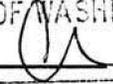


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STATE OF WASHINGTON

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No. 43825-9-II

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

GERALD G. RICHERT, et al.,

Plaintiffs/Respondents,

vs.

CITY OF TACOMA,

Defendant/Petitioner.

RESPONDENTS' BRIEF

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I. INTRODUCTION

The Respondents (hereinafter “Ranchers”) are families who have lived in the Skokomish Valley along its River for as much as nine generations. In some cases, their great grandfathers gave testimony in *Tacoma v. Funk*, Civil Case File No. 1651 (1920) (“*Funk*”).

II. PROCEDURAL POSTURE

The City of Tacoma’s Public Utility (“Utility”) is appealing both the denial of its motion for summary judgment and the granting of the Ranchers’ motion. See *Appellant’s Brief* (“*App. Brief*”), p. 4 citing to CP 87-92, 94-96. However, it has limited its briefing before this Court solely to its own motion based on *res judicata* law in violation of RAP 10.3(a)(6).¹

The Ranchers’ motion relied upon condemnation law. The primary argument, based on *Spokane v. Colby*, 16 Wash. 610, 48 P. 248 (1897) and its progeny, established that “additional damages” cannot be barred by a previous condemnation.² CP 2526-2527. Cases involving other federal dams with prior condemnations and current additional

¹ Its opening brief is only 30 pages long so there was ample space to address the Ranchers’ motion.

² Some of the other cases relied upon by Respondents were *Reichling v. Covington Lumber*, 57 Wash. 225, 106 Pac. 777 (1910); *Neitzel v. Spokane International Railway*, 65 Wash.100, 117 Pac. 864 (1911); and *Hinkley v. Seattle*, 74 Wash. 101, 132 Pac. 855 (1913).

damaging flows that were deemed outside the earlier condemnations were also discussed. CP 2525-2527.³

The Utility has wholly failed to carry its burden. The Ranchers' summary judgment against the Utility should be affirmed by this Court since it need not consider argument not supported by any reference to the record or any citation to relevant authority. *See Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 809, 828 P.2d 549 (1992).

Although Respondents will not be opening up their motion on appeal, their Response to the Utility's *res judicata* motion is part of the record on appeal. CP 680. Some of the facts with regard to the *Funk* proceeding are responsive to the Utility's *res judicata* arguments and will be reiterated below.⁴ Finally, the Utility may not open up this area of law on Reply. *See In re Marriage of Sacco*, 114 Wn.2d 1, 5, 784 P.2d 1266 (1990).

³ The cases relied upon included *Richard v. U.S.*, 282 F.2d 901 (Ct. Cl. 1960); *Tri-State Materials Corp., v. U.S.*, 213 Ct. Cl. 1, 550 F.2d 1 (1977).

⁴ The Utility has also apparently abandoned a number of its arguments on appeal with regard to its own *res judicata* motion by failing to revive them at this level. RAP 10.3 (a)(6). It argued below that the words "fee simple" as applied to a water right conveyed the land as well (CP 2933-2934), it discussed torts that were in the Ranchers' Amended Complaint (CP 2934-2937) and that it could not be a "tortfeasor." CP 2941-2942. It claimed that the Ranchers had to somehow move to re-open its ninety year old *Funk* condemnation relying upon *Pelley v. King County*, 63 Wn. App. 638, 821 P.2d 536 (1991). CP 2941-2944. Because these arguments have not been pursued by the Utility on appeal, they are waived and cannot be revived on Reply. *See . In re Marriage of Sacco*, 114 Wn.2d 1, 5, 784 P.2d 1266.

III. COUNTER STATEMENT OF THE CASE

A. The Current Conditions, Channel Capacity and Flows.

The first figure that the Utility offers the Court is not in the record. *See App. Brief*, p. 5, Figure 1. The citation it provides for Figure 1 is to CP 401 and 2569. It appears that the Utility has combined the two maps after deleting and adding certain features on them. Lake Cushman and the location of the Utility's two dams have been deleted. The Skokomish Indian Reservation has been added which tends to obscure the location of the Main Stem of the Skokomish River. *Compare* CP 401 and 2569 with Figure 1. The Main Stem of the river is clearer on CP 401. It is important to note that the current "lower" North Fork of the river starts near the boxed number "D2" and it winds its way down to the Main Stem where the Ranchers live and attempt to farm and ranch. The Utility admits in its brief that from its "Project" to the "Mainstem" is a distance of about fifteen miles. *See App. Brief*, p. 7.⁵

The Skokomish Valley where the Main Stem is located and the Ranchers live and work is approximately nine miles long and one mile

⁵ The second figure that the Utility offers the Court has had a key added to the bottom of the page and the words "Boundary of Floodway" placed onto the document. *See App. Brief*, p.7, Figure 2 *citing to* CP 2718, 2754. The citations are to two maps created by the Utility which were in the declaration of Maureen Barnes. CP 2709-2716. It made an argument at the trial level, which it has not revived here, that the properties were in the 1998 FEMA floodway and therefore in the "channel." The argument was pursued below through another declarant, Mr. Kammereck (CP 2536-2545). The Ranchers successfully argued that the analysis was deeply flawed because it ignored the condition of the river in the 1920s. CP 685.

across. The River flows on its north side. The Valley elevation falls from the north wall to the south wall by fourteen feet which is the equivalent of dropping a story and a half. *See Declaration of Derek B. Booth, Ph.D. P.E., P.G. In Support of Remand ("Booth Fed. Decl. ")*, ¶ 6.⁶ Because of this geometry, floodwaters escaping the River spread out onto the land and raise the groundwater table. As is attested to by one of the Ranchers, Paul Hunter, they are witnessing more flooding and access problems and changes to their land such that it is too wet to support hay, crops and trees. CP 591-591. Their septic systems are beginning to fail. *Id.* Cattle sink into what formerly was pasture and farm equipment cannot access the fields due to the heightened groundwater table. *Id.* The farming and ranching heritage that the Ranchers have so long preserved is rapidly disappearing.

After the Utility removed all the flow of the North Fork in the 1920s, gravels began to build up in the Main Stem. It settled a lawsuit filed by the Skokomish Tribe, in part, for damages from the aggradation and consequent flooding on the Main Stem. CP 738-798. Five million dollars was paid in addition to the Tribe receiving a percentage of the proceeds from the Cushman dam. CP 3009. The Utility later attempted to

⁶ This declaration was before the trial court, listed in the Order and a photographic exhibit from it was used in oral argument. The Ranchers have filed a supplemental designation with the Mason County Superior Court to have the declaration sent to the Court.

obtain insurance proceeds for this settlement as is set out in an unpublished case. *See Indemnity Insurance Co. of North America v. City of Tacoma*, 158 Wn. App. 1022 (2010). In its briefing, it vigorously and repeatedly argued to Division One that the aggradation was an unknown at the time of the *Funk* condemnation. CP 469. (“Damage to riparian rights is so fundamentally different than aggradation-related real property damage that the “expect some expect all” rule is inapplicable.”) *See also* CP 627-637 (excerpts from brief to Division One). Before this Court, the Utility is arguing the opposite side of the coin. It should be estopped from doing so. *Miller v. Campbell*, 164 Wn.2d 529, 192 P.3d 352 (2008).

No one involved in the *Funk* proceedings could have foreseen the creation of aggradation in the River or the passing of the Endangered Species Act (“ESA”) that would require putting flows back in the channel. The aggradation is unnatural as is the present day channel. The Utility was well aware of the changes to the natural capacity of the channel before it opened its newly installed jet valve.⁷ It admitted in its briefing to the Ninth Circuit in 2006 that the new flows of 240 cfs would cause overbank flooding in the Valley. CP 715-736, n. 20. In the natural state,

⁷ A photograph of the jet valve is found at CP 881. It was opened up in a ceremony on March 7, 2008 that included the Skokomish Tribe. To view the event, a website was provided to the trial court (CP 3720) and it is: <http://www.youtube.com/watch?v=11n1mDY4nY8&feature=related>. The jet valve had to be specially made in order to thrust the enormous flows into the River. It is not a needle nose release that has been in existence throughout the life of the dam.

the channel's capacity was 18,000 cfs. CP 334. In October 2011, the U.S. Army Corps of Engineers did a study entitled: "Skokomish River Basin Flooding and Sedimentation Baseline" ("2011 Corps Study"). The Utility selectively quotes from it. Although it relates that the Valley has "a long history of flooding," it goes on to state "the problem has steadily grown worse." CP 2585. In 1941, it was reported that there were 29 floods in 29 years between 1912 and 1941. *Id.* Floods now "occur multiple times a year." *Id.* The increased flooding is due to the accumulation of gravel in the channel. *Id.* The channel capacity at mile five of the River (measured from the mouth therefore about mid-valley) is estimated to have declined from "13,000 cfs in 1941 to 11,000 cfs in 1969, to only 4,000 cfs today." CP 2597. The Utility, in consultation with USGS, recently found that the Main Stem is at a "bank full" condition at only 2,460 cfs. CP 2477. This fact formed the basis for it to cease adding flows to the River to mimic storms and to try to flush the gravels out of the channel under its FERC license. CP 2472-2486. In its Order of November 3, 2011,⁸ FERC stated that "it is not staff's intent to cause flooding." CP 2483. The Utility repeatedly asserts throughout its brief that it has "all" the riparian rights

⁸ Because of this Order, it made no sense to pursue the appeal of FERC's earlier Order to the U.S. Court of Appeals for the Ninth Circuit which decision was unrelated to this litigation contrary to the Utility's linking the two in its footnote number three.

with regard to the Ranchers' properties.⁹ Their properties are primarily on the Main Stem of the Skokomish River and the Utility did not condemn all riparian rights on the Main Stem. It is an irrefutable fact, in accordance with its Petition for Condemnation, that the Utility only condemned a portion of the riparian rights that related to the removal of the flows of the North Fork. CP 3320-3331.

