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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By_____

NO. 331962

(Consolidated with No. 332390 and 332381)

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

CHELAN BASIN CONSERVANCY,

Respondent,

v.

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

Appellants.

OPENING BRIEF OF APPELLANT STATE OF WASHINGTON

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TABLE OF CONTENTS

I. INTRODUCTION 1

II. ASSIGNMENTS OF ERROR AND ISSUES PRESENTED 3

A. Assignments of Error. 3

B. Issues Related to Assignments of Error. 3

III. STATEMENT OF THE CASE 5

A. Overview of the Three Fingers. 5

B. Procedural History. 8

IV. SUMMARY OF ARGUMENT 9

V. ARGUMENT 13

A. Standard of Review. 13

B. The Superior Court Erred by Ordering Removal of the Three Fingers Fill Because RCW 90.58.270(1) Authorizes Continued Maintenance of This Historic Fill From 1962. 14

1. RCW 90.58.270(1) Applies and Precludes Claims Based on Impairment of Public Rights of Navigation Caused by the Three Fingers Fill 15

a. By Its Plain Language, RCW 90.58.270 Abridges Private Rights of Action That Attack Historic Fill or Development Based on a Claimed Impairment of Public Rights of Navigation. 17

b. By Concluding That the Proviso Phrase "In Violation of Statutes" in RCW 90.58.270(1) Depends on Whether Historic Fill Impaired Navigation in 1969, the Superior Court Entirely Frustrates the Intent of the Statute and Leaves It With No Meaning....19

2. The Superior Court's Construction Defies the Legislative Intent to Respond to the *Wilbour* Case By Adopting the Shoreline Management Act and Limiting Future Actions Against Historic Development Under a *Wilbour* Claim....25

C. RCW 90.58.270(1) Is a Valid Exercise of State Authority to Authorize Development in Navigable Waters and Does Not Violate Washington's Public Trust Doctrine....29

1. The Public Trust Doctrine....30

2. The Public Trust Doctrine Is Fulfilled by the Comprehensive Planning and Control of the SMA....31

3. The SMA Protected Historic Development of Washington Shorelines....33

4. RCW 90.58.270(1) Passes the *Caminiti* Test....38

D. Chelan Basin Lacks Standing to Challenge the Applicability of RCW 90.58.270(1)....42

E. If the Three Fingers Fill Is Not Covered by RCW 90.58.270, and if Chelan Basin Has Standing to Pursue a *Wilbour*-Type of Action, Then the Superior Court Erred By Failing to Recognize That There Are Genuine Issues of Material Fact That Should be Addressed Before Ordering Removal of the Fill....42

VI. CONCLUSION....43

TABLE OF AUTHORITIES

Cases

Bussell v. Ross,
60 Wash. 344, 111 P.165 (1910), *reheard and rev'd on other grounds*, 64 Wash. 418, 116 P. 1088 (1911) 36

Caminiti v. Boyle,
107 Wn.2d 662, 732 P.2d 662 (1987) ..... passim

City of Seattle v. Algar,
122 Wash. 367, 210 P. 664 (1922) 35

Comm'l Waterway Dist. No. 1 of King County v. State,
50 Wn.2d 335, 311 P.2d 680 (1957) 35

Dep't of Ecology v. Campbell & Gwinn, LLC,
146 Wn.2d 1, 43 P.3d 4 (2002) 17, 25

Deschenes v. King County,
83 Wn.2d 714, 521 P.2d 1181 (1974) 37

Eastlake Comty. Council v. Roanoke Assocs., Inc.,
82 Wn.2d 475, 513 P.2d 36 (1974) 26

Estate of Bunch v. McGraw Residential Ctr.,
174 Wn.2d 425, 275 P.3d 1119 (2012) 17, 21

Grundy v. Thurston County,
155 Wn.2d 1, 117 P.3d 1089 (2005) 20

Harris v. Hylebos Indus., Inc.,
81 Wn.2d 770, 505 P.2d 457 (1974) 25, 34

Hill v. Newell,
86 Wash. 227, 149 P. 951 (1915) 36

Illinois Cent. R.R. v. Illinois,
146 U.S. 387, 13 S. Ct. 110, 36 L. Ed. 1018 (1892) 40

Island County v. State,
135 Wn.2d 141, 955 P.2d 377 (1998) 14

Jongeward v. BNSF Ry. Co.,
174 Wn.2d 586, 278 P.3d 157 (2012) 21, 25

Judd v. Bernard,
49 Wn.2d 619, 304 P.2d 1046 (1956) 24

N.Y. Life Ins. Co. v. Jones,
86 Wn.2d 44, 541 P.2d 989 (1975) 28

Orion v. State,
109 Wn.2d 621, 747 P.2d 1062 (1987) 25, 32, 33, 37

People v. Cal. Fish Co.,
166 Cal. 576, 138 P. 79 (1913) 36

Pettis v. State,
98 Wn. App. 553, 990 P.2d 453 (1999) 22

Phillips Petroleum Co. v. Miss.,
484 U.S. 469, 108 S. Ct. 791, 98 L. Ed. 2d 877 (1988) 33

Portage Bay-Roanoke Park Cmty. Council v. Shorelines Hearings Bd.,
92 Wn.2d 1, 593 P.2d 151 (1979) 32

Rainier Heat & Power Co. v. City of Seattle,
113 Wash. 95, 193 P. 233 (1920) 36

Ralph v. Dep't of Natural Res.,
182 Wn.2d 242, 343 P.3d 342 (2014) 20, 28

Rettkowski v. Dep't of Ecology,
122 Wn.2d 219, 858 P.2d 232 (1993) 31, 38

School Dist. Alliance for Adequate Funding of Special Educ. v. State,
170 Wn.2d 559, 244 P.3d 1 (2010) 14

Skamania County v. Columbia River Gorge Comm'n,
144 Wn.2d 30, 26 P.3d 241 (2001) 37

State of Illinois v. Illinois Cent. R.R. Co.,
184 U.S. 77, 22 S. Ct. 300, 46 L. Ed. 440 (1902) 40

State v. Hall,
168 Wn.2d 726, 230 P.3d 1048 (2010) 21

State v. Longshore,
141 Wn.2d 414, 5 P.3d 1256 (2000) 33

State v. Roggenkamp,
153 Wn.2d 614, 106 P.3d 196 (2005) 21

State v. Sturtevant,
76 Wash. 158, 135 P. 1035 (1913) 35

State v. Wentz,
149 Wn.2d 342, 68 P.3d 282 (2003) 13

State v. Wright,
84 Wn.2d 645, 529 P.2d 453 (1974) 20

Wash. State Leg. v. Lowry,
131 Wn.2d 309, 931 P.2d 885 (1997) 20

Weden v. San Juan County,
135 Wn.2d 678, 958 P.2d 273 (1998) 13, 38

Wilbour v. Gallagher,
77 Wn.2d 306, 462 P.2d 232 (1969) ..... passim

Statutes

Laws of 1907, ch. 95, § 4 35

Laws of 1911, ch. 11, § 8 35

Laws of 1963, ch. 90, § 1 35

RCW 7.48.120 ..... 14, 19, 23, 24

RCW 7.48.140(3) 14, 19, 23, 24

RCW 7.48.160 24

RCW 85.05.082 35

RCW 86.12.034 35

RCW 90.58.020 ..... 31, 32

RCW 90.58.270 ..... passim

RCW 90.58.270(1) ..... passim

RCW 90.58.270(2) 18, 29

RCW 90.58.270(4) 2, 18, 23

RCW 90.58.920 22

Terr. Laws of 1854, p. 357 34

Other Authorities

5 Joseph V. Panesko, *Washington Real Property Deskbook: The Public Trust Doctrine*, § 18.2 (4th ed. 2011) 40

C. Corker, *Thou Shalt Not Fill Public Waters Without Public Permission-Washington's Lake Chelan Decision*, 45 Wash. L. Rev. 65 (1970) 25, 26

