IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

Supreme Court No. 90405-7

(Court of Appeals No. 43825-9-II)

GERALD G. RICHERT, et al.,

Plaintiffs/Respondents,

v.

CITY OF TACOMA,

Defendant/Appellant.

PETITION FOR REVIEW

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I. IDENTITY OF PETITIONER AND INTRODUCTION

Petitioner/Defendant the City of Tacoma ("Tacoma") seeks review under RAP 13.4(b)(1), (2), and (4). This case presents significant recurring legal questions regarding the condemnation of riparian rights, the application of res judicata, and the resolution of cross motions for summary judgment.

This Court has repeatedly recognized the importance of finality for judgments determining real property rights. In 1921, in *City of Tacoma v. Funk*, Tacoma condemned and acquired all the land parcels and other real property rights required to build and operate two hydroelectric dams on the North Fork of the Skokomish River. Plaintiffs ("the Richerts") are the current owners of land located downstream from the dams. Under the final judgment in *Funk*, Tacoma compensated the Richerts' predecessors for the reduction in the value of their real property caused by taking some of the rights attached to their land, including ***all riparian rights***. These riparian rights include the right to control the water level in the river channel. *De Ruwe v. Morrison*, 28 Wn.2d 797, 808, 184 P.2d 273 (1947).

Since 1924, the City has diverted most of the waters of the North Fork for hydroelectric power generation, with flow levels varying over the years. Beginning in 1988, federal and state regulators required Tacoma to maintain constant minimum flows in this tributary to accommodate

endangered fish species. In 2010, the Richerts sued Tacoma, seeking additional compensation for damage to the value of their properties allegedly caused by the level of water flowing in the channel. The Court of Appeals rejected Tacoma's res judicata defense as a matter of law, ruling that in *Funk* Tacoma "condemned only the right to deprive the parcel owners of their ability to use water." *Richert v. Tacoma Power Utility*, __ Wn. App. __, 319 P.3d 882, 888-90 (2014). This Court should accept review for three reasons:

First, the Court of Appeals' ruling conflicts with established case law regarding the scope of riparian rights. Riparian rights are not limited to water use, and the Richerts may not sue Tacoma for its lawful exercise of property rights the City already paid to acquire. Because the Court of Appeals' ruling threatens established property rights and jeopardizes utility operations throughout the state, this Court should accept review under RAP 13.4(b)(1) and (4).

Second, in determining the res judicata effect of the prior judgment, the Court of Appeals chose to rely on portions of selected pleadings in *Funk* referring to water use, but disregarded other parts of the record establishing the broad scope of Tacoma's condemnation. The Court of Appeals' approach conflicts with precedents including *Large v. Shively*, 186 Wash. 490, 58 P.2d 808 (1936) and its progeny.

Third, the Court of Appeals erroneously construed the facts in the light most favorable to the Richerts not only for purposes of Tacoma's summary judgment motion, but also for the Richerts' own cross motion. But as this Court has held, courts resolving "cross-motions for summary judgment" must "take the facts in the light most favorable to the ***nonmoving party*** with respect to the ***particular*** claim." *Anderson v. Akzo Nobel Coatings, Inc.*, 172 Wn.2d 593, 597, 260 P.3d 857 (2011) (emphasis added). The Court of Appeals' holding otherwise in this case (and others) conflicts with controlling authority, and also warrants review under RAP 13.4(b)(1), (2), and (4). This Court should accept review and restore consistency to Washington law.

II. COURT OF APPEALS DECISION

Tacoma seeks review of the published amended opinion filed on May 13, 2014, by Division II of the Court of Appeals. *See* Appendix.

III. ISSUES PRESENTED FOR REVIEW

1. Are the Richerts' damage claims barred by Tacoma's acquisition in *Funk* of ***all*** riparian rights attaching to their properties?

2. In determining whether a claim is barred by res judicata, what records from the prior action should courts consider?

3. Did the Court of Appeals erroneously conclude that ordinary CR 56 standards do not apply when parties file cross motions for summary judgment?

IV. STATEMENT OF THE CASE

A. Tacoma's Cushman Hydroelectric Project

For nine decades, Tacoma has operated the Cushman Hydroelectric Project on the North Fork of the Skokomish River in Mason County, generating clean, renewable energy. CP 3647-56. The Project consists of two dams and related structures, which Tacoma operates under Federal Energy Regulatory Commission ("FERC") licenses issued under the Federal Power Act. CP 3774-3973. *See* Fig. 1, Appx. at A-1.

The Project was the subject of FERC relicensing proceedings that began in 1974. During the relicensing process, Tacoma was required to maintain minimum flows into the North Fork in order to benefit endangered fish species. CP 3776. FERC ultimately issued a new Project license imposing a North Fork water flow regime that is intended to mimic the natural conditions of the North Fork of the Skokomish River. CP 3800. Tacoma's current license requires it to release amounts up to the natural inflow level into the reservoir. CP 3800-02. Tacoma continues to divert most of the waters of the North Fork for power generation.

B. Water Flow Through Land Owned By the Richerts

The Richerts own land parcels adjacent to the Main Stem, beginning approximately fifteen miles below the Project. *See* Figure 2, Appx. at A-2. The Richerts' parcels are located in the floodway of the

Skokomish River, *id.*, which is part of the river's natural watercourse. CP 2544. The Richerts claim that increased water levels in the floodway have caused damage to their properties. CP 3208.

The river has a long history of variable flow rates within the floodway, including regular flooding. CP 2542-43. The Main Stem has much less gradient than the upper forks of the Skokomish, with a broad and generally flat flood plain between the valley walls, and a channel that has meandered since at least 1861. CP 2542. This has resulted in continuous erosion problems for settlers and farmers. CP 2577. Aggradation—the gradual buildup of river floor from sediment—has also occurred in the basin. CP 2572 ("the valley [has] been in an aggradational environment for around 2,000 years").

Although the parties vigorously dispute the cause of the Richerts' claimed property damage, the issue of causation is not before this Court. CP 95. Instead, it is undisputed that (1) Tacoma has released no more water into the North Fork at the dam location than would occur in the absence of the dam, CP 3800; and (2) all flows released from the Project have stayed within the floodway of the River. CP 2536-45, 2710-11.

C. *City of Tacoma v. Funk* Condemnation Action

On September 11, 1920, Tacoma initiated the *Funk* condemnation action, Mason County Sup. Ct. No. 1651, for the purpose of acquiring the

land parcels and all other real property rights necessary for the Project's construction, operation, and maintenance. CP 1348-1408.

In its Petition for Condemnation, Tacoma identified those parcels subject to condemnation in whole or part. A-17 - 23. *Funk* involved two types of parcels: ***first***, land that would simply be acquired by Tacoma in its entirety—such as upstream parcels that would be submerged by the newly-formed reservoirs (referred to by the Court of Appeals as "Type One" parcels), *see, e.g.,* CP 3298; and ***second***, land Tacoma did not acquire title to in its entirety and instead paid to take some of the bundle of property rights held by the landowners—compensating landowners for all damage to their remaining property interests. *See* CP 3329-31. These "Type Two" parcels include all of the properties at issue in this appeal. For each Type Two parcel, Tacoma sought to condemn and acquire "the ***water rights***, ***riparian rights***, easements, privileges and other facilities upon said river below said dam, necessary and adequate for the proper development, construction, operation and maintenance of [the Project]." A-21 (emphasis added).

On June 1, 1921, defendant Skokomish River valley property owners, including some of plaintiffs' predecessors, filed a Cross-Complaint in *Funk* alleging their properties have "valuable riparian rights apertinent [*sic*] thereto." A-31. The owners alleged "the proposed taking

away of the riparian rights" would lower "the fair market value" of their property. *Id.* The property owners sought "compensation for ***any and all damages of every kind and nature whatsoever*** that will accrue to their said properties by reason of the doing of the things to be done by the plaintiff and petitioner as alleged in the complaint." A-31 - 32 (emphasis added).

Also on June 1, 1921, additional Type Two landowners, including the predecessors of other plaintiffs in this action, filed a successful petition to intervene in *Funk.* A-33 - 44. These claimants likewise alleged that the proposed dam project "involves the taking away of the riparian rights" of intervenors, and contended that they would be "damaged in diverse and other ways by reason of the said proposed damming of the waters of the North Fork of the said Skokomish river." A-44.

On September 8, 1923, the court issued a Decree of Appropriation awarding damages to the Type Two property owners and transferring to Tacoma in fee simple broad property rights, including "the waters, ***water rights***, ***riparian rights***, easements and privileges, including the right to divert the waters of the North Fork of the Skokomish River." A-51 (emphasis added). Unlike the Type One condemnees, these property owners retained title to the land and all other associated property rights not acquired by Tacoma. CP 2489. For over ninety years, the landowners and

their successors have enjoyed the benefit of their residual property interests, using the land for agricultural, recreational, and other purposes. CP 3203.

D. Procedural Background

The Richerts filed suit against Tacoma in 2010, alleging the existence of natural flow (or less) in the North Fork under the FERC License improperly raised water levels in the channel, lowering the value of their downstream properties. CP 4010-23. Tacoma denied that dam operations caused the Richerts' alleged damages, but contended that, in any event, the judgment in *Funk* barred the Richerts from asserting claims for additional compensation because Tacoma had already paid to acquire all riparian rights, including the right to vary water levels. CP 3764.

The parties filed cross-motions for summary judgment regarding the impact of the *Funk* judgment on the Richerts' claims. *See* CP 3713-40; CP 2505-35. On June 29, 2012, the superior court entered orders granting the Richerts' motion for summary judgment regarding *Funk*, and denying Tacoma's motion for summary judgment. CP 87-92. The court concluded the *Funk* judgment did not bar the Richerts' claims because their alleged damages were "not within the contemplation of the *Funk* litigants or the *Funk* court." RP (6/8/12) 7:16-17. The court entered a final judgment under CR 54(b) and RAP 2.2(d) solely regarding the

impact of *Funk*, CP 94-96, and Tacoma appealed. CP 52-86, CP 9-41.

On March 4, 2014, the Court of Appeals affirmed the superior courts' summary judgment rulings under a ***different*** rationale than the superior court, concluding that "in *Funk*, Tacoma condemned only the right to deprive the parcel owners of their ability to ***use water***." Court of Appeals Opinion ("Op.") at ¶ 36 (emphasis added). *See also id.* ¶ 31 ("Tacoma condemned the right to take away the use of the Type Two parcels' water," as "evidenced by Tacoma's petition for condemnation"). In determining the res judicata effect of the *Funk* judgments, the Court of Appeal considered only portions of Tacoma's petition, not other *Funk* pleadings or the broad language of the final Decree itself. *Id.*; *see also id.* ¶ 34 n.5.

Because the Court of Appeals' original opinion contained misstatements and appeared to suggest the court had resolved disputed factual issues, Tacoma moved for reconsideration. On May 13, 2014, the Court of Appeals granted Tacoma's motion in part, and issued an amended opinion correcting several factual misstatements. A-15. Nevertheless, the amended opinion in a new footnote confirmed that for purposes of ***both*** cross motions—Tacoma's unsuccessful motion for summary judgment dismissing the Richerts' claims as precluded by *Funk*, as well as the Richerts' successful motion for summary judgment striking Tacoma's res

judicata defense—the court had construed the facts in the light most favorable to the Richerts, on the ground that each motion "concerned whether the Richerts' claims were precluded as a matter of law." A-16. (citing *Witt v. Young*, 168 Wn. App. 211, 213, 275 P.3d 1218 (2012)).

V. ARGUMENT

A. This Court Should Grant Review to Correct the Court of Appeals' Mischaracterization of Riparian Rights.

The Court of Appeals' decision conflicts with this Court's prior rulings concerning riparian rights. A landowner whose land bounds a river, stream, lake, or salt water is a "riparian" owner. *Dept. of Ecology v. Abbott*, 103 Wn.2d 686, 689, 694 P.2d 1071 (1985) (riparian rights derive from the ownership of land "contiguous to or traversed by a watercourse"). "Riparian rights" are among the bundle of specific rights in real property that may be separately conveyed by deed or by a condemnation judgment. *See In Re Clinton Water Dist.*, 36 Wn.2d 284, 286, 218 P.2d 309 (1950) (government seeking to interfere with riparian rights other than water use nevertheless must acquire rights by condemnation); *Kalama Elec. Light & Power Co. v. Kalama Driving Co.*, 48 Wash. 612, 617, 94 P. 469 (1908) (utility seeking to vary flow in channel must first condemn downstream property owners' riparian rights).

Historically, riparian rights have included a priority claim to use

water, and thus many of this Court's prior cases involve Washington's evolving balance between riparian and appropriative water rights. *See, e.g.*, *In re Rights to Waters of Stranger Creek*, 77 Wn.2d 649, 653-57, 466 P.2d 508 (1970) (outlining history of water rights). But various other riparian rights also attach to such land parcels. *In Re Clinton Water Dist.*, 36 Wn.2d at 287-88 ("many rights may be exercised and enjoyed which have always been recognized as riparian rights"); *see also Dep't of Ecology*, 103 Wn.2d at 697 (contrasting Washington courts' treatment of water use versus other riparian rights). Nevertheless, the Court of Appeals improperly limited its analysis to "the parcel's water use." Op. ¶ 35.

In particular, riparian rights include the right to a continuation of the "natural flow" of water past the riparian owner's land, "as it was wont to run, without diminution or alteration." *Crook v. Hewitt*, 4 Wash. 749, 749-50, 31 P.28 (1892). As the Court of Appeals correctly recognized, "[r]iparian owners have a right to not have their water levels raised or lowered." Op. ¶ 24 (citing *De Ruwe*, 28 Wn.2d at 808). *See also Mood v. Banchero*, 67 Wn.2d 835, 840, 410 P.2d 776 (1966) ("riparian rights" include authority to open outlet, "thereby lowering the lake level to its natural level"). The holder of riparian rights attaching to a particular downstream property therefore may assert claims contending that the property has been "damaged by the interference with the natural flow of a

stream by an upstream owner without compensation." *Marshland Flood Control Dist. of Snohomish Cnty. v. Great N. Ry. Co.*, 71 Wn.2d 365, 368-69, 428 P.2d 531 (1967). *See also* A. DAN TARLOCK, LAW OF WATER RIGHTS AND RESOURCES § 3:16, at 3-28 (2010) ("Land use alterations which result in a substantial increase in the natural flow of a stream and cause flood damage are an interference with ***riparian rights***") (emphasis added).

The "natural watercourse" subject to riparian control "has long been defined to include the flood channel of a stream because the flood channel 'is as much a natural part of [the stream] as is the ordinary channel.'" *Fitzpatrick v. Okanogan Cnty.*, 169 Wn.2d 598, 607, 238 P.3d 1129 (2010) (citing *Sund v. Keating*, 43 Wn.2d 36, 43, 259 P.2d 1113 (1953)). Flows released throughout the history of the Project have indeed stayed within the natural watercourse of the River, where each of the Richerts' parcels is located. CP 2536-45, 2710-11. The Richerts' causes of action thus seek damages for the alleged violation of the riparian property rights attached to these parcels. *See, e.g.*, CP 3208.

But under *Funk* judgment, ***Tacoma***—not the Richerts—is the proprietor of the riparian rights attached to these downstream properties along the Main Stem. Tacoma acquired from plaintiffs' predecessors not just their "water rights," but also ***all*** of "the . . . ***riparian rights*** . . .

appertaining and appurtenant to [plaintiffs'] lands, real estate and premises." A-51 (emphasis added). Tacoma's condemnation of all riparian rights attached to plaintiffs' property necessarily includes the right to vary the water flow past the property without further compensation. *De Ruwe*, 28 Wn.2d at 805; *Marshland Flood*, 71 Wn.2d at 368.

The Court of Appeals erroneously allowed the Richerts to seek damages for the alleged invasion of riparian rights they do not own. *See, e.g., Lakewood Racquet Club, Inc. v. Jensen*, 156 Wn. App. 215, 232 P.3d 1147 (2010) (claim barred because plaintiff did not own property right at issue). This Court.should accept review of the Court of Appeals' water law ruling under RAP 13.4(b)(1) and (4) because the Court of Appeals' decision conflicts with established Washington law on a matter of public importance, effecting every hydroelectric facility in Washington.

B. The Court of Appeals' Res Judicata Decision Conflicts With Prior Case Law and Presents an Issue of Substantial Public Interest.

This appeal is limited to the superior court's summary judgment rulings on Tacoma's res judicata defense. CP 94-95. Under longstanding Washington law, the party arguing a claim that was previously adjudicated has the burden of pleading and proving the "record in the prior action." *Lemond v. Dep't of Licensing*, 143 Wn. App. 797, 806, 180 P.3d 829 (Div. 1 2008) (citing *Bodeneck v. Cater's Motor Freight Sys., Inc.*, 198 Wash.

21, 29, 86 P.2d 766 (1939)). In applying the equitable doctrine of res judicata, courts determine the legal significance of this record. *See, e.g., Atlantic Cas. Ins. Co. v. Oregon Mut. Ins. Co.*, 137 Wn. App. 296, 302, 153 P.3d 211 (2007). As this Court held in *Large v. Shively*, when parties dispute the application of res judicata, the issue "must be determined by the evidence thereon," including "the pleadings and counsel's statements" in the prior action. 186 Wash. at 491, 497. *See also Marshall v. Chapman's Estate*, 31 Wn.2d 137, 139-40, 195 P.2d 656 (1948) (res judicata defense determined by examining "entire file" in prior action).