The Utility also asserts that it has fluctuated the flows in the River over time pointing to gages that measure river flows. *See App. Brief*, pp. 11-12, Figure 3. Figure 3 was submitted below in the Utility's Reply brief. CP 654. The Ranchers did not have the opportunity to comment upon it. The Utility's statement is a blatant misrepresentation and Figure 3 has been provided in black and white, so it is misleading.¹⁰

The flows that are in the North Fork of the River from the Utility's Dam No. 2 to the Main Stem of the River are measured by gage number 12059500. The location of that gage is fifteen miles from Dam No. 2. *See App. Brief*, p. 7. It is telling that the Utility does not provide the discharges that are directly below Dam No. 2. It appears to have forgotten that information was submitted at the trial court level which included the location of the gages and what the historic flows were below Dam No. 2.

⁹ *See App. Brief*, pp. 1, 2, 4, 14, 20, 21, 24, 29.

¹⁰ This cannot be a simple error by a user not familiar with the website. The Utility helps pay for this website.

The gage locations can be seen on the gage map provided in the 2011 Corps Study. CP 2581. There are five active gages (CP 2579), which are indicated on the map. The gage that is closest to its Dam No. 2 is number 12058800. CP 2581. The gage at the Main Stem, number 12059500, indicates the flows in the river which come from the immense amount of rain in this area, groundwater and minor tributaries that join the Skokomish River along that fifteen mile route.

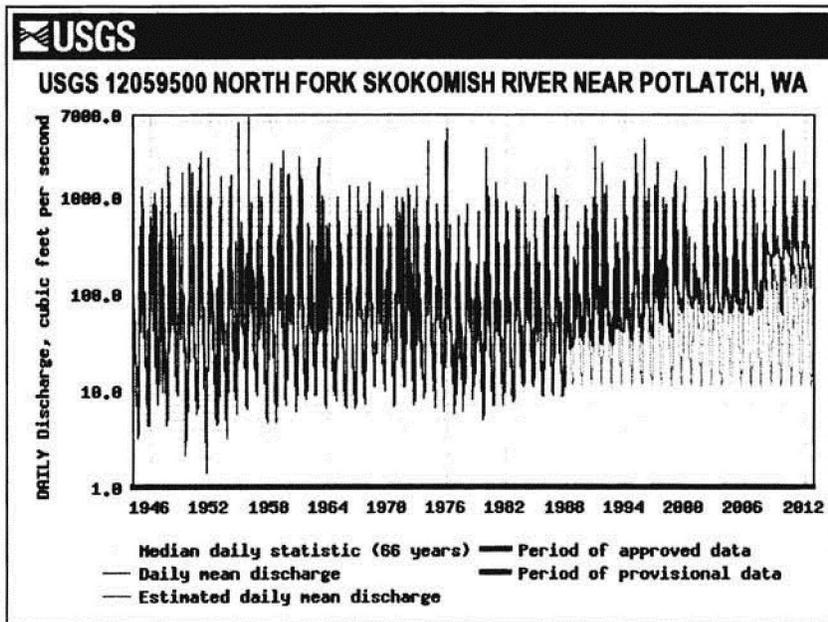
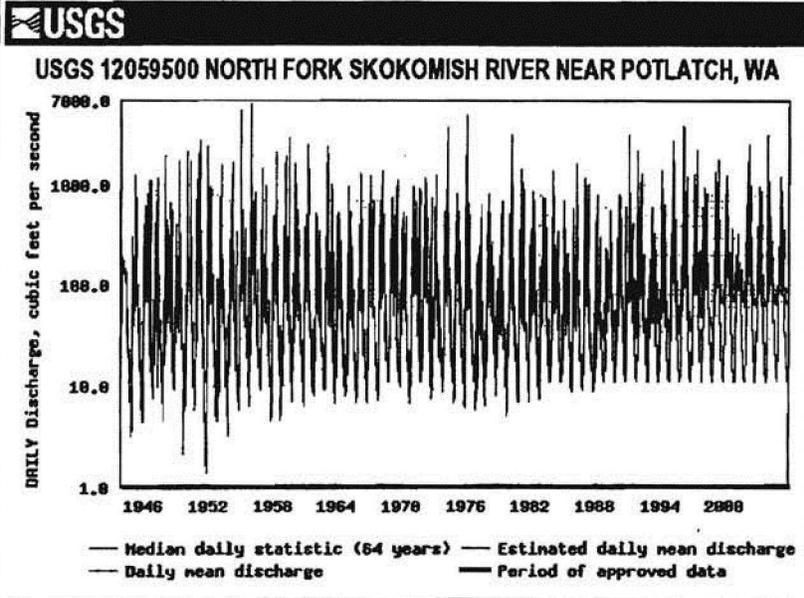
Stetson Engineers, referencing the work done by FERC for environmental analysis, describes in a section of its report entitled “Overview of Historical North Fork Flows” what the flows have been out of Dam No. 2. It states that prior to 1988 (when 30 cfs was released) “North Fork discharges below Dam No.2 averaged about 10 cfs, a result of seepage and tributary inflow.” CP 316 *citing* FERC’s 1995 DEIS, *accord* CP 2583 [2011 Corps Study] (“Between creation of the dam and 1988, very small base flows were released...”). It is more than incredible that the Utility ignores these reports and appears not to understand what the USGS gages measure. From a practical point of view, it cannot have “missed” that it did not add flows to the North Fork until 1988.

For Figure 3, the Utility directs the reader, via footnote two on page 12, to the USGS website, indicating that it recalled flows through 2012. If that is true, then the years “2006” and “2012” have been taken

off of the figure. The original graph is presented in color, not black and white. The “daily mean discharge” is recorded in blue while the “median daily statistic” is shown in orange. If presented in black and white, the flows look uniform because the orange line becomes black. In color, there are obvious and drastic changes to the base flow of the River from the flows the Utility added in 1988, 1998 and in 2008.¹¹ The Utility’s figure 3 is contrasted on the next page with the original colored version taken from the website it references.

Looking at the axis with the cubic feet per second, it is obvious that the river’s flows were at approximately 10 cfs from 1946 to 1988. The base flow “jumps up” in 1988 and again in 1998. After 2008, the base flow is over 250 cfs and will be above that sum for the rest of the life of the license which is for over forty years. Using the colored original graph, it is clear that at the Main Stem, where the Ranchers have lived and worked for generations, a drastic change has taken place. The Utility’s submission of a black and white copy of the original colored graph is misleading with regard to the base flows and with regard to what the graph is measuring.

¹¹ Respondents submit the colored original in this brief for illustrative purposes.



B. The Flows Pre-*Funk* and Post-*Funk*.

On his first site visit to the Valley in June of 2010, our expert, Dr. Booth,¹² noted the pasturelands were saturated at the surface with ponding water and he took a photograph of the conditions. *See Booth Fed. Decl.*, ¶ 5, **Exhibit 2**. He testifies that “even without much engineering analysis, one can see that the Valley is being adversely affected by the extremely high water table.” *Id.* At that time, he observed that the Valley floor is either wetlands or in the process of becoming emergent wetlands. *Id.* He explained that the soil, when it is continuously wet, becomes anaerobic (lacking in oxygen). *Id.* Over time, this changes the chemistry of the soils and they become wetlandmuck, which is “generally an irreversible change, (regardless of future hydrologic conditions) that precludes their return back into agricultural soils.” *See. Booth Fed. Decl.*, ¶ 8.

