

SCANNED

FILED
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WASHINGTON STATE
SUPREME COURT

CASE NO. 96227-8

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

COURT OF APPEALS CAUSE NO. 77741-6-1

CHARLES WOLFE, a single person,
JANICE WOLFE, a single person, and JOHN and DEE ANTONEN,
and the marital community comprised thereof,

Petitioners,

v.

STATE OF WASHINGTON
DEPARTMENT OF TRANSPORTATION,

Respondent.

FILED
COURT OF APPEALS DIV. I
STATE OF WASHINGTON
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**PETITION FOR REVIEW TO THE SUPREME COURT
BY CHARLES WOLFE, JANICE WOLFE AND JOHN and DEE
ANTONEN**

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I. INTRODUCTION

Petitioners ask this Court to accept review to clarify that pollution by itself is a public nuisance without regard to the geographic extent of the source of erosion or the more localized nature of an illegal flow alteration.

An altered flow is “pollution” under Section 401¹ of the Federal Clean Water Act, as this Court ruled in *Department of Ecology v Jefferson County PUD #1*, 121 Wn. 2d 179, 20 P.2d 646 (1993). The State Water Pollution Control Act, RCW 90.48.080, defines “pollution” as including an increase in “turbidity.”

The uncontroverted evidence shows that Washington State Department of Transportation has been polluting the waters of the Naselle River since 1985² when it constructed a 600-foot illegal obstruction in the floodplain of the river by raising the elevation and length of the approach road/berm to match the reconstructed (higher in elevation) SR 4 Bridge. Since that time, the Bridge approach road fill or berm has affected the normal/natural flow of the River. It acts as a dam to increase the height and velocity of the flow through the “cut” under the Bridge which then eats into banks downstream releasing dirt into the river. The altered flow and

¹ See *infra*, p. 15. The cite to the Federal Water Act is 33 U.S.C. § 1362(19).

² The original 1925 bridge, built before the enactment of modern floodplain management and environmental laws, also obstructed the floodplain of the river and affected river flows, but to a lesser extent than the replacement bridge.

turbidity will continue unless, and until, the obstruction is removed and the Bridge extended over the associated floodplain.

The Court of Appeals erroneously ruled that the conceded continuing pollution caused by the Department of Transportation's altering the stream flow of the Naselle River was "insufficient" to show a public nuisance. (Slip Opinion, p 13.) According to Division I, the erosion was limited to Petitioners' properties and did not extend to more properties. Public nuisance is defined in RCW 7.48.130 as, "one which affects equally the rights of an entire community or neighborhood, although the extent of the damage may be unequal."

The Court of Appeals impermissibly demanded proof that "the erosion or bank loss extended to the entire community or a broader neighborhood than the Plaintiffs." (Slip Opinion, p. 13). But, it is the pollution of the waters that is the ultimate focus of a public nuisance, not the length of the eroding bank. The bank erosion is the *source* of the pollution caused by the altered flow. That pollution is not localized, but affects the river as a whole in terms of functions and values.

The waters of the Naselle River are owned in trust for the public, so by definition, the community as a whole is affected. The obstruction damages functions and values of the floodplain, a protected critical area.

Public nuisance lawsuits are important tools to protect the environment, especially in times of limited resources for public agencies to enforce the law. This Court should accept review to (1) clarify and reaffirm the protections afforded by public nuisance law with respect to water pollution and stream and floodplain functions and values and (2) to remove the insurmountable hurdle the decision places on private landowners to bring public nuisance lawsuits to address circumstances that give rise to a change in both water flows and water quality.

II. IDENTITY OF PETITIONERS

Janice Wolfe and John and Dee Anttonen (“Wolfe”) own property on the Naselle River damaged by the actions of the Washington State Department of Transportation (“WSDOT”). They are plaintiffs in this public nuisance action filed in the Thurston County Superior Court requesting abatement, repair/restoration and damages.

III. COURT OF APPEALS DECISION FOR WHICH REVIEW IS SOUGHT

The Court of Appeals, Division I, on June 18, 2018, issued an unpublished opinion that affirmed a Thurston County Superior Court order granting WSDOT’s motion of involuntary dismissal after Wolfe presented their case in chief. The Opinion terminating review is attached as **Appendix A-1** hereto. Petitioners filed a timely Motion for Reconsideration on July 6, 2018, which was denied on July 23, 2018, **Appendix A-2** hereto.

IV. ISSUES PRESENTED FOR REVIEW

(1) Should a public nuisance claim survive a motion to dismiss when a plaintiff does not show that the source and cause of pollution is area-wide but adequately shows local cause and effects?

(2) Must a public nuisance claim based on laws regulating work in a floodplain by requiring an approval for an obstruction be supported by an expert opinion that the law applies?

(3) When a court enters a finding unchallenged on appeal that a public works project has altered the flow of a river, causing erosion and resulting in pollution to the waters of the state, is that sufficient to support a public nuisance action?

(4) Where a river does not meet current water quality standards, is it unnecessary for a plaintiff to present evidence of site specific samples to support a public nuisance claim when it is conceded a public agency is causing bank erosion resulting in dirt and debris emanating into the water body?

V. STATEMENT OF THE CASE

The waters, floodplain and aquatic life and habitat of the Naselle River are entitled to protection from environmental perturbations under

various laws, including but not limited to the Shoreline Management Act,³ the State Hydraulic Code,⁴ the Pacific County Shoreline Master Program⁵ and Pacific Flood Control Ordinance,⁶ the State Flood Control Law⁷ and State Water Pollution Control Act.⁸ Each statutory scheme requires an approval for obstruction of a floodplain or alteration (or pollution) of the waters of the state. Petitioners presented evidence during trial that the State never obtained such approvals.

Ms. Schaumberg testified that FEMA regulates floodplain obstructions. Under 44 CFR 60.3(d)(3) and (4),⁹ if anyone, including a public agency, performs any work within a defined floodplain without first doing an Engineered No Rise Analysis, it violates the law. Either an Engineered No Rise Certification must be obtained or FEMA revises the Flood Insurance Rate Manual (FIRM). Neither occurred here.

³ Chapter 90.58 RCW. RCW 90.58.140(2) requires an approval for a substantial development. "Development" includes "dumping and filling." RCW 90.58.030(3)(a)

⁴ Chapter 77.55 RCW. RCW 77.55.020 requires an approval for a "hydraulic project." "These terms are defined to mean "...the construction or performance of work that will ...obstruct or change the natural flow ...of any of the...freshwaters of the state."

⁵ See Exhibit 23

⁶ See Ordinance No 71, annexed hereto as Appendix A-3.(Section 4.1: "A development permit shall be obtained before construction or development work begins within any area of Special Flood Hazard.") An area of Special Flood Hazard is any land within the FEMA Rate Study Maps.

⁷ Chapter 86.16 RCW.

⁸ Chapter 90.48 RCW. RCW 90.48.080 states: "it shall be unlawful for any person... to cause...to (be) discharged into (waters of the state) ...any organic matter that shall cause or tend to cause pollution of such waters...."

⁹ The regulations are attached in the Appendix, A-4.

The Court of Appeals did not address that WSDOT failed to produce evidence that it had complied with any cited laws by obtaining necessary approvals to obstruct the floodplain. Petitioners' expert ecologist testified a floodplain could not be obstructed without approvals. *See infra*, p 8.

Turning to the Petitioners, Jan Wolfe¹⁰ and Mr. and Mrs. Anttonen own a 14.88-acre parcel immediately downstream of the SR 4 Bridge. The parcel includes about 600 feet of riverfront along the southeast bank of the Naselle River. The Anttonen land was acquired in 2007.¹¹ *See* Ex. 6 (Deed). It is 6.1 acres.¹² At the time of Wolfe's purchase in 2003, the FEMA FIRM map showed the property was not in the floodplain.¹³

As a result of the Bridge and approach road work, the river has avulsed away approximately 175 linear feet of terrace from Petitioners' property resulting now in a steep vertical bank that is easily eroded.¹⁴ This has contributed to the loss of use and enjoyment of the property.¹⁵

Erosion continues to occur each time the obstruction causes the River to exceed flood stage. It has accelerated since 1985, then again in

¹⁰ Charles Wolfe is the former spouse of Jan Wolfe and has never held an equitable interest in the properties. Mrs. Wolfe's interest in this litigation has been assigned to the other three Appellants by a written agreement.

¹¹ TR Vol. 1, p.45:7-8; TR 52:1-17.

¹² TR 48:4.

¹³ *See* Exhibits 9-10, Exhibits 60-61.

¹⁴ Findings 1.42, 1.43, 1.44, CP 1482:3-17. The Findings, Conclusions and Order of the Thurston County Superior Court are annexed as Appendix A-5.

¹⁵ Finding of Fact 1.30 CP 1507:10-12.

1998. *See* Exhibits 51, 54, and 55 and VRP Vol.1, p.63:11-25, p.64, p.65, p.66:1-15).¹⁶ The bank, as noted, is no longer stepped to be traversable to the river, but is a 15-foot vertical drop, impossible to climb.¹⁷ The owners can no longer reach the river from their land.¹⁸

Petitioners sued WSDOT for public nuisance. (CP 10-34), alleging: (1) the floodplain obstruction damaged functions and values associated with the floodplain; (2) water pollution resulted from the scouring/avulsion of dirt from riverbanks, rendering unwholesome the waters of the state; and (3) the alteration of the flow of the river was a nuisance and constituted pollution by itself without the necessary approvals.

The floodplain obstruction has affected all public and private landowners in the general vicinity whose property is located within or adjacent to the floodplain of the river.

Environmental impacts were identified and addressed by Kim Schaumburg, a fisheries biologist consultant and expert witness. Her focus was on assessing impacts to fish and wildlife, habitat and values, aquatic life and the habitat, and the floodplain functions and values resulting from the

¹⁶ *See* Ex. 54.

¹⁷ VRP Vol. 1, p.67:10-25, p.68:1-15.

¹⁸ VRP Vol. 1, p.68:21-25, p.69:1-13.

obstruction.¹⁹ Ms. Schaumburg testified that any development of the floodplain must prevent loss of other channel functions:

FEMA describes a floodplain as land adjacent to a river, a stream, or a waterway that may flood. FEMA also states that development in the regulatory floodplain must prevent or minimize the loss of hydraulic, geomorphic, and ecological floodplain or stream channel functions.

VRP Vol. 3, p.602:14-22. She concluded that the Bridge approach isolates the floodplain from the river, “[s]o there’s a disconnectivity between the floodplain and river.” *Id.* p.604:19-25, p.605:1. Scour is erosion from the water to the stream bank or bed and has numerous negative impacts to aquatic life.²⁰

The floodplain’s isolated because of the bridge approach – approximately 75 percent of the floodplain that is mapped by FEMA. And it is in the channel migration zone of the river. And then the bridge itself also causes impacts, as the water is sucked through it and out the other side. And it’s a – it is scouring the bank now severely, the south bank of the Plaintiffs’ property, and also scouring underneath the bridge, and probably doing a little bit of damage upstream as the water backs up during severe flood events and it has to be funneled through that – through the bridge piers.

(*Id.* p.605:12-23). Ms. Schaumburg testified that these are not “minimal” impacts, and that properties other than Plaintiffs’ properties would be affected in terms of the loss of functions and values.²¹

¹⁹ See VRP Vol. 3, p.593:2-25, p.594:1-25, p.595:1.

²⁰ VRP Vol. 4, p.617:12-13

²¹ VRP Vol. 4, p.643:14-25, p.644:1-10.

Ms. Schaumburg stated that she did not take water samples during her site visit. She relied on information from the Department of Ecology because they have “better equipment.”²² She testified that DOE’s information indicated that the *water quality levels were below WDFW’s standards for fish survival*, even if “close” to state water quality standards.²³

Plaintiffs’ engineer, fluvial geomorphologist expert Russ Lawrence,²⁴ addressed the obstruction of the floodplain in both 1925 and 1985, the latter caused by elevating the approach roads to meet a replacement bridge with a higher elevation.²⁵ The 600-foot-long fill across the 800-foot floodplain adversely affected the natural meandering characteristics of the river by funneling flood waters into a narrower space and raising their elevation. The planar piers were oriented differently than used for the original Bridge, which redirected the river 15 degrees towards Appellants’ property, leading to increased erosion.²⁶ The 1985 change in the piers exacerbated downstream erosion.²⁷

²² VRP Vol. 4, p.658:22-25, p.659:1-7.

²³ *Id.* p.659:8-19.

²⁴ The Lawrence resume is Ex. 78 (CP 1825 through 1831).

²⁵ VRP Vol. 1, p.152:12-25, p.152:1-25, p.153:1-8.

²⁶ Finding of Fact 1.29 (CP 1840: 7-9), citing Exhibits 46, 51, 54 and 55.

²⁷ VRP Vol. 1, p.131:22-25, p.132:1-7.