Christopher T. Bayley, *Administering The Washington Act, Shorelines Management: The Washington Experience, Proceedings of a Symposium*, June 24, 1972, Univ. of Wash. Press 68 (1972) 27

E. Rauscher, *The Lake Chelan Case-Another View*, 45 Wash. L. Rev. 523 (1970) 25

Geoffrey Crooks, *The Shoreline Management Act of 1971*, 49 Wash L. Rev. 423 (1974) 15, 27, 33

James M. Dolliver, *A Summary of the Washington Act-Legislative History, Shorelines Management: The Washington Experience, Proceedings of a Symposium*, June 24, 1972, Univ. of Wash. Press 19 (1972) 25

Ralph W. Johnson, et. al., *The Public Trust Doctrine in Washington State,* 67 Wash. L. Rev. 521 (1991) 26

Constitutional Provisions

Const. art. XV 34

Const. art. XVII 31

I. INTRODUCTION

The Chelan Basin Conservancy (Chelan Basin) sued a property owner (GBI), along with the State and the City of Chelan, to abate an area of filled lands along the Lake Chelan shoreline known as "the Three Fingers." These are three filled areas that extend like fingers into the lake. The Three Fingers are private lands that were once dry "upland" until a power project on the lake in the 1920s obtained a flooding easement, causing the lake to cover the lands seasonally. In 1962, the Three Fingers were filled and have been above the lake level ever since.

Chelan Basin sought removal of the Three Fingers by claiming that the fills caused an impediment to public navigation and use of lake waters. Chelan Basin named the State of Washington as a party because its claim to remove the fill ran headlong into RCW 90.58.270, a provision of the 1971 Shoreline Management Act (SMA). This statute provides the State's "consent and authorization . . . to the impairment of public rights of navigation, and corollary rights incidental thereto, caused by the retention and maintenance of . . . structures, improvements, docks, fills or developments" that were "placed in navigable waters before December 4, 1969." RCW 90.58.270(1). The authorization protects fills in any case decided after June 1, 1971, that "relat[es] to the removal of structures, improvements, docks, fills, or developments based on the impairment of

public navigational rights." RCW 90.58.270(4). Chelan Basin claimed that this statutory authorization was inapplicable or, alternatively, invalid because it violated the public trust doctrine.

The superior court resolved the case on summary judgment. It ruled that the fill fell outside the statutory authorization based on a proviso in the statute that excepted fill or development "in trespass or in violation of state statutes." RCW 90.58.270(1). The court concluded that because the Three Fingers fill impaired navigation, it constituted a public nuisance in 1969 and was excluded by the proviso.

The superior court's construction of RCW 90.58.270 is error. The statute consents to the impairment of navigation by the Three Fingers fill, and the proviso does not apply. Furthermore, the statute does not violate the public trust doctrine because that doctrine does not prevent the State from passing appropriate laws to authorize fill in public waters. By making these two conclusions of law, this Court can dismiss Chelan Basin's claim and the City's cross-appeal. But, if necessary, this Court may also reject two other superior court conclusions. First, the court erred by holding that there was no genuine issue of material fact that the fill violated the public trust doctrine and needed to be removed. And second, the court erred by finding that Chelan Basin had standing.

II. ASSIGNMENTS OF ERROR AND ISSUES PRESENTED

A. Assignments of Error.

1. The superior court erred by granting summary judgment to Chelan Basin and holding that RCW 90.58.270(1) does not apply to the fill in question. CP 1570 (Memorandum Decision); CP 1613-22 (Summary Judgment Order).

2. The superior court erred by granting summary judgment to Chelan Basin that the fill violates the public trust doctrine as a matter of law. CP 1570 (Memorandum Decision); CP 1613-22 (Summary Judgment Order).

3. The superior court erred by ordering removal of the fill in question on summary judgment. CP 2553 (Memorandum Decision); CP 2547-51 (Summary Judgment Order).

4. The superior court erred by ruling that Chelan Basin had standing to claim that the fill should be removed as a nuisance.

B. Issues Related to Assignments of Error.

1. Whether Plaintiff's claim that the Three Fingers fill impairs public navigation and should be removed is barred by RCW 90.58.270(1), which provides that fill or development made before December 4, 1969, may be maintained notwithstanding claims that the fill or development impairs public navigational rights.

2. Whether the proviso in RCW 90.58.270(1), which exempts fill in trespass or "in violation of state statutes," precludes application of the statute to the Three Fingers based on a theory that in 1969 the fill impaired public navigational rights contrary to nuisance statutes.

3. Given that RCW 90.58.270(1) provides certainty that historical development in navigable water may remain, including development such as roads, port infrastructure, and significant urban areas all across the state, and given that the statute applies only to lawful development made before December 4, 1969,—a date more than 45 years past—does RCW 90.58.270(1) exceed state authority and violate Washington's public trust doctrine? [This issue relates to both Chelan Basin's arguments below and the City's Cross-Appeal.]

4. Given that the Three Fingers is located in an area of Lake Chelan where other fills exist, and which is designated "urban" under the City's Shoreline Master Program and "commercial waterfront" under its zoning regulations, and in light of other disputed facts pertaining to the impact of the Three Fingers on public navigation, did the superior court err by finding the fill in question violates the public trust doctrine as a matter of law and ordering the fill removed?

5. Given that members of Chelan Basin Conservancy have only asserted interests in exercising general public navigational and

recreational rights in the area occupied by the Three Fingers, did the court err by finding that Chelan Basin has standing to challenge the fill as a nuisance that violates the public trust doctrine?

III. STATEMENT OF THE CASE

A. Overview of the Three Fingers.

The Three Fingers extend into Lake Chelan from State Route 97A in the City of Chelan—the same general area of the lake that was the subject of the dispute addressed in *Wilbour v. Gallagher*, 77 Wn.2d 306, 462 P.2d 232 (1969). *See* CP 140, 179-82, 2388-89. As described in *Wilbour* (and not subject to dispute), the establishment of the Lake Chelan Dam in 1927 artificially raised the level of Lake Chelan from 1,079 to 1,100 feet above sea level during peak summer months. *Wilbour*, 77 Wn.2d at 307-09. Lands along the shore that were dry land when the lake level was 1,079 feet were inundated during the spring and summer months due to the dam. *Id.*; CP 138-40, 143-55. The Three Fingers fill is on lands that were once seasonally inundated. AR 885, 1388 (survey showing 1,079-foot contour).

Work began on the Three Fingers in 1961 when GBI Holding Co., the defendant below, acquired the land as part of a project to widen State Route 97A through the area. CP 870-71, 952-53. Construction of the Three Fingers was completed in 1962. CP 871, 952. The Three

Fingers were filled by materials excavated from the roadway. *Id.* The fill raised the elevation of the land from approximately 1,090 feet to 1,102 feet above sea level and prevented the lake waters from covering the property during the spring and summer. CP 28. The fingers extend 250 to 300 feet into the lake. CP 29. It is undisputed that the fill provides some lateral support for Highway 97A. CP 871-72, 953.

The Three Fingers are currently vacant, CP 28, 2930, but have been used over the years for growing corn and parking. CP 1502; *see also* CP 893. More recently, the area was used as a staging area for work on the Holden Mine hazardous waste cleanup. CP 1502-03; *see also* CP 959-60 (discussing plans for additional support of cleanup effort). In 2012, the City of Chelan approved a short plat to subdivide the Three Fingers into six lots. CP 27-58. That approval required two of the lots to be dedicated as a public park to provide for public access to the lake for recreation. CP 55. GBI appealed this condition, which is pending in separate litigation.

The City of Chelan zoned the Three Fingers area as "Waterfront Commercial." CP 28. The Waterfront Commercial Zone extends east from the Three Fingers to include neighboring properties. *Id.* This zoning is intended "to provide areas on lakefront property for heavy waterfront commercial uses, such as boat fueling and servicing, industrial docks, and

other uses incidental to commercial waterfront transportation." CP 30, 1444 (City's Comprehensive Plan). Consistent with this zoning, the Three Fingers area is designated "Urban Environment" under the City's Shoreline Master Program (SMP)—the city ordinance implementing the SMA. CP 559 (legal description of Urban Environment). The "Urban Environment is an area of high intensity land use, including residential, commercial, and industrial development in addition to open space and public uses." CP 1436; SMP 7.2.24.3.

