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COURT OF APPEALS  
DIVISION III  
STATE OF WASHINGTON  
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No. 331962-III, 332381-III and 332390-III (consolidated)

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

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**CHELAN BASIN CONSERVANCY AND CHELAN COUNTY  
PUBLIC UTILITY DISTRICT,**

**Respondents.**

**v.**

**GBI HOLDING CO., CITY OF CHELAN, AND STATE OF  
WASHINGTON,**

**Appellants,**

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**BRIEF OF APPELLANT  
GBI HOLDING CO.**

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**ORIGINAL**

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## I. INTRODUCTION

This appeal arises from the February 27, 2015 order on summary judgment requiring appellant GBI to remove approximately eight acres (nearly 100,000 cubic yards) of fill from the waters of Lake Chelan that had been in place since 1961. The February 27, 2015 decision and order was the fourth in a series of decisions leading to the conclusions below that:

CBC members had sufficient “special interest” in the matters at issue to have standing to seek removal of the fill;

The Shoreline Management Act (“SMA”) at RCW 90.58.270(1), (2) did not preclude civil actions seeking removal of pre 1969 fills based on claims of interference with navigational interests; and

The Three Fingers fill substantially interfered with navigational interests of the plaintiffs sufficient to warrant a finding of public nuisance and abatement without regard to the public interests in development on such fill under the controls of the Shoreline Management Act (“SMA”).

The Trial Court’s decision was contrary to decades of property law. It found that a group of citizens, with no specialized injury resulting from the existence of the private fill, could seek to have it removed. Moreover, it disregarded the state’s specific consent to navigational impacts of pre-1969 fill on navigable waters granted in the 1971 Shoreline Management Act, RCW 90.58.270(1). Under the Trial Court’s

interpretation, fill that has been in place for decades is subject to removal if any members of the public complain. This is not what Washington law requires and would result in the undermining of the SMA, the very statute that was meant to authorize pre-1969 fills and resolve disputes like this one. Such a result would be chaos for Washington's shoreline property owners with historic (pre-1969) fills. For the reasons set forth below, the Trial Court's decision and order must be reversed and the case dismissed as a matter of law.

## II. ASSIGNMENTS OF ERROR

Assignment of Error No. 1. The Trial Court erred in denying GBI's motion to dismiss for lack of standing and directing GBI to remove the Three Fingers fill. Memorandum decision dated May 30, 2012; order entered July 11, 2012 (AR 458, 460 and AR 827-37, respectively).

Assignment of Error No. 2. The Trial Court erred in entering an order on the State of Washington's and GBI's motions for reconsideration, which corrected the premature order to remove the fill, but erroneously confirmed standing by CBC to bring the action. Memorandum decision dated January 15, 2013; order dated February 15, 2013 (AR 1254 and AR 1267-73, respectively).

Assignment of Error No. 3. The Trial Court erred in granting CBC's motion for summary judgment on the applicability of the SMA,

RCW 90.58.270. Memorandum decision dated October 3, 2014; judgment entered December 9, 2014 (AR 1570 and AR 1613-22, respectively).

Assignment of Error No. 4. The Trial Court erred in granting CBC's motion for summary judgment requiring the removal of the Three Fingers fill on GBI property as a public nuisance under RCW 7.48.140(3) as of 1969. Memorandum decision and order dated February 27, 2015 (AR 2553 and AR 2547-51, respectively).

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

1. CBC is a citizens group seeking removal of fill placed in Lake Chelan--fill that has been there since 1961. Its members said that they would like to use the filled part of the lake for fishing, kayaking and beach purposes. RCW 7.48.210 limits standing for nuisance claims to those for whom the challenged action is "specially injurious." Did the Trial Court err in holding that CBC has standing in the absence of a showing of "special injury" to any of its members? Assignments of Error 1, 2, 4.

2. The fill on GBI property was placed in Lake Chelan before 1969 and the adoption of the Shoreline Management Act, Chapter 90.58 RCW. CBC's claim is based on the violation of the public trust doctrine and the Supreme Court decision in *Wilbour v. Gallagher*, 77 Wn.2d 306, 462 P.2d 232 (1969). Under the Shoreline Management Act, however, the

state gave consent to navigational interference with respect to pre-1969 fills such as this one. RCW 90.58.270(1). Further, the state specifically prohibited *Wilbour*-type suits, which seek to remove fills based on claims of navigational interference in adopting RCW 90.58.270(2). Did the Trial Court err in failing to grant GBI the protections to which it was entitled under the requirements of RCW 90.58.270(1) and (2) in ordering the fill to be removed? Assignments of Error 1, 2, 3 and 4.

