1078-1079)

***

Prior to March 18, 1963, the Box Canyon Dam allowable backwater effect at Albeni Falls Dam was 1 foot for flows up to 90,000 cfs. On March 18, 1963, the FERC License for Box Canyon

> *Project was amended to allow 2 feet of backwater effect at Albeni Falls Dam. The increased backwater effect produced higher heads for the low to mid range of flows (less than 68,000 cfs); and thus greater power generation capability at Box Canyon.*

(CP 1081-1082).

The Dam's backwater effect when running at maximum licensing parameters is exhibited in charts, called backwater curves, which identify the River's elevation at Cusick for specific flow rates in the River's natural state (no Dam) versus its altered state (with the Dam). (CP 1223-1226). These backwater curve charts are intended to be utilized and relied upon by the Dam's operators to ensure the Dam stays within its licensing parameters. (CP 1229-1230). The backwater curves reveal that River elevation 2035.5 occurs naturally at a little over 60,000 cfs, and elevation 2041 is reached at 90,000 cfs. (CP 1225). Conversely, the Dam's full operation causes the River elevation to reach 2035.5 slightly over 34,000 cfs and reaches elevation 2041 at 69,000 cfs. (CP 1223). At flows

greater than 90,000 cfs, the Dam operators must remove all of the Dam's gates, and the Dam has no further impact on the River's elevation until flows drop below 90,000 cfs and the Dam's gates are reinserted. (CP 1235).

The PUD tracks and charts the River's daily flow rates similar to the River's elevation. (CP 1301, 1310-1311). The PUD's own civil engineering expert, Scott Mahnken, relied upon the daily flow records in generating his expert report. (CP 1246). Likewise, he also referenced and relied upon the backwater curves. (CP 1239-40, 1246). Mr. Mahnken utilized the flow logs and the backwater curves, in conjunction, to opine that from 2016-2018 elevation 2035.5 was exceeded a total of 199 days, but that 100 of those days were caused specifically by the Dam's operation. (CP 1246). However, Mr. Mahnken did **not** perform the same detailed analysis of the Dam's historical impact on the Maslonkas' property. (CP 1238-1249). Instead, as noted by the Court of Appeals, Mr. Mahnken and the PUD relied solely upon "historical averages" which vary widely.

Maslonka v. Pub. Util. Dist. No. 1 of Pend Oreille Cnty., 514 P.3d 203, 227 (Wash. Ct. App. 2022).

Thus, it is clear that the PUD's operation of the Dam does periodically cause the River's surface elevation to exceed river elevation 2035.5 at Cusick. However, contrary to the PUD's representation to this Court that "*there is no dispute the dam increases the frequency of flooding during the high-water season*", the PUD has repeatedly denied that the PUD causes an increase in the River's elevation or damage to the Maslonkas' property. (Compare CP 12 at ¶ 13; CP 13 at ¶ 17; CP 17 at ¶ 40; with CP 24 at ¶ 13 and ¶17; CP 27 at ¶ 40; also see CP 59; CP 209; CP 837 at n. 4 & 5; CP 853; CP 868-871 at 33:8-36:14; CP 908-910 at 38:24-39:3, 39:24-40:4; CP 1577-1578; CP 1582).

C. The PUD's Property Rights

In 1955, the PUD purchased an easement from the Maslonkas' predecessors in interest. (CP 331-332). The easement allowed the PUD to flood the Maslonkas' property up

to River elevation 2031.3. Id. This easement was consistent with the way in which the PUD operated the Dam at the time. However, in 1960, the PUD purchased an additional easement, which allowed the PUD to flood the Maslonkas' property up to elevation 2035.5. (CP 328-329). It is undisputed that the PUD never purchased any additional easements from the Maslonkas or their predecessors.