In this case, the Court of Appeals' rejection of Tacoma's res judicata defense as a matter of law relied on only a portion of Tacoma's petition in *Funk*: the court held that the City's statement "'the volume of water in said river below said dam will be diminished' ... shows that Tacoma sought only the right to deprive the Type Two parcels below the dam of their use of the main stem's water." Op. ¶ 33 (citing CP 1382). According to the Court of Appeals, the two cases involve different subject matters and causes of action because "Tacoma condemned only the right to deprive the parcel owners of their ability to ***use water***, as revealed by Tacoma's petition." Op. ¶ 36 (emphasis added); *see also id.* ¶ 35 ("*Funk*'s final judgment dealt with only deprivation of the parcels' ***water use***") (emphasis added).

But as discussed in the previous section, Tacoma condemned not only the landowners' "water rights," but also all the "riparian rights" attached to these properties. Contrary to the Court of Appeals' misstatement, Tacoma's petition in *Funk* on its face was not limited to acquiring "the parcel's water use." Op. ¶ 35. Rather, Tacoma's petition broadly sought all rights necessary for operating the Project, including "riparian rights." A-21. The Court of Appeals also ignores language in the final *Funk* judgment vesting in Tacoma ***all*** riparian rights, A-51, as well as jury instructions describing the scope of the riparian rights acquired and the measure of damages awarded. A-46 (damages intended to compensate for any depreciation in property value, including from "taking of ***any portion*** of the water") (emphasis added). Moreover, the Court of Appeals ***expressly refused*** to consider the landowners' own pleadings in *Funk*, Op. ¶ 34 n.5—even though the Richerts' predecessors successfully sought compensation for "any and all damages of every kind and nature whatsoever," including the depreciation in the "fair market value of their said premises" from "the proposed taking away of the riparian rights therefrom." A-31-32, A-43-44.

According to the Court of Appeals, "random filings from various predecessors in interest cannot illuminate the scope of those decrees." Op. ¶ 34 n.5. But the landowners' own counterclaims are hardly "random

filings." Under the established jurisprudence of this Court and other divisions of the Court of Appeals, the *Funk* records submitted by Tacoma are precisely the kind of evidence courts should consider in determining whether a particular claim was actually decided in a prior suit. *See, e.g.*, *Lively*, 186 Wash. at 491; *Lemond*, 143 Wn. App. at 806.

The Court of Appeals also disregarded longstanding standards for determining whether a claim ***could have been decided*** in a prior action—another basis for a res judicata defense. *Hisle v. Todd Pac. Shipyards Corp.*, 151 Wn.2d 853, 865, 93 P.3d 108 (2004) (quoting *Schoeman v. N.Y. Life Ins. Co.*, 106 Wn.2d 855, 859, 726 P.2d 1 (1986)). The Court of Appeals erroneously and colorfully characterizes the present case as involving "the right to overwhelm the Type Two parcels with the main stem's water." Op. ¶ 33. But it is undisputed that the flows released from the Project—always less than the actual inflow above the dams—have stayed within the floodway of the River. CP 2536-45, 2710-11. The Richerts' claims are governed by ***riparian*** water law regarding river ***levels*** (not ***surface water*** law regarding flooding outside the watercourse) because their properties are located within the natural watercourse of the Skokomish River. *Fitzpatrick*, 169 Wn.2d at 607. As this Court has held, waters in the river's entire natural watercourse, including heightened currents, are riparian waters rather than surface waters. *Sund*, 43 Wn.2d at

44-45; *Kalama Elect. Light & Power Co.*, 48 Wash. at 617.

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. *Great N. Ry. Co. v. City of Seattle*, 180 Wash. 368, 373, 39 P.2d 999 (1935) (emphasis added). But under the Court of Appeals' ruling, ***every*** time FERC orders Tacoma to change flow levels (either up or down) as a condition of relicensing, Tacoma will be subject to ***new*** damages from these ***same*** plaintiffs and their successors—rendering both the *Funk* Decree and the supposedly "final" judgment in this action equally ephemeral.

Moreover, the uncertainty resulting from the Court of Appeals' approach is not limited to the parties in this case. There are over one thousand dams in Washington State, including dozens of hydroelectric projects, all of which will be subject to new lawsuits each time their license or operating requirements change, with claimants potentially seeking additional compensation for alleged damage to property interests

that were previously condemned or acquired.[1] Because the res judicata standard adopted by the Court of Appeals conflicts with established Washington law on a matter of recurring public importance, this Court should accept review under RAP 13.4(b)(1), (2), and (4).

C. This Court Should Also Grant Review to Clarify the Standard for Resolving Cross Motions for Summary Judgment.

Summary judgment is improper if there are disputed issues of fact material to the specific claim or defense being challenged. *See* CR 56. As this Court has held, courts resolving "cross-motions for summary judgment" therefore must "take the facts in the light most favorable to the ***nonmoving party*** with respect to the ***particular*** claim." *Anderson*, 172 Wn.2d at 597 (emphasis added); *see also A.C.L.U. of Nev. v. City of Las Vegas*, 466 F.3d 784, 790-91 (9th Cir. 2006) (same).

The Court of Appeals has muddied Washington law by rejecting this basic principle of civil procedure. Instead, the court stated it was presenting "the facts in the light most favorable to the Richerts" for purposes of ***both*** parties' motions, on the grounds that each "concerned whether the Richerts' claims were precluded as a matter of law." A-16

[1] Washington's 1162 dams, located in all 39 counties, include numerous hydroelectric projects potentially affected by a ruling here. *See* https://fortress.wa.gov/ecy/publications/publications/94016.pdf. *See also* http://www.ecy.wa.gov/programs/wq/ferc/existingcerts.html (identifying hydroelectric projects certified by government).

(citing *Witt*, 168 Wn. App. at 213). But *Witt* involved the denial of a single motion for summary judgment, which the court properly construed "in the light most favorable to the ***nonmoving party***." 168 Wn. App. at 213 n.3 (emphasis added). Contrary to the Court of Appeals' apparent misapprehension, ordinary CR 56 standards apply to motions involving affirmative defenses, regardless of which party files the motion. *Anderson*, 172 Wn.2d at 612-13 (affirming denial of motion for partial summary judgment dismissing affirmative defense).

This Court should accept review of the Court of Appeals' published misstatement of the CR 56 standard for cross motions. The mere fact that both sides sought summary judgment does ***not*** mean that a party has conceded there are no disputed factual issues material to a particular defense. Some cases indeed involve underlying facts that are undisputed, and parties file cross motions that jointly frame purely legal issues requiring judicial resolution. *See, e.g., Firth v. Lu*, 103 Wn. App. 267, 278, 12 P.3d 618 (2000) (citing *Weden v. San Juan Co.*, 135 Wn.2d 678, 709-10, 958 P.2d 273 (1998)). But in other cases, the parties ask the court to adopt not only differing statutory construction or other legal arguments but also unrelated theories of the case, or competing versions of events; such cross motions are like ships passing by each other, rather than warships directly engaging fire. Whenever parties dispute facts related to

a specific motion, courts must construe the evidence in favor of the nonmoving party for each particular claim or defense. *Anderson*, 172 Wn.2d at 597.

The Court of Appeals has made similar misstatements in other published and unpublished cases involving cross motions. *See, e.g.*, *Eugster v. City of Spokane*, 118 Wn. App. 383, 423, 76 P.3d 741 (2003); *Tiger Oil Corp. v. Dep't of Licensing*, 88 Wn. App. 925, 946 P.2d 1235 (1997). This Court should accept review under RAP 13.4(b)(1), (2), and (4) to provide guidance to Washington courts resolving multiple motions under CR 56.

VI. CONCLUSION

This case presents important questions of both substance and procedure that require clear answers from this Court. Tacoma requests that the Court grant review of the Court of Appeals' May 13, 2014 decision.

RESPECTFULLY SUBMITTED this 11th day of June, 2014.

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CERTIFICATE OF SERVICE

The undersigned declares under the penalty of perjury under the laws of the State of Washington that I am now and at all times herein mentioned a citizen of the United States, a resident of the state of Washington, over the age of eighteen years, not a party to or interested in the above-entitled action, and competent to be a witness herein.

On this date I caused to be served in the manner noted below a copy of the PETITION FOR REVIEW on the following:

Via Messenger
Karen A. Willie
Bradley E. Neunzig
Terrell Marshall Daubt & Willie PLC
936 North 34th Street, Suite 300
Seattle, WA 98103

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

Dated this 11th day of June, 2014.

Crystal Moore

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

Supreme Court No. _____

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A-45 – A-47	Excerpts from *Funk* Jury Instructions filed June 8, 1921
A-48 – A-57	Decree of Appropriation dated September 8, 1923

RESPECTFULLY SUBMITTED this 11th day of June, 2014.

By: _____

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CERTIFICATE OF SERVICE

The undersigned declares under the penalty of perjury under the laws of the State of Washington that I am now and at all times herein mentioned a citizen of the United States, a resident of the state of Washington, over the age of eighteen years, not a party to or interested in the above-entitled action, and competent to be a witness herein.

On this date I caused to be served in the manner noted below a copy of the APPENDIX TO PETITION FOR REVIEW on the following:

Via Messenger
Karen A. Willie
Bradley E. Neunzig
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936 North 34th Street, Suite 300
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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.

Dated this 11th day of June, 2014.

Crystal Moore

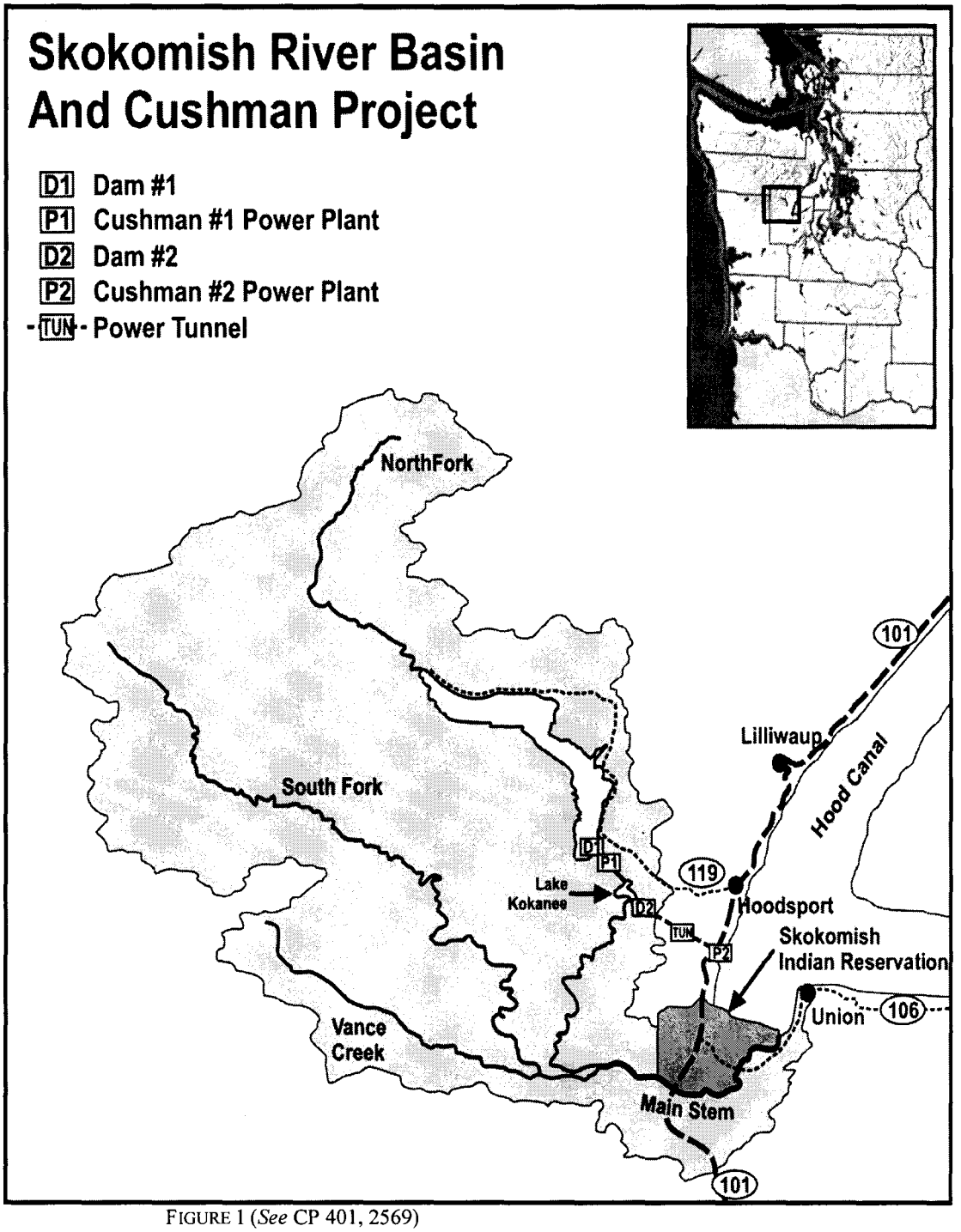

FIGURE 1 (*See* CP 401, 2569)

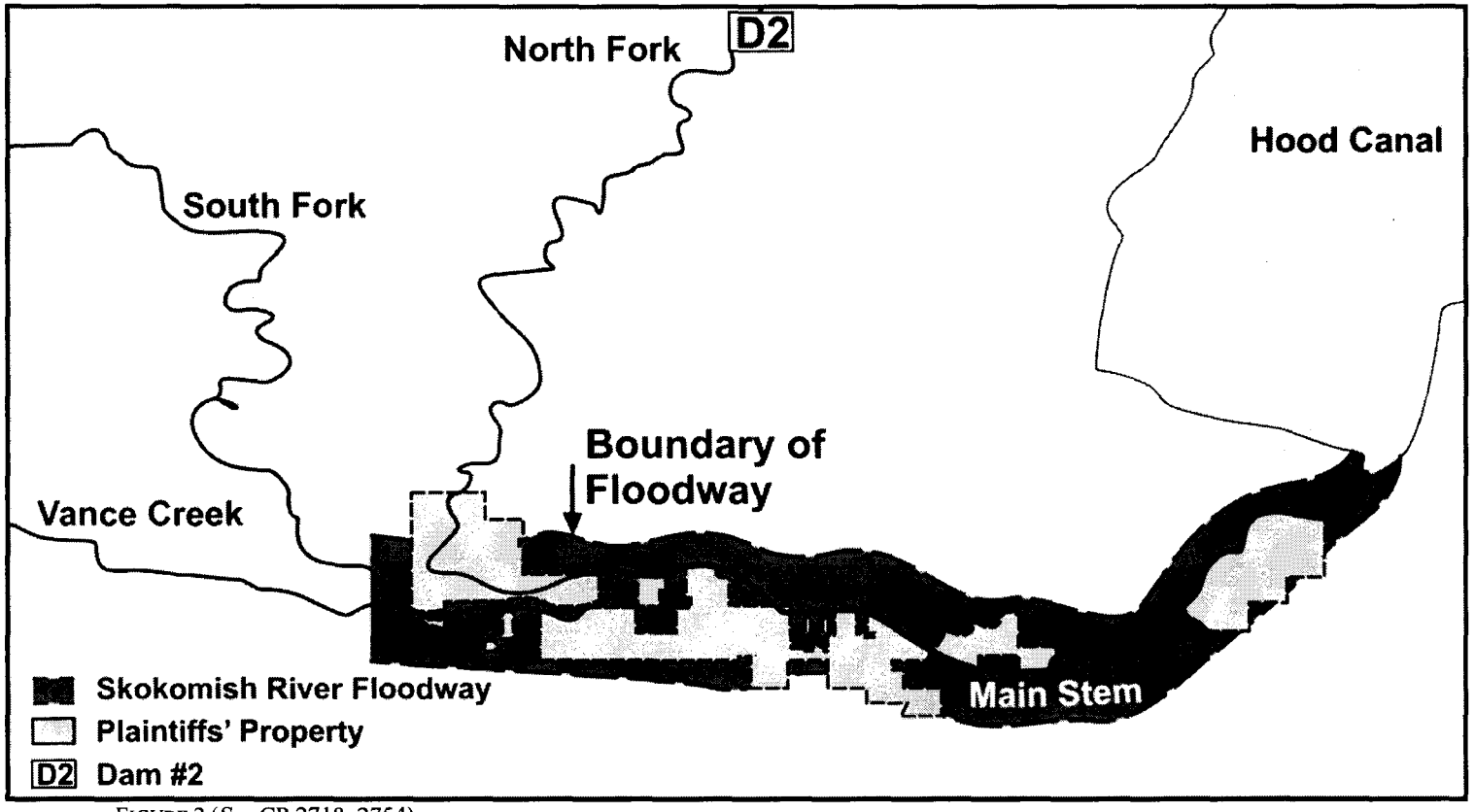

FIGURE 2 (*See* CP 2718, 2754)

319 P.3d 882
(Cite as: 319 P.3d 882)

H

Court of Appeals of Washington,
Division 2.

