Case No. 90405 - 7

SUPREME COURT
OF THE STATE OF WASHINGTON

GERALD G. RICHERT, et al.,

Plaintiffs/Respondents,

vs.

CITY OF TACOMA,

Petitioner.

RESPONDENTS' ANSWER TO CITY OF TACOMA'S PETITION FOR REVIEW

(Proof of Service Included)

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I. IDENTITY OF RESPONDENT

The Respondents/Ranchers are nine families that own approximately one thousand four hundred acres of land in the Skokomish Valley in Mason County. Their predecessors were involved in the condemnation action, *Funk v. Tacoma,* Mason Superior Court No. 1651, with regard to the removal of the flows of the North Fork of the Skokomish River.

II. INTRODUCTION

The issue that was before the lower courts was straightforward and involved well-settled Washington condemnation law that is ignored by Tacoma Power Utility ("Utility") in its attempt to garner this Court's attention. *Spokane v. Colby,* 16 Wash. 610, 48 P. 248 (1897) and its progeny[1], establish that "additional damages" cannot be barred by a previous condemnation. The same is true on the federal level. Where a hydroelectric dam caused additional damages, the earlier condemnation did not bar a subsequent lawsuit. *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). Moreover, when a dam owner changed the flows from its dam over a six-year period, the U.S. Supreme Court recently deemed that a taking. *See Arkansas Game and Fish Comm. v. U.S.,* 133 S. Ct. 511, 184 L.Ed.2d 417 (2012). The relevant law is clear and uncomplicated and provides no basis for review by this Court under RAP 13.4(b).

Generations of the Ranchers' families have lived along the Skokomish River, even before the Utility decided to divert a portion of the

[1] Other cases that pre-date the *Funk* case and follow the same holding are: *Reichling v. Covington Lumber*, 57 Wash. 225, 106 Pac. 777 (1910); *Neitzel v. Spokane International Railway*, 65 Wash.100, 117 Pac. 864 (1911); and *Hinkley v.Seattle*, 74 Wash. 101, 132 Pac. 855 (1913).

river's flows to produce hydroelectric power for Tacoma's citizens. They had viable ranching and farming acreage before and after the dams were built. Today, their way of life is being exterminated by the enormous flows being thrust into the river which has a channel that has narrowed over time through aggradation. These flows are causing more frequent flooding, raising the area's groundwater table and turning the ranching properties into wetlands.[2]

The Ranchers' predecessors were only paid for the Utility's diversion of the flows from the North Fork of the Skokomish River. They were not paid for all the riparian rights that they had on the entire river. They certainly were not paid through the *Funk* condemnation for all of the land that their families owned in the entire Skokomish Valley. The Utility attempts to manufacture a supposed conflict in riparian law by twisting Division Two's analysis of *res judicata* law. In the analysis of the first two prongs of *res judicata*, a court must look for concurrence of the identity of the subject matter and then of the causes of action. *Loveridge v. Fred Meyer Inc.* 125 Wn.2d 759, 887 P.3d 108 (1995). Division Two discussed the fact that water was taken away from the river and the Ranchers' properties in *Funk.* It described the subject matter of *Funk* being the loss of "use" of the water. *See Richert v. Tacoma Power Utility,* 179 Wn. App. 694, 697-98, 705, 319 P.3d 882 (2014). It then contrasted the flooding of the lands today. *Id.* The Utility claims riparian rights include more than the use of water, which is correct but beside the point. Division Two's decision did not implicate riparian rights.

[2] The valley is quite narrow, being only one mile in width. The Main Stem, along which most of the properties at issue are situated, is approximately nine miles in length. Dr. Derek Booth opines that the process of pastureland becoming wetlands muck is irreversible. CP 97-107; CP2498-2502.

The Utility reiterates its overly broad interpretation of "riparian rights" – a viewpoint that has not been accepted by the lower courts. It asserts that its right to remove the flows of the North Fork in the 1920s somehow included "the right to control the water level in the river." *See Petition*, pp. 1, 8. This assertion is unsupported by the record in *Funk*. It also claims the appellate opinion is a threat to its property rights. No threat exists to any legitimate property right but those of the Ranchers.

There has been no showing that other dam operators throughout the state are in similar circumstances. The websites the Utility provides show that hydroelectric dams comprise only 6.40% of the dams in this state. Over a twenty year period, only 47 hydroelectric dams have had certifications issued, denied or waived by Ecology.[3] To be in a similar situation to the Utility, these dam owners would have to assert a right to place overburdening flows into aggraded rivers thereby changing agricultural lands into wetlands. No similar facts have been shown to exist. There is no issue of substantial importance here to support the Utility's Petition.

The Utility faults the Court of Appeals for relying in its analysis of *res judicata* on selected portions of the *Funk* pleadings, claiming a conflict with precedent. *See Petition,* p. 2, *citing Large v. Shively*, 186 Wash, 490, 58 P.2d 808(1936). In *Shively*, records of the proceedings below were not "pleaded and proved." *Shively*, at 498. This Court held that making a determination with regard to *res judicata* was error absent a proper record. *Id.* In this case, the Ranchers placed the entire certified record of *Funk* from the State Archives into evidence. CP 1296-2486. Because the entire

[3] Three pages printed out from the two websites are attached at Appendix 1 for the Court's convenience.

record was before the courts and considered, there is no conflict with *Shively* and its progeny and no grounds under RAP 13.4(b) to grant review.

