

No. 331962-III, 332381-III and 332390-III (Consolidated)

IN THE COURT OF APPEALS FOR
THE STATE OF WASHINGTON
DIVISION III

FILED

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GBI HOLDING CO., CITY OF CHELAN,
and STATE OF WASHINGTON,

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

Appellants,

v.

CHELAN BASIN CONSERVANCY and
CHELAN COUNTY PUBLIC UTILITY DISTRICT,

Respondents.

On Appeal from the Superior Court of the
State of Washington for Chelan County

**BRIEF AMICUS CURIAE OF
PACIFIC LEGAL FOUNDATION
IN SUPPORT OF APPELLANTS**

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IDENTITY AND INTEREST OF AMICUS CURIAE

PLF was founded in 1973 and is widely recognized as the most experienced nonprofit legal foundation of its kind. PLF attorneys represent the interests of thousands of supporters nationwide who believe in limited government and the need to protect individual rights in property.

PLF attorneys litigate matters affecting the public interest at all levels of state and federal courts and have participated as lead counsel or amicus curiae in numerous cases before the U.S. Supreme Court and the Washington Supreme Court.

PLF litigates in defense of individual rights in private property and has extensive experience in shoreline matters, including the public trust doctrine and the Shoreline Management Act. The present case is of significant interest to the supporters of PLF because of the potential application of the drastic remedy being sought by plaintiffs under the public trust doctrine. PLF believes that its perspective will aid this Court in considering the appeal.

STATEMENT OF THE CASE

The factual background and framing of the issues have been well presented by the parties and need not be repeated here.

PLF contends that RCW 90.58.270, enacted in 1971 as part of the Shoreline Management Act, provides clear consent and legal authority for the Three Fingers fill to remain in place, as it has for over fifty years.

If allowed to stand, the trial court's misconstruction of the plain meaning of RCW 90.58.270 will result in a legal morass. Similar to the Three Fingers fill on Lake Chelan, thousands of parcels statewide (including much of the Seattle waterfront), only exist because of historic fills that pre-date December 4, 1969. The very purpose of RCW 90.58.270, which is to grant consent under the public trust doctrine to historic fills, will be gutted. The result will be to open the door to a myriad of lawsuits seeking removal of historic fill that in any manner impacted navigable waters of the state. But such legal uncertainty is contrary to the public interest. With the enactment of the Shoreline Management Act and RCW 90.58.270, the significant public interest in legal certainty and finality was protected while simultaneously establishing a system of close regulation of the development of the Washington shorelines. This Court should not undo those policy choices by adopting a strained and wrong interpretation of RCW 90.58.270. The purpose and plain meaning of RCW 90.58.270 should be upheld and applied to the Three Fingers fill.

ARGUMENT

I

RCW 90.58.270 GRANTS CONSENT TO THE THREE FINGERS FILL AND EXPRESSLY BARS THE CLAIM ADVANCED BY CHELAN BASIN CONSERVANCY

A. *Wilbour v. Gallagher* Prompted the Need for RCW 90.58.270

The genesis of RCW 90.58.270 was the controversial decision of the Washington Supreme Court in *Wilbour v. Gallagher*, 77 Wn.2d 306, 462 P.2d 232 (1969). As here, that case also involved Lake Chelan and its fluctuating water levels. The natural water level of Lake Chelan is 1,079 feet above sea level. However, during the summer months, the water level is artificially raised 21 feet, to an elevation of 1,100 feet above sea level.

The Chelan Electric Company constructed a dam, pursuant to a permit by the Federal Power Commission, which permitted the annual raising of the level of the lake to 1,100 feet above sea level, with the requirement that it reach that level by June 15 each year. . . . They are maintained at that level until September when the dam was opened and the waters gradually subsided to the natural 1,079 foot level.

Wilbour, 77 Wn.2d at 309.

By raising the water level, many properties that were once completely dry and above the 1,079-foot level were submerged during the summer months. Such was the case with Gallagher's property. The Gallagher

property was higher than 1,079 feet, but below 1,100 feet, and accordingly was inundated each summer. For 35 years, the public in the summer used the waters over the Gallagher property for fishing, swimming, and general recreational use. However, in 1961, Gallagher filled the private property to five feet above the 1,100-foot level, thereby precluding its annual summer inundation.

The neighbor, Wilbour, sought removal of the fill and sued Gallagher. The Washington Supreme Court concluded that the artificial raising of the lake level did not preclude rights of navigation and other public uses pursuant to the public trust doctrine.

