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No. 96798-9

**SUPREME COURT
OF THE STATE OF WASHINGTON**

GREGORY REGELBRUGGE, *et al.*,

Appellants,

v.

SNOHOMISH COUNTY,

Respondent.

ANSWER TO PETITION FOR REVIEW

ADAM CORNELL
Snohomish County Prosecuting Attorney

Joseph B. Genster, WSBA #14968
Michael C. Held, WSBA #19696
Deputy Prosecuting Attorneys
Snohomish County Prosecutor's Office
3000 Rockefeller Avenue, MIS #504
Everett, WA 98201
(425) 388-3333

HARRIGAN LEYH FARMER &
THOMSEN LLP

Timothy G. Leyh, WSBA #14853
Randall Thomsen, WSBA #25310
Kristin Ballinger, WSBA #28253
999 Third Ave., Suite 4400
Seattle, WA 98104
(206) 623-1700

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I. COURT OF APPEALS' DECISION

On December 31, 2018, the Court of Appeals issued a single decision on two linked appeals from a case consolidated at the trial court (Decision). The Decision is reported at 432 P.3d 859.

II. COUNTERSTATEMENT OF ISSUES PLAINTIFFS PRESENTED FOR REVIEW AND CONTINGENT ISSUES

Issues Not Presented. Plaintiffs have not sought review of any issue pertaining to claims arising from a March 2006 community meeting. *See* Pet. 1-2 (issue not listed in *Issues Presented for Review*); RAP 13.4(c)(5). In a footnote, plaintiffs "rely upon and incorporate" another plaintiff group's petition on these issues. Pet. 19 n.15. But the Court "do[es] not address issues based solely on incorporated arguments." *State v. Sublett*, 176 Wn.2d 58, 68 n.2, 292 P.3d 715 (2012). If the Court nonetheless considers this issue, the County incorporates its answer to that petition (filed in No. 96796-2). Similarly, plaintiffs did not seek review of the denial of their motion to strike the County's act of God defense. *See* Pet. 1-2. Their passing reference to it (Pet. 19 n.15) does not comport with RAP 13.4(c)(5), (6), or (7). The Court should disregard this issue.[1]

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[1] Nor is there reason to review the ruling. Because the "existence or nonexistence of the facts upon which" the act of God defense "is predicated are questions for the jury," *Gilson v. Cascade Lumber Co.*, 54 Wash. 289, 291, 103 P. 11 (1909), the trial court acted well within its discretion in denying the motion to strike. *See also Topping v. Great N. Ry. Co.*, 81 Wash. 166, 175, 177, 142 P. 425 (1914) (defense allowed in avalanche case even though the "accident would not have happened" absent railroad's actions). And,

Issues Presented. Snohomish County first restates the issues presented by plaintiffs. If the Court grants review, the County asks the Court to consider, or, if necessary, remand (*see* RAP 13.7(b)) the italicized conditionally raised issues.

1. Whether the Fish Habitat Projects Act (RCW 36.70.982), which immunizes a county for any adverse impacts resulting from a fish habitat project that has been permitted by the State, immunizes the County from all claims, whether based in negligence or strict liability, because the revetment was such a project and the State issued a permit for it.

2. Whether the Court of Appeals properly dismissed plaintiffs' "water law" claims for the alternative reason that plaintiffs failed to plead and offered no evidence that they were riparian owners, a required element to bring a claim based on riparian law.

3. *Whether there was a triable issue of fact about whether the County potentially could bear liability for a project when plaintiffs did not dispute that the County did not fund, design, permit, construct, inspect, or maintain the project, and the County's incidental actions related to it were*

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because (like intentional torts) acts of God are not caused by "fault" (*see* RCW 4.22.015), a jury first must segregate damages attributable to acts of God and then apportion the remaining damages between at-fault entities. *See Tegman v. Accident & Med. Invs., Inc.*, 150 Wn.2d 102, 111, 75 P.3d 497 (2003) (RCW 4.22.070 "does not speak of a total representing 100 percent of liability, but, rather, a total representing 100 percent of *fault*"); *Radburn v. Fir Tree Lumber Co.*, 83 Wash. 643, 644, 145 P. 632 (1915) (tortfeasor not responsible for share of fault attributable to "natural . . . cause").

insufficient as a matter of law to make the County liable.

4. *Whether the Flood Control Act, RCW 86.12.037, which immunizes a county's acts or omissions related to flood protection, immunizes the County for acts or omissions related to the Tribe's revetment when it is undisputed that the revetment also was designed to prevent flooding.*

5. *Whether the Court should dismiss plaintiffs' appeal as untimely when plaintiffs failed to file their appeal within 30 days of the trial court's entry of final judgment in favor of the County.*

III. STATEMENT OF THE CASE

The Decision contains a fair statement of the case (pp. 4-10).[2] In the next section, the County provides citations to the evidence discussed.

IV. REASONS FOR DENYING THE PETITION

A. Plaintiffs Fail to Justify Review.

Plaintiffs fail to justify review under the only basis they argue (*see* Pet. 3), that the *issue* (not the case) is "of substantial public interest that should be determined by the Supreme Court." RAP 13.4(b)(4).[3] Plaintiffs identify two issues as justifying review but fail to "discuss why th[ese]

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[2] With the exception that the County flood plan did not refer to the County as having any role in the Tribe's project. *Compare* Decision at 6 (flood plan "recommended that the County should implement a stabilization project") *with* CP 3695, 3847-48.

[3] Plaintiffs also cite RAP 13.4(b)(1) in their conclusion (Pet. 20) but fail to argue "why review should be accepted under" that "test[]" as required by RAP 13.4(c)(7).

particular issue[s] ha[ve] ramifications beyond the particular parties and the particular facts of" this case. 2 *Washington Appellate Practice Deskbook* § 18.2(3) (4th ed. 2016). They argue that the straightforward grant of immunity in RCW 36.70.982 presents an "issue[] of first impression," but this Court reviews an issue of first impression only when the issue otherwise meets a "test[] established in" RAP 13.4(b). RAP 13.4(c)(7). That was the case with the malpractice issues of collectability and emotional damages in the "issue of first impression" case cited by plaintiffs, *Schmidt v. Coogan*, 181 Wn.2d 661, 335 P.3d 424 (2014). There, the Court granted a petition for review when two divisions of the Court of Appeals had issued decisions in direct conflict with each other, meeting the test of RAP 13.4(b)(2). *See* Petition, *Schmidt*, 2013 WL 6989351, at *2, 20 (Feb. 21, 2013). In addition, the issues raised in *Schmidt* recur with such frequency that the Court cited cases from fourteen states (including eight from the states' highest courts) in deciding the policy issues presented. 181 Wn.2d at 666-68, 673-74.

