ORIGINAL

No. 48706-3-II

COURT OF APPEALS
DIVISION II

NORTH QUINAULT PROPERTIES, LLC, a Washington limited liability company; THOMAS LANDRETH, an individual, and BEATRICE LANDRETH,

Appellants,

v.

STATE OF WASHINGTON, PETER GOLDMARK, in his official capacity as Commissioner of Public Lands,

Respondent.

APPELLANTS' BRIEF

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I. INTRODUCTION

This matter involves the public's right to enforce the timeless public trust doctrine whereby the State of Washington is entrusted on behalf of the public with navigable waterways and is obligated to ensure that the public has access to those navigable waterways. The issue is complicated by the fact that the navigable waterway involved (Lake Quinault) abuts the reservation of the Quinault Indian Nation ("the Nation"), which Nation has unilaterally asserted ownership and jurisdiction over this navigable waterway despite conflicting evidence of the Lake's actual jurisdiction and in complete contradiction of the presumption that the Respondent, the State of Washington ("State") owns title to the Lake as a navigable waterway.

The trial court granted the Nation *amicus curiae* status (despite the fact that the State made identical arguments concerning tribal sovereignty) and the Nation asserted its interest in the Lake and sovereign immunity. The State also asserted tribal sovereignty as a threshold bar and argued the Nation was a necessary and indispensable party. This, despite the fact that the Plaintiffs' suit asserts claims against the State based on the public trust doctrine.

Although the Nation arguably is an interested party, it is not an indispensable party. Ultimately, the trial court dismissed the suit on a jurisdictional basis, despite acknowledging that the Plaintiffs have no

alternate forum under which relief may be granted and thereby denying any and all relief to the Plaintiffs. The trial court's Order granting the State's Motion for Summary Judgment should be reversed and the Plaintiffs' claims for a writ of mandamus and injunctive relief should proceed on the merits.

II. ASSIGNMENT OF ERROR

The trial court erred by granting the State's motion for summary judgment where, pursuant to the Washington Supreme Court's ruling in *Automotive United Trades Organization v. State*, 175 Wn.2d 214, 285 P.3d 52 (2012), even if the extent of prejudice to the Nation were significant, the Plaintiffs' claims should be allowed to proceed where there is an absence of any alternative forum whereby the Plaintiffs may seek relief.

The trial court further erred by granting the State's claims dismissing the Plaintiffs' request for injunctive relief and a writ of mandamus based upon the application of the public trust doctrine.

III. ISSUE PERTAINING TO ASSIGNMENT OF ERROR

Where the State applies tribal sovereign immunity as a sword to immunize itself from the Plaintiffs' state-based claims concerning the public trust doctrine, does the trial court err by granting a motion for summary judgment dismissing the Plaintiffs' state claims?

Where the Nation's sovereign immunity prevents the Plaintiffs from joining the Nation as a party and where the Plaintiffs' claims are against the State solely and not against the Nation, and where the Plaintiffs have no other judicial forum in which to seek relief, does a trial court err by granting a motion for summary judgment dismissing the Plaintiffs' state claims?

Where the State, as a trustee for the public as beneficiary, has minimum ascertainable and mandatory obligations pursuant to the public trust doctrine that may be enforceable through declartory and injunctive relief and enforced through a writ of mandate, does a trial court err by granting a motion for summary judgment dismissing the Plaintiffs' state claims?

IV. STATEMENT OF THE CASE

A. The State of Washington has in large part abandoned the public trust doctrine and specifically with regard to Lake Quinault.

This case involves jurisdiction and access to Lake Quinault ("the Lake"), a lake located on the Olympic Peninsula and abutting the reservation of the Nation[1]. It is undisputed among the parties that the Lake is a navigable waterway. CP 163-166. The Plaintiffs assert that, as a navigable waterway, title to the Lake was transferred from the federal

[1] The actual location of the lake with regard to the Nation's reservation is a non-issue since the lake is undisputedly a navigable waterway. As such, it is subject ot the public trust doctrine and title transferred from the federal government to the State of Washington upon statehood. *See U.S. v. Holt State Bank*, 270 U.S. 49, 59, 46 S.Ct. 197, 70 L.Ed. 465 (1926).

government to the State upon statehood. From that point forward, the State held this navigable waterway in trust for the the public pursuant to the doctrine of public trust.