This was also true in the recent U.S. Supreme Court decision where it found a taking occurred when a dam owner changed the flows coming out of its dam for a period of six years. *See Arkansas Game and Fish Comm. v. U.S.*, 133 S. Ct. 511 (2012). Trees were damaged because the flooding “reduced the oxygen level in the soil” and the destruction of

¹² Dr. Booth is a nationally known expert in salmon recovery and stream restoration. He teaches at the University of Washington and has been an instructor for the Corps of Engineers and the Environmental Protection Agency. He was on our Governor’s Salmon Recovery team, a panel member for Portland on the Endangered Species Act and is the Editor of an international scientific journal, *Quaternary Research*.

the trees led to the “invasion of undesirable plant species.” *Arkansas Game*, 133 S. Ct. 517.

Dr. Booth reviewed engineering documents entered in *Funk* and testified that the North Fork contributed approximately one third of the flows in the River. CP 2500. He prepared three profiles of the River’s channel—“pre-dam,” “post dam, pre-2008” and “present day,” which are helpful in understanding the changes that have occurred in the River since *Funk*. CP 2504. The “pre-dam” illustration is the “natural” condition and reveals a modest amount of sands and gravels at the bottom of the channel. Groundwater in the area would flow to the River’s channel and then eventually empty out into Hood Canal. *Id.*

After *Funk*, the amount of water in the channel lessened at all stages—summertime low flow, wintertime baseflow, and stormflows. CP 2501. The groundwater levels or what was termed “subirrigation” lowered, the River would not flood annually and water available for animal stocks and domestic use diminished. *Id.* The middle illustration shows the “post-dam” condition, before any additional flows were added under the new regime beginning in 2008. CP 2504. The water table throughout the Valley had begun to rise because flows could not escape the Valley via the channel. CP 2501.

Dr. Booth's illustration at the bottom of the page, (CP 2504) shows the "present day" condition, reflecting continuing aggradation of sediment in the channel with overbank flooding heightening the groundwater table. CP 2501-2502. *Id.* He testifies that the damages to the land today are different from, and additional to, the damages in the "pre-dam" condition at the time of *Funk*. *Id.*

C. The *Funk* Condemnation.

The Ranchers submitted the entire *Funk* record below. CP 1296-2486. The property owner defendants in the *Funk* case can be divided, as Tacoma did in its Petition for Condemnation "Petition" (CP 1348-1393), into three groups. The first group included those properties that would be inundated by the expanded lake behind the dam. CP 3286-3300. The second group included those properties that would be the site of the tunnel, canal and power plant and electrical lines. CP 3301-3319. The third group, which is of concern in this case, included those agricultural properties which "abut upon and lie adjacent to said river" downstream of the dam. CP 3320-3330. The introductory paragraph stated that "a portion" of the waters of the North Fork would be diverted and acquired and that the "volume of water in said river below the dam will be diminished." CP 3320. The Petition was clear that the third group had only their riparian rights taken. There were two trials in *Funk*. One

involved the fee simple lands of the property owners before Judge Wright and the other dealt with the riparian rights and was before Judge Wilson.

The owners of agricultural property filed a Statement and Cross Complaint (CP 1590-1598) and other agricultural property owners petitioned to intervene. CP 1601-1612. The Utility argues that these pleadings somehow set out the scope of damages despite its Petition, the Decrees and the Jury Instructions.¹³

The Utility submitted a jury instruction as follows: “they are entitled to be compensated for any damage they may sustain to their lands by the reason of the taking from them of that part of the flow of the stream which the evidence shows is to be diverted. Such damages, if they are found by you, will be . . . consequent upon the loss of the use of the diverted water.” CP 1863. Instructions marked “Petitioners 1” and “Petitioners 2” (CP 1903-1905) state that the measure of damages is the loss of fair market value due to the diversion of waters and enumerate the uses that can be lost, such as drinking water, the watering of domestic animals, and the loss of articles of soil as may be left on the land at time of flood. The Utility’s instruction then describes the right to the normal groundwater level and the loss of that explaining: “by reason of the flow

¹³ In *U.S. v. 60.22 Acres of Land Situated in Klickitat County, State of Washington*, 638 F.2d 1176 (1980), the court stated it gives effect to the intention of the court, not the parties. It examined the final judgment and jury instructions.

of the stream making that land more tillable or productive because some of the water of the stream makes its way from the stream underneath the surface.”

In the filed instruction number one (CP 2010), the jury was advised that: “The city of Tacoma seeks in this proceeding to condemn and take for public use certain water rights and riparian rights along the Skokomish river in this county.” It also advised that the Utility’s project would “divert the waters accustomed to flow in the north fork of the Skokomish [R]iver so that such waters will cease to flow over or past the lands involved in this proceeding.” Filed instruction number two advised that the measure of damages was the “loss or diminution of the fair market value of the land through or past which the stream flows consequent upon the loss of the use of the diverted waters.” CP 2011-2012. In filed instruction number six, (CP 2013) a description is given of groundwater but the remainder of the instruction is missing. The next instruction, number eight, addresses the benefits of yearly flooding and states that if the “alluvial deposits” are lost and it makes the lands less “useful for agricultural purposes” that compensation for those damages is proper. CP 2013-2014.

Moving to the single page instructions, number three (CP 1897) also states the possible loss of “alluvial deposits from the Skokomish

River in its current state” is a damage component. In number eight (CP 1902), the natural groundwater is described as a property right. It states that if the erection of the dam and the removal of any portion of the waters create a “lowering of the waterline of percolating waters in the soil” which depreciates the value of the lands, damages should be allowed. All of the instructions in the *Funk* file are consistent as to what the jury was asked to evaluate by way of damages: the loss of water, the loss of groundwater and the loss of alluvial deposits.

In the riparian rights trial before Judge Wilson, the jury verdicts describe in “the riparian rights and water rights appertaining and appurtenant thereto,” or “the water rights and easements appertaining and appurtenant thereto.” CP 1789-1794; 1796-1799; 1863-1876; 1881-1885; 1918-1920; 1921-1925; 1927-1928; 1936-1938; 1942-1943; 1946. The results of these jury verdicts are best summarized in the September 8, 1923 Decree of Appropriation. CP 2406-2415. As set forth in the decree, Tacoma petitioned for “a decree of appropriation of the waters, water rights, riparian rights, easements and privileges mentioned in the petition on file using the words herein and appertaining and appurtenant to the lands, real estate and premises hereinafter described. . .” The Court described the grant made to Tacoma as: “waters, water rights, riparian rights, easements and privileges....appertaining and appurtenant to the

following described real estate, lands and premises of the defendants....” CP 2409; 2435. There was no mention of taking the “appurtenant” properties in fee simple. As the Utility concedes, the riparian property owners were only paid \$7.96 per acre while the fee simple owners whose lands were taken were paid \$123.56 an acre. *See App. Brief*, p. 7, CP 2490.

The jury instructions signed by Judge Wright and filed (CP 2020-2033) state that the purpose of the proceedings was for the “condemning and appropriating, among others, the property of the [Putnam’s].” CP 2021. Filed instruction three (CP 2023) makes clear that the measure of compensation is the “fair cash value” in an arm’s length transaction. From filed instruction number nine (CP 2029), it is obvious that this jury viewed the properties to be taken in fee simple. In contrast with the filed jury instructions before Judge Wilson, the instructions before Judge Wright did not refer to loss of water, lowering of the groundwater table or loss of alluvial deposits.

In the final Decree of Appropriation dated September 8, 1923, Tacoma acquired both the lands in fee simple and the water rights in fee simple of all of the *Funk* defendants. CP 2428-2435. The language referring to these properties is very different from the riparian Decree. It is ordered and decreed that the land is “appropriated and granted to and

vested in fee simple” and the “lands, real estate, premises, water rights, easements, privileges and property, including the right to divert the North Fork of the Skokomish River” is transferred. The final paragraph (CP 2435) in the Order transfers the fee simple title of other lands which were appropriated by Tacoma through stipulations. Similarly, those lands were transferred for more than \$7.96 an acre.

