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STATE OF WASHINGTON  
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~~NO. 43825 II~~

IN THE COURT OF APPEALS  
OF THE STATE OF WASHINGTON  
DIVISION II

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GERALD G. RICHERT, et al.,

Plaintiffs/Respondents,

v.

CITY OF TACOMA,

Defendant/Appellant.

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REPLY BRIEF OF APPELLANT CITY OF TACOMA

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Elizabeth Pauli, City Attorney,  
WSBA #18254  
William Fosbre, Chief Deputy,  
WSBA #27825  
3628 S. 35<sup>th</sup> St.  
P.O. Box 11007  
Tacoma, Washington 98411  
Ph. (253) 502-8167; Fax (253) 502-8672

Fred B. Burnside, WSBA #32491  
Roger A. Leishman, WSBA #19971  
Davis Wright Tremaine LLP  
1201 Third Ave., Suite 2200  
Seattle, Washington 98101-3045  
Ph. (206) 757-8016; Fax (206) 757-7016

Matthew A. Love, WSBA #25281  
Van Ness Feldman Gordon Derr LLP  
719 Second Avenue, Suite 1150  
Seattle, Washington 98104  
Ph. (206) 623-9372; Fax (206) 623-4986

*Attorneys for Petitioner City of Tacoma*

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## I. INTRODUCTION AND SUMMARY

Plaintiff Ranchers' lawsuit improperly asks this Court to upend the parties' long-established allocation of property rights. The City of Tacoma paid plaintiffs' predecessors to take *all* riparian rights attached to their land. As the Ranchers observe, an agency "gets what it pays for in a condemnation." Resp. Br. at 26. Tacoma cannot be required to pay again and again to acquire and use the same property rights it already condemned.

The Ranchers devote much of their brief to the parties' factual disputes regarding causation—which are not among the issues presented by the parties' summary judgment motions or certified for interlocutory appeal—instead of addressing the scope of the *riparian rights* that Tacoma condemned, including the riparian proprietor's right to fluctuate flow in the watercourse.

The Ranchers also rely on cases involving mere *easements*, arguing that they should get more compensation now because the court in *Tacoma v. Funk* ninety years ago did not specifically refer to Tacoma's recent dam operations. But that is where the trial judge erred—applying a foreseeability standard applicable to overburdened access easements, rather than addressing Tacoma's acquisition of specific property rights in fee simple.

Tacoma did obtain easements to conduct hydroelectric operations affecting properties in the Skokomish River Basin; but as the parties and the court in *Funk* recognized almost a century ago, Tacoma also petitioned

to take—and explicitly took—other rights in fee simple, including *all* riparian rights attached to these particular properties. Tacoma is the sole proprietor of these rights. The Ranchers cannot seek damages for the alleged invasion of property rights they do not own.

Moreover, the Ranchers' claims for additional compensation are also barred as a matter of law under general *res judicata* principles governing condemnation actions.

Finally, under governing Washington law and regardless of the formal *res judicata* effect of the *Funk* judgment, Tacoma's right to remove up to the full amount of the North Fork flow above the dam locations did *not* impose an obligation to continue doing so in perpetuity for plaintiffs' benefit.

The Ranchers' damage claims against Tacoma fail as a matter of law on each of these separate and independent grounds. The Court should reverse the trial court's orders granting the Ranchers' motion for partial summary judgment and denying Tacoma's motion for summary judgment, and should direct that judgment be entered in favor of Tacoma.

## **II. RESPONSE TO RANCHERS' STATEMENT OF CASE**

This appeal involves the legal effect of the 1923 *Tacoma v. Funk* judgment determining the dams' public use and condemning particular property rights—not the parties' separate factual disputes regarding the history of flooding and the role of aggradation in the river before and after

2008. *See, e.g.*, A-8<sup>1</sup> (RAP 2.2(d) certification order). Nevertheless, much of the Ranchers' brief consists of an argumentative characterization of the factual record regarding flows in the North Fork and other tributaries to the Skokomish River before and after 2008. *See* Resp. Br. 3-13. But the trial court's ruling on the parties' cross motions was limited to the impact of the *Funk* orders and decrees, and did not reach the parties' factual disputes regarding causation, aggradation, and alleged damages. RP (6/8/12) 2:24-3:7. The court's certification for purposes of interlocutory review was similarly limited. A-8 (final CR 54(b) judgment identifying issues on appeal). As the court observed: "Both parties agree that there are no material disputed facts that would bar the court ruling as a matter of law on the narrow issue that is before me." RP (6/8/12) 2:20-23. *See also* RP (6/8/12) 5:23-25 (aggradation "not germane to the narrow issue of what is the effect of the Funk orders and decrees").