Finally, the Utility's argument for review based on Division Two's comment about construing the facts in a light most favorable to the Ranchers is baseless. The change to the opinion was made at the request of the Utility by way of a motion for reconsideration. In its briefing, it admitted that the facts were "not material to the legal issues presented on appeal." *See Motion for Reconsideration* ("*Motion*"), p. 1. It stated that although certain facts were contested the parties had "agreed that there were no material factual disputes regarding the 'narrow issue' of the impact of the *Funk judgment.*" *Motion,* p. 3, *citing to* RP (6/8/12) 2:19-23. The two cross-motions for summary judgment dealt with the same facts and the same legal issue—what is the effect of the *Funk* condemnation? Does it bar the Rancher's lawsuit in its entirety or should the Utility's affirmative defense based on *Funk* be stricken? Given that there are admittedly no material issues of fact on the narrow issue the trial and appellate courts have decided, it is irrelevant that the appellate court stated it construed the facts in a light most favorable to the Ranchers. No basis exists under RAP 13.4(b) for review by this Court.

III. COUNTERSTATEMENT OF THE FACTS

A. The Funk Condemnation was Limited to the Diversion of the Waters of the North Fork and did not Condemn the Ranchers' Lands

As is admitted by the Utility and emphasized by Division Two, the *Funk* condemnation addressed two types of takings. *See Petition*, p. 6; *Richert*, 179 Wn. App. at 697-98. The *Funk* Petition is forty-five pages long. CP 3286-3331. It sets out as "Type One" those properties taken in

their entirety because the land would be underwater or have the hydroelectric plant, its flume and electrical lines on it. CP 3286-3325. Type Two properties only involved riparian rights, adjacent to and "appurtenant" to the land along the river. CP 3326-3331. The Rancher's lands were not taken; only part of their riparian rights were. The price per acre paid for the Type One lands taken in their entirety was $123.56 per acre while the riparian rights to the flow of the North Fork were conveyed for $7.95 per acre. *See Richert*, at 698-99; CP 2490. The Petition stated that the "volume" of water would be "diminished." CP 1382. The trials of the two different property interests were set before different judges. Consistently, the jury instructions were different, with the instructions in the riparian rights trial before Judge Wilson referring to the diminishment of water, lowering of the groundwater table and loss of beneficial annual flooding. CP 1789-1794; 1796-1799; 1863-1876; 1881-1885; 1918-1920; 1921-1925; 1927-1928; 1936-1938; 1942-1943; 1946; 2406-2415. The results of these jury verdicts are best summarized in the September 8, 1923 Decree of Appropriation. CP 2010-2014.

B. The Condition of the Channel was Known to the Utility when It Added the Damaging Flows

The Utility relates that the valley has had a long history of flooding quoting to a 2011 U.S. Army Corps of Engineers' Study[4] that goes on to state that "the problem has steadily grown worse." CP 2585. The 2011 Study states that between 1912 and 1941, there were 29 floods in 29 years and now floods occur multiple times a year. *Id.* The channel capacity has dwindled due to the aggradation in the river. In 1941, its capacity was 13,000 cfs, in 1969 it was 11,000 cfs and by 2011 it was only 4,000 cfs.

[4] Dated October 2011 and entitled: "Skokomish River Basin Flooding and Sedimentation Baseline."

Id. The Utility, with the United States Geologic Survey, recently found the capacity to be approximately 2,500 cfs. CP 105, 335.

The Utility added 30 cfs to the river in 1988. It then added an additional flow of 60 cfs in 1999. In March of 2008 it added, via a jet valve[5], 240 cfs to the North Fork. Since the time of the *Funk* condemnation up to 1988 the river had base flows of only 10 cfs. CP 316. This enormous new flow caused access problems and changes to the land so it cannot support crops, hay or Christmas trees. CP 591. The Utility, in briefing to the Ninth Circuit in 2006, admitted that the new flows of 240 cfs would cause overbank flooding in the valley. CP 715-736, n.20. In a recent settlement, the Utility paid the Skokomish Tribe for aggradation in the river and for the flooding and groundwater heightening on their reservation located just downstream of the Ranchers' properties. CP 3009.

C. Remainderman Damages were not Paid in *Funk*, No Right to Vary the Base Flow of the River was ever Awarded and there has been no Variation to the Baseflow of the River over Time

The Utility states that in *Funk* it compensated landowner's for all damage to their remaining property interests. *See Petition*, p. 6 *citing* CP 3329-31. The citation is to three pages of the *Funk* Petition which provides no such language.[6] It then states it paid to acquire all riparian rights including "the right to vary water levels." *See* Petition, p.8, *citing to* CP 3764. The citation is to its own Answer in this matter and does not establish the Utility's contention. Next, it points to a Cross-Complaint and petition to intervene as proof of the broad scope of the damages paid by the jury. *See Petition*, pp. 6-7. Its reliance on these two documents was

[5] A photograph of the jet valve with a man standing at its base can be found at CP 881.
[6] A copy of the pages are attached to this brief as an Appendix 2 for the court's convenience.

rejected by the appellate court. *See Richert,* 179 Wn. App. at 706, n 5. The jury instructions only provided for damages due to the removal of the flows of the North Fork. CP 2010-2014. The *Funk* Decree gave the right to "divert the waters of the North Fork" that flowed past the Ranchers' properties and were "appertaining and appurtenant" to them. CP 3650. If a right is "appurtenant" to the land, it cannot also be a right to the land itself.