IV. ARGUMENT

A. **Standard of Review for Summary Judgment and *Res Judicata*.**

The Ranchers agree that the standard of review for the Utility’s summary judgment motion is *de novo*. See *Mike M. Johnson, Inc., v. County of Spokane*, 150 Wn.2d 375, 386 78 P.3d 161 (2003). Whether *res judicata* bars the Ranchers’ current law suit is a legal issue for the Court to decide. All factual inferences must be taken in a light most favorable to the Ranchers as the non-moving party. *Id.*

Res Judicata is an affirmative defense and the burden of proof is on the Utility. See *Meder v. CCME Corp.*, 7 Wn. App. 801, 807, 502 P.2d 1252 (1972). It must prove all four prongs of the inquiry which has been the case since prior to the *Funk* condemnation trial. See *Northern Pacific Railroad v. Snohomish Cty.*, 101 Wash. 686, 688, 172 P. 878 (1918). The case must involve (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 was made in the prior adjudication. *Id.*

The Utility cannot carry its burden as to prongs one and two and, for some properties, prong three. For prong two, claims are only identical if (1) prosecution of the later action would impair the rights established in the first earlier action, (2) the evidence in both actions is substantially the same, (3) infringement of the same right is alleged in both actions, and (4) the actions set out the same nucleus of facts. *See Rains v. State*, 100 Wn.2d 660, 664, 674 P.2d 165 (1983) (“*Rains Factors*”). The Utility fails to even address the *Rains Factors*.

B. *Res Judicata* Cannot Attach to the *Funk* Decision.

In the opening section of its *res judicata* argument, the Utility states that the doctrine is to protect the finality of judgments, citing to *Hayes v. Seattle*, 131 Wn.2d 706, 934 P.2d 1179 (1997). *See App. Brief*, p. 17. In *Hayes*, the doctrine was not applied because the two lawsuits did not involve the same subject matter although they involved the same facts. A developer successfully appealed a City Council decision and later sued for attorneys’ fees and costs under 42 U.S.C. Sections 1983 and 1988 due to the City Council’s actions. The fact that the two actions could have been combined was not persuasive. *See Hayes*, 131 Wn.2d at 714 *citing Schoenman v. New York Life*, 106 Wn.2d 855, 860, 726 P.2d 1 (1986).

Hayes does not support the Utility's *res judicata* arguments before this Court but it emphasizes that there is no commonality of subject matter here. The river channel has diminished over nine decades, the ESA was passed and flows have to be returned to the river. The *Funk* condemnation action was for riparian rights only related to the diminishing of the flows of the North Fork. Now, the Ranchers' properties are being flooded and taken in their entirety. The subject matter of the current lawsuit covers the entire fee simple properties of the Ranchers. They allege trespass, nuisance, riparian violations and inverse condemnation. CP 3200-3213. The *Funk* condemnation and the Ranchers' case do not embrace the same subject matter whatsoever.

Next, the Utility cites two cases that are supposedly in support of the assertion that Washington has a strong policy in favor of enforcing final judgments. *See App. Brief*, p. 17 citing *Stanley v. Cole*, 157 Wn. App. 873, 239 P.3d 611 (2010); *Lane v. Brown*, 81 Wn. App. 102, 912 P.2d 1040 (1996). Both cases involved CR 60(b)(1) motions based on the incompetence of attorneys. *See Stanley*, 157 Wn. App. at 613-614 (attorney fails to attend mandatory arbitration due to family problems); *Lane*, 81 Wn. App. at 104 (attorneys fail to attend hearing and summary judgment dismissal will not be vacated). These cases are not relevant to the Utility's motion.

Similarly, it uses two land use cases involving untimely actions to try to establish that “finality is particularly critical to an owner’s ability to safely proceed with the use and development of his or her property rights.” *See App. Brief*, p. 17 citing *Skamania Cty. v. Columbia River Gorge Comm.*, 144 Wn.2d 30, 26 P.3d 241 (2001). *Deschenes v. King Cty.*, 83 Wn.2d 714, 521 P.2d 1181 (1974). In both cases, the property owners’ rights to build on their property—one a home and out buildings and the other a dog kennel—were upheld. The Ranchers take no issue with these cases but they do not support the Utility’s arguments. The next case cited is off-point as well. *See App. Brief*, p. 17 citing *Arizona v. California*, 460 U.S. 605, 620 (1983).¹⁴

The Utility also asserts in this introductory section that only the second prong of *res judicata* is at issue here. *See App. Brief*, p. 18. This assertion is not true. The Utility itself addressed all four prongs in its briefing at the trial level. CP 2930, 2931. The Ranchers’ case lacks sameness with *Funk* in its subject matter and causes of action. Most of the Bourgault properties were not involved in the *Funk* condemnation according to the Utility’s employee so as to them, the third prong also fails. CP 2711-2715.

¹⁴ *Arizona* is one of the last cases in a well-known “consumptive” water rights fight involving the Colorado River, several states and an Indian Tribe. *See Arizona*, 460 U.S. at 605. The battle was over this “water-scarce part of the country.” *Id.* Ironically, the issues here involve too much water, not a scarcity of it.

The Utility ends its introductory section by citing to a number of *res judicata* cases but does not analyze any of them. *See App. Brief*, pp. 17, 18 citing *Williams v. Leone & Keeble, Inc.*, 171 Wn.2d 726, 730, 254 P.3d 818 (2011); *Loveridge v. Fred Meyer, Inc.*, 125 Wn.2d 759, 763 P.2d 898 (1995); *Kuhlman v. Thomas*, 78 Wn. App. 115, 122, 897 P.2d 365 (1995) (citing *Rains v. State*, 100 Wn.2d 660, 664 (1983)). The failure to discuss the cases perhaps is explained by the fact that in two of them, *res judicata* was not established (*Williams, Loveridge*) and in the other two where it was (*Kuhlman, Rains*), the facts were so egregious that they highlight the inappropriateness of the Utility's *res judicata* argument before this Court.

In *Williams*, a Washington worker was injured in Idaho and accepted benefits from the Idaho State Insurance Fund, which, under Idaho law, precludes a tort action. *See Williams*, 171 Wn.2d at 734. The worker brought a claim against a third party Washington general contractor for negligence. *See Williams*, 171 Wn.2d at 733. Under Washington's Insurance Act, the action was allowed and so *res judicata* did not apply. *Id.* This case does not advance the Utility's position.

Loveridge involved a sexual harassment complaint file with the EEOC and resolved by that agency with the employer, Fred Meyer, Inc. *See Loveridge*, 125 Wn.2d at 762. Ms. Loveridge filed a separate lawsuit

against Fred Meyer, Inc. *Id.* At the trial level, Fred Meyer, Inc. successfully argued that her lawsuit was barred by the EEOC settlement and *res judicata* applied. *Loveridge*, 125 Wn.2d at 763. The Supreme Court disagreed and explained that the purpose of *res judicata* is to “curtail multiplicity of actions and harassment in the courts.” *Id.* This case does not advance the Utility’s position and certainly there is no multiplicity or harassment occurring through the Ranchers’ lawsuit filed ninety years after *Funk*.

In the next case, Mr. Kuhlman worked for the Seattle Housing Authority (“SHA”) and was disciplined for harassing a female employee. *See Kuhlman*, 78 Wn. App. at 117-118. He claimed in *Kuhlman I* that the SHA’s procedures violated his due process rights and breached his contract. *Id.* In *Kuhlman II*, he sued SHA officers and employees for violation of his due process rights and for defamation. *Id.* Before a motion to consolidate these two cases was heard, he voluntarily dismissed *Kuhlman II*. Several months later, he served the defendants who had been in *Kuhlman II* with the same lawsuit entitled *Kuhlman III*. Meanwhile, *Kuhlman I* was entirely dismissed on summary judgment with a finding there had been no violations of Kuhlman’s civil rights. *Id.* *Kuhlman III* was later dismissed on the basis of *res judicata* because of the summary judgment decision. *See Kuhlman*, 78 Wn. App. at 119. One of the

primary facts in the triumvirate of Kuhlman's cases was that the three Complaints were virtually identical. *Id.* The *Kuhlman* case emphasizes that the Ranchers' Amended Complaint (CP3200-3219) and the Petition in *Funk* (CP 3285-3331) do not have the same subject matter nor do they have the same claims therefore *res judicata* cannot attach.

Rains also involved an alleged violation of constitutional rights, this time by the State's Public Disclosure Commission. *See Rains*, 100 Wn.2d at 662. The federal court concluded that members of the Commission and the Attorney General were immune from suit. *Id.* The plaintiff then filed a state court lawsuit against the State and the Commission on the same basis. The State apparently took the lawsuit as a form of harassment and countersued the defendant and his attorney for malicious prosecution. *Id.* The state lawsuit was dismissed based on the doctrine of *res judicata*. *See Rains*, 100 Wn.2d at 663. The subject matter of both lawsuits was held to be identical as were the causes of action. *See Rains*, 100 Wn.2d at 663. The *Rains Factors* were applied and it was found that the state action would impair the dismissal that the Commission received in federal court, the evidence for both actions was the same, the same rights were infringed and the actions rose out of the same nucleus of facts.

The Utility ignores the *Rains Factors* because the world has changed since 1920. It did not receive a flooding and groundwater heightening easement over the entire Valley in *Funk*. The evidence for the Ranchers' case, the rights infringed and the nucleus of facts are all very different. The cases cited by the Utility in the opening section of its *res judicata* discussion support the affirmation of the dismissal of its motion on appeal.