Counsel for the Ranchers explicitly confirmed that the parties' motions did not require the court to reach the causation and aggradation issues that had been a focus of the parties' briefing below:

THE COURT: But is it necessary for your motion to succeed that the Court determine that there is aggradation?

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<sup>1</sup> As in Tacoma's opening brief, references to "A-8," etc., refer to pages from the Clerk's Papers that were included in the Appendix to Brief of Appellants, filed November 19, 2012.

MS. WILLIE: No, Your Honor. Clearly, no.

THE COURT: The aggradation, whether it exists or not, you agree is not relevant to the legal determination of whether Funk is applicable?

MS. WILLIE: Correct, Your Honor, I agree with that.

RP (4/20/12) 5:11-18. This Court should disregard the Ranchers' attempt to reverse course and litigate the parties' disputes regarding aggradation—*because the issue of causation is not part of this appeal.*<sup>2</sup>

Contrary to the Ranchers' unfounded accusation, Resp. Br. 3, Tacoma's statement of the case accurately presented a "fair statement of the facts and procedure relevant to the issues presented for review" under RAP 13.2(a)(5). For example, Tacoma's brief includes two simple maps orienting the Court to the location and scope of the Project, and identifies the source of the underlying data. App. Br. 5, 7. Tacoma also forthrightly stated that it "has diverted most of the water from the North Fork" above

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<sup>2</sup> The trial court certified for interlocutory review its rulings on each party's cross motion for summary judgment. A-8. Nevertheless, the Ranchers suggest that only certain topics addressed in Tacoma's summary judgment motion are before the Court, and not any issues related to plaintiffs' cross motion regarding "condemnation law." Resp. Br. 1. To the contrary, Tacoma has assigned error to the trial court's rulings on *both* motions, and has identified the distinct legal issues relating to both of the motions that are the subject of this appeal. App. Br. 4. As the trial court recognized, the Ranchers' successful motion seeking partial summary judgment on Tacoma's *res judicata* defense was completely intertwined with Tacoma's unsuccessful motion for summary judgment based on the *Funk* orders and decrees. *See, e.g.*, RP (6/8/12) 9:2-6.

the dam locations, but noted that both release amounts from the Project and river levels have fluctuated over the years. *Id.* at 11; *see also* CP 933-34, 3428. Nevertheless, the Ranchers contend Figure 3 in Appellant’s Brief showing variations in river water levels was “misleading” because it was reproduced in black and white rather than color. Resp. Br. 7. But GR 14(a) *prohibits* “colored markings,” and the clerk’s office reproduces all briefs in black and white. The original color figure is easily accessible from the identified U.S. Geological Survey website, and confirms that river flow has varied.<sup>3</sup>

Tacoma provided a straightforward summary of the factual and procedural background to this appeal pursuant to RAP 13.2(a)(5). In any event, the disputed role of aggradation and factual issues of causation are not part of this appeal. *See, e.g.*, RP (6/8/12) 8:22 – 9:1.<sup>4</sup> This Court may

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<sup>3</sup> The Ranchers also object to citing historical data from this North Fork flow gauge on the grounds that it is located several miles downriver from the dam, Resp. Br. 8—but as the USGS website shows, data from any gauges further upstream only go back a few years. *See, e.g.*, [http://waterdata.usgs.gov/nwis/inventory?agency\\_code=USGS&site\\_no=12058790](http://waterdata.usgs.gov/nwis/inventory?agency_code=USGS&site_no=12058790) (data at gauge site below Cushman dam begins in 2008).

<sup>4</sup> Because the aggradation issue is not part of this appeal, the Court may also disregard the Ranchers’ passing reference suggesting that the aggradation issue has already been resolved as a matter of judicial estoppel. Resp. Br. 5 (citing *Miller v. Campbell*, 164 Wn.2d 529, 192 P.3d 352 (2008)). Moreover, judicial estoppel is inapplicable because Tacoma disputes that its statements before each tribunal were inconsistent **and** the court in the prior case ruled against Tacoma. *See, e.g., Anfinson v. FedEx Ground Package Sys., Inc.*, 174 Wn.2d 851, 861-62, 281 P.3d 289 (2012) (standard for applying judicial estoppel).

resolve as a matter of law the narrow legal question actually presented: whether the *Funk* order and decrees and longstanding Washington law regarding riparian rights bar the Ranchers' damage claims.

### III. ARGUMENT

#### A. Tacoma's acquisition of *all* riparian rights attached to these properties bars the Ranchers' claims as a matter of law.

