

No. 49729-8-II

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

---

CHARLES WOLFE, a single person, 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.

---

**OPENING BRIEF OF APPELLANTS CHARLES WOLFE, JANICE  
WOLFE and JOHN AND DEE ANTTONEN**

---

Dennis D. Reynolds  
DENNIS D. REYNOLDS LAW OFFICE  
200 Winslow Way West, Suite 380  
Bainbridge Island, WA 98110  
(206) 780-6777 Phone  
(206) 780-6865 Fax  
*Counsel for Appellants Charles Wolfe,  
Janice Wolfe, and John and Dee  
Anttonen*

## TABLE OF CONTENTS

	<b>Page</b>
I. INTRODUCTION .....	1
II. ASSIGNMENTS OF ERROR .....	3
III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR .....	6
IV. STATEMENT OF THE CASE.....	7
A. The SR4 Bridge Floodplain Obstruction. ....	7
B. Impact of the Obstruction on Wolfe and Anttonen Properties, Upstream, and Downstream.....	12
1. Impacts to Private Property Valuations .....	12
2. Impacts to Stream Functions and Values of Public Importance, Impacts of Floodplain Obstruction. ....	16
3. Impacts to Flood Plain Functions and Values, Aquatic Habitat and Water Quality. ....	17
C. No Permits Or Approvals Obstruct the Floodplain or Change the Direction of Flow of the River.....	19
D. The Trial Court Rulings and Decision. ....	22
V. ARGUMENT FOR REVERSAL OF ORDER OF DISMISSAL AND REMAND FOR TRIAL .....	23
A. Standard of Review.....	26
B. The Public Nuisance Claims and Overview of Nuisance Law.....	28
C. Substantial Evidence in the Record Shows that WSDOT’s Obstruction of the Floodplain Lacked “Legal Authority.” .....	35
D. The Court Misapplied the Law on Flooding and Pollution Causation.....	41

E.	The Court Shifted the Burden of Proof on the State’s Defenses to Wolfe and Assumed Facts Not in Evidence.....	45
F.	Substantive Evidence in the Record Shows that WSDOT’s Obstruction of the Floodplain Caused a Public Nuisance. ....	46
G.	The Court Erred in Dismissing the Case After the State Started Its Defense and in Denying Wolfe’s Right to Rebut Testimony of a State Witness.....	48
VI.	CONCLUSION.....	50
	CERTIFICATE OF SERVICE AND MAILING .....	51

## TABLE OF AUTHORITIES

	<b>Page(s)</b>
<b>Cases</b>	
<i>Bales v. City of Tacoma</i> , 172 Wash. 494, 20 P.2d 860 (1933).....	33
<i>C.f., Sumner Lumber &amp; Shingle Co. v. Pac. Coast Power Co.</i> , 72 Wash. 631, 131 P. 220 (1913).....	30, 33
<i>Commonwealth. Real Estate Servs. v. Padilla</i> , 149 Wash.App. 757, 205 P.3d 937 (2009).....	27
<i>In re Adoption of S.H.</i> , 169 Wn. App. 85, 279 P.3d 474 (2012).....	28
<i>In re Dependency of Schermer</i> , 161 Wn.2d 927, 169 P.3d 452 (2007).....	27, 28
<i>Elves v. King Cty.</i> , 49 Wn.2d 201, 299 P.2d 206 (1956).....	33
<i>Goggin v. City of Seattle</i> , 48 Wn.2d 894, 297 P.2d 602 (1956).....	33
<i>Hector v. Martin</i> , 51 Wn.2d 707, 321 P.2d 555 (1958).....	49
<i>Johnson v. Aluminum Precision Prods., Inc.</i> , 135 Wn. App. 204, 143 P.3d 876 (2006).....	46
<i>Locke v. City of Seattle</i> , 133 Wn.App. 696, 137 P.3d 52 (2006).....	36, 46
<i>Petersen v. Dep't of Labor &amp; Indus.</i> , 40 Wn.2d 635, 245 P.2d 1161 (1952).....	49
<i>State v. Boren</i> , 42 Wn.2d 155, 253 P.2d 939 (1953).....	31
<i>State ex rel. Bradford v. Stubblefield</i> , 36 Wn.2d 664, 220 P.2d 305 (1950).....	31

<i>State v. N.M.K.</i> , 129 Wn. App. 155, 118 P.3d 368 (2005).....	39
<i>Tiegs v. Watts</i> , 135 Wn.2d 1, 954 P.2d 877 (1998).....	31
<i>United States v. Keplinger</i> , 776 F.2d 678 (7th Cir. 1985) .....	40

**Statutes**

Shoreline Management Act of 197, RCW 90.58 .....	26, 37
NEPA .....	11
Public Records Act, RCW 42.56 .....	20
RCW 5.45 .....	36
RCW 7.40.140(2) and (3) .....	32
RCW 7.48.010 .....	30, 32
RCW 7.48.020 .....	33
RCW 7.48.120 .....	30, 31, 33
RCW 7.48.130 .....	31, 32, 33, 34
RCW 7.48.140 .....	31
RCW 7.48.140(2).....	passim
RCW 7.48.140(3).....	5, 24, 30, 32
RCW 7.48.160 .....	32
RCW 7.48.190 .....	33
RCW 42.56 Public Record Act.....	12
RCW 90.48.020 .....	29
RCW 90.58.020 .....	29, 34
RCW 90.58.210(2).....	41
RCW 90.58.220 .....	41

RCW 90.58.230 .....	34, 44
RCW Ch. 86.16.....	40
Shoreline Management Act.....	7, 41
Water Pollution Control Act, RCW 90.48 .....	7, 29, 44

**Other Authorities**

44 C.F.R., Parts 59 and 60 .....	40
44 CFR 60.3(d) .....	26
44 C.F.R. §60.3(d)(3).....	40
44 C.F.R. §60.3(d)(4).....	40, 41
44 CFR 60.3(d)(3).....	21, 42, 50
44 CFR 60.3(d)(4).....	37
CR 41 .....	28
CR 41(b)(3).....	<i>passim</i>
ER 803(a)(7) .....	36
WAC 197-11-926(2).....	11
WAC 220-110-070.....	42
WAC 220-110-070(1)(h) .....	40
WAC 220-660.....	37
WAC Chapter 173-27 .....	20
WAC Ch. 173-158 .....	40
WAC Chapter 173-201A .....	29

***“The erosion of the Anttonen and Wolfe properties has been caused by the mechanisms described by Mr. Lawrence [and] are attributable to the earth fill approach. This is supported by Exhibits 46, 51, 54, and 55.” – Finding of Fact 1.29<sup>1</sup>***

## I. INTRODUCTION

This appeal concerns the viability of a public nuisance action intended to protect the waters and aquatic habitat of the Naselle River. In a time of diminishing resources for agencies with jurisdiction to enforce the laws of this state, a public nuisance action serves the public interest.

The Superior Court correctly determined that the Washington State Department of Transportation (“State” or “WSDOT”) created conditions on a stretch of the Naselle River that constitute a nuisance obstruction of a waterway.<sup>2</sup> Its Findings show that WSDOT’s earth fill approach to the State Route 4 (“SR4”) Bridge (“Bridge”) over the Naselle River constricts and alters the direction of river flow, increasing floodwaters throughout the floodplain, scouring thousands of cubic yards of dirt and debris into the River, and results in special injury to Appellants Charles Wolfe, Janice Wolfe and John and Dee Anttonen (“Wolfe”), as well as general injury to all other property owners with property located within and adjacent to the

---

<sup>1</sup> Findings of Fact, Conclusions of Law, Order and Judgment, November 18, 2016. Clerk’s Papers (“CP”) 1840: 7-9.

<sup>2</sup> See Findings of Fact 1.26 through 1.30(CP 1840: 1-12) and Conclusions of Law 2.3 through 2.8(CP 1843: 9-22)

floodplain, with attendant upstream and downstream environmental impacts.<sup>3</sup> The Superior Court also determined the Bridge, its approach and rip rap installed by the State together have caused and are causing significant bank erosion along Wolfe's property.<sup>4</sup>

The Superior Court also correctly ruled that WSDOT obstructed the floodplain and affirmed that Washington law creates a cause of action for obstructions of a water body landward to the main stream or channel of a river.<sup>5</sup> The public nuisance is the result of a berm obstruction created by the State's elevation of and lengthening the approach road, SR4 eastbound, to the Bridge in 1985. The Bridge structure itself was raised in height 6 feet above the old bridge, which it replaced.<sup>6</sup>

Despite these correct findings and rulings that **obstruction and interference** with river flows and resultant erosion was occurring, and the uncontroverted fact that WSDOT's facility was the only bridge and berm

---

<sup>3</sup> See Findings of Fact 1.23(CP 1839:14-20) and 1.26 through 1.30(CP 1840:1-13).

<sup>4</sup> See Notes (1) -(3), *infra*. See also: Findings of Fact No. 1.29 (CP 1840: 5-6).

<sup>5</sup> The Court ruled the common enemy doctrine is not applicable and that the State stands in the same place as a private riparian landowner with respect to Wolfe's claims. *Oral Opinion of the Court* (Verbatim Report of Proceedings ("VRP")) Vol. 4, p.715:14-25, p.716:17 Finding no immunity from suit, it ruled 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." Finding of Fact 1.30 (emphasis added) (CP 1840):10-12).