Gerald G. RICHERT, on behalf of Skokomish Farms Inc., a Washington corporation; Gerald F. Richert and Shirley Richert, husband and wife, and the marital community thereof; the Estate of Joseph W. Bourgault; Norma Bourgault, a single woman; Arvid Haldane Johnson, on behalf of Olympic Evergreen, LLC, a Washington limited liability company; Arvid Haldane Johnson and Patricia Johnson, husband and wife, and the marital community thereof; Shawn Johnson and Shelloy Johnson, husband and wife, and the marital community thereof; James M. Hunter, on behalf of the Hunter Family Farms Limited Partnership, a Washington partnership; James M. Hunter and Joan Hunter, husband and wife, and the marital community thereof; James C. Hunter and Sandra Hunter, husband and wife, and the marital community thereof; Gregory Hunter and Tamara Hunter, husband and wife, and the marital community thereof; David Kamin and Jayni Kamin, husband and wife, and the marital community thereof; William O. Hunter, on behalf of Hunter Brothers Store, a Washington partnership; Paul B. Hunter, on behalf of Hunter Brothers, LLC, a Washington limited liability company; William O. Hunter and Carol Hunter, husband and wife, and the marital community thereof; Paul B. Hunter and Leslie Hunter, husband and wife, and the marital community thereof; William O. Hunter, Jr. and Luayne Hunter, husband and wife, and the marital community thereof; Douglas Richert, a single man; Evan Tozier, on behalf of Riverside Farm, a Washington partnership; Arthur Tozier, a single man; Maxine Tozier, in her individual capacity; and Evan Tozier, a single man, Respondents,

v.

TACOMA POWER UTILITY, a Washington Utility, and the City of Tacoma, a Washington municipality, Appellants.

No. 43825–9–II.

March 4, 2014.

Background: Landowners of property "below" a dam whose riparian rights had been condemned in prior litigation brought class action against city for property damage caused by increased water flow. The city filed a motion for summary judgment based on res judicata. The Mason County Superior Court, Ronald Castleberry, J., entered judgment in favor of class members. The city appealed.

Holdings: The Court of Appeals, Worswick, J., held that:
(1) landowners' claims did not have concurrence of identity with prior litigation, and
(2) landowners could not have brought current claims in prior litigation.

Affirmed.

West Headnotes

[1] Water Law 405 ⇨1229

405 Water Law
405VI Riparian and Littoral Rights
405VI(A) In General
405k1228 Nature and Extent of Rights in General
405k1229 k. In general. Most Cited Cases

Where riparian rights still exist, the riparian owner has the right: (1) to have the stream flow past his property in its natural condition, generally speaking, the owner above cannot divert or pollute the stream and the owner below cannot raise the level of the water by dams or other obstructions; (2) to such use of the water as it flows past his land as he can make without materially interfering with the common right of other riparian owners; (3) to whatever the water produces, such as ice.

[2] Water Law 405 ⇨1256

405 Water Law

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405VI Riparian and Littoral Rights
405VI(A) In General
405k1255 Right to Divert Waters of Natural Watercourse
405k1256 k. In general. Most Cited Cases

A riparian owner may not divert water in a natural watercourse without facing liability for damages caused to other riparian owners.

[3] Water Law 405 ⚿1233

405 Water Law
405VI Riparian and Littoral Rights
405VI(A) In General
405k1228 Nature and Extent of Rights in General
405k1233 k. Maintenance of natural flow of watercourse. Most Cited Cases

Riparian owners have a right to not have their water levels raised or lowered.

[4] Judgment 228 ⚿540

228 Judgment
228XIII Merger and Bar of Causes of Action and Defenses
228XIII(A) Judgments Operative as Bar
228k540 k. Nature and requisites of former recovery as bar in general. Most Cited Cases

Res judicata's purpose is to prevent parties from relitigating claims.

[5] Judgment 228 ⚿584

228 Judgment
228XIII Merger and Bar of Causes of Action and Defenses
228XIII(B) Causes of Action and Defenses Merged, Barred, or Concluded
228k584 k. Nature and elements of bar or estoppel by former adjudication. Most Cited Cases

Judgment 228 ⚿713(2)

228 Judgment
228XIV Conclusiveness of Adjudication
228XIV(C) Matters Concluded
228k713 Scope and Extent of Estoppel in General
228k713(2) k. Matters which might have been litigated. Most Cited Cases

Res judicata bars the relitigation of claims that were litigated to a final judgment or could have been litigated to a final judgment in a prior action.

[6] Judgment 228 ⚿540

228 Judgment
228XIII Merger and Bar of Causes of Action and Defenses
228XIII(A) Judgments Operative as Bar
228k540 k. Nature and requisites of former recovery as bar in general. Most Cited Cases

When considering whether res judicata precludes a party from litigating a claim, the Court of Appeals is careful to not deny the litigant his or her day in court.

[7] Judgment 228 ⚿584

228 Judgment
228XIII Merger and Bar of Causes of Action and Defenses
228XIII(B) Causes of Action and Defenses Merged, Barred, or Concluded
228k584 k. Nature and elements of bar or estoppel by former adjudication. Most Cited Cases

Res judicata applies not just to those claims that a prior case's final judgment actually resolved, but also to claims that were not resolved but that reasonably diligent parties should have raised in that prior litigation.

[8] Judgment 228 ⚿584

228 Judgment
228XIII Merger and Bar of Causes of Action and Defenses
228XIII(B) Causes of Action and Defenses Merged, Barred, or Concluded
228k584 k. Nature and elements of bar or estoppel by former adjudication. Most Cited Cases

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Judgment 228 ⚿624

228 Judgment
228XIII Merger and Bar of Causes of Action and Defenses
228XIII(C) Persons Who May Take Advantage of the Bar
228k624 k. Identity of persons in general. Most Cited Cases

For res judicata to preclude a party from litigating a claim, a prior final judgment must have a concurrence of identity with that claim in: (1) subject matter, (2) cause of action, (3) persons and parties, and (4) quality of the persons for or against whom the claim is made.

[9] Judgment 228 ⚿951(1)

228 Judgment
228XXIII Evidence of Judgment as Estoppel or Defense
228k951 Evidence as to Judgment in General
228k951(1) k. Presumptions and burden of proof. Most Cited Cases

The party asserting res judicata bears the burden of proof.

[10] Judgment 228 ⚿585(2)

228 Judgment
228XIII Merger and Bar of Causes of Action and Defenses
228XIII(B) Causes of Action and Defenses Merged, Barred, or Concluded
228k585 Identity of Cause of Action in General
228k585(2) k. What constitutes identical causes. Most Cited Cases

Regarding the second element of the four-part res judicata test, to determine whether two causes of action are the same, the Court of Appeals considers whether: (1) prosecution of the later action would impair the rights established in the earlier action, (2) the evidence in both actions is substantially the same, (3) infringement of the same right is alleged in both actions, and (4) the actions arise out of the same nucleus of facts.

[11] Eminent Domain 148 ⚿243(2)

148 Eminent Domain
148III Proceedings to Take Property and Assess Compensation
148k243 Conclusiveness and Effect of Award or Judgment in General
148k243(2) k. Matters concluded. Most Cited Cases

Landowners' class action against city for water damage caused by increased flow of river from dam did not have a concurrence of identity with prior litigation that led to condemnation of their riparian rights, and thus res judicata doctrine did not bar their claims, where their claims were for water damage to property from an increased water flow that led to flooding and a high water table, rather than for a violation of riparian rights.

[12] Eminent Domain 148 ⚿243(2)

148 Eminent Domain
148III Proceedings to Take Property and Assess Compensation
148k243 Conclusiveness and Effect of Award or Judgment in General
148k243(2) k. Matters concluded. Most Cited Cases

Landowners whose riparian rights were condemned by city in prior litigation could not have brought their more recent class action claims against city for property damage due to increased water flow from a dam in the prior litigation, and thus res judicata did not bar their claims, where their claims were based, in part, on aggradation in the river bed that occurred only after the condemnation of their riparian rights, the increased water flow from the dam did not occur until several decades after the initial condemnation, and the court that heard the prior litigation explicitly stated that the condemnation was occurring due to a diminishment of the river's flow, rather than an increase.

[13] Judgment 228 ⚿584

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228 Judgment

228XIII Merger and Bar of Causes of Action and Defenses

228XIII(B) Causes of Action and Defenses Merged, Barred, or Concluded

228k584 k. Nature and elements of bar or estoppel by former adjudication. Most Cited Cases

Res judicata applies to claims that were not resolved in a prior litigation's final judgment, where reasonably diligent parties should have raised those unresolved claims in the prior litigation.

***884** Fred B. Burnside, Davis Wright Tremaine LLP, Roger Ashley Leishman, Davis Wright Tremaine LLP, Matthew Alan Love, Van Ness Feldman LLP, Seattle, WA, Tyson Clinton Kade, Van Ness Feldman LLP, Washington, DC, Elizabeth Ann Pauli, Attorney at Law, William Cody Fosbre, Tacoma City Attorney's Office, Tacoma, WA, for Appellants.

Karen A. Willie, Bradley E. Neunzig, Terrell Marshall Daudt & Willie PLLC, Seattle, WA, for Respondents.

PUBLISHED OPINION

WORSWICK, C.J.

¶ 1 In this class action lawsuit for property damage caused by increased water flow, the City of Tacoma makes an interlocutory appeal of the superior court's two rulings on cross summary judgment motions. The first ruling granted a motion for partial summary judgment that served to strike one of Tacoma's affirmative defenses against the claims of Gerald Richert and the members of his class involved in this appeal (the Richerts). The second ruling denied Tacoma's motion for summary judgment for dismissal of the Richerts' claims. The superior court's two rulings summarily determined one limited legal issue in favor of the Richerts: *City of Tacoma v. Funk,* No. 1651 (Mason County Super. Ct., Sept. 11, 1920)—a 1920 condemnation action in which Tacoma condemned the Richerts' riparian and water rights so as to allow Tacoma to build two dams on the Skokomish River—did not preclude the Richerts' claims for flood and groundwater damage***885** as a matter of law. In this interlocutory appeal, Tacoma argues that *Funk* precludes the Richerts' claims as res judicata. We affirm the superior court, because Tacoma has failed to meet its burden of proving that the Richerts' claims have a concurrence of identity with *Funk* 's final judgment.

FACTS

A. *Background*

¶ 2 The Skokomish River's main stem is fed by three tributaries: the North Fork, the South Fork, and Vance Creek. Water flows through the main stem and into the Hood Canal.

¶ 3 Tacoma has operated two dams on the North Fork of the Skokomish River since 1926. These dams today operate under Federal Energy Regulatory Commission (FERC) licenses. Tacoma's dams prevent most of the North Fork's water from flowing to the main stem. Prior to the existence of Tacoma's dams, the North Fork contributed 800 cubic feet per second (cfs) of water to the main stem, which was one third of the main stem's water.

B. *Funk Condemnation*

¶ 4 In 1923, Tacoma condemned the property rightsthat the dams' construction and operation would damage in *Funk.* The *Funk* condemnation action condemned the property rights of over 80 parcels of real property. In *Funk,* Tacoma condemned the property rights of two different parcel types, depending on how much damage the dams would cause the parcels.

¶ 5 First, Tacoma condemned in their entirety those parcels on the North Fork that the dams' construction and operation would either occupy or overflow with water (Type One parcels). The Type One parcels constituted a combined total of 730 acres.

¶ 6 Second, Tacoma condemned the riparian and water rights, but not the land rights, of those parcels located below the dam, primarily on the

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main stem (Type Two parcels). Tacoma condemned only the riparian and water rights of the Type Two parcels because the dams' construction and operation took water away from these parcels but did not occupy or overflow them. In its condemnation petition, Tacoma stated the following as to its reason for condemning the Type Two parcels' water rights:

> That with the construction of [the dams] ... a portion of the waters of [the North Fork] will be diverted from the present channel thereof and used by [Tacoma] ... *and the volume of water in said river below said dam will be diminished and by reason thereof* it is and will be necessary and convenient for said City of Tacoma to take and acquire ... the water rights, riparian rights, easements, privileges and other facilities upon said river below said dam, necessary and adequate for the proper development, construction, operation and maintenance of said power plant.

Clerk's Papers (CP) at 1382 (emphasis added).

¶ 7 In *Funk*, Tacoma paid compensation for the entire Type One parcels and the riparian and water rights of the Type Two parcels. The *Funk* court determined these compensation awards individually for each owner. Many parcel owners received their individualized compensation awards by jury verdict;, while other parcel owners received their compensation awards under stipulation agreements.

¶ 8 The Type One parcel owners received a combined total of $90,200, in approximately 7 individual compensation awards, for their 730 acres of parcels, averaging $123.56 per acre. The Type Two parcel owners received a combined total of $50,670.30, in approximately 40 individual compensation awards, for their riparian and water rights (which were attached to 6,360.6 acres), averaging $7.95 per acre. After Tacoma paid these compensation awards, the *Funk* superior court entered two separate decrees condemning the land rights of the parcels.

The decree condemning the land rights of the Type One parcels for Tacoma's use stated:

> [I]t is hereby ORDERED AND DECREED that there is hereby appropriated and granted to and vested in fee simple in [Tacoma] ... for the construction, operation and maintenance of an hydroelectric ***886** power plant on and along the North Fork of the Skokomish River and on and along Lake Cushman in Mason County, Washington, as set forth in the petition herein on file, the lands, real estate, premises, water rights, easements, privileges and property, including the right to divert the North Fork of the Skokomish River located in Mason County, Washington, hereinafter described, of the [Type One parcels].

CP at 3660.

¶ 9 On the same day, the *Funk* superior court entered a decree condemning the riparian and water rights of the Type Two parcels stating:

> [I]t is hereby ORDERED AND DECREED that there is hereby appropriated and granted to and vested in fee simple in [Tacoma] ... for the construction, operation and maintenance of an hydro electric power plant on and along the North Fork of the Skokomish river and on and along Lake Cushman in Mason County, Washington, as set forth in the petition herein on file, the waters, water rights, riparian rights, easements and privileges, including the right to divert the waters of the North Fork of the Skokomish River located in Mason County, Washington, appertaining and appurtenant to the [Type Two parcels].
>
> ....
>
> [I]t is further ORDERED AND DECREED that [Tacoma] ... is hereby granted the right, at any time hereafter, to take possession of, appropriate and use all of the waters, water rights, riparian rights, easements and privileges appertaining and appurtenant to the lands, real estate and premises hereinabove described, together with the right to divert the waters of the North Fork of the Skoko-

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mish River, and the same is hereby appropriated and granted unto, and the title shall vest in fee simple in [Tacoma] as of the 11th day of September, 1920, and its successors forever; the same being for a public use.[FN1]

FN1. Tacoma limits its appeal to the riparian and water rights granted by *Funk*, and explicitly states that it makes no claims on appeal related to the easements that Tacoma condemned in *Funk*.

CP at 3650, 3656.

C. *Tacoma's Increase in Water Flow*

¶ 10 From 1926 until 1988, Tacoma's dams diverted most of the North Fork's water flow out of the river, resulting in an average of only 10 cfs released from the North Fork and into the main stem.

¶ 11 In 1988, FERC required Tacoma to increase the flows to 30 cfs as part of its water quality certification for the project. In 1998 FERC began requiring Tacoma to release even more water through the dams, for the purpose of preserving fish and the environment. Litigation with FERC regarding minimum water flow required Tacoma to increase the flow to 60 cfs in 1999 and to 240 cfs in 2008. In 2010, an amendment to Tacoma's 1998 FERC license created a schedule for releasing different amounts of water at different times throughout the year. However, the 2010 amendments to the license required Tacoma to maintain an average flow that was significantly higher than the 10 cfs released by the dams through most of their history.

¶ 12 Since 1988, Tacoma increased water flow to and through the main stem, increasing the amount of water that flowed alongside the Richerts' parcels. This increase of water is the subject of the Richerts' lawsuit against Tacoma.

D. *The Richerts' Lawsuit*

¶ 13 Gerald Richert and the members of his class involved in this appeal are owners of 88 of the Type Two parcels, whose riparian and water rights, but not land rights, were condemned by Tacoma in *Funk*.[FN2] The Richerts' parcels are located below the dams and primarily on the main stem.

FN2. Twenty-two additional parcels are included in the superior court case, but are not included in the eighty-eight Type Two parcels relevant to this appeal, because the twenty-two parcels were not involved in *Funk*.

¶ 14 The Richerts sued Tacoma, alleging that the increased amount of water that Tacoma's dams released overflowed the main ***887** stem, causing the water to invade and damage the Richerts' parcels.

¶ 15 The dams' diversion of water away from the main stem, from 1926 until 2008, prevented the water from naturally washing accumulating gravel out of the main stem. The Richerts claimed that over the decades this failure to wash out the gravel caused aggradation: the slow building up of gravel in a river bed that greatly reduces the amount of water that a river can contain.

¶ 16 The Richerts alleged that by 2008, the main stem had suffered aggradation to the point that it could not contain Tacoma's sudden increase of water flow into the main stem, which caused the main stem to overflow. The Richerts claim that the increased water flow overflowed the banks of the main stem and additionally has caused a continuing rise in the groundwater table.

E. *Procedural History*

¶ 17 The Richerts sued Tacoma for (1) violation of riparian rights, (2) failure to provide a proper outflow for channeled surface waters, (3) violation of RCW 4.24.630 (liability for damage to land and property), (4) trespass and continuing trespass, (5) nuisance and continuing nuisance, (6) negligence, (7) inverse condemnation by flooding, and (8) inverse condemnation by groundwater. Tacoma asserted as an affirmative defense that *Funk* 's de-

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crees constitute a final judgment barring the Richerts' claims as res judicata.