##### 1. The Ranchers cannot sue for the invasion of riparian rights they do not own.

The Ranchers' arguments in this Court are predicated on a fundamental misstatement: that Tacoma "only condemned *a portion* of the riparian rights" appertaining to their properties. Resp. Br. 7 (emphasis supplied). See also *id.* at 20 ("*Funk* condemnation was for riparian rights *only* related to the diminishing of the flows of the North Fork") (emphasis supplied); *id.* at 7 ("the Utility did not condemn *all* riparian rights on the Main Stem") (emphasis supplied); *id.* at 24 ("the Utility did not condemn 'all' riparian rights").

The Ranchers identify no legal authority and provide no citation to the record in support of their contention. In fact, the plain language of the *Funk* Petition and Decree speak for themselves. Contrary to plaintiffs' unsupported assertions, Tacoma acquired *all* riparian rights appurtenant to these plaintiffs' properties,<sup>5</sup> without any qualification or limitation:

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<sup>5</sup> Contrary to the Ranchers' suggestion, Resp. Br. 21, the trial court excluded from this appeal any parcels other than those "explicitly included in the *Tacoma v. Funk* condemnation." A-7. The impact of *Funk* on other properties is not before the Court.

it is hereby ORDERED AND DECREED that there is hereby appropriated and granted to and *vested in fee simple* in said City of Tacoma, .... 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 real estate, lands and premises . . . .

A-44 (emphasis added). Tacoma acquired “all” of these “riparian rights” in “fee simple.” A-50. *See also* Resp. Br. 13 (recognizing that Ranchers’ predecessors had “their riparian rights taken”); A-40 (*Funk* intervenors alleged Project “involves the *taking away of the riparian rights* of these intervenors”) (emphasis supplied); A-27 (*Funk* claimants alleged Project “will deprive said premises of *all* their riparian rights”) (emphasis supplied).

Nevertheless, the Ranchers attempt to sow confusion with their suggestion that Tacoma sought to condemn their *properties* in fee simple. *See, e.g.*, Resp. Br. 39-40. To the contrary, Tacoma has explicitly distinguished between properties in *Funk* that the utility acquired in their entirety in fee simple, and those parcels—including the Ranchers’—where Tacoma acquired some property rights, including all riparian rights, and compensated the landowners for damage to the value of their remaining property interests. *See, e.g.*, App. Br. 8. The parties agree that “riparian rights are separate from real property rights in condemnation cases,” and “you must pay for every ‘stick’ of the bundle of rights that you are taking.” Resp. Br. 28-29. Each of the riparian-rights cases cited by the parties recognizes that the riparian rights appurtenant to a particular parcel

are a separate property interest subject to condemnation. *See, e.g., id.* (citing *Petition of Clinton Water Dist. of Island County*, 36 Wn.2d 284, 286, 218 P.2d 309 (1950)); App. Br. 18-19.

Because Tacoma acquired in fee simple *all* the riparian rights attached to every one of the Ranchers' properties, the law of riparian rights governs and disposes of the Ranchers' claims. Indeed, in the trial court, the Ranchers repeatedly acknowledged that this litigation is governed by the law of riparian rights. *See, e.g.,* CP 3716 ("This case involves riparian rights and the natural watercourse rule."); CP 688 ("The rights condemned were the 'appurtenant' riparian rights of the lands adjacent to the River."); CP 694 ("Here, there are no flooding easements, only riparian rights").

As the Ranchers note, an upstream property owner is barred from prejudicing "downstream riparian owners" by altering the level of the river flow across their properties. Resp. Br. 29-30. *See, e.g., De Ruwe v. Morrison*, 28 Wn.2d 797, 808, 184 P.2d 273 (1947) (recognizing "the right of *riparian owners* not to have the level of the natural watercourse lowered. *They* also have the right not to have it raised.") (emphasis supplied); A. DAN TARLOCK, LAW OF WATER RIGHTS AND RESOURCES § 3:16, at 3-28 (2010) ("Land use alternations which result in a substantial increase in the natural flow of a stream and cause flood damage are an interference with *riparian rights*") (emphasis supplied). Each of the Ranchers' causes of action seeks damages for the alleged violation of this property right. *See, e.g.,* Second Am. Compl. at ¶¶ 3.3-3.7, CP 3208

(alleging Tacoma is strictly liable for damages based upon violations of riparian rights); *id.* ¶¶ 3.12-3.16, CP 3209 (alleging Tacoma is liable for trespass because Tacoma’s release of flows from the Project are causing trespass of water upon the Ranchers’ riparian properties); *id.* ¶¶ 3.22-3.27, CP 3210-11 (alleging Tacoma’s negligent release of flows from the Project has caused damages to the Ranchers’ riparian properties).