<sup>6</sup> See Findings No. 1.8 (raising height of bridge and approach road), CP 1838: 5-6; Conclusion No. 2.8 (Bridge and earth fill work "... are obstructing the flood plain, causing erosion of Plaintiffs' property and interfering with the quiet enjoyment of their land."), CP 1843 21-22.

in the immediate vicinity, the Superior Court erroneously denied any relief to Wolfe dismissing Appellants' nuisance claims pursuant to CR 41(b)(3).<sup>7</sup> This Court should reverse and remand for a new trial.

## II. ASSIGNMENTS OF ERROR

1. The Superior Court erred when it granted the State's Motion for Involuntary Dismissal pursuant to CR 41(b)(3) when the State had started presenting its defense and Wolfe was prejudicially denied the right to call rebuttal witness(es).
2. The Superior Court erred by shifting to Wolfe the burden of proof to show that flooding in the area is not the result of the Bridge, but the result of some "other" obstruction and ignoring uncontroverted evidence that the only obstruction in the vicinity was placed by the State.
3. The Superior Court erred in ruling Wolfe had not established causation after finding that Wolfe has experienced increased inundation in flooding events in Finding of Fact 1.31 but then determining Wolfe had not established a causal link in Findings of Fact 1.32 through 1.34 and 1.36 by requiring evidence of the "percentage" to which the Bridge and its approach are interfering with the floodplain and causing an increase in base flood elevation.
4. The Superior Court erred in ruling that Wolfe failed to establish the Bridge caused water pollution of the River in Findings of Fact 1.42 through 1.44 and Conclusion of Law 2.17 where Wolfe's expert testified regarding the known impacts of scouring and sedimentation on fish and wildlife habitat and water quality, the evidence shows that 32,000 cubic yards of dirt has been scoured from the Wolfe property into the river as a result of the Bridge system and the Superior Court specifically found the Bridge system was causing the erosion of the Wolfe property in Findings of Fact 1.29-1.30.

---

<sup>7</sup> See Judgment and Order, CP 1844:22 to 1845:2.

5. The Superior Court erred in ruling that Wolfe failed to establish the State lacked “legal authority” to obstruct the floodplain in Findings of Fact 1.35 through 1.37 where substantial evidence in the record and inferences therefrom show that the State did not obtain all required permits for the Bridge and where the burden of proving it had legal authority was on the State.
6. Additional assignment of error is made to the following ostensible findings of fact (some set forth as conclusions of law) in the Decision:
  - 1.40 *However, in light of this testimony and the reasonable inferences drawn therefrom, the court does not find this evidence is sufficient to show that erosion or bank loss extended to the entire community or a broader neighborhood than the Plaintiffs.*
  - 1.41 *Therefore, the court finds that sufficient evidence has not been offered to support a claim for public nuisance for the bridge and earth fill approach’s obstruction of the river’s floodplain.*
  - 1.45 *Sufficient 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.*
  - 1.46 *The court also finds sufficient evidence has not been offered to establish that the entire community has been injured by any water quality change attributable to the bridge. The area near the bridge supports fishing by members of the general public, and plaintiff John Anttonen admitted he has fished the river near his property in the past.*
7. Additional assignment of error is made to the following ostensible conclusions of law in the Decision (that are properly construed as findings of fact):
  - 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.*
- *2.11 The evidence is insufficient to prove that WSDOT did not have lawful authority to replace the Naselle River Bridge in 1985.*
- *2.12 The evidence is insufficient to prove that WSDOT did not have lawful authority to repair the Naselle River Bridge in 1998.*
- *2.13 The evidence is insufficient to prove that the earth fill approach is adversely affecting an entire community or neighborhood.*
- *2.14 The evidence is insufficient to prove that the Naselle River Bridge is adversely affecting an entire community or neighborhood.*
- *2.15 The evidence is insufficient to prove that the earth fill approach of the Naselle River Bridge is a public nuisance under RCW 7.48.140(3).*
- *2.16 The evidence is insufficient to prove that the Naselle River Bridge is a public nuisance under RCW 7.48.140(3).*
- *2.17 The evidence is insufficient to prove that the earth fill approach is corrupting nor rendering unwholesome or impure the water of the Naselle River.*
- *2.18 The evidence is insufficient to prove that the earth fill approach is corrupting nor rendering unwholesome or impure the water of the Naselle River.*
- *2.19 The evidence is insufficient to prove that the earth fill approach is a public nuisance under RCW 7.48.140(2).*

- 2.20 *The evidence is insufficient to prove that the Naselle River Bridge is a public nuisance under RCW 7.48.140(2).*

### **III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR**

1. Did Wolfe present adequate evidence to support their claim of public nuisance to survive the State's motion for involuntary dismissal (Assignments of Error 1, 2, 3, 4, 5, 6 and 7)?

2. Did Wolfe present adequate evidence regarding causation of erosion and flooding damage resulting from the Bridge (Assignments of Error 1, 2, 3, 4, 5, 6 and 7)?

3. Did the Court erroneously shift the burden of proof such to require proof of a negative and/or impermissibly ignore uncontroverted evidence that no obstruction other than that erected by the State could have caused flooding and erosion in the vicinity of the Bridge (Assignments of Error 1, 2 and 5)?

4. Are the Superior Court Findings adverse to Wolfe supported by substantial evidence (Assignments of Error 1, 2, 3, 4 and 5)?

5. Is the Superior Court's ruling inconsistent with State and Federal law requiring a flood plain approval for any obstruction of a flood plain (Assignments of Error 1, 4, 5, 6 and 7)?

6. Did the Superior Court err in granting the State's motion for involuntary dismissal where the State had already started to present its

case in chief and Wolfe was denied the opportunity to call rebuttal witnesses (Assignments of Error 1)?

#### **IV. STATEMENT OF THE CASE**

This case is not about damages but rather protection and restoration. Under various laws, including the Shoreline Management Act, the State Hydraulic Code, the Pacific County Shoreline Master Program, and the State Water Pollution Control Act, the waters, flood plains and aquatic life and habitat of the Naselle River are entitled to protection from environmental perturbations.

##### **A. The SR4 Bridge Floodplain Obstruction.**

The Bridge was first built in 1925 and crossed the 200 foot wide river and its adjacent 600 foot wide floodplain using a bridge that spanned only the river, not the floodplain. Findings of Fact 1.3 through 1.9, CP 1504:19-25, 1505:1-9 This obstruction disconnected the river from 37.5% of the floodplain, especially so downstream of the bridge, although the river eventually did re-establish a natural variability for back and forth movement along the bank of the river across from the Plaintiffs' property. Vol. 1, p:156:25, p.157, p.158, p.159, p.160:1-23. In fluvial geomorphology terms, the natural floodplain immediately downstream of the Bridge approach was reduced in size from 800 feet to 200 feet. *Compare*

Exhibits 45, 55 and 51.<sup>8</sup> Over time, the environment adjusted and the River itself had fully stabilized by about 1972. Exhibit 55.

After a flood event in 1977 impacted the load bearings and girders of the Bridge, and over topped SR4 at the low point of a vertical curve 300 feet west of the bridge, WSDOT built the replacement Bridge in 1985 six feet higher to clear floodwaters.<sup>9</sup> From 1925 to 1985, the floodplain obstruction was only 300 feet (37.5%), half that of the 1985 replacement bridge obstruction (600 feet, or 75%). The 1977 flood was the highest on record, according to the design report. Exhibit 66, USGS Geological Survey River Gauge Data shows the highest recorded river flow that year of about 9,000 cfs, slightly less than the official FEMA 10-year flood flow. The original bridge was not designed to clear the 100-year flooding event.

Rather than extending the Bridge the additional 600 feet to completely clear the floodplain, WSDOT raised the replacement bridge, placing the highway on top of an elevated and lengthened earth fill approach to the Bridge.<sup>10</sup> The new bridge was to be built four feet higher than the flood level to allow flooding debris to pass underneath the

---

<sup>8</sup> A Supplemental Designation of Clerk's Papers has been filed for the admitted trial exhibits.

<sup>9</sup> Finding of Fact 18, CP 1505:5-6.

<sup>10</sup> Findings of Fact 1.7 and 1.8 CP 1505:4-6

bridge.<sup>11</sup> This higher approach/ obstruction increased the interference with the floodplain's functioning and values, as the raised elevation extended the length of the approach road by 300 feet, out to the full 800 foot width of the floodplain.<sup>12</sup> The 1985 work thus disconnected the migration area within the flood plain for 600 feet, or 75% of the active migration zone.<sup>13</sup>

The new bridge support piers within the bed of the River were built at a 15-degree angle to the old piers changing the direction of flow of the River 15 degrees towards the Wolfe property, with greater water energy directed towards the bank than on the opposite side of the River.<sup>14</sup> This again destabilized the flow of the river. *See* Exhibit 55. From that time until 1985, the River "meandered" within a 200-foot-wide floodplain immediately below the bridge, but only on that opposite side of the river, which was within the established floodplain. WSDOT was aware the watercourse would be diverted when the Bridge was re-built in 1985, but it did not ask for approval of such an impact.<sup>15</sup>

---

<sup>11</sup> WSDOT bridge layout drawing, Exhibit 72

<sup>12</sup> VRP Vol. 1, p.152:12-15.

<sup>13</sup> VRP Vol. 1, p.152:16-19.

<sup>14</sup> VRP Vol. 1, p.165:1-10 and VRP Vol. 2, p.207:17-25, p.208:1-6.

<sup>15</sup> VRP Vol. 2, p.295:12-21.