¶ 18 The Richerts filed a motion for partial summary judgment, asking the superior court to dismiss Tacoma's affirmative defense related to *Funk*. Tacoma also filed a motion for summary judgment, asking the superior court to dismiss the Richerts' claims in their entirety.

¶ 19 The superior court granted the Richerts' motion for partial summary judgment, dismissing Tacoma's affirmative defense. The superior court determined that the Richerts' claims were "not within the contemplation of the *Funk* litigants or the *Funk* court." Verbatim Report of Proceedings (June 8, 2012) at 8. The superior court denied Tacoma's motion for summary judgment.

¶ 20 The superior court entered a very limited final judgment to facilitate our interlocutory review under CR 54(b), RAP 2.2(d), and RAP 2.3(b)(4). The superior court limited its final judgment to the issue of whether the *Funk* condemnation action precluded the Richerts' ability to pursue their claims. The superior court stated that its final judgment "does not apply to any of the other issues adjudicated on summary judgment." CP at 63. Tacoma appeals the superior court's partial summary judgment, arguing that *Funk* 's final judgment precludes the Richerts' claims as res judicata.

ANALYSIS

¶ 21 Tacoma argues that res judicata bars the Richerts' claims because these claims share a concurrence of identity with *Funk* 's final judgment. We disagree.

¶ 22 We review summary judgments de novo. *Michak v. Transnation Title Ins. Co.*, 148 Wash.2d 788, 794, 64 P.3d 22 (2003). Summary judgment is appropriate if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. CR 56(c). In this case, the parties agree that no genuine issue of material fact exists on the limited issue of the effect of the *Funk* judgment on the Richerts' ability to pursue their claims.

I. RIPARIAN RIGHTS

¶ 23 The ownership of a parcel adjacent to a watercourse gave that parcel owner riparian rights in the watercourse. *Dep't of Ecology v. Abbott*, 103 Wash.2d 686, 689, 694 P.2d 1071 (1985). Washington State abolished riparian rights in 1917, but maintained those riparian rights existing prior to 1917. *Abbott*, 103 Wash.2d at 692, 694 P.2d 1071. These rights existing before 1917 can still be condemned under eminent domain. *See* Former RCW 90.03.040 (1917); *Lummi Indian Nation v. State*, 170 Wash.2d 247, 253, 241 P.3d 1220 (2010). The State abolished all preexisting but unused riparian rights in 1932. *Abbott*, 103 Wash.2d at 695–96, 694 P.2d 1071.

[1][2][3] ¶ 24 Where riparian rights still exist, the riparian owner has the right "(1) to ***888** have the stream flow past his property in its natural condition ... (generally speaking, the owner above cannot divert or pollute the stream and the owner below cannot raise the level of the water by dams or other obstructions); (2) to such use of the water as it flows past his land as he can make without materially interfering with the common right of other riparian owners; (3) to whatever the water produces, such as ice." *DeRuwe v. Morrison*, 28 Wash.2d 797, 805, 184 P.2d 273 (1947). A riparian owner may not divert water in a natural watercourse without facing liability for damages caused to other riparian owners. *See Fitzpatrick v. Okanogan County*, 169 Wash.2d 598, 608, 238 P.3d 1129 (2010). Riparian owners have a right to not have their water levels raised or lowered. *DeRuwe*, 28 Wash.2d at 808, 184 P.2d 273.

¶ 25 Rights to water use can be condemned by eminent domain. Former RCW 90.03.040; *Lummi Indian Nation*, 170 Wash.2d at 253, 241 P.3d 1220. However, where one has a right to use water, one still may not overflow the river and flood parcels without compensation. *See* RCW 90.03.030 (person with right to use river water may not increase water in river above ordinary high-water mark); *see also*

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Thompson v. Dep't of Ecology, 136 Wash.App. 580, 586, 150 P.3d 1144 (2007) (ordinary high-water mark " 'represent[s] the point at which the water prevents the growth of terrestrial vegetation.' " [FN3]).

FN3. Quoting Frank E. Maloney, *The Ordinary High Water Mark: Attempts at Settling an Unsettled Boundary Line*, 13 LAND & WATER L.REV. 465, 470 (1978).

II. RES JUDICATA

[4][5][6][7] ¶ 26 Whether res judicata bars a party from pursuing an action is a matter of law reviewed de novo. *Martin v. Wilbert*, 162 Wash.App. 90, 94, 253 P.3d 108 (2011). Res judicata's purpose is to prevent parties from relitigating claims. *Loveridge v. Fred Meyer, Inc.*, 125 Wash.2d 759, 763, 887 P.2d 898 (1995). Res judicata bars the relitigation of claims that were litigated to a final judgment or could have been litigated to a final judgment in a prior action. *Loveridge*, 125 Wash.2d at 763, 887 P.2d 898; *Hisle v. Todd Pac. Shipyards Corp.*, 151 Wash.2d 853, 865, 93 P.3d 108 (2004). However, when considering whether res judicata precludes a party from litigating a claim, we are careful to not " 'deny the litigant his or her day in court.' " *Hisle*, 151 Wash.2d at 865, 93 P.3d 108 (quoting *Schoeman v. N.Y. Life Ins. Co.*, 106 Wash.2d 855, 860, 726 P.2d 1 (1986)). Res judicata applies not just to those claims that a prior case's final judgment actually resolved, but also to claims that were not resolved but that reasonably diligent parties should have raised in that prior litigation. *Hisle*, 151 Wash.2d at 865, 93 P.3d 108.

[8][9] ¶ 27 For res judicata to preclude a party from litigating a claim, a prior final judgment must have a concurrence of identity with that claim in (1) subject matter, (2) cause of action, (3) persons and parties, and (4) quality of the persons for or against whom the claim is made. *Spokane Research & Def. Fund v. City of Spokane*, 155 Wash.2d 89, 99, 117 P.3d 1117 (2005); *Loveridge*, 125 Wash.2d at 763, 887 P.2d 898. The party asserting res judicata, in this case Tacoma, bears the burden of proof. *Hisle*, 151 Wash.2d at 865, 93 P.3d 108.

[10] ¶ 28 Regarding the second element of this four-part res judicata test, to determine whether two causes of action are the same, we consider whether "(1) prosecution of the later action would impair the rights established in the earlier action, (2) the evidence in both actions is substantially the same, (3) infringement of the same right is alleged in both actions, and (4) the actions arise out of the same nucleus of facts." *Civil Service Comm'n v. City of Kelso*, 137 Wash.2d 166, 171, 969 P.2d 474 (1999).

III. APPLICATION OF RES JUDICATA IN THE CONTEXT OF RIPARIAN RIGHTS

¶ 29 Tacoma argues that *Funk* 's final judgment bars the Richerts' claims as res judicata. We disagree, because Tacoma has failed to prove that *Funk* 's final judgment shares a concurrence of identity with the Richerts' claims or that reasonably diligent parties should have thought to petition the ***889** *Funk* court to resolve the Richerts' claims in *Funk* 's final judgment. [FN4]

FN4. Tacoma argues on policy grounds that if we do not hold that res judicata precludes the Richerts' claims, every dam will, in the future, face potential lawsuits from plaintiffs whose property rights were previously condemned. But Tacoma's policy argument does not overcome long standing res judicata law.

A. *Funk's Final Judgment and the Richerts' Claims*

[11] ¶ 30 Tacoma argues that the Richerts' claims are precluded by res judicata, because these claims share a concurrence of identity with *Funk* 's final judgment. We disagree.

¶ 31 In *Funk*, Tacoma condemned the right to take away the use of the Type Two parcels' water, but it did not condemn the right to invade the Richerts' parcels with water. This is evidenced by Tacoma's petition for condemnation in *Funk*.

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¶ 32 Although the decrees constitute *Funk* 's final judgment, Tacoma's petition reveals the scope *of Funk* 's subject matter (i.e., the scope of what rights Tacoma was condemning) and its cause of action (i.e., the scope of what Tacoma was askingthe court to decide). Thus, Tacoma's petition helps explain the scope of the action below, which allows this court to compare *Funk* with the Richerts' claims to determine if they share a concurrence of identity of subject matter or cause of action.

¶ 33 Tacoma's petition in *Funk* requested condemnation of the Type Two parcels because "the volume of water in said river below said dam will be diminished." CP at 1382. This shows that Tacoma sought only the right to deprive the Type Two parcels below the dam of their use of the main stem's water, not the right to overwhelm the Type Two parcels with the main stem's water. Thus, *Funk* 's decrees condemned only the right to the Richerts' parcels' use of the main stem's water that Tacoma actually requested in *Funk*.

¶ 34 The Richerts make claims for (1) violation of riparian rights; (2) failure to provide a proper outflow for channeled surface waters, (3) violation of RCW 4.24.630 (liability for damage to land and property), (4) trespass, (5) nuisance, (6) negligence, (7) inverse condemnation by flooding, and (8) inverse condemnation by groundwater. More important than the names of the Richerts' claims is what they concern. All of the Richerts' claims concern the recent flooding and a rise in the groundwater table on the Richerts' parcels, allegedly caused by Tacoma's release of too much water into the main stem.[FN5]

FN5. Tacoma argues that *Funk* precludes the Richerts' claims as res judicata because *some,* but not all, of the Richerts' predecessors in interest filed various individual motions in *Funk* stating broad requests for any and all damages that Tacoma's dams would cause. But the final judgment controls, and random filings from various predecessors in interest cannot illuminate the scope of those decrees.

1. *Concurrence of Identity with Subject Matter*

¶ 35 Regarding the first element of res judicata's test, concurrence of identity of subject matter, the Richerts' alleged invasion of water onto their parcels does not have the same subject matter with the claims litigated to a final judgment in *Funk* . This is because *Funk* 's final judgment dealt with only deprivation of the parcels' water use, rather than flood or groundwater damage to the parcels themselves.[FN6] *See* RCW 90.03.030; *see also Austin v. City of Bellingham,* 69 Wash. 677, 679, 126 P. 59 (1912).

FN6. Tacoma argues that the Richerts concede that they limited their claims to riparian rights violations, citing CP at 4018–19, 4023; Br. of Appellant at 20. However the cited pages in the record contain no such concession.

2. *Concurrence of Identity with Cause of Action*

¶ 36 Regarding the second element, concurrence of identity with cause of action, Tacoma has failed to meet its burden of proving that the Richerts' claims constitute the same cause of action as *Funk*. This is because in *Funk*, Tacoma condemned only the right to deprive the parcel owners of ***890** their ability to use water, as revealed by Tacoma's petition. The Richerts now claim that their parcels are being damaged by floods and high water tables, with some land taken in its entirety. Thus *Funk* 's final judgment and this case do not (1) impair the same rights (right to water use vs. right to land use), (2) deal with the same evidence (loss of water use vs. flooding, groundwater tables, and aggradation), (3) allege an infringement of the same rights (right to use water vs. right to use land), or (4) arise out of the same nucleus of facts as the prior action (deprivation of water use vs. deprivation of land use).[FN7]

FN7. Even beyond this, *Funk* 's final judgment was limited to condemnation, and the Richerts make a series of claims that have

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> nothing to do with condemnation: (1) failure to provide a proper outflow for channeled surface waters, (2) violation of RCW 4.24.630 (liability for damage to land and property), (3) trespass, (4) nuisance, and (5) negligence. Thus, these five claims, on their face, do not constitute the same "cause of action" as litigated in *Funk* . This is because none of these causes of action were considered by the *Funk* court, as *Funk* was limited to the cause of action of condemnation.

¶ 37 Tacoma has failed to prove that the Richerts' claims for invasion of water share a concurrence of identity with *Funk* 's final judgment in terms of subject matter or cause of action. *See Loveridge*, 125 Wash.2d at 763, 887 P.2d 898. For res judicata to preclude the Richerts' claims, Tacoma must prove that the Richerts' claims meet all four elements of res judicata. Because Tacoma cannot prove that the Richerts' claims for invasion of water share a concurrence of identity with *Funk* 's final judgment in terms of subject matter or cause of action, Tacoma cannot prove either of the first two elements of res judicata. *See Loveridge*, 125 Wash.2d at 763, 887 P.2d 898. Thus, we need not consider elements three and four of res judicata. FN8

> FN8. As a part of its res judicata argument, Tacoma argues that because it acquired the Richerts' riparian rights in *Funk*, that this gave Tacoma the right to raise the water level up to its natural flow, even if it flows over the Richerts' parcels. We disagree, because as discussed above, Tacoma condemned only the Richerts' parcels' use of water, not the right to cause flood or groundwater damage to their land. *See* RCW 90.03.030; *see also Austin*, 69 Wash. at 679, 126 P. 59.

B. *The Claims that Reasonably Diligent Parties Should Have Raised in Funk.*

[12] ¶ 38 Tacoma argues that the Richerts' claims are precluded by res judicata, even if they were not raised in *Funk*, because reasonable parties should have raised them in *Funk*. We disagree.

[13] ¶ 39 Res judicata applies to claims that were not resolved in a prior litigation's final judgment, where reasonably diligent parties should have raised those unresolved claims in the prior litigation. *Hisle*, 151 Wash.2d at 865–66, 93 P.3d 108. However, in this case, the *Funk* litigants could not have reasonably brought the Richerts' claims at the time of *Funk* for three reasons.

¶ 40 First, the Richerts based their claims on alleged aggradation that occurred over the past eight decades, which reduced the amount of water that the main stem could handle. The *Funk* litigants could not have reasonably predicted such aggradation over eight decades and, thus, reasonable litigants could not have predicted such a phenomenon would combine with the dams to cause water to overflow and damage the Richerts' parcels.

¶ 41 Second, the dams' increased water flow resulted from requirements imposed on Tacoma by FERC litigation for the purpose of water quality and environmental protection, starting in 1988. No reasonable litigant in the 1920's could have predicted the rise of modern environmental protection, nor could a reasonable party have predicted that starting in 1988, a federal agency would require Tacoma to increase the water flow through its dams for water quality and preservation of fish and the environment.

¶ 42 Third, Tacoma explicitly stated in its *Funk* petition that it needed to condemn the *Funk* litigant's riparian rights because "the volume of water in said river below said dam will be diminished." CP at 1382. Thus, Tacoma's petition put the parties on notice ***891** only that their parcels would lose the ability to use the river's water, not that their parcels would suffer flood and groundwater damage from an overabundance of water. For these reasons, the *Funk* litigants could not have reasonably predicted that Tacoma would overwhelm the main stem with

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water and cause water damage to their parcels eight decades after *Funk*. We hold that Tacoma has failed to prove that *Funk* bars the Richerts' claims as res judicata.[FN9] *See Loveridge*, 125 Wash.2d at 763, 887 P.2d 898.

FN9. The Richerts argue that Tacoma should be estopped from arguing that the *Funk* litigants could have predicted aggradation because Tacoma argued the opposite in an unpublished case. *See Indemnity Ins. Co. of N.Am. v. City of Tacoma*, noted at 158 Wash.App. 1022, 2010 WL 4290648, at *3–*4 (2010). We do not address this issue because the superior court did not resolve this issue in its final judgment and, thus, the issue is outside the scope of this appeal of that final judgment.

Tacoma argues alternatively that even if res judicata did not preclude the Richerts' claims, Tacoma has no duty to maintain its dams' artificial diversion of water away from the main stem and, thus, it cannot face liability for merely decreasing the amount of water that its dams divert away from the main stem. We do not address this issue because it concerns Tacoma's general duty to maintain its artificial diversion of water from the main stem. This does not relate to the effect of *Funk* on the Richerts' claims, and is thus outside this appeal's limited scope.

Finally, we do not decide all "issues with regard to *Tacoma v. Funk* " as requested by the superior court's final judgment, because that would constitute an impermissible advisory opinion. CP at 63–64; *see To–Ro Trade Shows v. Collins*, 144 Wash.2d 403, 416–17, 27 P.3d 1149 (2001).

¶ 43 Affirmed.

We concur: PENOYAR, J.P.T. and HUNT, J.

Wash.App. Div. 2,2014.
Richert v. Tacoma Power Utility
319 P.3d 882

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DIVISION II

2014 MAY 13 AM 9:13

STATE OF WASHINGTON
BY
DEPUTY

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

GERALD G. RICHERT, on behalf of SKOKOMISH FARMS INC., a Washington corporation; GERALD F. RICHERT and SHIRLEY RICHERT, husband and wife, and the marital community thereof; THE ESTATE OF JOSEPH W. BOURGAULT; NORMA BOURGAULT, a single woman; ARVID HALDANE JOHNSON, on behalf of OLYMPIC EVERGREEN, LLC, a Washington limited liability company; ARVID HALDANE JOHNSON and PATRICIA JOHNSON, husband and wife, and the marital community thereof; SHAWN JOHNSON and SHELLOY JOHNSON, husband and wife, and the marital community thereof; JAMES M. HUNTER, on behalf of the HUNTER FAMILY FARMS LIMITED PARTNERSHIP, a Washington partnership; JAMES M. HUNTER and JOAN HUNTER, husband and wife, and the marital community thereof; JAMES C. HUNTER and SANDRA HUNTER, husband and wife, and the marital community thereof; GREGORY HUNTER and TAMARA HUNTER, husband and wife, and the marital community thereof; DAVID KAMIN and JAYNI KAMIN, husband and wife, and the marital community thereof; WILLIAM O. HUNTER, on behalf of HUNTER BROTHERS STORE, a Washington partnership; PAUL B. HUNTER, on behalf of HUNTER BROTHERS, LLC, a Washington limited liability company; WILLIAM O. HUNTER and CAROL HUNTER, husband and wife, and the marital community thereof; PAUL B. HUNTER and LESLIE HUNTER, husband and wife, and the marital community thereof;

No. 43825-9-II

No. 43825-9-II

WILLIAM O. HUNTER, JR. and LUAYNE HUNTER, husband and wife, and the marital community thereof; DOUGLAS RICHERT, a single man; EVAN TOZIER, on behalf of RIVERSIDE FARM, a Washington partnership; ARTHUR TOZIER, a single man; MAXINE TOZIER, in her individual capacity; and EVAN TOZIER, a single man,

Respondents,

v.