The Plaintiff seeking removal is Chelan Basin Conservancy. It has two members, Tammy Hauge and William Schuldt, who contended that the Three Fingers impair public use of Lake Chelan for recreation. CP 375, 380. Specifically, Hauge and Schuldt state that if the Three Fingers were removed "the entire bay would revert to [a] high quality swimming beach . . ." CP 380, 375-76.[1]

[1] GBI disputed those facts. Longtime resident of the area Steven Scott McKellar provided a declaration stating that to his recollection there was not a sandy beach in the area of the Three Fingers before they were built. AR 890-91. While a small sandy beach exists near Mr. McKellar's residence west of the Three Fingers today, he stated it does not extend as far east as the Three Fingers. *Id.* According to Mr. McKellar, the lake bottom in that area is silt and rock, particularly in the area where the shore is armored to support the highway. AR 891. Urban planner Robert W. Thorpe concurred that the area would be unsuitable for a public swimming beach if the Three Fingers were removed due in part to the close proximity of the highway. AR 906. According to Mr. Thorpe, the location of the highway would necessitate armoring the shore, create a steep slope with deep water when the lake is high, and limit the possibilities for parking and sanitation facilities. AR 901-7.

Chelan Basin also contended through its member John Page, Jr., who kayaks in the waters of Lake Chelan including the area in the vicinity of the Three Fingers, that the Three Fingers make kayaking in the area "awkward, if not difficult" because they jut out into the lake. CP 385. He also states that kayaking around the Three Fingers can be dangerous in summer months when boat traffic is greatest. *Id.*[2]

B. Procedural History.

Chelan Basin filed its complaint on November 4, 2011, seeking removal of the Three Fingers and alleging that the fill violated the public trust doctrine. CP 3-4, 10. The complaint named GBI as defendant and the City of Chelan ("City"), State of Washington ("State"), and Chelan County PUD as additional named parties. *Id.*

GBI moved for summary judgment dismissing Chelan Basin's claims. CP 106. The City filed a counter-motion for summary judgment arguing that, as interpreted by GBI, RCW 90.58.270(1) was unconstitutional under the public trust doctrine. CP 236-38. The State responded to the City's argument to defend the validity of RCW 90.58.270(1). CP 339.

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[2] Again, those assertions are contested by GBI. In his declaration, Mr. McKellar states he and his family regularly boat and swim in the area in question and that boat traffic is not a safety concern in part because the area is protected by a no-wake zone. AR 892.

The superior court initially granted summary judgment on the City's theory that RCW 90.58.270(1) was unconstitutional and summarily ordered removal of the Three Fingers. CP 460. On motions for reconsideration from the State and GBI, the court vacated this summary judgment and found that issues of material fact precluded summary judgment. CP 1253-54.

Chelan Basin then filed a motion for summary judgment making two arguments. First, Chelan Basin argued that RCW 90.58.270(1) did not apply, and second, that the Three Fingers must be removed based on the public trust doctrine. CP 1354. The court granted Chelan Basin's motion on October 3, 2014. CP 1580. After supplemental briefing, the court ordered removal of the Three Fingers. CP 2547-53.

The State and GBI appealed. The City filed a cross-appeal seeking review of the court's order granting reconsideration and denying the City's cross-motion for summary judgment that RCW 90.58.270(1) was invalid because it violated the public trust doctrine.

IV. SUMMARY OF ARGUMENT

This Court should reverse the summary judgment orders holding that because the Three Fingers fill impaired public rights of navigation as of December 4, 1969, it was a statutory nuisance, fell outside the

protections of RCW 90.58.270(1), and must now be removed under the public trust doctrine.

First, RCW 90.58.270(1) applies to the Three Fingers and authorizes any impairment of public rights of navigation caused by the fill. The plain language of RCW 90.58.270(1) read on its own in the context of RCW 90.58.270 as a whole bars private actions for removal of development made before December 4, 1969, *whenever* the action is based on impairment of public rights of navigation. Moreover, the language of RCW 90.58.270 was adopted as a direct response to the controversy created by the decision in *Wilbour v. Gallagher*. Construed using plain language and in the context of its enactment, the statute unambiguously bars actions for removal of fill and other development made before *Wilbour* was decided, to the extent the cause of action is based on impairment of public rights of navigation. Thus, the statute bars the cause of action that Chelan Basin pursues. CP 3-4, 10 (Complaint).

The superior court's conclusion that RCW 90.58.270(1) does not apply to the Three Fingers rests on a misconstruction of the statute's proviso. The court found that the phrase "in violation of state statutes" in the proviso applied to defeat the statute because, in 1969, the impairment of navigation caused by this fill would have been a violation of nuisance statutes. In other words, the court concluded that very same "impairment

of navigation" that the statute consents to also triggers the proviso and defeats application of the statute. This construction of the proviso leaves the statute providing no usable defense to a claim that historic fill was an impairment to navigation, confounds the statute's plain language, and defies the Legislature's intent to provide a safe harbor for lawful historic development against *Wilbour*-type claims that the fill impairs public navigation rights.

Second, the statutory authorization that authorizes these fills does not violate Washington's public trust doctrine under controlling decisions of the Washington Supreme Court. As those decisions have repeatedly pointed out, the public trust doctrine has always existed in Washington. Historically, as Washington developed from a wilderness, the doctrine supported the State's policy, evident in numerous historical legislative enactments, of encouraging investment in widespread reclamation of shorelands and tidelands to promote commerce and navigation. The public trust doctrine has never imposed an absolute prohibition on all filling or development in navigable waters, but rather ensures that such filling or development must recognize and protect certain public uses.

RCW 90.58.270(1) recognizes that historic development of tidelands and shorelands invited by the State in the interest of commerce and navigation may not now be attacked as an impairment to it. In doing

so, RCW 90.58.270(1) passes the test announced by the Washington Supreme Court in *Caminiti v. Boyle*, 107 Wn.2d 662, 732 P.2d 662 (1987). As part of the SMA's legislatively drawn controls on shoreline development, the statute promotes the public interest by addressing the uncertainty regarding the status of historic development in navigable waters created by *Wilbour v. Gallagher* in 1969. In the absence of the certainty provided by RCW 90.58.270(1), historic development in navigable waters, including substantial fills and developments along the waterfronts of cities all across Washington, would have remained under a threat of removal indefinitely. That the statute applies only to lawful fills and development made more than 45 years ago, and insulates it only against attack based on impairment of public navigational interests, further demonstrates that any impairment of the overall public interest in navigable waters created by the statute is insubstantial.

The Court may also address, if necessary, a third and fourth reason to reverse. These need be reached only if the Court holds that RCW 90.58.270(1) does not validly authorize the Three Fingers fill so that Chelan Basin may make a *Wilbour*-type claim. The third reason is that the superior court erred by ordering abatement of the fill on summary judgment when there were disputed questions of fact. The superior court should have considered the conflicting evidence regarding the impact of

the development on navigation and the present and future planned uses for this urban and commercial area of the City. And the fourth reason to reverse is that the superior court erred by finding that Chelan Basin had standing. The State will rely on the briefing of GBI for these last two reasons to avoid repetition.

V. ARGUMENT

A. Standard of Review.

The case was decided based on motions and cross-motions for summary judgment. This Court reviews orders on summary judgment de novo. *Weden v. San Juan County*, 135 Wn.2d 678, 689, 958 P.2d 273 (1998).

The primary issues presented by the assignments of error involve questions of statutory construction and constitutional limitations on state authority. Construction of a statute is a question of law that is reviewed de novo on appeal. *State v. Wentz*, 149 Wn.2d 342, 346, 68 P.3d 282 (2003). The alleged limitation affecting the validity of RCW 90.58.270(1) under the public trust doctrine also presents a legal issue that is reviewed de novo. *See Weden*, 135 Wn.2d at 696-97.