In a case where a flooding easement was condemned and, later, the flow regime differed from the evidence presented at the condemnation trial, the court held *res judicata* did not apply. See *Narramore v. U.S.*, 30 Fed. Cl. 383 (1994). At the condemnation, the government claimed it would adhere to a "Schedule A" for flow releases and it was assumed they would not create any problems. *Narramore*, 30 Fed. Cl. at 385. The court analyzed the transcript and jury instructions questioning whether there was an additional taking due to a new transaction or event. *Narramore*, 30 Fed. Cl. at 388. Using an analysis similar to the *Rains Factors*, the court held that the abandonment of Schedule A did not fall within the scope of the existing easement and the landowners could pursue their claim for an additional taking. *Narramore*, 30 Fed. Cl. at 391.

The Utility's position is apparently that the current flooding conditions and damages due to the ever heightening groundwater on the

Ranchers' lands were already paid for in the *Funk* condemnation. It alleges that if it needs to put the flows back into the channel for the operation of the dam, it has immunity under *Funk*. This is an untenable position because a municipality only gets what it pays for in a condemnation. The price for fee simple property per acre was \$123.56 and the price for taking the riparian rights was \$7.96 an acre. If it needed, for the operation of the dam, to triple the size of the current channel and own more farming land in fee simple, the *Funk* condemnation, could not be used to perform such a land grab.

1. **The *Funk* condemnation did not reach the “appurtenant” fee simple properties and it conveyed only a usufruct interest in the flows of the North Fork**

The Utility makes assumptions here which are in error. It continuously asserts that purchasing the right to take the flows out of the North Fork somehow stripped the Ranchers of any riparian rights whatsoever on the entire Skokomish River. Again, it is important to note that before and after *Funk* the ranching families continued to live and work along the Main Stem of the River. They had and have a right not to be flooded and expect the channel to function as a natural one. The aggradation unnaturally changed the capacity of the Main Stem and then enormous flows were introduced. CP 3232-3233. In a case factually similar, condemnation decrees granting easements to a dam owner where a

stream channel had aggraded were held not to bar a new lawsuit. *See Gossner v. Utah Power and Light*, 612 P.2d 337 (Utah 1980). The volume of the released water was limited to the carrying capacity of the natural channel. *See Gossner*, 612 P.2d at 340.

The Utility also hinges its argument on its own view that in condemning riparian rights related to the flows of the North Fork, it has immunity and can flood the fee simple property that the riparian rights are attached to raising the groundwater level and destroying that property. This argument ignores the words in the Decree it quotes which state that the riparian rights are “appertaining and appurtenant to [plaintiffs] lands, real estate and premises.” *See App Brief*, p. 20 *quoting* A-44. The riparian rights do not include the fee simple property as the word “appurtenant” is defined as:

Belonging to; accessory or incident to; adjunct, appended or annexed to; answering to accessorium in civil law.... Being employed in leases for the purpose of including any easements or servitudes used or enjoyed with the demised premises... A thing is “appurtenant” to something else only when it stands in relation of an incident to a principal, and is necessarily connected with the use and enjoyment of the later.... A thing is deemed to be incidental or appurtenant to land when it is by right used with the land for its benefit, as in the case of a way or water-course, or a passage for light, air, or heat from or across the land of another.... Land cannot be appurtenant to land.... except in case of land under water.

See Black's Law Dictionary (Revised 4th Edition), p. 133 (citations omitted).

Its stance also ignores the case the Utility cites which explains that riparian rights are separate from real property rights in condemnation cases. *See App. Brief*, p. 18 citing *In Re Clinton Water Dist.*, 36 Wn.2d 284, 286, 218 P.2d 309 (1950). *Clinton* held that condemning just the riparian rights to a lake does not adequately compensate a landowner for other valuable property rights taken. There, a water district was attempting to condemn waters of a lake for a domestic water supply. *See Clinton*, 36 Wn.2d at 285. The court explained that when the owners acquired title to the center of the lake, “riparian rights attached and became appurtenant thereto or incidents of their ownership.” *See Clinton*, 36 Wn.2d at 287 (*emphasis added*). If the water district condemned the riparian rights, then the board of health would forbid fishing, boating, bathing and the watering of domestic animals. *See Clinton*, 36 Wn.2d at 288. The land could no longer be used for raising loganberries and so the restrictions were seen as impairing the value of “property for agricultural and other uses.” *See Clinton*, 36 Wn.2d at 289. The court held that the water district had to pay not just for the riparian rights but also for “damage to the property and property rights” of the landowners. *Id.*

The *Clinton* case supports the basic proposition in condemnation law that you must pay for every “stick” of the bundle of rights that you are taking. Paying for the riparian rights in *Clinton* was not enough. The water district had to also pay for the impacts to the agricultural use of the land. In *Funk*, the Utility only paid \$7.96 an acre for the riparian rights of the Ranchers’ predecessors and the right taken related only to the removal of the flows of the North Fork. The Utility did not pay for altering the channel, adding flows back into the river causing flooding in the Main Stem which is severely damaging the Ranchers’ agricultural interests and will continue to do so for the life of the license.

The Utility next partially quotes from *Crook v. Hewitt*, 4 Wash. 749, 749-750, 31 P. 28 (1892), that a riparian has the right to the “natural flow” and that the water is “wont to run, without diminution or alteration.”¹⁵ The Utility ignores the word “alteration” in its quote. The base river flows have been forever disturbed by the Utility’s addition of damaging flows. CP 3232-3323; see Figure 3 in color *supra*. It also does not quote the next sentence which states that: “No proprietor has a right to use the water to the prejudice of other proprietors above or below him.” *Crook*, 4 Wash. at 749-750. The Utility pretends that the Ranchers are not

¹⁵ This case involves Wood’s Creek which is the subject of *Drainage District No. 2 v. Everett*, 171 Wash. 471, 18 P.2d. 53 (1933). that the Utility relies upon in error. The creek, unlike the Skokomish River, had a natural channel that the flows could be placed back into.

proprietors on the Main Stem of the River. It has not delivered “natural flow” to a “natural river” as was being described in the 1892 *Crook* case. The “natural” Skokomish River that existed at the time of the *Funk* condemnation is gone. The Utility took all the flows of the North Fork and unnatural aggradation occurred. Its re-introduction is of flows that the channel cannot handle. *Id.* Under *Crook*, the Utility is altering the flow of the River to the prejudice of downstream riparian owners.

Moreover, in *Crook*, the court stated that one has no “property in the water itself, but a simple usufruct while it passes along.” *Id.* The word “usufruct” is defined in *Black’s Law Dictionary*, (Rev’d. 4th Ed. 1968), p. 1712 in civil law as: “The right of enjoying a thing, the property of which is vested in another, and to draw from the same all the profit, utility, and advantage which it may produce, provided it be without altering the substance of the thing.” Here, the Utility has altered the flows and it has stepped beyond the riparian rights that it condemned and is destroying the fee simple lands which are vested in the Ranchers.

The next case relied upon by the Utility establishes its liability for the aggradation and flooding of downstream riparian properties. *Sund v. Keating*, 43 Wn.2d 36, 259 P.2d 1113 (1953). In *Sund*, oyster beds were covered in gravels because a ridge in the channel was excavated. The court stated: “*With this flood channel no one is permitted to interfere to*

the injury of other riparian owners.” Sund, 43 Wn.2d at 43 (emphasis in original). The rule articulated in *Sund* has been followed in subsequent cases.¹⁶ The Utility is actually asserting with its arguments that it condemned the Main Stem and the entire Skokomish Valley in the 1920 *Funk* condemnation. Aside from the Decree, common sense argues that the Utility cannot believe this is true. In its briefing to Division One it relates that it “provided a settlement package” to the Skokomish Tribe “worth millions of dollars” which “expressly states” that it is partly for “aggradation related damages.” CP 627.

The Utility’s reliance upon *De Ruwe v. Morrison*, 28 Wn.2d 797, 184 P.2d 273 (1947), is curious. *De Ruwe* is quoted for the proposition that one cannot lower or raise a “natural watercourse.” *See App. Brief*, p. 19. Again, the Skokomish River is no longer in a natural condition and the Utility began raising the base level of the river in 1998 and put extremely damaging flows in it in 2008, violating riparian law. The body of water addressed in *De Ruwe* was Saltese lake which the trial and appellate courts held was not a natural watercourse. *De Ruwe*, 28 Wn.2d at 810. Riparian rights were discussed to drive home the court’s decision and it stated that no riparian rights were “infringed unless it can be

¹⁶ It has been cited in *Fitzpatrick v. Okanogan County*, 169 Wn.2d 598, 607, 609, 238 P.3d 1129 (2010); *Halverson v. Skagit County*, 139 Wn.2d 1, 15-18, 983 P.2d 643 (1999); and *Strom v. Sheldon*, 12 Wn.App. 66, 69, 527 P.2d 1382 (1974).

established that so much of the dam complained of as may project above the bed of Saltese lake casts some burden of excess water upon the land of the appellants.“ *See DeRuwe*, 28 Wn.2d at 279. *De Ruwe* supports the Ranchers’ claims in this matter since its dam is casting excess water upon their land in the Main Stem where aggradation has altered the channel.