TACOMA POWER UTILITY, a Washington Utility, and the CITY OF TACOMA, a Washington municipality,

Appellants.

ORDER AMENDING OPINION

It is hereby ORDERED that this court's opinion filed on March 4, 2014 is amended as follows:

On page 2, paragraph 1, the following text shall be deleted:

> In this class action lawsuit for property damage caused by increased water flow, the City of Tacoma makes an interlocutory appeal of the superior court's two rulings on cross summary judgment motions. The first ruling granted a motion for partial summary judgment that served to strike one of Tacoma's affirmative defenses against the claims of Gerald Richert and the members of his class involved in this appeal (the Richerts).

The following language shall be inserted in its place:

> In this lawsuit for property damage caused by increased water flow, the City of Tacoma makes an interlocutory appeal of the superior court's two rulings on cross summary judgment motions. The first ruling granted a motion for partial summary judgment that served to strike one of Tacoma's affirmative defenses against the claims of Gerald Richert and the other plaintiffs involved in this appeal (the Richerts).

And on page 3, immediately following the "S" in the heading "FACTS," the following text shall be added in a footnote:

> Because both of the superior court orders on review concerned whether the Richerts' claims were precluded as a matter of law, we write the facts in the light most favorable to the Richerts. *See Witt v. Young*, 168 Wn. App. 211, 213, 275 P.3d 1218, *review denied*, 175 Wn.2d 1026, 291 P.3d 254 (2012).

And on page 7, paragraph 1, the following text shall be deleted:

> Gerald Richert and the members of his class involved in this appeal are owners of 88 of the Type Two parcels, whose riparian and water rights, but not land rights, were condemned by Tacoma in *Funk*.

The following language shall be inserted in its place:

> Gerald Richert and the other plaintiffs in this appeal are owners of 88 of the Type Two parcels, whose riparian and water rights, but not land rights, were condemned by Tacoma in *Funk*.

The footnote that follows the sentence ending in "condemned by Tacoma in *Funk*" shall remain.

DATED this 13TH day of MAY, 2014.

Worswick C.J.
Worswick, C.J.

I concur:

Hunt, J.

Penoyar, J.

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON,

IN AND FOR MASON COUNTY.

CITY OF TACOMA,
a municipal corporation,

Petitioner,

- v -

GEORGE H. FUNK and Mrs. George H. Funk, his wife; William T. Putnam and Harriett G. Putnam, his wife; A. G. Cushman and Mrs. A. G. Cushman, his wife; Russell Homan, a bachelor; Puget Mill Company, a corporation; Olive Hanson, widow of Arne Hanson, deceased; Marius Hanson, Simon Hanson, Fritjof Hanson; Valborg Rustad, Mina Caroline Davis, Olofine Thue, Agnes Gilbertson, Olaf Hanson, children, heirs at law and devisees of Arne Hanson, deceased; Frances Hanson, Carrie Falie, Hassie Hanson, Ole Hanson, Fred Hanson and Jeanette Hanson, his wife, heirs at law of Arne Hanson, deceased; Alice E. Dow Browner and C. W. Browner, her husband; A. E. Hillier and Stella Hillier, his wife; Henry O. Pixley; William Musser and Mrs. William Musser, his wife; Ida M. Finch and Vincent Finch, her husband; Tacoma Savings Bank & Trust Company, a corporation, as Trustee; Marie H. Bradley, William T. Bradley and Edith C. Bradley, his wife; James W. Bradley; Martha E. Hayward, a widow; Weyerhaeuser Timber Company, a corporation; Thad B. Preston and Mrs. Thad B. Preston, his wife; Ellen Rudy and John Doe Rudy, her husband; Dr. J. Richter and Mrs. J. Richter, his wife; Potlatch Commercial & Terminal Company, a corporation; Sig. G. Aardal and Mrs. Sig G. Aardal, his wife; H. N. Woolfield and Mrs. H. N. Woolfield, his wife; E. A. Sims and Mrs. E. A. Sims, his wife; George Franz and Mrs. George Franz, his wife; Myra L. Lutz and John Doe Lutz, her husband; W. D. Davidson and Mrs. W. D. Davidson, his wife; Morrison F. Pixley and Mrs. Morrison F. Pixley, his wife; M. M. Grogan and Mrs. M. M. Grogan, his wife; J. A. Schmidt and Mrs. J. A. Schmidt, his wife; Wm. Wagner and Mrs. Wm. Wagner, his wife; Abraham J. Gross and Mrs. Abraham J. Gross, his wife; Perry J. Perkins and Mrs. Perry J. Perkins, his wife; The Oregon Mortgage Co., Ltd., a corporation; Higgins-Cady Timber Co. a corporation; L. W. Olds and Mrs. L. W. Olds, his wife; J. T. Argyle and Mrs. J. T. Argyle, his wife; Stephen Merrick and Mrs. Stephen Merrick, his wife; Mae Land Company, a corporation; Kneeland Investment Co. a corporation; Rob't E. Andrews and Mrs. Rob't E. Andrews, his wife; Edw. F. Leach and Mrs. Edw. F. Leach, his wife; Northern Pacific Railway Company, a corporation; S. K. Waterman and Mrs. S. K. Waterman, his wife; Mary A. O. Rechenderfer and John Doe Rechenderfer, her husband; Olympia Door Co., a corporation;

No. 1651

PETITION FOR CONDEMNATION.

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Hattie E. Packie-Garfield
CLERK OF THE SUPERIOR COURT
MASON COUNTY, WASH.

That T. G. Garrison and Mary L. Garrison are husband and wife. That Karl Rose and Emilie Rose are husband and wife. That B. B. Jackson and Mary A. Jackson are husband and wife. That John L. Sutherland and Mrs. John L. Sutherland are husband and wife. That R. B. Wilson and Bertha Wilson are husband and wife. That William M. Foster and Mrs. William M. Foster are husband and wife. That Thomas W. Webb and Maude Webb are husband and wife. That George Cameron and Louise Cameron are husband and wife. That ~~[illegible]~~ John Doe McNeeley, whose true christian name is to petitioner unknown, and Genera A. McNeeley are husband and wife. That W. A. Morris and Maude Morris are husband and wife. That George F. Weaver and Mabel H. Weaver are husband and wife. That J. C. McKiel and Mrs. J. C. McKiel are husband and wife. That W. A. Nobles and Mrs. W. A. Nobles are husband and wife. That Joseph Vail and Mrs. Joseph Vail are husband and wife. That W. A. Hunter and Oliver Hunter are husband and wife. That William Deyette and Mrs. William Deyette are husband and wife. That Lew Ottermatt and Jeanette F. Ottermatt are husband and wife. That Jos. C. Mongrain and Mrs. Jos. C. Mongrain are husband and wife. That Alex Johnson and Mrs. Alex Johnson are husband and wife. That John Doe Hauptly, whose true christian name is to petitioner unknown, and Fannie L. Hauptly are husband and wife. That Arthur H. Eells and Mrs. Arthur H. Eells are husband and wife. That Rasmus Hanson and Mrs. Rasmus Hanson are husband and wife. That George Webb and Mrs. George Webb are husband and wife. That I.N.Wood and Ethel Wood are husband and wife. That Robert Lewis and Mrs. Robert Lewis are husband and wife. That Henry Allen and Mrs. Henry Allen are husband and wife. That McKinney Pulsifer and Mrs McKinney Pulsifer are husband and wife. That Frank MacKean and Mrs. Frank MacKean are husband and wife. That A.D.Miller and Mrs. A.D. Miller are husband and wife. That Alonzo Ray and Bessie Ray are husband and wife. That Joseph Wickstrom and Mrs. Joseph Wickstrom are husband and wife. That W.B. Sammons and Mrs. W.B.Sammons are husband and wife. That W.H.Rowe and Mrs. W.H.Rowe are husband and wife. That W.G.Rex and Mrs. W.G.Rex are husband and wife. That W.H.Smith and Mrs. W.H.Smith are husband and wife. That Albert Hale and Mrs. Albert Hale are husband and wife. That Frank W. Hale and Mrs. Frank W.Hale, are husband and wife. That Clinton O. Harris and Mrs. Clinton O. Harris are husband and wife. That Joseph M. Sparr and Mrs. Joseph M. Sparr are husband and wife. That F.A.Robison and Mrs. F.A.Robison are husband and wife.

IX.

That at all times since the year 1893 the City of Tacoma has been engaged in the business of owning lands, real estate, rights of way, franchises, easements, privileges and other facilities, and owning, operating and maintaining works, plants and facilities for the purpose of furnishing said City of Tacoma and the inhabitants thereof and any other persons, with electricity and electric energy for ligh-ing, heating, fuel, power and other public purposes, and has regulat-ed and controlled the use, distribution and price thereof.

X.

That heretofore and prior to August 12th, 1919, the corporate authorities, towit, the City Council of said City of Tacoma, deemed it advisable that said City of which they were officers, should acquire

by condemnation or purchase, of both of said methods, a site, which should include land and real estate, rights of way, water rights, overflowage rights, easements, privileges and other facilities for the purpose of making certain additions, betterments and extensions, hereinafter mentioned, to the present electric generating plant and system now owned, controlled, operated and maintained by said City, and the said City Council of said City thereupon and on the 9th day of July,1919, duly passed an ordinance, numbered 7040, entitled:-

"An ordinance declaring the advisability of the City of Tacoma's acquiring a site for establishing a hydro-electric power plant on the North Ford of the Skokomish River and on and along Lake Cushman in Mason County, Washington, with the necessary water rights, overflowage rights, easements and other property rights incident and necessary thereto as an addition to and extension of its electric light and power system; specifying and adopting the system and plan proposed; declaring the estimated cost thereof, as near as may be; and providing for the submission of this ordinance and the system and plan herein set forth to the qualified voters of the City for their ratification or rejection thereof at a special election to be held on the 12th day of August, 1919; and repealing Ordinance No. 6938";

which said ordinance was signed by the Mayor of said City and was thereafter duly published in the official newspaper of said City on the 10th day of July, 1919.

XI.

That said Ordinance No. 7040 specified and adopted the system or plan proposed for the acquisition of said site for such proposed additions, betterments and extensions of its present electric generating system, and declared the estimated cost of said site as near as might be, and said ordinance and the plan and system therein specified and adopted was thereafter, on August 12th, 1919, submitted for ratification or rejection to the qualified voters of said City, and at said election said ordinance and the plan and system therein specified and adopted was ratified by the affirmative vote of such a majority of the qualified voters of said City voting at said election as was required by the statute in such cases made and provided. That a copy of said Ordinance No. 7040 is attached hereto, marked Exhibit A, and made a part of this petition.

XII.

That the system and plan specified and adopted by said ordinance was and is to acquire by condemnation or otherwise a site upon and along Lake Cushman, and on and along the North Ford of the Skokomish River, in Mason County , Washington, for a hydro-electric generating plant to be known and designated "Hydro-electric Power Unit No 2 of the City of Tacoma"; said plant to be owned, constructed, operated and maintained as an addition, betterment and extension of and to the present system of said City, which site so to be acquired and owned by said City, should include all lands, rights of way, water rights, overflowage rights, reservoirs, easements and privileges as should be necessary for the ultimate development thereof, including also sufficient rights of way, franchises, and easements to provide a double pole line and private telephone line where it may be located from the headworks to the Pierce County Line.

XIII.

That pursuant to the further provisions of said Ordinance No. 7040 said City of Tacoma, by its Commissioner of Light and Water and its City Council has caused the proper and necessary surveys to be made and prepared, and has determined that in order to develop and put in operation said Hydro-electric Power Unit No.2 of the City of Tacoma hereinafter described, it is and will be necessary and convenient to include in said site the lands, rights of way, water rights, overflowage rights, easements and privileges hereinafter described, and said City of Tacoma heretofore and on the 7th day of July, 1920, duly passed Ordinance No. 7281, entitled:-

"An ordinance authorizing and directing the City Attorney of the City of Tacoma to institue and prosecute an action or actions in the proper courts in the name of the City of Tacoma, under the right of eminent domain, for the condemnation and acquisition of lands, real estate, premises, rights-of-way, riparian rights, water rights, overflowage rights, easements and privileges necessary for the construction, operation and maintenance of the hydro-electric power plant on and along the North Fork of the Skokomish River, and on and along Lake

CIII.

That with the construction of said dam in the North Fork of said Skokomish River, above mentioned, and the construction of said tunnel and canal and the utilization of said waters in the manner herein set forth, a portion of the waters of said North Fork of Skokomish River will be diverted from the present channel thereof and used by petitioner upon the site herein described, and to be acquired by these proceedings for the operation of said proposed Hydro-Electric Power Unit #2 of the City of Tacoma, and the volume of water in said river below said dam will be diminished and by reason thereof it is and will be necessary and convenient for said City of Tacoma to take and acquire, as a part of the site for said proposed power plant, pursuant to the provision of said Ordinances No. 7040 and No. 7281, the water rights, riparian rights, easements, privileges and other facilities upon said river below said dam, necessary and adequate for the proper development, construction, operation and maintenance of said power plant.

CIV.

That the lands, real estate and premises mentioned and described in Group 11 of said Ordinance No. 7281, attached hereto as Exhibit B, and hereinafter described, abut upon and lie adjacent to said river, and the defendants.

CV.

That defendant Olympia Door Company, a corporation, is or claims to be the owner of the following described tracts of land, with the riparian rights upon said river appurtenant thereto, to-wit:-

the N.E.$\frac{1}{4}$ of N.E.$\frac{1}{4}$;

Government Lot 1, being the N.W.$\frac{1}{4}$ of N.E.$\frac{1}{4}$; the S.W.$\frac{1}{4}$ of N.E.$\frac{1}{4}$; the N.W.$\frac{1}{4}$ of S.E.$\frac{1}{4}$; the N.E.$\frac{1}{4}$ of S.W.$\frac{1}{4}$ and Government Lot 8 being the S.E.$\frac{1}{4}$ of S.W.$\frac{1}{4}$; all in Section 6, Township 21 North, Range 4 West, W.M. Also that portion of the N.E.$\frac{1}{4}$ of S.E.$\frac{1}{4}$ of Section 8, Township 21 North, Range 4 West, W.M., lying North of Skokomish River.

And that defendant Ella A. L. Waddle, has or claims some interest in the N.E.$\frac{1}{4}$ of S.W.$\frac{1}{4}$ of said Section 6, and defendant Washington Mill Company, a corporation, has or claims some interest in said portion of N.E.$\frac{1}{4}$ of S.E.$\frac{1}{4}$ of said Section 8, lying North of Skokomish River.

CVI.

That defendants C. A. Hudson and Mrs. C. A. Hudson, his wife, are or claim to be the owners of the W.$\frac{1}{2}$ of Section 7, Township 21 North, Range 4 West, W.M., except the N.E.$\frac{1}{4}$ of the N.W.$\frac{1}{4}$ of said section, and of the riparian rights on and along said river appurtenant thereto.

That defendants T. G. Garrison and Mary L. Garrison, his wife, are or claim to be the owners of said N.E.$\frac{1}{4}$ of the N.W.$\frac{1}{4}$ of said Section 7, and of the riparian rights on and along said river appurtenant thereto hereinafter named are or claim to be the owners of the respective tracts or parcels of land hereinafter mentioned and of the water rights, riparian rights, privileges and easements upon and along said river, appurtenant or pertaining thereto, and that all of said lands are in Mason County, Washington.

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-electric 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. Bonsh
Burns Pomeroy
Peters & Powell
J. Chas R. Lewis
Attorneys for petitioner.

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

C. 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.

C M Riddell

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

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

FUNK 000097

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON,

IN AND FOR MASON COUNTY.

CITY OF TACOMA, a municipal corporation, Plaintiff. -vs- GEORGE H. FUNK, et als., Defendants.	No. 1651 STATEMENT AND CROSS COMPLAINT

3

Come now the following named defendants, T. W. Webb and _____ Webb, husband and wife, G. F. Weaver, and _____ Weaver, husband and wife, J. C. Mongrain, and _____ Mongrain, husband and wife, W. H. Johnston and _____ Johnston, husband and wife, W. O. Watson and _____ Watson, husband and wife, Fred Lassaie as Administrator of the Estate of George Cameron, Karl T. Rose and _____ Rose, husband and wife, A. H. EEils, and _____ Eels, husband and wife; R. B. Wilson, and _____ Wilson, husband and wife; Oliver Bishop and _____ Bishop, husband and wife, William Deyette and _____ Deyette, husband and wife; J. L. Sutherland, and _____ Sutherland, husband and wife; F. A. Robison and _____ Robison, husband and wife, M. F. Pixley and _____ Pixley, husband and wife; W. A. Nobles and _____ Nobles, husband and wife; J. C. Mc Kiel and _____ Mc Kiel, husband and wife, Jeam Todd Fredson and _____ Fredson, husband and wife, and Joseph Sparr and _____ Sparr, husband and

FUNK 000294

wife, and by way of statement and cross complaint allege:-

I

That the above named T. W. Webb and _____ Webb are now and at all times mentioned herein were husband and wife and that they are the owners of the following described premises situate, lying and being in Mason County, Washington, to-wit:-

Lot Two (2); the Southwest quarter of Northwest quarter; the West half of the southwest quarter of Section Seven (7) Township twenty one (21), North, Range Three (3); Lots Seven (7), Eight (8), Nine (9) Ten (10) and Lot Eleven (11), exeept School Cite. Also, the Southeast quarter of the southwest quarter; the Northeast quarter of the southeast quarter and the West half of the Southeast quarter, Section Twelve, Township Twenty-one (21) North, Range 4, West of W. M. and the Northeast quarter of the Northwest quarter of Section Thirteen (13) Township Twenty one (21) North, Range Four, (4) West of W. M.