Courts review legislation under the public trust doctrine as if they were measuring that legislation against constitutional protections. *Weden*, 135 Wn.2d at 698. Statutes are presumed constitutional, and a statute's

challenger has a heavy burden to overcome that presumption. *School Dist. Alliance for Adequate Funding of Special Educ. v. State*, 170 Wn.2d 559, 605, 244 P.3d 1 (2010). A court will not strike down a duly enacted statute unless the court is "fully convinced, after a searching legal analysis, that the statute violates the constitution." *Id.* at 606, quoting *Island County v. State,* 135 Wn.2d 141, 147, 955 P.2d 377 (1998).

B. The Superior Court Erred by Ordering Removal of the Three Fingers Fill Because RCW 90.58.270(1) Authorizes Continued Maintenance of This Historic Fill From 1962.

The superior court found that because the Three Fingers fill impaired public navigational rights as of December 4, 1969, the fill violated RCW 7.48.120 and 7.48.140(3)—two state statutes prohibiting impairments to navigation as nuisances. CP 1620-22 (October 3, 2014 Memorandum Opinion, which was incorporated into the court's order). CP 1615 (December 9, 2014, Order). This Court should reverse because RCW 90.58.270(1) authorizes whatever impairment of public rights of navigation was caused by the historic fill at the Three Fingers. The superior court's conclusion that the fill is "in violation of state statutes" under the proviso to that statute is contrary to the plain language of the statute read as a whole and results in a construction of an exception that swallows the rule and leaves the statute with no meaning.

If any doubt remains after considering the statutory language and structure, the history of this statute also makes the legislative intent clear. The statute was adopted to preclude claims for removal of development or fill in navigable waters that existed before the 1969 case of *Wilbour v. Gallagher* recognized a cause of action for impairment of public navigational rights. *See* Geoffrey Crooks, *The Shoreline Management Act of 1971*, 49 Wash L. Rev. 423, 461 (1974) (explaining that RCW 90.58.270(1) "precludes new *Lake Chelan*-type actions against most existing uses . . .").

1. RCW 90.58.270(1) Applies and Precludes Claims Based on Impairment of Public Rights of Navigation Caused by the Three Fingers Fill.

The plain language of RCW 90.58.270(1) authorizes impairments to public rights of navigation that might be caused by fills that existed before December 4, 1969. But a proviso in RCW 90.58.270(1) excludes fill that "is in trespass or in violation of state statutes." The subsection reads, as a whole:

> (1) Nothing in this section shall constitute authority for requiring or ordering the 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: PROVIDED, That the

> consent herein given shall not relate to any structures, improvements, docks, fills, or developments placed on tidelands, shorelands, or beds underlying said waters which are in trespass or in violation of state statutes.

The superior court held that the proviso applied to the Three Fingers. To reach this conclusion, the superior court reasoned that she should ask whether, *as of 1969*, the fill impaired navigation and constituted a type of statutory nuisance. *See* CP 1615, 1619. Based on the tautology that this fill impaired navigation in 1969, the Court concluded the fill was a statutory nuisance in 1969 and, therefore, "in violation of statutes" for purpose of the proviso. CP 1622.

The superior court's construction and reliance on 1969 nuisance law is incorrect. The plain meaning of the statute, read as a whole, shows that this historic fill is authorized by the statute and is not excluded by the bare conclusion that it impairs navigation. RCW 90.58.270(1) specifically authorizes fill and development made before December 4, 1969, to impair navigation. The superior court's reading of the proviso to exclude fill that affected navigation before 1969 renders the consent to impairment of navigation in RCW 90.58.270(1) meaningless.

a. By Its Plain Language, RCW 90.58.270 Abridges Private Rights of Action That Attack Historic Fill or Development Based on a Claimed Impairment of Public Rights of Navigation.

A court's objective when interpreting a statute is to ascertain and carry out the intent of the Legislature. *Estate of Bunch v. McGraw Residential Ctr.*, 174 Wn.2d 425, 432, 275 P.3d 1119 (2012). To find that intent, a court must start with the statute's plain meaning, which is gleaned primarily from the language of the statute and related statutes. *Id.; Dep't of Ecology v. Campbell & Gwinn, LLC,* 146 Wn.2d 1, 11, 43 P.3d 4 (2002). The language in RCW 90.58.270(1) explicitly authorizes impairment of public navigational rights by development, such as the Three Fingers fill, made before December 4, 1969. The statute grants "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 [such] . . . developments . . ." The plain language of RCW 90.58.270(1) shows an unambiguous intent to authorize historic development that might otherwise be attacked as impairing the public right of navigation and corollary public rights.[3]

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[3] Those rights include "*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*." *Wilbour*, 77 Wn.2d at 316-17 (emphasis added).

This plain reading of subsection (1) is confirmed by RCW 90.58.270(2). RCW 90.58.270(2) provides that nothing in RCW 90.58.270 is intended to abridge private rights of action "other than a private right *which is based upon impairment of public rights consented to* in subsection (1) of this section." In other words, RCW 90.58.270 *is* intended "to abridge" private rights of action based on impairment of public rights of navigation. That is, it is intended to bar the very cause of action used in *Wilbour* and upon which Chelan Basin relies. CP 3-4, 10 (Complaint), 1362 (Motion for Summary Judgment).

Further, RCW 90.58.270(4) makes the authorization granted in subsection (1) applicable to "any case" pending on the effective date of the Shoreline Management Act (June 1, 1971) that seeks "removal of . . . fills, or developments *based on the impairment of public navigational rights.*" (Emphasis added.) Again, this statutory provision serves only one purpose: to show that subsection (1) was intended to abridge private causes of action for removal of historic fill or development in *any case* in which the basis for removal asserted is impairment of public navigational rights. The statute used the broadest possible language—"any case"—to confirm that subsection (1) bars a private action for removal of historic fill based solely on impairment of public rights of navigation.

b. By Concluding That the Proviso Phrase "In Violation of Statutes" in RCW 90.58.270(1) Depends on Whether Historic Fill Impaired Navigation in 1969, the Superior Court Entirely Frustrates the Intent of the Statute and Leaves It With No Meaning.

The superior court's conclusion that RCW 90.58.270(1) does not apply to the Three Fingers fill is based on its strained interpretation of the statute's proviso, which excludes fill or development "in trespass or in violation of state statutes." The superior court interpreted the phrase "in violation of state statutes" to mean that if the Three Fingers fill "substantially and unreasonably" interfered with public navigational rights as of December 4, 1969, then it was excluded from the statute as a statutory nuisance based on this hindsight application of two nuisance statutes, RCW 7.48.120 and .140(3). CP 1620-22 (Memorandum Opinion). This interpretation and reliance on whether the fill violated statutes in 1969 turns RCW 90.58.270 on its head. Instead of applying in "any case" in which impairment of public navigational rights has been asserted, RCW 90.58.270(1) would apply to almost no cases, because it would be limited to cases where the impairment of public navigational rights caused by historic development was not substantial and unreasonable.[4]

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[4] The "test for whether an otherwise lawful action may constitute a nuisance 'is the reasonableness or unreasonableness of making the use of the property complained of

There was no need for the Legislature to adopt a consent statute that is relevant only in circumstances where there is no basis for a cause of action and no need for the consent. The Court should avoid interpretations of statutes that render them meaningless or absurd. *See Ralph v. Dep't of Natural Res.*, 182 Wn.2d 242, 248, 343 P.3d 342 (2014) (courts review statutes "as a whole so that, if possible, no clause, sentence, or word shall be superfluous, void, or insignificant.") (citations and internal quotation marks omitted).