The Utility asserts that obtaining the water rights in "fee simple" of the North Fork's flows in 1923 means that, ninety years later, it can place enormous damaging flows into the river, change its baseflow and destroy the entire valley. At the trial court level, the Ranchers put in the declaration of a water law expert, Gregory S. McElroy. CP 3235-3243. He explained that the term "fee simple" with regard to water rights was a term of art and testified that: "The Court's use of the term 'fee simple' to describe the riparian water rights condemned in *Tacoma v. Funk* does not in any sense connote or imply that other real property interests or rights in the land were being condemned. " CP 3242. No countervailing opinion was ever raised on the issue. The Utility has made other attempts, to no avail, to support its theory that the baseflow of the river has fluctuated over time. [7]

[7] The Utility claimed through an expert that it had varied the flows coming out of the dam over time as reflected in its "spill records." The Ranchers obtained the spill records which only covered the winter months from 1971 to 1995. CP 3261-3262. Twenty-six of the events were in November and December of 1975. From 1980 to 1990, there were no spills and only eight from 1990 to 1995. *Id.*; CP 3246.
At the appellate level, a new argument was advanced that the USGS records provided support for the Utility's theory that flows varied in the river. A figure was advanced (CP 654) in black and white so the obvious change in baseflow was not apparent. The colored version of the chart clearly shows the baseflow drastically changing in 2008. (A colored copy is provided at Appendix 3 for the Court's working papers.)

D. Being in A Floodplain does not Strip away Property Rights

The Utility asserts that the "Richert parcels are located in the floodway." *See Petition*, pp. 4-5, *citing to* CP 2544. First, the citation is to a page of the Utility's expert's declaration wherein he asserts that only five parcels are in the "floodway" with all the rest being in the "floodplain" of the Skokomish River. CP 254.[8] The Ranchers have 112 parcels, so 107 of them are not in the "floodway." CP 3217-3219 (parcel numbers). This focus on the floodplain or even the floodway is a revival of an argument abandoned on appeal. It is a fact that the flooding on the river is not natural. CP 2585. This unnatural flooding is somehow seen by the Utility as acceptable if it stays in the floodway or within the floodplain. The floodplain of the valley is the entire valley with its people, homes, barns, roads and animals. CP 3214-3215 (map). It is a mile wide and nine miles long. If the Utility's assertion were true, anyone with a riparian right would own acres and acres of fee simple land in the countless river valleys throughout this state. This argument is strained and it cannot be revived at this stage in the appellate process. *See Holder v. City of Vancouver*, 136 Wash. App. 104, 107, 147 P.3d 641 (2006).

E. The Procedural Stance taken by the Utility

In a motion for reconsideration, the Utility specifically asked Division Two to state that it had not intended to address the parties' disputed factual contentions. *See Motion*, p. 1. The Utility admitted that these facts were not "material to the legal issues presented on appeal." *Id.* In response to the Utility's request, the appellate court stated that it had viewed the facts in a light most favorable to the Ranchers. Given that those facts were not material to the legal issue before the appellate court,

[8] A copy of this page is attached at Appendix 4 for the Court's convenience.

the Utility's claim of prejudice is puzzling. Division Two's words cannot form the basis for review by this Court since there were no material facts at issue and the words are irrelevant.

IV. ARGUMENT

A. This Case Involves Simple and Well-Settled Condemnation Law; There is no Conflict with Regard to Riparian Law in Division Two's Decision

This case is about condemnation law. The narrow issue before the lower courts was the impact of the *Funk* condemnation. The Utility states the law correctly:

> Although a condemnation judgment does not bar a subsequent claim "to take or damage a ***distinct and separate property right*** which was not specifically included in the condemnation proceedings," a condemnor who has paid for the right to "take and damage the specifically described property" cannot be compelled to pay additional compensation for damage to the same property rights.

See Petition, p. 17, *citing Great Northern. Railway Co. v. Seattle,* 180 Wash. 368, 373, 39 P.2d 999 (1935) (*emphasis in original*).

The theory of the Utility is that by condemning a portion of the Ranchers' riparian rights it has the right to flood their lands, raise the groundwater level and destroy their fee simple properties. The *Funk* condemnation paid the Ranchers' families $7.95 an acre for the loss of the flows of the North Fork. Now, all of their agricultural lands are being taken. The finality of the *Funk* decision is not being invaded; distinct and separate property rights of the Ranchers are being invaded. The Utility's argument for review by this Court hinges on its own belief that in condemning "riparian rights" it can flood and destroy fee simple property. Its argument has been rejected by the lower courts and no clarification of

the appellate decision is necessary. The specifically described "property" that the Utility took was the water flow of the North Fork of the river.

Next, the Utility takes the words "water use" from Division Two's opinion and attempts to build it into a conflict in riparian law. No conflict exists. The appellate court was not discussing riparian law but, rather, condemnation law and the Utility's *res judicata* motion when it used the words. It was making a distinction between the flows of the North Fork being taken away from the parcels and the current condition of the inundated parcels. It stated that in *Funk,* "the right to take away the use of the Type Two parcels' water" was condemned, not "the right to invade the Richert's parcels with water." *Richert*, at 705. It looked to the *Funk* Petition to discern the scope of the property right taken. It found that the Utility took away the use of the water but it did not obtain the right to overwhelm the Type Two parcels' with water. *Richert* at 706-707.