II

That the above named G. F. Weaver and _____ Weaver are now and at all times mentioned herein were husband and wife, and that they are the owners of the following described premises situate, lying and being in Mason County, Washington, to-wit:-

Lot Eleven (11) and the South twenty five (25) acres of the Southwest quarter of theNorthwest quarter of Section Fifteen (15), Township Twenty one (21) North Range Four (4) West of W. M.

III

That the above named J. C. Mongrain, and _____ Mongrain, are now and at all times mentoned herein were husband and wife and that they are the owners of the following dwscribed premises, situate, lying and being in Mason County, Washington, to-wit:-

The East half of the Northeast quarter of Section Sixgeen (16), Township Swenty one (21) North, RangeFOur (4) West of W. M.

IV

That the above named W. H. Johnston and _____

FUNK 000295

Johnston are now and at all times mentioned herein were husband and wife, and that they are the owners of the following described premises, situate, lying and being in Mason County, Washington, to-wit:-

Southwest quarter of the southeast quarter of Section Eight (8), Township Twenty one (21) North, Range Four (4) West, W. M.

V

That the above named W. O. Watson and _____ Watson are now and at all times mentioned herein were husband and wife, and that they are the owners of the following described premises, situate, lying and being in Mason County, Washington, to-wit:-

The Northeast quarter of the Northeast quarter of Section Sixteen (16), Township Twenty one (21), North, Range Four (4) West of W. M.

VI

That the above named Fred Lassaie is Administrator of the Estate of George Cameron and that the estate owns the following described premises, situate, lying and being in Mason County, Washington, to-wit:-

Lots Five, (5), Six (6), Seven (7) and the South half of the Southwest quarter of Section Fourteen (14) Also the East half of the Southeast quarter of Section Fifteen (15) all in Township Twenty one (21) North, Range Four, West of W. M.

VII

That the above named Karl T. Rose and _____ Rose are now and at all times mentioned herein were husband and wife and that they are the owners of the following described premises, situat e, lying and being in Mason County, Washington, to-wit:-

The South half of the Southeast quarter of Section Seven (7), Township Twenty one (21) North, Range Four (4) West of W. M.

VIII

That the above named A. H. Eells and _____ Eells are now and at all times mentioned herein werehusband and wife and that they are the owners of the following described premises, situate, lying and being in Mason County, Washington, to-wit:-

The West half of the Northwest quarter of the Northeast quarter and the west half of the southwest quarter of of the Northeast quarter; the Northwest quarter of the Northwest quarter of the southeast quarter of Section Eighteen, Township Twenty one (21) North, Range Four (4), West of W. M.

IX

That the above named R. B. Wilson and _____ Wilson are now and at all times mentioned herein were husband and wife and that they are the owners of the following described premises situate, lying and being in Mason County, Washington , to-wit:-

The Southeast quarter of the southwest quarter of Section Eight (8), Township Twenty one (21) North, Range Four (4) West W. M.

X

That the above named Oliver Bishop and _____ Bishop are now and at all times mentioned herein were husband and wife and that they are the owners of the following descri bed premises situate, lying and being in Mason County, Washington, to-wit:-

The East half of the Southeast quarter lying South of the Skokomish River, except west 5 chains thereof and except the west 208.7 feet of south 364.6 feet of east 15 chains of East half of the Southeast quarter, Section Eight (8) Township Twenty one (21) North Range Four (4) West of W. M.

XI

That the above named William Deyette and _____ Deyette are now and at all times mentioned hereim were husband and wife and that they are the owners of the following described premises situate, lying and being in Mason County, Washington, to-

FUNK 000297

A-27

wit:-

The West half of the Northwest quarter of the Northeast quarter of Section Sixteen (16) Township Twenty-one (21) North, Range Four (4) West W. M.

XII

That the above-named J. L. Sutherland and _____ Sutherland are now and at all times mentioned herein were husband and wife and that they are the owners of the following described premises, situate, lying and being in Mason County, Washington, to-wit:-

Beginning at the southwest corner off the southeast quarter of the southeast quarterl run thience east on south line 5 chains; thence north to Skokomish River; thence following tiver in westerly direction to west line of Northeast quarterof southeast quarter, said Section Eight, run thence south on west line of East half of southeast quarter to place of beginning Containing 13 acres, more or less, Section Eight, Township Twenty one (21) North, Range Four (4) West W. M.,

XIII

That the above named F. A. Robison and _____ Robison are now and at all times mentioned herein were husband and wife and that they are the owners of the following described premises, situate, lying and being in Mason County, Washington, to-wit:-

Lots twenty two and twenty three (22 and 23) in Section Fourteen (14) Township Twenty One (21) North, Range Four (4) West W. M. ALSO Indian Lots Three, (3) four (4), five (5) and ten (10) in Section Twelve (12) Township twenty one (21) North, Range Four, West W. M.

XIV

That the above-named M. F. Pixley and _____ Pixley are now and at all times mentioned herein were husband and wife and that they are the owners of the following described premises, situate, lying and being in Mason County, Washington, to-wit:-

Lot One (1) in Block ~~######~~ Twelve (12) in Townsend's Addition to Union City, Mason County, Washington.

XV

That the above named W. A. Nobles and _____Nobles are now and at all times mentioned herein were husband and wife and that they are the owners of the following described premises situate, lying and being in Mason County, Washington, to-wit:-

The Northwest quarter of the southeast quarter of Section Fifteen (15) Township Twenty one (21) North, Range Four, West W. M.

XVI

That the aobve named J. C. Mc Kiel and _____Mc Kiel are now and at all times mentkoned herein were husband and wife and that they are the owners of the following described premises situate, lying and being in Mason County, Washington, to-wit:-

Government Lot Eleven (11) lying north of the main channelof the Skokomish River.

XVII

That the above named Jean Todd Fredson and _____ Fredson are now and at all times mentioned herein were husband and wife and that they are the owners of the following described premises situate, lying and being in Mason County, Washington, to-wit:-

The West half of the Northwest quarter of the Northeast quarter of Section Sixteen, (16) Township Twenty one (21) Nnrth, Range Four (4) West W. M.

XVIII

That the above named Joseph Sparr and _____ Sparr are now and at all times mentioned herein were husbandd and wife and that they are the owners of the following described premises situate, lying and being in Mason County, Washington, to-wit:-

A portion of Indian Lot Eleven (11), Government Lot Five (5), Section Twelve (12) Township Twenty one (21) North, Range Four (4) except a portion sold to Frank Fredson.

XIV

That in addition to the damages to the said several

FUNK 000299

tracts of land caused by the taking of the riparian rights therefrom by reason of the proceedings on the part of the petitioner wach and all of said tracts are greatly damaged and affected thereby and the fair market value of the same depreciated by reason of the menace of the dam proposed to be erected by the petitioner and plaintiff herein, and the impounding of the large body of water proposed to be impounded by the said petitioner and plaintiff and the consequent damages of the premises of these defendants being inundated and flooded through the chance of the said dam washing out or the said impounded waters breaking through and around the proposed dam of petitioner or plaintiff and escaping from said i mpounding basin and flooding the premises of these defendants and doing great damage thereto and by reason of the fear of such escaping of water from said impounding basin and the fear of resulting injury to their said several tracts of land above described; that the menace of said proposed dam and the said proposed project has and does greatly depreciate the fair market value of the said property of these defendants by reason of the fear and apprehension of the washing out of said dam or the escaping of said impounddd waters around the said dam and the inundating and flooding of their said premises, aforesaid.

~~XV~~ 19

That the said several tracts of land above described are suitable and used for agricultural purposes and lie in the lower endof a narrow valley commencing at the mouth of a narrow canyon of the North Fork of the Skokomish River in which canyon the plaintiff and petitioner proposes to erect its dam behind which dam and up the said North Fork of said River will be impounded a great and vast body of water; that the natural and only outlet of said waters is through the daid conyon and valley and over the said above de-

FUNK 000300

described lands of these defendants.

~~XVI~~ 20

That by reason of the storage of said waters so situate with reference to the above described lands of these defendants these defendants and any persons purchasing or occupying lands in the said valley are placed in constant fear of impending disaster by reason of the storage of said water and apprehension of damag e from flowage or of the dam or storage basin and the escaping of water therefrom with the possibility of destruction of the property of these defendants, together with loss of life of the inhabitants residing therein so that the property of these defendants so situate, has become undesirable and unmarketable and the fair market value thereof greatly depreciated.

~~XVII~~ 21

That each and all of said tracts of land lie contiguous to said Skokomish River in the said valley lying below the canyon in which the petitioner proposes to erect its dam and have valuable riparian rights apertinent thereto by reason of the flowge of the said River alongside their several tracts of land.

~~XVIII~~ 22

That the fair market value of their said premises will be and are greatly depreciated by reason of the proposed taking away of the riparian rights therefrom which attach to the whole and every part of their said above described premises and which taking of said water will deprive said premises of all their riparian rights including the benefits that annually accrue thereto by virtue of subirrigation from the said river.

WHEREFORE, they pray the Court:-

1- That they be awarded compensation for any and all damages of every kind and nature whatsoever that will accrue to their said

properties by reason of the doing of the things to be done by the plaintiff and petitioner as alleged in the complaint and the matters and things alleged in this statement and cross-complaint.

2- For their costs and disbursements of suit herein.

3- For such other and furtherrrelief as shall seem meet in the premises.

Attorneys for above named defendants.

RECEIVED
AND FILED
JUN 1 1921
Stella E Jensen
CLERK OF THE SUPERIOR COURT
MASON COUNTY, WASH.
By M. D. Knight Deputy.

FUNK 000302

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON,

IN AND FOR MASON COUNTY.

CITY OF TACOMA, a municipal corporation, Plaintiff. -vs- GEORGE H. FUNK, et al., Defendants.	No. 1651 PETITION IN INTERVENTION.

Come now T. G. Garrison, and _____ Garrison, husband and wife, Blanche B. Bell and Al L. Bell, wife and husband, Fred R. Bell, and Mayme Bell, his wife, J. Ernest Eaton, and _____ Eaton, husband and wife, Harry Deyette and _____ Deyette, his wife, Victor Roberts and _____ Roberts, his wwife, George N. Adams and _____ Adams, his wife, Charles Fisk and _____ Fisk his wife, John Hawk and _____ Hawk, his wife, William Morris and _____ Morris, his wife, Joshua Jemison and Mattie Jemison, his wife, W. A. Hunter and _____ Hunter, his wife, Teofil Rickert and Helena Rickert, his wife, Robert N. Johnson and _____ Johnson, his wife, Ed O'Heren and _____ O'Heren, his wife, Henry Barrett and _____ Barrett, his wife, William Mc Dowell and _____ Mc Dowell, his wife, Will H. Peterson and _____ Peterson, his wife, O. T. Aubol and _____ Aubol, his wife, John Edmiston and _____ Edmiston, his wife, Hugh Brydon and _____ Brydon, his wife, George W. Dixon and _____ Dixon, his wife, Mary Adams and _____ Adams, her husband, Jesse Kifkland and _____ Kirkland, his wife, and B. C. Willey and _____ Willey, his wife, Warren Lincoln, and _____ Lincoln, his wife, Edward A. Harris and _____ Harris his wife, Charles W. Mason

FUNK 000305

and _____ Mason, his wife, J. G. Haller and _____ Haller, his wife, I. N. Wood and _____ Wood, his wife, and petition and represent to the Court as follows, to-wit:-

I

That the above named T. G. Garrison and _____Garrison are now and at all times mentioned herein were husband and wife and that they are the owners of the following described premises, situate, lying and being in Mason County, Washington, to-wit:-

The southwest quarter of the Northeast quarter, the Northeast quarter of the Northwest quarter, the Southeast quarter of the Northwest quarter, the Northeast quarter of the Southwest quarter, the Southeast quarter of the Southwest quarter, the Northwest quarter of the Southeast quarter all in Section Seven, (7), Township Twenty one (21), North Range Four (4) West ofW. M.

II

That the above named Blanche B. Bell and A. L. Bell are now and at all times mentioned herein were wife and husband, and that they are the owners of the foll owing described premises, situate, lying and being in Mason County, Washington, to-wit:-

The West half of the Southwest quarter of Section Fifteen (15) and the South half of the Northeast quarter of the Southeast quarter of the Section Sixteen (16) Township Twenty one (21) North Range Four (4) West of W. M.

III

That the above named Fred R. Bell and Mayme Bell are now and at all times mentioned herein were husband and wife, and that they are the owners of the following described premises, situate, lying and being in Mason County, Washington, to-wit:-

The Southeast quarter of the Northeast quarter, except seven acres conveyed to Jean Todd Fredson, recorded in vol. 36, Deeds, page 515, records Auditor's Office, Mason County, ALSO, the North half of the Northeast quarter of the southeast quarter, all in Section Sixteen (16), Township Twenty one (21), North Range Four (4) West of W. M.

IV

That the above named J. Ernest Eaton and _____ Eaton are now and at all times mentioned herein were husband and wife, and that

FUNK 000306

they are the owners of the following described premises, situate, lying and being in Mason County, Washington, to-wit:-

An undivided one half of Lot ten (10) and the North fifteen (15) acres of the Southwest quarter of the Northwest quarter of Section Fifteen (15), Township Twenty one(21) North, Range Four (4) West of W. M.

V

That the above named Harry Deyette and & _____ Deyette are now and at all times mentioned herein were husband and wife and that they are the owners of the following described premises, situate, lying and being in Mason County, Washington, to-wit:-

The West thirty acres of the southeast quarter of the Northwest quarter of Section Sixteen (16) Township Twenty one (21) North, Range Four (4) West W. M.

VI

That the above named Victor Roberts and _____ Roberts are now and at all times mentioned herein were husband and wife and that they are the owners of the following described premises situate, lying and being in Mason County, Washington, to-wit:-

The West fifteen acres of the southwest quarter of the Northeast quarter and the East ten acres of the Southeast quarter of the Northwest quarter of Section Sixteen, (16), Township Twenty one (21), North Range Four (4) West of W. M.

VII

That the above named George Adams and _____ Adams are now and at all times mentioned herein were husband and wife, and that they are the owners of the following described premises, situate, lying and being in Mason County, Washington, to-wit:-

Twelve and a half (12½) acres in Lots Twelve (12) and thirteen (13) Section Eleven, Township Twenty One (21) North, Range Four, West W. M. beg. at the southwest corner, running twenty chains east; thence 10 chains north; thence 5 chains west; thence to point of beginning. ALSOLot eight (8) or the Southwest quarter of the Southwest quarter of the Northwest quarter of Section Twelve, (12)

FUNK 000307

Township twenty one North, Range Four, West W. M. except one (1) acre thereof conveyed to James by deed recorded in Vol. 33, page 486, Mason County Deed Records.

VIII

That the above named Charles Fisk and _____ Fisk are now and at all times mentioned herein were husband and wife, and that they are the owners of the following described premisms situate, lying and being in Mason Countym Washington, to-wit:-

The south half of the northwest quarter of the Northwest quarter of the Northeast quarter of Section Eleven, (11) Township Twenty one (21) North, Range Four, West of W. M. except west twenty (20) feet for road.

IX

That the above named John Hawk and _____ Hawk are now and at all times mentioned herein were husband and wife, and that they are the owners of the following described premises situate, lying and being in Mason County, Washington, to-wit:-

The South twenty six-2/3 acres of the west 53-1/3 acres of the North half of the Northeast quarter of Section Eleven (11) Township Twenty one (21) North Range Four West W. M., also the West half of the Southeast quarter of the Southeast quarter of Seutheast quarter or tract #7 and tract #3, both in Section Twelve (12) Township Twenty one(21) North Range Four (4) West of W. M.

X

That the above named William Morris and _____ Morris are now and at alll times mentioned herein were husband and wife, and that they are theownersoof the following described premises, situate, ly ing and being in Masoon County, Washington, to-wit:-

Lots nine (9) and twelve (12) and the Southeast quarter of the Northeast quarter ofSection Fifteen, (15) Township Twenty one (21) Range Fpur (4) West of W. M.

XI

That the above named Joshua Jemison and Mattie Jemison

FUNK 000308

are now and at all times mentioned herein were husband and wife, and that they are the owners of the following described premises, situate, lying and being in Mason County, Washington, to-wit:-

The Northeast quarter of the Southwest quarter of Section Sixteen (16) Township Twenty one (21) North Range Four (4) West of W. M.