Further, the superior court's interpretation of the proviso defies the long-established rule that "[p]rovisos operate as limitations upon or exceptions to the general terms of the statute to which they are appended and as such, generally, should be strictly construed with any doubt to be resolved in favor of the general provisions, rather than the exceptions." *State v. Wright*, 84 Wn.2d 645, 652, 529 P.2d 453 (1974), *quoted with approval* in *Wash. State Leg. v. Lowry*, 131 Wn.2d 309, 327, 931 P.2d 885 (1997). The superior court did not strictly construe the proviso. Instead, it added a gloss to it so the proviso is triggered by asking if there was historic impairment of navigation in 1969 (and therefore a nuisance). By

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in the particular locality and in the manner and under the circumstances of the case.'" CP 1621, quoting *Grundy v. Thurston County*, 155 Wn.2d 1, 5, 117 P.3d 1089 (2005). The superior court reasoned that it must consider "whether the obstruction of the passage upon [Lake Chelan] was both substantial and unreasonable . . ." as of December 4, 1969, to determine whether RCW 90.58.270(1) applies to the Three Fingers. *Id.* at 1621.

doing this, it takes the *same* impairment that the statute purports to authorize and uses it as the test for the proviso. This reading of the proviso ensures that it defeats the general intent to authorize the continued existence of historic impairments to navigation. Plaintiff avoids RCW 90.58.270(1) by simply pleading that he or she seeks to remove a "substantial and unreasonable" pre-1969 impairment to public navigational rights.

The superior court's construction thus failed to consider the phrase "in violation of state statutes" in the context of RCW 90.58.270(1) as a whole. *See Estate of Bunch*, 174 Wn.2d at 433 (proper construction compelled by "[t]he context of the statute, together with our duty to avoid absurd results") citing *State v. Hall,* 168 Wn.2d 726, 737, 230 P.3d 1048 (2010) ("Such an interpretation could lead to absurd results, which we are bound to avoid when we can do so without doing violence to the words of the statute."). "Under the principle of noscitur a sociis, 'a single word in a statute should not be read in isolation . . .'" *Jongeward v. BNSF Ry. Co.*, 174 Wn.2d 586, 601, 278 P.3d 157 (2012) quoting *State v. Roggenkamp*, 153 Wn.2d 614, 623, 106 P.3d 196 (2005) (internal quotation marks omitted). "Instead, 'the meanings of words may be indicated or controlled by those with which they are associated.'" *Id.* The words in the proviso must be read in the light of the other words of the statute. The impairment

of navigation that is allowed by the statute cannot also be the "violation of state statutes" that renders the statute inapplicable.

The superior court reached its erroneous result by ignoring grammar to misconstrue the proviso. The proviso uses the present tense and excludes developments or fills that are "in trespass" or "in violation of state statutes." "When statutory language is in the present or future tenses, the statute is interpreted to apply prospectively." *See Pettis v. State*, 98 Wn. App. 553, 561, 990 P.2d 453 (1999). The language in question was adopted in the SMA, which became effective on June 1, 1971, pending a popular vote that took place in 1972. *See* RCW 90.58.920 (emergency declaration). Under these ordinary rules and a natural reading, the phrase "developments . . . which are . . . in violation of state statutes" in the proviso refers to development in violation of state statutes as of June 1, 1971, or in the future.

But as of June 1971, RCW 90.58.270(1) consented to the impairment of public navigational and other corollary public rights caused by fill made before December 4, 1969. As explained below at pages 25-29, the statute uses the date of the *Wilbour* decision, which confirms that the statute was a response to that case and the uncertainty it created regarding existing development. Because the objective of RCW 90.58.270(1) as a whole is to consent to pre-*Wilbour* development,

it follows that the proviso is concerned, not with development that impaired navigation at the time of *Wilbour*, but with development that might be in trespass or in violation of state statutes as of 1971 when the statute became effective, or thereafter.[5]

When the proviso is read using its present and prospective tense, there is no legal relevance to the superior court's conclusion that the fill was a nuisance because it impaired navigation in 1969. The first subsection of RCW 90.58.270 gives consent to such pre-1969 impairments. The proviso then applies prospectively and is limited to whether the fill or development is "in trespass" or "in violation" at the time subsections (1), (2), and (4) are raised to bar a claim against the historic fill or development. Or, if the Court looks to the status of the fill as of the effective date of the statute, June 1, 1971, it reaches the same conclusion. The fill was not a statutory nuisance based on impairment of navigation at the time the statute and proviso took effect.

This fair interpretation of RCW 90.58.270 also defeats the superior court's reliance on two nuisance statutes, RCW 7.48.120 and RCW 7.48.140(3). CP 1621. RCW 7.48.120 defines "nuisance" to

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[5] The use of a present and prospective tense in the proviso is echoed by that in the other provisions stating that RCW 90.58.270(1) "shall apply to any case pending in the courts of this state on June 1, 1971 relating to the removal of structures, improvements, docks, fills, or developments based on the impairment of public navigational rights." RCW 90.58.270(4).

include "*unlawfully* doing an act . . . which . . . interferes with, obstructs or tends to obstruct . . . any lake . . ." (emphasis added). RCW 7.48.140(3), in turn, provides that it is a public nuisance to "obstruct or impede, *without legal authority*, the passage of any, river, harbor, or collection of water . . ." (emphasis added). But RCW 90.58.270(1) authorizes pre-*Wilbour* development. Thus, the impairment of navigation by such development is not unlawful and has legal authority, falling outside RCW 7.48.120 and .140(3). *See also* RCW 7.48.160 ("Nothing which is done or maintained under the express authorization of a statute, can be deemed a nuisance."); *Judd v. Bernard*, 49 Wn.2d 619, 621, 304 P.2d 1046 (1956) (killing of fish, even if ordinarily a nuisance, cannot be one under circumstances of the case because statute expressly authorizes the director of the game commission to kill fish).

For all these reasons, this Court should reject the superior court's misreading of the proviso. RCW 90.58.270 does not, through the court's strained reading of the proviso, provide only limited consent to insubstantial or reasonable impairment of navigational rights caused by historic development. The language of the statute, its purposes, and ordinary grammar contradict the superior court's approach to the proviso, where it asked if impairment was a statutory nuisance in 1969. Because the superior court's construction of the proviso is contrary to plain

language of the statute read as whole, it must be rejected. *See Campbell & Gwinn*, 146 Wn.2d at 9 ("if the statute's meaning is plain on its face, then the court must give effect to that plain meaning as an expression of legislative intent").

2. The Superior Court's Construction Defies the Legislative Intent to Respond to the *Wilbour* Case By Adopting the Shoreline Management Act and Limiting Future Actions Against Historic Development Under a *Wilbour* Claim.

Assuming for argument that the statute was reasonably susceptible to the superior court's interpretation, the Court may resort to extrinsic sources of construction. *Jongeward*, 174 Wn.2d at 600, citing *Campbell & Gwinn*, 146 Wn.2d at 12. This statute includes a unique indication of legislative intent because RCW 90.58.270(1) unambiguously responded to, and created a statutory barrier to, the claim in *Wilbour v. Gallagher*.

The order to remove fill from the lands in *Wilbour* "engendered considerable controversy." *See Harris v. Hylebos Indus., Inc.*, 81 Wn.2d 770, 785, 505 P.2d 457 (1974).[6] The *Wilbour* court itself recognized that its decision might have unknown impacts on other historic developments

[6] *See also* James M. Dolliver, *A Summary of the Washington Act-Legislative History, Shorelines Management: The Washington Experience, Proceedings of a Symposium*, June 24, 1972, Univ. of Wash. Press 19, 22-24 (1972); C. Corker, *Thou Shalt Not Fill Public Waters Without Public Permission-Washington's Lake Chelan Decision*, 45 Wash. L. Rev. 65 (1970); E. Rauscher, *The Lake Chelan Case-Another View*, 45 Wash. L. Rev. 523 (1970). As a result of the decision, Governor Evans placed all tideland fill projects under a moratorium until passage of the Shoreline Management Act in 1971. *See Orion v. State*, 109 Wn.2d 621, 627, 747 P.2d 1062 (1987).

