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JACKASS MT. RANCH INC., and DAVID and AMI MACHUGH,  
dba JACKASS MT. RANCH

Appellants,

vs.

SOUTH COLUMBIA BASIN IRRIGATION DISTRICT, et al.,

Respondent,

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APPELLANTS' REPLY BRIEF

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## I. INTRODUCTION

The brief of Respondent South Columbia Basin Irrigation District [SCBID] underscores the disputed nature of all material facts in this case – and thus why summary judgment was inappropriate at the trial court level. Specifically, SCBID has failed on appeal to identify any *legal question or issue* that was appropriately decided as a matter of law by the trial court.

Instead, SCBID has reiterated to this Court the same *factual issues and arguments* that the trial court impermissibly weighed and decided on summary judgment. Thus, SCBID has asked the Court of Appeals to do exactly what the trial court did – weigh the evidence and determine that SCBID is entitled to summary judgment because its version of the facts is right, and Appellants are wrong.

However, as argued in the opening brief of Appellants David and Ami MacHugh and Jackass Mt. Ranch [MacHughs], such substantive determination of the disputed issues of material fact is not appropriate on summary judgment – by either the trial court or the Court of Appeals.

Accordingly, SCBID's brief proves the MacHughs' point: SCBID's motion for summary judgment was based on disputed issues of material fact and SCBID was not otherwise entitled to judgment as a matter of law. Thus, summary judgment pursuant to CR 56(c) was inappropriate and the trial court's decision granting SCBID's summary judgment motion should be reversed and remanded for entry of an Order denying summary judgment.

## II. LEGAL ARGUMENTS IN REPLY

SCBID's overarching position both at the trial court and now on appeal is that, while it may be in charge of operation and maintenance of the Ringold Wasteway, it has not done *enough* to be held liable under any of the MacHughs' claims or causes of action.

Putting aside the fact that omission or failure to act (like failing to monitor or install sufficient drainage works<sup>1</sup>) can form a basis for liability, this argument is fundamentally a question of fact and not subject to determination on summary judgment – especially based upon the disputed facts before the trial court. Thus, summary judgment was inappropriate and the trial court's decision granting summary judgment should be reversed.

A. **SCBID's Response Brief Underscores the Existence of Disputed Issues of Material Fact – Defeating Summary Judgment.**

The MacHughs' opening brief detailed the specific disputed issues of material fact on record before the court, including the specific provisions of the Repayment Contract that rebut SCBID's assertion that it had no power or authority and was totally subservient to the Federal Bureau of Reclamation [BuRec]. *See Brief of Appellants, p. 7-11, 13-16.* In its Response, SCBID simply reasserts this same argument that it was powerless and under BuRec's control.

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<sup>1</sup> CP 438-441, 445, 447, 488, 749, 1009, 1017; *Brief of Appellants, p. 14-16.*

Thus, this is still a disputed issue of material fact. Specifically, the Repayment Contract and the record before the trial court established that SCBID was in charge of:

- Determining whether or not land in slide areas like that along White Bluffs should receive irrigation and adjusting the scope of irrigated land in its District by substituting, including, or excluding certain land from irrigation services – with or without BuRec approval; CP 337-338.
- Delivering irrigation water to the farmers under the irrigation contracts; CP 374, 1010
- Determining and instructing BuRec on when irrigation services should commence and terminate each year, and thus when water should start and stop being delivered through the irrigation system; CP 346-347
- Consulting with BuRec on the design, location, modification, elimination and construction of irrigation works in the District; CP 327
- Monitoring seepage and the level of groundwater in irrigated lands in the District through existing monitoring systems and installing or constructing any additional monitoring wells; CP 438-440, 447, 742, 749
- Constructing – or having BuRec construct – additional drainage works in the District if necessary; CP 317, 330, 410
- Initiating review and inspection of the drainage works, performing all repairs itself or having BuRec perform repairs, and paying for all maintenance and repairs to the drainage works. CP 352-353.

Thus, there were disputed issues of material fact on record before the trial court regarding SCBID's assertion and argument that it could not

do anything with regard to the irrigation works and/or the Ringold Wasteway specifically and thus should not be liable for the landslide.

This ongoing "blame the BuRec" argument by SCBID raises factual issues that could only be determined by weighing the evidence, assessing credibility of the witnesses, and making a factual determination on liability – which the court cannot do on summary judgment. CR 56; Barker v. Advanced Silicon, 131 Wn. App. 616, 624, 128 P.3d 623 (2006) (citing Renz v. Spokane Eye Clinic P.S., 114 Wn. App. 611, 623, 60 P.3d 106 (2002)); see also Dalton v. State, 130 Wn. App. 653, 661 fn3, 124 P.3d 305 (2005) ("In a summary judgment motion, the court does not weigh the evidence. Rather, it decided whether the evidence gives rise to any issue of material fact.").