Following the reasoning of these cases we hold that when the level of Lake Chelan is raised to the 1,100 foot mark (or such level as submerges the defendants' land), that land is subjected to the rights of navigation, together with its incidental rights of fishing, boating, swimming, water skiing, and other related recreational purposes generally regarded as corollary to the right of navigation and the use of public waters. When the level of the lake is lowered so that the defendants' land is no longer submerged, then they are entitled to keep trespassers off their land, and may do with the land as they wish consistent with the right of navigation when it is submerged.

Wilbour, 77 Wn.2d at 316 (citations omitted). Having found that the navigational and public use rights attach to the waters when artificially raised, the Court was quick to determine that the fill must be removed.

It follows that the defendants' fills, insofar as they obstruct the submergence of the land by navigable waters at or below the 1,100 foot level, must be removed. The court cannot authorize or approve an obstruction to navigation.

Id.

This was a remarkable decision. The result was to place a cloud of uncertainty regarding all fills in navigable waters throughout Washington. Indeed, the Washington Supreme Court was itself uneasy about the decision, recognizing the potential impact of requiring pre-existing fill in navigable waters to be removed. Footnote 13 expressed this concern.

We come to this conclusion with some reluctance since there have been other fills in the neighborhood about which there has apparently been no protest.

Id. at 316 n.13. The Court likewise recognized that there are many fills of navigable waters that are desirable.

We are concerned at the absence of any representation in this action by the Town or County of Chelan, or of the State of Washington, all of whom would seem to have some interest and concern in what, if any, and where, if at all, fills and structures are to be permitted (and under what conditions) between the upper and lower levels of Lake Chelan. There undoubtedly are places on the shore of the lake where developments, such as those of the defendants, would be desirable and appropriate.

Id.

Of course, throughout Washington there were many fills and development of the shorelines prior to the *Wilbour* decision that are very

desirable and needed, yet include filling within the navigable waters. What impact would the *Wilbour* decision have on other properties throughout the state? Indeed, the Court recognized that its *Wilbour* decision “engendered considerable controversy.” *Harris v. Hylebos Industries, Inc.*, 81 Wn.2d 770, 784, 505 P.2d 457 (1974).

While the Court did not have power to approve even desirable or appropriate fill or development that blocked public navigation rights, other governing bodies had that power. In referring to its footnote 13 in *Wilbour*, the Court explained:

As the footnote at page 317 of the [*Wilbour*] opinion discloses, we had in mind the right of appropriate governing bodies to authorize fills and commercial uses of lands situated on the shores of navigable bodies of water.

Harris, 81 Wn.2d at 787.

The appropriate governing body was the State Legislature and the majority of voters who approved the Shoreline Management Act. That Act provided the authorization for pre-existing fill and development that otherwise could be argued was in interference with navigational rights. The Act also established a permitting procedure for controlling and regulating future development of Washington’s shorelines.

B. The Plain Meaning of RCW 90.58.270 Provides Authorization for Fills That Pre-Existed the *Wilbour* Decision

As part of the Shoreline Management Act, the language of RCW 90.58.270 (1) provides clear authority and consent for fills and other shoreline developments that pre-dated the *Wilbour* decision. The date of *Wilbour* was December 4, 1969. In direct response to *Wilbour*, section 90.58.270 provides:

Nothing in this section shall constitute authority for requiring or ordering removal of any structures, improvements, docks, fills, or developments **placed in navigable waters prior to December 4, 1969**, and the **consent and authorization** of the state of Washington to the impairment of public rights of navigation, and corollary rights incidental thereto, caused by the retention and maintenance of said structures, improvements, docks, fills or developments are **hereby granted**.

RCW 90.58.270 (1) (emphasis added).

The Three Fingers fill has been in place since 1961, pre-dating *Wilbour*, and clearly within the consent and authorization of RCW 90.58.270. Despite this authorization, the trial court below latched on to the second part of RCW 90.58.270 (1) which contains a proviso that this consent shall not relate to fills or developments “which are . . . in violation of state statutes.” The trial court reasoned that because the Three Fingers fill obstructed or impeded passage of a lake, it was an unlawful nuisance prior to 1969, and

therefore was in “violation of state statutes.”

Pacific Legal Foundation agrees with, and does not need to repeat, the well developed argument of the State of Washington that the Three Fingers fill cannot be construed as a nuisance in violation of state statutes. *See* Opening Brief of Appellant State of Washington at 19 - 25, and Reply Brief of State of Washington at 3 - 12.

