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DIVISION III  
STATE OF WASHINGTON  
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NO. 331962

(Consolidated with No. 332390)

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**IN THE COURT OF APPEALS,  
DIVISION III  
OF THE STATE OF WASHINGTON**

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CHELAN BASIN CONSERVANCY,

Respondent,

v.

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

Appellants.

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**RESPONSE BRIEF OF CHELAN BASIN CONSERVANCY  
TO BRIEF OF AMICUS CURIAE PACIFIC LEGAL  
FOUNDATION**

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## I. INTRODUCTION

Respondent Chelan Basin Conservancy (“CBC”) respectfully offers the following response to the Brief of Amicus Curiae Pacific Legal Foundation (“PLF”).

Amicus PLF offers little, if any, new analysis for the Court – instead largely rehashing arguments made by GBI Holding Company and the State. CBC believes these arguments are addressed in CBC’s response brief as well as the opening and reply brief of cross-appellant City of Chelan.

CBC offers the following brief response to three issues raised by PLF. First, RCW 90.58.270(1) does not consent to all *pre-Wilbour* fills because the statute, on its face, excludes fills in trespass or violation of state statutes. Second, the trial court’s ruling does not render RCW 90.58.270(1) meaningless. Only fills that significantly and unreasonably interfere with navigable rights are public nuisances and thus outside the statute’s consent. Finally, despite PLF’s doomsday scenario, the trial court’s ruling was limited solely to an analysis of the Three Fingers fill and does not address any other fill on Lake Chelan or elsewhere in the State.

## II. ARGUMENT

### A. RCW 90.58.270(1) does not consent to all pre-*Wilbour* fills because the statute, on its face, excludes fills in trespass or violation of state statutes.

Amicus PLF argues first that 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.” Brief of Amicus at 7, citing *Wilbour v. Gallagher*, 77 Wn.2d 306, 462 P.2d 232 (1969). This is the same erroneous position urged by the State on appeal: that, in effect, RCW 90.58.270(1) consents to *all* pre-December 1969 fills and development regardless of their resulting impact to navigation. Opening Brief of State at 17-18.<sup>1</sup>

Similar to the State, PLF reaches its conclusion by necessarily ignoring the plain language of the last sentence in RCW 90.58.270(1) which expressly limits the provision to fills or development that are *not* “in trespass or in violation of state statute.” As explained in CBC’s Response at 25-26, read as a whole, including the final sentence, the plain language of RCW 90.58.270(1) consents only to *certain* pre-1969

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<sup>1</sup> If the State and Pacific Legal Foundation are correct – that all pre-December 1969 fills are necessarily authorized – then the statute is a complete abdication of state sovereignty over tidelands or shorelands. *See* CBC Response Brief at 46-50; Reply Brief of Cross-Appellant City of Chelan at 9-16.

development – development that was not in trespass or a violation of state statute.<sup>2</sup>

**B. The trial court’s ruling does not render RCW 90.58.270(1) meaningless because only fills that rise to the level of significant and unreasonable interference with navigable rights are public nuisances and therefore in violation of state statutes.**

PLF argues next that the trial court’s ruling renders RCW 90.58.270(1) “meaningless because *any fill or development* within navigable waters will necessarily obstruct or impede navigation to some degree.” Brief of Amicus at 9 (emphasis added). But PLF’s argument fundamentally misunderstands the trial court’s ruling. The trial court did not conclude that *all* fills are by definition public nuisances. As the court explained,

However, as noted in *Grundy v. Thurston Co.*, 155 Wn.2d 1, 5 (2005), even a lawful action may be a nuisance. The test for whether an otherwise lawful action may constitute a nuisance “is the reasonableness or unreasonableness of making use of the property complained of in the particular locality and in the manner and under the circumstances of the case.” *Id.* Therefore, if the Three Fingers presented an “substantial and unreasonable” obstruction or

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<sup>2</sup> And when read together with RCW 90.58.270(1), RCW 90.58.270(2) actually *protects*, and does not alter or abridge, private rights of action based on an impairment to public rights of navigation where the development is in trespass or violation of state statute. *See* CBC’s Response at 25-26

impediment to “the passage of any collection of water,” then it would constitute a public nuisance under Washington Law.

Although reasonableness is typically a question of fact, it may be determined by the court if reasonable minds could come to only one conclusion. *Lakey v. Puget Sound Energy*, 176 Wn.2d 909, 924 (2013). Reasonableness is determined by “weighing the harm to the aggrieved party against the social utility of the activity.” *Id.*

CP 1620.

Thus, contrary to PLF’s assertion, the trial court narrowly concluded that only fills that presented a “substantial and unreasonable” obstruction or impediment to navigation rise to the level of a public nuisance.<sup>3</sup>

**C. The trial court’s decision addressed only the Three Fingers fill and does not apply to any other fill on Lake Chelan or elsewhere in the State.**

Raising the specter that the trial court’s decision could put at risk “thousands of parcels statewide (including much of the Seattle waterfront),” PLF argues next that the trial court’s conclusion that the Three Fingers fill is a public nuisance and therefore not protected by RCW

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<sup>3</sup> Citing *Caminiti v. Boyle*, 107 Wn.2d 662, 670, 732 P.2d 989 (1987), PLF argues that the Shoreline Management Act and specifically RCW 90.58.270(1) reflects a balance that serves the overall public interest by allowing pre-existing fills to remain. Amicus Brief at 10-11. But as discussed above, *supra* at 2, only pre-existing fills that are not in trespass or violation of state statute are allowed to remain. Where, as here, a pre-existing fill rises to the level of substantially impacting navigation the balance tips toward removal.

90.58.270(1) must be made for “virtually all fill or development within navigable waters.” Brief of Amicus at 2, 9. But this argument fundamentally misunderstands the trial court’s narrow decision.

After first setting out the standard of review, *supra* at 3-4, the trial court next addressed the evidence and arguments before it and applied the standard of review to “the question before it” – the Three Fingers. CP 1620-21.<sup>4</sup> The trial court concluded:

Having considered all of the evidence submitted, the court concludes that reasonable minds could not differ as to whether the Three Fingers fill constituted a substantial and unreasonable interference with the public’s right as of 1969. Defendants have presented, at best, a mere scintilla of evidence regarding any public benefit provided by the fill as of the critical date of December 1969. As such, the court concludes as a matter of law that, although the Three Fingers fill was placed prior to December 4, 1969, it was in violation of statute statute as a public nuisance. Accordingly, it is not entitled to the protection of RCW 90.58.270(1).

CP 1622.

Thus, in stark contrast with PLF’s assertion, the trial court did not conclude that all pre-December 1969 fills were public nuisances. The court’s decision was limited solely to the Three Fingers fill. And, based on

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<sup>4</sup> See also CBC’s Response at 35-37 (discussing “evidence” offered by GBI).

the facts provided, the court properly concluded that the Three Fingers fill alone was a public nuisance and therefore in violation of state statute and not subject to the protection of RCW 90.58.270(1). The trial court's decision is not applicable to any other pre-December 1969 fill either on Lake Chelan or elsewhere in Washington.

### III. CONCLUSION

For the foregoing reasons and reasons set out in CBC's response brief, the Court should affirm the decisions of the superior court ordering abatement of the Three Fingers fill.

Respectfully submitted this 12<sup>th</sup> day of November, 2015.

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DATED this 12<sup>th</sup> day of November, 2015, at Seattle, Washington.

A handwritten signature in black ink, appearing to read "David S. Mann", written over a horizontal line.

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