Instead, the burden on summary judgment is one of *production*, not *persuasion*. Both the trial court and the Court of Appeals on review must "pass on whether a burden of production has been met, not whether evidence produced is persuasive. That is the jury's role, once the burden of production has been met." Renz, 114 Wn. App. at 623; quoted in Barker, 131 Wn. App. at 624.

The trial court usurped the role of the jury in determining on summary judgment that SCBID was right and it did not do enough to warrant liability under ANY of the MacHughs' claims. This determination of disputed facts by the trial court was directly contradictory to the well established standards and requirements for summary judgment. CR 56;

Barker 131 Wn. App. at 624; Rentz, 114 Wn. App. at 623; Dalton, 130 Wn. App. at 661 fn 3.

Thus, the trial court's order granting SCBID summary judgment and dismissing the MacHughs' claims in their entirety should be reversed on appeal.

**B. There Were Disputed Issues of Material Fact Regarding the Inverse Condemnation Claim and Thus the MacHughs Met Their Burden of Production on Summary Judgment.**

Again, SCBID's argument in its Response is that BuRec was in charge of construction and design of the Ringold Wasteway and SCBID did not have enough authority to be found liable under the MacHughs' inverse condemnation claim. This is a factual argument and not subject to determination on summary judgment. CR 56; Barker 131 Wn. App. at 624; Rentz, 114 Wn. App. at 623; Dalton, 130 Wn. App. at 661 fn 3. Thus, the trial court's decision granting summary judgment on this disputed issue of material fact should be reversed on appeal.

1. **THE INVERSE CONDEMNATION CLAIM IS BASED ON MAINTENANCE AND OPERATION – NOT CONSTRUCTION AND DESIGN.**

As argued in the MacHughs' opening brief, the evidence on summary judgment established disputed issues of material fact regarding whether SCBID's operation and maintenance of the Ringold Wasteway constituted government action for purposes of a taking or inverse condemnation claim. See Halverson v. Skagit Cy, 139 Wn.2d 1, 12-13, 983 P.2d 643 (1999) ("To have a taking, some governmental activity must

have been the direct or proximate cause of the landowner's loss.'" (quoting Phillips v. King Cy, 136 Wn.2d 946, 966, 968 P.2d 871(1998)).

This is the focus of the MacHughs' argument against SCBID – operation and maintenance, not construction and design. SCBID's Response is still arguing construction and design, though. SCBID makes much of the fact that the MacHughs' Complaint states that the landslide was caused by the "creation and maintenance" of the wasteway by SCBID and that the "creation/construction" part must be dismissed. *See Brief of Respondent, p. 13-14; CP 602.*

However, SCBID's original motion for summary judgment – and the trial court's decision based thereon – was not limited to just the "creation/construction" part of the MacHughs' claim. SCBID argued for and the trial court granted dismissal of the MacHughs' inverse condemnation claim *in its entirety* without acknowledging the maintenance/operation portion of the MacHughs' claim; the trial court merely stated that there was no evidence SCBID was negligent. CP 33-34.

On appeal, the MacHughs have not argued that SCBID should be liable for creation/construction. On appeal, the MacHughs have argued that negligence is not part of an inverse condemnation claim and there are disputed issues of material fact regarding whether SCBID's operation and maintenance of the Ringold Wasteway constituted a taking by a government entity. As the Washington State Supreme Court recognized in Boitana v. Snohomish Cy, 11 Wn.2d 664, 672, 120 P.2d 490 (1941),

SCBID's ongoing argument regarding creation/construction is not dispositive of this disputed operation/maintenance issue.

Thus, while SCBID was not in charge of construction and design of the Ringold Wasteway, it was in charge of operation and maintenance – and under Boitano and the cases cited therein, the constitutional provision prohibiting a government taking applies to damages arising from operation and maintenance. Boitano, 11 Wn.2d at 673.

This issue was properly plead in the MacHughs' complaint and, taking the evidence in the light most favorable to the MacHughs as the non-moving party, there was sufficient evidence to establish that SCBID's operation and maintenance activities caused the landslide and thus constituted a government taking. The MacHughs' burden of production on summary judgment was met and the motion should have been denied. The trial court's decision to the contrary, based on construction/design and negligence rather than operation/maintenance, should be reversed on review.

2. HALVERSON & PHILLIPS ARE FACTUALLY  
DISTINCT AND DO NOT ENTITLE SCBID TO  
JUDGMENT AS A MATTER OF LAW.

In a new twist on the same old argument, SCBID's Response also contends that it was entitled to judgment as a matter of law under the Halverson and Phillips decisions because the MacHughs' damages were caused by the existence of the Ringold Wasteway alone and that is a construction/design issue, not a maintenance/operation issue.