While this case involves a nationally publicized natural disaster and a significant loss of life, it does not present legal issues justifying review. This Court does not accept review of cases solely because they involve extraordinary events or tragic outcomes. *E.g., Karr v. State*, 112 Wn.2d 1011 (1989) (denying review of decision affirming summary

judgment against personal representatives of 14 of the 60 people killed in Mount St. Helens eruption). Because the issues raised do not meet "one or more of the tests" of RAP 13.4 (*see* RAP 13.4(c)(7)), review is unwarranted.

B. Review Is Not Warranted of the Court's Holding That the County Could Not Be Liable for the Tribe's Project.

1. The court applied settled law in interpreting the grant of immunity to mean what it says: that a county "is not liable" for a project meeting the criteria of the statute and permitted by the State (Issue 1).

The Fish Habitat Projects Act, Laws of 1998, ch. 249 (codified in various titles), enacted in response to the threat of listing Chinook as endangered, streamlined the permitting process for projects to enhance fish habitat by eliminating all regulatory requirements other than a permit from the Department of Fish and Wildlife (DFW). RCW 77.55.181(4). The statute immunizes a county from liability for these projects: "A county is not liable for adverse impacts resulting from a fish enhancement project that meets the criteria of RCW 77.55.181 and has been permitted by the department of fish and wildlife." RCW 36.70.982. The Court of Appeals correctly ruled that the immunity applied, making the County "not liable" for the Tribe's project, no matter the extent of its alleged involvement and no matter whether the claim required proof of duty (*i.e.*, negligence) or not (*i.e.*, strict liability). Decision at 13-16, 18.

Plaintiffs argue that the "project" did not "meet the criteria of RCW 77.55.181" because the State had not "develop[ed] size or scale threshold tests" as required by RCW 77.55.181(1)(b). But the requirement that the *project* meet the criteria of the statute pertains to its characteristics (*e.g.*, that it "accomplish one or more of the following tasks," RCW 77.55.181(1)(a)), not whether the State did or did not meet its obligation to develop tests to *evaluate* the projects. Plaintiffs' related argument concerns RCW 77.55.181(1)(b), which states that a "project proposal shall not be reviewed under the process created in this section *if the department determines* that the scale of the project raises concerns regarding public health and safety." *Id.* (emphasis added). Plaintiffs argue that the Tribe's project *should have* raised those concerns and therefore the project did not meet this "criteri[on]." But, as the Court of Appeals held, the Legislature assigned that determination to DFW's discretion, and DFW determined it was met. Decision at 14-15 ("The approval of the permit indicates that, in the department's view, the scale of the cribwall project did not make it potentially threatening to public health or safety.").[4]

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[4] For several reasons, the County moves to strike plaintiffs' Appendix B. None of the pages at Appendix B are from the clerk's papers: all have been renumbered in red ink and, in renumbering them, plaintiffs' misnumbered many. *See* comparison at Appendix 4, *infra*. Three pages include new annotations in ink, apparently designed to bolster the evidence on this and other points. *See id.* at B1.1, B1.2, B2, B3. Still other pages are not part of the record *at all*. *See id.* at B5, B6. Finally, RAP 13.4(c)(9) lists the information that should be provided in an appendix; clerk's papers are not listed.

There is no basis in the statute's language to limit the immunity to situations where a county exercises "its regulatory authority." Pet. 5. Plaintiffs' construction cannot be squared with the statute's plain language, that a county "is not liable" so long as the project is permitted by DFW and meets the statutory criteria of a fish habitat enhancement project. As the Court of Appeals held, "This argument tries to read into the statute an intention not found there. . . . Because the statute's meaning is clear based on its text, our inquiry is at an end." Decision at 15-16. Construed as plaintiffs urge, the immunity would have no force, because traditional negligence principles already require "active involvement" for a party (including government) to be liable. *See infra* next section.

Finally, the Court of Appeals did not err in holding that the immunity statute "does not foreclose eligibility for a project that accomplishes one of the identified tasks, such as fish habitat restoration, and also serves some other purpose, such as landslide prevention." Decision at 15. As an initial matter, the Tribe's project was not a "landslide prevention" project, and plaintiffs cite to no evidence that it was. Rather, the permit application stated, "[t]he purpose is to prevent landslide materials [from prior slides] from being eroded away and depositing further downstream." CP 248. In other words, the "stabilization" the Tribe intended was of the river "bank," as it sought to

"control the erosive forces" of the river, all of which is an identified "task" eligible for a streamlined permit. RCW 77.55.181(1)(a)(ii).[5]

More broadly, had the Legislature intended to prohibit projects that served more than one purpose, it would have said so. *See HomeStreet, Inc. v. Dep't of Revenue*, 166 Wn.2d 444, 451-52, 210 P.3d 297 (2009) (no judicial interpretation necessary where the "statutory language is plain and unambiguous"). Because no statutory language supports their argument, plaintiffs rely on a draft policy statement and testimony about the draft, both made *ten years after* the law's passage. Pet. 9 (citing CP 2726, which references Dep. Ex. 884 (CP 2759)). While a court "may resort" to "legislative history" and "relevant case law" in determining the meaning of an ambiguous statute, *State v. Jones*, 172 Wn.2d 236, 242, 257 P.3d 616 (2011), it cannot "resort to" an after-the-fact draft policy statement or an employee's interpretation of that document. Nor does the draft statement say what plaintiffs claim. It says:

> [A project's] purpose must be solely to enhance fish habitat. It may not include other activities that are not integral to one of the fish habitat enhancement activities authorized under

[5] Plaintiffs spend a full page citing culvert removal as the sine qua non of the Fish Habitat Projects Act. Pet. 10. But culvert removal is only one of four "tasks" listed in the statute as eligible for streamlined permitting. RCW 77.55.181(1)(a) (listing "Culvert repair and replacement" along with "Fish passage barrier removal projects," "Restoration of an eroded or unstable stream bank . . . including . . . stabilization . . . at the toe of the bank . . . to control the erosive forces of flowing water," and "Placement of wood debris").

> RCW 77.55.181, such as construction of hiking trails, picnicking areas, bike paths or removal of buildings.