The Bridge and approach fill continues to disconnect the River from its floodplain in that area, both upstream and downstream, although the effects diminish further away from the Bridge.<sup>16</sup> The structure causes 800 foot wide waters to be forced to flow through a 200-foot wide opening, increasing the rate of flow, and causing the direction of the flow to be compressed into a “nozzle” pointed at the Wolfe property 15 degrees under the “Bernoulli effect.”<sup>17</sup> See also Exhibits 60, 64. The Bernoulli effect results in an increase in the backwater elevation throughout the floodplain which leads to an expansion of the floodplain beyond its unobstructed boundaries along the full length of the floodplain, as water seeks its own level. *Ibid.* The River “backs up” into the mouth and lower portion of Salmon Creek (which flows through the Wolfe property) causing a rise in the Base Flood Elevation (“BFE”) there as well. See Exhibit 61.

Mr. Lawrence discovered evidence in 2011, that someone who was aware of the increased erosion along the Appellants’ property had installed

---

<sup>16</sup> VRP Vol. 1, p:134:6-24; p.140:11-25, p.141:1.

<sup>17</sup> The obstruction is like the nozzle of a hose, where the water pressure increases as the nozzle opening gets smaller. (See Exhibit 74, page 13, last paragraph) Water pressure relates to the depth of the water upstream of the bridge, also known as the backwater elevation; the higher the water level, or water head, the higher the pressure. *Ibid.* The bridge piers direct the hose nozzle 15 degrees towards the Wolfe property, causing erosion/avulsion, as a nozzleed garden hose would do had it been so directed. (VRP Vol. 1, p.199:24-25, p.200:1-23.)

rip rap a distance of 60 feet down it.<sup>18</sup> He concluded that the rip rap was installed after the Bridge was rebuilt in 1985.<sup>19</sup> Shortly thereafter, Mr. Wolfe discovered, via Public Record Requests, that WSDOT did this work, and did it without getting a Shorelines permit from Pacific County or approval from the Army Corps of Engineers. According to the application for the Hydraulics permit issued by WDFW for this work, the project itself was an attempt to control and prevent further scouring and erosion damage. *See Exhibit 25.*

The 1998 work actually increased the downstream erosion of the Wolfe property, as the Appellant observed over the years. VRP 63:11 through 66:16 and Exhibit 51 shows the tree being discussed by Mr. Anttonen, in a 1996 aerial photo. WSDOT was its own Lead Agency for SEPA Compliance for this 1998 work, as well as the original 1985 bridge reconstruction work.<sup>20</sup> VRP Vol. 2, p.291:10-21. WSDOT did not disclose this 1998 work to Mr. Wolfe, in response to 2008 Public Record Requests or Wolfe I discovery, and pleaded before both the Wolfe I trial

---

<sup>18</sup> Exhibit 74, p.14

<sup>19</sup> Exhibit 74, p.14

<sup>20</sup> The state law (WAC 197-11-926(2)) provides that the individual responsible for assuring compliance with SEPA and NEPA must not be the same individual who was proposing the project. WSDOT ignored this requirement. There was one individual, Keith Ahola, who played both roles. He applied for both the Shorelines Permit (SSDP) and the hydraulics permit (HPA). He also made the Determination of Non-Significance. VRP Vol. 2, p.291:6-21

and this Court that they had done no work on the bridge after 1985. Mr. Wolfe then filed an RCW 42.56 Public Record Act violation lawsuit in Thurston County (No. 12-2-01059-2).

**B. Impact of the Obstruction on Wolfe and Anttonen Properties, Upstream, and Downstream.**

1. Impacts to Private Property Valuations

Jan Wolfe and Mr. and Mrs. Anttonen together own a 14.88 acre parcel immediately downstream of the SR 4 Bridge. *See* Exhibits 5, 6. The parcel includes about 600 feet of riverfront along the southeast bank of the River.<sup>21</sup> The Anttonen land was acquired in 2007.<sup>22</sup> *See* Ex. 6 (Deed). It is 6.1 acres.<sup>23</sup> Ex. 62 is an annotated GoogleEarth aerial photo of the ownerships.

At the time of Wolfe's purchase in 2003, the FEMA FIRM map showed the property was not in the floodplain;<sup>24</sup> as a result, they paid fair market value, the price for prime River and Salmon Creek waterfront property.<sup>25</sup> Today, over half of the Anttonen property is in the floodplain. The Anttonen property's assessed value has gone down from \$75,700 in

---

<sup>21</sup> 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. *See* Exhibit 8.

<sup>22</sup> TR Vol. 1, p.45:7-8; TR 52:1-17.

<sup>23</sup> TR 48:4.

<sup>24</sup> *See* Exhibits 9-10, Exhibits 60-61.

<sup>25</sup> Mrs. Wolfe purchased her final 1.38 acres of upland property away from Salmon Creek in May 2014 in an arm's length transaction for \$25,000, or \$18,114/acre.

2015 to \$50,500 now that approximately half of the six acres is in the floodplain.<sup>26</sup>

Buildings constructed in compliance with the National Flood Insurance Program (“NFIP”) must have their first (lowest) floor built a minimum of one foot above BFE<sup>27</sup>. Exhibit 22, p.9 (*Freeboard*) Wolfe built two structures, both of which had their first/lowest floor located one foot above BFE, by law and survey, in compliance with NFIP regulations at that time. After the 2015 FIRM revision, with the 3 foot increase in the BFE, the first floors are located two feet below BFE. Had WSDOT been in compliance with 44CFR60.3(d)(4) requirements, FEMA would have required WSDOT to purchase both structures for either demolition or relocation removal from the expanded floodplain. The actual total construction cost of the two Wolfe buildings (one in 2003 and the second in 2016) was \$126,385.

As a result of the Bridge, the River has avulsed away approximately 175 linear feet of terrace from Appellants’ property resulting now in a steep vertical bank that is easily eroded. Over the 92-year lifetime of the Bridge, the Wolfe property has lost over 1.25 acres of

---

<sup>26</sup> VRP Vol. 1, p.73:20-25, p.74, p.75:1-6.

<sup>27</sup> See Exhibit 22 for general floodplain management concepts in Washington State discussed throughout this brief, including WSDOT expertise in this area (p.6), Freeboard (construction 1 foot above Base Flood Elevation, p.9), Channel Migration Zones (p.10), Zero Rise Criteria in the Flood Fringe (p.10), and FEMA Fish-Flood Ordinances (p.12)

land, involving over 32,000 cubic yards of dirt (from 1925 through 2006), washed away downstream to Willapa Bay.<sup>28</sup> Dirt eroded from the property is sedimentary pollution of the adjacent riparian waters as evidenced by the testimony presented at trial by the Appellant's expert, Ms. Kimberly Schaumburg.<sup>29</sup> This has added to the loss of use and enjoyment of that property.<sup>30</sup>

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.<sup>31</sup> Per the original FEMA FIRM data, the property should not flood unless the river flow exceeds 13,450 cfs, which is the 500-year flood. 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.<sup>32</sup> An 11-second video (*see* Exhibit 69) presented at trial shows the Anttonen property under three feet of water when, according to the original FEMA FIRM, that same property

---

<sup>28</sup> The amount of dirt and property lost over the years is 'estimated' by starting with the 1925 WSDOT survey of the area (Exhibit 46) determining those values at another point in time by looking at aerial photos, such as Exhibit 47 (1939, the earliest photo), Exhibit 49 (1985), Exhibit 51 (1996), and GoogleEarth (today), which allows input of each of those to "superimpose" the "old" on the "new" and measure distances. Mr. Lawrence used this technique to prepare figures, such as Exhibit C on page 27 in his technical report, Trial Exhibit 74.

<sup>29</sup> Findings 1.42, 1.43, 1.44, CP 1482:3-17

<sup>30</sup> Finding of Fact 1.30 CP 1507:10-12.

<sup>31</sup> *See* CP 538:20 through 539:3. *See also* Exhibits 66, 67.

<sup>32</sup> VRP Vol. 1, p.61:2-25, p.62:1-2.

was not in the 500-year floodplain. *See also* photos of flooding, Exhibit 68. The Appellants lose the use and enjoyment of their property each time enough rain causes the river to overflow its bank (4,460 cfs) because of the WSDOT obstruction of the floodplain, as shown in that video. This happens once or twice a year.<sup>33</sup>

Erosion continues to occur each time the obstruction causes the River to exceed flood stage. It has accelerated since 1985, then again in 1998. *See* Exhibits 51, 54, and 55 and VRP Vol.1, p.63:11-25, p.64, p.65, p.66:1-15).<sup>34</sup> The bank is no longer stepped to be traversable to the River, but is a steep 15-foot vertical, impossible to climb.<sup>35</sup> The owners can no longer reach the River from their land.<sup>36</sup> The Anttonens sought solutions, which turned out to be prohibitively expensive.<sup>37</sup>

Appellants' experts, Pacific Water Resources (*Wolfe I*) and StreamFix (Russ Lawrence, *Wolfe II*) developed preliminary plans and rough cost estimates to stabilize the Wolfe/Anttonen bank, preventing further avulsion/erosion damage, and repairing/restoring the bank back to its 1925 condition. Both designs included four river barbs or Rosgen

---

<sup>33</sup> VRP Vol. 3, p.537:5-14.

<sup>34</sup> *See* Ex. 54

<sup>35</sup> VRP Vol. 1, p.67:10-25, p.68:1-15.

<sup>36</sup> VRP Vol. 1, p.68:21-25, p.69:1-13.