that had been made long before the case was decided. *Wilbour*, 77 Wn.2d at 316 n.13 ("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"). The problem for the court was that state and local government had failed to enact appropriate laws to distinguish fills that were appropriate from those that were not. *Id.* The *Wilbour* court's concerns are often credited with catalyzing the SMA. *See* Ralph W. Johnson, et. al., *The Public Trust Doctrine in Washington State,* 67 Wash. L. Rev. 521, 537 (1991) ("This footnote [13] is generally thought to have inspired the Shoreline Management Act of 1971").[7]

Other scholars at the time of passage of the SMA also observed that "not inconsiderable equities" favored those who had developed private lands in navigable waters prior to the date of *Wilbour*, particularly those shorelands and tidelands purchased from the State for such purposes. Corker, 45 Wash. L. Rev. at 73. RCW 90.58.270(1) addressed that inequity by precluding *Wilbour*-type claims against historic development

[7] *See also Eastlake Comty. Council v. Roanoke Assocs., Inc.*, 82 Wn.2d 475, 501, 513 P.2d 36 (1974) ("The necessity of thoughtful management of our shorelines was recognized by our *Wilbour* decision and the legislature has recently enacted . . . the Shoreline Management Act . . .").

based on impairment of public rights of navigation. *See* Crooks, 49 Wash. L. Rev. at 461 (1974).[8]

The December 4, 1969, date used in RCW 90.58.270(1) confirms that the statute is a direct response to *Wilbour*, which was decided on that date. This conclusion is underscored by the statute's use of language from the holding in *Wilbour* to describe the impairment of navigational rights authorized. The *Wilbour* court held that lands within Lake Chelan were subject to "*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.*" *Wilbour*, 77 Wn.2d at 316-17 (emphasis added). The use of the same terms in RCW 90.58.270(1) confirms the legislative intent to counter *Wilbour* with respect to historic fills or development. Where the court in *Wilbour* concluded that it could not authorize an "obstruction to navigation" and ordered removal of the fill, RCW 90.58.270(1) provides the authorization the *Wilbour* court could not give.

The purpose of RCW 90.58.270 is thus unmistakable. It is a legislative response to the court's observations in *Wilbour* and to the public concern that *Wilbour* might engender litigation to remove

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[8] Christopher T. Bayley, *Administering The Washington Act, Shorelines Management: The Washington Experience, Proceedings of a Symposium*, June 24, 1972, Univ. of Wash. Press 68, 74 (1972).

appropriate historic fill. *See Ralph*, 182 Wn.2d at 249 ("[i]f the legislature uses a term well known to the common law, it is presumed that the legislature intended to mean what it was understood to mean at common law."), quoting *N.Y. Life Ins. Co. v. Jones,* 86 Wn.2d 44, 47, 541 P.2d 989 (1975). Thus, the consent to "impairment of public rights of navigation" in RCW 90.58.270(1) refers to impairment of navigational rights at issue in *Wilbour* and refers equally to the impairment that Chelan Basin relies on to make its claim against the Three Fingers.[9]

Given that the facts of this case parallel *Wilbour*—the Three Fingers fill are in the same area of the same lake—and given that RCW 90.58.270(1) was a direct response to *Wilbour*, it is unreasonable to construe RCW 90.58.270(1) to render it inapplicable to the Three Fingers fill.

In summary, the lower court misinterpreted RCW 90.58.270(1) to allow a claim for removal of historic, pre-*Wilbour* fill based on impairment of public rights of navigation. That interpretation is contrary

[9] The superior court explicitly used *Wilbour* to conclude that the fill was a public nuisance "in violation of state statutes" as of December 4, 1969. AR 1620 ("In evaluating this issue, the court is also cognizant of the Decision in *Wilbour* . . . wherein the court addressed a similar area of fill on Lake Chelan."). The court reasoned that *Wilbour*'s recognition that the lands at issue there were subject to public navigational rights supported its conclusion that the Three Fingers fill equally "constitutes an unreasonable interference with the public's right." *Id.*

to the plain meaning of RCW 90.58.270(1) and depends on a misreading of the proviso that would render the statute absurd. It contradicts the unambiguous history of the statute as a response to *Wilbour*. The holding that RCW 90.58.270(1) does not apply to the Three Fingers fill must be reversed and the claim dismissed.[10]

C. RCW 90.58.270(1) Is a Valid Exercise of State Authority to Authorize Development in Navigable Waters and Does Not Violate Washington's Public Trust Doctrine.

Because RCW 90.58.270(1) bars the Plaintiff's claims against the Three Fingers fill, the Court must also address the Plaintiff's and City's challenges to the validity of the statute. As shown next, RCW 90.58.270(1) does not run afoul of any limitations on legislative action created by the public trust doctrine. First, the statute is an essential part of the SMA's "legislatively drawn controls" on shoreline development, which fulfill the requirements of the public trust doctrine. Second, consenting to impairment of public navigational rights caused by historic improvements is a necessary response to protect historic shoreline development in Washington. And third, the statutory consent to impairment of navigable waters in RCW 90.58.270(1) easily passes the test for constitutionality announced in *Caminiti*.

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[10] As RCW 90.58.270(2) clarifies, fill may be subject to removal based on other claims. The State's argument is limited to the claim by Chelan Basin, which is based on the same impairment to navigational interests raised in *Wilbour*. That claim is barred by RCW 90.58.270(1).

1. The Public Trust Doctrine.

The "public trust doctrine" refers to certain attributes of the common law concerned with the public use of navigable waters. *See Caminiti*, 107 Wn.2d at 669-70. Although no Washington cases have overturned legislation based on a violation of the public trust doctrine, the doctrine may, in theory, affect the validity of legislation that deals with navigable waters.

In *Caminiti*, the court rejected a public trust doctrine challenge to a state statute that allowed owners of residential property abutting state-owned tidelands and shorelands to install and maintain private recreational docks on such lands without payment to the State. *Caminiti*, 107 Wn.2d at 665-66. Caminiti asserted that this free private occupation of public aquatic lands and navigable waters violated the public trust doctrine. *Id.* at 663. The court confirmed that Washington common law included the public trust doctrine. It reviewed cases that illustrated how aquatic lands the State had received at statehood included both the attributes of private land ("*jus privatum*") as well as the "*jus publicum* or public authority interest." *Caminiti,* 107 Wn.2d at 668. The *jus publicum* is the attribute of the land and waters that serves the *public* 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.'" *Caminiti*, 107 Wn.2d at 669, quoting *Wilbour*, 77 Wn.2d at 316. As illustrated by the *Caminiti* court's reliance on *Wilbour*, the *jus publicum* describes the public interest in navigable waters covering both public and private submerged lands—including the uplands that were flooded by the waters of Lake Chelan when the dam raised the level of the lake.[11]

The *Caminiti* court provided a test for when legislation violates the public trust. Before applying that test, however, the Court must examine how RCW 90.58.270 was passed as part of the Shoreline Management Act of 1971.

2. The Public Trust Doctrine Is Fulfilled by the Comprehensive Planning and Control of the SMA.

The SMA is a comprehensive plan for allowing use of shorelines while providing protection of the public uses and rights embodied in the public trust doctrine. RCW 90.58.020. The SMA confirms that public trust doctrine interests do not restrict development on every segment of land that is, or could be, covered with navigable waters. Instead, the SMA allows the state to "foster[] all reasonable and appropriate uses" of the

[11] The public trust doctrine applies to such artificially created navigable waters. *See Wilbour*, 77 Wn.2d at 315-16. But art. XVII of the state constitution in which the doctrine is "partially encapsulated," *see Rettkowski v. Dep't of Ecology*, 122 Wn.2d 219, 232, 858 P.2d 232 (1993), does not because the lands beneath such waters were never owned by the State.

State's shorelines. *Id.* The SMA acknowledges that limited reductions in public rights in some navigable waters may occur as part of promoting broader public interests. *Id.* In doing so, the SMA "does not mandate a calculation of equal public benefits to be offset against private benefits." *Portage Bay-Roanoke Park Cmty. Council v. Shorelines Hearings Bd.*, 92 Wn.2d 1, 593 P.2d 151 (1979) (discussing RCW 90.58.020).