In a section entitled: "Concurrence of Identity with Subject Matter," which relates to one of the elements of *res judicata,* the appellate court stated: "*Funk's* final judgment dealt with only deprivation of the parcel's water use, rather than flood or groundwater damage to the parcels themselves." *Id.* Again, discussing *res judicata* in a section entitled "Concurrence of Identity with Cause of Action," it stated that in *Funk* the Utility only "condemned the right to deprive the parcel owners of their ability to use water." In assessing the Ranchers' current lawsuit, it pointed out that the claim is that the "parcels are being damaged by floods and high water tables, with some land taken in its entirety." *Richert* at 707-708. No mischaracterization of riparian rights exists in Division Two's opinion. There is no basis under RAP 13.4(b) for review.

B. There is no Conflict with *Res Judicata* Precedents and no Significant Issue Exists

The Utility's second argument for review is based on *Large v. Shively* in which a court evaluated a *res judicata* motion without the record. The case involved a boundary dispute on Hood Canal. Certain portions of two previous matters on the same subject were offered into evidence but the court refused their submission. *See Large*, at 497. With regard to one of the matters, the appellant was not even a party. *Id.* Under these circumstances, it was error for the trial court judge to enter a finding based on *res judicata*. *See Large*, at 489.

In *Lemond v. Dept. of Licensing,* 143 Wn.App. 797, 180 P.3d 829 (2008), the results of a Breathalyzer test were suppressed by a municipal court judge. In a later proceeding before the Department of Licensing, the plaintiff argued that the Breathalyzer results should be suppressed under *res judicata.* She did not present "competent evidence...to prove the precise issues." *Lemond*, at 804. The court stated that to undertake the necessary analysis, the issue resolved in the prior proceeding must be established by competent evidence. *Id. and see e.g., Brodeneck v. Cater's Motor Freight System, Inc.*, 198 Wash. 21, 86 P.2d 766 (1939) (no evidence produced).

As the Utility points out, the courts determine the legal significance of the record, not the parties. *See Petition,* p. 14 *citing Atlantic Casualty Ins. Co. v. Oregon Mutual Ins. Co.,* 137 Wn. App. 296, 302, 153 P.3d 211 (2007). Here, the lower courts analyzed the entire record, primarily relying on the *Funk* Petition, the jury instructions and the Decrees. *See Richert*, at 706, n.5. Both courts considered and then rejected the Utility's argument that a Cross-Complaint and a petition to

intervene should have entirely guided their analysis. *Id.* In this case the entire *Funk* record was before the lower courts. CP 1296-2486. Having the entire record of a prior action incorporated by reference in a complaint allowed the court to examine that file in analyzing a *res judicata* matter in *Marshall v. Chapman's Estate,* 31 Wn.2d 137, 195 P.2d 656 (1948). The Utility's citation to this case as supporting its position is odd given that the entire record was before the lower courts. The facts in this case are not at all similar to *Large* and its progeny and no conflict with *res judicata* law exists within Division Two's decision.

The Utility's websites (set out in footnote one) reveal that hydroelectric dams comprise only 6.40% of the over one thousand dams in Washington State. *See Appendix 1.* The overwhelming ownership is private at 58.17%, with recreation and irrigation comprising 52.93% of the "purposes" for the dams. *Id.* Over the last twenty years, there were only 47 dams where hydropower certificates were granted, denied or waived. *Id.* To be similar to the Utility, all the hydropower dam owners would have to be in the re-licensing process, have Endangered Species Act problems, and have a river so badly aggraded that the flows will cause flooding and groundwater problems to adjacent properties. The facts of this case are rare and do not raise an issue of substantial importance under RAP 13.4(b).

C. Division Two's Decision did not Rely upon Any Facts That were Disputed and there is no Issue for Supreme Court Review

The final basis for seeking review is that Division Two, in response to a reconsideration motion by the Utility, stated that it had construed the facts in a light most favorable to the Ranchers. *See Petition,* p. 18-20. The statement by Division Two is harmless error since there

were no disputed facts before it. The Utility admitted in its motion for reconsideration to Division Two that there were "no material factual disputes regarding the 'narrow issue' of the impact of the *Funk* judgment." *See Motion*, p. 3. It quoted back to the court from its opinion that "the parties agree that no genuine issue of material fact exists on the limited issue of the effect of the *Funk* judgment." *Id., citing to Richert* at 703. There is no error in Division Two stating that it was construing the facts in a light most favorable to the Ranchers.[9] The standard it set was irrelevant since no material factual issues existed for it to construe on the narrow legal issue before it. The Utility's argument should be dismissed as without merit.

V. CONCLUSION

The Court of Appeals' decision in this matter does not conflict with riparian law. The entire *Funk* record was before the lower courts and was properly reviewed. The parties agreed that no issue of material fact existed on the narrow legal issue before the courts. The Supreme Court is respectfully asked to decline review of this matter.

DATED this 11th day of July, 2014.

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[9] The decision only discusses the Utility's *res judicata* motion, which would require it to carry the burden and all facts would be construed in a light most favorable to the Ranchers. But, again, there were no material facts to construe.