The Plaintiffs own property adjacent to the Lake and have suffered from the Nation's actions and restrictions concerning use and enjoyment of the Lake, which actions have become increasingly strict and controlling over time. *E.g.* CP 253-261. In hopes of gaining clarity over the various rights and privileges associated with the Lake, the Plaintiffs filed a civil action asserting the State's abandonment of the public trust doctrine and seeking relief to force the State to comply with its mandatory obligations with regard to the Lake. The claims are solely tailored to action and/or inaction by the State with regard to its citizens and the public.

The Plaintiffs have not asserted claims against the Nation. Nonetheless, the trial court ruled that the Nation is a necessary and indispensable party pursuant to Civil Rule 19 and on that basis dismissed the Plaintiffs' suit.

This Court does not have to decide the extent of the Nation's interest in the Lake to grant relief to Plaintiffs. Plaintiffs have cited to many historical records indicating that the Lake is not part of the reservation. CP 141-157. The State and Nation refer to conflicting records to support the Nation's assertion of jurisdiction over the Lake. CP 134-137; *see also* CP

103-108. As will be discussed further below, the Court does not need to resolve these disputed facts or make a decision on the merits of the Nation's assertion because the State must presume it has regulatory authority over the navigable water of the Lake in the absence of an adjudication of the Nation's claim.

B. Procedural History

The Plaintiffs filed a civil action in December 2014 against the Quinault Indian Nation and the State of Washington Department of Natural Resources in the Western District of the United States District Court, seeking declaratory and injunctive relief and seeking to quiet title to the Lake.

In January 2015, the Nation and the State brought Motions to Dismiss alleging sovereign immunity. The Motions were granted and the civil action was dismissed in February 2015.

In September 2015, the Plaintiffs filed a civil action against the State in Thurston County Superior Court seeking declaratory and injunctive relief and including a writ of mandamus.

On or about February 4, 2016 the State filed a Motion for Summary Judgment seeking dismissal of the Plaintiffs' suit. On or about February 8, 2016 the Nation filed a Motion for Leave to Appear as Amicus Curiae. Oral argument was heard on both Motions on March 4, 2016 before Thurston

County Superior Court Judge Anne Hirsch who granted both Motions and entered an Order dismissing the Plaintiffs' suit.

V. STANDARD OF REVIEW

The Court reviews *de novo* a trial court's order granting summary judgment. *Michak v. Transnation Title Ins. Co.*, 148 Wn.2d 788, 794-95, 64 P.3d 22 (2003). The *de novo* standard of review is used by an appellate court when reviewing all trial court rulings made in conjunction with a summary judgment motion. *Momah v. Bharti*, 144 Wn. App. 731, 749, 182 P.3d 455 (2008) (quoting *Folsom v. Burger King*, 135 Wn.2d 658, 663, 958 P.2d 301 (1998)); *Anderson v. Weslo, Inc.*, 79 Wn.App. 829, 833, 906 P.2d 336 (1995).

VI. ARGUMENT

A. The State has authority to regulate the navigable water regardless of any claim made by the Nation.

The Court does not have to adjudicate the scope of the Nation's interest in the Lake. As a matter of law, the presumption is that the State has the authority and duty to regulate the navigable water of the Lake.