Similarly, it is also undisputed that the PUD never initiated condemnation proceedings against the Maslonkas' property. Indeed, an internal PUD memo reveals the PUD has knowingly, intentionally, and strategically chosen **not** to initiate condemnation proceedings against private property owners along the River. (CP 1409). The PUD's memo states, "[*t*]*he District has no plans at this time to begin condemnation proceedings on any private lands along the project reservoir. The landowners may bring a suit against the District, if they wish*." Id. The PUD's CR 30(b)(6) witness, testified:

> *I don't know what the PUD at that time was - -why they did what they did one way or the other. I do know that from a public entity standpoint of condemning land is not looked on very favorable by the public. That might have played into it.*

(CP 1412 at 49:11-20)

D. <u>Changes in the PUD's Historical Use</u>

The record contains substantial evidence of the PUD's periodic changes in operation over the decades. In 1955, the PUD's engineer, H.A. Sewell, described the Dam's then operational protocol as follows:

> *…since the water from Box Canyon Dam is held at 2028 at Cusick from the time that it reaches that elevation naturally after the spring flood until the end of the hay season approximately September 15 to October 1…It is true that when they are dumping water from Albeni Falls Dam the elevation at that point sometimes reaches 2,033 ft., but that is only for short periods of time, and we lower the pond as rapidly as possible to get it back to our average winter level, which is about 2031.3 at that point. This level is maintained as closely as possible during the period of releases from Albeni Falls Dam from the end of the haying season until the natural flood starts to rise in the spring. The natural flood is then handled in the natural manner by opening the gates at Box Canyon and*

> *after the flood the water is held down so that the farmers can cut their hay.*

(CP 623).

The Dam's modern-day operations do not follow this same procedure. In 1963, the Dam's license was amended to increase the backwater allowance at Albeni Falls from one foot to two feet. (CP 75, 78-79, 935, 1653). An internal PUD memo from 1997, confirms that "*historically holding the elevation at Cusick to 2035 or less during the local runoff season has not been a problem (with 2 feet of backwater 2035 at Cusick occurs at a flow of 33,000 cfs)*". (CP 1525-26). However, as discussed above, the PUD's own expert confirms that from 2016-2018 the PUD caused the River's elevation to exceed 2035.5 a total of 100 days. (CP 1246).

In 2005, the Dam's operational parameters were changed again to limit the PUD to a maximum drawdown in the River's elevation to a rate of 3 inches per hour. (CP 203). Such a restriction upon the speed with which the River's elevation can

be drawn down necessarily results in the River maintaining a higher elevation for a longer duration. Nevertheless, the PUD repeatedly misrepresents to this Court that the PUD's evidence establishes that the 2005 change in the Dam's operational parameters "*did not have a quantifiable effect on the flooding of the Maslonkas' property*." Pet. For Review, pg. 21 citing CP 102; also see FN 4, pg. 5 ("*Due to the river's topography, the drawdown limitation does not have any quantifiable effect on the river's elevation at the Cusick Gauge*." citing CP 69, 105, ¶ 5).

The PUD's expert witness did not offer any opinion at all regarding this change. Mr. Mahnken's opinions were limited to what, if any, affect the PUD's turbine modernization and spillway gate hoist projects had upon the River's elevation. (CP 69 at ¶ 5, CP 102, and CP 105). His analysis was entirely unrelated to the 3 inch per hour draw down limitation imposed by FERC in 2005.

Moreover, the PUD notably continues to ignore that both Lawrence Cordes and Brock Maslonka each testified that the flooding problems had increased and the River's elevation was being held higher for longer periods over the last seven or eight years. (CP 573-574 at 28:17-29:5; CP 167 at 7-18). Finally, the Maslonkas' appraiser, David Sitler, opined that the Maslonkas have suffered a diminution in value of $159,963 related to the riverbank property. (CP 709). The PUD has offered no expert testimony or evidence refuting this opinion.