<sup>37</sup> VRP Vol. 1, p.72:5-7.

weirs, which are hydraulic structures designed to redirect the river back towards the original centerline of the river. Both projects involved bank contouring, where the near vertical bank is contoured upland back away from the river and replanted with bank stabilization foliage. The older PWR design came in at roughly \$1,000,000, the more recent StreamFix at roughly \$1.5 million.<sup>38</sup>

2. Impacts to Stream Functions and Values of Public Importance, Impacts of Floodplain Obstruction.

Wolfe's engineer, fluvial geomorphologist Mr. Russ Lawrence,<sup>39</sup> 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.<sup>40</sup> The 600-foot-long fill across the 800-foot flood plain adversely affected the natural meandering characteristics of the river. As discussed above, planar piers were oriented differently than used for the original Bridge, which redirected the river 15 degrees towards Appellants' property, leading to increased erosion.<sup>41</sup> The 1985 change in the piers exacerbated downstream erosion.<sup>42</sup> The affected area and its meander pattern would look significantly different if flood waters had

---

<sup>38</sup> VRP Vol. 3, p.541:20 through p.544:23

<sup>39</sup> The Lawrence resume is Ex. 78 (CP 1825 through 1831).

<sup>40</sup> VRP Vol. 1, p.152:12-25, p.152:1-25, p.153:1-8.

<sup>41</sup> Finding of Fact 1.29 (CP 1840: 7-9), citing Exhibits 46, 51, 54 and 55.

<sup>42</sup> VRP Vol. 1, p.131:22-25, p.132:1-7.

access to the entire flood plain instead of the 25% remaining open under the Bridge.<sup>43</sup>

Mr. Lawrence's testimony was based upon his 2011 examination of the Wolfe property. *See* Findings of Fact 1.26 through 1.30 (CP 1507), which correctly capture his expert testimony regarding the bridge system and erosion damage caused over time due to expansion of the approach roads, 15-degree re-orientation of the support piers, and exacerbated in 1998 by the unpermitted placement of rip rap along the bank of the river.

3. Impacts to Flood Plain Functions and Values, Aquatic Habitat and Water Quality.

Environmental impacts were identified and addressed by Ms. Kim Schaumburg, a fisheries biologist consultant. Her focus was on assessing the impacts to fish and wildlife, habitat and values, aquatic life and the habitat, and the floodplain functions and values in the area resulting from the obstruction.<sup>44</sup> She used the information in Mr. Lawrence's report, reviewed information from Mr. Wolfe, photographs and a report from Pacific Water Resources and conducted a site visit.<sup>45</sup>

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

---

<sup>43</sup> VRP Vol. 1, p.133.1 through p.143.1.

<sup>44</sup> *See* VRP Vol. 3, p.593:2-25, p.594:1-25, p.595:1.

<sup>45</sup> Kim Schaumburg testimony, VRP Vol. 3, p.598:11-15

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 (emphasis added). 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

A major impact caused by the obstruction is scour:

The floodplain’s isolated because of the bridge approach – approximately 75 percent of the floodplain this 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 stated that scour is erosion from the water to the stream **bank or bed** and has numerous negative impacts to aquatic life.<sup>46</sup> The witness testified that these are not “minimal” impacts, **and that it would affect properties other than Plaintiffs’ properties in terms of the loss of functions and values.**<sup>47</sup>

---

<sup>46</sup> VRP Vol. 4, p.617:12-13

<sup>47</sup> 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 because she relied on information from the Department of Ecology because they have “better equipment.”<sup>48</sup> She testified that DOE’s information indicated that the *water quality levels were below WDFW’s standards for fish survival*, even if it was “close” to state water quality standards.<sup>49</sup>

**C. No Permits Or Approvals Obstruct the Floodplain or Change the Direction of Flow of the River.**

A total of eight approvals were required to allow WSDOT to complete both the 1985 bridge construction work and the 1998 bridge repair work, four for each project (Hydraulics, Shorelines, Floodplains, and Wetlands.)

There is no evidence in Pacific County, WSDOT, WDOE, WDFW, FEMA, or ACOE public records that WSDOT obtained five of the required eight approvals (the two Floodplain approvals, the two Wetlands approvals, or the 1998 project Shorelines approval). WSDOT submitted two of the four required permits to the court, the 1985 Shoreline Substantial Development Permit (“SSDP”) (Exhibit 20) and the 1985 Hydraulic Project Approval (“HPA”) (Exhibit 24). The 1998 project was

---

<sup>48</sup> VRP Vol. 4, p.658:22-25, p.659:1-7.

<sup>49</sup> *Id.* p.659:8-19.

not admitted. The 1998 project SSDP, including the floodplains, shorelines, and wetlands approvals, does not exist in local or state records. WSDOT did not produce evidence that a 1998 shoreline exemption was obtained either, as required by the law. *See* WAC Chapter 173-27.

No stone was left unturned by Mr. Wolfe in searching for the required SEPA analysis and permit approvals for the SR4 Bridge. Since 2007, Mr. Wolfe, a retired Boeing engineer, has been researching the cause of the increased flooding and erosion on the properties that has worsened since they purchased the land, utilizing the Public Records Act, RCW 42.56 (“PRA”). PRA requests were submitted to WSDOT, which was less than cooperative.<sup>50</sup> Separate requests went to Pacific County, Department of Ecology, Department of Fish & Wildlife, FEMA, and the Army Corps of Engineers, looking for all the permits required to do the 1985 and 1998 work.

After Mr. Wolfe’s review of the first three boxes of responsive records, in July and August 2008, Mr. Wolfe sent a letter to Mr. Bryce Brown, the Senior Assistant Attorney General for the Public Construction Division, dated September 19, 2008, which not only highlighted his property damage concerns but also served as his second Public Record

---

<sup>50</sup> Mr. Wolfe was compelled to file litigation against WSDOT for its violations of the PRA. Thurston County Superior Court, Cause No. 12-2-01059-2, the Honorable John Skinder.

Request. *See* Exhibit 15. Six more boxes, plus 1 CD, were shown to Mr. Wolfe in 2012 while the final 4 boxes, which included a bridge design document, were shown to him in 2013.

WSDOT's only witness Steve Zaske said that he worked on the permitting for the 1985 and 1998 work.<sup>51</sup> He testified that the SEPA Environmental Checklist for the 1985 project indicated it would "alter the course and flow of floodwaters."<sup>52</sup> He admitted 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.<sup>53</sup> The approval required under 44 CFR 60.3(d)(3) is called a floodplain Engineered No Rise Analysis and Certification ("the Certification"). The permits obtained from WDFW 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 project.<sup>54</sup> This resulted in a false assurance that the

---

<sup>51</sup> VRP Vol. 2, p.267:23-25

<sup>52</sup> *See* Exhibit 29, VRP Vol. 2, p.277:1-18.

<sup>53</sup> VRP Vol. 2, p.291:22-25, p.292:1-25, p.293:1-17.

<sup>54</sup> *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.

work "... should have minimal negative effects on the streams and surrounding countryside."<sup>55</sup>

**D. The Trial Court Rulings and Decision.**

Wolfe moved to recall Mr. Lawrence, in part to rebut State's witness Mr. Zaske, whose permit-focused testimony was presented by the State out of order, after Mr. Lawrence, and during Wolfe's case-in-chief.<sup>56</sup> Mr. Zaske had given conflicting non-expert testimony regarding the effect that the bridge approach and piers would have on the river and floodplain, whether valid permits and approvals had been secured, and the regulatory requirements related to those permits and approvals.<sup>57</sup> Mr. Lawrence, as a Fluvial Geomorphologist and a Professional Engineer, could rebut Mr. Zaske's testimony. The Court denied this request.<sup>58</sup> It issued an oral ruling<sup>59</sup> and thereafter entered its final decision.<sup>60</sup> This timely appeal followed.<sup>61</sup>

---

<sup>55</sup> Exhibit 165, Item 7, p.2.

<sup>56</sup> VRP Vol. 3, p.516:7-13.

<sup>57</sup> See Exhibit 165.

<sup>58</sup> VRP Vol. 3, p.524:3-9.

<sup>59</sup> VRP 710:3 through 748:23

<sup>60</sup> CP 1836 through 1845

<sup>61</sup> CP 1833, 1834

## V. ARGUMENT FOR REVERSAL OF ORDER OF DISMISSAL AND REMAND FOR TRIAL

The Superior Court dismissed Wolfe’s nuisance claims pursuant to CR 41(b)(3)<sup>62</sup> for three apparent reasons. First, it found no causal link between downstream effects or impacts and the obstruction such to establish a public nuisance and speculated with respect to “other causes” of flooding.<sup>63</sup> See Findings Nos. 1.31-1.34(CP 1840) 1.36-1.40 (CP 1840-41); Conclusions Nos. 2.9-2.10 (CP 1843). *It impermissibly required evidence indicating the “percentage” to which the Bridge and its approach are interfering with the floodplain and causing an increase in base flood elevation, compared to those other unspecified causes.*<sup>64</sup> Second, it premised dismissal on the basis that an “entire community” must be impacted, and determined that such was not the case.<sup>65</sup> Finally, despite the testimony of Mr. Wolfe and Mr. Zaske that WSDOT missed obtaining all required permits, and the lack of submittal of all required exhibits by WSDOT, the Court concluded there was no “proof” that the State had not obtained permission to engage in the 1985 and 1998 work,

---

<sup>62</sup> CP 1503-1512.

<sup>63</sup> The State asserted as an affirmative defense that third parties were responsible for the flooding and floodplain interference. Amended Answer ¶7.5, CP 59. The Court ruled Wolfe had not established that other potential causes of the flooding were not to blame, citing general recitals in a Pacific County ordinance. See VRP Vol. 4, p.728:22-25. P.729:1-18.