PROOF OF SERVICE

I, Karen A. Willie, hereby certify that on this 11th day of July, 2014. I caused to be served via email and legal messenger a true and accurate copy of the foregoing upon the following parties:

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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.

Karen A. Willie

Karen A. Willie, WSBA No. 15902

— APPENDIX 1 —

Characteristic Charts of Dams in Washington: Purpose / Ownership

Counties: 39/39, Dams: 1141/1141

Figure 3. Dam Purposes Across All Selected Counties

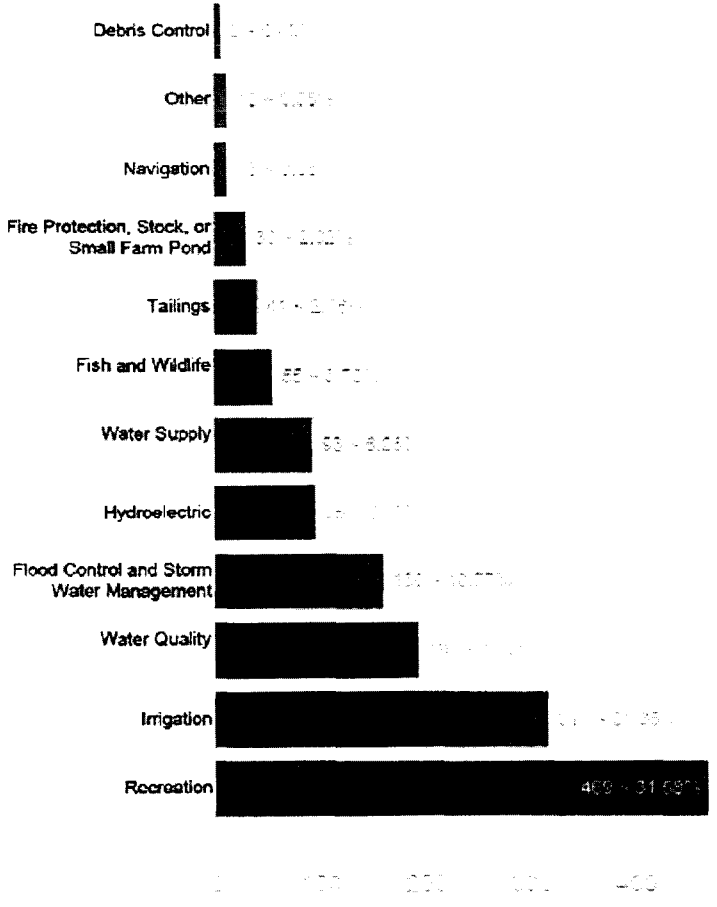
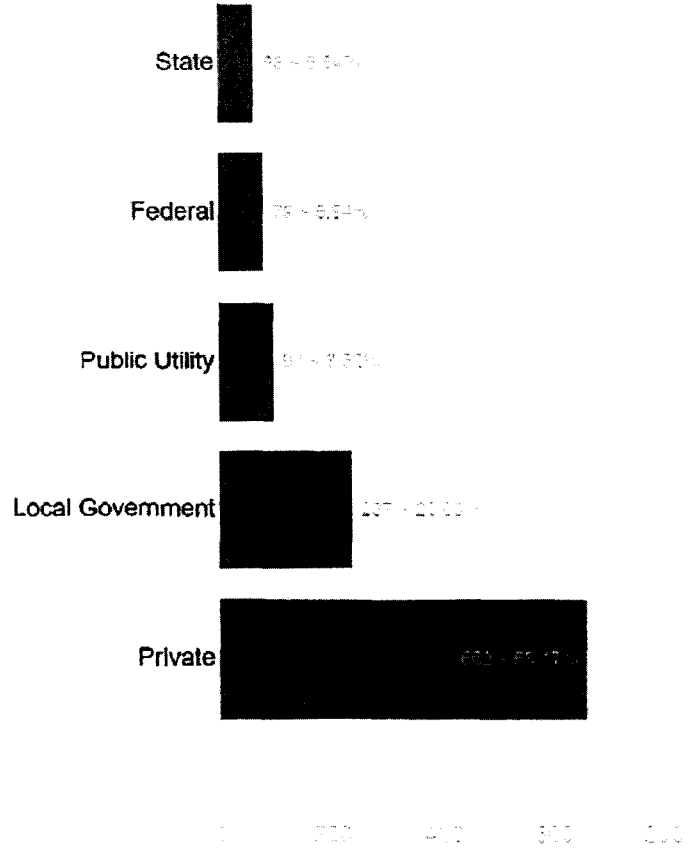


Figure 4. Dam Ownership Across All Selected Counties



DEPARTMENT OF ECOLOGY State of Washington http://www.ecy.wa.gov

Existing 401 Certifications for Dams

Below are links to most of the hydropower 401 certifications that Ecology issued, denied or waived in the past 20 years.

Note: Available in Adobe Acrobat (.PDF file) format. To view and/or print PDF files, you first will need to download and install Adobe Reader.

Contact us for more information.