The trial court allowed WSDOT to present one witness, but precluded Petitioners from presenting rebuttal testimony. The WSDOT witness was a lay witness who worked for WSDOT in 1985 and 1998. He testified as to the environmental permits WSDOT applied for and offered the WSDOT version of two permits that WSDOT did obtain. He also testified as to other permits or approvals that were not obtained. The witness offered no testimony with regard to floodplain obstruction, river hydraulics, bank erosion, or pollution. The trial court then granted a motion for involuntary dismissal and entered findings and conclusions supporting the dismissal. (CP 1503-1512).

The uncontroverted findings show WSDOT obstructed the floodplain with attendant downstream impacts. Finding Nos. 1.26-1.30:

1.26 The 600-foot earth fill approach supporting the bridge is an obstruction of the floodplain in that area.

1.27 The obstruction of the floodplain resulted in a change of water flow, as well as increased river velocities in the vicinity of the bridge.

1.28 The 600-foot long earth fill approach across the floodplain has constrained and interfered with the natural meandering characteristics of the river.

1.29 The erosion of the Anttonen and Wolfe properties has been caused by the mechanisms described by Mr. Lawrence are

attributable to the earth fill approach. This is supported by Exhibits 46, 51, 54, and 55.

1.30 The court finds that the erosion of the Anttonen and Wolfe properties, as well as the interference with the natural migration of the meandering stream, indicate an interference with plaintiffs' use and enjoyment of the property.

The Superior Court correctly ruled that WSDOT was wrong in arguing obstruction of the floodplain is not a public nuisance under RCW 7.48.140(3) and/or RCW 7.48.160 because these statutes refer not to passage of the River itself, but to navigation of the River by persons.²⁸

The Superior Court found the Petitioners' properties "have experienced inundation by floodwater during flooding events." Finding No 1.31.²⁹ However, it did not find the bridge and earth fill approach work caused the flooding or resulted in the change in the FEMA Flood Insurance Rate Manual (FIRM) Maps for the area.³⁰ (*Ibid.*) The Court of Appeals affirmed these rulings (Slip Opinion, pp 10-11).³¹

²⁸ CP 713:16-25, CP 714:1-22.

²⁹ Conclusion No 2.6.

³⁰ The Anttonen property floods whenever the river flow is 4,460 cfs, which reflects the effect that the floodplain obstruction has had on the flooding characteristics of their property. See CP 538:20 through 539:3. See also Exhibits 66, 67. Per FEMA FIRM data, the property should not flood unless the river flow exceeds 13,450 cfs, which is the 500-year flood. VRP Vol. 1, p.61:2-25, p.62:1-2. As a result, the floodplain boundary has expanded into the Anttonen property such that over half of the property is now within the FEMA mapped floodplain. VRP Vol. 3, p.537:5-14.

³¹ Contrary to Note 5 in the Slip Opinion, (page 4), Wolfe explicitly challenged the Superior Court's Finding No. 1.31 on causation. See Opening Brief, Assignment No. 3, page 3. See also, Argument, pp.43-44, pp.46-48.

VI. REASONS FOR GRANTING THE PETITION

Petitioners ask this Court to accept review to clarify that continuing pollution is by itself a public nuisance, even if expert testimony is limited to addressing the source of the pollution as to discrete properties and the flow alteration causing the pollution. This Court should further clarify that an expert opinion is not required to establish a claim on the basis that environmental regulatory laws that unambiguously require approvals to obstruct a floodplain. Guidance is needed from this Court to prevent a chilling effect on public nuisance cases that enable citizens to help protect waters of the state.

1. **RAP 13.4(b)(1) and (2): The Decision is in Conflict with Decisions of the Washington Supreme Court and the Supreme Court of the United States.**

The effect that the Bridge and fill had on the hydraulics of the Naselle River, starting in 1925, is not in dispute. Fluvial geomorphologist expert Russ Lawrence found an approximately 75% reduction in the width of the available floodplain. *See infra*, p.8. The Bridge piers point the River “nozzle” towards the Wolfe property and away from the property on the other side of the River. Legally, this is a change in the “quantity” of water within the river, in the sense of the depth of the water, its speed/velocity, and/or its direction of flow. It also creates pollution. The increased river flow, pointed 15 degrees towards the Wolfe property, resulted in the

erosion/avulsion of more than 32,000 cubic yards of dirt, involving the loss of over 1.25 acres of land over the decades.³²

The numbers are not in dispute. That dirt was sloughed into the Naselle River. Because the turbidity of the river water was increased, as a matter of law, a change in the quality of the waters of the state has taken place. The bottom line is that, regardless of the source or “cause” of the dirt that is now within the Naselle River, there are two fundamental conclusions that cannot be ignored: (1) the flow and intensity of the river flow has changed as a result of the bridge approach, which scours dirt from the banks in the vicinity of the Plaintiffs’ properties; and (2) the deposition of dirt and debris into the river is a continuing source of pollution.

Department of Ecology v Jefferson County PUD No. 1 (1993) discussed *infra*, p.1, was subsequently appealed to the United States Supreme Court and resulted in a landmark opinion regarding the relationship of water quantity and quality. *Public Utility District No. 1 of Jefferson County v. Washington State Department of Ecology*, 511 U.S. 700 (1994). Water quality and water quantity are linked and must be managed together.

We also note that the concept of pollution in the Clean Water Act is extremely broad.

³² Given that a WSDOT dump truck holds 10 cubic yards of dirt, this erosion is equivalent to a WSDOT dump truck full of dirt being taken from the Petitioners’ property every 10 days, taken to the center of the bridge, and unloaded over the side.

Section 502(19) of the Act, 33 U.S.C. § 1362(19), reads: “The term ‘pollution’ means the man-made or man-induced alteration of the chemical, physical, biological, and radiological integrity of water.” Under this broad definition, man-induced alteration of stream flow level is “pollution”.³³

While finding that WSDOT was responsible for the introduction of 32,000 cubic yards of dirt into the Naselle River, and while also finding that WSDOT changed the direction of flow of the River, the Superior Court inexplicably ruled (and the Court of Appeals let stand) that WSDOT did not pollute the Naselle River. Hence, it determined that WSDOT did not create a public nuisance under the plain language of RCW 7.48.140(3), which prohibits obstruction of a waterway without legal authority, or under RCW 7.48.140(2), which prohibits the corruption or rendering unwholesome or impure any body of water.

The Court of Appeals’ decision is contrary to and inconsistent with this Court’s decision in *Moore v. Steve’s Outboard Services*, 182 Wn.2d 152, 155, 339 P.3d 169 (2014) and other public nuisance and nuisance *per se* cases.³⁴ In *Moore*, the court contrasted “regular” nuisance from nuisance

³³ *Department of Ecology v Jefferson County PUD No. 1*, 121 Wn.2d at 187. “[P]rotection of water quality involves far more than just addressing water chemistry. Rather, protection of water quality includes protection of multiple elements which together make up aquatic systems including the aquatic life, wildlife, wetlands and other aquatic habitat, vegetation, and hydrology required to maintain the aquatic system. Relevant water quality issues include ... the diversity and composition of the aquatic species ... [and] habitat losses” *Id.* (citing letter from LaJuana Wilcher, Assistant Administrator of the EPA, to the Honorable Lois D. Cashell, Secretary of FEREC).

³⁴ See also *Public Utility Dist. No. 1 of Pend Oreille County v. State, Dept. of Ecology*, 146 Wn.2d 778, 820, 51 P.3d 744 (2002) (discussing that pollution is defined broadly as

per se. Based on this ruling, the Court should rule that WSDOT's failure to obtain permission to obstruct the floodplain is a public nuisance under RCW 7.28.120 (nuisance consists in an act or omission which "obstructs or tends to obstruct, or render dangerous for passage, any lake or navigable river, bay, stream, canal or basin") and .140(2) and (3) because it is "not permissible or excusable under any circumstance." *Id.* (citing *Tiegs v. Watts*, 135 Wn.2d 1, 13, 954 P.2d 877 (1998) (*Tiegs II*) (citing *Jones v. Rumford*, 64 Wn.2d 559, 392 P.2d 808 (1964))). There, the court ruled:

Where the condition that gives rise to the nuisance - pollution of water, for example - is the very condition prohibited by the statutes, there is support for finding a nuisance *per se*.

Id.

WSDOT's failure to obtain a permit is a nuisance at all times and under all conditions and it is not "incidental" to Wolfe's complaint. Simply put, a failure to obtain a permit where the watercourse is obstructed is a nuisance at all times and under all conditions. RCW 7.48.140(3). The Court of Appeals' decision is in direct conflict with these rulings of the

encompassing man-induced reduction of water quantity where it has the negative effects outlined in RCW 90.48.020 , which defines pollution as "such contamination, or other alteration of the physical, chemical or biological properties, of any waters of the state, including change in temperature, taste, color, turbidity, or odor of the waters, or such discharge of any liquid, gaseous, solid, radioactive, or other substance into any waters of the state as will or is likely to create a nuisance or render such waters harmful, detrimental or injurious to the public health, safety or welfare, or to domestic, commercial, industrial, agricultural, recreational, or other legitimate beneficial uses, or to livestock, wild animals, birds, fish or other aquatic life"); *Packwood v. Mendota Coal & Coke Co.*, 84 Wash. 47, 146 P. 163 (1915) (quoting *Day v. Louisville, Coal & Coke Co.*, 60 W.Va. 27, 53 S.E. 776, 10 L. R. A. (N. S.) 167 "

Washington Supreme Court.

WSDOT did not explicitly ask to obstruct the floodplain for the two permits it did obtain.³⁵ More fundamentally, it conceded it failed to obtain approval to obstruct the floodplain or pollute the River required by other laws. *See* Notes 3-8 *infra*, p.5. This should have been enough. Until the Court of Appeals ruling in this matter, the law has been that the absence of a needed approval was as if it was never created or obtained. *See State v. N.M.K.*, 129 Wn. App. 155, 162, 118 P.3d 368 (2005).³⁶ The conflict is obvious.

The ruling that expert testimony is required to support a nuisance *per se* claim also conflicts with established precedent. In each of the following cases, the courts did not require any expert explanation of legal requirements/prohibitions applicable to the defendants. The court merely addressed the text of the statutes and found that, under the facts presented

³⁵ The permits obtained from the State of Washington Department of Fish and Wildlife and Pacific County could not grant permission to obstruct the floodplain or change the direction of flow of the river by increasing the length and height of the approach road to match the new elevation of the replacement bridge because WSDOT did not identify this element as part of the description of the proposal. *See* Exhibit 165, Item 6, Exhibit 167 (Description of Proposal); Exhibit 169 p.1, p.3. *See also* VRP Vol. 2, p. 293:18-25, p.294:1 through p.297:9.

³⁶ Evidence Rule ("ER") 803(a) allows admission of evidence that an event or matter was not recorded in public records to show that it did not occur or did not exist. (Allowing admission of evidence that a matter is not included in business records, kept in accordance with the provisions of RCW 5.45, to prove the nonoccurrence or nonexistence of the matter). *See* Karl B. Tegland, *Washington Practice: Courtroom Handbook on Washington Evidence*, 409-10 (2005). *See also, United States v. Keplinger*, 776 F.2d 678, 689-90 (7th Cir. 1985) (stating that proof of absence of records that would ordinarily exist if a particular event had occurred is properly admitted to show that the event did not occur).

to it, the defendants had failed to comply: *Miotke v. City of Spokane*, 101 Wn.2d 307, 309, 329, 678 P.2d 803 (1984) (“In short, ***it is clear from the federal and state statutory schemes*** [including RCW 90.48] ... that the discharge of pollutants into state waters is prohibited unless authorized by a permit.”) (emphasis added); *Tiegs v. Boise Cascade Corp.*, 83 Wn.App. 411, 420, 922 P.2d 115 (1996) (“If the jury determined Boise was leaching pollutants into the groundwater, then that act was unlawful under RCW 90.48 and constituted a nuisance.”).

Petitioners submit that these rulings and the Court’s requested review here invoke statutory construction principles by analogy. Where the laws or regulations are not found to be vague or uncertain, there is no “interpretation” or “construction” that is required.³⁷ The trial court made no finding that the federal and state requirements concerning obstruction of a floodplain were vague such that expert testimony was required to interpret or apply them. Accordingly, the requirement that a plaintiff support its public nuisance claim based on failure to obtain permits to obstruct a floodplain with expert testimony is without legal authority and further constitutes an impediment to the citizens’ rights to pursue public nuisance claims.

³⁷ Courts do not engage in statutory construction if a statute’s language is plain and unambiguous. *Cerrillo v. Esparza*, 158 Wn.2d 194, 201, 142 P.3d 155 (2006).

2. **RAP 13.4(b)(4): There Is a Question of Substantial Public Interest That Should be Determined by the Washington State Supreme Court**

This case presents a question of substantial public interest that this Court should decide. The effects of the obstruction on the floodplain extend to all private and public property owners who own property located within, or adjacent to, the floodplain of the river. The Wolfe experts described the effects that the obstruction has had on the floodplain and the stream. Petitioners were not required to present testimony analyzing the full 15-mile long extent of the floodplain. That study was beyond the financial constraints of the litigants, as it would be for most property owners. The lack of such analysis does not mean that such impacts were not experienced by other property owners.