CP 2759. Even if implemented, the draft policy statement would not have prohibited a fish habitat project with a second purpose. It would have prohibited constructing a second project (such as a hiking trail) under the streamlined permit. *E.g.,* Hr'g on H.B. 2879 Before S. Nat. Res. & Parks Comm'n (Feb. 20, 1998) ("a bridge that would span the entire floodplain and the crick" for the purpose of "creat[ing] access" to a landowner's property would be beyond scope of statute), *audio recording* by TVW, https://www.tvw.org/watch/?eventID=1998021111 at 37:17-38:03.

As in *Snowden v. Kittitas County School District*, 38 Wn.2d 691, 231 P.2d 621 (1951), concerning a similarly worded statute, "[t]here is nothing whatever in the language of the statute indicative of the more restricted scope which" plaintiffs urge. *Id.* at 698. The Court should decline review of these issues.

2. The court did not err in holding plaintiffs' "water law" theory inapplicable (Issue 2).

Plaintiffs pleaded a strict liability "water law" theory predicated on the County's alleged role in the revetment. In addition to holding that the immunity statute barred the strict liability theory (*see* preceding section and Decision at 18), the court held that the claim was otherwise untenable. Plaintiffs pleaded in their complaint that *the County* was a riparian owner,

not that *they* were riparian owners (CP 2993), and their theory of liability was not predicated on ownership of riparian land (CP 2992-93). The court "decline[d] to extend riparian law" to "create[] a right to recover personal injury damages caused by diversion of a river regardless of whether the plaintiffs are riparian landowners." Decision at 17.

Review is not warranted on this issue, and not only because the County is immune (*see supra*), plaintiffs seek expansion of this narrow area of the law, and plaintiffs failed to adduce evidence that they were riparian owners.[6] Review is unwarranted because, even if riparian law were at issue, the standard would be negligence, not strict liability.

Riparian law imposes strict liability only in the narrow circumstance where (1) a party obstructs or diverts a river and (2) that obstruction causes flooding or erosion (3) of riparian property. In that circumstance, the party is negligent as a matter of law, *i.e.*, strictly liable, for the property damage caused. *Johnson v. Sultan Ry. & Timber Co.*, 145 Wash. 106, 108-09, 258 P. 1033 (1927). In all other circumstances,

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[6] Proving riparian ownership requires more than proof that one's property is adjacent to a river. *See Richert v. Tacoma Power Util.,* 179 Wn. App. 694, 703, 319 P.3d 882 (2014) (damages are recoverable under a riparian rights theory only if the "riparian rights still exist," *i.e.*, were in existence as of 1917 and used by 1932). Plaintiffs include as Appendix B3 and B6 documents not part of the record to belatedly try to present evidence they were riparian owners, apparently in response to the Court of Appeals' holding that plaintiffs' "assert[ion], in a footnote," that some were "riparian owners" lacked sufficient evidentiary basis. Decision 17. These documents, which were not part of the record, are not "evidence" and should be stricken. *See* footnote 4, *supra*.

negligence principles apply. *E.g., Sund v. Keating*, 43 Wn.2d 36, 40-46, 259 P.2d 1113 (1953) (negligence, not "absolute" liability, applied where defendants' actions weakened river bank leading to flooding); *Nielson v. King County*, 72 Wn.2d 720, 724-25, 435 P.2d 664 (1967) (rejecting argument that diversion of stream "is actionable both with or without proof of negligence").

Ronkosky v. City of Tacoma, 71 Wash. 148, 128 P. 2 (1912), and *Fitzpatrick v. Okanogan County*, 169 Wn.2d 598, 238 P.3d 1129 (2010), cited by plaintiffs, are not to the contrary. *Ronkosky* did not involve riparian rights, applied a negligence standard, and did not involve personal injury or death. 71 Wash. at 152-54. *Fitzpatrick* involved an inverse condemnation claim, not a tort (*see* 169 Wn.2d at 605) making its analysis inapposite to the issues presented here. The trial court in *Fitzpatrick* had already dismissed the "riparian" tort claims (*id.*) finding them barred by Flood Control Act immunity (*see Fitzpatrick*, Resp. Brief, 2006 WL 6288121, at *4 (July 10, 2006)) just as plaintiffs' claims here are barred by Fish Habitat Projects immunity (*see supra*) and Flood Control Act immunity (*see infra*). Finally, "[a]n inverse condemnation claim is 'an action . . . brought to recover the value of *property*,'" 169 Wn.2d at 605 (emphasis added) (citation omitted), meaning, "[h]ad there been children in the *Fitzpatrick* house who died as it was swept away," as plaintiffs posit

(Pet. 15 n.12), the claim would not have compensated for that loss.

The trial court held that even if riparian rights were at issue, the standard would be negligence, not strict liability, the Court of Appeals left that holding intact, and plaintiffs do not seek review of that issue. It does not matter whether the claim is called "riparian law" or not. If plaintiffs' claim were otherwise tenable, negligence (not strict liability) would apply.

3. Additional bases support dismissal of this claim.

Review also is not warranted because additional bases support the dismissal of the claim, making review futile. But, if the Court reviews any issue regarding this claim, the Court should review these bases as well.

a. The County cannot be liable for a project funded, designed, permitted, constructed, inspected, and maintained entirely by others (Issue 3).

Contrary to plaintiffs' mistaken statement otherwise (Pet. 1), the Court of Appeals did not reach the question of whether "the County's involvement in building the cribwall was sufficient to give rise to liability." Decision at 13 (question "may be a factual issue"). Plaintiffs presented inconsequential facts[7] to argue the County was involved but

[7] An analysis of those facts is at the County's opening brief below, including the fact that most of the County's "involvement" was in its governmental role. Resp. Brief, pp. 30-31 & nn. 27-33 (Oct. 6, 2017). Plaintiffs did not appeal the trial court's dismissal of claims predicated on those actions as barred by the public duty doctrine (*see* CP 4684, 4705) and cannot now rely on them to establish a duty. *See Hoffer v. State*, 110 Wn.2d 415, 422, 755 P.2d 781 (1988) (distinguishing between proprietary and non-proprietary acts of

have never established why the County could bear legal liability for a project funded, designed, permitted, constructed, inspected, and maintained by others. Unlike in *Borden v. City of Olympia*, where the city "was engaging in a proprietary function" by designing, engineering, and paying for the project, 113 Wn. App. 359, 371, 53 P.3d 1020 (2002), plaintiffs offered no evidence that the County did anything of the sort.