But under the *Funk* decrees, **Tacoma**—not the Ranchers—is the “proprietor” of the riparian rights attached to these downstream properties along the Main Stem. Resp. Br. 29 (citing *Crook v. Hewitt*, 4 Wash. 749, 749-50, 31 P. 28 (1892)). As a matter of law, the Ranchers cannot seek damages for the alleged invasion of riparian rights that they themselves do not own and have never owned. *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).

Finally, the Ranchers argue the riparian rights Tacoma paid to acquire do not authorize it to “flood the fee simple property that the riparian rights are attached to.” Resp. Br. 27. But the Ranchers’ claims are governed by **riparian** water law regarding river levels (not **surface water** law regarding flooding outside the watercourse) because the Ranchers’ properties are located within the natural watercourse of the Skokomish River. *Fitzpatrick v. Okanogan Cnty.*, 169 Wn.2d 598, 238 P.3d 1129 (2010); *see also* CP 3716 (admitting “[t]his case involves riparian rights and the natural watercourse rule”). Waters in the river’s entire natural watercourse, including heightened currents, are riparian

waters rather than surface waters. *Sund v. Keating*, 43 Wn.2d 36, 44-45, 259 P.2d 1113 (1953). As a result, cases related to flooded land—governed by surface-water law—are irrelevant to this appeal.

Nevertheless, the Ranchers on appeal apparently now deny that their properties are located in the watercourse, objecting to Tacoma’s inclusion of a map showing that their properties are located within the “Floodway” of the Skokomish River, which corresponds to the actual location of the River’s natural watercourse. Resp. Br. 3 n.5 (citing App. Br. Fig. 2). The Ranchers assert—citing only to a page of argument from their own brief below—that they “successfully” challenged Tacoma’s evidence regarding the location of the river channel. *Id.* (citing CP 685). To the contrary, the Ranchers identify ***no such court ruling***, and offer ***no evidence*** disputing the location of the watercourse or their properties. *Id.* In contrast with the Ranchers, Tacoma presented substantial, ***unrebutted*** documentary and expert evidence establishing that all of the properties at issue in this appeal are located within the Skokomish River’s natural watercourse. CP 2536-45, 2710-11. The Ranchers failed to come forward with any contrary evidence. Resp. Br. 3; CP 685. The law of riparian rights, not surface water, governs this appeal, and cases and argument relating to flooded land are irrelevant. The question before this Court is whether Tacoma acquired the riparian right to vary river levels, and the undisputed evidence shows it did.

Because there are no genuine issues of material fact, Tacoma is entitled to summary judgment dismissing the Ranchers’ claims. *Dowler v.*

*Clover Park Sch. Dist. No. 400*, 172 Wn.2d 471, 484, 258 P.3d 676 (2011) (summary judgment standard). The Ranchers' properties are all located within the natural watercourse of the Skokomish River. By condemning "*all*" riparian rights appurtenant to the Ranchers' properties, A-44, Tacoma acquired the right to raise or lower the water level in the watercourse as part of the Project's lawful operation. Tacoma is simply exercising the riparian rights it acquired from the Ranchers' predecessors in *Funk*. Because Tacoma cannot be liable under any theory for raising or lowering the river level, and the Ranchers' claims fail as a matter of law.

**2. The Ranchers' claims against Tacoma are governed by the law of riparian rights, not easements.**

According to the Ranchers, "condemnation law" authorizes their present claims—contending that "*Spokane v. Colby*, 16 Wash. 610, 48 P. 248 (1897) and its progeny, established that 'additional damages' cannot be barred by a previous condemnation." Resp. Br. 1. But the Ranchers erroneously rely on cases involving the condemnation of mere *easements*—which may not be overburdened without additional compensation—rather than the acquisition of property rights in *fee simple*. For example, as the Ranchers acknowledged below, "[i]n *Colby*, there had been a previous condemnation of an *easement* on a portion of the land for pipes. The question was whether 'an additional burden is imposed upon the land by the erection of telephone poles and wires, for which he has not been remunerated.'" CP 2528 (emphasis supplied) (citing 16 Wash. at 612). Each of the other Washington cases the Ranchers refer to, Resp. Br.

1 n.2, likewise involve allegedly overburdened easements.<sup>6</sup> In contrast with easements, however, a municipality that acquires a property interest in fee simple is free to change the original “contemplated use to another and entirely different use, whensoever the needs and requirements of the city suggest.” *HTK Mgmt., L.L.C. v. Seattle Popular Monorail Auth.*, 155 Wn.2d 612, 634, 121 P.3d 1166 (2005) (citing *Reichling*, 57 Wash. at 228).