The State has regulatory authority over a body of water that serves as the boundary of a reservation. *United States v.Anderson*, 736 F.2d 1358 (9th Cir. 1984), dealt with regulation of excess water of the Chamokane

Basin by non-Indians on non-Indian lands. The Chamokane Creek forms the exterior boundary of part of the Spokane Indian Reservation and a dispute arose over regulation of the water rights. *Id.* The Ninth Circuit held that the State has authority to regulate the use of excess water by non-Indians on non-tribal land. *Id.* at 1365. Similarly, a tribal assertion of regulatory authority over non-member uses of water, on or off the reservation, is invalid. *Holly v. Confederated Tribes & Bands of the Yakima Indian Nation,* 655 F. Supp. 557 (E.D. Wash. 1985) (finding that Yakima Nation water code was invalid to the extent it purported to regulate non-member use of excess water on or passing through the reservation).

When a State is admitted to the United States, it acquires title to the land underlying navigable waters within the State under the equal footing doctrine, unless such land had been previously disposed of by the United States. *Montana v. United States*, 450 U.S. 544, 551, 101 Sup. Ct. 1245, 67 L.Ed.2d 493 (1981); *U.S. v. Holt State Bank,* 270 U.S. 49, 54-55, 46 S.Ct. 197, 70 L.Ed. 465 (1926). However, since the policy of the United States regarding navigable waters in its territories was to hold it "for the ultimate benefit of future states, ... disposals by the United States during the territorial period are not lightly to be inferred, and should not be regarded as intended unless the intention was definitely declared or otherwise made very plain." *Holt State Bank*, 270 U.S. at 55.

Thus, in *Montana*, the United States Supreme Court found that the bed and banks of the Bighorn River, a navigable stream flowing through the Crow Reservation, had not been included in the original reservation and the tribe did not hold beneficial title. *Montana*, 450 U.S. at 556-57. The Court found there was no indication of intent to confer beneficial ownership nor any basis to infer such an intent from the other purposes of the reservation, so Montana holds title to the land under the navigable water. *Id.* Similarly, Mud Lake in Minnesota was entirely within the Red Lake Reservation when the State was admitted, but the grant of the reservation was not intended to convey all the navigable water in the reservation, so Minnesota became the owner of the lake when it became a state. *Holt State Bank*, 270 U.S. at 58-59.

Regardless of whether Quinault Lake is the boundary of the reservation or partly or entirely within the reservation, the State owns the land beneath the navigable water and consequently has the authority to regulate it. Plaintiffs are not asking the Court to determine the scope of the Nation's rights in the Lake. The Nation has not been named as a party and has chosen not to participate. Thus, there is no legal challenge to the presumption that the State acquired title to the bed of the lake when it became a state. Accordingly, the State has jurisdiction over the navigable water of the Lake, even if such water is located in or near a reservation. As

between Plaintiffs and the State, the Court can and should recognize the legal presumption and rule that the State has an obligation to take action with regard to Quinault Lake.

B. The trial court erred in ruling that the Nation is an indispensable party to the Plaintiffs' civil action.

The Plaintiffs' claims for declaratory relief, injunctive relief and a writ of mandamus were directed solely against the State; however, the Nation and the State both argued that pursuant to Civil Rule 19, the claims must be dismissed. The appropriate analysis leads to a result far different from that outlined by the State and the Nation and erroneously adopted by the trial court.

Under CR 19, a trial court undertakes a two-part analysis to determine whether a party is indispensable. *Mudarri v. State*, 147 Wn. App. 590, 604, 196 P.3d 153 (2008). The court must first decide whether a party is necessary for the adjudication. *Id.* If it is determined that the absent party is necessary but cannot be joined, "the court must determine whether in equity and good conscience the action should proceed among the parties before it or should be dismissed, the absent party being thus regarded indispensable." *Id.* (quotations omitted). The Court is to consider four factors in determining whether that party is indispensable:

1) To what extent a judgment rendered in the person's absence might be prejudicial to the person or those already parties;

2) The extent to which, by protective provisions in the judgment, by the shaping of relief, or other measures, the prejudice can be lessened or avoided;

3) Whether a judgment rendered in the person's absence will be adequate; and

4) Whether the plaintiff will have an adequate remedy if the action is dismissed for nonjoinder.

Id. at 604-05; CR 19(b).