Public nuisance is a fundamental part of this State's legal system:

This case involves principles very important everywhere, but especially important in this state at present and in the future; but those principles are old and have been called into requisition through many, many years in actions for the pollution of streams. The established maxim of centuries is, 'Sic utere tuo ut alienum non laedas' (so use your own property that you do not injure another). That rule is almost equal to the Golden Rule in importance, and must never be lost sight of in the daily doings and transactions of organized society.");

(Public Utility Dist. No. 1 of Pend Oreille County v. State, Dept. of Ecology,
146 Wn.2d 778, 820, 51 P.3d 744 (2002))

Other than the ruling on “expert proof” on applicable laws, and the spatial limit on flow alteration and aquatic pollution, the Court erroneously affirmed several constraints created by the Superior Court on public nuisance claims: (1) “proof of causation” of flooding and changes to the federal floodplain map when the altered flow and bank erosion was the gravamen of the claim, and (2) gathering of site specific water quality samples even though WSDOT did not contest that floodplain functions and values were damaged and the Naselle River does not meet all applicable water quality standards. (Slip Opinion, p 15) None of these requirements established by the Court of Appeals were linked to any prior ruling.

By focusing just on the flooding, the Court missed the forest for the trees.³⁸ It is the loss of *floodplain functions and values* (and the alteration of flow direction and elevation which erodes the bank) that is of importance. On the latter, the trial court found the impacts were caused by WSDOT. Both the Superior Court and the Court of Appeals failed to acknowledge that the theories of liability were independent, and the components of the

³⁸ See Note 32, *infra*, p. 12, where the Court of Appeals missed an assignment of error but held its mistake against the Petitioners. It then went from bad to worse. The court of Appeals states in its Slip Opinion, p.20 (N. 16) that whether or not applications were submitted “concerning the floodwaters, or flood rise” was “never pursued.” Steve Zaske, admitted that WSDOT did not obtain a no-rise certificate and there was no floodplain permit issued, which would have required an Engineered No-Rise Certificate under 44 C.F.R § 60(3). He further admitted that WSDOT did not obtain a flood control approval from Ecology, nor did the agency ask for or obtain a flood control approval from any federal agency. These admissions are of record in the trial transcript. *See* pages from Volume 2 of the Verbatim Report of the Proceedings, attached as **Appendix A-6**.

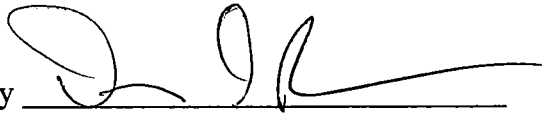
requested relief were separate.

This Court should accept review to level the playing field with government entities who engage in public works projects without (1) full disclosure of impacts and (2) without obtaining all required approvals.

VII. CONCLUSION

For the reasons stated, the Petition should be granted.

RESPECTFULLY SUBMITTED this 21st day of August, 2018.

By 
Dennis D. Reynolds, WSBA #04762
DENNIS D. REYNOLDS LAW OFFICE
Counsel for Petitioners

CERTIFICATE OF SERVICE

I hereby certify that on this 21st day of August, 2018, I caused the document to which this certificate is attached to be hand-delivered for filing:

Clerk of Court
Court of Appeals, Division I
600 University St,
Seattle, WA 98101
(206) 464-7750

I further certify that on this date, I caused a copy of the document to which this certificate is attached to be delivered to the following via e-mail and Priority U.S. mail as follows:

<p>Matthew D. Huot, AAG, WSBA #40606 Attorney General of Washington Transportation & Public Construction Div. P.O. Box 40113 Olympia, WA 98504-0113 <u>Deliveries/FedEx Only:</u> Transportation & Public Construction Div. 7141 Cleanwater Drive SW Tumwater, WA 98501-6503 (360) 753-6126, tel / (360) 586-6847, fax MattH4@atg.wa.gov; tpcef@atg.wa.gov; JennahW@atg.wa.gov; MelissaE1@atg.wa.gov <i>Attorneys for Respondent</i></p>	<p><input type="checkbox"/> <i>Legal Messenger</i> <input type="checkbox"/> <i>Hand Delivered</i> <input type="checkbox"/> <i>Facsimile</i> <input type="checkbox"/> <i>First Class Mail</i> <input checked="" type="checkbox"/> <i>Express Mail, Next Day</i> <input checked="" type="checkbox"/> <i>Email</i> <input type="checkbox"/> <i>COA Online Portal</i></p>
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Declared under penalty of perjury under the laws of the State of Washington at Bainbridge Island, Washington this 21st day of August, 2018.


Legal Assistant

WOLFE PETITION APPENDIX A-1

FILED
COURT OF APPEALS DIV 1
STATE OF WASHINGTON
2018 JUN 18 AM 9:13

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COURT CLERK

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

CHARLES WOLFE, a single person,)	No. 77741-6-1
and JANICE WOLFE, a single person,)	
and JOHN and DEE ANTTONEN, and)	
the marital community comprised)	
thereof,)	
)	
Appellants,)	DIVISION ONE
)	
v.)	
)	
STATE OF WASHINGTON,)	
DEPARTMENT OF)	
TRANSPORTATION,)	UNPUBLISHED OPINION
)	
Respondent.)	FILED: June 18, 2018

MANN, A.C.J. — Appellants Charles and Janice Wolfe and John and Dee Anttonen (collectively Wolfe) own property downstream of the Naselle River Bridge in Pacific County. Wolfe sued the Washington State Department of Transportation (WSDOT) in 2014, alleging that the bridge was a public nuisance. The case proceeded to a bench trial. After Wolfe rested, the trial court granted WSDOT's motion for involuntary dismissal. Wolfe appeals the trial court's findings, conclusions, and order of dismissal.

Because substantial evidence supports the trial court's findings, and those findings support its conclusions of law, we affirm.

FACTS

In 1926, WSDOT commissioned the construction of a bridge to accommodate a state highway, now known as SR 4.¹ The bridge was designed to span the Naselle River, approximately 200 feet. In order to elevate the roadway to accommodate this span, a 600-foot earth-fill embankment (approach embankment) was built on the northwesterly bank of the river. The bridge was replaced in 1985. The 1985 bridge was widened to 36 feet, and raised 6 feet to obtain flood clearance; the approach embankment was also raised 6 feet. Like the 1926 bridge, the 1985 bridge spanned approximately 200 feet, which cleared the channel of the Naselle River flowing underneath. One of the bridge piers was repaired in 1998. This repair included installing a riprap adjacent to one of the bridge piers to protect it from river scour.²

In 2004, Charles and Janice Wolfe purchased a nearby parcel of real property downstream of the bridge (Wolfe property). The Wolfes then purchased a neighboring parcel that abuts the Wolfe property to the east. In 2007, the Wolfes conveyed the second property to John and Dee Anttonen (Anttonen property). Both properties experience recurring flooding and bank erosion that the parties maintain was caused by the bridge, particularly the realignment of the bridge piers in 1985 that redirected the river toward their properties.

¹ Both parties substantially rely on the trial court's findings of fact in their "Statement of the Case." The majority of the trial court's findings of fact are unchallenged, and unchallenged findings of fact are verities on appeal. Cowiche Canyon Conservancy v. Bosley, 118 Wn.2d 801, 808, 828 P.2d 549 (1992). Wolfe does assign error to findings of fact, 1.31-1.34, 1.36, 1.40-1.46.

² Riprap is "a foundation or sustaining wall of stones thrown together without order (as in deep water on a soft bottom, or on an embankment to prevent erosion)." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1960 (2002).

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In 2010, Wolfe sued WSDOT in Pacific County Superior Court alleging inverse condemnation, negligence, and nuisance (Wolfe I). Wolfe I was dismissed by the superior court. The dismissal was affirmed by Wolfe v. Dep't of Transp., 173 Wn. App. 302, 293 P.3d 1244 (2013).

In 2014, Wolfe again sued WSDOT in Thurston County Superior Court (Wolfe II), alleging the bridge was a public nuisance and seeking an abatement of the nuisance. The trial court denied WSDOT's motion for summary judgment, finding that a floodplain obstruction claim was actionable under Washington's public nuisance laws. To avoid the doctrine of res judicata, however, Wolfe's public nuisance claims were limited to (1) an "obstruction" claim under RCW 7.48.140(3), and (2) a "pollution" claim under RCW 7.48.140(2).

Wolfe II proceeded as a bench trial. Wolfe called four witnesses, plaintiff Colonel John Anttonen, expert Russ Lawrence, plaintiff Charles Wolfe, and expert Kimberly Schaumburg.

Anttonen testified to the flooding and erosion he had seen on his property. Anttonen described how he had looked at the FEMA floodplain map before deciding where to build his house, but noticed that more areas had been flooding than were designated by the floodplain. Anttonen also testified that the area of his property included in the FEMA floodplain maps had increased, thereby reducing the value of his property. Anttonen explained that he had reached out to agencies and experts to determine the cause of the erosion on his property. In response, WSDOT inspected the property and WSDOT engineer Jim Park prepared a report (Park report). The Park report concluded the erosion was caused by natural river meander. Anttonen then hired

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Pacific Water Resources to review the Park report. Pacific Water Resources believed that the erosion was being driven by the way the bridge was built. Finally, Anttonen testified that he fished in the area and regularly witnessed other people fishing in the area.

Russ Lawrence, a fluvial geomorphologist, testified as an expert witness. Lawrence opined that the bridge and its approach embankment are obstructing the Naselle River. Lawrence based his testimony on his 2011 examination of the Wolfe property.³ Lawrence testified that the placement of the fill in the 600-foot area within the floodway constricted the natural course of the river and interfered with the natural meandering of the river. Lawrence also testified that the piers for the 1985 bridge were rotated 15-degrees south, changing the water flow and increasing the velocity in the direction of the plaintiff's property. This, he explained, subsequently caused increased erosion below the bridge and caused the flow of the river to change. Finding of Fact (Finding) 1.23.⁴ Lawrence testified he "would expect" the change in pier orientation would cause "the flood levels above the bridge to be incrementally reduced and below the bridge to be incrementally increased." Lawrence did not, however, testify that flooding had actually increased downstream of the bridge or that the bridge was the cause of increased flooding downstream.⁵

³ Lawrence summarized his findings in a report entitled, "Geomorphic Evaluation of the Impacts of the SR 4 Bridge Across the Naselle River, SR 4 milepost 6.06." Lawrence's testimony was veritabily a reiteration of this report.

⁴ In Wolfe's opening brief, Wolfe states "Findings of Fact 1.26 through 1.30 (CP 1507)" correctly capture his expert testimony.

⁵ See Unchallenged Finding 1.31: "The Wolfe and Anttonen properties have experienced inundation by floodwater during flooding events. However, the court does not find sufficient evidence to establish that the bridge or earth fill approach was the cause of the increased flooding events."

Lawrence reluctantly agreed there are other banks along the Naselle River that are eroding, unrelated to the bank on the Wolfe and Anttonen properties. Lawrence also agreed that the erosion has been occurring "throughout the system" at a higher rate due to a greater frequency of high flow events. Although Lawrence opined that it was worse near the bridge, Lawrence did not state what other areas of the river he had examined to support this statement.⁶ Finally, Lawrence stated that the earth fill approach does not obstruct the flow of the river below the "ordinary high water mark," and that "the bridge, as it currently exists, is wide enough to pass a 'bankfull' event without upstream or downstream impacts."⁷ Findings 1.23-1.24. According to Lawrence, his conclusion was "that the reorientation of the piers supporting the bridge did not ameliorate the floodplain construction and increased downstream erosion."

After Lawrence's testimony, WSDOT sought leave to call their witness, Steven Zaske, out of order to accommodate Zaske's schedule. Wolfe initially stipulated to this request until WSDOT qualified that they did not waive any defense or assume any burden of proof. Wolfe then objected. The trial court noted the objection, but allowed WSDOT to call Zaske out of order. Zaske testified that he worked for WSDOT and had prepared an environmental checklist and issued a determination of non-significance for

⁶ The State questioned whether Lawrence reviewed the Pacific Water Resources report, Exhibit 80, which concluded the frequency of high flow events have increased over time. Lawrence stated he did not.

⁷ "Bankfull" and "ordinary high water" were used interchangeably throughout the testimony, although they have slightly different definitions. 'Ordinary high water mark' is "that mark that will be found by examining the bed and banks and ascertaining where the presence and action of waters are so common and usual, and so long continued in all ordinary years, as to mark upon the soil a character distinct from that of the abutting upland." RCW 90.58.030. A "Bank" is any land surface that is "landward of the ordinary high water line next to a body of water and constrains the water except during floods." WAC 220-660-030. "Bankfull depth" means "the average vertical distance between the channel bed and the estimated water surface elevation required to completely fill the channel to a point above which water would enter the flood plain or intersect a terrace or hillslope." WAC 222-16-010.