The MacHughs have already detailed why Halverson and Phillips do not stand for or establish that an "inheriting" government entity cannot be liable for defects in the system it inherits. *See Brief of Appellants, p. 26-29.* SCBID now argues that these cases establish that an "inheriting" government entity cannot be liable for damages caused by the very existence of the system – which is a construction/design issue, not operation/maintenance. This mischaracterizes both the facts and the holdings in Halverson and Phillips and the MacHughs' arguments here.

The Washington State Supreme Court's analysis and decision in both Halverson and Phillips was based on *proximate cause*, a necessary element for a taking action. *See Phillips*, 136 Wn.2d at 966 ("To have a taking, some governmental activity must have been the direct or proximate cause of the landowner's loss."); *quoted in Halverson*, 139 Wn.2d at 9.

Thus, *based on the specific and distinct facts* of both Halverson and Phillips, the Supreme Court concluded there was no proximate cause between any action by the government entity and the injury or loss. *See Halverson*, 139 Wn.2d at 10 ("Plaintiffs' theory of the case is fatally flawed by the total lack of evidence of proximate cause."); *see also Phillips*, 136 Wn.2d at 966 (holding that since the County had not yet accepted the drainage system for maintenance "[i]t is factually impossible for lack of maintenance by the County to have been the cause of the damages alleged by the Phillips.")

The facts that establish lack of proximate cause in both Halverson and Phillips are different from the facts here. Most significantly, in both of

those cases the systems at issue only operated when Mother Nature provided the water – i.e., when it rained and/or flooded. Thus, there was no action by any government entity to actually "operate" or get water in the dike/levee system in Halverson<sup>2</sup> or the public drainage system in Phillips.<sup>3</sup> Since no one actually "operated" either system, the construction and design of each system was really the proximate cause of the damage sustained and not any action by the County. Halverson, 139 Wn.2d at 9-10; Phillips, 136 Wn.2d at 966.

That is not the case here. The Ringold Wasteway is not a passive system essentially operated by Mother Nature and the weather. SCBID actively operates the wasteway and any seepage due to construction and design defects also occurs because the wasteway is in operation – and thus has water in it. Without water, there is nothing to seep. Thus, the landslide may very well have been caused by seepage due to BOTH construction AND operation of the Ringold Wasteway. However, the fact that two different parties were responsible for construction and operation does not absolve one of responsibility.

Thus, it is the MacHughs' position in this lawsuit that SCBID's operation of the Ringold Wasteway – filling it with spill to maintain pressure for delivery further down the system and using it to deliver irrigation water to farmers along White Bluffs – coupled with SCBID's insufficient monitoring and drainage activities were a proximate cause of

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<sup>2</sup> Halverson, 139 Wn.2d 1.

<sup>3</sup> Phillips, 136 Wn.2d 946.

the seepage and resulting landslide. CP 443-444, 447-448, 453, 1009, 1017, 1024-1025.

This position by the MacHughs is supported by the disputed facts and evidence in the record and thus this case is factually distinct from both Halverson and Phillips – where there was no evidence that the County had done anything to cause the damage. In contrast, here the MacHughs have met their burden of production via the evidence in the record establishing the spill and irrigation water only shows up in the wasteway when SCBID instructs BuRec to deliver it. CP 346-347.

Thus, in addition to whatever construction or design defect there may be, there are disputed issues of material fact regarding whether SCBID's active operation of the system was a proximate cause of the seepage and landslide that damaged the MacHughs' property. Halverson and Phillips do not answer this disputed question and it cannot properly be determined on summary judgment. CR 56(c). Thus, the trial court's decision granting summary judgment and dismissing the inverse condemnation claim should be reversed.

3. SCBID'S SUBSEQUENT PURCHASER THEORY IS A NEW ARGUMENT AND UNSUPPORTED BY THE RECORD.

SCBID's Response argues for the first time that the MacHughs' inverse condemnation claim should be dismissed because they were subsequent purchasers with no decline in market value. This argument should not be considered on appeal because it was not properly argued to

or considered by the trial court and the record on appeal is insufficiently developed to afford fair consideration. RAP 2.5(a).

"Arguments or theories not presented to the trial court will generally not be considered on appeal." Washburn v. Beatt Equipment Co., 120 Wn.2d 246, 290, 840 P.2d 860 (1992); see also State v. Houvener, 145 Wn. App. 408, 420, 186 P.3d 370 (2008) ("A party may not generally raise a new argument on appeal that the party did not present to the trial court."); accord Ferencak v. Labor, 142 Wn. App. 713, 729, 175 P.3d 1109 (2008). "While the reviewing court has the discretion to address the issue, 'we are not bound to do so and usually refuse.'" Houvener, 145 Wn. App. at 420 (quoting In re Det. of Ambers, 160 Wn.2d 543, 557 n.6, 158 P.3d 1144 (2007)).