The trial court erroneously ruled that the Nation was an indispensable party, despite the fact that the court agreed the Plaintiffs are left with no alternative forum for seeking relief.Although the Nation has made an unsubstantiated claim to the Lake, that is not dispositive with regard to CR 19. The test is whether the Nation is "indispensible" for the adjudication in question. The controversy presented by the Plaintiffs' Complaint is whether the State has failed to uphold its obligation to the public and the citizens of the State pursuant to the public trust doctrine by failing to maintain the public's access to Lake Quinault for navigation, commerce and recreation. *See* CP 5-35.

These claims are narrowly construed as involving the State and its obligation to manage navigable water for the benefit of the public. A ruling that the State should act in accordance with the legal presumption that the Lake is a public resource does not unduly prejudice the Nation. Such a

ruling does not necessitate any restriction of the Nation's use or enforcement against the Nation. The State's management of this public resource does not require that it prohibit any use by the Nation – the two are not mutually exclusive. The State's assurance of public access would not interrupt any activities already enjoyed by the Nation, including fishing and fishery habitat, boating and recreating.

The trial court failed, in its analysis, to adequately weigh the prejudice to the Plaintiff in having no alternative forum for relief. Such application is fundamentally unfair because it forces the Plaintiffs (and any plaintiffs with claims even marginally impacting a tribe) to bear the consequences of being denied a legal remedy of any sort. The court's analysis does not serve the Plaintiffs' interest in obtaining a legal remedy or society's interest in resolving disputes, which interests are arguably more significant than the interests of the State or the absent tribe.

Chief Justice Marshall once stated:

> The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury. One of the first duties of government is to afford that protection .... "[I]t is a general and indisputable rule, that where there is a legal right, there is also a legal remedy by suit or action at law, whenever that right is invaded."

Marbury v. Madison, 5 U.S. (1 Cranch) 137, 163 (1803) (quoting 3 WILLIAM BLACKSTONE, COMMENTARIES *23).

The trial court suggested that the Plaintiffs have an available remedy if only they create a controversy with the Nation (such as by violating the Nation's unilateral rules and restrictions and thereby subjecting themselves to whatever actions the Nation might impose – which could even subject the Plaintiffs to encounters with armed representatives of the tribe who have been known to patrol the Lake). However, even if the Plaintiffs were to do so, that would result in the Plaintiffs' claims being heard in tribal court where the Plaintiffs would still have no legal remedy because the State would undoubtedly claim sovereign immunity.

Given that the Plaintiffs have no other forum for relief, the trial court should more completely analyzed the options left to the Nation if the Plaintiffs' case were permitted to move forward. The Nation could claim that it is not bound by any ruling of the Court, having asserted immunity, and either ignore the ruling altogether or take later action against the State to assert its rights. Alternatively, the tribe can avoid any resulting prejudice by exercising its right to intervene under Civil Rule 24.[2] In contrast, Plaintiffs have no alternatives and no viable means to protect their rights if the case is dismissed because the Nation chooses not to participate.

[2] Under CR 24(a), an absentee has the right to intervene when a statute confers the right or "when the applicant claims an interest relating to the property or transaction which is the subject of the action and the applicant is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest, unless the applicant's interest is adequately represented by existing parties." This is essentially identical to the test for determining whether a party is necessary under CR 19(a)(2).

Civil Rule 19 should not serve as a barrier that prevents parties from obtaining justice simply because an absent tribe claims an interest in the suit but refuses to participate and the State (not the tribe) then asserts sovereignty. Civil Rule 19's two goals are complete resolution of the parties' dispute and avoidance of multiple or piecemeal litigation. *See HB Gen. Corp. v. Manchester Partners, L.P.*, 95 F.3d 1185, 1198 n. 9 (3d Cir. 1996). Civil Rule 19 should not "in equity and good conscience" condone allowing an absent third party that claims an interest in the suit to prevent the current parties from obtaining justice – the only justice that the Plaintiffs can obtain.