For purposes here, it is sufficient to recognize that the trial court relied on RCW 7.48.120 which provides that a nuisance includes obstructing any lake or navigable river. Similarly, RCW 7.48.140 (3) states that a nuisance includes obstructing or impeding the passage through any collection of water. However, these statutes are not violated by the Three Fingers fill because any impact on navigation is specifically authorized by RCW 90.58.270. Indeed, by being authorized by RCW 90.58.270, the Three Fingers fill cannot be a nuisance. RCW 7.48.160 (“Nothing which is done or maintained under the express authorization of a statute, can be deemed a nuisance.”).

The trial court’s contrary decision fundamentally undermines the plain meaning and intent of the consent granted through RCW 90.58.270. If the Three Fingers fill is ruled to be in violation of state statutes as a nuisance (because it obstructed or impeded passage of a body of water), then the same

conclusion must be made for virtually all fill or developments within navigable waters. In other words, the consent granted by RCW 90.58.270 becomes meaningless because any fill or development within navigable waters will necessarily obstruct or impede navigation to some degree.

Under the reasoning of the trial court, all structures, improvements, docks, fills, or developments **placed in navigable waters prior to December 4, 1969**, will not have the benefit of the consent granted under the Shoreline Management Act pursuant to RCW 90.58.270. Of course, that is contrary to the very purpose of the grant of consent. The impact of such a decision will open the door to a multitude of legal challenges, including challenges to fill placed in navigable waters at the Seattle waterfront and many other communities throughout the state.

C. The Shoreline Management Act Is Consistent with the Public Trust Doctrine

In *Caminiti v. Boyle*, 107 Wn.2d 662, 732 P.2d 989 (1987), the Washington Supreme Court held that the public trust doctrine is fully met by the Shoreline Management Act.

[W]e first note that the requirements of the “public trust doctrine” are fully met by the legislatively drawn controls imposed by the Shoreline Management Act of 1971, RCW 90.58.

Caminiti, 107 Wn.2d at 670. The Court referenced its earlier decision in

Portage Bay-Roanoke Park Comm 'ty Coun. v. Shorelines Hearings Bd., 92 Wn.2d 1, 4, 593 P.2d 151 (1979).

As we observed in *Portage Bay*, that act by its terms provides as follows:

“It is the policy of the state to provide for the management of the shorelines of the state by planning for and fostering all reasonable and appropriate uses. This policy is designed to insure the development of these shorelines in a manner which, while **allowing for limited reduction of rights of the public in the navigable waters, will promote and enhance the public interest**. This policy contemplates protecting against adverse effects . . . while protecting generally public rights of navigation and corollary rights incidental thereto.”

Caminiti, 107 Wn.2d at 670 (quoting *Portage Bay*, 92 Wn.2d at 4, quoting RCW 90.58.020) (emphasis added).

Of course, the Shoreline Management Act did two things. First, it granted consent to pre-existing fills and developments, thereby allowing a limited reduction of rights in navigable waters. The granting of consent served the public interest by establishing with certainty and finality that such pre-existing fills will not be subject to removal under the *Wilbour* decision. It reflects a legislative choice that any impacts to navigation rights are minimal and acceptable. Second, the Shoreline Management Act established a rigorous permitting procedure for future shoreline development. Accordingly, any development of the Three Fingers property must be pursuant to a shoreline substantial development permit.

In short, the people of the State of Washington struck a balance that serves the overall public interest. Rather than allowing *Wilbour*-type claims to cast legal uncertainty over pre-existing fills and developments, consent is granted to those fills thereby allowing a limited reduction of rights in navigable waters. That policy is then supported by a new regulatory process to ensure that the public interest, including rights of navigation, are appropriately balanced and considered in future development.

CONCLUSION

The consent granted for pre-existing fill and developments under the Shoreline Management Act pursuant to RCW 90.58.270 should be applied to the Three Fingers fill at Lake Chelan. Any other conclusion will cast the same cloud of uncertainty that was cast by the *Wilbour* decision. The public interest in continued certainty and finality concerning long-established structures, docks, fills, and developments should be protected. That policy choice was made with the enactment of RCW 90.58.270, and should not now be disturbed by this Court. For the foregoing reasons, amicus Pacific Legal Foundation urges that the trial court decision be reversed.

DATED: October 2, 2015.

Respectfully submitted,

JOHN M. GROEN

A handwritten signature in black ink, appearing to be 'J. Groen', written over a horizontal line.

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