3. The navigational intrusion of the Three Fingers fill was specifically approved by the state and maintained by GBI under the fill protection provisions of the SMA, RCW 90.58.270(1). Nothing maintained under the express authority of a statute can be deemed a nuisance. RCW 7.48.160. Did the Trial Court err in holding that the fill was a public nuisance when it was specifically approved and maintained by the authority of the Shoreline Management Act? Assignments of Error 2, 3, 4.

4. Did the Trial Court err as a matter of law in ordering removal of the Three Fingers fill in the face of material uncontested testimony concerning the absence of “substantial interference” with navigational interests on Lake Chelan and the uncontested ability to use the Three Fingers fill, similar to many other fills in the area to serve the

identified public purposes set forth in RCW 90.58.020. Assignments of Error 3, 4.

#### IV. STATEMENT OF THE CASE

##### A. The Three Fingers Fill.

The case involves approximately eight acres of property in Chelan, Washington owned by GBI Holding Co. (GBI) and commonly referred to as “Three Fingers.” (See Exhibit C-4 to Beardslee declaration filed January 29, 2015 (AR 2391), also attached hereto as Appendix 2, Attachment 1 for a site view of the property as it existed at the time the lawsuit was filed.) The property was created in the early 1960s, in accordance with the practice of the day, by placing fill on private land owned by GBI, which would otherwise be covered by the waters of Lake Chelan during the summer season.<sup>1</sup> The fill was created when GBI was hired to widen the highway adjacent to the GBI property in 1961-62. The site is improved with highway access and City of Chelan waterlines, but it has no structures.

##### B. The Shoreline Management Act and the Public Trust Doctrine.

The case involves (1) the public trust doctrine, that is, the state’s duty to manage navigable waters of the state to promote the public interest, (2) the 1969 decision of the Washington State Supreme Court in

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<sup>1</sup> A full discussion of the unique nature of Lake Chelan shorelines can be found in the court’s decision in *Wilbour v. Gallagher*, 77 Wn.2d 306, 462 P.2d 232 (1969).

*Wilbour v. Gallagher* objecting to the lack of any public control over fills in Lake Chelan, and (3) the subsequent response of the people of the state in adopting Initiative 43B, the Shoreline Management Act of 1971, rectifying the lack of control and authorizing the retention of existing fills subject to subsequent development under the control and public purposes of the Shoreline Management Act (*see* RCW 90.58.020).

**C. The Complaint and Procedural Background.**

No one complained about the three Fingers fill for decades. Indeed, there is evidence that the fill was used and enjoyed by members of the public on occasion and offered other benefits for the public. Scott McKeller declaration filed July 23, 2012 (AR 890-93). In December 2010, GBI filed an application to subdivide the land into six parcels.<sup>2</sup>

The plat was approved with conditions allowing the fill to remain. CBC initially appealed the plat approval, but withdrew its appeal and filed a civil action in November 2011, seeking removal of the fill as a violation of the public trust “*jus publicum*” —that is, interference with the association’s members’ purported interest in being able to use the waters of Lake Chelan for recreational purposes. *See* complaint, request for relief at 8 (AR 10).

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<sup>2</sup> A previous application for development into a townhouse program received much public opposition and was withdrawn. (AR 288-93, at 18-23, ¶¶ 58-59 of short plat decision dated July 25, 2011).

After discovery and a series of motions, the Trial Court entered a final order directing GBI to “promptly remove” the property in question as a public nuisance. Memorandum decision and order entered February 27, 2015 (AR 2552-53 and AR 2547-51, respectively). GBI appealed, as did the City of Chelan and the State of Washington. The appeals were consolidated.

The case involves several parties. The plaintiff below is Chelan Basin Conservancy (CBC), a local group interested in protecting the “use and enjoyment of navigable waters of Lake Chelan.” (CBC complaint at 2 (AR4)). Defendant GBI has owned and controlled the Three Fingers fill since it was filled in 1961-62. Terhaar declaration filed January 25, 2012 at 1 (AR 184). The City of Chelan is the local municipal corporation that chose to participate in the case. *See* City of Chelan answer and cross claim filed December 14, 2011 (AR 22-25).<sup>3</sup>

The State of Washington was named and participated as the case involved questions about the state’s authority under the public trust doctrine, though no specific claim was made against the state (*see* answer of the State of Washington, AR 96-101). The Chelan County Public

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<sup>3</sup> The City of Chelan concurs with CBC that a violation of the public trust doctrine exists, but it holds that the remedy should be vested in the City, which wants to allow the fill to remain with a portion dedicated for a park.

Utility District was also named as it holds flowage rights in Lake Chelan, but announced early on that it was not participating in the case.