A B C D E F G H I J K L M N O P Q R S T U V W Y Z

1.	Anderson Creek	18.	Meyers Falls
2.	Baker River Hydroelectric Project	19.	Monroe Street
3.	Bear Creek	20.	Morse Creek Final Water Quality Amendment to Certification Morse Creek Amendment Order No. 7732
4.	Boundary 401 (~45 mb)		
5.	Box Canyon Box Canyon Amendment	21.	Newhalem Creek Hydroelectric Project
6.	Burnham Creek	22	Nisqually
7.	Calligan Creek	23.	Packwood Lake Hydroelectric Project
8.	Cedar Creek Waiver	24.	Priest Rapids Hydroelectric Project
9.	Cispus Denial	25.	Rock Island
10.	Condit Cert • 401 certification (1993) • 401 certification for decommissioning (2010)	26.	Rocky Creek
11.	Cow Fall 401	27.	Rocky Reach
12.	Cowlitz Falls License Order	X	Rocky Reach Pool Raise
13.	Cowlitz River • Amended Order No. DE 02WQSR-4098A-01 • Supplemental Order in #01SEASR-3367 on Remand from PCHB #02-022	28.	Skagit Waiver
14.	Cushman No. 2 Dam	29.	Snoqualmie Falls 401 WQC • Amended Certification Order No. 9311
15.	Cushman WQC 401	30.	Spokane River 401 Final Certification • Amended Order No. 7792 for FERC license 2545 • Amended Order No. 9802 for FERC license 2545
16.	Elkhorn	31.	Sullivan Creek
	Elwha Dam	32.	Trinity Hydro 401 Cert
17.	Enloe Dam • Appendix A: Fish Management Plan • Appendix B: Water Quality Management Plan • Appendix C: Construction Sediment Management Plan • Appendix D: Storm Water Pollution Prevention Plan • Appendix E: Erosion and Sediment Control Plan • Appendix F: Construction QAPP • Appendix G: Spill Response Plan • Appendix H: Operation QAPP • Appendix I: Aquatic Invasive Species	33.	Twin Falls Hydro License Amended Order

• Appendix J: Revegetation and Wetlands Management Plan	
34. Grant Turbine Upgrade	43. Upriver Dam Spokane
35. Jackson, Henry M. Hydroelectric Project Order No. 7918	44. Wells Dam
36. Koma Kulshan Project 401 (Sulfur and Rocky)	45. White River
37. Lake Chelan Water Quality Certification No. 637 • Non-capacity License Amendment - Order No. 6215 • Amended 401 Certification - Order No. 9389	46. Yelm Centralia Diversion

38. Lewis River Hydroelectric Projects:
• Merwin
  • Amendment No. 1
  • Amendment No. 2
  • Amendment No. 3
  • Amendment No. 4
39. • Swift No. 1
  • Amendment No. 1
  • Amendment No. 2
  • Amendment No. 3
  • Amendment No. 4
40. • Swift No. 2
  • Order No. 3927
  • Amendment No. 2
  • Amendment No. 3
  • Amendment No. 4
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Contact us for more information

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Last updated October 2013

— APPENDIX 2 —

Agnes Simmons, Annie Bliner and Emma DeFoe, are heirs at law of one Big John, deceased, and are or claim to be the owners of Lot 21 in Section 14, Township 21 North, Range 4 West, W.M., and of the water rights and riparian rights appertaining and appurtenant thereto.

CLV.

That defendants Charles Frank and Mrs. Charles Frank are husband and wife and are or claim to be the owners of Lot 6 in Section 14, Township 21 North, Range 4 West, W.M., and of the water rights and riparian rights appertaining and appurtenant thereto.

CLVI.

That defendants F. A. Robinson and Mrs. F. A. Robinson are husband and wife and are or claim to be the owners of Lots 22 and 23 in Section 14, Township 21 North, Range 4 West, W.M., and of the water rights and riparian rights appertaining and appurtenant thereto.

CLVII.

That defendants Pat Slade, Frances Bowers, Charles Frank, Annie Frank, who is a minor, Lizzie Wells and Allen Yellout and the unknown heirs of Mrs. Allen Yellout, deceased, are heirs at law of one Duke Williams, deceased, and are or claim to be the owners of Lot 5 in Section 14, Township 21 North, Range 4 West, W.M., and of the water rights and riparian rights appertaining and appurtenant thereto.

CLVIII.

That defendants Mrs. Charles Baker, Alice Pemmant and Mary Bill are heirs at law of John Walker and are or claim to be the owners of Lot 1 in Section 15, Township 21 North, Range 4 West, W.M., and of the water rights and riparian rights appertaining and appurtenant thereto.

CLIX.

That defendants Minath Sherwood, sometimes known as Sarah Sherwood, Augusta Robinson, Herbert Johnson and Peter Squally are heirs at law of one Curley, deceased, and are or claim to be the owners of Lot 2 of Indian Allotment No. 3 in Section 15, Township 21 North, Range 4 West, W.M., and of the water rights and riparian rights appertaining and appurtenant thereto.

CLX.

That defendants Augusta Robinson, Herbert Johnson, John Meeker and Peter Squally are heirs at law of one Andrew Johnson, deceased, and are or claim to be the owners of Lots 7 and 8 in Indian Allotment No. 2 in Section 15, Township 21 North, Range 4 West, W.M., and of the water rights and riparian rights appertaining and appurtenant thereto.

CLXI.

That defendants Robert Lewis and Joseph M. Sparr are heirs at law of one Old Tom, deceased, and are or claim to be the owners of Lots 3 and 4 in Indian Allotment No. 1 in Section 15, Township 21 North, Range 4 West, W.M., and of the water rights and riparian rights appertaining and appurtenant thereto.

CLXII.