The Nation's sovereign immunity should not deny justice to the parties before the Court. The Nation can intervene if it so chooses. The Plaintiffs, however, do not have the ability to litigate their dispute in an alternative forum where the court dismisses the case, as the trial court did here. This Court should be less concerned with the harm or prejudice that may result to the Nation and more concerned with the current parties' interests in litigating the dispute and society's interest in the administration of judtice under the judicial system.

C. The State should not be allowed to assert the Nation's immunity to avoid its own obligations.

By dismissing the Plaintiffs' claims because the Nation could not be named as a party, the trial court effectively allowed the State to use the Nation's immunity as a sword. A similar result was condemned by the Supreme Court in *Automotive United Trades Organization v. State*, 175 Wn.2d 214, 285 P.3d 52 (2012). In *AUTO*, a trade association of Washington State gasoline and automotive service retailers brought an action against the State of Washington alleging that fuel tax compacts entered into by the State with various Indian tribes were unconstitutional. *Id.* at 221. The association sought declaratory and injunctive relief and a writ of prohibition preventing the State from authorizing disbursements (essentially gas tax rebates) to the tribes. *Id.*

The primary issue in *AUTO*, as in this case, was the fact that as a result of tribal sovereign immunity, the tribes could not be joined as parties. The Supreme Court concluded that the tribes were "necessary" parties pursuant to Civil Rule 19(a)(2)(A), and then considered the four factors to determine whether the tribes were indispensable parties (i.e., the balancing test). *Id.* at 229.

The Washington Supreme Court discussed at some length how sovereign immunity impacts the first factor under CR 19 (prejudice), concluding that the tribes' sovereign statusshould be accorded "heavy weight." *Id.* at 229-230. The Court acknowledged that the extent of

prejudice to the tribes was significant, even though the absent tribes would not be bound by the ruling, because the effect of the ruling would be to prevent disbursements from the State to the tribes. *Id.* at 231. The Court also found that the other two factors (ability to fashion adequate relief and adequacy of a judgment) also favored dismissal in the absence of the tribes. *Id.* at 231-32.

However, the Court awarded great weight to the fourth factor, that the plaintiffs would have no other remedy if the suit were dismissed. *Id.* at 232-34. The Court stated:

> But "complete justice" may not be served when a plaintiff is divested of all possible relief because an absent party is a sovereign entity. In such an instance, the quest for "complete justice" ironically leads to none at all – an outcome at odds with the equitable purposes underlying compulsory joinder. Nor does our respect for sovereign immunity compel this result. Sovereign immunity is meant to be raised as a shield by the tribe, not wielded as a sword by the State. An absentee's sovereign immunity need not trump all countervailing considerations to require automatic dismissal.

Id. at 233. Dismissing the suit "would have the effect of immunizing *the State*, not the tribes, from judicial review. *Id.* at 234 (emphasis in original). Thus, although the tribes in *AUTO* were necessary parties, they were not indispensable. *Id.* at 235.

The Court's ruling in *AUTO* provides considerable guidance as to the interplay between tribal sovereignty and dismissal of suits because of

inability to join a party. Sovereign immunity is meant to be **raised as a shield by the tribe – not wielded as a sword by the State**. This statement is exactly on point in the instant matter which involves state-based claims specifically against the State, rather than claims against the Nation. The guidance from the Supreme Court informs the decision that should result – the Plaintiffs should be permitted to move forward with their claims. Thus, the trial court's failure to apply *AUTO* and the holding therein was erroneous. It cannot be disputed that the Plaintiffs have no other venue for their claims. In fact, the Plaintiffs sought relief in federal court and were dismissed as a result of sovereign immunity of both the State and the Nation. This court is the Plaintiffs' last resort for relief.