IV. ARGUMENT

The Court of Appeals properly held "*it is the PUD's burden to prove damage prior to the Maslonkas' tenure if the PUD is to receive the benefit of the subsequent purchaser rule*." Maslonka at 228. Likewise, the Court of Appeals properly determined that the record on appeal is insufficient to make these determinations.

As an initial matter, the PUD misconstrues the "subsequent purchaser" rule as an issue of "standing". Rather,

the rule is an affirmative defense asserted by the PUD against the Maslonkas' claims for inverse condemnation. Indeed, an affirmative defense is "*a defendant's assertion raising new facts and arguments that, if true, will defeat the plaintiff's or prosecution's claim, even if all allegations in the complaint are true*." Black's Law Dictionary, Abridged 7th Edition, West Group, 2000. It is well settled that the Defendant bears the burden of proof to establish an affirmative defense. Gerlach v. Cove Apartments, LLC, 196 Wn.2d 111, 126 (2020) citing Olpinski v. Clement, 73 Wn.2d 944, 950 (1968) ("*Defendant has the burden of proof on the issues of his affirmative defense.*").

It is clear the Court of Appeals properly held that the PUD bears the burden of establishing the applicability of the "subsequent purchaser" rule.

Finally, the PUD's argument about standing is a red herring intended to distract from the PUD's shortcomings regarding its burden of proof. "*Standing is determined by a two*

part test: (1) whether the interest sought to be protected is 'arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question' and (2) whether the petitioners have asserted 'injury in fact'." Rocha v. King Cnty., 195 Wn.2d 412, 419–20 (2020) (internal citations omitted). "*Standing is not intended to be a 'high bar' to overcome*." Washington Bankers Ass'n v. State, 198 Wn.2d 418, 455 (2021).

It is uncontested that the Maslonkas have owned the subject property continuously since 1993. (CP 127-130; CP 461-464). Similarly, it is undisputed that the Maslonkas have alleged injury to their property. (CP 10-19). Moreover, the Maslonkas have put forth substantial evidence of their damages. (CP 702-709; CP 1123-1142). There is no doubt that the Maslonkas have standing to assert their claims.

A. Material Questions of Fact Exist Regarding the Applicability of the "Subsequent Purchaser" Rule

The "subsequent purchaser" rule stands for the general proposition that a property owner cannot sue for a

governmental taking that occurred before the current owner acquired title to the property. Wolfe v. State Dep't of Transp., 173 Wn. App. 302, 307 (2013). As such, it is axiomatic that the rule requires that an actual governmental taking occur **prior** to ownership!

The PUD ignores this fundamental requirement. Indeed, the PUD argues, "*the PUD established the only fact relevant to the subsequent purchaser rule: that the Maslonkas are in fact subsequent purchasers, and thus lack standing as a matter of law*." Pet. For Review, pg. 10. This conclusory statement glosses over the obvious question—the Maslonkas were the purchasers "subsequent" to what? The PUD's only apparent answer to this question is "subsequent to the Dam's construction in 1955."

Moreover, the PUD asked the courts below, and now this Court, to relieve the PUD of its burden of proof by simply assuming that the PUD was **always** the cause of the River's rise above elevation 2035.5. This is a thinly veiled attempt to mask

critical defects in the PUD's evidence by eviscerating the summary judgment standard whereby all reasonable inferences are drawn in favor of the non-moving party.

The PUD's arguments ignore the same fundamental shortcoming noted by the Court of Appeals regarding **both** the PUD's claim for a prescriptive easement **and** its assertion of the "subsequent purchaser" rule. The PUD simply has not put forward any competent evidence establishing if, when, how often, and to what extent the PUD has **caused** flooding/damage on the property **prior** to the Maslonkas acquiring the property.