RAP 2.5(a) does provide that a party may present a new ground for affirming the trial court "if the record has been sufficiently developed to fairly consider the ground." In interpreting and applying this rule, though, the Washington State Supreme Court has recognized that the "purpose of RAP 2.5(a) is met where the issue is advanced below and the trial court has an opportunity to consider and rule on relevant authority." Washburn, 120 Wn.2d at 291. Thus, even under RAP 2.5(a) the record before the trial court – and thus on appeal – must sufficiently raise and explore the theory for fair determination. Id.

In its original motion for summary judgment, SCBID cited an unpublished Washington Court of Appeals opinion, Cain v. City of Kennewick, 117 Wn. App. 1057 (2003), to support a statement in its brief

that a subsequent purchaser cannot sue for a taking that occurred prior to his acquisition of title. As an unpublished opinion, Cain was not controlling authority and should not have been cited to the trial court. GR 14.1(a); Johnson v. Allstate Ins. Co., 126 Wn. App. 510, 519, 108 P.3d 1273 (2005).

In addition, SCBID did not advance any argument based on this statement or unpublished case, did not cite or discuss any facts (disputed or otherwise) relevant to or supporting this proposition, and specifically did not argue in either its brief or at the hearing that the MacHughs' claim for inverse condemnation should be denied because they were subsequent purchasers suing for a prior taking. CP 480-507; RP 7-31, 65-68. What is more, the trial court's decision and order was not based on either this proposition or the unpublished opinion. CP 10-40.

Now, on appeal, SCBID argues for the first time that even if a taking did occur, the MacHughs' inverse condemnation claim should be denied because they were a subsequent purchaser. *See Brief of Respondent, pp. 30-40.*

This is a new argument on appeal and the Court of Appeals should decline to consider it because, contrary to the purpose of RAP 2.5(a), the trial court was not afforded "an opportunity to consider and rule on relevant authority" – especially since the only case cited on the issue was an unpublished opinion. Washburn, 120 Wn.2d at 291; GR 14.1(a). SCBID has not contended otherwise and in fact failed to mention RAP 2.5(a) in its Response brief.

In addition, review of the record before this court establishes that it does not support SCBID's assertions and, accordingly, is insufficient for fair determination of this issue on appeal. Id.

It is well established under Washington law that a purchaser cannot sue for a taking that occurred prior to his acquisition of title, but the same purchaser may sue for any new taking or injury that occurs after his purchase. Hoover v. Pierce Cy., 79 Wn. App. 427, 433, 903 P.2d 464 (1995) (citing State v. Sherrill, 13 Wn. App. 250, 257 n.1, 534 P.2d 598 (1975)); cited in Tom v. State, 164 Wn. App. 609, 614, 267 P.3d 361 (2011).

"A new taking cause of action accrues with each measurable or provable decline in market value of the property." Hoover, 79 Wn. App. at 434 (citing Highline Sch. Dist. 401 v. Port of Seattle, 87 Wn.2d 6, 15, 548 P.2d 1085 (1976)); cited in Tom, 164 Wn. App. at 614. In addition, an additional event or activity after purchase that causes further damage is compensable as a taking. Id.; see also Crystal Lotus Enterprises v. Shoreline, 167 Wn. App. 501, 505, 274 P.3d 1054 (2012) ("There is thus no event during its ownership upon which Crystal Lotus can base a takings claim.")

Thus, a subsequent purchaser may make a claim for a new taking if 1) there has been a measurable decline in market value OR 2) if there has been additional activity or a new event during ownership that has caused a new injury or loss. Hoover, 79 Wn. App. at 434; Crystal Lotus, 167 Wn. App. at 505; Tom, 164 Wn. App. at 614.

SCBID's argument on this new subsequent purchaser theory is based on obscure handwritten comments on the Seller's Disclosure Statement indicating "landslide" or "hillside slide" prior to the MacHughs purchasing the property. CP 664-665. First, these comments are inadmissible hearsay. ER 802. Second, there is no other information in the record regarding this alleged incident – either confirming it actually occurred or, if it did, what it entailed (i.e., when, how large, where, was anything covered or damaged, etc). In other words, there is no evidence in the record that any prior taking occurred on the property the MacHughs purchased.

On the contrary, the reports of both SCBID's and the MacHughs' geological experts indicated they found no evidence of any prior landslide on the MacHughs' property; the closest was a landslide immediately adjacent to their property that destroyed a large portion of an orchard and flowed all the way to the Columbia River. CP 109-110; 755. However, there is no indication that this slide occurred on the property and orchard the MacHughs purchased. Thus, under the current record SCBID has failed to establish there was actually anything wrong with the property prior to the MacHughs purchasing it.