As part of the judgment entered in *Funk*, Tacoma indeed obtained various easements in those parcels that the utility did not acquire in their entirety, including the Ranchers’ lands. *See, e.g.*, A-50. But unlike the municipality in *Spokane v. Colby*, Tacoma **also** acquired specific property rights—including **all** riparian rights appurtenant to these properties—in **fee simple**. A-44.

In seeking reversal of the judgment in this case, Tacoma has **not** relied on the easement rights it acquired in *Funk*. Thus, any dispute over whether Tacoma used an easement unreasonably, or in a manner that was not specifically anticipated by the parties and judge in *Funk*, is not before

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<sup>6</sup> *See Reichling v. Covington Lumber Co.*, 57 Wash. 225, 229-30, 106 P. 777 (1910) (contrasting acquisition of property interest in “fee simple,” whose use was not limited, with an “easement” that could not be burdened by new use “without additional compensation”); *Neitzel v. Spokane Int’l Ry. Co.*, 65 Wash. 100, 117 P. 864 (1911) (holding that easement obtained for rail right of way could not be leased for use as wholesale grocery); *Hinckley v. City of Seattle*, 74 Wash. 101, 103-04, 132 P. 855 (1913) (after city obtained right to place a sloped bank on a portion of privately-owned property, it added additional fill that “pushed the slope further down on plaintiff’s property”).

this Court. Instead, the claims and defenses actually on appeal are governed by the law of *riparian rights*. Because Tacoma acquired all riparian rights appurtenant to the properties at issue, the judgment in *Funk* bars the Ranchers' claims for additional compensation. See discussion *supra* at pp. 6-11.

Each of the easement-condemnation cases discussed in the Ranchers' brief is thus inapposite. For example, the Ranchers rely on *Narramore v. United States*, 30 Fed. Cl.383 (1994), where "the court held *res judicata* did not apply" to changes in the flow regime in "a case where a *flooding easement* was condemned." Resp. Br. 25 (emphasis supplied). Similarly, the Ranchers acknowledge that *Gossner v. Utah Power & Light*, 612 P.2d 337 (Utah 1980) involved "condemnation decrees granting *easements* to a dam owner." Resp. Br. 26-27 (emphasis supplied).

Following the Ranchers' misguided lead, the trial court erroneously analyzed the preclusive impact of the *Funk* decree using the foreseeability standard for overburdened easements, rather than identifying those property rights that had been acquired in fee simple. See RP (6/8/12) 7:16-17 (concluding that the *Funk* judgment did not bar plaintiffs' claims because their alleged damages were "not within the contemplation of the *Funk* litigants or the *Funk* court"); *id.* at 8:4-10 (citing two easement cases, *Spokane v. Colby* and *Hinckley v. City of Seattle*). But in *Funk*, Tacoma acquired in fee simple all riparian rights attached to these parcels, not mere access or flooding easements. Because the Ranchers' claims are barred under the governing law of riparian rights,

this Court should reverse the trial court's judgment, and direct that judgment be entered in favor of Tacoma.

**B. The *res judicata* effect of the *Funk* judgment also bars the Ranchers' claims for additional compensation.**

Because Tacoma acquired all riparian rights appurtenant to the Ranchers' properties in *Funk*, it is unnecessary to reach either of Tacoma's alternative arguments for reversing the judgment below. Nevertheless, the Ranchers' claims are also barred under ordinary *res judicata* principles. *Res judicata* applies to condemnation actions. *Corbin v. Madison*, 12 Wn. App. 318, 323, 529 P.2d 1145 (1974). The doctrine bars subsequent actions involving "(1) the same subject matter, (2) the same cause of action, (3) the same persons or parties, and (4) the same quality of persons for or against whom the decision is made as did a prior adjudication." *Marshall v. Thurston Cnty.*, 165 Wn. App. 346, 353, 267 P.3d 491 (2011). Although the Ranchers dispute the first three elements, Resp. Br. 19, they fail to identify any material issue of fact. The Court therefore may reverse the judgment on this additional ground.

**1. The Ranchers' claims involve the same subject matter as *Funk*.**

Like their predecessors in *Funk*, the Ranchers seek compensation for the impact of Tacoma's dam operations on enumerated parcels of property along the Skokomish River. See A-40 (*Funk* intervenors alleged

Project “involves the taking away of the riparian rights of these intervenors”); A-27 (*Funk* claimants alleged Project “will deprive said premises of all their riparian rights,” and sought “compensation for any and all damages of every kind and nature whatsoever”); *compare* CP 3208-11 (Ranchers’ Complaint). As this Court held in *Marshall*, lawsuits concerning an agency’s installation of a water diversion device and suits regarding subsequent flooding involve the same “subject matter.” 165 Wn. App. at 354.