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compliance with the State Environmental Policy Act, chapter 43.21C RCW (SEPA). Zasko testified to his knowledge of the bridge's reconstruction project in 1985, including the environmental compliance measures WSDOT performed as part of the project.

Charles Wolfe then testified to the increased flooding on his property and the erosion that has occurred since he purchased it. Wolfe described the research he performed investigating the cause of the erosion, and how he determined the best way to protect his property from further erosion. Wolfe eventually concluded that the bridge was the cause of the erosion and reached out to WSDOT, resulting in the Park report. Wolfe then described his efforts to acquire proof that WSDOT had obtained the correct permits when the bridge was built. Wolfe was not offered as an expert witness and was not permitted to analyze the causes of the flooding or the data related to the flooding.

On the third day of trial, while Charles Wolfe was still testifying, Wolfe moved for leave to recall Anttonen to clarify and expand on some of his previous testimony. The trial court granted that motion. Later that day, Wolfe moved for leave to recall Lawrence arguing that he could rebut Zasko's testimony and to discuss the bridge's effect on the floodplain. After hearing argument from both sides, the trial court denied Wolfe's motion to recall Lawrence.

Kimberly Schaumburg, a biologist, then testified as an expert witness. Schaumburg testified to her observations of the property and the types of pollution that often occurs due to erosion. Schaumburg testified that scour is erosion from the water to the stream bank or bed and has numerous negative impacts to aquatic life. Schaumburg testified that she did not perform an independent assessment of the water quality and did not take water samples. Schaumburg instead relied on water quality

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sampling collected by the Washington Department of Ecology (DOE) upstream of the bridge. DOE's data showed water quality concerns for temperature, dissolved oxygen, and ammonia. Schaumberg did not testify that DOE's data indicated concerns about sediment or turbidity.

After Wolfe rested, WSDOT moved for involuntary dismissal. The trial court granted the motion and issued an extensive oral ruling. The trial court rejected WSDOT's legal claims, but concluded, "the evidence that has been presented by the Plaintiffs is not sufficient to carry the burden of proof that the Plaintiffs have and to establish the elements of a public nuisance." The trial court held, "I have given great thought to all of the evidence, and ultimately, I am finding that the evidence simply does not make all of the connections and does not support all of the elements that must be shown for a public nuisance." The trial court then entered extensive written findings of fact and conclusions of law, and dismissed Wolfe's public nuisance claims. This appeal followed.

ANALYSIS

Standard of Review

Under CR 41(b)(3), "[a]fter the plaintiff, in an action tried by the court without a jury, has completed the presentation of evidence, the defendant, without waiving the right to offer evidence in the event the motion is not granted, may move for a dismissal on the ground that upon the facts and the law the plaintiff has shown no right to relief." The trial court may grant the motion as a matter of law or fact. Roy v. Goerz, 26 Wn. App. 807, 809, 614 P.2d 1308 (1980), overruled on other grounds by Chaplin v. Sanders, 100 Wn.2d 853, 859, 676 P.2d 431 (1984).

If the trial court rules as a matter of law, “it must treat the plaintiff’s evidence as true and determine that the plaintiff has failed to establish a prima facie case.” Logan v. Logan, 36 Wn. App. 411, 415, 675 P.2d 1242 (1984) (quoting N. Fiorito Co. v. State, 69 Wn.2d 616, 618, 419 P.2d 586 (1966)). If the trial court rules as a matter of fact, it may “weigh the evidence in support of plaintiff’s case and make ‘a factual determination that plaintiff has failed to establish a prima facie case by credible evidence, or that the credible evidence establishes facts which preclude plaintiff’s recovery.’” Logan, 36 Wn. App. at 415 (quoting N. Fiorito, 69 Wn.2d at 618); Dependency of Schermer, 161 Wn.2d 927, 939, 169 P.3d 452 (2007). In weighing the evidence, “the trial court, as the trier of the facts, is not required to accept all of plaintiff’s evidence as true.” N. Fiorito, 69 Wn.2d at 618-19. The trial court is to “appraise the credibility of the testimony and the force of any exhibits, and may believe or disbelieve plaintiff’s evidence, resolve testimonial conflicts, evaluate circumstantial evidence, [and] draw reasonable and allowable inferences.” N. Fiorito, 69 Wn.2d at 618-19.

When the trial court enters a judgment on the merits, it must make findings of fact. Schermer, 161 Wn.2d at 939; CR 41(b)(3). There is a strong suggestion that the trial court has weighed evidence when it enters findings of fact and conclusions of law. Schermer, 161 Wn.2d at 940.

In this case, the trial court entered judgment on the merits after entering extensive findings of fact and conclusions of law.⁸ Therefore, “appellate review is limited to whether substantial evidence supports the trial court’s findings and whether

⁸ Wolfe incorrectly argues that the trial court ruled as a matter of law because the dismissal turned on “incorrect legal views.” In the trial court’s oral ruling, the trial court explicitly rejected the State’s legal arguments and instead weighed the factual evidence against the legal standard, resolving the case on its merits. We find no support for Wolfe’s contention that the trial court ruled as a matter of law.

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the findings support its conclusions of law." Schermer, 161 Wn.2d at 940 (citing Nelson Constr. Co. of Ferndale v. Port of Bremerton, 20 Wn. App. 321, 582 P.2d 511 (1978).

Substantial evidence is the quantum of evidence "sufficient to persuade a rational fair-minded person the premise is true." Sunnyside Valley Irrig. Dist. v. Dickie, 149 Wn.2d 873, 879, 73 P.3d 369 (2003).

Public Nuisance

Wolfe's claims arise out of Washington's public nuisance statute, chapter 7.48 RCW. A nuisance is broadly defined as "unlawfully doing an act, or omitting to perform a duty, which act or omission either annoys, injures or endangers the comfort, repose, health or safety of others . . . or in any way renders other persons insecure in life, or in the use of property." RCW 7.48.120; Grundy v. Thurston County, 155 Wn.2d 1, 6-7, 117 P.3d 1089 (2005). An actionable nuisance includes "an obstruction to the free use of property, so as to essentially interfere with the comfortable enjoyment of the life and property." RCW 7.48.010. Any person whose property is injuriously affected or whose personal enjoyment is lessened by a nuisance may sue for damages and for injunctive relief to abate the nuisance. RCW 7.48.020; Grundy, 155 Wn.2d at 6-7.⁹

A nuisance "which affects equally the rights of an entire community or neighborhood" is a public nuisance." RCW 7.48.130. RCW 7.48.140 lists several enumerated public nuisances, including, as pertinent here, "(2) . . . to corrupt or render unwholesome or impure the water of any such spring, stream, pond, lake, or well, to the

⁹ "Every person who has the care, government, management, or control of any building, structure, . . . shall, for the purposes of this section, be taken and deemed to be the owner or agent of the owner or owners of such building, structure, . . . and, as such, may be proceeded against for erecting, contriving, causing, continuing, or maintaining such nuisance." RCW 7.48.140(9). Nobody contests that WSDOT has control over the bridge.

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injury or prejudice of others; [and] (3) To obstruct or impede, without legal authority, the passage of any river, harbor, or collection of water.” RCW 7.48.140(2)-(3). “A private person may maintain a civil action for a public nuisance, if it is specifically injurious to himself.” RCW 7.48.210; Hostetler v. Ward, 41 Wn. App. 343, 356-57, 704 P.2d 1193 (1985). Wolfe argues that the bridge is a public nuisance under both RCW 7.48.130 (2) and (3).

A. Obstruction

Wolfe argues first that the bridge is a public nuisance because it obstructs “without legal authority, the passage of any river, harbor, or collection of water.” RCW 7.48.140(3). Wolfe maintains the bridge obstructs the Naselle River floodplain, which negatively impacts the river's natural migration process causing increased flooding to the Wolfe property and the community below the river.

The trial court's findings of fact affirmed Wolfe's claims that the earth fill and the bridge constituted an obstruction of the floodplain. Finding 1.26. The trial court also agreed that the obstruction “resulted in a change of water flow, as well as increased river velocities in the vicinity of the bridge,” and the “600-foot long earth fill approach across the floodplain has constrained and interfered with the natural meandering characteristics of the river.” Findings 1.26-1.28. The court also found that the Wolfe and Anttonen properties “have experienced inundation by floodwater during flooding events.” Finding 1.31. Neither party contests these findings.

Nevertheless, the trial court found the evidence was insufficient “to establish that the bridge or the earth fill approach was the cause of the increased flooding events.” Finding 1.31. The court found also that the evidence was insufficient “to establish that

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the bridge or the earth fill approach was the cause of any change in the floodplain designation on FEMA Flood Insurance Rate Manual (FIRM) maps of the area." Finding 1.32. Thus, without evidence to demonstrate a "causal link" between the bridge and the increased flooding, the trial court concluded "[t]he evidence is insufficient to prove that the bridge and the earth fill approach are the cause of flooding on plaintiffs' land or of any change in the area's FEMA FIRM maps." Conclusion of Law (Conclusion) 2.9.

After reviewing the record, we agree with the trial court that Wolfe failed to demonstrate that the bridge was the cause of the flooding. While Lawrence speculated that he "would expect" the bridge to result in increased flooding downstream, he offered no evidence or opinion that the bridge was the actual cause of any downstream flooding and instead agreed that there had been increased flooding events throughout the river. Wolfe's argument relies simply on evidence that flooding was occurring. Wolfe does not identify evidence in the record that demonstrates the cause of this flooding. Wolfe's argument instead relies on mere speculation, arguing the "reasonable inference from evidence in the record" is that "the cause of the increase in base flood elevation is the SR4 Bridge."

Wolfe maintains "WSDOT had the burden of proving the affirmative defense" that the bridge was not the cause of the flooding. Wolfe is incorrect. Wolfe, as the plaintiff, carried the burden of demonstrating that the bridge was an "obstruction" that constituted a "nuisance." "An actionable nuisance must injure the property or unreasonably interfere with enjoyment of the property." Tiegs v. Watts, 135 Wn.2d 1, 13, 954 P.2d 877 (1998). Thus, for Wolfe to meet his burden, he needed to provide sufficient evidence that the bridge and fill obstructed the river, and that obstruction caused the

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changes to the rivers floodplain that injured his property. The State did not have the burden to “justify the impacts of the SR4 Bridge,” because Wolfe failed to meet his burden of proving that the bridge was causing those impacts. We hold the trial court’s conclusion that Wolfe failed to prove that the bridge and the earth fill approach are the cause of flooding on Wolfe’s property is supported by the court’s findings and substantial evidence. Conclusion 2.9.¹⁰

Wolfe also argues the trial court committed legal error when it erroneously required proof that the increased flooding exceeded a certain percentage when the law prohibits any increase in base flood elevation. This is incorrect. The trial court explicitly found there was no evidence that the bridge had caused any increase in flooding. The trial court only mentioned whether the flooding had “create[d] an impact in the base flow elevation by more than one foot” while discussing whether the construction of the bridge was lawful, not in determining causation. The trial court did not misapply the law.

We turn next to Wolfe’s argument that the bridge is a public nuisance because, due to its obstruction, it is causing erosion. There is no dispute that the banks of the Wolfe and Anttonen properties are eroding. The trial court concluded that “[t]he bridge and the earth fill approach are obstructing the Naselle River’s floodplain, causing erosion of plaintiffs’ property and interfering with their quiet enjoyment of their land.”

Conclusion 2.8.

¹⁰ WSDOT briefly argues in their response that the statutory language “to obstruct or impede . . . the passage of any river, harbor, or collection of water,” does not apply when the obstruction is not interfering with the ability to travel by way of the river. This corresponds with WSDOT’s motion for summary judgment that was denied by the trial court. WSDOT does not assign error to the trial court’s ruling that obstruction of the river includes an obstruction that alters the floodplain. “If a respondent is also seeking review, the brief of respondent must state the assignments of error and the issues pertaining to those assignments of error presented for review by respondent and include argument of those issues.” RAP 10.3(8)(b). As this issue was not properly raised on appeal, we decline to consider it.

The trial court's analysis next considered whether the erosion amounted to a public nuisance. A public nuisance must affect "an entire community or neighborhood." RCW 7.48.130. The trial court found, "in light of this testimony and the reasonable inferences drawn therefrom" the evidence was insufficient "to show that erosion or bank loss extended to the entire community or a broader neighborhood than the Plaintiffs." Finding 1.40. After reviewing the record, we agree with the trial court.

Wolfe's expert, Lawrence, opined that the bridge was causing increased erosion. Lawrence's testimony, however, was limited to the effect the bridge had on the Wolfe and Anttonen properties. While Lawrence speculated that continued erosion might result in the Naselle River jumping its bank and connecting with Salmon Creek within five years, the bank and portions of Salmon Creek that are at risk of this avulsion are entirely within the Anttonen and Wolfe properties. Wolfe failed to present evidence or testimony that the erosion would affect other properties in the community. We hold the trial court's findings are supported by substantial evidence and support the conclusion that the evidence was insufficient to demonstrate that the erosion was impacting the community.