Nonetheless, SCBID spends time in its Response arguing that the MacHughs' purchase price must have included and thus compensated for diminished value caused by prior landslide. *See Brief of Respondent, p. 37-39.* Again, there is absolutely no evidence on the record before the Court to support – or even address – this contention, including no

evidence that any prior taking actually occurred, no evidence of what the purchase price was when the MacHughs bought the property, and no evidence that said price was decreased, below market value, or otherwise "diminished" for a prior taking.

Further, the MacHughs are not making a claim for a prior landslide or any other prior taking. This case is factually distinct from Hoover, the prior takings case relied upon by SCBID in its Response; however, the limited significance of the Court's holding in Hoover gets lost in SCBID's exhaustive recitation. *See Brief of Appellants, p. 31-37.*

Hoover was a case where the reoccurring flooding and associated damage was apparent when the Plaintiffs bought the property as the subsequent purchasers. Hoover, 79 Wn. App. at 434. There was no evidence before the court of any new taking, new government activity, or new decline in market value. Hoover, 79 Wn. App. 427. Instead, Plaintiffs argued that every occurrence of the known, reoccurring, preexisting flooding should constitute a new taking and give rise to a new cause of action. Id., at 435-436. The Court recognized that such argument was without authority and contrary to existing law and rejected it. Id., at 436. That is the significance of the decision Hoover.

However, the decision in Hoover is not applicable here. The MacHughs are not seeking the same damages for the same loss that occurs it the same place over and over again, like the reoccurring floods and associated loss in Hoover. Here, there is no evidence before the Court that any prior landslide was visible on the property when the MacHughs

bought it; in fact, the reports of the two landslide experts found no indication of prior landslide activity on the property. CP 109-110, 755. In addition, the MacHughs are not arguing a taking based on a known, reoccurring, preexisting condition that causes damage to their land over and over again – such as flooding. The Plaintiffs in Hoover were seeking to change inverse condemnation law by having the Court recognize a new cause of action for the same preexisting, reoccurring event *every time it happened*. Hoover, 79 Wn. App. at 435-436. The MacHughs are seeking compensation for a single landslide that damaged a previously untouched portion of their property and that occurred during their ownership of the property.

Thus, the claims, facts and circumstances between Hoover and this case are different and the Court's decision in Hoover is not controlling or determinative here. Aside from the fact that there is no actual evidence of a prior taking, the MacHughs are not trying to recover damages for a preexisting, reoccurring, known event.

SCBID also argued for the first time on appeal that the MacHughs "failed to demonstrate" any additional or new government action or event which has resulted in a measurable decline in market value. *Brief of Respondent*, p. 39. Part of the reason the MacHughs have failed to "demonstrate" a decline in market value is because it was not part of SCBID's position on summary judgment and has never been argued or raised before.

Thus, there is nothing in the record before this court regarding market value – period. This means that SCBID has failed to show by undisputed facts what the market value for the property was following the landslide and, more significantly, that no marked decline has occurred. That was the standard SCBID had to meet for summary judgment and it has failed to do so. CR 56(c).

In addition, the new event or activity that has occurred is the 2006 landslide itself. This was a new event with corresponding new damage or injury and forms the basis for a new taking claim by the MacHughs. Cf. Crystal Lotus, 167 Wn. App. at 505 (holding no new event and therefore no basis for a new taking claim).

Ignoring the landslide itself, SCBID contends there is no new activity that *caused* the landslide. However, the record is completely devoid of any evidence to support this conclusory statement – nothing to establish what the Ringold Wasteway water levels, delivery schedules, or seepage rates were or the level of the surrounding water table prior to and contemporaneous with the landslide and that no change or increased activity occurred. See Tom, 164 Wn. App. at 615 (finding insufficient evidence to determine any increased activity absent any evidence of past usage to compare with current usage). Instead, SCBID's Secretary Manager testified that how much water each farmer uses – and thus whether the Ringold Wasteway's operates at an increased or decreased level – varies year to year. CP 1032.

Thus, SCBID has failed to establish its new theory by undisputed facts or that it is otherwise entitled to judgment as a matter of law. CR 56(c). The record before the court on SCBID's new subsequent purchaser theory either does not support SCBID's conclusory arguments or is too sparse to establish anything one way or the other – and thus is insufficient for determination on appeal. RAP 2.5(a).

Accordingly, this Court should decline to consider this argument because it was not presented to the trial court, the requirements of RAP 2.5(a) have not been argued or met by SCBID, and the record on review is insufficient to fairly consider or determine this theory on appeal. RAP 2.5(a); Washburn, 120 Wn.2d at 290; Houvener, 145 Wn. App. at 420-421; Ferencak, 142 Wn. App. at 729.

4. AN INVERSE CONDEMNATION CLAIM AGAINST SCBID IS APPROPRIATE IN STATE COURT.

Finally, SCBID asks this Court to take judicial note that the MacHughs have filed a separate lawsuit against a separate defendant – BuRec – in Federal Court, making separate claims for inverse condemnation based on construction and design, not operation and maintenance.