**2. The Ranchers’ claims involve the same cause of action as *Funk*.**

The Ranchers’ claims also satisfy the second *res judicata* prong, which requires courts to consider the following criteria:

- (1) whether rights or interests established in the prior judgment would be destroyed or impaired by prosecution of the second action;
- (2) whether substantially the same evidence is presented in the two actions;
- (3) whether the two suits involve infringement of the same right; and
- (4) whether the two suits arise out of the same transactional nucleus of facts.

*Rains v. State*, 100 Wn.2d 660, 664, 674 P.2d 165 (1983). These factors are analytic tools, and all four need not be present in a particular case. *Kuhlman v. Thomas*, 78 Wn. App. 115, 122, 897 P.2d 365 (1995). To the contrary, as this Court has observed, whether actions “are identical is not subject to any narrow, mechanistic test.” *Marshall*, 165 Wn. App. at 356 (citing *Rains*, 100 Wn.2d at 663-64). *Res judicata* bars the Ranchers’ claims for at least three reasons.

**First**, the property interests Tacoma obtained in *Funk* would be impaired if the Ranchers are permitted to prosecute a second action seeking compensation for alleged invasion of riparian rights and alleged damages to their other property interests. As Tacoma observed in its opening brief, dam owners and other property owners around the state depend on the finality of condemnation decrees when they “take” private property for public use. App. Br. 23-24. The Ranchers’ reliance on the United States Supreme Court’s recent decision in *Arkansas Game & Fish Commission v. United States*, 133 S. Ct. 511 (2012), is misplaced. See Resp. Br. 44 (dismissing “slippery slope” argument). In *Arkansas Game*, the lower court had ruled no “taking” occurred as a matter of law when a series of temporary annual dam releases flooded downstream properties. 133 S. Ct. at 523. The Supreme Court reversed, holding that “recurrent floodings, even if of finite duration, are not categorically exempt from Takings Clause liability,” and remanded for an individualized factual determination. *Id.* at 515, 522. Unlike this case, *Arkansas Game* did not involve any prior taking related to the dam. In contrast, Tacoma already compensated the Ranchers’ predecessors in *Funk* for **taking** particular property interests.

**Second**, the Ranchers’ claims involve the alleged infringement of the same rights that were previously at issue. In *Funk*, Tacoma acquired particular property rights held by the Ranchers’ predecessors—including **all** riparian rights—and paid them for the impact of Tacoma’s acquisition of these rights on the value of the farmers’ remaining property interests.

*See, e.g.*, A-44, 50. In this case, the Ranchers likewise seek compensation for damage to their property allegedly caused by Tacoma’s exercise of its right to operate the dam and to increase the flow within the watercourse. CP 3208-11.

**Finally**, the two actions involve the same evidence and the “same transactional nucleus of facts,” *Marshall*, 165 Wn. App. at 354, namely the value of the rights acquired by Tacoma by condemnation. *See, e.g.*, *State v. Evans*, 96 Wn.2d 119, 127-28, 634 P.2d 845 (1981) (condemnation action must determine without speculation the value of property taken or damaged by government agency); *State v. Williams*, 68 Wn.2d 946, 949, 416 P.2d 350 (1966) (value of property is determined as of date of condemnation trial).

Nevertheless, the Ranchers argue that the measure of damages in *Funk* was limited to those losses “consequent upon the loss of the use of the diverted water.” Resp. Br. 14 (citing CP 1863 [sic]).<sup>7</sup> *See also* Resp. Br. 5 (citing CP 2011-12 [sic]).<sup>8</sup> The Ranchers apparently rely on isolated excerpts from individual jury instructions that may or may not have been

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<sup>7</sup> The document found at CP 1863 does not contain the quoted language, and is not part of any jury instruction. Tacoma assumes that the Ranchers intend to refer to some other document, such as CP 2109, which contains the quoted jury instruction language—but notes that the omitted text recognizes the general rule that the damage measure is based on the “loss or diminution in market value of the land.” *Id.*

<sup>8</sup> Again, the Ranchers’ citation does not correspond with the Clerk’s Papers.

used in any trial involving their predecessors.<sup>9</sup> In fact, Judge Wilson gave instructions recognizing Tacoma was condemning the riparian rights themselves:

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 occasioned [sic] by *the taking of such riparian rights*.

CP 2111 (emphasis supplied).