Similarly, *Hood v. Slefkin*, 88 R.I. 178, 143 A.2d 683 (1958), is not a riparian case because there was insufficient evidence to prove Lebanon Pond was a natural body of water or that there were riparian rights in the “stream from which the pond was formed.” *See Hood*, 88 R.I. at 183-184. Flashboards were removed from a dam allowing the water level to lower in the pond revealing sewage sludge that was being transported from a plant in Massachusetts. *Id.* An easterly dam was also involved and lowering it resulted in the diversion of the entire flow of the easterly channel where the Casey’s had property. *See Hood*, 88 R.I. at 188. The court nonetheless analyzed riparian law and found that the westerly neighbors could not compel the dam owners to “maintain it for the benefit of other riparian owners who benefit from the formation of an *artificial pond* by the erection of the dam.” *Hood*, 88 R.I. at 185 (*emphasis added*).¹⁷ It distinguished the Casey’s situation stating that if they could establish riparian rights, that is, “proprietaryship in the bed of the channel

¹⁷ This case cited to *Drainage Dist.*, 171 Wash at 186, and the Doctrine of Reciprocal Rights which is discussed in Section C below.

below the dam” their riparian right to the “stream flowing in its accustomed and natural course” had been invaded. *See Hood*, 88 R.I. at 188. The court found that the Casey’s did not have the “use and enjoyment of the natural flow of stream.” *Id.* This Rhode Island case has been cited to numerous times by the Utility without reference to this part of the case. *See App. Brief*, pp. 3, 19, 26, 27, 28.¹⁸

With yet another condemnation case, the Utility acknowledges the distinctions that the Ranchers are making with regard to the scope of the *Funk* condemnation. *See App. Brief*, p. 19 citing *Marshland Flood Control Dist. of Sno. Cty. v. Great Northern Ry. Co.*, 71 Wn.2d 365, 428 P.2d 531 (1967). A flood control district wanted to condemn an easement so it could tie its dikes into both sides of the railroad’s embankment near a bridge that spanned the Snohomish River. *See Marshland*, 71 Wn.2d at 366. It additionally sought a judicial determination whether it also had to pay damages to the bridge “caused by the greater velocity of the water, and by higher water in the Snohomish River resulting from a dike the district plans to install along the west bank of the river.” *Id.* The district sought to characterize the waters that would harm the bridge as surface

¹⁸ It has only been cited in Rhode Island three times since 1958. Once as part of the primary case: *Winsten v. Slefkin*, 88 R.I. 178 (1959) (one page re-affirmation); in an artificial dam case where the river could go back to its natural state: *Kiwanis Club Foundation*, 179 Neb. 598 (1966) and in a case where it was rather off-point involving sewage allegedly entering a well. *Gagnon v. Landry*, 103 R.I. 45 (1967).

flows which it could not be liable for under the Common Enemy Rule. The court applied riparian law stating a “riparian owner” is entitled to compensation for damages caused by the “interference” of the stream’s flow. *See Marshland*, 71 Wn.2d at 369. The district had to pay for the “property appropriated” which was the easement, as well as for the damage to the “remainder of the property not actually taken or appropriated.” *See Marshland*, 71 Wn.2d at 368. Despite the Utility’s arguments, there was no payment for the “remaining” damages to the properties in 1920 for the addition of flows that would occur in the future because of passage of the ESA. The two distinct takings in *Marshland* illustrate that a single and limited taking was bestowed by Judge Wilson in the trial with regard to the riparian rights related to the flows of the North Fork being removed.

The Utility cites to *Marshland* for the proposition that a “condemnation of all riparian rights” includes the right to “vary the water flow past the property without further compensation.” *See App. Brief*, p. 20. Again, the Utility did not condemn “all” riparian rights and there is nothing whatsoever in *Marshland* that addresses varying the flows. If we were in the year 2057, ninety years past the condemnation decision in *Marshland*, and the district decided to jet more water into the Snohomish River and it further damaged or destroyed the bridge, the earlier

condemnation would not be a bar to compensation for the new and additional damages.

Finally, *Corbin v. Madison*, 12 Wn. App. 318, 529 P.2d 1145 (1974), is erroneously cited as supporting the contention that the Ranchers' "new claims involve the same subject matter as the claims in *Funk*." See *App. Brief*, p. 3, accord pp. 20, 22. Factually, this assertion is wrong but *Corbin* does not discuss the asserted contention.¹⁹ In *Corbin*, the City of Puyallup condemned property in its downtown, ten percent of which was under a real estate contract to a corporation that eventually did not receive any of the proceeds. See *Corbin*, 12 Wn. App. at 320. The corporation was not represented by counsel and an individual, Mr. Madison, appeared on its behalf. See *Corbin*, 12 Wn. App. at 321. The proceedings were continued and Mr. Madison was directed to obtain legal counsel or the corporation would "be deemed to have waived" any interest in the condemnation award. *Id.* At the continued proceeding, Mr. Madison appeared *pro se* stating that he had a quitclaim deed to the property. The court's final order left nothing to be distributed to Mr. Madison or the corporation, which order was never timely appealed. *Id.*

Mr. Madison later wrote defamatory letters about the property owners who obtained the condemnation award and they successfully sued

¹⁹ The citation is to page 323 which has no such statement in it, nor does the rest of the case.

him for an accounting on the real estate contract and for libel. *See Corbin*, 12 Wn. App. at 322. Mr. Madison, through his cross-complaint, brought in Puyallup as a third party defendant seeking an “adjudication of the Madisons’ interest in the previous condemnation proceedings.” *Id.* Puyallup had been dismissed on summary judgment and the appellate court stated it was proper since “relitigation of the legality or constitutionality” of the condemnation was “barred by the doctrine of *res judicata*.” *Id.* It found that Mr. Madison had “participated” in the earlier condemnation, failed to appeal it and now wanted to open a “new and collateral inquiry” into an alleged unconstitutional taking “two years later.” *See Corbin*, 12 Wn. App. at 324.

Obviously, none of the Ranchers before the Court participated in the *Funk* condemnation. They are not trying to third party the Utility into a lawsuit in order to obtain condemnation proceeds. They do not question the \$7.96 an acre that went to their great grandfathers and great grandmothers for the limited riparian right the Utility condemned by taking the waters of the North Fork. They firmly believe destroying their lands and way of life was not included in that condemnation award. The use of *res judicata* in *Corbin* was appropriate while its use in the Ranchers’ case is not.

2. **There is no “general” *res judicata* to attach, the condemnation cases support the Ranchers’ position and the Utility’s new policy argument fails**

The Utility argues that claims that “*could have*” been brought in *Funk* are also barred and so the Ranchers’ lawsuit should be dismissed. *See App. Brief*, p. 21 (*emphasis in original*). Factually, at the time of *Funk*, no one “*could have*” known that: 1) there would be passage of the ESA in 1973;²⁰ 2) species in the Skokomish River would be listed as endangered under that Act in 1999 (CP 553); 3) the loss of the North Fork flows would cause aggradation in the River; 4) the Main Stem would lose significant channel capacity; 5) there would be a re-licensing process with a requirement that 240 cfs of the condemned flow would have to be returned to the River; and 6) the resultant flooding would heighten the groundwater table, turning the Valley into a wetland.