In addressing the PUD's purported claim for a prescriptive easement, the Court of Appeals stated:

> *Not only does **the PUD's evidence fail to provide any certainty on when it first began damaging the Maslonkas' property**, and how many days the dam has caused flooding on the Maslonkas' property during a 10-year period, **but there is no evidence as to the extent of the flooding**. Again, **the question is** not whether the Maslonkas' property has flooded, it is **whether the flooding was caused by the dam and to what extent and over what period of time**. Instead, the PUD argues that the dam has been in existence since 1955 and the*

> *water has exceeded the easement. Under Northwest Cities (what Gamboa called Washington's "seminal case on prescriptive easements"), a prescriptive easement is not defined by the highest one-time level of use during the prescriptive period; rather, it is based on the highest level of use sustained over the prescriptive period.*

Maslonka at 227 (emphasis added). In addressing this same shortcoming regarding the "subsequent purchaser" rule, the Court of Appeals correctly observed:

> *…the PUD also relies on the fact that the dam has been in constant operation since before the Maslonkas purchased their property. This fact is also meaningless when presented on its own.* ***In order to receive the benefit of the subsequent purchaser rule, the PUD must show that its operations began causing damage above 2035.5 feet prior to 1993****.*

Id at 228 (emphasis added).

Moreover, the PUD has failed to even establish that it had authority to effectuate a governmental taking against the Maslonkas' property prior to 1993. The United States Supreme Court has confirmed that the government cannot exercise eminent domain beyond the authority conferred to it by the

Constitution. Kohl v. United States, 91 U.S. 367, 371 (1875). Similarly, the PUD is constrained by the limitations conferred upon it by the parameters of the FERC license.

Prior to 1999, the project's boundary extended only 24 miles up the reservoir to the town of Ruby. (CP 199-205). It was not until 1999, that FERC expanded the project's boundary upstream of Ruby beyond the town of Cusick (where the Maslonkas' property is located). Id. At that time, FERC amended the PUD's operating license and expanded the project boundary to include all lands below El. 2041 between Box Canyon Dam and Albeni Falls Dam. (CP 205, CP 203, n. 14, CP1291-1335). In expanding the project boundary, FERC stated:

> *The no action alternative in this proceeding is for the Commission to deny the PUD's application for amendment and make no change in the existing project boundary. Such a Commission order would likely force the PUD to change project operations so that waters from the Box Canyon reservoir did not rise above elevation 2028 at Cusick, except at times when water would be that high naturally. Reservoir fluctuations would*

> *essentially return to those experienced under unregulated conditions, especially in the upper end of BCR…**A permanent injunction prohibiting PUD from flooding above 2028 feet is being stayed pending PUD's license amendment application to FERC. If this license amendment is denied, that permanent injunction would become effective.***

(CP 670) (emphasis added). Consequently, prior to 1999, anytime the PUD caused backwater on the Maslonkas' property the PUD did so outside of its authorized project boundaries—thereby exceeding the authority conferred upon the PUD by the FERC license. As such, it is likely that any alleged taking by the PUD prior to 1993 was unlawful and therefore ineffective.

The Court of Appeals decision is entirely consistent with the established "subsequent purchaser" rule. Moreover, the Court of Appeals properly applied the rule to the facts and evidence in the record. It is unnecessary for this Court to review the case prior to its remand for a jury trial.

B. The Record Contains Substantial Evidence of the PUD's Additional Action and Historical Changed Use

A subsequent purchaser **may sue** for any new taking or injury occurring as a result of additional governmental conduct. Indeed, "*a new taking cause of action arises when additional governmental action occurs*." Hoover v. Pierce Cty., 79 Wn. App. 427, 435 (1995), also see Wolfe at 307 ("…*the subsequent purchaser may sue only for a **new** taking or injury*.").

In Hoover, Pierce County installed a culvert in 1972 to drain water under a roadway. Hoover at 429. Prior to the culvert being installed, water from nine acres naturally flowed over the plaintiff's property. Id. However, the roadway channeled water across the plaintiff's property from an additional twelve acres that would otherwise have drained into the bay. Id. In 1988, the Hoovers purchased the property affected by the culvert. Id at 428. In 1990 and 1991, two storms caused substantial flooding upon and significant damage to the Hoover's property. Id at 429.