Regardless which individual instructions were given in the trials involving the Ranchers' predecessors, *this* instruction accurately reflects both the nature of the riparian rights at issue, as well as Washington law

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<sup>9</sup> There is no evidence in the record identifying which specific instructions were used in each of the many individual *Funk* trials. Indeed, the Ranchers erroneously cite jury instructions dated July 8, 1921, CP 2116-17, but the verdict in the Richert damages trial in *Funk* occurred three weeks earlier June 16, 1921, CP 1669, and thus could not be among the instructions given to the jury valuing the parcel owned by plaintiff's own ancestors.

regarding the measure of damages when an agency takes some but not all of an owner's property rights. *See, e.g.*, WASHINGTON PRACTICE, PATTERN JURY INSTRUCTIONS - CIVIL 150.06 (6th ed. 2012) (Partial Taking) ("Just compensation means the difference between the fair market value of the entire property before the acquisition and the fair market value of the property remaining after the acquisition. ... In determining the fair market value of the property remaining after the acquisition, you are to consider the diminution of the fair market value, if any, of the remaining property caused by the acquisition.") This fundamental measure has been Washington law since before *Funk*, and was presumably reflected in the instructions given to the jurors valuing the property rights Tacoma took from the Ranchers' predecessors. *See, e.g., State v. Kelley*, 108 Wash. 245, 182 P. 942 (1919) (damage instructions when state condemned portion of land).

The final judgment in the *Funk* condemnation bars the Ranchers' claims seeking additional compensation for taking the ***same real property interests*** that were at issue in *Funk*. *See Bradley v. State*, 73 Wn.2d 914, 917, 442 P.2d 1009 (1968). The Ranchers' attempt to distinguish *Bradley* is futile; contrary to the Ranchers' suggestion, *Bradley* did not involve "one type of ***damage*** but not another." Resp. Br. 38 (emphasis supplied). Rather, the court held in *Bradley* that the plaintiff could assert some new claims for additional damage because the prior action had not addressed ***personal*** property rights—but that *res judicata* barred any claims seeking additional damages to the ***real*** property rights at issue in the earlier

litigation. *Bradley*, 73 Wn.2d at 917; *cf. Great N. Ry. Co. v. City of Seattle*, 180 Wash. 368, 373, 39 P.2d 999 (1935) (subsequent action not barred when it involved a “distinct and separate property right which was not specifically included in the condemnation proceedings”). Because this action involves the same real property rights that were at issue *Funk*, *res judicata* applies to the Ranchers’ claims.

**3. The parties to this appeal are the successors to the parties in *Funk*.**

The Ranchers acknowledge that they are the successors to the owners of “those agricultural properties which ‘abut upon and lie adjacent to said river’ downstream of the dam” that were at issue in *Funk*. Resp. Br. at 13. The Ranchers argue that *res judicata* does not apply to the additional “Bourgault properties” that “were not involved in the *Funk* condemnation. *Id.* at 21. But the trial court explicitly limited this interlocutory appeal to those properties that *were* before the court in *Funk*, excluding the disputed properties. A-7. For purposes of *res judicata*, this appeal involves the same parties as in *Funk*.

Because there are no material issues of fact on any of the *res judicata* prongs regarding the claims that are actually on appeal, this Court should reverse the judgment below on this separate and independent ground, and remand for entry of judgment in favor of Tacoma on the Ranchers’ claims.

**C. Tacoma has no obligation to operate the dam unchanged in perpetuity for plaintiffs' benefit.**

Eighty years ago, the Washington Supreme Court held that downstream property owners cannot require a dam owner to continue dam operations unchanged for their benefit. *Drainage Dist. No. 2 v. City of Everett*, 171 Wash. 471, 480-81, 18 P.2d 53 (1933). Contrary to the Ranchers' dismissive characterization, this is no "detour" or "frolic into water law," Resp. Br. 44, but rather a longstanding Washington legal rule that independently bars the Ranchers' claims.

It is undisputed that the current outflow below the dam is *less* than the natural flow level in the North Fork above the dams. CP 3800. Indeed, the Ranchers do not dispute that the dam's complete *removal* would further increase the current flow level in the North Fork below the dam location and in the Main Stem where their properties are located. Nevertheless, the Ranchers contend they are entitled to compensation for damages allegedly caused by Tacoma's failure to maintain dam outflow at its pre-2008 level. Resp. Br. 45.