That Mrs. William Frank, wife of defendant William Frank, is deceased. That Andrew Foster, husband of defendant Mrs. Andrew

Foster, is deceased. That John Doe Pulsifer, whose true Christian name is unknown to petitioner, husband of defendant Kate Pulsifer, is deceased. That Mrs. Ben Johns, wife of defendant Ben Johns, is deceased. That Mrs. Allen Yellout, wife of defendant Allen Yellout, is deceased. That there has never been any adjudication of or determination of, who the heirs at law of the deceased persons above mentioned are. That the heirs at law of each of said deceased persons above mentioned are proper and necessary parties defendant in the above entitled proceeding. That said deceased persons are Indians and that it is impossible to ascertain or determine who the respective heirs of said deceased persons are, until the Indian Department shall have passed upon their several claims and petitioner has made diligent search and inquiry but has been unable to ascertain the names, or residence of any such heirs or whether or not there are any heirs of said deceased persons.

CLXIII.

That all of the tracts of land mentioned and described in paragraphs numbered 140 to 162 inclusive, are in the Skokomish Indian Reservation and the defendants named in said respective paragraphs are Indians and that said tracts abut upon said Skokomish River and that it is and will be convenient and necessary for said City to take and acquire the rights to take a portion of the water from said river at a point near said dam as above described.

CLXIV.

That the County of Mason has or claims to have some lien for taxes upon the lands hereinbefore described.

CLXV.

That the defendants named herein and made parties hereto are the owners and occupants of the lands, waters, water rights, riparian rights, overflowage rights, easements and privileges affected by this proceeding, and all of the persons having any interest therein so far as known to the Mayor of said City and the City Attorney thereof; or appearing from the records in the office of the Auditor of Mason County.

CLXVI.

That it is necessary, pursuant to the laws of the State of Washington, in such cases made and provided, that the taking and damaging, if any, of the lands, rights-of-way, water rights, riparian rights, overflowage rights, easements and privileges herein alleged to be necessary and convenient to be taken and acquired for the purposes herein set forth, should be adjudged to be a public use and necessity; that just compensation should be made to said defendants and each of them for their said lands, rights-of-way, water rights, overflowage rights, easements, franchises and privileges and property taken or damaged, and that such damages and compensation, if any, should be ascertained in the manner provided by law.

WHEREFORE - Your Petitioner prays:-

That it may be adjudged herein that the taking and damaging, if any, of the lands, rights-of-way, waters, water rights, overflowage rights, easements, privileges and property of said defendants for the purposes of acquiring the said site for petitioner's said hydro-electri power plant, is and will be a public use and necessity; that thereupon

the just compensation to be paid to said defendants, and each of them, for their said lands, rights-of-way, water rights, waters, overflowage rights, easements, privileges and property, as the case may be, or any damages thereto, may be ascertained and determined in the manner provided by law; and that upon payment by said City of Tacoma of the amounts so awarded this Court may finally adjudge and decree that the title to said lands, rights-of-way, waters, water rights, easements, privileges and property are vested in fee simple in said City.

And petitioner will ever pray.

J. Chas Dennis
Percy P. Bonsch
Burton Pomeroy
Peters & Powell
J. Chas R. Lewis
Attorneys for petitioner.

STATE OF WASHINGTON)
:ss.
County of Pierce.)

O. M. RIDDELL being first duly sworn on oath deposes and says: That he is the duly elected, qualified and acting Mayor of the City of Tacoma, the petitioner herein, and as such is authorized by law to verify pleadings on behalf of said City; that he has read and knows the contents of the above and foregoing Petition for Condemnation and that the statements contained therein are true as he verily believes.