Moreover, even if Wolfe had demonstrated that the bridge resulted in increased flooding or erosion affecting the community, he also needed to demonstrate that the obstruction existed "without legal authority." RCW 7.48.140(3). Wolfe argued that WSDOT did not have the legal authority to obstruct or impede the river because there was no evidence that WSDOT received the proper permits.¹¹ The trial court

¹¹ Wolfe argues that the bridge is a nuisance "per se" because he proved it is "obstructing" the river. "A nuisance per se is an activity that is not permissible under any circumstances, such as an activity forbidden by statute or ordinance." Kitsap County v. Kitsap Rifle & Revolver Club, 184 Wn. App.

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acknowledged this argument, but found, "sufficient evidence was not provided to establish that as a matter of fact WSDOT violated a permitting requirement at the time the bridge was replaced in 1985, or that the bridge or its approach caused a change in the base flood elevation."

The trial court's findings are supported by substantial evidence. Wolfe did not offer testimony or evidence from experts or other persons familiar with the permitting requirements to substantiate the claim that WSDOT needed to obtain additional permits in 1985.¹² The only evidence of the permits required in 1985 was a list of permits identified in the SEPA environmental checklist prepared by WSDOT. All of the permits noted in the environmental checklist were offered and admitted as exhibits.¹³ Other than the permits identified in the environmental checklist, Wolfe failed to offer any credible evidence as to which permits were required at the time the bridge was built, or that WSDOT violated any permit procedures. Wolfe simply testified to what he believed to be the permits that were required at the time the bridge was built. Citing to statutes alone does not specify what permits were required administratively at the time.

252, 277, 337 P.3d 328 (2014), amended on denial of reconsideration (Feb. 10, 2015). A bridge is permissible under many circumstances; therefore, the bridge would only be a nuisance if it was built in violation of a statutory prohibition and without agency approval.

¹² Wolfe also argues that WSDOT did not have the correct permits for the original bridge or the 1998 repair work, however, this information is irrelevant. The original bridge was an obstruction; however, Wolfe did not present any evidence that it "interfered with the comfortable enjoyment" of his property. Wolfe similarly did not present any evidence that the repair work done in 1998 affected his property. Wolfe only provided evidence that the bridge, as built in 1985, caused the erosion and the flooding that they have experienced. Therefore, the issue is whether the bridge, as built in 1985, was an unlawful obstruction.

¹³ See Exs. 169 and 20 (Application for Pacific County Shoreline Management Permit); Ex. 170 (Shoreline Management Permit from Department of Ecology); Exs. 172 and 24 (Hydraulic Project Approval from Department of Fisheries); Ex. 164 (SEPA Declaration of Non-Significance, application); 165 (Environmental checklist); Ex. 167 (SEPA Final).

The trial court's findings support the conclusion that Wolfe failed to present the necessary evidence to demonstrate a prima facie case for public nuisance under RCW 7.48.140(3).

B. Erosion as Pollution

Wolfe argues next that the bridge is a public nuisance under RCW 7.48.140(2), which provides, "[i]t is a public nuisance . . . to corrupt or render unwholesome or impure the water of any such spring, stream, pond, lake, or well, to the injury of others." Wolfe maintains that the bridge is causing erosion which in turn results in excessive amounts of sediment being deposited into the river negatively affecting the river's water quality and habitability for aquatic life.

The trial court summarized the requirement for demonstrating a public nuisance under RCW 7.48.140(2) stating, "there needs to be evidence of pollution being introduced into a river that renders the river impure and that causes injury to people." Finding 1.42. The trial court found that Wolfe presented, through Schaumburg's testimony, some evidence of the potential for "water pollution." Finding 1.43. In analyzing this evidence, however, the trial court found Schaumburg "did not take specific measurements of the water quality in the area. And, while she described potential impacts to water quality in general terms, she did not offer an opinion that the bridge or the earth fill approach caused the water quality issues she noted." Finding 1.44. The trial court found that "[s]ufficient evidence has not been offered to support a finding that the bridge or the earth fill approach caused any negative impact to the river's water quality or impacts to fish or other aquatic life." Finding 1.45.

The trial court's findings are supported by substantial evidence. There is no dispute that the trial court found the bridge caused the erosion on the Wolfe and Anttonen properties. The trial court also recognized that sedimentation fouls the waters of the state and damages fish habitat. However, Schaumberg failed to present evidence that the erosion had "corrupt[ed] or render[ed] unwholesome or impure" the river "to the injury of others." RCW 7.48.140(2). Schaumberg relied entirely on water quality measurements taken by the DOE upstream of the bridge, which simply indicated concerns for temperature, dissolved oxygen, and ammonia. Schaumberg only testified to the possible effects of increased sedimentation in the water, without offering any evidence of an increase in sedimentation below the bridge.

The trial court also found "sufficient evidence [had] not been offered to establish that the entire community has been injured by any water quality change attributable to the bridge. This finding is also supported by substantial evidence.

The area near the bridge supports fishing and recreation by members of the general public. Plaintiff John Anttonen testified that this fishing continues, and that he has fished the river near his property in the past. Finding 1.46. Schaumberg did not testify that the alleged pollution had any effect on the communities continued use of the river. Wolfe simply argues "[t]he people of the state have a vested interest in clean water, unobstructed floodplains, robust aquatic habitat, and robust floodplain functions and values, consistent with RCW 90.58.020" and "a violation of these laws which threaten (or damage) public waters and public resources affect the entire community without regard to the location of the environmental perturbation." However, this is not a

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concrete measure of injury.¹⁴ Even if general statements of possible pollution were sufficient to prove a nuisance, Wolfe did not provide any evidence that he had been “specially” harmed by this pollution.

The findings support the trial court’s conclusion that the evidence was insufficient to prove that the bridge or the earth fill approach were “corrupting or rendering unwholesome or impure the water of the Naselle River.” Conclusions 2.17-2.18. We hold the findings support the trial courts conclusion that Wolfe failed to demonstrate a prima facie case for public nuisance under RCW 7.48.140(3).

Procedural Issues

Wolfe next raises three procedural issue on appeal.

Wolfe contends first that the trial court abused its discretion when it permitted the State’s witness, Zaske, to be called during their presentation of the case. We disagree.

It is undisputed that the plaintiff bears the burden of proof at trial, and is entitled to present its case first. Allowing the plaintiff to completely present its case without interruption is generally the preferred method of procedure, however, “a trial court has discretion to permit the interruption of a party’s case when necessary for the convenience of litigants or the trial court.” Wilson v. Overlake Hosp. Medical Center, 77 Wn. App. 909, 913, 895 P.2d 16 (1995). Here, the State’s witness was only available at this time. The trial court did not abuse its discretion in granting this limited interruption.

¹⁴ Compare to Miotke v. City of Spokane, 101 Wn.2d 307, 319, 678 P.2d 803 (1984), abrogated by Blue Sky Advocates v. State, 107 Wn.2d 112, 727 P.2d 644 (1986), where the city had allowed a bypass that permitted untreated sewage to enter the lake.

Wolfe argues next that permitting Zaske to testify barred the State from subsequently filing a motion for involuntary dismissal under CR 41(b)(3).¹⁵ Again, we disagree.

A defendant generally waives a challenge to the sufficiency of the evidence by proceeding to present evidence after his motion to dismiss has been denied, or where the court “fails to rule or reserves its ruling.” Hector v. Martin, 51 Wn.2d 707, 709, 321 P.2d 555 (1958); NW. Wholesale v. Pac Organic Fruit, 184 Wn.2d 176, 182-183, 357 P.3d 650 (2015), cert. denied, 136 S. Ct. 1453, 194 L. Ed. 2d 551 (2016). “This rule simply means a defendant waives the right to challenge the sufficiency of the plaintiff’s evidence alone by presenting evidence in defense,” it does not bar the court from considering “the motion in light of all of the evidence.” See NW. Wholesale, 184 Wn.2d at 182-83.

In NW. Wholesale, the plaintiff challenged the decision of the trial court granting the defendant’s motion for dismissal after the defendant presented evidence. The appellate court held “even if sufficiency of the evidence bore on any pertinent question, nothing indicates that the trial court limited itself to considering only [the plaintiff’s] evidence.” 184 Wn.2d at 183. Thus, the prejudice occurs when the plaintiff does not

¹⁵ CR 41(b)(3) states:

After the plaintiff, in an action tried by the court without a jury, has completed the presentation of the evidence, the defendant, without waiving the right to offer evidence in the event the motion is not granted, may move for a dismissal on the ground that upon the facts and the law the plaintiff has shown no right to relief. The court as trier of the facts may then determine them and render judgment against the plaintiff or may decline to render any judgment until the close of all the evidence. If the court renders judgment on the merits against the plaintiff, the court shall make findings as provided in rule 52(a). Unless the court in its order for dismissal otherwise specifies, a dismissal under this subsection and any dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction, for improper venue, or for failure to join a party under rule 19, operates as an adjudication upon the merits.

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receive the benefit of all of the evidence presented, not that the defendant's evidence prejudiced the plaintiff.

In this case, the trial court specifically stated that it had considered Zaskes testimony when ruling on the motion. Therefore, both parties were given the benefit of all of the evidence. Wolfe also frequently uses Zaskes testimony in his favor throughout his brief. Hector and NW Wholesale indicate that the remedy for a potential error is that we are also to view all of the evidence on appeal, which we have done.

Finally, Wolfe argues that the trial court erred in denying his request to recall Lawrence "as a rebuttal expert." We disagree. "The recalling of a witness prior to the close of a party's case is a matter for the discretion of the trial court, and will not be reversed absent a manifest abuse of discretion." State v. Martinez, 53 Wn. App. 709, 717, 770 P.2d 646 (1989). We also review the refusal by a trial court to admit rebuttal evidence under a manifest abuse of discretion standard. State v. White, 74 Wn.2d 386, 395, 444 P.2d 661 (1968). Such abuse occurs only when no reasonable person would take the adopted view. Discipline of Van Camp, 171 Wn.2d 781, 799, 257 P.3d 599 (2011). A trial court is responsible for controlling the mode and order of witnesses and presentation of evidence pursuant to ER 611.

At trial, Wolfe moved for leave to recall Lawrence for the purpose of testifying to new issues that he did not address previously, to clarify his prior testimony, and to rebut the discussion of the permits that have been identified by Zaskes testimony. On appeal, Wolfe argues that recalling Lawrence was necessary to rebut Zaskes testimony regarding the need for a no-rise certificate or other applications considering flood levels.

Rebuttal evidence is admitted to enable the plaintiff to answer new matters presented by the defense. White, 74 Wn.2d at 394. In this case, Lawrence's testimony would not have responded to new matters raised by Zaske. One of the arguments Wolfe raised at trial was that WSDOT failed to obtain the necessary permits at the time the bridge was built. In doing so, Wolfe provided copies of all the permits WSDOT had obtained, including the SEPA environmental checklist. Zaske's testimony simply reiterated the information available on the SEPA environmental checklist. Zaske did not offer new testimony regarding a "no-rise certification," or whether they submitted any applications considering the floodwaters, or flood rise.¹⁶ These topics were raised, objected to, and then never pursued. Contrary to Wolfe's assertion, Zaske did not offer new evidence that needed to be rebutted.

Moreover, Wolfe failed to lay a foundation that Lawrence was qualified to testify to the permitting requirements in place at the time the bridge was built. Although Lawrence was an engineer, Wolfe offered no evidence that Lawrence was familiar with permitting requirements in 1985. The trial court also noted that Wolfe had been granted significant time to examine Lawrence, and had two years to prepare for trial. The trial court did not abuse its discretion.

¹⁶ "Do you know what an engineering no rise certificate is? MR. HUOT: Objection. Exceeds the scope. THE COURT: Over -- MR. REYNOLDS: Let me ask it a different way, Your Honor. See Report of Proceedings (Oct. 11, 2016) at 295.

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We affirm.

Mann, A.C.J.

WE CONCUR:

Trickey, J

Vudky

WOLFE PETITION APPENDIX A-2

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

CHARLES WOLFE, a single person,)
and JANICE WOLFE, a single person,)
and JOHN and DEE ANTTONEN, and)
the marital community comprised)
thereof,)

Appellants,)

v.)

STATE OF WASHINGTON,)
DEPARTMENT OF)
TRANSPORTATION,)

Respondent.)
_____)

No. 77741-6-I

DIVISION ONE

ORDER DENYING MOTION
FOR RECONSIDERATION

Appellants Charles Wolfe, Janice Wolfe, and John and Dee Anttonen have filed a motion for reconsideration of the court's opinion filed on June 18, 2018. The panel has determined that the motion for reconsideration should be denied.

Therefore, it is

ORDERED that the motion for reconsideration is denied.

FOR THE PANEL:

Wann, A.C.J.

