Case No. 90405 – 7

E CRF



**SUPREME COURT**
**OF THE STATE OF WASHINGTON**

GERALD G. RICHERT, et al.,

Plaintiffs/Respondents,

vs.

CITY OF TACOMA,

Petitioner.

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

*(Proof of Service Included)*

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## I. INTRODUCTION

*Amici* misunderstand the scope of the rights that the Utility condemned in *Funk* and the scope of the appellate decision in this matter. There is no basis for review by this Court since well settled condemnation law was correctly applied by the appellate court. The argument advanced is that the "***same real property rights***" are involved here and that the appellate decision is "***limiting riparian rights.***" *Amicus Curiae* Memorandum in Support of Review of the Northwest Hydroelectric Association, Public Utility District No. 1 of Snohomish County, Washington and the City of Seattle ("*Amicus* Brief") p. 1 (*emphasis in original*). The Ranchers' fee simple agricultural properties were not obtained in *Funk*. Today these lands are being converted into wetlands by the additional flows that the Utility is adding to the river. CP 2498-2502. The Petition, the Decrees, the jury instructions and, especially, the price paid in *Funk* establish that the Utility sought only the right to remove all the flows of the North Fork. The appellate court correctly found that riparian rights do not extend to taking the fee simple property that they are appurtenant to. The decision correctly held that the Utility's assertion of a limitless riparian right is contrary to the law.

## II. ARGUMENT

### A. Hydroelectric Licensees Are Not At Risk Due to the Appellate Decision

The Federal Power Act ("FPA") does not authorize hydropower licensees to flood and destroy fee simple properties. Licensees have been granted eminent domain powers in order to compensate landowners for their property if it will be taken. *See* 16 U.S.C. § 814. Pursuant to 16 U.S.C. § 803(c), "[e]ach licensee hereunder shall be liable for all damages

occasioned to the property of others by the construction, maintenance, or operation of the project works or of the works appurtenant or accessory thereto, constructed under the license, and in no event shall the United States be liable therefor." Case law establishes that this section of the FPA reserves jurisdiction in state law courts to determine state law claims for damages. The claims presented by the Ranchers are such claims. [1]

*Amici* observe that generally a licensee will compensate landowners through "one-time, up-front payment either to acquire fee title to rights attached to non-federal lands or to obtain a permanent easement to burden those rights." *Amicus* Brief p. 5. Neither action occurred in *Funk.* The Utility did not obtain the fee simple title to the Ranchers' lands. It did not obtain a flowage or flooding easement that set out various levels of acceptable flooding. Through the *Funk* trial, the Utility took all of the flows of the North Fork and it paid only for that right. No reference was made to returning flows into the river; no reference was made to varying the flows of the Main Stem.

*Amici* make an argument based upon economic reliance. *See Amicus* Brief, pp. 4-5 *citing City of Seattle v. FERC,* 883F.2d 1084 (D.C. Cir.1989). In *Seattle,* the Federal Energy Regulatory Commission ("FERC") presented Seattle with a bill on August 22, 1985 for $979,633 for its use of federal land from 1977 through 1983. *Seattle,* at 1087. The retroactive application of the charges was held unenforceable because the FPA protects the utility's customers and "whole sale purchasers cannot plan their activities unless they know the cost of what they are receiving." *Seattle* at 1089. Predictability is imperative for setting the rates charged to

[1] The Utility removed this case to Federal Court and the Ranchers were successful at having it remanded because damage claims are properly in state court.

customers. *Id.* The underpinnings of *Seattle* are not applicable here. The Utility has been setting rates and receiving payment for the hydropower that it delivers to the citizens of Tacoma for over eighty years. No issue of properly setting rates applies to this case. In fact, one would expect that the Utility's investment in its hydropower dams has been paid off for decades.

In the re-licensing process, the Utility did not elect to analyze and pay for the additional damages that it would create downstream. It knew of the flooding that would occur downstream and even referenced the overbank flooding in its brief to FERC. CP 574-576. The Ranchers continued to fully use their fee simple properties for decades after the condemnation of the flows of the North Fork. On March 7, 2008, the Utility's new jet valve was opened and 250 cfs of water was thrust into the river. CP 881. These flows caused flooding, the raising of the groundwater table and the creation of wetlands where pastureland and cropland had existed. The Ranchers never expected that crops and livestock could not be supported on their lands due to the *Funk* condemnation. They are the ones that have had a distressing loss of economic expectations because of the recent additional flows that have been added to the river.