Thus, SCBID is asking the Court to take judicial notice of a separate lawsuit that is in no way controlling or dispositive in this lawsuit. SCBID has failed to make any argument of res judicata, judicial estoppel or issue preclusion based on the Federal lawsuit against BuRec and has failed to cite or provide a single case – in Washington State or Federal

Claims court – prohibiting a landowner from suing one party for construction and design, and a separate party for operation and maintenance.

On the contrary, the Repayment Contract clearly indicates that these were separate duties between BuRec and SCBID (as SCBID has argued all along) and thus the MacHughs have made separate claims for liability based thereon. The one does not preclude or exclude the other, and SCBID has failed to provide any authority otherwise.

Instead, SCBID appears to use the existence of the Federal action as a basis to cite and argue Federal law in this State Court case. However, SCBID has misrepresented the decision in the Federal law it cites.

Richard v. United States v. Stone Corral Irrig. Dist., 282 F.2d 901, 152 Ct.Cl. 225 (1960) was an action by owners of a fruit orchard against BuRec for eminent domain due to seepage from an irrigation canal that caused root rot and loss of production in their orchard. The United States Court of Claims found the evidence clearly established the Plaintiff's loss was caused by seepage from the canal – and that such seepage was both a natural consequence of the construction of the canal AND due to the carriage of water in the canal, i.e. operation of the canal. Richard, 282 F.2d at 904.

However, unlike here, in Richard BuRec both *constructed and operated* the canal at issue; the irrigation district was not in charge of operation of the canal and thus the seepage "occurred prior to receipt of any water by the Stone Corral Irrigation District." Id. Thus, the Court

dismissed BuRec's indemnity claim against the irrigation district because the irrigation district "was in no way responsible for the seepage." Id.

Accordingly, Richard stands for the proposition that damage due to seepage is caused by both construction and operation of an irrigation canal – and in that case the same party was responsible for both. That is not the case here. While BuRec was responsible for construction of the Ringold Wasteway, SCBID was in charge of operation and thus responsible for the "carriage of water" that the Court recognized caused the seepage in Richard. Id.

Thus, contrary to supporting dismissal of the MacHughs' inverse condemnation claim (as SCBID argues), Richard actually supports the MacHughs' separate claims against BuRec and SCBID as the separate parties in charge of construction AND operation of the Ringold Wasteway.

The other Federal case cited by SCBID does not involve an irrigation district and only stands for the proposition that landowners can sue BuRec – which is not dispositive in this State case against SCBID.

Thus, SCBID has failed to establish that either the Federal action or the Federal law supports the trial court's decision granting summary judgment on a record of disputed material facts. Instead and as argued above, summary judgment was not appropriate and the trial court's decision dismissing the inverse condemnation claim should be reversed.

C. **There Were Disputed Issues of Material Fact Regarding the MacHughs' Negligence Claim & Whether SCBID Breached its Duty to Operate/Maintain Ringold Wasteway Without Harming the Property of Others.**

SCBID responds to the MacHughs' argument regarding their negligence claim by reciting the extensive law establishing an irrigation district may be liable for either construction or operation/maintenance of an irrigation system, and then arguing once again that it was not responsible for construction. *See Brief of Respondent, p. 50-52.* The MacHughs are not contending otherwise.

SCBID then re-asserts its same argument that it made to the trial court on operation and maintenance – namely, that it is the only party with an expert on irrigation operation and maintenance practices and its expert says it did nothing wrong. As argued in the MacHughs' opening brief, this argument by SCBID misunderstands the nature of the duty and breach contended by the MacHughs on their negligence claim and thus is non-responsive.

Again, the MacHughs are contending that SCBID was negligent by operating the Ringold Wasteway as it did – with knowledge of instability in the area, seepage from the wasteway, and the inadequate monitoring and drainage systems that SCBID itself could have fixed or replaced – and not by violating some undefined "operations and maintenance" standard or code.<sup>4</sup>

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<sup>4</sup> *See Brief of Appellant, p. 29-35.*

SCBID's expert can and does speak only to the latter situation, but he has failed to address or opine on the former. The closest he gets is to point out that the Ringold Wasteway has less seepage than other irrigation systems, but he fails to address the inadequate drainage and monitoring systems (as detailed in the MacHughs' opening brief) and SCBID's failure to exercise its authority under the Repayment Contract to do anything about either one. CP 473-478.

Thus, despite the testimony and opinions of SCBID's expert, there are still disputed issues of material fact which – when taken in the light most favorable to the MacHughs as the non-moving party – establish SCBID knew irrigation operations along White's Bluff with inadequate drainage caused landslides (CP 414-423); knew the current monitoring and drainage system in place along White's Bluff was not sufficient or intended to solve the drainage/landslide problem (CP 438-441, 447, 451-453, 749, 1009); had authority under the Repayment Contract to put in additional, better or new monitoring wells AND drainage works (CP 317, 330, 410); but ultimately failed to do anything except continue to operate the irrigation system the same way it always had and, as SCBID stipulated, to cause the landslide that damaged the MacHughs property (CP 500-501, 1009, 1017, 1025; RP 19).