WOLFE PETITION APPENDIX A-3

PACIFIC COUNTY
FLOOD DAMAGE PREVENTION ORDINANCE

NO. 71

STATUTORY AUTHORIZATION AND STATEMENT OF SECTION 1.0 PURPOSE

1.1 STATUTORY AUTHORIZATION

The Legislature of the State of Washington has in RCW 36.70 delegated the responsibility to local governmental units to adopt regulations designed to promote the public health, safety, and general welfare of its citizenry.

1.2 STATEMENT OF PURPOSE

It is the purpose of this ordinance to promote the public health, safety, and general welfare, and to minimize public and private losses due to flood conditions in specific areas by methods and provisions designed for:

- (1) Restricting or prohibiting uses which are dangerous to health, safety, and property due to water or erosion hazards, or which result in damaging increases in erosion or in flood heights or velocities;
- (2) Requiring that uses vulnerable to floods, including facilities which serve such uses, be protected against flood damage at the time of initial construction;
- (3) Controlling the alteration of natural flood plains, stream channels, and natural protective barriers, which help accomodate or channel flood waters;
- (4) Controlling filling, grading, dredging, and other development which may increase flood damage; and,
- (5) Preventing or regulating the construction of flood barriers which will unnaturally divert flood waters or which may increase flood hazards in other areas.

SECTION 2.0
DEFINITIONS

Unless specifically defined below, words or phrases used in this ordinance shall be interpreted so as to give them the meaning they have in common usage and to give this ordinance its most reasonable application.

"AREA OF SHALLOW FLOODING" means a designated AO or AH Zone on the Flood Insurance Rate Map (FIRM). The base flood depths range from one to three feet; a clearly defined channel does not exist; the path of flooding is unpredictable and indeterminate; and, velocity flow may be evident.

"AREA OF SPECIAL FLOOD HAZARD" means the land in the flood plain within a community subject to a one percent or greater chance of flooding in any given year.

"BASE FLOOD" means the flood having a one percent chance of being equalled or exceeded in any given year.

"BREAKAWAY WALLS" mean any type of walls, whether solid or lattice, and whether constructed of concrete, masonry, wood, metal, plastic, or any other suitable building material which are not part of the structural support of the building and which are so designed as to breakaway, under abnormally high tides or wave action, without damage to the structural integrity of the building on which they are used or any buildings to which they might be carried by flood waters.

Flood Damage Prevention Ordinance

"COASTAL HIGH HAZARD AREA" means the area subject to high velocity waters, including but not limited to, storm surge or tsunamis. The area is designated on a FIRM as Zone VI-30.

"DEVELOPMENT" means any man-made change to improved or unimproved real estate, including but not limited to buildings or other structures, mining, dredging, filling, grading, paving, excavation or drilling operations located within the area of special flood hazard.

"EXISTING MOBILE HOME PARK OR MOBILE HOME SUBDIVISION" means a parcel (or contiguous parcels) of land divided into two or more mobile home lots for rent or sale for which the construction of facilities for servicing the lot on which the mobile home is to be affixed (including, at a minimum, the installation of utilities, either final site grading or the pouring of concrete pads, and the construction of streets) is completed before the effective date of this ordinance.

"EXPANSION TO AN EXISTING MOBILE HOME PARK OR MOBILE HOME SUBDIVISION" means the preparation of additional sites by the construction of facilities for servicing the lots on which the mobile homes are to be affixed (including the installation of utilities, either final site grading or pouring of concrete pads, or the construction of streets).

"FLOOD" or "FLOODING" means a general and temporary condition of partial or complete inundation of normally dry land areas from:

- (1) The overflow of inland or tidal waters and/or
- (2) The unusual and rapid accumulation of runoff of surface waters from any source.

"FLOOD INSURANCE RATE MAP" (FIRM) means the official map on which the Federal Insurance Administration has delineated both the areas of special flood hazards and the risk premium zones applicable to the community.

"FLOOD INSURANCE STUDY" means the official report provided by the Federal Insurance Administration that includes flood profiles, the Flood Boundary-Floodway Map, and the water surface elevation of the base flood.

"FLOODWAY" means the channel of a river or other watercourse and the adjacent land areas that must be reserved in order to discharge the base flood without cumulatively increasing the water surface elevation more than one foot.

"HABITABLE FLOOR" means any floor usable for living purposes, which includes working, sleeping, eating, cooking or recreation, or a combination thereof. A floor used only for storage purposes is not a "habitable floor".

"MEAN SEA LEVEL" means the average height of the sea for all stages of the tide.

"MOBILE HOME" means a structure that is transportable in one or more sections, built on a permanent chassis, and designed to be used with or without a permanent foundation when connected to the required utilities. It does not include recreational vehicles or travel trailers.

"NEW CONSTRUCTION" means structures for which the "start of construction" commenced on or after the effective date of this ordinance.

"NEW MOBILE HOME PARK OR MOBILE HOME SUBDIVISION" means a parcel (or contiguous parcels) of land divided into two or more mobile home lots for rent or sale for which the construction of facilities for servicing the lot (including, at a minimum, the installation of utilities, either final site grading or the pouring of concrete pads, and the construction of streets) is completed on or after the effective date of this ordinance.

"START OF CONSTRUCTION" means the first placement of permanent construction of a structure (other than a mobile home) on a site, such as the pouring of slabs or footings or any work beyond the stage of excavation. Permanent construction does not include land preparation, such as clearing, grading, and filling, nor does it include the installation of streets and/or walkways; nor does it include excavation for a basement, footings, piers or foundations or the erection of temporary forms; nor does it include the installation on the property of accessory buildings, such as garages or sheds not occupied as dwelling units or not as part of the main structure. For a structure (other than a mobile home) without a basement or poured footings, the "start of construction" includes the first permanent framing or assembly of the structure or any part thereof on its piling or foundation. For mobile homes not within a mobile home park or mobile home subdivision, "start of construction" means the affixing of the mobile home to its permanent site. For mobile homes within mobile home parks or mobile home subdivisions, "start of construction" is the date on which the construction of facilities for servicing the site on which the mobile home is to be affixed (including, at a minimum, the construction of streets, either final site grading or the pouring of concrete pads, and installation of utilities) is completed.

"STRUCTURE" means a walled and roofed building or mobile home that is principally above ground.

"SUBSTANTIAL IMPROVEMENT" means any repair, reconstruction, or improvement of a structure, the cost of which equals or exceeds 50 percent of the market value of the structure either:

- (1) before the improvement or repair is started, or
- (2) if the structure has been damaged and is being restored, before the damage occurred. For the purposes of this definition "substantial improvement" is considered to occur when the first alteration of any wall, ceiling, floor, or other structural part of the building commences, whether or not that alteration affects the external dimensions of the structure.

The term does not, however, include either:

- (1) any project for improvement of a structure to comply with existing state or local health, sanitary, or safety code specifications which are solely necessary to assure safe living conditions, or
- (2) any alteration of a structure listed on the National Register of Historic Places or a State Inventory of Historic Places.

SECTION 3.0 GENERAL PROVISIONS

3.1 BASIS FOR ESTABLISHING THE AREAS OF SPECIAL FLOOD HAZARD

The areas of special flood hazard identified by the Federal Insurance Administration in a scientific and engineering report entitled "The Flood Insurance Study for the County of Pacific", dated July, 1977, with accompanying Flood Insurance Maps is hereby adopted by reference and declared to be a part of this ordinance. The Flood Insurance Study is on file at the Pacific County Department of Public Works, P.O. Box 66, South Bend, WA 98586.

3.2 COMPLIANCE

No structure or land shall hereafter be constructed, located, extended, converted, or altered without full compliance with the terms of this ordinance and other applicable regulations.

3.3 ABROGATION AND GREATER RESTRICTIONS

This ordinance is not intended to repeal, abrogate, or impair any existing easements, covenants, or deed restrictions. However, where this ordinance and another ordinance, easement, covenant, or deed restriction conflict or overlap, whichever imposes the more stringent restrictions shall prevail.

3.4 INTERPRETATION

In the interpretation and application of this ordinance, all provisions shall be:

- (1) Considered as minimum requirements;
- (2) Liberally construed in favor of the governing body; and,
- (3) Deemed neither to limit nor repeal any other powers granted under state statutes.

3.5 WARNING AND DISCLAIMER OF LIABILITY

The degree of flood protection required by this ordinance is considered reasonable for regulatory purposes and is based on scientific and engineering considerations. Larger floods can and will occur on rare occasions. Flood heights may be increased by man-made or natural causes. This ordinance does not imply that land outside the areas of special flood hazards or uses permitted within such areas will be free from flooding or flood damages. This ordinance shall not create liability on the part of Pacific County, any officer or employee thereof, or the Federal Insurance Administration, for any flood damages that result from reliance on this ordinance or any administrative decision lawfully made thereunder.

SECTION 4.0 ADMINISTRATION

4.1 ESTABLISHMENT OF DEVELOPMENT PERMIT

A development permit shall be obtained before construction or development begins within any area of special flood hazard established in Section 3.2. The permit shall be for all structures including mobile homes, as set forth in the "DEFINITIONS," and for all other development including fill and other activities, also as set forth in the "DEFINITIONS." Application for a development permit shall be made on forms furnished by the Director of Public Works and may include, but not be limited to; plans in duplicate drawn to scale showing the nature, location, dimensions, and elevations of the area in question; existing or proposed structures, fill, storage of materials, drainage facilities; and the location of the foregoing.

4.2 DESIGNATION OF THE FLOOD ADMINISTRATOR

The Director of Public Works is hereby appointed to administer and implement this ordinance by granting or denying development permit applications in accordance with its provisions.

4.3 DUTIES AND RESPONSIBILITIES OF THE DIRECTOR OF PUBLIC WORKS

Duties of the Director of Public Works shall include, but not be limited to:

4.3-1 Permit Review

- (1) Review all development permits to determine that the permit requirements of this ordinance have been satisfied.
- (2) Review all development permits to determine that all necessary permits have been obtained from those federal, state or local governmental agencies from which prior approval is required.
- (3) Review all development permits to determine if the proposed development is located in the floodway. If located in the floodway, assure that the encroachment provisions of Section 5.3(1) are met.

4.3-2 Use of Other Base Flood Data

When base flood elevation data has not been provided in accordance with Section 3.2, BASIS FOR ESTABLISHING THE AREAS OF SPECIAL FLOOD HAZARD, the Director of Public Works shall obtain, review, and reasonably utilize any base flood elevation data available from a federal, state or other source, in order to administer Sections 5.2-1, SPECIFIC STANDARDS, Residential Construction, and 5.2-2, SPECIFIC STANDARDS, Nonresidential Construction.

4.3-3 Information To Be Obtained And Maintained

- (1) Obtain and record the actual elevation (in relation to mean sea level) of the lowest habitable floor (including basement) of all new or substantially improved structures, and whether or not the structure contains a basement.
- (2) For all new or substantially improved floodproofed structures:
 - (i) verify and record the actual elevation (in relation to mean sea level), and
- (3) Maintain for public inspection all records pertaining to the provisions of this ordinance.
- (4) In coastal high hazard areas, certification shall be obtained from a registered professional engineer or architect that the structure is securely anchored to adequately anchored pilings or columns in order to withstand velocity waters.

4.3-4 Alteration of Watercourses

- (1) Notify adjacent communities and the Washington State Department of Ecology prior to any alteration or relocation of a watercourse, and submit evidence of such notification to the Federal Insurance Administration.
- (2) Require that maintenance is provided within the altered or relocated portion of said watercourse so that the flood carrying capacity is not diminished.

4.3-5 Interpretation of FIRM Boundaries

Make interpretations where needed, as to exact location of the boundaries of the areas of special flood hazards (for example, where there appears to be a conflict between a mapped boundary and actual field conditions).

4.4 VARIANCE PROCEDURE

4.4-1 Appeal Board

- (1) The Pacific County Board of County Commissioners shall hear and decide appeals and requests for variances from the requirements of this ordinance. Such appeals shall be granted consistent with the standards of Section 1910.6 of the rules and regulations of the National Flood Insurance Program (24 CFR 1909, etc.).

SECTION 5.0
PROVISIONS FOR FLOOD HAZARD PROTECTION

5.1 GENERAL STANDARDS

In all areas of special flood hazards, the following standards are required:

5.1-1 Anchoring

- (1) All new construction and substantial improvements shall be anchored to prevent flotation, collapse or lateral movement of the structure.
- (2) All mobile homes shall be anchored to resist flotation, collapse, or lateral movement by providing over-the-top and frame ties to ground anchors. Specific requirements shall be that:

- (i) over-the-top ties be provided at each of the four corners of the mobile home, with two additional ties per side at intermediate locations, with mobile homes less than 50 feet long requiring one additional tie per side;
 - (ii) frame ties be provided at each corner of the home with five additional ties per side at intermediate points, with mobile homes less than 50 feet long requiring four additional ties per side;
 - (iii) all components of the anchoring system be capable of carrying a force of 4,800 pounds; and,
 - (iv) any additions to the mobile home be similarly anchored.
- (3) An alternative method of anchoring may involve a system designed to withstand a wind force of 90 miles per hour or greater. Certification must be provided to the Director of Public Works, that this standard has been met.