Plaintiffs continue to argue that the inverse condemnation standard of *Phillips v. King County*, 136 Wn.2d 946, 968 P.2d 871 (1998), applies to their tort claim. It does not. Inverse condemnation requires that the government acted with a public purpose in taking private property, which was "satisfie[d]" in *Phillips* because the county "allow[ed] the use of public land to convey the subdivision's storm water" onto plaintiffs' property. *Id.* at 967. Negligence requires "a duty of care running from the defendant to the plaintiff," which the Court of Appeals found lacking, 87 Wn. App. 468, 481-82, 943 P.2d 306 (1997), and which ruling this Court declined to review, 136 Wn.2d at 950. The Court of Appeal's holding in *Phillips* that the facts were insufficient to maintain a negligence claim remains good law. Thus, *Phillips* underscores that inverse condemnation and negligence claims require different proof, and evidence sufficient for

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government as determining applicability of public duty doctrine).

one may be insufficient for the other.

But even if the inverse condemnation analysis in *Phillips* were applicable to a tort claim as plaintiffs argue, they did not meet that test because "active, proprietary participation—participation *without which the alleged taking or damaging would not have occurred*—. . . is required under *Phillips* before liability can attach." *Halverson v. Skagit County*, 139 Wn.2d 1, 13, 983 P.2d 643 (1999). Plaintiffs presented no evidence that, had the County not done what it allegedly did, the Tribe's project would not have been built.

At every step the Tribe, not the County, made decisions about the design, construction, siting, and maintenance of the project; the State and federal government, not the County, approved the project; and the State, not the County, paid for it. The County's actions, construing every inference in plaintiffs' favor, do not evidence that the County had *any* authority over, responsibility for, or even a say in the project. Because no individual could be liable for the Tribe's project if it had done what the County did, the claim fails. *See Robb v. City of Seattle*, 176 Wn.2d 427, 438, 295 P.3d 212 (2013) (government has no duty "to foresee and eliminate dangers everywhere"); RCW 4.96.010 (municipal entity liable only "to the same extent as if [it] were a private person").

If the Court grants review, the Court should review this issue as an independent basis to affirm the decisions below.

b. Flood Control Act immunity applies given the unrebutted evidence that the revetment also was designed to prevent flooding (Issue 4).

The Court of Appeals also did not reach the question of whether the revetment was built as a flood prevention project, immunizing the County under RCW 86.12.037. The Flood Control Act bars all claims against the County relating to the Tribe's revetment. It provides:

> No action shall be brought or maintained against any county . . . for any noncontractual acts or omissions of such county . . . relating to the improvement, protection, regulation, and control for flood prevention and navigation purposes of any river or its tributaries and the beds, banks, and waters thereof . . . .

RCW 86.12.037. In *Paulson v. Pierce County,* 99 Wn.2d 645, 664 P.2d 1202 (1983), the Court recognized the statute's broad application, stating it was to "shield counties from liability for their efforts to protect the public from flood damage." *Id.* at 649.

From its inception, the Tribe intended the revetment to reduce flooding in addition to enhancing fish habitat. The design proposal for the Tribe and the U.S. Army Corps of Engineers discussed that the 1967 landslide had destroyed houses, stated that a "1967 event may be imminent" which would "divert [river] flow through an inhabited floodplain," and suggested the revetment in part because this flooding

hazard "emphasize[d] the need for immediate action." CP 170-71.

Six years later, the 2006 landslide caused just such a flood. The Tribe explicitly incorporated the objective of reducing flooding risks into its permit application, revised the project design to further address the flood hazard, removed a stand of trees to widen the river in pursuit of that objective it, and concluded, "[o]nce the proposed project is completed, flooding will be reduced." CP 139-40, 248, 250, 262-63.

The trial court found a fact dispute about whether flood immunity applied, because the "first page" of the Tribe's application "only identifies fish habitat rehabilitation as the purpose of the project." CP 1511. But the trial court's focus on the first page ignored that the first page was a State *form*. CP 245. As described above, the project also was intended to reduce flooding risks (*e.g.*, CP 171 ("[r]educe floodplain encroachment" listed in the proposal as a "project objective")) and the permit application described how the project was designed to reduce flooding risks (*e.g.*, CP 250 (the January 2006 landslide "has confined the river such that a large scale flood event will likely result in some flooding of homes"); CP 248 (tree removal to reduce likelihood that "a 2-year recurrence flow will cause flooding of [occupied] adjacent properties"; "[o]nce the proposed project is completed, flooding will be reduced")).

Plaintiffs allege that the Tribe's decision to remove trees to facilitate the widening of the river and prevent flooding made the Oso Landslide more deadly. Apps.' Brief, pp. 13-14 (July 31, 2017). Because the Tribe removed the trees expressly to "improve[]" the river for "flood prevention," RCW 86.12.037, the County is immune. If the County potentially bears liability for the project based on its alleged involvement, then it is entitled to immunity given the project's goal to reduce flooding.

C. Review Is Not Warranted because Plaintiffs' Appeal Was Untimely (Issue 5).

Review also is unwarranted because the Court of Appeals should have dismissed plaintiffs' appeal as untimely. If review is granted, the Court should review this issue, either by designating it as an issue as to which review is granted or by granting a motion to dismiss.

In September 2016, the trial court entered a final CR 54(b) judgment dismissing all claims plaintiffs made against the County (the September Judgment). Their notice of appeal was due 30 days later (*see* RAP 2.2(d), RAP 5.2(a)), but plaintiffs did not file it until January 2017. In that notice, plaintiffs designated the September Judgment and the earlier interlocutory orders leading to it. They did not designate a later December 2016 order, a stipulated order dismissing the third and last

defendant as part of a settlement agreement (the December Order),[8] and twice have affirmed that that omission was purposeful.[9]

RAP 2.4(b) allows the court to review an earlier order in a timely appeal from a later order, but only if that earlier order prejudicially affected the latter. Neither predicate is present here. Unlike in *Fox v. Sunmaster Products, Inc.*, 115 Wn.2d 498, 798 P.2d 808 (1990), plaintiffs did not appeal a later order, meaning RAP 2.4(b) was not even implicated. Nor could they have. Also unlike in *Fox*, the trial court did not enter any later order relating to the County from which plaintiffs could appeal, let alone one that was prejudicially affected by the CR 54(b) judgment.[10]

If the Court grants review, the Court should correct the Court of Appeals' misapplication of *Fox* to confirm that while a party does not "*automatically* lose the right to appellate review of" a CR 54(b) judgment "by failing to file a notice of appeals within 30 days," *Fox*, 115 Wn.2d at 505 (emphasis added), the corollary is also true: a party does not *always*

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[8] The notice had a typographical error, identifying an interlocutory December 2015 order as having issued in December 2016. *See* Mot. Discr. Rev., App. 53, 55 (July 31, 2017).