With or without SCBID's self-proclaimed "operations and maintenance" expert, these facts are sufficient to create disputed issues of material fact sufficient to survive summary judgment on the MacHughs' negligence claim. Summary judgment was inappropriate and the trial

court's order dismissing the MacHughs' negligence claim should be reversed on review.

**D. Res Ipsa Loquitur Applies as a Matter of Law.**

The doctrine of res ipsa loquitur applies in this case because all the elements are met. As SCBID acknowledged in its Response, application of res ipsa loquitur requires that (1) the occurrence causing the injury generally does not happen in the absence of negligence, (2) the instrumentality that caused the injury was in the exclusive control of the defendant, and (3) the occurrence is not due to any voluntary action or contribution by the plaintiff. Pacheco v. Ames, 149 Wn.2d 431, 436, 69 P.3d 324 (2003).

No one has contended that the landslide was due to any voluntary action or contribution by the MacHughs and SCBID does not argue in its Response that this is not the type of occurrence that ordinarily occurs absent negligence; on the contrary, SCBID acknowledged the "multitude of other landslide and irrigation district cases" cited in the MacHughs' opening brief and that establish such occurrences ordinarily involve negligence by the irrigation district. *See Brief of Respondent, p. 50; See Brief of Appellants, p. 39-40.*

Thus, the parties agree that the first and third elements for application of the res ipsa loquitur doctrine are met. The only element that SCBID actually challenges in its Response is the second element, exclusive control.

Quoting extensively from Justice Madsen's concurrence in Curtis v. Lien, 169 Wn.2d 884, 239 P.3d 1078 (2010), SCBID contends that the exclusive control element is only met if a Plaintiff cannot inspect the instrumentality and thus cannot determine the specific act of negligence that caused the injury. *See Brief of Respondent, p. 47-48.*

Based on this interpretation of exclusive control, SCBID contends this element cannot be met because the Ringold Wasteway is still there and can be inspected by the MacHughs at any time. *Id., at 48.* As explained in the MacHughs opening brief, though, the seepage from the wasteway is the instrumentality – not the wasteway by itself – and the seepage with the portion of White Bluffs that came down in the landslide is no longer there. Thus, the MacHughs cannot inspect the instrumentality.

Instead, SCBID was in exclusive control of monitoring the wasteway and the seepage and thus in the best position to explain the mechanics of what actually happened; it just failed to do so. Inspecting the wasteway itself after the fact will not provide this information and thus Plaintiffs are unable to explain the mechanics of the landslide. This is exactly the type of scenario where *res ipsa loquitur* applies – where the Plaintiff cannot explain what happened and the Defendant is in the better position to do so. Robinson v. Cascade Hardwoods, Inc., 117 Wn. App. 552, 563, 72 P.3d 244 (2003) (citing Morner v. Union Pac. R.R., 31 Wn.2d 282, 291-292 (1948)).

Thus, under SCBID's interpretation of "exclusive control," this element is met because SCBID had exclusive control of – or access to,

since they did not actually collect anything – information regarding how the seepage caused the landslide. The doctrine should be applied and preserve the MacHughs' negligence claim on summary judgment. Pacheco, 149 Wn.2d at 441, 69 P.3d 324 (2003); Douglas v. Bussabarger, 73 Wn.2d 476, 487, 438 P.2d 829 (1968). Accordingly, the trial court's decision and order should be reversed.

**E. There Were Disputed Issues of Material Fact Regarding the MacHughs' Trespass Claim and Thus Summary Judgment Was Inappropriate.**

Finally, SCBID's Response reiterates the erroneous conclusion that only a negligence action can be maintained against an irrigation district and then argues a new, higher "intent" standard for intentional trespass.<sup>5</sup> Neither of these contentions are supported by authority and SCBID's argument is still ultimately based on disputed issues of material fact. Thus, summary judgment was inappropriate and the trial court's decision should be reversed on appeal.