XII

That the above named W. A. Hunter and _____ Hunter are now and at all times mentioned herein were husband and wife, and that they are the owners of the following described premises, situate, lying and being in Mason County, Washington, to-wit:-

The West half of the Northwest quarter of Section Sixteen and the East half of the Northeast quarter and Southwest quarter of the Northeast quarter of Section Seventeen (17) all in Township Twenty one (21) North, Range Four (4) West of W. M.

XII

That the above named Teofil Rickert and Helena Rickert are now and at all times mentioned herein were husband and wife, and that they are the owners of the following described premises, situate, lying and being in Mason County, Washington, to-wit:-

The Northwest quarter of the Northwest quarter and the Southwest quarter of the Northwest quarter of Section Seventeen, Township Twenty one (21) North Range Four, West of W. M.

XIII

That the above named Robert N. Johnson and _____ Johnson are now and at all times mentioned herein were husband and wife, and that they are the owners of the following described premises, situate, lying and being in Mason County, Washington, to-wit:-

The Northeast quarter of the Northweast quarter, Sec. 17 Township Twenty one (21) North Range Four (4) West of W. M.

FUNK 000309

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XIV

That the above named Ed. O'Heren, and _____ O'Heren, are now and at all times mentioned herein were husband and wife, and that they are the owners of the following described premises, situate, lying and being in Mason County, Washington, to-wit:-

The East half of the West half of the Southeast quarter of the Northeast quarter, except right of way, Section Eighteen (18) Township Twenty one (21)North, Range Four (4) West W. M.

XV

That the above named Henry Barrett and _____ Barrett are now and at all times mentioned herein were husband and wife, and that they are the owners of the following described premises, situate, lying and being in Mason County, Washington, to-wit:-

The Northeast quarter of the Northeast quarter of Section Eighteen (18), Township Twenty one (21) North, Range Four, West W. M.

XVI

That the above named William Mc Dowell and _____ Mc Dowell are now and at all times mentioned herein were husband and wife, and that they are the owners of the following described premises, situate, lying and being in Mason County, Washington, to-wit:-

The Northwest quarter of the Southeast quarter and strip 100 feet by 33 rods, in Northeast quarter of Southwest quarter and about ½ acre between above land and the County Road in the Southwest quarter of Northwest quarter, all in Sec. 12, Tp. 21. North, Range 5, W.W.M. XVII

That the above named Will H. Peterson and _____ Peterson are now and at all times mentioned herein were husband and wife and that they are the owners of the following described.

premises, situate, lying and being in Mason County, Washington, to-wit:-

35' XX300' in Southeast cornerof West half of the Northeast quarter of the Southwest quarter, East half of southeast quarter of Northwest quarter and East half of Northeast quarter of Southwest quarter, except .060 acres. A tract 104' X 125' adjoining County Road in Southeast quarter of southeast quarter of Southwest quarter, all in Section Twelve (12) Township Twenty one (21), North Range Five (5) West W. M.

XVIII

That the above named O. T. Aubol and _____ Auboll are now and at all times mentioned herein were husband and wife and that they are the owners of the following described premises, situate, lying and being in Mason County, Washington, to-wit:-

The south half of the southeast quarter, Southeast quarter of Southwest quarter, except 104' X 125' and except about one-half acre, all in Section Twelve (12), Township Twenty-one (21), ########################## North Range Five, West W. M.

XVIV

That the above named John Edmisdon and _____ Edmiston, are nowand at all times mentioned herein were husband and wife and that they are the owners of the following described premises, situate, lying and being in Mason County, Washington, to-wit:-

The north half of the southeast quarter of Section Eleven (11) Township Twenty one (21) North Range Five, (5), West W. M.

XX

That the above named Hugh Brydon and _____ Brydon are now and at all times mentioned herein were husband and wife and that they are the owners of the following described premises, situate, lyingand being in Mason County, Washington, to-wit:-

The Southeast quarter of the Northeast quarter and about one third acre in the Northeast corner of the Northeast quarter of the southeast quarter, all in Section ten (10) Township Twenty one (21) North Range Five, (5) West W. M.

XXI

That the above named George W. Dixon and _____ Dixon are now and at all times mentioned herein were husband and wife and that they are the owners of the following described premises, situate, lying and being in Mason County, Washington, to-wit:-

The East half of the southeast quarter of the North-west quarter, in Section Seventeen (17) Township Twenty one (21) North Range Four (4) West W. M.

XXII

That the above named Mary Adams and _____ Adams are now and at all tmes memtioned herein were wife and husband and that they are the owners of the following described premises situate, lying and being in Mason County, Washington, to-wit:-

The east half of the southwest quarter, of Section Eleven, Township twenty one (21) North Range Four, West W. M.

XXIII

That the above named Jesse Kirkland and _____ Kirkland are now and at all times mentioned herein were husband and wife, and that they are the owners of the following described premises, situate, lying and being in Mason County, Washington, to-wit:-

The North half of the Southeast quarter, except 1/3 acre to Hugh Brydon and except a tract 4 ch. x 2 ch. along the North Line of North half of the southeast quarter, Section Ten (10, Township Twenty one (21) North Range Five, West W. M. ALSO, Northwest quarter of Southwest quarter, of Section Eleven (11) Township twenty one (21), North, ## Range Five (5) West W. M.

FUNK 000312

XXIV

That the above named B. C. Willey and _____Willey are now and at all times mentioned herein were husband and wife, and that they are the owners of the following described premises, situate, lying and being in Mason County, Washington, to-wit:-

The southwest quarter of the Northeast quarter and the Northwest quarter of the Southeast quarter, except a five acre tract in Section Eleven (11) Township Twenty one (21), North Range Four, (4) West of W. M.

XXV

That the above named Warren Lincoln and _____Lincoln are now and at all times mentioned herein were husband and wife, and that they are the owners of the following described premises, situate, lying and being in Mason County, Washington, to-wit:-

The Southeast quarter of the Southeast quarter of S Section Sixteen (16) Township Twenty one (21) North Range Four, West of W. M.

XXVI

That the above named Edward A. Harris and _____Harris are now and at all times mentioned herein were husband and wife, and that they are the owners of the following described premises, situate, lying and being in Mason County, Washington, to-wit:-

XXVII

That the above named Charles W. Mason and _____Mason are now and at all times mentioned herein were husband and wife, and that they are the owners of the following described premises, situate, lying and being in Mason County, Washington, to-wit:-

The East 24.75 acres of the Southwest quarter of the southwest quarter of Section Nine (9) and also the South Sixteen (16) feet of the West 15.25 acres of the said southwest quarter of the southwest quarter of said Section Nine (9) Also a tract of land sixteen (16) feet square in the southeast corner of the southeast quarter of the southeast quarter of

FUNK 000313

of Section eight (8) and also a strip of land sixteen (16) feet wide from the last above described South tract to the County Road in the Northeast corner of the Northeast quarter of the Northeast quarter of Section Seventeen (17) all in Township Twenty one (21) North Range Four, West W. M.

XXVIII

That the above named J. G. Haller and _____ Haller are now and at all times mentioned herein were husband and wife, and that they are the owners of the following described premises, situate, lying and being in Mason County, Washington, to-wit:-

Tract three (3) Lot Two (2) Section Twelve (12) and the West half of the East half of the Southwest quarter of the Southeast quarter of Section _____, all in Township Twenty one (21) North, Range Four, containing 12.65 acres more or less.

XXIX

That the above named I. N. Wood and _____ Wood are now and at all times mentioned herein were husband and wife, and that they are the owners of the following described premises, situate, lying and being in Mason County, Washington, to-wit:-

The West half of the Northeast quarter of the Northwest quarter of Section Seven (7) Township Twenty - one (21) North Range Three (3) West W. M.

FUNK 000314

A-42

XXIV

That each and all of said tracts are greatly damaged by the project of the petitioner or plaintiff herein inasmuch a s the value of the premises of the foregoing petitioners in intervention are each and all affected thereby and the fair market value of said premises is depreciated by reason of the menace and threat of the erection of the dam proposed to be erected by the petitioner and plaintiff herein and the impounding of the large body of water proposed to be impounded by the said petitioner and plaintiff and the danger of the premises of these petitioners for intervention described above of being inundated and flooded through the chance of the said dam washing out or the water of the said Skokomish River breaking through and around the proposed dam of the petitioner or plaintiff and flooding the premises of these intervenors and doing great damage thereto; that the menace of said dam and said proposed project has and does greatly depreciate the fair market value of the## said property of these petitioners in intervention.

XXV

That the said premises of intervenors are seriously damaged and injured in their fair market value by reason of the fact that the sub-irrigation of their lands, the same being agricultural lands, will be greatly deteriorated and that their lands will suffer great injury thereby by virtue of the fact that they will be devoid of a large amount of moisture that will be due to the diversion of the waters of the North Fork of the said Skokomish River.

XXVI

That the said premises of these intervenors will be and are affected and damaged in diverse and other ways by reason of the said proposed damming of the waters of the North Fork of the said Skokomish River and diverting of said waters elsewhere.

XXVII

That these petitioners for intervention will suffer and are suffering great ad irreparable damage unless they be permitted to intervene herein and for their damages assessed and fixed by the jury herein in this eminent domain proceedings.

XXVIII

That the project of the petitioner or plaintiff herein involves the taking away of the riparian rights of these intervenors and their said premises all to the great damage and injury of the said premises.

WHEREFORE, they pray the Court:-

1- That they be permitted to intervene herein and have their damages assessed in the manner and form prescribed by law, together with their costs and disbursements of suit.

2- For such other and further relief as to the Courtshall seem meet in the premises.

Attorneys for Intervenors.

RECEIVED
AND FILED
JUN 1 1921
CLERK OF THE SUPERIOR COURT
MASON COUNTY, WASH.
By M. K. Knight Deputy.

FUNK 000316

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

FOR MASON COUNTY

CITY OF TACOMA, a municipal corporation,

Petitioner,

vs

GEO. H. FUNK ET ALS.,

Respondents.

No. 1651

I N S T R U C T I O N

Gentlemen of the jury in this case the Court instructs you as folows:

1.

The city of Tacoma seeks in this proceeding to condemn and take for public use certain water rights and riparian rights along the Skokomish river in this county. The petitioner proposes by suitable and adequate structures at or below the outlet of Lake Cushman to divert the waters of the north fork of the Skokomish river flowing therein and the waters so diverted will be conducted by a new channel other than that in which they are now accustomed to flow an will be used to operate machinery to generate electric light and power for the use of the inhabitants of the city of Tacoma and for the use of such other localities to whom the city of Tacoma may lawfully dispose of such electrical energy. This work will divert the waters accustomed to flow in the north fork of the Skokomish river so that such waters will cease to flow over or past the lands involved in this proceeding. The petitioner will not divert any part of the Skokomish river except the waters of the north fork which originate and flow

to inundation and the benefits, if any, incident to alluvial deposit from the Skokomish River, in its present state and that the said benefits will be lost anddestroyed by reason of the taking of any portion of the water of the said river by petitioner for the purpose stated in its petition and if the said taking the water and the consequent loss of inundation and alluvial deposit will damage the lands of the parties or any of them and make them less useful for agricultural purposes then you are instructed to allow the said defendants andintervenors so affected such compensation for the said damages, as you shall find reasonable.

9

You are instructed that, by riparian rights is meant that an owner of land abutting upon a stream of water has a right to the use and enjoyment of all benefits arising by reason of the said waters, including the right to use for domestic purposes or power purposes and to any other benefits naturally incident to the presence of the said stream in its natural and usual state and you are instructed that if you find that petitioner will, in any way, interfere with or destroy any portion of the benefits conferred by the said stream upon abutting property owners by reason of the taking of any portion of the water in the said Skokomish river for the purpose alleged in its petition, then you are instructed to find for the defendants and intervenors such sum in damages as will reasonably compensate them for the taking of or interference with their said riparian rights. The measure of any such damages is the depreciation, if any, in the fair market value of said premises occassioned by the taking of such riparian rights.

10

If you find that these defendants' lands, or any of them,

FUNK 000718

No 18

This is a civil action and requires only ten of you to agree upon a verdict. When ten of you have agreed, it will be considered as the verdict of the jury and you through your foreman will sign the verdict, after writing in the blank space the amount which you think respondents are entitled to, whereupon you will notify the bailiff who will have you in charge that you have agreed upon a verdict and you will then be conducted into the court room for the purpose of the receipt thereof.

No 19

Immediately upon retiring to your jury room you will select one of your number as foreman who will sign the verdict that you agree upon. From now on until the further order of the Court you will not be permitted to separate.

John M. Wilson
Judge.

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JUL 8 1921
Stella A. Jensen
CLERK OF THE SUPERIOR COURT
MASON COUNTY, WASH.
Ida Needham Jamison

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

IN AND FOR MASON COUNTY.

CITY OF TACOMA, a municipal corporation,

Petitioner,

No. 1651

- v -

-DECREE OF APPROPRIATION-

GEORGE H. FUNK, et al,

Defendants.

Now on this 8th day of September 1923, this cause coming on regularly for hearing upon the application of the petitioner herein for a decree of appropriation of the waters, water rights, riparian rights, easements and privileges mentioned in the petition on file herein and appertaining and appurtenant to the lands, real estate and premises hereinafter described, and it appearing to the Court that heretofore verdicts were duly rendered in the above entitled action in favor of the defendants George Webb and Mrs. George Webb, his wife, in the sum of NOTHING; George Franz and Martha Franz, his wife, in the sum of $175.00; Thomas W. Webb and Federal Land Bank of Spokane in the sum of $2,250.00; Louise Cameron, Fred Lassoie, Administrator of the estate of George Cameron, deceased, the heirs of George Cameron, deceased, the State Bank of Shelton and C. I. Pritchard in the sum of $1,250.00; Hugh Eaton in the sum of $960.00; George F. Weaver and Mabel H. Weaver, his wife, J. C. McKiel, and the Federal Land Bank of Spokane, in the sum of $1,080.00; Nels Jydstrup, W. A. Nobles, Mrs. W. A. Nobles, his wife, the Federal Land Bank of

Spokane and Joseph Vail, in the sum of $960.00; Alex Johnson and Mrs. Alex Johnson, his wife, W.O. Watson and Mrs. W.O. Watson, his wife, Fannie L. Hauptly and the State of Washington, in the sum of $1,500.00; Robert Ebert, E. A. Harris and Mrs. E. A. Harris, his wife, and the State of Washington, in the sum of $375.00; Oliver Bishop, Washington Mill Company, a corporation, James M. Sweetland, George A. Sheppard, and Lumberman's Mercantile Company in the sum of $2,100.00; Jeanette F. Ottermatt and Lew Ottermatt her husband, Jos. C. Mongrain and the State of Washington, in the sum of $450.00; Jean Todd Fredson, William Deyatte, and the State of Washington in the sum of $510.00; John L. Sutherland, Mrs. John L. Sutherland, his wife, State Bank of Shelton, and Washington Mill Company, in the sum of $270.00; William H. Johnston, Alice Johnston, Warren Johnston, Gertrude Johnston, Mrs. Lila Fieser, Mrs. Nellie Bryden, Herman Ahern, Edwin Ahern, Chester Vally, children and heirs at law of Alice Johnston, deceased wife of William H. Johnston, and Washington Mill Company, in the sum of $1,575.00; R. B. Wilson and Bertha Wilson his wife, and the Washington Mill Company, in the sum of $410.00; Arthur H. Eells and Mrs. Arthur H. Eells his wife in the sum of $1,500.00; Karl Rose and Emilie Rose his wife, H. Parry Jones and C. A. Hudson in the sum of $1,252.50; John Hawk and Mrs. John Hawk his wife in the sum of $560.00; Charles Fisk and Mrs. Charles Fish his wife, in the sum of $37.50; A. B. Roe and Mrs. A. B. Roe his wife, in the sum of $151.25; Mary Adams and William Adams her husband in the sum of $500.00; Warren Dicky and Mrs. Warren Dicky his wife, B. C. Willey and Mrs. B. C. Willey his wife, in the sum of $465.00; George N. Adams and

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Mrs. Geo. N. Adams his wife, in the sum of $183.75; Charles Olson and Jane Doe Olson his wife, in the sum of $525.00; Allan Bell and Blanch B. Bell his wife, in the sum of $1100.00; T. G. Garrison and Mary L. Garrison his wife, in the sum of $2,182.50; Marion Smart and Mrs. Marion Smart his wife, in the sum of $156.00; George M. Dixon and Mrs. George M. Dixon his wife, in the sum of $125.50; Fred R. Bell and Mayme Bell, his wife, in the sum of $1,252.50; Jean Todd Fredson in the sum of $170.00; Harry Deyette and Mrs. Harry Deyette his wife, in the sum of $600.00; Robert C. Johnson and Mrs. Robert C. Johnson his wife, in the sum of $800.00; Victor Roberts and Mrs. Fannie Roberts his wife in the sum of $607.00; Warren Lincoln and Blanche W. Lincoln his wife in the sum of $340.00; Teofil Rickert and Helena Rickert his wife in the sum of $1,268.00; School District No. 43 of Mason County, Washington, in the sum of $450.00; W. A. Hunter and Mrs. W. A. Hunter his wife in the sum of $3,360.00; Blanch B. Bell and A. L. Bell, husband and wife, in the sum of $200.00; Joshua Jemison and Mattie Jemison his wife and the State of Washington in the sum of $450.00; Louis Pfundt and Mrs. Louis Pfundt his wife in the sum of $137.50; Albert Pfundt and Mrs. Albert Pfundt his wife in the sum of $112.50; Henry Barrett, Alice Latham and G. A. Hudson in the sum of $634.00; E. J. A'Hern in the sum of $176.00; Puget Mill Company, Charles Nuby, C. I. Pritchard and C. A. Hudson in the sum of $400.00; D. B. Jackson, Mary A. Jackson, Puget Mill Company, and Washington Mill Company in the sum of $10.00; Maria Jensen, Mrs. John Dockar, Arthur Jensen, Anna Jensen Flannigan, Mrs. Lillian Wallace and Mrs. Lomdoff, children and heirs at law of Hans Jensen, deceased husband of Maria Jensen, and Stella Jensen, widow of Carl Jensen a deceased son of said Hans Jensen, deceased, and C. A. Hudson, in the sum of $10.00;

Geneva A.McNeeley andJohn Doe McNeeley her husband in the sum of $10.00; Martha E.Hayward, widow of Anthony J.Hayward, deceased, Tacoma Savings Bank and Trust Company as the Trustee, JamesW W. Bradley, William T. Bradley and Edith C.Bradley his wife, and Marie A. Bradley, a widow, in the sum of $1,500.00; Odelia Vater in the sum of $300.00; E. G.Wolfe in the sum of $300.00; Ellen Young in the sum of $50.00;

Said verdicts being against said City of Tacoma; and that thereafter, towit: on the 10th day of October, 1921, judgments were duly and regularly entered upon said verdicts in favor of the above named defendants and in the amounts herein set forth, together with costs;

And it further appearing to the court that the said petitioner has paid into this court for the benefit of said defendants the full sum of $~~which sum included~~ the said several judgments and costs hereinabove mentioned;

Now on motion of P. C. Sullivan, City Attorney, and Percy P. Brush, Assistant City Attorney, counsel for the said petitioner, it is hereby

ORDERED AND DECREED that there is hereby appropriated and granted to and vested in fee simple in said City of Tacoma, a municipal corporation, petitioner herein, for the construction, operation and manitenance of an hydro electric power plant on and along the North Fork of the Skokomish river and on and along Lake Cushman in Mason County, Washington, as set forth in the petition herein on file, the waters, water rights, riparian rights, easements and privileges, including the right to divert the waters of the North Fork of the Skokomish River located in Mason County, Washington, appertaining and appurtenant to the following described

premises of the defendants hereinabove named, towit:-

George Webb and Mrs. George Webb, his wife: Lot 5 of Section 6, Township 21 North, Range 3 West, W.M. Mason County, Washington.