Applying the "subsequent purchaser" rule, the Court of Appeals held "*surface water flooding cases in Washington also support the proposition that a new taking cause of action arises when additional governmental action occurs*." Id at 435. However, the Hoovers "*did not claim that there was any additional government action by Pierce County since the installation of the culvert in 1972*." Id. Consequently, the Court of Appeals held that no new taking cause of action had arisen.

Similarly, in Wolfe, the Department of Transportation ("DOT") reconstructed a bridge in 1986. Wolfe at 303-304. Prior to the reconstruction, the riverbank had been stable. Id. As part of the reconstruction, DOT placed new support piers at a 15-degree angle to the river's flow. Id. In 2003 and 2004, the Wolfes purchased property along the riverfront near the bridge. Id. In 2010, the Wolfes filed suit against the DOT for inverse condemnation. Id. The Wolfes neither alleged nor offered evidence of any new governmental action that contributed to

the riverbank erosion after the bridge piers initial construction in 1986. Id at 308-309. Furthermore, Charles Wolfe testified that he was aware that erosion was occurring before he purchased the property. Id at 309. Because there had been no additional governmental conduct contributing toward the erosion, and because the Wolfes had the opportunity to negotiate a price that factored in the ongoing erosion's resultant diminution in property value, the Court of Appeals held the "subsequent purchaser" rule barred the Wolfes' claim for inverse condemnation. Id.

Unlike Hoover and Wolfe, the Maslonkas' inverse condemnation claim is decidedly **not** based upon stationary objects that have never been changed, altered, or manipulated by the government in any way since being built. It was not the mere construction of the Dam in 1955 which caused the taking of the Maslonkas' property. To the contrary, the PUD's taking is the result of the PUD's conduct in actively manipulating the River's elevation daily by adjusting the Dam's gates.

Indeed, the PUD monitors and regulates the River's elevation on a daily, if not hourly, basis. (CP 524; CP 1630-1632; CP 1024-1027). The PUD does so by adding or removing gates from the River's flow. (CP 1630-1632). It is the PUD's continuing adjustment of the River's elevation through the Dam's operation which constitutes "*additional governmental action*" and causes new damage to the Maslonkas' property. It is this PUD action that results in a new governmental taking.

Furthermore, as discussed above, there is ample evidence in the record regarding changes in the PUD's historical operational methodology and parameters in the decades since the Dam's construction—including since 1997. See Section III(D) above. It is with such evidence in the record, not based upon "*bald and unnecessary speculation*" as argued by the PUD, that the Court of Appeals stated, "[*i*]*t is not inconceivable to think that the PUD altered or expanded its operations as a*

result of those amendments in such a way as to cause new damage to the Maslonkas' property." Maslonka at 228.

Consequently, the Court of Appeals did **not** effectuate a "*change to the law*" as the PUD argues. To the contrary, the Court of Appeals correctly applied the law to the facts of this case and determined that the record was insufficient to dismiss the Maslonkas' inverse condemnation claims on summary judgment.

C. The Maslonkas Have Viable Tort Claims For Damage Caused By the PUD to the Maslonkas' Property

The Court of Appeals correctly confirmed that the Maslonkas' tort claims are not subsumed by an inverse condemnation claim. Notably, the PUD's argument continues to ignore the same fatal flaw affecting its analysis under the "subsequent purchaser" rule—material questions of fact exist regarding whether a governmental taking occurred prior to the Maslonkas acquiring the property. Indeed, this flaw was specifically identified by the Court of Appeals when it stated, "[*t*]*he evidence submitted by the PUD is insufficient to prove as*

a matter of law that any and all takings occurred prior to the Maslonkas' purchase in 1993." Maslonka at 230.