<sup>64</sup> VRP Vol. 4, p.728:22 through 730:4

<sup>65</sup> Conclusion No. 1.46, CP 1509:21-24; Conclusions Nos. 2.14-2.20, CP 1511:8-20.

so the State could obstruct the floodplain despite the prohibitions of the Public Nuisance Law, RCW 7.48.140(3).<sup>66</sup> But the testimony of Mr. Wolfe and Mr. Lawrence was sufficient. The Court erroneously required proof of a negative, rather than drawing a proper conclusion from the testimony of Mr. Wolfe.

The Court's ruling contradicts its very own findings/conclusions and ignores substantial evidence in the record that satisfy Wolfe's *prima facie* burden to show that the Bridge, constructed within the floodplain without lawful authority, causes the both the increased flooding and erosion of their properties with attendant impacts to environmental functions and values of substantial public importance.

The Superior Court equivocated in its description of evidence that it relied on in its findings of fact, but from which its legal conclusions make no sense. For instance, the Court concluded that, because there are fish in the river, there is no evidence of pollution, disregarding its own findings concerning the testimony of Ms. Schaumburg regarding the scouring of dirt into the River.<sup>67</sup> The Court seemed confused about the definition of public and private nuisance itself (flooding and erosion) and the cause of the nuisance (floodplain obstruction by the SR 4 Bridge.) The

---

<sup>66</sup> Conclusions 2.10, 2.11, and 2.12 (CP 1510:25-26, CP 1511:1-4).

<sup>67</sup> Conclusions 2.17/2.18 (identical), 2.19, 2.20 (CP 1511:13-20).

Bridge approach is the floodplain obstruction, as the Court found, which is, by definition, a Nuisance Per Se. It, in turn, causes the flooding and erosion damage (the Public Nuisance) whenever enough rain falls to cause the river to overflow its bank, at a flow rate of 4,460 cfs., which is below the official FEMA 100-year flood value of 11,800 cfs. So the Court's conclusion of law in Conclusion 2.19 makes no sense: "2.19 The evidence is insufficient to 'prove' that the 'earth fill approach' is a 'public nuisance' under RCW 7.48.140(2)."

Finding 1.30 states that the erosion of the Anttonen/Wolfe properties, as well as the interference with the natural migration of the meandering stream indicates an interference with plaintiffs' use and enjoyment of the property. Inexplicitly, the Court's legal conclusion determined that there was a failure of proof that it is a Public Nuisance under RCW 7.48.140(2), where it is unlawful to corrupt or render unwholesome or impure the water of river to the injury or prejudice of others (Conclusions 2.19 and 2.20.)<sup>68</sup> Likewise, Findings 1.27 and 1.28 state that the approach obstruction resulted in a change in water flow, as well as increased velocities near the bridge, in addition to interfering with

---

<sup>68</sup> Findings CP 1507:10-12, Conclusions CP 1511:17-20.

the natural meandering characteristics of the River.<sup>69</sup> It makes no sense that the Court then concluded that the flooding and flood plain changes are not evidence of impacts or injuries or interference with the use and enjoyment due to the lack of evidence on the causal link.<sup>70</sup>

Although the Court determined the effects of the Bridge system have resulted in substantial erosion of Wolfe's property, it ignored expert testimony concerning the impact of such excess sedimentation on fish and wildlife. The Court stated that it considered testimony of State's own witness who admitted that WSDOT did not obtain critical required permits to build the earth fill road approach in the River floodplain. So it makes no sense that the Court concluded a failure of proof on the issue of "lawful authority." In this regard, the Court ignored testimony by Mr. Wolfe that he had personally reviewed thousands of pages of public records, which did not include the permits WSDOT admitted it did not secure.<sup>71</sup>

**A. Standard of Review.**

Under CR 41(b)(3), dismissal is only appropriate "if there is no

---

<sup>69</sup> CP 1507:3-6.

<sup>70</sup> CP 1507:20-22.

<sup>71</sup> The State never produced a copy of an engineered no-rise certificate under federal law, 44 CFR Section 60.3(d), administered by the State Department of Ecology, which also required a floodplain permit at the time the bridge was re-built in 1985. Shoreline Management Act of 197, RCW 90.58 No floodplain permit was found or produced. No shoreline permit or exemption for the 1998 work is in the record. No hydraulic permit ("HPA") exists to allow the change of direction of the flow of the river in 1985 or 1998.

evidence, or reasonable inferences therefrom, that would support a verdict for the plaintiff.” *Commonwealth. Real Estate Servs. v. Padilla*, 149 Wash.App. 757, 762, 205 P.3d 937 (2009) (quoting *Willis v. Simpson Inv. Co.*, 79 Wash.App. 405, 410, 902 P.2d 1263 (1995)). A trial court “may either weigh the evidence and make a factual determination that the plaintiff has failed to come forth with credible evidence of a prima facie case, or it may view the evidence in the light most favorable to the plaintiff and rule, as a matter of law, that the plaintiff has failed to establish a prima facie case.” *In re Dependency of Schermer*, 161 Wn.2d 927, 939, 169 P.3d 452 (2007).

Where the trial court dismisses the case as a matter of law after the plaintiff rests, “review is de novo and the question on appeal is whether the plaintiff presented a *prima facie* case, viewing the evidence in the light most favorable to the plaintiff. But if the trial court acts as a fact-finder, appellate review is limited to whether substantial evidence supports the trial court’s findings and whether the findings support its conclusions of law.” *Commonwealth. Real Estate Servs. v. Padilla*, 149 Wash.App. 757, 762, 205 P.3d 937 (2009).

Here, the Superior Court granted the State’s CR 41(b)(3) motion as a matter of law concluding that Wolfe did not present a *prima facie* case regarding lawful authority and the adequacy of the permits. Yet, in a

conflicting manner, the Court stated that none of the legal arguments made by the State in their oral arguments to dismiss resulted in the Court concluding that Wolfe's cause of action could not legally stand.<sup>72</sup> The Court appears to have found that the case failed as to: (1) flooding causation, although not erosion causation, and/or (2) the State's legal authority to obstruct the floodplain (disregarding evidence of its lack of such authority). See *Schermer*, 161 Wn.2d at 940-41 (the context of the oral ruling and order is determinative on the question of whether a CR 41(b)(3) motion is granted on the basis of facts or law); *In re Adoption of S.H.*, 169 Wn. App. 85, 101-02, 279 P.3d 474 (2012). This Court, therefore, should review the issues de novo, viewing the evidence in the light most favorable to Wolfe. In the alternative, this Court should conclude that substantial evidence supports an outcome in favor of Wolfe, and does not support the CR 41 dismissal.

**B. The Public Nuisance Claims and Overview of Nuisance Law.**

Wolfe's lawsuit alleged violations of the Water Pollution Control Act<sup>73</sup> and the SMA<sup>74</sup> to support nuisance *per se* claims<sup>75</sup> and to show

---

<sup>72</sup> VRP Vol. 4., p.716:18-23.

<sup>73</sup> RCW 90.48.080 states, "It shall be unlawful for any person to throw, drain, run, or otherwise discharge into any of the waters of this state, or to cause, permit or suffer to be thrown, run, drained, allowed to seep or otherwise discharged into such waters any organic or inorganic matter that shall cause or tend to cause pollution of such waters according to the determination of the department, as provided for in this chapter." "Pollution" is defined in RCW 90.48.020 to mean "such contamination, or other

violation of those laws are presumed to affect the entire public because of the public interest in protecting the shoreline environment. These violations that are continuing because excess loading of sedimentation is corrupting the river because of floodwater scouring that exists and has intensified in recent years due to the SR4 Bridge. This claim is based on RCW 7.48.140(2). The evidence shows that sedimentation continues to inundate the waters via the Bridge obstruction and pier redirection with a resulting impact on water quality.<sup>76</sup>

Wolfe's second enumerated public nuisance claim is based on RCW 7.48.140(3). The common law in effect at the time the Bridge was originally constructed stated that the floodplain is a channel of the river and cannot be obstructed (HENRY PHILLIP FARNHAM, THE LAW OF WATERS AND WATER RIGHTS § 880 (1904)). Since before the original

---

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." (Emphasis supplied.) Water quality standards for surface water in the state of Washington are set forth in WAC Chapter 173-201A.

<sup>74</sup> RCW 90.58.020 sets forth goals and policies of the SMA and states, in relevant part, "This policy contemplates protecting against adverse effects to the public health, the land and its vegetation and wildlife, and the waters of the state and their aquatic life," and "To this end uses shall be preferred which are consistent with control of pollution and prevention of damage to the natural environment, or are unique to or dependent upon use of the state's shoreline."

<sup>75</sup> Complaint for Injunctive Relief and Nuisance Per Se, CP 10 through 34

<sup>76</sup> CP 1509:3-24.

Bridge was built in 1925, Washington law has statutorily prohibited the obstruction of navigable waters and pollution of waters of the State. *See, e.g., Sumner Lumber, supra.* The 1985 Bridge was built in approximately the same location as the original Bridge (20 feet further south), 6 feet higher, and fails to span the floodplain.<sup>77</sup> There is no evidence that WSDOT was granted any exemption from compliance with all current environmental, shorelines, and hydraulic permitting requirements for the Bridge and all its components in force at that point in time.

RCW 7.48.010 broadly defines an actionable nuisance as:

The obstruction of any highway or the closing of the channel of any stream used for boating or rafting logs, lumber or timber, or whatever is injurious to health or indecent or offensive to the senses, or an obstruction to the free use of property, so as to essentially interfere with the comfortable enjoyment of the life and property, is a nuisance and the subject of an action for damages and other and further relief.