George Franz and Martha Franz, his wife: Lot 3 of Section 6, Tp. 21 N., R. 3 W., W.M.

Thomas W. Webb and the Federal Land Bank of Spokane: Lot 2; the southwest quarter of northwest quarter; the west half of the southwest quarter of Section 7, Tp. 21 N., R. 3 W., W.M.; Lots 7, 8, 9, 10 and 11, except School Site; also the southeast quarter of the southwest quarter; the northeast quarter of the southeast quarter and the west half of the southeast quarter, Sec. 12, Tp. 21 N., R. 4 W.W.M.; and the northeast quarter of the northwest quarter of Sec. 13, Tp. 21 N., R. 4 W. , W.M.; all in Mason County, Washington.

Louise Cameron and Fred Lassoie, Administrator of the estate of George Cameron, deceased, the heirs of George Cameron, deceased, the State Bank of Shelton and C. I. Pritchard: Government Lots 5, 6 and 7 of Sec. 14, Tp. 21 N., R. 4 W., W.M.

Hugh Eaton: Government Lot 10 and the north 15 acres of the southwest quarter of the northwest quarter of Section 15, Tp. 21 N., R. 4 W., W.M.

George F. Weaver, and Mabel H. Weaver his wife, J. C. McKiel and the Federal Land Bank of Spokane; Government Lot 11 and the south 25 acres of the southwest quarter of the northwest quarter of Sec. 15, Tp. 21 N., R. 4 W., W.M.

Nels Jydstrup, a widower, W. A. Nobles, Mrs. W. A. Nobles his wife, the Federal Land Bank of Spokane and Joseph Vail: the northwest quarter of the southeast quarter of Sec. 15, Tp. 21 N., R. 4 W., W.M.

Alex Johnson and Mrs. Alex Johnson, his wife, W. O. Watson and Mrs. W. O. Watson his wife, Fannie L. Hauptly and the State of Washington: the northeast quarter of the northeast quarter of Sec. 16, Tp. 21 N., R. 4 W., W.M.

Robert Ebert, E. A. Harris and Mrs. E. A. Harris his wife, and the State of Washington: the northeast quarter of the northwest quarter of Sec. 16, Tp. 21 N., R. 4 W., W.M.

Oliver Bishop, Washington Mill Company, James M. Sweetland, George A. Sheppard, and Lumberman's Mercantile Company: the southwest quarter of the southwest quarter of Sec. 9, Tp. 21 N., R. 4 W., W.M.; that portion of Sec. 8, Tp. 21 N.,R. 4 W.,W.M. described as follows: the east half of southeast quarter lying south of the Skokomish River except west five chains thereof and except the west 208.7 feet of south 364.6 feet of east 15 chains of east half of southeast quarter.

Jeanette E. Ottermatt and Lew Ottermatt her husband, Jos. C. Mongrain and the State of Washington: the east half of the northwest quarter of the northeast quarter of Sec. 16, Tp. 21 N., R. 4 W., W.M.

Jean Todd Fredson, William Deyette, and the State of Washington; the west half of the northwest quarter of the northeast quarter of Sec. 16, Tp. 21 N., R. 4 W., W.M.

John L. Sutherland, Mrs. John L. Sutherland his wife, State Bank of Shelton, and Washington Mill Company: the following described lands situate in Sec. 8, Tp. 21 N., R. 4 W., W.M.- Beginning at the southwest corner of the SE¼ of SE¼; run thence east on south line 5 chains; thence north to Skokomish river; thence following river in westerly direction to west line of NE¼ of SE¼, said section; run thence south on west line of E½ of SE¼ to place of beginning, containing 13 acres, more or less, and being the west 5 chains of the E½ of SE¼ south of Skokomish river.

William H. Johnston, Alice Johnston, Warren Johnston, Gertrude Johnston, Mrs. Lila Fieser, Mrs.Nellie Bryden, Herman Ahern, Edwin Ahern, Chester Vally, children and heirs at law of Alice Johnston deceased wife of William H. Johnston, and Washington Mill Company: the southwest quarter of the southeast quarter of Sec. 8, Tp. 21 N., R. 4 W., W.M.

and Washington Mill Co.;

R. B. Wilson and ~~Mrs.~~ Bertha Wilson his wife; / the southeast quarter of the southwest quarter of Sad. 8, Tp. 21 N., R. 4 W.,W.M.

Arthur H. Eells and Mrs. Arthur H. Eells his wife; the west half of the northwest quarter of the northeast quarter, the west half of the southwest quarter of the northeast quarter, and the northwest quarter of the northwest quarter of the southeast quarter, all in Sec. 18, Tp.21 N., R. 4 W.,W.M.

Karl Rose and Emilie Rose his wife, H. Parry Jones and C. A. Hudson: the south half of the southeast quarter of Sec. 7, Tp. 21 N., R. 4 W., W.M.

John Hawk and Mrs. John Hawk, his wife; the south half of the west 53-1/3 acres of the north half of the northeast quarter of Sec. 11, Tp. 21 N.,R. 4 W., W.M. and the north half of the southeast quarter of the northeast quarter of said section.

Charles Fisk and Mrs. Charles Fisk, his wife: the south half of the northwest quarter of the northwest quarter of the northeast quarter of Sec. 11, Tp. 21 N., R. 4 W., W.M.

A. B. Roe and Mrs. A. B. Roe his wife: the north half of the northwest quarter of the northwest quarter of the northeast quarter of Sec. 11, Tp. 21 N., R. 4 W. W.M.

Mary Adams and William Adams her husband: the east half of the southwest quarter of Sec. 11, Tp. 21 N.,R. 4 W.,W.M.; Indian Lots 3, 8 and 19, Sec. 14, Tp. 21 N., R. 4 W.M.; 7½ acres in Indian Lots 12 and 13, Sec. 11, Tp. 21 N., R. 4 W., W.M.

Warren Dicky and Mrs. Warren Dicky his wife, B. C.Willey and Mrs. B.C. Willey: the west half of the southwest quarter of the northeast quarter and Indian Lots 10 and 11; the south half of the northeast of the northwest quarter of the southeast quarter; the northwest quarter of the northwest quarter of the southeast quarter; the southwest quarter of the northwest quarter of the southeast quarter and the southeast quarter of the northwest quarter of the southeast quarter, all being in Section 11, Tp. 21 N., R. 4 W., W.M.

George N. Adams and Mrs. Geo. N.Adams, his wife: 12.50 acres in Indian Lots 12 and 13, Sec. 11, Tp. 21 N., R. 4 W., W.M., and Indian Lot 8 (the southwest quarter of the southwest quarter of the northwest quarter), Sec. 12, Tp. 21 N., R. 4 W., W.M., except one acre therein conveyed by Joseph M. Sparr to James by deed recorded in Vol. 33 of Deeds, at page 486.

Charles Olson and Jane Doe Olson his wife: the east 25 acres of the southwest quarter of the northeast quarter of Sec. 16, Tp. 21 N., R. 4 W., W.M.

Allan Bell and Blanch B. Bell his wife: the west half of the southwest quarter of Sec. 15, Tp. 21 N., R. 4 W., W.M.

T. G.Garrison and Mary L. Garrison his wife: the east half of the northwest quarter, the east half of the southwest quarter, the southwest quarter of the northeast quarter, and the northwest quarter of the southeast quarter, of Sec. 7, Tp. 21 N., R. 4 W., W.M.

Marion Smart and Mrs. Marion Smart his wife: the west half of the southeast quarter of the northwest quarter of Sec. 17, Tp. 21 N., R. 4 W., W.M.

George M. Dixon and Mrs. George M.Dixon his wife: the east half of the southeast quarter of the northwest quarter of Sec. 17, Tp. 21 N.,R. 4 W.,W. M.

Fred R. Bell and Mayme Bell his wife: the north half of the northeast quarter of the southeast quarter, and the southeast quarter of the northeast quarter (except seven acres sold to Jean Todd Fredson) all in Sec. 16, Tp. 21 N., R. 4 W., W.M.

Jean Todd Fredson: Beginning at the northwest corner of the southeast quarter of the northeast quarter of Sec. 16, Tp. 21 N., R. 4 W., W.M.; thence run south on the west line of said southeast quarter of northeast quarter 935 feet to a point near the center of the creek; thence east 326.1 feet; thence north parallel with the west line, 935 feet to the north line of said southeast quarter of northeast quarter; thence west on said north line 326.1 feet to the place of beginning, containing 7 acres, all in Sec. 16, Tp. 21 N., R. 4 W., W.M.

Harry Deyette and Mrs. Harry Deyette his wife: the west 30 acres of the southeast quarter of the northwest quarter of Sec. 16, Tp. 21 N., R. 4 W., W.M.

Robert C.Johnson and Mrs. Robert C. Johnson his wife: the northeast quarter of the northwest quarter of Sec. 17, Tp. 21 N., R. 4 W., W.M.

Victor Roberts and Mrs. Fannie Roberts his wife: the west 15 acres of the southwest quarter of the northeast quarter, and the east 10 acres of the southeast quarter of the northwest quarter of Sec. 16, Tp. 21 N., R. 4 W., W.M.

Warren Lincoln and Blanche W. Lincoln his wife: the southeast quarter of the southeast quarter of Sec. 16, Tp. 21 N., R. 4W.,W.M.

Teofil Rickert and Helena Rickert his wife: the northwest quarter of the northwest quarter, and the southwest quarter of the northwest quarter of Sec. 17, and the east half of the southeast quarter of the northeast quarter of Sec. 18, Tp. 21 N., R. 4 W., W.M.

School District No. 43, Mason County, Washington: the south 364.6 feet of the west 208.7 feet of the east 15 chains of the east half of the southeast quarter of Sec. 8, Tp. 21 N., R. 4 W., W.M.lying south of the Skokomish river.

W. A. Hunter and Mrs. W. A. Hunter his wife: the west half of the northwest quarter of Sec. 16, and the east half of the northeast quarter and the southwest quarter of the northeast quarter of Sec. 17, except land in the northeast quarter of the northeast quarter of Sec. 17, 80 links by 15 chains, sold to Oliver Bishop, all in Tp. 21 N., R. 4 W., W.M.

Blanch B. Bell and A. L. Bell, husband and wife: the south half of the northeast quarter of the southeast quarter of Sec. 16, Tp. 21 N., R. 4 W., W.M.

Joshua Jemison and Mattie Jemison his wife, and the State of Washington: the northeast quarter of the southwest quarter of Sec. 16, Tp. 21 N., R. 4 W., W.M.

Louis Pfundt and Mrs. Louis Pfundt his wife: the southwest quarter of the southeast quarter of Sec. 15, Tp. 21 N., R. 4 W., W.M.

Albert Pfundt and Mrs. Albert Pfundt his wife: the southeast quarter of the southwest quarter of Sec. 15, Tp. 21 N., R. 4 W., W.M.

Henry Barrett, Alice Latham and C. A.Hudson: the northeast quarter of the northeast quarter of Sec. 18, Tp. 21 N., R. 4 W.,W.M.

E. J. A'Hern: the east half of the west half, and the east half of the northeast quarter of Sec. 18, Tp. 21 N.,R. 4 W. W.M.

Puget Mill Company, Charles Nuby, C.I. Pritchard, and C. A. Hudson: the northwest quarter and the west half of the west half of the southwest quarter of Sec. 29; the northeast quarter, and the east half of the southeast quarter of Sec. 31; all in Tp. 22 N., R. 4 W., W.M.

D. B. Jackson, Mary A.Jackson, Puget Mill Company, and Washington Mill Company: the northwest quarter of the southeast quarter of Sec. 8, Tp. 21 N., R. 4 W., W.M.

Maria Jensen, Mrs. John Dockar, Arthur Jensen, Anna Jensen Flannigan, Mrs. Lillian Wallace and Mrs. Lomdorf, children and heirs at law of Hans Jensen,deceased husband of Maria Jensen, and Stella Jensen,widow of Carl Jensen, a deceased son of said Hans Jensen,deceased, and C. A. Hudson: the southwest quarter of the southwest quarter of Sec. 8, Tp. 21 N.,R. 4 W., W.M.

Geneva A. McNeeley and John Doe McNeeley: Government Lot 8 of Sec. 14, Tp. 21 N., R. 4 W., W.M.

Martha E. Hayward, widow of Anthony J.Hayward,deceased, Tacoma Savings Bank and Trust Company, as the Trustee, James W. Bradley, William T. Bradley and Edith C. Bradley his wife, and Maria A. Bradley, a widow: the southeast quarter of the southeast quarter of Sec. 17, Tp. 22 N.,R. 4 W., W.M., and the southeast quarter of Sec. 20, Tp. 22 N., R. 4 W., W.M.

Odelia Vater: the east half of the northwest quarter of the northeast quarter of Section 18, Township 21 North, Range 4 West, W.M., and also that parcel of land lying south of the above described tract and north of the County road and more particularly described as follows, towit: Beginning at the intersection of the east I/16 line with the north 1/16 line in the above mentioned section; thence west 10 chains; thence south 3.40 chains to the center of the county road; thence north 84 degrees 15' East, 10.06 chains along center line of county road; thence north 2.40 chains to the point of commencement, and being in the southwest quarter of the northeast quarter of said section, township and range,containing in the aggregate 22.85 acres, more or less.

E. G. Wolfe: Beginning at a point 2.40 chains south of the northeast corner of the southwest quarter of the northeast quarter of Section 18, Township 21 North, Range 4 West, W.M., thence south to the southeast corner of said southwest quarter of the northeast quarter; thence west along the south line of said southwest quarter of the northeast quarter 10 chains to a point; thence north 16.60 chains, more or less, to the center of the county road; thence north 84 degrees 15' East 10.06 chains along the center line of said county road to the place of beginning, excepting therefrom the northerly 15 feet included within the right of way for said road, and containing 17.15 acres more or less.

Ellen Young: Beginning at a point 16.20 chains east of 1/4 post west boundary of Section 2, Township 21 North, Range 4 West, W.M., which is a post 30 feet east of the center of Olympia Highway; run thence north 2 degrees 15' east 3.33 chains; thence north 4 degrees 15' west 7.56 chains; thence east 2.73 chains to west side of county road; thence south 29 degrees 45' east along west boundary of county road 12.36 chains to center line east and west of section 2; thence west on said line 8.50 chains to point of beginning on east side of highway, containing 5.80 acres, more or less.

It is further ORDERED AND DECREED that the said petitioner, City of Tacoma, a municipal corporation, be and it is hereby granted the right, at any time hereafter, to take possession of, appropriate and use all of the waters, water rights, riparian rights, easements and privileges appertaining and appurtenant to the lands, real estate and premises hereinabove described, together with the right to divert the waters of the North Fork of the Skokomish River, and the same is hereby appropriated and granted unto, and the title shall vest in fee simple in said City of Tacoma as of the 11th day of September, 1920, and its successors forever; the same being for a public use.

John McMillan

Judge.

Entered on Page 61-62
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