*First*, the Ranchers contend that *Drainage District No. 2* "involved restoring the *natural* regime" in the "*natural* channel" downstream from the dam, where the claimants' properties were located. *Id.* (emphasis supplied). To the contrary, the court held that the utility "had the legal right to discontinue the use of that reservoir at any time it saw fit." 171 Wash. at 480. The court also recognized the utility's right "to allow the waters naturally flowing in the Woods creek stream to pass through" the

former dam location. *Id.* at 474. As the Ranchers note, the court observed anthropomorphically that “the **waters** of Woods creek had a right to flow as they were wont to flow in the old channel” **below** the dam, but the court recognized that the waters were unable to do so because “**that** old channel” had “been obstructed by” the claimants. Resp. Br. at 45 (quoting 171 Wash. at 480) (emphasis supplied). However, the specific cause of the downstream obstruction was irrelevant to the court’s resolution of the plaintiffs’ claims, because a dam owner “comes under no obligation to maintain the structure **and the conditions produced by it from the lapse of time.**” 171 Wash. at 481 (citing *Lake Drummond Canal & Water Co. v. Burnham*, 147 N.C. 41, 60 S.E. 650, 652 (1908)) (emphasis supplied). Contrary to the Ranchers’ suggestion, the court in *Drainage Dist. No. 2* did not impose on the utility a duty to “bring the channel back to its natural capacity in order to ameliorate” the impact of the restored flow level on changed conditions in a downstream channel. Resp. Br. 46. As with most long-established dams, numerous circumstances in the Skokomish River Basin have changed since the 1920s. There is no pristine “natural regime” to be restored—and even if such a thing existed, Tacoma would have no obligation to maintain the “conditions produced” over time since the erection of its dam. 171 Wash. at 481.

**Second**, the Ranchers argue that longstanding *Drainage Dist. No. 2* rule does not bar their claims because that case “involves the concept of easements.” Resp. Br. 47. But in upholding the dam owner’s right to discontinue retaining river flow in *Drainage Dist. No. 2*, the court did not

rely on any easement. Rather, the Court recognized that the utility “could not be compelled to maintain the dam for the benefit of the lower proprietors.” 171 Wash. at 478. Moreover, as discussed above, Tacoma did not acquire a mere flood easement in *Funk*—instead Tacoma obtained **all** of the riparian rights in the Ranchers’ properties. *See discussion supra* at pp. 6-14. Contrary to the Ranchers’ assertion, they have never possessed any “right, as riparian owners,” Resp. Br. 49, regarding the regulation of flow levels at the dam location.

**Finally**, the Ranchers speculate that the Supreme Court’s decision in *Drainage Dist. No. 2* must have been based on “the balance of powers doctrine,” because “a decision of that magnitude would necessarily involve both the Executive and Legislative decision makers of the city.” Resp. Br. 50. The Ranchers offer no authority for this assertion, and do not explain why that earlier utility’s decision should be treated any differently than the very thorough relicensing process that occurred in this case. *See City of Tacoma, Washington*, 132 FERC ¶ 61,037 (2010), CP 3774-3973 (Cushman Project FERC License). In any event, the Supreme Court’s direction in *Drainage Dist. No.2* is unambiguous, and governs this case: because Tacoma has no obligation to operate the dam unchanged in perpetuity for the Ranchers’ benefit, their claims for additional compensation fail as a matter of law. 171 Wash. at 480.

#### IV. CONCLUSION

The public interest in protecting the finality of judgments is at its zenith in matters involving real property rights. As a matter of law, Tacoma has no duty to compensate the Ranchers further for its lawful exercise of property rights the city acquired decades ago. The Court should reverse the trial court's orders granting the Ranchers' motion for partial summary judgment and denying Tacoma's motion for summary judgment, and should direct that judgment be entered in favor of Tacoma.

DATED this 4th day of February, 2013.

Respectfully submitted,

By: 

Fred B. Burnside, WSBA #32491  
Roger A. Leishman, WSBA #19971  
Davis Wright Tremaine LLP  
1201 Third Ave., Suite 2200  
Seattle, Washington 98101-3045  
Ph. (206) 757-8016; Fax (206) 757-7016

Elizabeth Pauli, City Attorney,  
WSBA #18254  
William Fosbre, Chief Deputy,  
WSBA #27825  
3628 S. 35<sup>th</sup> St.  
P.O. Box 11007  
Tacoma, Washington 98411  
Ph. (253) 502-8167; Fax (253) 502-8672

Matthew A. Love, WSBA #25281  
Van Ness Feldman Gordon Derr LLP  
719 Second Avenue, Suite 1150  
Seattle, Washington 98104  
Ph. (206) 623-9372; Fax (206) 623-4986

*Attorneys for Petitioner City of Tacoma*

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STATE OF WASHINGTON

DEPUTY

### CERTIFICATE OF SERVICE

The undersigned certifies 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 February 4, 2013, I caused to be served in the manner noted below, true and correct copies of the foregoing on the following:

**Via Legal Messenger**

Karen A. Willie  
Bradley E. Neunzig  
Terrell Marshall Daubt & Willie PLC  
936 North 34th Street, Suite 400  
Seattle, WA 98103  
*Attorneys for Respondents/Plaintiffs*

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

Executed this 4<sup>th</sup> day of February, 2013, in Seattle, Washington.

  
Suzette Barber

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