[9] Mot. Discr. Rev., App. 159 (July 31, 2017); Answer at 3 (Aug. 31, 2017).

[10] An earlier order "prejudicially affects" a later order only if "the order appealed from would not have happened but for the first order." *Right-Price Recreation, LLC v. Connells Prairie Cmty. Council*, 146 Wn.2d 370, 380, 46 P.3d 789 (2002). Compare *Fox*, where, at the end of the case, the trial court entertained a motion to reinstate a defendant who had been earlier dismissed, with here, where plaintiffs advised the trial court in September 2016 that, having "dismissed their last claim against [the] County . . . no jurisdiction exists as to their case against the County in the trial court." Mot. Discr. Rev., App. 5 (July 31, 2017).

have two opportunities to appeal from a CR 54(b) judgment. Litigants routinely seek CR 54(b) judgments to carve out of the case those parties or claims for which judgment is final. The action as to parties or claims subject to the CR 54(b) judgment is "terminate[d]" and cannot be revised by the trial court. CR 54(b). A prevailing party who secured a final judgment but must wait to defend the judgment until the conclusion of the entire case will suffer the precise "injustice of a delay" that the rule was meant to prevent. *Doerflinger v. New York Life Ins. Co.*, 88 Wn.2d 878, 880, 567 P.2d 230 (1977) (citation omitted); *see also Schiffman v. Hanson Excavating Co.*, 82 Wn.2d 681, 686, 513 P.2d 29 (1973) (sufficient findings are required "since the time for appeal begins to run from the entry of an order that meets the requirements of the rule." (citation omitted)). The Court of Appeals misapplied *Fox*, and the issue is perfectly framed for clarification because the parties agree that the September Judgment did not prejudicially affect the December Order.

V. CONCLUSION

For the foregoing reasons, the Court should deny review.

RESPECTFULLY SUBMITTED this 22nd day of March, 2019.

ADAM CORNELL
Snohomish County Prosecuting Attorney

Joseph B. Genster, WSBA #14968
Michael C. Held, WSBA #19696
Deputy Prosecuting Attorneys
Civil Division

HARRIGAN LEYH FARMER &
THOMSEN LLP

By ______________________________
Timothy G. Leyh, WSBA #14853
Randall Thomsen, WSBA #25310
Kristin Ballinger, WSBA #28253

Attorneys for Snohomish County

CERTIFICATE OF SERVICE

I, Florine Fujita, declare that I am employed by the law firm of Harrigan Leyh Farmer & Thomsen LLP, a citizen of the United States of America, a resident of the state of Washington, over the age of eighteen (18) years, not a party to the above-entitled action, and competent to be a witness herein.

On March 22, 2019, I caused a true and correct copy of the foregoing document to be served on the parties listed below in the manner indicated:

Karen A. Willie Law Office Of Karen A. Willie Pllc 2212 Queen Anne Ave. N. Seattle WA 98109-2312	☐ Via Legal Messengers ☐ Via First Class Mail ☐ Via Facsimile ☒ Via Electronic Mail
Michael D. Daudt Daudt Law PLLC 2200 6th Ave. St. 1250 Seattle, WA 98121-1820	☐ Via Legal Messengers ☐ Via First Class Mail ☐ Via Facsimile ☒ Via Electronic Mail
Emily J. Harris David B. Edwards Guy P. Michelson Corr Cronin Michelson Baumgardner Fogg & Moore, LLP 1001 4th Ave. – Suite 3900 Seattle, WA 98154-1051	☐ Via Legal Messengers ☐ Via First Class Mail ☐ Via Facsimile ☒ Via Electronic Mail
Corrie J. Yackulic Corrie Yackulic Law Firm, PLLC 315 5th Ave. S. – Suite 1000 Seattle, WA 98104	☐ Via Legal Messengers ☐ Via First Class Mail ☐ Via Facsimile ☒ Via Electronic Mail
John W. Phillips Phillips Law Group, PLLC 315 5th Ave. S. – Suite 1000 Seattle, WA 98104	☐ Via Legal Messengers ☐ Via First Class Mail ☐ Via Facsimile ☒ Via Electronic Mail

<table>
<tr><td>Darrell L. Cochran
Loren A. Cochran
Pfau Cochran Vertetis Amala PLLC
911 Pacific Ave. – Suite 200
Tacoma, WA 98402</td><td>☐ Via Legal Messengers
☐ Via First Class Mail
☐ Via Facsimile
☒ Via Electronic Mail</td></tr>
</table>

DATED this 22nd day of March, 2019.

Florine Fujita
999 Third Avenue, Suite 4400
Seattle, WA 98104
Tel: (206) 623-1700
Fax: (206) 623-8717
Email: florinef@harriganleyh.com

APPENDIX 1 (FISH HABITAT PROJECTS ACT)

RCW 36.70.982

A county is not liable for adverse impacts resulting from a fish enhancement project that meets the criteria of RCW 77.55.181 and has been permitted by the department of fish and wildlife.

RCW 77.55.181

(1)(a) In order to receive the permit review and approval process created in this section, a fish habitat enhancement project must meet the criteria under this section and must be a project to accomplish one or more of the following tasks:

(i) Elimination of human-made or caused fish passage barriers, including:

(A) Culvert repair and replacement; and

(B) Fish passage barrier removal projects that comply with the forest practices rules, as the term "forest practices rules" is defined in RCW 76.09.020;

(ii) Restoration of an eroded or unstable stream bank employing the principle of bioengineering, including limited use of rock as a stabilization only at the toe of the bank, and with primary emphasis on using native vegetation to control the erosive forces of flowing water; or

(iii) Placement of woody debris or other instream structures that benefit naturally reproducing fish stocks.

(b) The department shall develop size or scale threshold tests to determine if projects accomplishing any of these tasks should be evaluated under the process created in this section or under other project review and approval processes. A project proposal shall not be reviewed under the process created in this section if the department determines that the scale of the project raises concerns regarding public health and safety.