The State attempts to distinguish *AUTO*, arguing that it was a closely decided case and that in only involved a contractual right of the tribes as opposed to the Nation's claimed property interest in the Lake. The tribes in *AUTO* would potentially lose the reimbursements of gasoline taxes if the plaintiff's claim was not dismissed. Here, Plaintiffs are only asking that the State be required to recognize the legal presumption that the Lake is a public resource that should bemanaged by the State for the benefit of Plaintiffs and other citizens. As discussed, this does not necessarily prevent the Nation from using or accessing the Lake. There is no assertion that the Nation stands to lose any revenue if it shares the Lake with the citizens of

Washington. And allowing the Plaintiffs' claims to proceed would have no res judicata affect to prevent the Nation from asserting a greater right to the Lake should it so choose. However, as in *AUTO*, dismissing the Plaintiffs' claims would wrongfully immunizes the State from judicial review.

What is absolutely at stake in this case is the public's inalienable interest in public access to navigable waterways – an interest that cannot be eliminated by governmental discretion. It is undisputed that Lake Quinault is a navigable waterway and that it falls within the purview of the public trust doctrine. By refusing to allow the Plaintiffs' case to proceed and by using tribal sovereignty as the mechanism for denying the Plaintiffs a judicial forum the trial court denied the Plaintiffs the right to even present their argument that the State's failure to uphold the public trust doctrine in this regard is wrongful.

D. The trial court erred in dismissing the Plaintiffs' Writ of Mandamus claim for relief.

The trial court erroneously determined that the Plaintiffs' writ of mandamus claim would compel discretionary action by the State. This is incorrect. The Plaintiffs' writ of mandamus claim is predicated upon the public trust doctrine – a doctrine that requires the State to maintain public access to navigable waterways. The obligation is mandatory – not discretionary.

The public trust doctrine is a recognition of the sovereign right of the individual States to protect inviolable public entitlements associated with navigable waterways, among other natural resources. Implicit in the doctrine is the fundamental notion that a State may not alienate or otherwise diminish to private or non-public entities the public interest in navigable waterways. *E.g.*, A. Reid Allison III, *THE PUBLIC TRUST DOCTRINE IN WASHINGTON, University of Puget Sound Law Review*, Vol. 10:633, 638 (1987). The public trust doctrine concerns the public's right to navigation and the incidental rights of fishing, boating, swimming, waterskiing and other related recreational uses of public waters. *Caminiti v. Boyle*, 107 Wn.2d 662, 669, 732 P.2d 989 (1987) (quoting *Wilbour v. Gallager*, 77 Wn.2d 306, 316, 462 P.2d 232 (1969)).

Like other doctrines, the public trust was created with "a set of minimum [constitutional] standards that can be expanded, **but not contracted**, by the states." *Charles F. Wilkinson, THE HEADWATERS OF THE PUBLIC TRUST: SOME THOUGHTS ON THE SOURCE AND SCOPE OF THE TRADITIONAL DOCTRINE*, 19 Envtl. L. 425, 426 & n.3 (1989) (emphasis added). In other words, the obligations imposed by the doctrine cannot be "contracted" or lessened – they impose a mandatory obligation on the State. As such, this provides the public with a mechanism to demand that the mandatory obligations be performed – a writ of mandamus.

The Washington State Constitution declares state ownership of the beds and shores of all navigable waters in the State. *Wash.Const. art. XVII.* This language was a formal declaration by the people of rights which the State possessed by virtue of its sovereignty. *Caminiti*, 107 Wn.2d at 666. The public policy expressed in the State Constitution is consistent with public trust principles, the State reserving complete ownership in the beds and shores of navigable waters including Lake Quinault.

Washington State legislation reiterates and underscores the importance of the doctrine and the mandatory duties that the State maintains as part of the doctrine. The legislature has enacted the following statutes:

> **Aquatic lands – Findings.**
>
> The legislature finds that state-owned aquatic lands are a finite natural resource of great value and an irreplaceable public heritage. **The legislature recognizes that the state owns these aquatic lands in fee and has delegated to the department the responsibility to manage these lands for the benefit of the public**.

RCW 79.105.010 (2016) (emphasis added).

> **Aquatic lands – Management guidelines**
>
> The management of state-owned aquatic lands **shall be in conformance with constitutional and statutory requirements**. The manager of state-owned aquatic lands shall strive to provide a balance of public benefits for all citizens of the states.