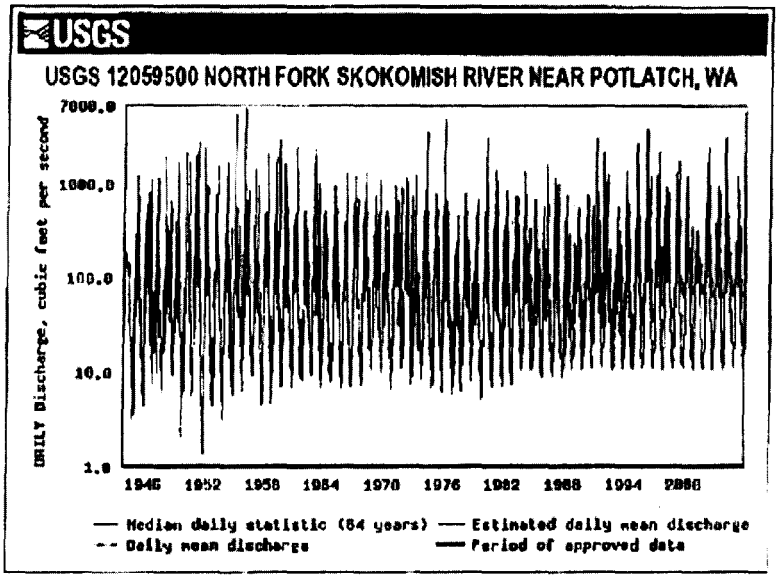
O M Riddell

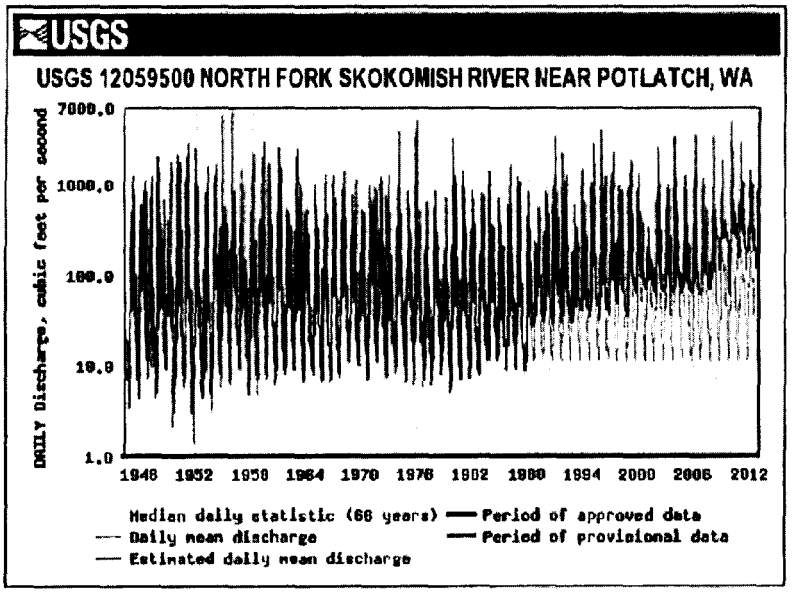
Subscribed and sworn to before me this 10th day of September 1920.

Percy P. Bonsch
Notary Public in and ~~for the~~
State of Washington, residing
at Tacoma.

CP 3331

— APPENDIX 3 —


USGS
USGS 12059500 NORTH FORK SKOKOMISH RIVER NEAR POTLATCH, WA
DAILY Discharge, cubic feet per second
7000.0
1000.0
100.0
10.0
1.0
1946 1952 1958 1964 1970 1976 1982 1988 1994 2000
Median daily statistic (54 years)
Daily mean discharge
Estimated daily mean discharge
Period of approved data


USGS
USGS 12059500 NORTH FORK SKOKOMISH RIVER NEAR POTLATCH, WA
DAILY Discharge, cubic feet per second
7000.0
1000.0
100.0
10.0
1.0
1946 1952 1958 1964 1970 1976 1982 1988 1994 2000 2006 2012
Median daily statistic (66 years)
Daily mean discharge
Estimated daily mean discharge
Period of approved data
Period of provisional data

— APPENDIX 4 —

watercourse of the Skokomish River has the potential to change throughout all of the 100-year floodplain for the Skokomish River.

8. Plaintiffs' Properties are Located within the Floodway of the Mainstem of the Skokomish River. Maureen Barnes, in her declaration, depicts the location of Plaintiffs' properties. Barnes Decl. § 4, Ex. A. I have compared the location of Plaintiffs' properties with the location of the 100-year floodplain for the Skokomish River.

All of the Plaintiffs' properties are located completely or substantially within the floodplain with the exception of the following parcels:

- 421163200020 Hunter Family Farm Lim Partnsp;
- 421174100010 Hunter Family Farm Lim Partnsp;
- 421121400000 James Hunter et al Hunter Brothers LLC;
- 421132100000 James Hunter et al Hunter Brothers LLC; and
- 421071300000 Skokomish Farms Inc.

Due to the unique and dynamic flood hazards of the Mainstem Skokomish River, and the corresponding regulatory definition mandated by Mason County for the identified flood hazards, these Plaintiffs' properties are therefore also within the floodway (which serves as the flood channel). Because these Plaintiffs' properties are within the floodway, these properties are also considered to be within the natural watercourse of the Skokomish River.

VAN NESS FELDMAN, P.C.
719 Second Avenue, Suite 1150
Seattle, Washington 98104-1728
(206) 623-9372 Telephone
(206) 623-4986 Facsimile

OFFICE RECEPTIONIST, CLERK

From: OFFICE RECEPTIONIST, CLERK
Sent: Friday, July 11, 2014 11:37 AM
To: 'Christine Stanley'
Cc: Karen Willie; Bradley Neunzig
Subject: RE: Respondents' Answer to City of Tacoma's Petition for Review (Gerald Richert, et al., v. City of Tacoma, Case No. 90405-7)

Rec'd 7-11-14

Please note that any pleading filed as an attachment to e-mail will be treated as the original. Therefore, if a filing is by e-mail attachment, it is not necessary to mail to the court the original of the document.

From: Christine Stanley [mailto:cstanley@tmdwlaw.com]
Sent: Friday, July 11, 2014 11:34 AM
To: OFFICE RECEPTIONIST, CLERK
Cc: Karen Willie; Bradley Neunzig
Subject: Respondents' Answer to City of Tacoma's Petition for Review (Gerald Richert, et al., v. City of Tacoma, Case No. 90405-7)

Dear Clerk of the Supreme Court of Washington,

Attached please find Respondents' Answer to City of Tacoma's Petition for Review, to be filed in the Richert v. City of Tacoma case, case no. 90405-7. This is being filed on behalf of:

Karen Willie
kwillie@tmdwlaw.com
Bradley Neunzig
bneunzig@tmdwlaw.com
(206) 816-6603

Thank you.

Sincerely Yours,

Christine

Christine Stanley
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Terrell Marshall Daudt & Willie PLLC
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Fax: (206) 350-3528
cstanley@tmdwlaw.com