The MacHughs' original brief explained how the Court's decision in Seal v. Naches-Selah Irrig. Dist., 51 Wn. App. 1, 751 P.2d 873 (1988), did not support the trial court's conclusion that only a negligence action may be maintained against an irrigation district and not claims for trespass. *Brief of Appellant*, p. 47. As detailed therein, the Court in Seals

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<sup>5</sup> SCBID's Response also argued Nuisance and Ultra-Hazardous Activity, but the MacHughs did not assign error to the trial court's decisions on these two issues and thus has not appealed them. Accordingly, they will not be addressed in this Reply.

denied the intentional trespass claim for lack of evidence, not because the claim was impermissible. *Id.*

In its Response, SCBID again asserts this unfounded argument that it can only be liable for negligence, not trespass – but without citing to or relying on Seal. Instead, SCBID provides a string cite to the following cases to support this proposition: Longmire v. Yelm Irrig. Dist., 114 Wn. 619, 195 P. 1014 (1921); see Dalton v. Selah Water Users' Ass'n, 67 Wn. 589, 122 P. 4 (1912); Robillard v. Selah-Moxee Irrig. Dist., 54 Wn.2d 582, 343 P.2d 565 (1959); cf., Clark v. Icicle Irrig. Dist., 72 Wn.2d 202, 432 P.2d 541 (1967). *See Brief of Respondent*, p. 59.

This string citation is from Holland v. Columbia Irrig. Dist., 75 Wn.2d 302, 305, 450 P.2d 488 (1969) – which does not discuss trespass and does not conclude that only a negligence claim or standard may be applied to an irrigation district. In addition, none of the cases above that were cited in Holland (and then again by SCBID) discuss trespass or hold that a trespass claim cannot be maintained against an irrigation district. Longmire, 114 Wn. 619; Dalton, 67 Wn. 589; Robillard, 54 Wn.2d 582; Clark, 72 Wn.2d 202.

Thus, SCBID has failed to provide any authority to support its oft repeated assertion that only negligence is actionable against an irrigation district. Instead, the Seal court specifically considered a claim for intentional trespass against an irrigation district and rejected the claim *for lack of evidence*, not because it could not be made. Seal, 51 Wn. App. at 6.

SCBID then argues, based on Seal, that its knowledge that the seepage was occurring is insufficient to establish the necessary intent element for a trespass claim. *See Brief of Respondent, p. 60.* Again, this misrepresents the Court's decision in Seal. The Court there did not conclude that the irrigation district's knowledge of seepage was insufficient to establish intent; it concluded Plaintiffs failed to establish intent to harm due to evidence of the district's efforts to prevent and alleviate seepage and thus prevent the harm. Seal, 51 Wn. App. at 6.

There is no such evidence of efforts to prevent or alleviate seepage by SCBID and thus the Court's analysis in Seal does not control here. What is more, the question of whether SCBID intended the harm that occurred, i.e. the landslide, is a question of fact for determination by a jury and not on summary judgment. CR 56(c); Renz, 114 Wn. App. at 623; Barker, 131 Wn. App. at 624.

On Response, SCBID contends there is no evidence that it intended to "increase" seepage, allow seepage at an "excessive" rate or "substantially raise" the groundwater table to cause the landslide. *Brief of Respondent, p. 61.* In other words, SCBID's argument is that the intent element should not be met because it did not do anything *more* to the situation it already knew was substantially certain to cause the 2006 landslide. However, SCBID fails to provide any authority requiring it to make a harmful situation worse in order to fulfill the intent requirement for a trespass claim and thus this contention is unfounded.

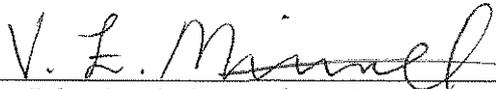
Instead, the MacHughs have met their burden of production by identifying extensive evidence in the record to create a disputed issue of material fact regarding whether SCBID knew continued operation of the Ringold Wasteway with the current insufficient drainage system would cause or was substantially certain to cause the landslide that damaged the MacHughs' property. CP 317, 330, 410, 414-423, 438-441, 445, 447, 451-453, 749, 1009, 1017, 1025. Summary judgment on the MacHughs' trespass claim was therefore inappropriate and the trial court's decision dismissing this claim should be reversed.

### III. CONCLUSION

For the reasons argued by the MacHughs in their opening brief and reiterated herein, the trial court's August 30, 2011 Order should be reversed on appeal and the matter remanded for entry of an Order denying SCBID's motion for summary judgment.

DATED this 31st day of October, 2012.

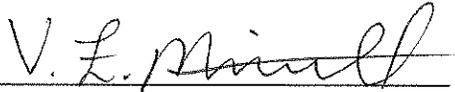
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CERTIFICATE OF SERVICE

I certify that on the 31<sup>st</sup> day of October, 2012, I caused a true and correct copy of this APPELLANTS' REPLY BRIEF to be served on the following in the manner indicated below:

Andrew C. Bohrsen, P.S. Law Office of Andrew C. Bohrsen, P.S. 505 W. Riverside Avenue, Suite 400 Spokane, WA 99201 Attorneys for South Columbia Basin Irrigation District	<input checked="" type="checkbox"/> HAND DELIVERY <input type="checkbox"/> U. S. MAIL <input type="checkbox"/> OVERNIGHT MAIL <input type="checkbox"/> VIA FACSIMILE
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Vicki L. Mitchell

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