RCW 7.48.120 also defines nuisance as:

Nuisance consists in 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, offends decency, ....

Public nuisance is defined in RCW 7.48.130 as, “one which affects equally the rights of an entire community or neighborhood, although the

---

<sup>77</sup> Finding 1.8 1838:5-6

extent of the damage may be unequal.”

For a nuisance *per se*, such as the bridge approach itself, RCW 7.48.120 does not limit the type of law that suffices to demonstrate unlawfulness. Washington courts have broadly defined a nuisance *per se* as an “act, thing, omission or use of property which of itself is a nuisance and hence is not permissible or excusable under any circumstance.” *Tiegs v. Watts*, 135 Wn.2d 1, 13, 954 P.2d 877 (1998); *State ex rel. Bradford v. Stubblefield*, 36 Wn.2d 664, 671, 220 P.2d 305 (1950); *see also State v. Boren*, 42 Wn.2d 155, 163, 253 P.2d 939 (1953). As the court noted in *Tiegs*, “[t]he fact a governmental authority tolerates a nuisance is not a defense if the nuisance injures adjoining property.” 135 Wn.2d at 15. Water pollution and obstruction of a floodplain are two conditions that are not permissible or excusable under any circumstance.

Specific enumerated public nuisances are described in RCW 7.48.140. *See also* RCW 7.48.130 (general definition of public nuisance); RCW 7.48.010 (defining nuisance). It is a public nuisance, among other things:

(2) To throw or deposit any offal or other offensive matter, or the carcass of any dead animal, in any watercourse, stream, lake, pond, spring, well, or common sewer, street, or public highway, or in any manner to corrupt or render unwholesome or impure the water of any such spring, stream, pond, lake, or well, to the injury or prejudice of others;

(3) To obstruct or impede, without legal authority, the passage of any river, harbor, or collection of water.

RCW 7.40.140(2) and (3); *see* Conclusion of Law 2.6:

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 the obstruction of a river’s floodway that supports the functioning of the overall river system, beyond the river’s main channel.

(CP 1510:15-17)

The Superior Court correctly found that the phrase “collection of water” should be broadly interpreted as a river or stream including the floodplain, otherwise known as a watercourse. There is no limitation in the definition of public nuisance in RCW 7.48.130 concerning navigable waters.<sup>78</sup> It ruled that WSDOT was incorrect 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. *C.f., Sumner Lumber & Shingle Co. v. Pac. Coast Power Co.*, 72 Wash. 631, 131 P. 220 (1913).<sup>79</sup>

The Superior Court also correctly found that private parties are entitled to maintain an action for nuisance against the government. *Bales v. City of Tacoma*, 172 Wash. 494, 503, 20 P.2d 860 (1933); RCW

---

<sup>78</sup> Even if there was, WSDOT’s witness (Mr. Zaske) confirmed that all stretches of the River are navigable. VRP Vol. 2, p.288:21-25

<sup>79</sup> CP 713:16-25, CP 714:1-22.

7.48.020. Governmental immunity does not extend to the creation or maintenance of a nuisance, even though in creating or maintaining such nuisance, the city, county or agency is exercising a governmental function. *See Elves v. King Cty.*, 49 Wn.2d 201, 201, 299 P.2d 206, 206 (1956); *see also Goggin v. City of Seattle*, 48 Wn2d 894, 898, 297 P.2d 602, 604 (1956). A nuisance is a substantial and unreasonable interference with the use and enjoyment of another's property. *Grundy*, 155 Wn.2d at 6; RCW 7.48.120; RCW 7.48.130. No lapse of time can legalize a public nuisance, amounting to an actual obstruction of public right. RCW 7.48.190.

In its ruling, the court narrowly construed pollution laws of the state and the functions and values of a floodplain, contrary to law. The floodplain is approximately 13 miles long, from the mouth of the river to the area near the WDFW Naselle River fish hatchery.<sup>80</sup> Although the exact definition of a "neighborhood", with respect to RCW 7.48.130, is not defined, a reasonable definition for the instant case would be those other property owners near the Wolfes/Anttonens, specifically the property owner, Ms. Francie Penttila, who owns the parcel of waterfront land on the other side of the river from the Appellants, along with WSDOT itself, which owns the right of way for the highway approach

---

<sup>80</sup> All FEMA FIRM map panels define the floodplain, one panel of which is Exhibit 60, the area of the floodplain near the bridge, including the Appellants' property. The same panel, revised in 2015, is Exhibit 9.

immediately upstream of both. The “entire community”, in terms of RCW 7.48.130, should have been determined to include all private and public property owners who own property located within, or adjacent to, the floodplain of the river. Moreover, the 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. As a result, state law RCW 90.58.230 provides that private individuals, like the Plaintiffs, can sue on their behalf as well as all other persons, private or public, similarly situated.

The Superior Court’s ruling did not address nor did the Superior Court apparently even consider this aspect of the law. Moreover, the Superior Court’s Findings of Fact and Conclusions of Law are completely silent on nuisance *per se*. There is no ruling dismissing or otherwise addressing the claim directly.

The Superior Court ruled that, to sustain a claim for public nuisance for “water pollution,” there needs to be evidence of pollution being introduced into a river that renders the river impure and that causes injury to people.<sup>81</sup> The Court also found that the erosion of the Anttonen and Wolfe properties has been caused by the mechanisms described by

---

<sup>81</sup> Findings 1.42 CP 1509:3-5.

Mr. Lawrence are attributable to the earth fill approach.<sup>82</sup> Evidence was presented at trial that the amount of dirt eroded from the property over time was over 32,000 cubic yards and that dirt went into the river, nowhere else<sup>14</sup>. That dirt no longer belongs to Appellants. It became a public “asset” whenever it left the Appellants’ property, one that indicated an interference with Appellants’ use and enjoyment of the property.<sup>83</sup> It is inconsistent and incongruous for the Court to somehow conclude that this same dirt in the same water did not render it unwholesome or that it did not interfere with the use and enjoyment of any other property owner in the neighborhood or in the entire community.<sup>84</sup> This is clear error of law and contrary to substantial evidence in the record.

**C. Substantial Evidence in the Record Shows that WSDOT’s Obstruction of the Floodplain Lacked “Legal Authority.”**

Wolfe presented sufficient evidence to show that WSDOT lacked “legal authority” to obstruct the floodplain. The Superior Court’s contrary conclusion is legal error, both ignoring Wolfe’s testimony and requiring Wolfe to “prove a negative,” concerning permits that WSDOT was required to obtain to allow a bridge to be situated in the floodplain.<sup>85</sup>

---

<sup>82</sup> Findings 1.29 CP 1507:7-9.

<sup>83</sup> Findings 1.30 (CP 1507:10-12).

<sup>84</sup> Conclusions 2.17/2.18 (identical) CP 1511:13-16.

<sup>85</sup> WSDOT had the responsibility to call, as witnesses, testimony from Pacific County, the Washington State Departments of Ecology and Fish & Wildlife, the Army Corps of

Under Findings of Fact 1.25 through 1.30<sup>86</sup> and Conclusions of Law 2.6 and 2.8,<sup>87</sup> WSDOT may only avoid liability by proving it had “legal authority” to obstruct the floodplain. It failed to do so, taking the risk with its motion to dismiss.<sup>88</sup> Since “legal authority” is the key factor in determining whether WSDOT could lawfully obstruct the waterway, it was required to present testimony as to the existence and adequacy of those permits. *See Locke v. City of Seattle*, 133 Wn.App. 696, 713, 137 P.3d 52 (2006). It did not do so. The Court did not interpret this factual dispute in a light most favorable to the non-moving party, erroneously dismissing the case.

WSDOT needed (1) a floodplain approval from the State of Washington Department of Ecology (“Ecology”) (RCW 90.58) and (2) a hydraulic project approval from the Department of Fish and Wildlife (“WDFW”) (WAC 220-660) for the reconstruction of the Bridge in 1985.

---

Engineers, and FEMA as to the adequacy of their permits. WSDOT did not put on any evidence that it had obtained all proper and valid permits to construct the SR4 bridge or to do the 1998 maintenance work; in fact, its only witness, Mr. Steve Zaske, conceded that was not the case under direct testimony. VRP Vol. 2, p.293:2-10

<sup>86</sup> CR 1506:24-26, 1507:1-12.

<sup>87</sup> CR 1510:15-22.

<sup>88</sup> WSDOT failed to produce copies of all required permits or approvals, despite an exhaustive review of agency records by Mr. Wolfe which establishes the permits do not exist. *See*, Evidence Rule (“ER”) 803(a)(10) (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); ER 803(a)(7) (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).

The 1985 Bridge project falls within a NFIP defined flood plain management zone. That requirement was in place on a national level (enacted in 1968) when the 1985 work occurred. The placement of a rip rap river barb, extending out from the bank to the pier, then 60 feet on down the bank of the Wolfe's property also required a shoreline permit or a written exemption. The testimony/exhibits introduced by Wolfe showed that the 1998 shorelines permit was never applied for, nor obtained, according to Public Records Requests made to WSDOT, Pacific County, and WDOE. Nor is there evidence of a written exemption for the shorelines work issued to WSDOT.