(c) A fish habitat enhancement project must be approved in one of the following ways in order to receive the permit review and approval process created in this section:

(i) By the department pursuant to chapter 77.95 or 77.100 RCW;

(ii) By the sponsor of a watershed restoration plan as provided in chapter 89.08 RCW;

(iii) By the department as a department-sponsored fish habitat

enhancement or restoration project;

(iv) Through the review and approval process for the jobs for the environment program;

(v) Through the review and approval process for conservation district-sponsored projects, where the project complies with design standards established by the conservation commission through interagency agreement with the United States fish and wildlife service and the natural resource conservation service;

(vi) Through a formal grant program established by the legislature or the department for fish habitat enhancement or restoration;

(vii) Through the department of transportation's environmental retrofit program as a stand-alone fish passage barrier correction project;

(viii) Through a local, state, or federally approved fish barrier removal grant program designed to assist local governments in implementing stand-alone fish passage barrier corrections;

(ix) By a city or county for a stand-alone fish passage barrier correction project funded by the city or county;

(x) Through the approval process established for forest practices hydraulic projects in chapter 76.09 RCW; or

(xi) Through other formal review and approval processes established by the legislature.

(2) Fish habitat enhancement projects meeting the criteria of subsection (1) of this section are expected to result in beneficial impacts to the environment. Decisions pertaining to fish habitat enhancement projects meeting the criteria of subsection (1) of this section and being reviewed and approved according to the provisions of this section are not subject to the requirements of RCW 43.21C.030(2)(c).

(3)(a) A permit is required for projects that meet the criteria of subsection (1) of this section and are being reviewed and approved under this section. An applicant shall use a joint aquatic resource permit application form developed by the office of regulatory assistance to apply for approval under this chapter. On the same day, the applicant shall provide copies of the completed application form to the department and to each appropriate local government. Applicants for a forest practices hydraulic project that are not otherwise required to submit a joint aquatic resource permit application must submit a copy of their forest practices application to the appropriate local government on the same day that they submit the forest practices application to the department of natural resources.

(b) Local governments shall accept the application identified in this

section as notice of the proposed project. A local government shall be provided with a fifteen-day comment period during which it may transmit comments regarding environmental impacts to the department or, for forest practices hydraulic projects, to the department of natural resources.

(c) Except for forest practices hydraulic projects, the department shall either issue a permit, with or without conditions, deny approval, or make a determination that the review and approval process created by this section is not appropriate for the proposed project within forty-five days. The department shall base this determination on identification during the comment period of adverse impacts that cannot be mitigated by the conditioning of a permit. Permitting decisions over forest practices hydraulic approvals must be made consistent with chapter 76.09 RCW.

(d) If the department determines that the review and approval process created by this section is not appropriate for the proposed project, the department shall notify the applicant and the appropriate local governments of its determination. The applicant may reapply for approval of the project under other review and approval processes.

(e) Any person aggrieved by the approval, denial, conditioning, or modification of a permit other than a forest practices hydraulic project under this section may appeal the decision as provided in RCW 77.55.021(8). Appeals of a forest practices hydraulic project may be made as provided in chapter 76.09 RCW.

(4) No local government may require permits or charge fees for fish habitat enhancement projects that meet the criteria of subsection (1) of this section and that are reviewed and approved according to the provisions of this section.

(5) No civil liability may be imposed by any court on the state or its officers and employees for any adverse impacts resulting from a fish enhancement project permitted by the department or the department of natural resources under the criteria of this section except upon proof of gross negligence or willful or wanton misconduct.

APPENDIX 2 (FLOOD CONTROL ACT)

RCW 86.12.037

No action shall be brought or maintained against any county, city, diking district, or flood control zone district when acting alone or when acting jointly with any other county, city, or flood control zone district under any law, or any of its or their agents, officers, or employees, for any noncontractual acts or omissions of such county or counties, city or cities, diking district or districts, flood control zone district or districts, or any of its or their agents, officers, or employees, relating to the improvement, protection, regulation, and control for flood prevention and navigation purposes of any river or its tributaries and the beds, banks, and waters thereof: PROVIDED, That nothing contained in this section shall apply to or affect any action now pending or begun prior to the passage of this section.

APPENDIX 3 (TITLE 4 RCW)

RCW 4.22.015

"Fault" includes acts or omissions, including misuse of a product, that are in any measure negligent or reckless toward the person or property of the actor or others, or that subject a person to strict tort liability or liability on a product liability claim. The term also includes breach of warranty, unreasonable assumption of risk, and unreasonable failure to avoid an injury or to mitigate damages. Legal requirements of causal relation apply both to fault as the basis for liability and to contributory fault.

A comparison of fault for any purpose under RCW 4.22.005 through 4.22.060 shall involve consideration of both the nature of the conduct of the parties to the action and the extent of the causal relation between such conduct and the damages.

RCW 4.22.070

(1) In all actions involving fault of more than one entity, the trier of fact shall determine the percentage of the total fault which is attributable to every entity which caused the claimant's damages except entities immune from liability to the claimant under Title 51 RCW. The sum of the percentages of the total fault attributed to at-fault entities shall equal one hundred percent. The entities whose fault shall be determined include the claimant or person suffering personal injury or incurring property damage, defendants, third-party defendants, entities released by the claimant, entities with any other individual defense against the claimant, and entities immune from liability to the claimant, but shall not include those entities immune from liability to the claimant under Title 51 RCW. Judgment shall be entered against each defendant except those who have been released by the claimant or are immune from liability to the claimant or have prevailed on any other individual defense against the claimant in an amount which represents that party's proportionate share of the claimant's total damages. The liability of each defendant shall be several only and shall not be joint except:

(a) A party shall be responsible for the fault of another person or for payment of the proportionate share of another party where both were acting in concert or when a person was acting as an agent or servant of the party.

(b) If the trier of fact determines that the claimant or party suffering bodily injury or incurring property damages was not at fault, the defendants against whom judgment is entered shall be jointly and

severally liable for the sum of their proportionate shares of the claimants [claimant's] total damages.

(2) If a defendant is jointly and severally liable under one of the exceptions listed in subsections (1)(a) or (1)(b) of this section, such defendant's rights to contribution against another jointly and severally liable defendant, and the effect of settlement by either such defendant, shall be determined under RCW 4.22.040, 4.22.050, and 4.22.060.

(3)(a) Nothing in this section affects any cause of action relating to hazardous wastes or substances or solid waste disposal sites.

(b) Nothing in this section shall affect a cause of action arising from the tortious interference with contracts or business relations.