This Court has definitively held that "[*g*]*overnmental torts do not become takings simply because the alleged tortfeasor is the government*." Dickgieser v. State, 153 Wn.2d 530, 541 (2005) citing N. Pac. Ry. v. Sunnyside Valley Irrigation Dist., 85 Wn.2d 920 (1975); also see Eggleston v. Pierce Cty., 148 Wn.2d 760, 768 (2003) ("*But clearly, not every government action that takes, damages, or destroys property is a taking*.")

The PUD's reliance upon Wolfe for the general proposition that tort claims are subsumed, as a matter of law, by an inverse condemnation claim is misplaced. Wolfe at 306 n.2. As noted by the Court of Appeals (Div. 3) in this case, the Court of Appeals (Div. 2—which also decided Wolfe) rejected this same argument in the subsequent unpublished opinion Pac. Highway Park, LLC v. Washington State Dep't of Transp., 181 Wn. App. 1020 at *6 (2014). Maslonka at 229.

In Pac. Highway Park, the Court of Appeals (Div. 2) distinguished and declined to follow its earlier holding in Wolfe stating:

> *WSDOT relies primarily on a footnote in Wolfe, 173 Wn. App. at 306 n. 2, in which we stated that the takings claim subsumed the trespass claim "as discussed with counsel at oral argument."* ***Because our statement in Wolfe is based on an unknown discussion with counsel at oral argument [r]ather than any cited legal authority and because it is inconsistent with the cases noted above, it is not persuasive here****. Accordingly, we hold that PHP's trespass claims* ***are not subsumed*** *into PHP's dismissed inverse condemnation claim.*

Pac. Highway Park at *6 (emphasis added). Furthermore, in rejecting WSDOT's argument that the plaintiff's claim for trespass was subsumed by the inverse condemnation claim, the Court of Appeals (Div. 2), also cited this Court's opinion in Dickgieser, and quoted Olson v. King Cty., 71 Wn.2d 279, 284 (1967) ("*Every trespass upon, or tortious damaging of real property does not become a constitutional taking or damaging simply because the trespasser or tortfeasor is the state or one of*

its subdivisions, such as a county or a city."). Pac. Highway Park at *6.

In this case, the Court of Appeals correctly analyzed the older holdings cited by the PUD in Ackerman v. Port of Seattle, 52 Wn.2d 903 (1958) and Highline Sch. Dist. 401 v. Port of Seattle, 87 Wn.2d 6 (1976) and juxtaposed those opinions with subsequent decisions such as Lakey v. Puget Sound Energy, Inc., 176 Wn.2d 909 (2013). Maslonka at 229.

This Court's holdings in Dickgieser, Eggleston, and Lakey confirm the holdings of the Court of Appeal's (Div. 3) in this case, as well as the Court of Appeal's (Div. 2) in Pac. Highway Park, LLC—tort claims are not necessarily subsumed by an inverse condemnation claim.

V. CONCLUSION

The Court of Appeals properly held that the PUD bears the burden of proof in establishing the "subsequent purchaser" rule as an affirmative defense. Similarly, the Court of Appeals correctly held that the PUD had failed to establish as a matter of

law that the "subsequent purchaser" rule applies to the facts in this case. Indeed, there are material questions of fact which must be decided on remand.

Similarly, the Court of Appeals properly held that the evidentiary record confirms material questions of fact exist regarding the PUD's altered or expanded operations since the Maslonkas acquired the property in 1993.

Finally, the Court of Appeals properly concluded that the Maslonkas' tort claims are not inherently and necessarily subsumed into the inverse condemnation claim.

Based upon all of the above, Brock and Diane Maslonka respectfully request that the PUD's Petition for Review be denied.

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Certification Under RAP 18.17

I certify that this brief contains 4993 words in compliance with RAP 18.17(c)(8).

RESPECTFULLY SUBMITTED this 30th day of September, 2022.

DUNN & BLACK, P.S.

/s/ Richard T. Wetmore
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 30th day of September, 2022, I caused to be served a true and correct copy of the foregoing document to the following:

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