RCW 79.105.030 (2016) (emphasis added).

Fostering use of aquatic environment – Limitation

> The department **shall foster** the commercial and recreational use of the aquatic environment for production of food, fibre, income, and **public enjoyment** ....

RCW 79.105.050 (2016) (emphasis added).

The mandatory duties associated with the public trust doctrine and the State's ownership of navigable waterways are evident in the statutory language and the use of the word "shall."

Case law further supports the mandatory nature of the public trust doctrine. In *Hill v. Newell*, the Washington Supreme Court approved the reasoning of the leading California public trust case. *Hill v. Newell*, 86 Wash. 227, 149 P. 951 (1915) (citing *People v. California Fish Co.*, 166 Cal. 576, 138 P. 79 (1913)). In *State v. Sturtevant*, the Supreme Court acknowledged that the State held the right of navigation "in trust for the whole people of this state." *State v. Sturtevant*, 76 Wash. 158, 135 P. 1035 (1913); *see also Caminiti*, 107 Wn.2d 662.

In Caminiti, the Court stated:

> The state can no more convey or give away this *jus publicum* interest than it can "abdicate its police powers in the administration of government and the preservation of the peace." Thus it is that the sovereignty and dominion over this state's [navigable waterways], as distinguished from title, always remains in the state, and the state holds such dominion in trust for the public. It is this principle which is referred to as the "public trust doctrine". Although not always clearly labeled or articulated as such, our review of

> Washington law establishes that the doctrine has always existed in the State of Washington.

Caminiti, 107 Wn.2d at 669-70 (quoting *Illinois Cent. R. Co. v. State of Illinois*, 146 U.S. 387, 453, 13 S.Ct. 110, 36 L.Ed 1018 (1892)).

A cursory review of Washington case law regarding the public trust doctrine discloses repeated examination by the courts as to whether the State has abdicated its mandatory duty to protect the public interest in navigable waters. In *Caminiti* the Washington Supreme Court held that RCW 79.90.105 did not violate the public trust doctrine, concluding that the legislature had given up relatively little right of control over the *jus publicum*. 107 Wn.2d at 665-66. In *Weden v. San Juan County*, the Washington Supreme Court held that a San Juan County ordinance banning the use of motorized personal watercraft on all marine waters and one lake did not violate the public trust doctrine because the county had not given up control over its waters. *Weden v. San Juan County*, 135 Wn.2d 678, 699, 958 P.2d 273 (1998). The Court found that while the ordinance prohibited a particular form of recreation, the waters were open to the entire public, including personal watercraft owners who use other recreational methods. *Id.*

The duties imposed by the public trust doctrine upon the State are mandatory, not discretionary. In *Illinois Central R.R. v. Illinois*, the United States Supreme Court discussed a trust that the Court labeled "inalienable"

by the legislature. *Illinois Central R.R.*, 146 U.S. at 453. One early example of Washington State legislative action regarding public trust was the enactment in 1927 of the "Public Lands Act." Designating navigable waterways such as tidelands "belonging to or held in trust by the state" as "public lands", the legislature in effect recognized its sovereign responsibility to manage these lands as a valuable natural resource held by the State of Washington in trust for its citizens. RCW 79.01.004 (1962).

Under the public trust doctrine, the State has no discretion: the interests of the public are paramount and inalienable. This public property interest requires that the State protect public access to navigable waterways encompassed by the public trust doctrine. Implicit in the doctrine, the Constitution and the subsequent legislative action is a mandatory duty to maintain control over the navigable waterway.

The State argues that the public trust doctrine has never been used affirmatively to force the State to take action; rather, that the State alone may use the doctrine to prevent infringements upon public resources. However, that is not the case. In the seminal case *Illinois Central Railroad Co. v. Illinois*, the U.S. Supreme Court held that a State cannot wholly grant control of trust resources to a private entity, thereby laying the foundation of the doctrine as an upper limit on State power. *Illinois Cent. R. Co. v. State of Illinois*, 146 U.S. 387.