Even dismissing the factual impossibility of bringing in a claim for the fee simple destruction of the Valley in the *Funk* condemnation, the cases the Utility relies upon are off-point. *See App. Brief*, p. 21 *citing Hisle v. Todd Pac. Shipyards Corp.* 151 Wn.2d 853, 865, 93 P.3d 108 (2004) (*res judicata* did not apply because of different subject matter); *Schoeman v. New Your Life Ins.*, 106 Wn.2d 855, 726 P.2d 1 (1986) (contemporaneous dismissal in federal court applied to wrongful death

²⁰ *See* 7 USC § 136, 16 USCA § 1531, et seq. signed into law December 28, 1973.

action when filed in state court shortly thereafter). The two condemnation cases that the Utility offers support the Ranchers' position that *res judicata* cannot attach here. *Bradley v. State*, 73 Wn.2d 914, 442 P.2d 1009 (1968); *Great Northern Ry. Co. v. Seattle*, 180 Wash. 368, 39 P.2d 999 (1935).

a. The condemnation cases demonstrate that *res judicata* is inapplicable to the Ranchers' current lawsuit

Bradley demonstrates that *res judicata* is not appropriate when a condemnation addressed one type of damage but not another. The State condemned real property described in a decree by metes and bounds on which a tavern was located. *See Bradley*, 73 Wn.2d at 914. The decree recited that "lands, real estate, premises and other property" were being condemned. *Id.* The tavern owners sued the State for personal property that they were not compensated for in the condemnation. The trial court found the condemnation was *res judicata*. *See Bradley*, 73 Wn.2d at 915. The appellate court reversed, framing the issue:

The question presented is whether the decree in the condemnation action necessarily determined the validity of the plaintiffs' claim. In other words, was that decree, which described only real property, broad enough to include fixtures and personal property?

Bradley, 73 Wn.2d at 915.

Although the fixtures had become part of the realty, the court held that the personal property was not because the judgment only applied to "those

matters which were or *could have been* litigated in the action.” *Bradley*, 73 Wn.2d at 917 (*emphasis added*). The phrase that the Utility banter is not as broad as it presses for as is demonstrated by its own case.

Of procedural interest in *Bradley* is the court’s recitation of the “general rule” that the one raising *res judicata* must prove “by competent evidence consistent with the record in the former cause, that such issue was involved and actually determined.” *Id.* No such showing has been even attempted here by the Utility. The appellate court stated that under RCW 8.04.090, the trial court’s only authority was to distribute the award as to the property “described in the petition.” *Id.*

The *Funk* Petition with regard to the riparian rights is very clear. It applies to water and riparian rights, not to the fee simple land. The Utility actually recites the Petition’s words that state the riparian rights are “appertaining and appurtenant to the lands” but then argues it has a right to damage and take the land itself. *See App. Brief*, p. 22. It refers to the legal description on a few riparian properties (A-41 through A-50 here, *see also App. Brief* p.8 *citing* CP 3329-33) as establishing that compensation was paid “for damage to each of their specifically described parcels.” *Id.* These citations refer to the legal descriptions of a few of the lands. The riparian right “attaches” to the “appurtenant land” so there is no way to describe the riparian right without using the legal description of the land it

attaches to. Using the legal descriptions did not convert the condemnation of riparian rights for \$7.96 an acre to a fee simple taking of the land which was done for \$123.56 an acre. The reference to the legal description does not prove what the Utility claims.

As is set out in the factual section, the Petition starts with properties to be inundated and taken in fee simple (CP 3286-3300), moves to those taken in fee simple for the storage reservoir, the flume, the canal and the power plant and its transmission lines (CP 3301-3319) and then addresses the riparian rights to the flowage of the North Fork. CP 3320-3330. Introductory paragraph 103 (CP 3320) states that the Utility will take “a portion of the waters of said North Fork of Skokomish River” and that it will be “diverted from the present channel thereof and used by petitioner upon the site herein describe” and the “volume of the water in said river below said dam will be diminished.” In accordance with *Bradley*, the Decree that dealt with riparian rights was clear and did not take the fee simple properties of the Ranchers.

In *Great Northern*, Seattle condemned a railroad’s land in order to extend a street which was carried across tracks on a viaduct. *Great Northern*, 180 Wash. at 370. In connecting the viaduct to another, rows of columns were taken out and moved. *Id.* Because of the change of location of the columns, the railroad could not use a “spur track” which

was part of its franchise rights. The spur track had to be relocated and re-built. *Id.* The railroad sued for the cost of moving and re-building the spur track. *See Great Northern*, 180 Wash. at 371. The City argued that these damages “could and should have been litigated” in the condemnation suit and that *res judicata* barred the current lawsuit. *Id.* The City’s argument was based on the fact that the blueprints for the project were attached to the condemnation Petition and “plainly indicated that the new row of columns would interfere with the operation of trains” on the spur. *Id.* Even with this “notice” in the Petition, the appellate court reversed, holding that *res judicata* did not apply because the franchise rights had not been paid for. *See Great Northern*, 180 Wash. at 372. The court explained:

All that the city had paid for in the condemnation proceeding was the right to take and damage the specifically described property lying in blocks 19 and 20. It had no legal or moral right to take more than it paid for. The doctrine of *res judicata* will not be invoked to sustain a city’s claim of right to take or damage a distinct and separate property right which was not specifically included in the condemnation proceedings, and for which compensation was not made.

Great Northern, 180 Wash. at 373-374.

The facts before this Court are stronger than those involved in *Great Northern*. There was no inkling in the Petition of the type of damages that would occur ninety years later. The only expectation of

“remaining” damages was that annual flooding might not occur or the groundwater table might remain low. *Great Northern* establishes that *res judicata* cannot attach here.

b. Judge Castleberry’s oral decision does not support the Utility

Finally, the Utility’s citations to the decision of Judge Castleberry as supporting of its position are disingenuous. *See App. Brief*, p. 16 *citing* RP (6/8/12) 9:6-10:14 and 7:16-17; p. 22 *citing* RP (6/8/12) 4:2-3 and 6:23-7:23). Judge Castleberry explained his examination of the Petitions and Decrees and that *Funk* was “all about the loss of property from the diversion of water.” CP 28, RP (6/8/12) 6:23-25. He found the flooding was not within the contemplation of the *Funk* litigants or the *Funk* court, no one envisioned the channel’s alteration or that there would be a return of the flows. CP 29, RP (6/8/12) 8:16-21. The Utility transforms the mention of the predecessors’ Answer asking for “any and all damages” into a finding by the court. This is false. It also asserts that when mention was made that the public use and necessity order was still viable and that the current flows could be seen as being within that order, somehow the entire 1998 Order from FERC was within the *Funk* condemnation. This ignores Judge Castleberry’s comments in context. He said he was giving counsel a “head’s up as to at least the general thinking of this court.” CP

31, RP (6/8/12) 10: 11-12. The exchange can only be seen as an invitation to the Utility to file a condemnation action rather than have the parties go up on appeal. The invitation, of course, was rebuffed.

c. The Utility's new policy argument is unavailing

At the end of this section, the Utility makes an argument that if the trial court's decision is affirmed, there are thousands of Washington dams including dozens of hydro-electric dams which will be at risk of lawsuits for any change in flow conditions mandated by FERC. *See App. Brief*, pp. 22-23, n. 6. First, this is a new argument ushered in with website references that were not before the trial court which violates the appellate rules. *See* RAP 12; *e.g. Landis & Landis Const., LLC v. Nation*, 286 P.3d 979, 983 (2012) (declining to consider articles from four websites cited in appellant's reply brief). However, if one consults the proffered websites, one learns that half the dams in the state are small and privately owned and there are only 49 hydro-electric dams here with FERC licenses.²¹ More fatal to this "policy" argument, however, is that it was very recently panned by the Supreme Court in *Arkansas Game*.²² Again, in that case a taking was found for flows being released from a dam in a different

²¹ The FERC licensed dams are set out as those requiring Section 401 permits. The other website shows that of the dams in the state, 57.86% are privately owned and only 6.5% of them are hydro-electric.

²² One of the Justices recused herself. This was an 8-0 Opinion which did not favor any of the theories pressed by the dam operator.

manner (and only for six years). *See Arkansas Game*, 133 S. Ct. at 521.

The Court christened the argument the “slippery slope” argument and noted that it was “hardly novel” coming from “Government.” *Arkansas Game*, 133 S. Ct. at 521. The Court stated:

Time and again in Takings Clause cases, the Court has heard prophesy that recognizing a just compensation claim would unduly impede the government’s ability to act in the public interest.

....

While we recognize the importance of the public interests the Government advances in this case, we do not see them as categorically different from the interests at stake in myriad other Takings Clause cases. The sky did not fall after *Causby*, and today’s modest decision augurs no deluge of takings liability.

Id. (citation omitted).

This Court is respectfully requested to disregard the Utility’s new found policy argument²³ on both procedural and substantive grounds.

C. *Drainage Dist.*²⁴ Provides No Safe Harbor to the Utility.

1. The natural regime was restored in *Drainage Dist.* and the release did not cause downstream flooding

The Utility goes on a frolic into water law in order to claim that it has the right, based on obtaining riparian water rights for \$7.96 an acre in 1920, to destroy the Ranchers’ entire acreage today. Its detour into water

²³ The other “policy” argument made in footnote six implies that filing the class action case is a reaction to winning the motion below. This makes no sense. The motion below was originally filed on behalf of the Ranchers and the class. CP 2506-2531.