The specific conditions under which an encroachment of the floodplain could be permitted are set forth in 44 CFR 60.3(d)(4). A community may permit encroachments within the 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 Administrator. Where a local jurisdiction proposes to permit an encroachment in the floodway or the floodplain that will cause a net increase in the BFE, it is required to apply to the FEMA Regional Office for conditional approval of such action *prior to permitting the project to occur*. The following

must be submitted, among other things:

- An evaluation of alternatives which, if carried out, would not result in an increase in the BFE more than allowed, along with documentation as to why these alternatives are not feasible. The alternative that would not result in a 3 foot increase in the Base Flood Elevation would simply be to build the Bridge 800 feet long.
- Documentation of individual legal notice to all affected property owners (anyone affected by the increased flood elevations, within and outside of the community) explaining the impact of the proposed action on their properties.
- Certification that no structures are located in areas which would be affected by the increased BFE (unless they have been purchased for relocation or demolition).

These federal regulations are implemented through the SMA in the form of an Engineered No Rise Analysis and Certification, part of the Shorelines permit issued by Pacific County. WSDOT did not produce evidence of the certification for either the 1985 Bridge reconstruction or the 1998 project work despite numerous Public Record Requests and discovery production. Mr. Zaske confirmed that floodplain impacts were not disclosed to permitting agencies and were simply not considered by WSDOT because it did not believe the Bridge would impact the floodplain.<sup>89</sup> This evidence substantially supports a conclusion that WSDOT never obtained any permits or authorization for its obstruction.

---

<sup>89</sup> VRP Vol. 2, p.291:22-25, p.292:1-25, p.293:1-17.

Accordingly, none of the approvals that WSDOT did obtain allowed any floodplain obstruction or watercourse redirection, any increase in the base flood elevation, any extension of the size of the floodplain, or any redirection of the flow of the river. These effects were silently withheld from all persons interested and affected, as well as the permitting agencies themselves such as Pacific County.

Not only did Wolfe submit sufficient evidence on this issue to prove WSDOT did not have lawful authority to obstruct the floodplain, the law requires the trier of fact to presume that required permits or approval were not issued by the agencies with jurisdiction, which presumption is dispositive, especially because Wolfe was the non-moving party. *State v. N.M.K.*, 129 Wn. App. 155, 162, 118 P.3d 368 (2005) (Evidence Rule (“ER”) 803(a)(10) 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); KARL B. TEGLAND, WASHINGTON PRACTICE: COURTROOM HANDBOOK ON WASHINGTON EVIDENCE, 409-10 (2005); *United States v. Keplinger*, 776 F.2d 678, 689-90 (7th Cir. 1985) (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).

The Court appeared confused about the law with respect to 44 C.F.R. §60.3(d)(4)<sup>90</sup> “prerequisites,” but the “triggering conditions” were shown to be present and there was no approval to work within the floodplain granted to the State. 44 C.F.R. §60.3(d)(3) prohibits any work within a floodplain, once the floodplain has been established, unless it can be demonstrated that the work does not lead to any increase in the base flood level. Per WAC 220-110-070(1)(h): “Abutments, piers, piling, sills, approach fills, etc., shall not constrict the flow so as to cause any appreciable increase (not to exceed 0.2 feet) in backwater elevation (calculated at the 100-year flood) or channel wide scour and shall be aligned to cause the least effect on the hydraulics of the watercourse.” 0.2 feet is 2.4 inches.

The specific conditions under which an encroachment of the floodplain could be permitted are detailed in 44 CFR §60.3(d)(4). But the onus was not on Wolfe to establish these “precedents.” The fact that the FEMA/FIRM map recently changed without any application for floodway revisions supports Appellants’ arguments. Wolfe submitted substantial evidence sufficient to conclude that WSDOT never obtained any appropriate permit authorizing its obstruction of the floodplain. The

---

<sup>90</sup> Washington’s floodplain management laws including RCW Ch. 86.16 and WAC Ch. 173-158 incorporate the standards and definitions contained in 44 C.F.R., Parts 59 and 60 for the National Flood Insurance Program as the minimum state standards.

Superior Court's contrary conclusions were legal error, and/or are unsupported by substantial evidence.

Anyone who does work within a floodplain, close to a wetland, or on the shorelines of the state without a valid permit violates the state Shorelines Management Act of 1971. *See* RCW 90.58.210(2); RCW 90.58.220.

The Superior Court correctly determined that WSDOT stands in the place of an individual property owner in this lawsuit in terms of accountability for damage to other private property as a result of its actions.<sup>91</sup> Yet the Court failed to call WSDOT to task for doing unpermitted work within a river and its floodplain, along shorelines, and close to a wetland as it would have if a private individual property owner performed the same work. This is an error of law as well as not being within the discretion of the Court.

**D. The Court Misapplied the Law on Flooding and Pollution Causation.**

The Superior Court erred in ruling that floodplain obstructions are legally allowed as long as they do not result in more than a one foot increase in the Base Flood Elevation.<sup>92</sup> This is an error of law.

---

<sup>91</sup> VRP Vol. 4, p.715:14-25, p.716:1-16.

<sup>92</sup> Oral Ruling, VRP Vol. 4, p.731:22-25

The State criterion allows only a 0.2 feet (2.4 inches) increase in BFE, not one foot (12 inches), per WAC 220-110-070. This is a “relaxed” requirement because federal law (44 CFR 60.3(d)(3)) allows no net rise in backwater elevation. The one-foot standard referred to by the Superior Court is that applied at the County level whenever someone wants to build a structure within the floodplain, as the Wolfes have done. It allows for future permitted construction of something that would partially obstruct the floodplain (only 0.8 feet, or 9.5 inches of “slop”) without affecting NFIP regulations regarding existing structures. The Superior Court misapplied the law on a broader scale and committed an error of law.

The Superior Court entered findings that WSDOT’s earth fill approach within the floodplain has caused erosion downstream and interfered with the River’s natural Condition.<sup>93</sup> The evidence does not support any result except that WSDOT caused the impacts found. One, it is noted that aerial photos to the head of the floodplain (approximately three miles upstream of the Bridge)<sup>94</sup> do not show any visible natural or manmade obstructions other than the SR 4 approaches to the Bridge. Neither does a direct examination of both the original and 2015 FEMA FIRM maps. Exhibit 60 is the original FEMA FIRM near the Bridge

---

<sup>93</sup> Findings Nos. 1.26-1.31 (CP 1507:1-16).

<sup>94</sup> See, e.g., Exhibits 152-163, 176-178, 180-182, 189-192; Exhibits 47-55.

showing the 200-foot-wide obstruction “nozzle” along with the associated floodplain boundaries, which are 800 feet wide immediately above and below the bridge.

Two, the erosion is increasing and it is caused by the effect of increased water intensity. The court found WSDOT caused the erosion.<sup>95</sup> Findings of Fact 1.42, 1.43 and the first part of Finding 1.44<sup>96</sup> capture the essence of erosion, water pollution law and Ms. Schaumburg’s testimony as to the impacts on the general public. The last part of Findings 1.44, along with 1.45 and 1.46<sup>97</sup> are at illogical odds with Schaumburg’s testimony. If erosion causes pollution and WSDOT caused the erosion, it logically follows that WSDOT caused the pollution which affected, and continues to affect, functions and values of the floodplain and the river downstream.

Violations of the Water Pollution Control Act and the SMA exist and are continuing because excess loading of sedimentation is corrupting the Naselle River as a result of floodwater scouring that exists and has intensified in recent years due to the SR4 bridge system. While Wolfe cannot seek injunctive relief under the SMA (or directly sue to enforce the

---

<sup>95</sup> See Finding Nos. 1.29-1.30. CR 1507:7-12.

<sup>96</sup> CR 1509:3-15.

<sup>97</sup> CR 1509:15-24.

Water Pollution Control Act), these violations support a claim under RCW 7.48.140(2). The SMA allows a private party to seek “restoration” for damages caused by violation of its terms. *See* RCW 90.58.230.

The Superior Court acknowledged that WSDOT was responsible for the erosion/avulsion of 32,000 cubic yards of dirt into the river, since 1925. The Superior Court recognized that sedimentation fouls the waters of the state and damages fish habitat. It failed to connect the fact that man-caused sedimentation is pollution, while naturally occurring sedimentation (normal avulsion/erosion process) are not. The difference is one of causation – WSDOT is polluting a river; Mother Nature does not pollute.

The bottom line is that public resources are impacted, even if the exact point where the impacts end cannot be precisely delineated. Any other result would put a hole in public nuisance law, obligating citizens who desire to represent the public to prove a negative. The state’s environmental laws are liberally construed. Damage to a portion of the River and Floodplain impacts the public in general because of the importance of the habitat and resources at risk, which provide benefits downstream. Any impact to these resources affects the entire community because of their importance to the public. The burden shifts to WSDOT to

provide a justification, which it failed to do. Dismissal of Appellants' claims is clear error.

**E. The Court Shifted the Burden of Proof on the State's Defenses to Wolfe and Assumed Facts Not in Evidence.**

Instead of requiring evidence from WSDOT to justify the impacts of the SR4 Bridge, the trial court improperly required Wolfe to "prove a negative." The Superior Court excused the State from producing evidence to support its affirmative defense that third parties were responsible for the flooding and floodplain interference. The State also asserted that it had legal authority to obstruct the floodplain, but did not support this argument with evidence; the only evidence is to the contrary. *See, infra*, pp.34-40.

The Superior Court erroneously ruled that Wolfe had not established that other potential causes of the flooding were not to blame, citing general recitals in a Pacific County ordinance.<sup>98</sup> Yet the Plaintiffs did not have the burden of proof on an affirmative defense. *Locke v. City of Seattle*, 133 Wn.App. 696, 713, 137 P.3d 52 (2006) ("The burden of proof is ... placed upon the party asserting the avoidance or affirmative defense").