(c) Nothing in this section shall affect any cause of action arising from the manufacture or marketing of a fungible product in a generic form which contains no clearly identifiable shape, color, or marking.

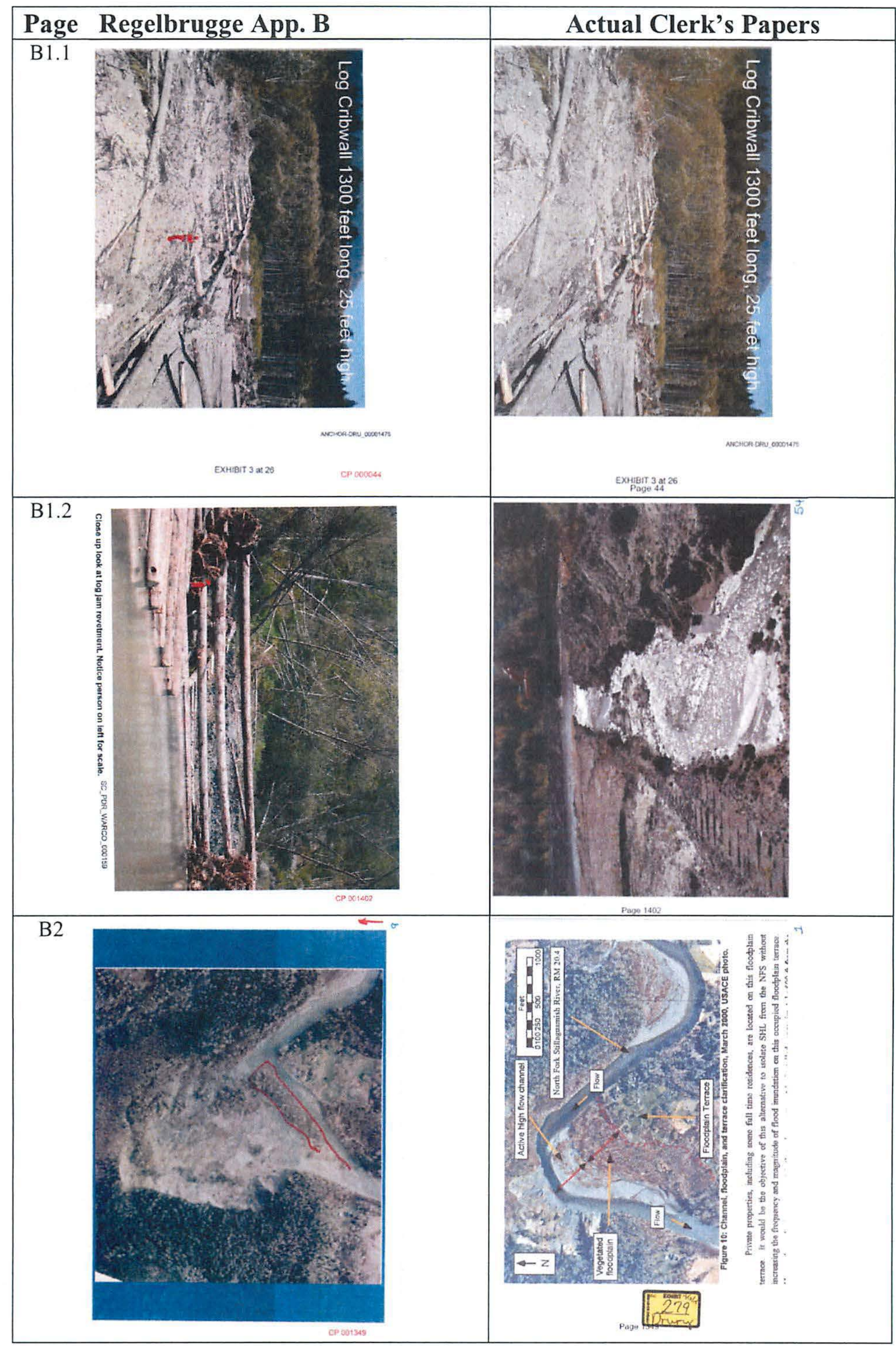
RCW 4.96.010

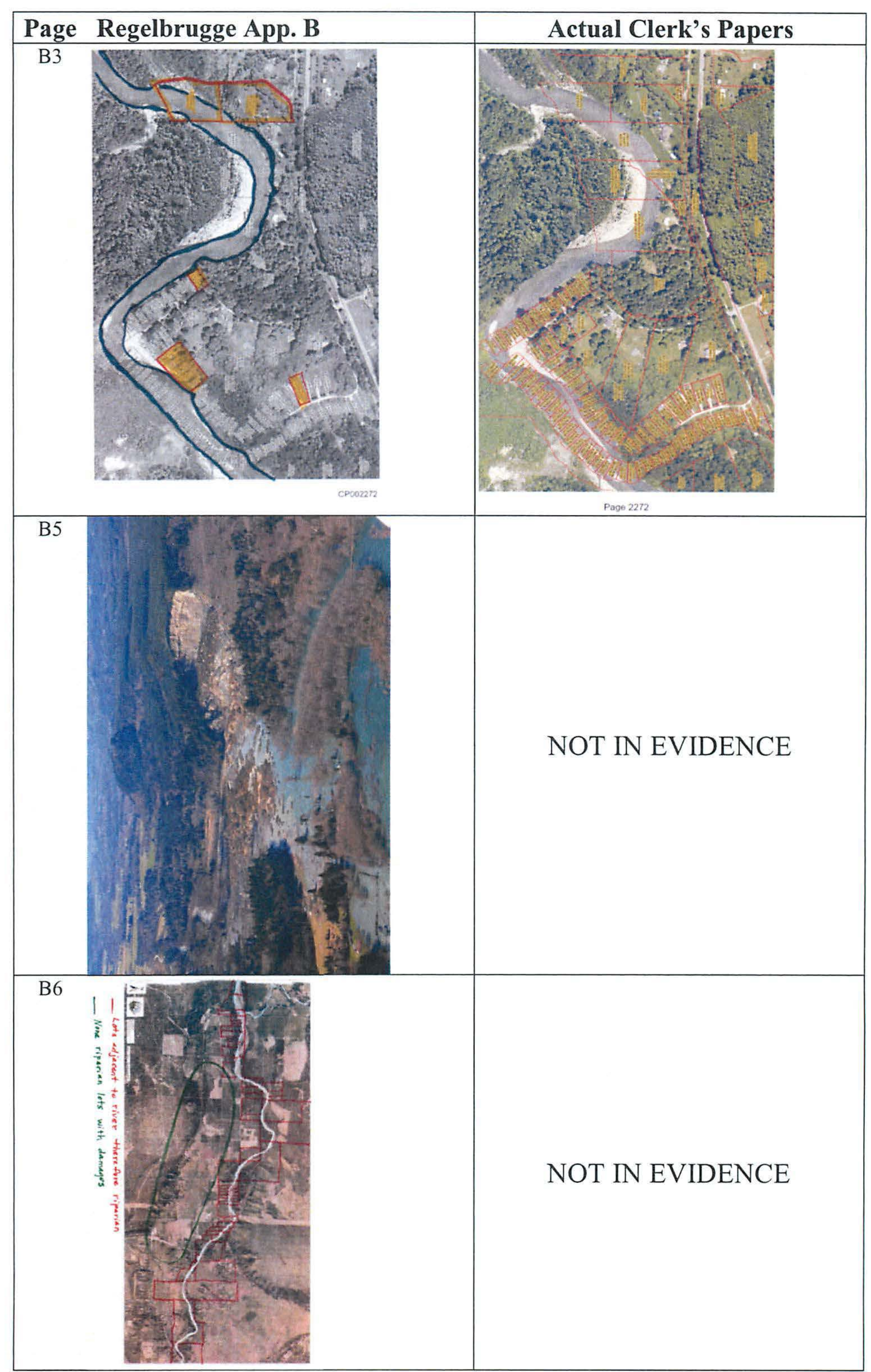
(1) All local governmental entities, whether acting in a governmental or proprietary capacity, shall be liable for damages arising out of their tortious conduct, or the tortious conduct of their past or present officers, employees, or volunteers while performing or in good faith purporting to perform their official duties, to the same extent as if they were a private person or corporation. Filing a claim for damages within the time allowed by law shall be a condition precedent to the commencement of any action claiming damages. The laws specifying the content for such claims shall be liberally construed so that substantial compliance therewith will be deemed satisfactory.