²⁴ *Drainage District No. 2 v. Everett*, 171 Wash. 471, 18 P.2d. 53 (1933).

law is unavailing. The Utility appears to conveniently forget that the families before the Court farmed the land adjacent to the river on its Main Stem for generations before the Utility decided to build its hydro-electric dam on the North Fork. They did not fill in a dry stream channel for farming as was done by the plaintiffs in *Drainage Dist.*

The *Drainage Dist.* case involved restoring the natural regime and doing so without creating any flooding.²⁵ The irrefutable facts before this Court on appeal are inapposite. The facts of *Drainage Dist.* highlight the impropriety of the Utility's actions here and distinguish the case. The reasoning by the court was that Everett could "legally abandon" the dam and allow the waters to "flow as those waters were wont to flow in the natural channel." *Drainage Dist.*, 171 Wash. at 477. The Skokomish River has not been restored to its natural regime by the Utility. Unlike Wood's Creek, the Skokomish River, as it naturally flowed prior to the Utility's condemnation, does not exist anymore. It is our contention, and it was the Utility's contention before Division One, that taking out all of the flows of the North Fork resulted in unnatural aggradation and loss of the Main Stem's channel capacity. CP 627-637. In *Drainage Dist.*, the farmers caused their own problem: "Had the old channel not been obstructed by respondent, the natural banks of the stream would have

²⁵ The Utility has never addressed the facts in *Drainage Dist.*

carried away the water, and there would not have been the deposition of sediment.” *Drainage Dist.*, 171 Wash. at 480.

Obviously, pre-condemnation, the Main Stem channel of the Skokomish River had the capacity to handle not just 240 cfs in flows but all of the flows from the North Fork. The 2011 Corps Study indicates a capacity of 13,000 cfs in the channel by 1941 with it dwindling to 11,000 cfs by 1969. CP 2597. If the Utility had placed some or all of the flows of the North Fork back into the river when it had capacity, damage would not have occurred. However, the Utility did nothing to bring the channel back to its natural capacity in order to ameliorate the flooding that it knew would happen in 2008.

In contrast, the court described the careful measures taken by Everett in de-commissioning its dam. *Drainage Dist.*, 171 Wash. at 480. The water in the reservoir was gradually released over three or four days and the dam was only opened two weeks later. *Id.* The Court specifically stated that: “There were no flood conditions.” *Id.* It stated that its reasoning “presupposes” that the water was not released quickly and in such a quantity as to “flood” the land. *Drainage Dist.*, 171 Wash. at 477. As to the maintenance of the dam itself, the Court clearly stated:

So long as appellant maintained the dam in such a manner as not to injuriously interfere with the legal rights of others

below and above the reservoir, no right of action could be maintained against the appellant.

Id.

Here, the fact that new flows would create overbank flooding was known to the Utility. Its attorneys used this fact in its briefing to the Ninth Circuit attempting to avoid placing the damaging flows back into the river. CP 736.

The Utility has not restored the natural regime. It is not decommissioning its dam. Its dam is an “artificial condition” which still exists on the Skokomish River. The recent flows were placed into a river with known aggradation problems and an “unnatural” lack of channel capacity. The flows create and continue to create unnatural flooding of the entire Skokomish Valley. *Drainage Dist.* does not advance the Utility’s position but rather highlights that it is liable in this matter.

2. **The Utility directs the Court to the Doctrine of Reciprocal Rights without defining the easement involved in *Drainage Dist.***

Aside from the facts of *Drainage Dist.* being inapposite to those in this case, the Court is offered the Doctrine of Reciprocal rights which involves the concept of easements. Henry Phillips Farnham’s *The Law of Waters and Water Rights* (hereinafter “*Waters*”), provides the legal basis for the holding in *Drainage Dist.* This treatise is a three volume work that remains the leading authority on water related issues despite a copyright of

1904. *Waters* is quoted extensively in *Drainage Dist.*, 171 Wash. at 477, and in order to better understand the holding of *Drainage Dist.*, it is important to understand *Waters*.

The citation to *Waters* in *Drainage Dist.*, is to Farnham's third volume of *Waters*, Chapter XXV, "Licenses, Easements and Artificial Conditions." Within this chapter, § 827, which is specifically about the "Acquisition of rights in artificial conditions," it is quoted at page 477 of *Drainage Dist.* for the proposition that: "An artificial condition of a water course may be established which, in favor of its owner, may be as permanent as though the condition was natural and that the acquisition of a right to maintain the condition carried with it no reciprocal right to have it maintained." The lower property owners in *Drainage Dist.* did not obtain an easement through the "Doctrine of Reciprocal Rights" from Everett. The easement involved in *Drainage Dist.* was to the dry creek bed. The plaintiffs there on either side of an old bed of the river filled it in "for agricultural purposes." *Drainage Dist.*, 171 Wash. at 473. The case does not state the width of the slough but it was "three-fourths of a mile in length." *Id.* It is important to note that the plaintiffs were "Johnny Come Lately" farmers filling and then using a dry streambed and laying claim to it. The court stated that the right of the appellant was "dominant" and that of the respondents was "servient." Under the Doctrine of Reciprocal

Rights, Everett could not be forced to keep the natural flows out of what was the natural streambed.²⁶

The farmers in the Everett case were not riparian owners along a stream. The entire stream was gone. The Utility attempts to pretend that it condemned all of the flows of the entire Skokomish River and the Ranchers have no riparian rights on the Main Stem whatsoever. It only condemned the flows of the North Fork. The absence of the stream in *Drainage Dist.* was an “artificial condition” that was created by the man-made dam. The Ranchers are not Johnny Come Lately farmers straddling a dry creek bed with crops in it demanding that a dam owner maintain the dam and continue to impound the waters of the creek because Johnny believes he has some sort of reciprocal easement to keep his crops in the recently created dry streambed. The Ranchers’ have the right, as riparian owners, not to have their agricultural lands repeatedly flooded and taken in their entirety by the Utility. The Doctrine of Reciprocal rights does not apply here.

Everett decided in July of 1931 to abandon its water system and the dam at Wood’s Creek. See *Drainage Dist.*, 171 Wash. at 474.

²⁶ The foreign cases relied up by the Utility in footnote nine are off-point and deal with artificial lakes, ponds and ditches. *Powers v. Lawson*, 88 R.I. 441, 136 A.2d 613 (1957) (earlier case involving Lebanon Pond which is artificial); *Green v. Williamstown*, 848 F.Supp. 102 (E.D. Ky. 1994) (artificial waters); *In re Drainage Dist. No. 5 of Dawson Cty.*, 179 Neb. 80, 136 N.W. 2d 364 (1985) (artificial ditch); *Mitchell Drainage Dist.v. Farmer’s Irr. Dist.*, 127 NEB. 484, 256 N.W. 15 (1934) (artificial ditch).

Common sense would argue that a decision of that magnitude would necessarily involve both the Executive and the Legislative decision makers of the city. One cannot “force” a city to spend its money over the years to keep a dam in operation that it no longer wants or needs. For a court to so hold would invade the balance of powers doctrine.²⁷

V. CONCLUSION

The Utility offers the Court cases that do not support its position but which emphasize that *res judicata* cannot attach to the Ranchers’ lawsuit. The Court is respectfully asked to affirm the trial court’s decisions dismissing the Utility’s defenses based on *Funk* and denying the Utility’s request to dismiss the Ranchers’ lawsuit based on *Funk*.

DATED this 19th day of December, 2012.

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²⁷ See *Saldin Sec., Inc. v. Snohomish County*, 134 Wash. 2d 288, 304, 949 P.2d 370, 379 (1998); *Harris v. Hornbaker*, 98 Wn.2d 650, 659 P.2d 1219 (1983).

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DIVISION II

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STATE OF WASHINGTON

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6 **IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON**
7 **DIVISION II**

8 GERALD G. RICHERT, et al.,

No. 43825-9-II

9
10 Plaintiffs/Respondents,

CERTIFICATE OF SERVICE

11 vs.

12 THE CITY OF TACOMA,

13
14 Defendants/Petitioners.
15

16
17 I, JANELLE E. CHASE, declare the following to be true and correct under penalty of
18 perjury under the laws of the State of Washington:

19 That I am now and at all times herein mentioned was a citizen of the United States
20 and a resident of the State of Washington, over the age of eighteen years, not a party to or
21 interested in the above-entitled action and am competent to be a witness herein.

22 That on the 28th day of December, 2012, I caused to be served via US Mail a copy of
23 the following documents:

- 24 1. Respondents' Brief; and
25 2. Certificate of Service

26 to the following parties:

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Additionally, I am filing the above referenced documents with the Clerk of the above-entitled court via legal messenger.

DATED this 28th day of December, 2012, at Seattle, Washington.



JANELLE E. CHASE