The flows that are currently being placed into the river are the result of the Utilities' re-licensing before FERC and the listing of various fish under the Endangered Species Act. FERC is the agency that applies the FPA to applicants attempting to obtain hydroelectric licenses. FERC does not sanction the flooding of private property. Because of downstream flooding, on November 3, 2011, FERC modified its original decision which called for additional flows to be introduced into the river.

CP 2472-2486. The current flows of 250 cfs are referred to as "Component 1" flows which are the minimum required under the license for fish. Component 2 flows were to be introduced to mimic storm events. Enormous yearly flows referred to as "Component 3" flows were to be released in order to flush out the gravels that are choking the river. The Utility, in consultation with USGS, found that the Main Stem was "bankful" at only 2,460 cfs. CP 2477. This fact prompted FERC to state in its November Order that is was not the intent of staff "to cause flooding" and so the two regimes, Component 2 and 3, have been delayed indefinitely. CP 2483. Under the earlier Order of May 19, 2011, FERC noted that the Commission has no authority to assess damages under the FPA and that only a state court has the jurisdiction to do so. CP 3687-3691. Hydroelectric licensees and the FPA are not under any threat because of the appellate decision in this matter.

### B. The Utility Has Violated Riparian Law But That Is Not Here On Appeal

First, an earlier condemnation proceeding cannot bar compensation for additional damages that were not addressed by that condemnation. *See Great Northern Railway Co. v. City of Seattle,* 180 Wn. 368, 370-73, 39 P.2d 999 (1935). The same rule applies at the federal level. The most analogous cases to the one before this Court involved hydroelectric dams that caused additional damages which were not barred by earlier condemnation actions. *See Richard v. U.S.*, 282 F.2d 901 (Ct.Cl. 1960); *Tri-State Materials Corp., v. U.S.*, 550 F.2d 1, 213 Ct. Cl. 1(1977).

However, even if one considers the water law arguments that *Amici* and the Utility insist upon making, they are unavailing. The Main Stem of the Skokomish River passes through the properties of the

Ranchers making them riparian owners. Washington was a territory when it adopted the common law of England in this regard. *See* Laws of 1862, p. 82, ch.1, *discussed by Matter of Deadman Creek Drainage Basin in Spokane Cnty.,* 103 Wash. 2d 686, 689, 694 P.2d 1071 (1985); *Crook v. Hewitt*, 4 Wash. 749, 31 Pac. 28 (1892). A third of the flows of the Main Stem were condemned by the Utility in *Funk*--not all of the river's flows.[2] *Amici* attempt to strip all riparian rights from the Ranchers but cite to *Wallace v. Weitman,* 52 Wn.2d 585, 328 P. 2d 157 (1958) which makes it clear that they are riparian owners. *See also Department of Ecology v. Abbot,* 103 Wn.2d 686, 694 P.2d 1071 (1985). As the cited *Wallace* passage states, other proprietors on a stream, like the Utility, must make "reasonable use of the stream." *Wallace* at 588. Knowingly placing flooding flows into a stream is certainly unreasonable use of the stream. In addition, one of the basic premises of riparian law is that one cannot exceed the capacity of a stream. *Strickland v. Seattle*, 62 Wn. 2d 912, 385 P. 2d 33 (1963). It is a well-known fact that the capacity of this stream has dwindled and dwindled over the years because of the gravel aggradation. The Utility acknowledges that the aggradation was caused in part by its taking of the flows of the North Fork. *See Indemnity Insurance Co. of North America v. City of Tacoma,* 158 Wn. App. 1022 (2010)[3]. In its briefing, the Utility vigorously and repeatedly argued to Division One that the aggradation was a "different" type of "real property" damage and

[2] From a practical point of view, the *Amici's* argument does not make sense. The Ranchers use the flows of the Main Stem for irrigating crops and watering their cattle. Under *Amici's* theory, the Utility could demand that they cease these riparian uses because it somehow condemned all the waters of the river, not just the North Fork's.