5.1-2 Construction Materials and Methods

- (1) All new construction and substantial improvements shall be constructed with materials and utility equipment resistant to flood damage.
- (2) All new construction and substantial improvements shall be constructed using methods and practices that minimize flood damage.

5.1-3 Utilities

- (1) All new and replacement water supply systems shall be designed to minimize or eliminate infiltration of flood waters into the system;
- (2) New and replacement sanitary sewage systems shall be designed to minimize or eliminate infiltration of flood waters into the systems and discharge from the systems into flood waters; and,
- (3) On-site waste disposal systems shall be located to avoid impairment to them or contamination from them during flooding.

5.1-4 Subdivision Proposals

- (1) All subdivision proposals shall be consistent with the need to minimize flood damage;
- (2) All subdivision proposals shall have public utilities and facilities such as sewer, gas, electrical, and water systems located and constructed to minimize flood damage;
- (3) All subdivision proposals shall have adequate drainage provided to reduce exposure to flood damage; and,
- (4) Base flood elevation data shall be provided for subdivision proposals and other proposed development which contain at least 50 lots or 5 acres (whichever is less).

5.1-5 Review of Building Permits

Where elevation data is not available, applications for building permits shall be reviewed to assure that proposed construction will be reasonably safe from flooding. The test of reasonableness is a local judgment and includes use of historical data, high water marks, photographs of past flooding, etc., where available.

5.2 SPECIFIC STANDARDS

In all areas of special flood hazards where base flood elevation data has been provided as set forth in Section 3.1 BASIS FOR ESTABLISHING THE AREAS OF SPECIAL FLOOD HAZARD or Section 4.3-2, Use of Other Base Flood Data, the following provisions are required:

5.2-1 Residential Construction

New construction and substantial improvement of any residential structure shall have the lowest floor, including basement, elevated to or above base flood elevation.

5.2-2 Nonresidential Construction

New construction and substantial improvement of any commercial, industrial or other nonresidential structure shall either have the lowest floor, including basement, elevated to the level of the base flood elevation; or, together with attendant utility and sanitary facilities, shall:

- (1) be floodproofed so that below the base flood level the structure is watertight with walls substantially impermeable to the passage of water;
- (2) have structural components capable of resisting hydrostatic and hydrodynamic loads and effects of buoyancy; and,
- (3) be certified by a registered professional engineer or architect that the standards of this subsection are satisfied. Such certifications shall be provided to the Director of Public Works.

5.2-3 Mobile Homes

- (1) Mobile homes shall be anchored in accordance with Section 5.1-1.
- (2) For new mobile home parks and mobile home subdivisions; for expansion to existing mobile home parks and mobile home subdivisions; for existing mobile home parks and mobile home subdivisions where the repair, reconstruction or improvement of the streets, utilities and pads equals or exceeds 50 percent of value of the streets, utilities and pads before the repair, reconstruction or improvement has commenced; and for mobile homes not placed in a mobile home park or mobile home subdivision, require that:
 - (i) stands or lots are elevated on compacted fill or on pilings so that the lowest floor of the mobile home will be at or above the base flood level;
 - (ii) adequate surface drainage and access for a hauler are provided; and,
 - (iii) in the instance of elevation on pilings, that:
 - lots are large enough to permit steps,
 - piling foundations are placed in stable soil no more than ten feet apart, and
 - reinforcement is provided for pilings more than six feet above the ground level.
- (3) No mobile home shall be placed in a floodway, except in an existing mobile home park or existing mobile home subdivision.

5.3 FLOODWAYS

Located within areas of special flood hazard established in Section 3.2 are areas designated as floodways. Since the floodway is an extremely hazardous area due to the velocity of flood waters which carry debris, potential projectiles, and erosion potential, the following provisions apply:

- (1) Prohibit encroachments, including fill, new construction, substantial improvements, and other development unless certification by a registered professional engineer or architect is provided demonstrating that encroachments shall not result in any increase in flood levels during the occurrence of the base flood discharge.
- (2) If Section 5.3(1) is satisfied, all new construction and substantial improvements shall comply with all applicable flood hazard reduction provisions of Section 5.0 PROVISIONS FOR FLOOD HAZARD REDUCTION.
- (3) Prohibit the placement of any mobile homes, except in an existing mobile home park or existing mobile home subdivision.

5.4 COASTAL HIGH HAZARD AREA

Coastal high hazard areas (V Zones) are located within the areas of special flood hazard established in Section 3.0. These areas have special flood hazards associated with high velocity waters from tidal surges and, therefore, the following provisions shall apply:

- (1) All buildings or structures shall be located landward of the mean high tide.
- (2) All buildings or structures shall be elevated so that the lowest supporting member is located no lower than the base flood elevation level, with all space below the lowest supporting member open so as not to impede the flow of water, except for breakaway walls as provided for in Section 5.4(8).
- (3) All buildings or structures shall be securely anchored on pilings or columns.
- (4) Pilings or columns used as structural support shall be designed and anchored so as to withstand all applied loads of the base flood flow.
- (5) Compliance with provisions of Section 5.4(2), (3) and (4) shall be certified to by a registered professional engineer or architect.
- (6) There shall be no fill used for structural support.
- (7) There shall be no alteration of sand dunes which would increase potential flood damage.
- (8) Breakaway walls shall be allowed below the base flood elevation provided they are not a part of the structural support of the building and are designed so as to breakaway under abnormally high tides or wave action, without damage to the structural integrity of the building on which they are to be used.
- (9) If breakaway walls are utilized, such enclosed space shall not be used for human habitation.
- (10) Prior to construction, plans for any structure that will have breakaway walls must be submitted to the Director of Public Works for approval.
- (11) Prohibit the placement of mobile homes, except in an existing mobile home park or mobile home subdivision.
- (12) Any alteration, repair, reconstruction or improvement to a structure started after the enactment of this ordinance shall not enclose the space below the lowest floor unless breakaway walls are used as provided for in Section 5.4(8) and (9).

SECTION 6.0 SEVERABILITY, PENALTY PROVISIONS, REPEAL OF CONFLICTING ORDINANCES AND ENACTMENT

6.1 CONSTITUTIONALITY OR INVALIDITY

If any section, sub-section, clause or phrase of this Ordinance is for any reason held to be invalid or unconstitutional, such invalidity or unconstitutionality shall not affect the validity or constitutionality of the remaining portion of this Ordinance. It being hereby expressly declared that this Ordinance, and each section, sub-section, sentence, clause and phrase hereof would have been prepared, proposed, adopted, approved and ratified irrespective of the fact that any one or more section, sub-sections, sentences, clauses or phrases be declared invalid or unconstitutional.

6.2 VIOLATORS PUNISHABLE BY FINE AND IMPRISONMENT

Any violation of the provisions of this Ordinance or amendments thereto is hereby made a misdemeanor. Each day such violation continues may be considered a separate offense.

6.2-1 Injunctive And Other Proceedings

Notwithstanding the imposition of any penalties hereunder, the County may institute any appropriate action or proceeding to require compliance with or to enjoin violation of the provisions of this Ordinance, or any administrative orders or determinations made pursuant to this Ordinance.

6.3 REPEAL OF CONFLICTING ORDINANCES AND ADOPTION

All ordinances in conflict with this Ordinance, or inconsistent with the provisions of this Ordinance are hereby repealed to the extent necessary to give this Ordinance full force and effect. This Ordinance shall become effective on JANUARY 3, 1978.

PASSED and ADOPTED this 3rd day of JANUARY, 1978.

BOARD OF COUNTY COMMISSIONERS
PACIFIC COUNTY, WASHINGTON

Joseph L. Anderson
Chairman

Bill Gosman
Commissioner

Eldred Bouletta
Commissioner

Approved as to form:

Ally Green
Prosecuting Attorney

ATTEST:

Robert M. Johnson
Clerk of the Board

The State of Washington



Office of the Secretary of State

Kim Wyman, Secretary of State

Certificate

I, *Jewell Lorenz Dunn*, in accordance with the provisions of Chapter 40.14, Revised Code of Washington, certify that I have compared the attached copy, or specific part thereof, listed below, with the records in our custody, and that the same, or each of the same, is a true and correct copy of the Record in the Official Custody of the State Archivist of the State of Washington.

FROM THE RECORDS OF:

Pacific County Government,

Commissioners, Proceedings Working Papers,

Ordinance No. 71

January 3, 1978

(9 pages)



WASHINGTON STATE
ARCHIVIST

In Testimony Whereof, I have hereunto set my hand and affixed hereto the Seal of the Office of the State Archivist of the State of Washington.

Jewell Lorenz Dunn
Done at Thurston County, Washington, this 8th day of March, A.D. 2018

A handwritten signature in black ink, appearing to read "Jewell Lorenz Dunn".

Washington State Archivist

WOLFE PETITION APPENDIX A-4

(d) When the Federal Insurance Administrator has provided a notice of final base flood elevations within Zones A1-30 and/or AE on the community's FIRM and, if appropriate, has designated AO zones, AH zones, A99 zones, and A zones on the community's FIRM, and has provided data from which the community shall designate its regulatory floodway, the community shall:

- (1) Meet the requirements of paragraphs (c) (1) through (14) of this section;
- (2) Select and adopt a regulatory floodway based on the principle that the area chosen for the regulatory floodway must be designed to carry the waters of the base flood, without increasing the water surface elevation of that flood more than one foot at any point;
- (3) Prohibit encroachments, including fill, new construction, substantial improvements, and other development within the adopted regulatory floodway unless it has been demonstrated through hydrologic and hydraulic analyses performed in accordance with standard engineering practice that the proposed encroachment would not result in any increase in flood levels within the community during the occurrence of the base flood discharge;
- (4) Notwithstanding any other provisions of § 60.3, a community may permit encroachments within the adopted regulatory floodway that would result in an increase in base flood elevations, provided that the community first applies for a conditional FIRM and floodway revision, fulfills the requirements for such revisions as established under the provisions of § 65.12, and receives the approval of the Federal Insurance Administrator.

WOLFE PETITION APPENDIX A-5

FILED

NOV 18 2016

Superior Court
Linda Myhre Enlow
Thurston County Clerk

SUPERIOR COURT OF THE STATE OF WASHINGTON
FOR THURSTON COUNTY

CHARLES WOLFE, a single person, JANICE
WOLFE, a single person, and JOHN and DEE
ANTTONEN, and the marital community
comprised thereof,

Plaintiffs,

v.

STATE OF WASHINGTON
DEPARTMENT OF TRANSPORTATION,

Defendant.

NO. 14-2-01481-1

(Consolidated with 14-2-01941-3)

FINDINGS OF FACT, CONCLUSIONS OF
LAW, ORDER & JUDGMENT

This matter was tried to the Court, without a jury, on October 10-12 and October 17, 2016. The Honorable Mary Sue Wilson presided at the trial. This matter came before the Court pursuant to a complaint for public nuisance pursuant to RCW 7.48.120-.140.

Plaintiffs Charles Wolfe, a single person, and Janice Wolfe, a single person; and John Anttonen, appeared personally at trial and through their attorneys of record, Dennis D. Reynolds, Alan S. Middleton, and Stephanie Marshall Hicks. Defendant State of Washington Department of Transportation appeared personally at trial and through its attorneys of record, Attorney General Robert W. Ferguson and Assistant Attorney General Matthew D. Huot.

FINDINGS OF FACT, CONCLUSIONS OF LAW, ORDER &
JUDGMENT - 1

[90263-2]

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(206) 780-6865 (Facsimile)

1 The following witnesses were called and testified at trial:

2 1. Plaintiffs' witnesses:

- 3 a. John Anttonen
4 b. Russ Lawrence
5 c. Charles Wolfe
6 d. Kim Schaumburg

7 2. Defendant's witnesses (called out of order):

- 8 a. Steven Zaske

9 The following exhibits were admitted into evidence and considered by the Court:

- 10 1. Plaintiffs Exhibit Numbers: 2, 3, 4, 5, 6, 7, 8, 9, 10, 14, 15, 16, 17, 19, 20, 22, 25, 30,
11 31, 45, 46, 47, 49, 51, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, and 78.
12 2. Defendant's Exhibit Numbers: 164, 165, 167, 168, 169, 170, 172, and 197.

13 **I. FINDINGS OF FACT**

14 1.1 Any finding of fact stated herein, that is properly characterized as a conclusion of law,
15 shall be incorporated under the conclusions of law as if set forth therein.

16 1.2 The Washington State Department of Transportation (WSDOT) is a public agency for
17 the State of Washington with delegated authority to construct highways and bridges subject to various
18 statutory restrictions.

19 1.3 In 1926, WSDOT (then known as the Department of Highways) constructed a bridge
20 across the Naselle River at approximately milepost 6 of State Route (SR) 4 in Pacific County (the
21 "Naselle River Bridge").

22 1.4 The Naselle River Bridge (as built in 1926) was designed to span the Naselle River
23 just upstream from the river's confluence with Salmon Creek. The bridge is approximately 200-feet
24 long.
25
26

1 1.5 In 1926, a 600-foot earth-fill embankment (the "approach") was constructed on the
2 northwesterly bank of the Naselle River to accommodate the bridge's span of the river.