In Arizona, Native American tribes successfully challenged the State legislature's bill to eliminate the public trust doctrine from being considered in water rights adjudications. *San Carlos Apache Tribe v. Superior Court ex rel. County of Maricopa*, 193 Ariz. 195, 972 P.3d 179 (Ariz. 1999). The Arizona Supreme Court expressly stated that the doctrine is a state-level constitutional limitation on legislative power to give away trust resources and found that the legislature could not remove restraints on its powers. *Id.* at 199.

In the California case *Center for Biological Diversity, Inc. v. FPL Group, Inc.*, the California Court of Appeals affirmed the right of citizens to sue the State for failing to uphold trust duties. *Center for Biological Diversity, Inc. v. FPL Group, Inc.*, 166 Cal.App.4th 1349, 83 Cal.Rptr.3d 588 (2008). The Court stated:

> The concept of a public trust over natural resources unquestionably supports exercise of the police power by public agencies .... But the public trust doctrine also places a duty upon the government to protect those resources. .... The state has an affirmative duty to take the public trust into account in the planning and allocation of water resources, and to protect public trust uses whenever feasible ....

Id. at 1365. The Court further stated:

> **[T]he public retains the right to bring actions to enforce the trust when the public agencies fail to discharge their duties**. Many of the cases establishing the public trust doctrine in this country and in California have been brought by private parties to prevent agencies of government from

> abandoning or neglecting the rights of the public with respect to resources subject to the public trust.

Id. at 1366 (emphasis added).

Other States, such as Michigan, Minnesota, Connecticut and South Dakota have statutes that permit citizen suits against the State and private parties for violation of public trust duties. The public trust doctrine in Washington should be interpreted to allow a writ of mandamus claim against the State to compel it to take action under its mandatory duty to maintain public access to navigable water.

E. The public trust doctrine is an unalienable right of the public to force government to protect natural resources.

The public trust doctrine may be an older doctrine that has arguably been under-utilized in modern litigation; however, it is likely to be used increasingly frequently as natural resources dwindle and as the public asserts its rights to demand that States preserve and provide public access to resources. Deriving from the common law of property, the public trust doctrine is the most fundamental legal mechanism to ensure that government safeguards natural resources necessary for public welfare and survival. In the context of climate change, for example, the public trust doctrine will be the paramount mechanism used to ensure that government takes an active role in preservation of resources. The public trust doctrine functions as a judicial tool to ensure that the government protects the basic

rights held by the citizens. A number of experts believe the most promising cause of action for fighting climate change through litigation is an action by the public involving the public trust doctrine. *See, e.g.*, Patrick Rowe, *CAN LITIGATION STOP CLIMATE CHANGE*? Outlook: Environmental & Natural Resources Section, Winter 2009, at p. 14.

VII. CONCLUSION

Lake Quinault is a navigable waterway entrusted to the State by the federal government upon statehood for the benefit of the citizens. The Plaintiffs' civil action alleges that the State has abrogated its mandatory duties under the public trust doctrine. The State has used a non-party's sovereign immunity (i.e., the Nation) to immunize itself from suit. The trial court erroneously allowed the use of tribal sovereign immunity as a sword wielded by the State – not the tribe – amounting to an obstruction of justice. This is particularly egregious where the State is the trustee for the Plaintiffs (i.e., the citizens).

The trial court's decision was erroneous and the Plaintiffs' claims for injunctive relief and the Plaintiffs' writ of mandamus should be allowed to proceed on the merits. The Plaintiffs respectfully request that the Court vacate the trial court's Order granting the State's Motion for Summary Judgment.

Respectfully submitted this 31st day of May, 2016.

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CERTIFICATE OF SERVICE

Under penalty of perjury of the laws of the State of Washington, I hereby certify that I served the foregoing Appellants' Brief to counsel of record as follows:

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DATED this 31st day of May, 2016.

Elizabeth Thompson