[3] Respondents cite to the unpublished Court of Appeals case of *Indemnity Insurance Co. of North America*, not as precedential authority (GR 14.1), but to establish the utility's prior positions on the issues here.

unknown at the time of the *Funk* condemnation. ("Damage to riparian rights is so fundamentally different than aggradation-related real property damage that the "expect some expect all" rule is inapplicable.") CP 469, *see also* CP 627-637. The Utility placed flows in the river that are beyond its capacity to handle. Under *Wallace* and *Strickland* it has violated riparian law. However, water law and these theories were not addressed in the cross-motions at the trial level or at the appellate level. The parties agreed that there were no material issues of fact and the narrow scope before the courts was whether the *Funk* condemnation barred the Ranchers' lawsuit or whether the facts of this case present additional damages not compensated for in *Funk.* CP 23.[4]

An attempt is made by *Amici* to change the condemnation of the North Fork flows into some sort of grant to vary the flows of the Main Stem today. Again, this is not a simple "variation" or "fluctuation" of flows. The flows cause flooding which is not allowed under the case that *Amici* rely upon. *See Amicus* Brief, p. 6 *citing Drainage District No. 2 v. Everett,* 171 Wash.471, 18 P.2d (1933). *Drainage District* deals with the water law concept of whether farmers who planted crops in a dry creek bed have obtained "reciprocal rights" to demand that the creek never be restored to its bed. *Drainage District* at 479, *citing* Farnham, *Waters & Water Rights*, p. 2401. Everett's population voted to abandon the dam on the creek in favor of piping its drinking water from the Sultan River up in the mountains. CP 3692-3695. The creek's flows were placed back into

[4] The appellate decision is very narrow. The riparian arguments being made are based on a single sentence where the appellate court stated that: "*Funk's* final judgment dealt with only deprivation of the parcels' water use, rather than flood or groundwater damage to the parcel's themselves." *See Richert,* at 707. The statement is correct and should not have been elevated to a discourse on riparian law.

the channel in a careful manner and the court specifically observed that: "There were no flood conditions." *Drainage District,* at 480. Similar to here, in *DeRuwe v. Morrison,* 28 Wn. 2d 797, 184 P.2d 273 (1947), a dam was at issue. The court observed that a riparian owner has the right to not have the level of a watercourse lowered or raised. But, riparian rights are not "infringed unless it can be established that so much of the dam complained of...casts some burden of excess water upon the land of the appellants." *DeRuwe,* at 808. Clearly, flooding a downstream property is not allowed under these cases.

The remaining cases are off point since they all involve removing flows, not flooding downstream fee simple properties. *See Amicus* Brief, pp. 8-9 *citing Malley v. Weidensteiner,* 88 Wn. 389, 153 P. 342 (1915); *Mood v. Ranchero,* 67 Wn. 2d 835, 410 P.2d 776 (1966); *Kalama Electric Light & Power v. Kalama Driving Co.* 48 Wn. 612, 94 Pac. 469 (1908). *Malley* involved the apportionment of a creek's flows for water use on non-riparian lands due to adverse possession being established. *Malley,* at 400. In *Mood* a lake was formed on non-riparian properties because its outlet was naturally clogged. The non-riparians could not enjoin the unplugging of the outlet. *Mood,* at 840. *Kalama* established that if a logging company wanted to erect splash dams above a power plant and deprive the plant of flows, it had to condemn the power plant. *Kalama,* at 617. Finally, in all of these cases, the appellate courts, similar to Division Two, discussed the "uses" to which the water was being made. There is no water law error for this Court to correct.

## III. CONCLUSION

The two issues affirmed by Amici in support of review by this Court are in error. The property rights condemned eighty years ago in

*Funk* are not the same property rights at issue today. The appellate court's decision does not limit riparian rights. The Court is respectfully asked to decline review of this matter.

DATED this 10TH day of SEPTEMBER, 2014.

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## PROOF OF SERVICE

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

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## OFFICE RECEPTIONIST, CLERK

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Dear Clerk,

Attached please find Respondents' Response to Amicus Curiae Memorandum in Support of Review of Northwest Hydroelectric Association, Public Utility District No. 1 of Snohomish County, Washington and the City of Seattle.

Filed by:

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Sincerely Yours,

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