3 1.6 WSDOT replaced the Naselle River Bridge beginning in 1985,

4 1.7 The 1985 bridge utilizes the same 600-foot approach embankment to span the river.

5 1.8 The 1985 bridge was widened to thirty-six feet, and raised six feet to obtain flood
6 clearance. The approach embankment was also raised six feet.

7 1.9 Like the 1926 bridge, the 1985 bridge cleared a span of approximately 200-feet, which
8 cleared the channel of the Naselle River flowing underneath.

9 1.10 WSDOT performed a repair project on the bridge in 1998, which ~~consisted~~
10 ~~among other things of~~ installing rip rap alongside one of the bridge piers to protect it from
11 river scour.

included

*atm
MDA
MZW*

12 1.11 Charles Wolfe is a resident of Pennsylvania. Jan Wolfe is a resident of
13 Washington. John Anttonen and Dee Anttonen, husband and wife, are residents of New
14 Mexico.

15 1.12 On December 2, 2003, Charles F. Wolfe and Janice E. Wolfe purchased a
16 parcel of real property in Pacific County (Wolfe property).

17 1.13 On December 9, 2004, Charles F. Wolfe and Janice E. Wolfe purchased a second
18 parcel of real property in Pacific County (Anttonen property).

19 1.14 The Wolfe property and Anttonen property are abutting parcels that have frontage
20 along the Naselle River.

21 1.15 On July 18, 2005, Charles F. Wolfe and Janice Wolfe recorded a boundary line
22 adjustment resulting in a change to the boundaries and acreage of the Wolfe and Anttonen parcels.

23 1.16 On July 28, 2005, the Wolfes sold the Anttonen property to Frank T. McLucas and
24 Shannon K. McLucas, subject to a deed of trust.

1 1.17 On November 22, 2005, the Wolfes (as a marital community), conveyed the Wolfe
2 property to Janice Wolfe as her separate property.

3 1.18 On January 22, 2007, Charles Wolfe and Janice Wolfe conveyed, by way of Quit
4 Claim Deed, Tax Parcel No. 10091050006 (the Anttonen property), to Dee Christine Anttonen and
5 John Stuart Russel Anttonen.

6 1.19 On January 23, 2007, Frank R. McLucas and Shannon K. McLucas, husband and
7 wife, conveyed the Anttonen property back to Charles F. Wolfe and Janice E. Wolfe in satisfaction of
8 the deed of trust.

9 1.20 Plaintiffs do not engage in commercial activity on the Wolfe or Anttonen property that
10 utilizes the river (e.g., floating of logs or timber).

11 1.21 Plaintiffs do not pilot any vessels on the Naselle River.

12 1.22 Plaintiffs do not rely on the Naselle River for access to the Wolfe property or
13 Anttonen property.

14 1.23 1.23 Mr. Lawrence was designated an expert in the area of river systems.
15 He testified that the Naselle River is a meandering stream; it flows in alternate directions like
16 a "sine wave," and the bends of the river change position over time. In his opinion, the
17 placement of the fill in the 600-foot area within the floodway constricted the natural course of
18 the river and interfered with the natural meandering of the river. He also testified that the
19 placement of the piers in such a way as to change the water flow and increased velocity also is
20 an obstruction.

21 1.24 Mr. Lawrence further testified that the Naselle River is not impacted by the tides in
22 the vicinity of the bridge. He also stated that the earth fill approach does not obstruct the flow of the
23 river below the ordinary high water mark.

24 1.25 The Court finds that there is no evidence that the main channel of the river has been
25 obstructed below the ordinary high water mark.

1 1.26 The 600-foot earth fill approach supporting the bridge is an obstruction of the
2 floodplain in that area.

3 1.27 The obstruction of the floodplain resulted in a change of water flow, as well as
4 increased river velocities in the vicinity of the bridge.

5 1.28 The 600-foot long earth fill approach across the floodplain has constrained and
6 interfered with the natural meandering characteristics of the river.

7 1.29 The erosion of the Anttonen and Wolfe properties has been caused by the mechanisms
8 described by Mr. Lawrence are attributable to the earth fill approach. This is supported by Exhibits 46,
9 51, 54, and 55.

10 1.30 The court finds that the erosion of the Anttonen and Wolfe properties, as well as the
11 interference with the natural migration of the meandering stream, indicate an interference with
12 plaintiffs' use and enjoyment of the property.

13 1.31 The Wolfe and Anttonen properties have experienced ~~increased~~ inundation by
14 floodwater during flooding events. However, the court does not find sufficient evidence to
15 establish that the bridge or the earth fill approach was the cause of the increased flooding
16 events.

*ARM
MDA
mhw*

17 1.32 The court does not find sufficient evidence to establish that the bridge or the earth fill
18 approach was the cause of any change in the floodplain designation on FEMA Flood Insurance Rate
19 Manual (FIRM) maps of the area, including the Anttonen and Wolfe properties.

20 1.33 The court finds that the flooding and the flood plain changes are not evidence of
21 impacts or injuries or interference with use and enjoyment due to the lack of evidence on the causal
22 link. [DELETED?]

23 1.34 The plaintiffs failed to present evidence that the bridge or earth fill approach
24 are ~~not~~ interfering with plaintiffs' use and enjoyment of their property as to (a) the flooding of
25 their property, or (b) the changes in the floodplain designation on FEMA FIRM maps.
26

1 1.35 In order to maintain a public nuisance action for obstruction of a river or its
2 floodplain, the conduct giving rise to the nuisance must be taken without lawful authority. RCW
3 7.48.120, .140(3). Plaintiffs have alleged the bridge and the earth fill approach, as a matter of fact,
4 have impacted the base flow elevation by more than one foot, which has impacted the surrounding
5 area.

6 1.36 While some of plaintiffs' evidence generally touched on this argument, sufficient
7 evidence was not provided to establish that as a matter of fact WSDOT violated a permitting
8 requirement at the time the bridge was replaced in 1985, or that the bridge or its approach caused a
9 change in the base flood elevation.

10 1.37 Plaintiffs did not presented sufficient facts to establish WSDOT's lack of
11 lawful authority. Moreover, the legal requirement asserted by Plaintiffs (40 C.F.R. § 60.3(d))
12 is not clearly established as a matter of fact, as plaintiffs have not offered sufficient evidence
13 to support a finding that all the prerequisites set forth in that regulation have been met in this
14 case.

15 1.38 In order to maintain a public nuisance, the nuisance must affect an entire community
16 or neighborhood. RCW 7.48.130.

17 1.39 Mr. Lawrence testified that there may be an impact downstream to another property
18 owner when asked about the extent of the change in the riverbank and the erosion he noted on
19 plaintiffs' property. He testified that the river's migration will slow down at some point, but he could
20 not say when that would occur. Photographs and testimony from plaintiff John Anttonen were also
21 offered indicating impacts to the river bank in the vicinity of plaintiffs' property upstream from the
22 bridge.

23 1.40 However, in light of this testimony and the reasonable inferences drawn therefrom,
24 the court does not find this evidence is sufficient to show that erosion or bank loss extended to the
25 entire community or a broader neighborhood than the Plaintiffs.
26

1 1.41 Therefore, the court finds that sufficient evidence has not been offered to support a
2 claim for public nuisance for the bridge and earth fill approach's obstruction of the river's floodplain.

3 1.42 In order sustain a claim for public nuisance for "water pollution," there needs to be
4 evidence of pollution being introduced into a river that renders the river impure and that causes injury
5 to people.

6 1.43 In addition to photographs and testimony from lay witnesses, plaintiffs offered expert
7 testimony from fisheries biology consultant Kim Schaumburg. Ms. Schaumburg testified generally as
8 to concerns caused when a river's bank erodes and introduces sediment into a river system, including
9 increases in water temperature and river velocity that in turn negatively impacts fish and aquatic life,
10 as well as their habitat.

11 1.44 Ms. Schaumburg also testified that interruptions with stream and floodplain
12 connectivity can negatively impact river systems and habitats for the type of aquatic life found in the
13 Naselle River near plaintiffs' property. She further testified as to what she personally observed during
14 her site visit of the area, as well as the opinions she drew from that visit. However, she did not take
15 specific measurements of the water quality in the area. And, while she described potential impacts to
16 water quality in general terms, she did not offer an opinion that the bridge or the earth fill approach
17 caused the water quality issues she noted.

18 1.45 Sufficient evidence has not been offered to support a finding that the bridge or the
19 earth fill approach caused any negative impact to the river's water quality or impacts to fish or other
20 aquatic life.

21 1.46 The court also finds sufficient evidence has not been offered to establish that the
22 entire community has been injured by any water quality change attributable to the bridge. The area
23 near the bridge supports fishing by members of the general public, and plaintiff John Anttonen
24 admitted he has fished the river near his property in the past.

II. CONCLUSIONS OF LAW

2.1 The Court has jurisdiction of the parties and subject matter of this action.

2.2 Civil Rule 41(b)(3) provides that after the plaintiff in a nonjury trial has rested, the defendant may move for dismissal on the ground that, upon the facts and the law, the plaintiff has shown no right to relief. CR 41(b)(3). When considering a defendant's CR 41(b)(3) motion to dismiss at the close of the plaintiff's case, the court may grant the motion either as a matter of law or as a matter of fact. *Commonwealth Real Estate Servs. v. Padilla*, 149 Wn. App. 757, 762, 205 P.3d 937, 940 (2009).

2.3 "Nuisance" is a substantial and unreasonable interference with the use and enjoyment of land.

2.4 When considering unreasonable interference, the court considers the reasonableness of the harm and balances that against the social utility of the activity.

2.5 Public nuisance is defined in RCW 7.48.130 as "one which affects equally the rights of an entire community or neighborhood, although the extent of the damage may be unequal".

2.6 It is a public nuisance to "obstruct or impede, without lawful authority, the passage" of any river. RCW 7.48.140(3). This can include obstruction of a river's floodway that supports the functioning of the overall river system, beyond the river's main channel.

2.7 It is a public nuisance to corrupt or render unwholesome or impure the waters of any river to the injury of others. RCW 7.48.140(2). *Miotke v. City of Spokane*, 101 Wn.2d 307, 678 P.2d 803 (1984); *Tiegs v. Watts*, 135 Wn.2d 1, 954 P.2d 877 (1998).


2.8 The bridge and the earth fill approach are obstructing the Naselle River's floodplain, causing erosion of plaintiffs' property and interfering with their quiet enjoyment of their land.

2.9 The evidence is insufficient to prove that the bridge and the earth fill approach are the cause of flooding on plaintiffs' land or of any change in the area's FEMA FIRM maps.

2.10 The evidence is insufficient to prove that WSDOT did not have lawful authority to build the Naselle River Bridge and the approach embankment in 1926.

1 a public nuisance on either of the theories that the plaintiffs have offered. It is therefore
2 ORDERED that plaintiffs' claims are dismissed with prejudice and without costs.

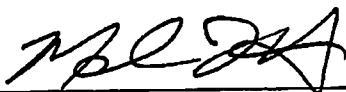
3 DATED this 18th day of November, 2016.

4
5
6 

7 HONORABLE MARY SUE WILSON

8 Presented by:

9 ROBERT W. FERGUSON
10 Attorney General

11 

12 MATTHEW D. HUOT
13 Assistant Attorney General
14 Attorneys for Defendant
15 State of Washington Department of Transportation

16 Approved as to Form:

17 DENNIS D. REYNOLDS LAW OFFICE

18
19 

20 DENNIS D. REYNOLDS, WSBA #04762
21 Attorneys for Plaintiffs

22 LAW OFFICES OF ALAN S. MIDDLETON PLLC

23
24 

25 ALAN S. MIDDLETON, WSBA #18118
26 Attorneys for Plaintiffs

FINDINGS OF FACT, CONCLUSIONS OF LAW, ORDER &
JUDGMENT - 10
[90263-2]

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WOLFE PETITION APPENDIX A-6

1 A. Yes. It's the SEPA checklist, item 9.

2 Q. Thank you. My question is just a little bit
3 different. Bear with me. I've got one extra page
4 there.

5 My question's a little different. My question
6 relates to the State of Washington Department of
7 Ecology. Do you recall asking for or receiving from
8 the 1985 work a flood control approval for the State
9 of Washington Department of Ecology? Yes or no.

10 A. No.

11 Q. What about a flood control approval from any federal
12 agency, starting with the Army Corps of Engineers?
13 Yes or no?

14 A. No.

15 Q. How about a flood control approval from FEMA? Yes
16 or no?

17 A. No.

18 Q. What is FEMA?

19 A. The Federal Emergency Management Agency.

20 Q. Sir, could you take me back? You said there was a
21 reference in the Shoreline Substantial Development
22 Permit to flooding. Could you take me back and show
23 me the language? Was it in the SEPA checklist or in
24 the permit?

25 A. It was part of the Shoreline Management Permit as