The Washington Supreme Court has repeatedly held that the comprehensive strategy in the SMA for the protection of public navigation rights both complies with and implements the public trust doctrine. *See Caminiti*, 107 Wn.2d at 671 ("we first note that the requirements of the 'public trust doctrine' are fully met by the legislatively drawn controls imposed by the Shoreline Management Act . . ."), citing *Portage Bay,* 92 Wn.2d at 4; *see also Orion*, 109 Wn.2d at 640 n.11 ("We have also observed that trust principles are reflected in the SMA's underlying policy"). By providing a comprehensive approach to present and future uses of navigable waters, the SMA addresses the very concerns about the conflict between public and private rights discussed in *Wilbour*. For example, by requiring future planning and permitting, the SMA addresses the *Wilbour* court's fear that "the whole area around Lake Chelan . . . could be dotted with structures on fills, or stilt-like structures . . ." *Wilbour*, 77 Wn.2d at 316 n.13 And by consenting to historic

development under RCW 90.58.270, the SMA addresses the court's concern that its order to remove fills in *Wilbour* might place a cloud over other fills in Lake Chelan "about which there has been no protest." *Id.* *See also* Crooks, 49 Wash. L. Rev. at 460-61 ("[RCW 90.58.270] thus precludes new *Lake Chelan* type actions against most existing uses, although it does not preclude private challenges based on theories other than the public rights of navigation").

3. The SMA Protected Historic Development of Washington Shorelines.

In contrast to the SMA, Washington's public trust doctrine is a creature of the State's common law. "'[T]he individual States have the authority to define the limits of the lands held in public trust and to recognize private rights in such lands as they see fit.'" *State v. Longshore*, 141 Wn.2d 414, 427-28, 5 P.3d 1256 (2000), quoting *Phillips Petroleum Co. v. Miss.*, 484 U.S. 469, 475, 108 S. Ct. 791, 98 L. Ed. 2d 877 (1988). The Washington public trust doctrine has never been interpreted so that all lands covered by navigable waters are irrevocably bound to serve public trust doctrine purposes. *See Orion*, 109 Wn.2d at 640 n.9 ("We do not mean to suggest that once the state conveys to a private party property subject to the trust the property will always be burdened by trust requirements.").

The consent to historic development in RCW 90.58.270 reflects a realistic legislative response to a long history of private and public development in navigable waters. The need for access to navigable waters was recognized by the first territorial Legislature. It granted a right to waterfront properties to build wharfs over public tidelands to reach navigable waters. *See* Terr. Laws of 1854, p. 357. The Washington Constitution emphasized the public need for similar waterfront development by allowing sales of tidelands. *See Harris*, 81 Wn.2d at 775 ("The state has invited investment in these [tide] lands . . . [to] be reclaimed and put to useful purposes.") Thus, when article XV of the Washington Constitution reserved the navigable waters of harbor areas from sale, it encouraged private development and fill in the navigable waters landward of the inner harbor line by selling such lands to "be reclaimed and put to useful purposes." *Id.* And from its very first session, the "Legislature passed numerous laws for the purpose of encouraging the development of certain tidelands by lessees and purchasers thereof. . . ." *Harris*, 81 Wn.2d at 775-78 (identifying laws "designed to encourage the development of the particular tide and shorelands affected.").[12]

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[12] As noted in *Harris*, "[m]any other statutes have been enacted which were apparently designed to encourage the development of the particular tide and shorelands affected, . . . " 81 Wn.2d at 778. For example, under a variety of statutes, the State has granted local districts authority to make improvements in navigable waters and sell the beds of such waters abandoned because of the improvements to finance development.

These laws show beyond dispute that lands under navigable waters can be owned and filled without offense to Washington's public trust doctrine. *Caminiti*, 107 Wn.2d at 670 (The public trust can "be lost . . . as to such parcels as are used in promoting the interests of the public therein, or can be disposed of without any substantial impairment of the public interest in the lands and waters remaining.") This history also explains the compelling need for RCW 90.58.270. For example, long before the SMA, the State allowed large-scale development, fill, and elimination of navigable waters when it authorized the lowering of Lake Washington with the Montlake cut and the creation of the ship canal. *See State v. Sturtevant*, 76 Wash. 158, 135 P. 1035 (1913) (after lowering Lake Washington, the lake shore lands "lying back of the inner harbor line . . . would be reclaimed and put to useful purposes."). State history includes large blocks of submerged lands that were filled to be suitable for commercial use. *See City of Seattle v. Algar*, 122 Wash. 367, 210 P. 664 (1922); *Rainier Heat & Power Co. v. City of Seattle*, 113 Wash. 95,

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See Comm'l Waterway Dist. No. 1 of King County v. State, 50 Wn.2d 335, 336-37, 311 P.2d 680 (1957) (discussing such grant to waterway districts under the Laws of 1911, ch. 11, § 8); *see also* Laws of 1907, ch. 95, § 4 (diking districts) (currently codified in RCW 85.05.082); Laws of 1963, ch. 90, § 1 (granting county title to beds of navigable waters abandoned by flood control works) (currently codified in RCW 86.12.034).

193 P. 233 (1920); *Bussell v. Ross*, 60 Wash. 344, 111 P.165 (1910), *reheard and rev'd on other grounds*, 64 Wash. 418, 116 P. 1088 (1911).[13]

In *Hill v. Newell*, 86 Wash. 227, 149 P. 951 (1915), the court recognized that a large navigational improvement program eliminated public uses of navigable waters in portions of the Duwamish River. *Hill*, 86 Wash. at 231. The court explained:

> It is also settled that in the administration of this trust when the plan or system of improvement or development adopted by the state for the promotion of navigation and commerce cuts off a part of these tidelands or submerged lands from the public channels, so that they are no longer useful for navigation, the state may thereupon sell and dispose of such excluded lands into private ownership or private uses, *thereby destroying the public easement in such portion of the lands and giving them over to the grantee, free from public control and use.*

Id. (emphasis added), quoting *People v. Cal. Fish Co.*, 166 Cal. 576, 584, 138 P. 79 (1913).

The legislative branch is uniquely well suited to evaluate public need related to navigable waters and to define the objectives of legislation.

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[13] In *Algar*, the court described selling and filling tidelands as follows:

> In 1893, the state, being then the owner of a great area of tidelands situated within the corporate limits of the city of Seattle, and desiring to make this property more valuable, provided for the improvement of this property by the opening up of waterways through the tidelands and filling in the lands adjoining such waterways, so that they might be raised above high tide, thus giving them a commercial value and adding to the revenue of the state by their sale.

Algar, 122 Wash. at 368-69.

See Orion, 109 Wn.2d at 641 ("The trust's relationship to navigable waters and shorelands resulted not from a limitation, but rather from a recognition of where the public need lay."). Using this power, the Legislature consented to historic impairments to navigation that might have been attacked based on the *Wilbour* case. This consent was endorsed by a vote of the general public when they approved the SMA. Thus, the statute reflects an appropriate and compelling legislative judgment that historic improvements were omnipresent and had undoubtedly served important public trust doctrine interests by enhancing public and private use of navigable waters.

In the absence of RCW 90.58.270(1), historic development in navigable water would have remained subject to removal indefinitely. By providing certainty that such historic development could remain, in the wake of the uncertainty generated by *Wilbour*, RCW 90.58.270(1) promotes investment in these lands, including that which would enhance the value of the lands for public trust doctrine purposes. As has been repeatedly noted in the context of land use decisions, without finality, "no owner of land would ever be safe in proceeding with development of his property. . . ." *Skamania County v. Columbia River Gorge Comm'n*, 144 Wn.2d 30, 49, 26 P.3d 241 (2001), quoting *Deschenes v. King County*, 83 Wn.2d 714, 717, 521 P.2d 1181 (1974).