(2) Unless the context clearly requires otherwise, for the purposes of this chapter, "local governmental entity" means a county, city, town, special district, municipal corporation as defined in RCW 39.50.010, quasi-municipal corporation, any joint municipal utility services authority, any entity created by public agencies under RCW 39.34.030, or public hospital.

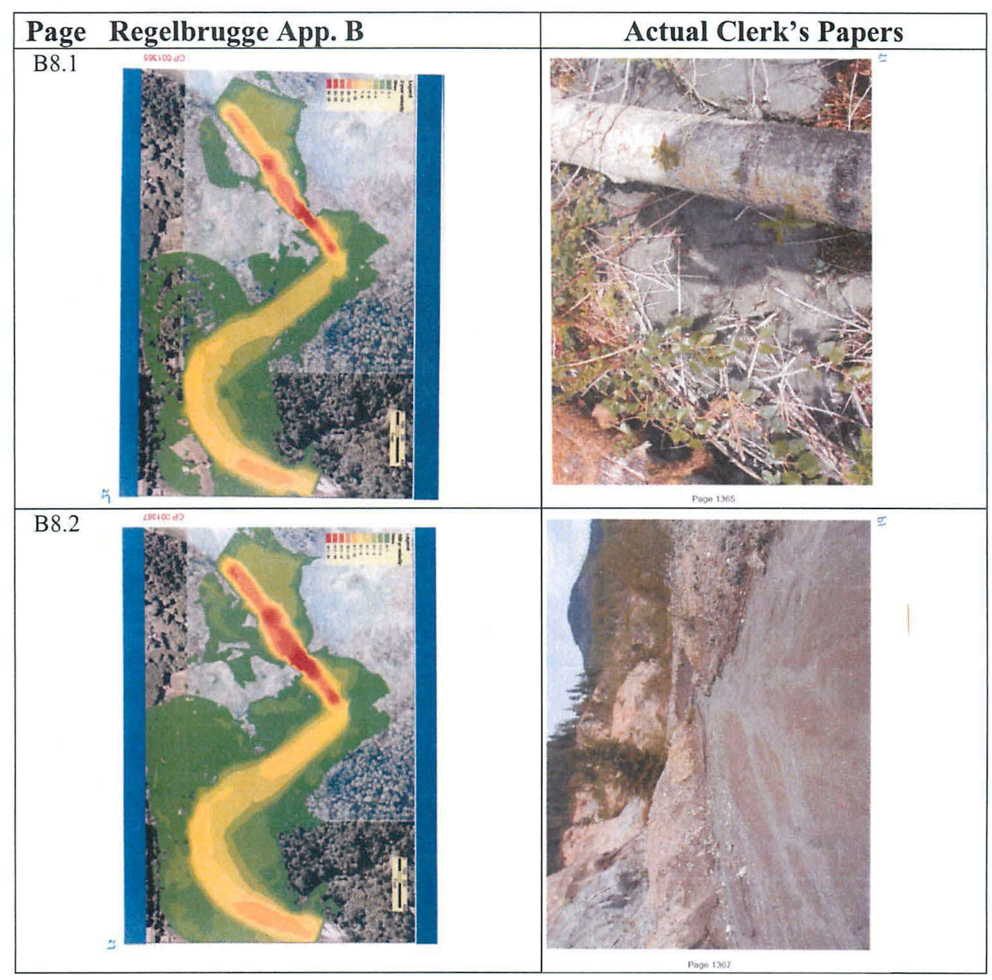
(3) For the purposes of this chapter, "volunteer" is defined according to RCW 51.12.035.

APPENDIX 4 (COMPARE PLS' APP. B WITH RECORD)





Page	Regelbrugge App. B	Actual Clerk's Papers
B3	CP002272	Page 2272
B5		NOT IN EVIDENCE
B6	— Lots adjacent to river therefore riparian — Non riparian lots with damages	NOT IN EVIDENCE



Page	Regelbrugge App. B	Actual Clerk's Papers
B8.1		Page 1365
B8.2		Page 1367

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- sawes@pcvalaw.com
- sdamon@corrcronin.com
- tkranz@snoco.org
- wwalsh@cozen.com

Comments:

Sender Name: Florine Fujita - Email: florinef@harriganleyh.com
Filing on Behalf of: Timothy George Leyh - Email: timl@harriganleyh.com (Alternate Email: florinef@harriganleyh.com)

Address:
999 Third Avenue
Suite 4400
Seattle, WA, 98104
Phone: (206) 623-1700 EXT 303

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