Moreover, the Court impermissibly assumed facts not in evidence, and then interpreted this "evidence" in a light most favorable to the State,

---

<sup>98</sup> Exhibit 10

not Wolfe.<sup>99</sup> It was the State's burden to prove, with real evidence and not speculation, that flooding is resulting from obstructions other than the SR4 bridge or by other practices, such as major land development. Speculation cannot sustain a finding. *See Johnson v. Aluminum Precision Prods., Inc.*, 135 Wn. App. 204, 208-09, 143 P.3d 876 (2006) (mere speculation and conjecture will not sustain a finding). Not only must the State offer this defense in its part of the trial, it must also lay the proper foundation in terms of specific identification of those third parties and the extent to which they contributed to the total obstruction and resulting increases in BFE observed by Wolfe throughout the full extent of the floodplain. This was not done.

**F. Substantive Evidence in the Record Shows that WSDOT's Obstruction of the Floodplain Caused a Public Nuisance.**

Wolfe presented sufficient evidence to show that WSDOT's obstruction of the floodplain caused a public nuisance. As discussed *infra*, the Court found that WSDOT's earth fill approach to the Bridge obstructed the floodplain and has interfered with the River's natural condition. (Findings Nos. 1.26-1.31.) There are no other manmade obstructions in the area other than the SR4 Bridge and its approach.<sup>100</sup>

---

<sup>99</sup> Oral Ruling, VPR Vol. 4, p.729:19-25, p.730:1-4

<sup>100</sup> WSDOT Exhibits 152-163, 176-178, 180-182, 189-192; Plaintiffs' Exhibits 47-55; see also Exhibit 60.

Testimony and evidence from both Mr. Wolfe and Col. Anttonen established that their properties now experience 500-year flood events when the same properties were not mapped in the original FEMA FIRM maps since the 1985 and 1998 projects.<sup>101</sup> Their properties are inundated by three feet of water several times a year when they are not even supposed to flood. Specifically, the Anttonen property floods whenever the river flow is 4,460 cfs, showing the floodplain obstruction effect on the flooding characteristics of their property.<sup>102</sup> The Appellants lose the use and enjoyment of their property each time enough rain causes the river to overflow its bank (4,460 cfs) because of the WSDOT obstruction of the floodplain, which now happens once or twice a year.<sup>103</sup>

The Superior Court's conclusion that Appellants did not establish evidence of causation is legal error, ignoring Wolfe's testimony and the law which prohibits *any* increase in base flood elevation (not requiring a specific amount or number). It is irrefutable the base flood elevation in the area has increased. The Superior Court ignored such evidence based on speculation that it could be from "other" causes, which is not adequate proof. Nor did WSDOT present evidence to support its affirmative

---

<sup>101</sup> VRP Vol. 1, p.61:2-25, p.62:1-2; Ex. 69.

<sup>102</sup> See CP 538:20 through 539:3. See also Exhibits 66, 67.

<sup>103</sup> VRP Vol. 3, p.537:5-14.

defense of “other causes,” as discussed above. Simply put, the Superior Court’s findings on the fact of the floodplain obstruction and its conclusions on causation do not match up and are unsupported by substantial evidence in the record.

**G. The Court Erred in Dismissing the Case After the State Started Its Defense and in Denying Wolfe’s Right to Rebut Testimony of a State Witness.**

WSDOT made a strategic decision to start putting on its defense in this matter prior to Appellants’ close of its case in chief, by calling Steve Zaske out of order to testify on the second day of trial. Wolfe agreed to accommodate the State’s request and objected to any qualifications asserted by the State at the time. Under this unique circumstance, the State waived its right to ask for directed dismissal under CR 41(b)(3) when Wolfe rested. The principal reason behind the waiver rule is to allow both parties, on appeal, the benefit of all evidence in the case, including evidence presented by the defense, when determining if the plaintiff’s evidence was sufficient to sustain a claim. *Hector v. Martin*, 51 Wn.2d 707, 710, 321 P.2d 555 (1958); *Petersen v. Dep’t of Labor & Indus.*, 40 Wn.2d 635, 641, 245 P.2d 1161 (1952). In the alternative, the State failed to rest its opened case prior to making its Motion.

Prior to Wolfe resting, the Superior Court denied Wolfe’s request to recall Mr. Lawrence as a rebuttal expert. The State’s witness Mr. Zaske

testified after Mr. Lawrence and before Mr. Wolfe. The Superior Court denied Wolfe the ability to rebut the testimony presented by the State in *its* case. Further, the Court admitted that it had considered Mr. Zaske's testimony, taken out of order.<sup>104</sup> This prejudiced Wolfe. Due to the procedural irregularity of the Court's ruling, Mr. Lawrence, the Plaintiffs' expert, could not rebut Mr. Zaske's non-expert testimony regarding the No Rise Certificate and the floodplain obstruction conclusion in his expert report.<sup>105</sup> His rebuttal is preserved in the Declaration of Russell A. Lawrence in Support of Plaintiffs' Amended Motion for Summary Judgment dated September 18, 2015.<sup>106</sup>

The Court ruled that Wolfe failed to present sufficient evidence to support a finding that all prerequisites set forth in that regulation have been met. However, Wolfe was entitled to present evidence in this regard in rebuttal to the State's witness's testimony, particularly considering its own witness's admission that they did not obtain permits to either obstruct the floodplain or change the direction of flow. The lack of a No Rise Certification is defined as an illegal encroachment on the floodplain in 44

---

<sup>104</sup> VRP Vol. 4, p.710:5-10.

<sup>105</sup> See Exhibit 74.

<sup>106</sup> CP 976 through 987.

CFR 60.3(d)(3). The Superior Court's ruling denying rebuttal and the unorthodox procedure prejudiced Wolfe's ability to make his case.

## VI. CONCLUSION

For all the foregoing reasons, this Court should reverse the ruling of the Superior Court and remand so that the parties are able to present their cases in full and their rebuttal thereto, and should order the Superior Court to correct its errors of fact and law concerning causation in the Decision.

RESPECTFULLY SUBMITTED this 26<sup>th</sup> day of April, 2017.

By   
Dennis D. Reynolds, WSBA #04762  
DENNIS D. REYNOLDS LAW OFFICE  
200 Winslow Way West, Suite 380  
Bainbridge Island, WA 98110  
(206) 780-6777 Phone  
(206) 780-6865 Fax  
E-mail: dennis@ddrlaw.com  
*Counsel for Appellants*

**CERTIFICATE OF SERVICE AND MAILING**

I, the undersigned, hereby certify under penalty of perjury under the laws of the State of Washington, that I am now, and have at all times material hereto been, a resident of the State of Washington, over the age of 18 years, not a party to, nor interested in, the above-entitled action, and competent to be a witness herein.

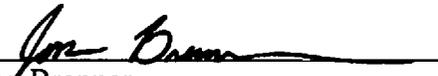
I further certify that the original of the foregoing brief was timely filed on April 26, 2017 pursuant to RAP 18.6(c), as follows:

Clerk of Court  
Court of Appeals, Division II  
950 Broadway, Suite 300, MS TB-06  
Tacoma, WA 98402-4454  
**Via Court's JIS-Link Electronic Filing System**

I further certify that I caused a true and correct copy of the foregoing brief to be served this date, in the manner indicated, to the parties listed below:

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 <u>MatH4@atg.wa.gov; tpcef@atg.wa.gov;</u> <u>JannahW@atg.wa.gov;</u> <u>MelissaE1@atg.wa.gov</u> <i>Attorneys for Respondent</i>	<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 type="checkbox"/> <i>Express Mail, Next Day</i> <input checked="" type="checkbox"/> <i>Email</i>
--	--

DATED at Bainbridge Island, Washington, this 26<sup>th</sup> day of April, 2017.

  
Jon Brenner  
Paralegal

**DENNIS D REYNOLDS LAW OFFICE**  
**April 26, 2017 - 4:43 PM**  
**Transmittal Letter**

Document Uploaded: 5-497298-Appellants' Brief.pdf

Case Name: Wolfe, et al., v. WSDOT

Court of Appeals Case Number: 49729-8

Is this a Personal Restraint Petition?    Yes     No

**The document being Filed is:**

Designation of Clerk's Papers                      Supplemental Designation of Clerk's Papers

Statement of Arrangements

Motion: \_\_\_\_\_

Answer/Reply to Motion: \_\_\_\_\_

Brief: Appellants'

Statement of Additional Authorities

Cost Bill

Objection to Cost Bill

Affidavit

Letter

Copy of Verbatim Report of Proceedings - No. of Volumes: \_\_\_\_\_

Hearing Date(s): \_\_\_\_\_

Personal Restraint Petition (PRP)

Response to Personal Restraint Petition

Reply to Response to Personal Restraint Petition

Petition for Review (PRV)

Other: \_\_\_\_\_

**Comments:**

No Comments were entered.

Sender Name: Jon Brenner - Email: [jon@ddrlaw.com](mailto:jon@ddrlaw.com)

A copy of this document has been emailed to the following addresses:

[matth4@atg.wa.gov](mailto:matth4@atg.wa.gov)

[jennahw@atg.wa.gov](mailto:jennahw@atg.wa.gov)

[melissael@atg.wa.gov](mailto:melissael@atg.wa.gov)

[tpcef@atg.wa.gov](mailto:tpcef@atg.wa.gov)

[dennis@ddrlaw.com](mailto:dennis@ddrlaw.com)

[christy@ddrlaw.com](mailto:christy@ddrlaw.com)

[jon@ddrlaw.com](mailto:jon@ddrlaw.com)

[alanscottmiddleton@comcast.net](mailto:alanscottmiddleton@comcast.net)