4. RCW 90.58.270(1) Passes the *Caminiti* Test.

Returning to the challenge to RCW 90.58.270, this Court should hold that the statutory consent to historic development passes the test announced in *Caminiti* for determining whether a statutory grant of an interest in the State's submerged lands or navigable waters violates the public trust doctrine. This test asks:

> (1) whether the State, by the questioned legislation, has given up its right of control over the jus publicum and (2) if so, whether by so doing the State (a) has promoted the interests of the public in the jus publicum, *or (b) has not substantially impaired it.*

Caminiti, 107 Wn.2d at 670 (emphasis added). "The doctrine in Washington "prohibits the State from disposing of its interest in the waters of the state in such a way that the public's right of access is substantially impaired, unless the action promotes the overall interests of the public." *Weden*, 135 Wn.2d at 698, quoting *Rettkowski*, 122 Wn.2d at 232 (emphasis added).

RCW 90.58.270(1) passes the *Caminiti* test for two separate reasons. First, as explained above, RCW 90.58.270(1) promotes the interest of the public in the *jus publicum* because it was essential to the overall interests of the public in planning for the development and use of the State's shorelines. To create a uniform approach to shoreline development and end the *ad hoc* approach, the SMA had to address

historic development. The Legislature reasonably recognized that historic fills should not be attacked solely because such fill or development displaced potential public navigation. But in granting this consent, the SMA as a whole took greater control over the *jus publicum* and adopted a set of tools that promoted the overall interests of the public in the *jus publicum*. Thus, the statute satisfies parts (1) and (2)(a) of the *Caminiti* test.

Second, RCW 90.58.270(1) does not substantially impair the public interest in the *jus publicum*. Lake Chelan is not significantly diminished by the Three Fingers fill. It remains an immense body of water—bigger than it was historically, before the dam raised the level of the lake. And there can be no dispute that public navigation and incidental public uses have continued on the lake during the 53 years that the fill has been in place. Whatever *de minimus* loss to the *jus publicum* results from RCW 90.58.270, the statute did not "substantially impair" public trust uses of the lake.[14]

The absence of substantial impairment is further shown by the fact that the Three Fingers fill is *de minimus* compared to other historic

[14] The City argued that the statute provides blanket grandfathering of all offensive structures based on their mere existence in 1969. But the authorization in RCW 90.58.270(1) does not apply to any fills or other improvements "which are in trespass or violation of state statutes." And further, no structures are "grandfathered"—they are simply not subject to a *Wilbour*-type lawsuit for removal based solely on a theory that fill interference with public uses of the water that is displaced by the fill.

development. Immense structures like Safeco and Quest fields are built on filled tidelands. Tidelands and shorelands are filled in every working waterfront in the state. It makes little sense that a statute that consented to so much important historic development would be unconstitutional because it also consented to a small historic fill in Lake Chelan. Put another way, the impact of RCW 90.58.270(1) is simply not comparable to the facts of *Illinois Central,* one of the very few cases nationwide that have invalidated legislative action based on the public trust doctrine.[15]

Finally, the fact that the statute does not substantially impair the *jus publicum* is demonstrated by the fact that this case arises a half century after GBI filled the Three Fingers. How can RCW 90.58.270be considered to be a substantial impairment of the *jus publicum* if there has been no complaint about the statute in the 44 years since the SMA was

[15] The *Caminiti* court derived its test from *Illinois Cent. R.R. v. Illinois*, 146 U.S. 387, 453, 13 S. Ct. 110, 118, 36 L. Ed. 1018 (1892). The facts of *Illinois Central* are illustrative of what it takes for state law to violate the Public trust doctrine. Illinois had conveyed over 1,000 acres of lands in the Chicago Harbor to a railroad, occupying the most important mile of Chicago harbor and giving the private railroad a tyrannical power to control the city's future. But while the court invalidated that conveyance as a violation, it left undisturbed several previous grants under which the railroad had built significant improvements in the harbor which "in no respect interfered with any useful freedom in the use of the waters of the lake for commerce, foreign, interstate or domestic." *Id.* at 444. *See also* 5 Joseph V. Panesko, *Washington Real Property Deskbook: The Public Trust Doctrine*, § 18.2 (4th ed. 2011) (discussing limitations on when the public trust doctrine invalidates state actions); *State of Illinois v. Illinois Cent. R.R. Co.*, 184 U.S. 77, 22 S. Ct. 300, 46 L. Ed. 440 (1902) (finding that extensive private improvement in the harbor were consistent with navigational rights).

passed? The answer is straightforward: the statute is a proper exercise of legislative powers over shorelines of navigable waters.

The public trust doctrine has never been so restrictive that the Legislature could not adopt the SMA and consent to historic impairments of navigable waters. If it were otherwise, all developments on reclaimed lands that were once below navigable waters would remain subject to removal under a public trust theory, forever. And if RCW 90.58.270 is invalid, the alternative is worse for the public trust because it would require *ad hoc* evaluations of historic development by courts that are ill-equipped to evaluate the competing public trust interests, as recognized by *Wilbour*.

For all these reasons, the SMA and the consent to historic development in RCW 90.58.270 does not substantially impair the *jus publicum* for purposes of the *Caminiti* test factor (2)(b). The City and the Plaintiff do not satisfy the heavy burden of showing the statute to be unconstitutional or invalid. The statute is part of the SMA, and it complies with the *Caminiti* test and Washington's public trust doctrine. And because the statute is valid and the Three Fingers fill is covered by the statute, the superior court should be reversed and the complaint dismissed.

D. Chelan Basin Lacks Standing to Challenge the Applicability of RCW 90.58.270(1).

The State joins in GBI's briefing in No. 331962 which demonstrates that Chelan Basin lacks standing. To avoid burdening the Court with duplicative briefing, the State will not repeat those arguments but will incorporate the arguments of GBI by reference. *See* Br. of Appellant GBI Holding Co. at 11-19.

E. If the Three Fingers Fill Is Not Covered by RCW 90.58.270, and if Chelan Basin Has Standing to Pursue a *Wilbour*-Type of Action, Then the Superior Court Erred By Failing to Recognize That There Are Genuine Issues of Material Fact That Should be Addressed Before Ordering Removal of the Fill.

The State's interest in this litigation is to correct the superior court's misinterpretation of RCW 90.58.270 and to defend the validity of that statute. However, given that the fill in question has been in place for 53 years, and given that it exists in an urban environment for shoreline purposes, and a commercial zoning district, the superior court erred by equating this to the fill abated in *Wilbour* in the 1960s. There are disputed issues of material fact that preclude summary judgment on whether the Three Fingers fill substantially impairs public navigation, even if the Court concludes that RCW 90.58.270(1) does not bar Chelan Basin's claims. These points have been briefed by Appellant GBI. The State

incorporates GBI's arguments rather than repeating them here. *See* Br. of Appellant GBI Holding Co. at 42-48.

VI. CONCLUSION

The Superior Court's circular construction of RCW 90.58.270(1) renders the statute a pointless act that makes the same impairment of navigation authorized by the statute the basis for excluding its application. It must be rejected. Whether read on its own, in the context of RCW 90.58.270 as a whole, or in the light of its enactment as a response to *Wilbour,* the language of RCW 90.58.270(1) grants an unambiguous authorization for historic fill and development such as the Three Fingers that insulates it from claims for removal based on impairment of navigation. As part of the SMA's comprehensive system for controlling shoreline development, the statute also complies with the limitations on legislative power under the common law public trust doctrine. RCW 90.58.270(1) promotes the public interest by providing certainty that historic public and private development everywhere present along the state's waterfronts and generally invited by the State as necessary for progress, may remain.

Accordingly, because RCW 90.58.270(1) applies to the Three Fingers and defeats Chelan Basin's claims based on impairment of

navigation, the Court must reverse the summary judgment orders below and dismiss Chelan Basin's claims.

RESPECTFULLY SUBMITTED this 17th day of June, 2015.

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I certify that I caused a copy of the foregoing document to be served on all parties or their counsel of record on June 17, 2015, as follows:

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I certify under penalty of perjury, under the laws of the State of Washington, that the foregoing is true and correct.

DATED this 17th day of June, 2015, at Olympia, Washington.

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