The complaint was filed on November 4, 2011, seeking removal of the Three Fingers fill from the waters of Lake Chelan as a violation of the public trust doctrine. *See* complaint at 1 and request for relief at 8 (AR 3 and AR 10, respectively). GBI initially moved to dismiss on standing grounds because CBC failed to allege any facts supporting a claim of special injury to one or more of its members as required by RCW 7.48.210. CBC responded with declarations from three of its members who said they were interested in using the GBI property for beaches, fishing and kayaking should the fill be removed.<sup>4</sup>

In response, the Trial Court specifically granted CBC standing to pursue the case. Remarkably, the decision also ordered the fill to be removed as a violation of the public trust doctrine, even though CBC had filed no motion for such a judgment.<sup>5</sup> Both the state and GBI filed for reconsideration. The Trial Court reversed its judgment on the ultimate question of removal due to issues of fact on substantial interference and

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<sup>4</sup> *See* declarations of Hauge (AR 375-78), Schuldt (AR 379-83), and Page (AR 384-88), attached at Appendix 2, Attachment 2 hereto. *See* Exhibit J to Beardslee declaration filed January 29, 2015 on location of CBC members (AR 2412).

<sup>5</sup> *See* memorandum decision dated May 30, 2012 at 5 (AR 460) and order entered July 11, 2012 (AR 827-37).

public interest, but reaffirmed the conclusion that CBC has standing. *See* order entered February 15, 2013 (AR 1267-73).

Subsequently, CBC moved for summary judgment on the issue of the applicability of the protective language in the SMA, RCW 90.58.270, in which the state consented to fills existing prior to 1969. *See* motion filed March 7, 2014 (AR 1354-76). The Trial Court concluded that the statutory consent to fill did not apply to fills placed on shoreland in “violation of state statutes” prior to the adoption of the Shoreline Management Act. The Trial Court then concluded that the Three Fingers fill was a public nuisance in 1969 under the provisions of RCW 7.48.140(3), and as a consequence, the fill was placed in violation of state law and the protections of RCW 7.48.160 and RCW 90.58.270(1) were not applicable. *See* memorandum decision dated October 3, 2014 and order dated December 9, 2014 (AR 1570 and AR 1613-17, respectively).

The final motion resolving the case was a motion for summary judgment ordering abatement of the nuisance, in this case, removal of the fill. Requests to show that the Three Fingers fill could be used for a variety of public purposes under the SMA were denied, and the Trial Court granted the motion and ordered the fill to be removed promptly. *See* memorandum decision and order entered February 27, 2015, (AR 2552-53 and AR 2547-51, respectively).

## V. SUMMARY OF ARGUMENT

GBI submits that the Trial Court below erred in three respects:

1. The Trial Court erred in holding that the citizens group CBC had standing to seek removal of fill. CBC failed to identify any member with the “special injury” as a result of the three Fingers fill as required by state law to pursue a private claim to abate a public nuisance. The decision of the Trial Court allowing CBC to proceed with the case with no showing of special injury is in error and in violation of RCW 7.48.210.

2. Nothing done or maintained under express authority of a statute can be considered a nuisance. RCW 7.48.160. RCW 90.58.270(1) authorizes the maintenance of pre-1969 fills in waters of the state. RCW 90.58.270(2) prohibits civil actions challenging pre-1969 fills based on claims of interference with navigational rights. The decision of the Trial Court to allow CBC to proceed with the present case without regard to the consent to fills provided by RCW 90.58.270(1) is an error and in violation of RCW 90.58.270(1) and (2) and RCW 7.48.160.

3. The Trial Court below came to its conclusion notwithstanding the absence of any evidence of specific prior or unique use by CBC members or any other basis for concluding that the navigational interference was “substantial.” Further, substantial

uncontested evidence showed that the Three Fingers fill, similar to many other developed fills in the area, could serve a variety of public purposes identified in RCW 90.58.020 under the control of the Shoreline Management Act, the Chelan Shoreline Master Program, and the City Zoning and Comprehensive Plans. The decision of the Trial Court to proceed to a final order of abatement in the face of uncontested material facts concerning the absence of substantial interference with recreational use of Lake Chelan and the merits of the possible use of GBI's property under the control of the SMA, was in error, in violation of CR 56.

Resolution of the case under either of the first two arguments requires a reversal of the decision below and a remand with instructions to dismiss the case as a matter of law.

Resolution of the case on the third ground requires reversal of the decision below and a remand for a trial on the issues of substantial interference and public interest as may be clarified in the Court's opinion.

## VI. ARGUMENT

### A. **CBC Members Lacked the "Special Injury" Necessary for Standing to Bring a Suit for the Removal of GBI's Three Fingers Fill. Assignments of Error 1 and 2.**

The Trial Court erred by denying GBI's motion to dismiss CBC's action for lack of standing. CBC, as an association, has the right to file a civil action on behalf of its members only if one or more of its members

have standing. *SAVE v. City of Bothell*, 89 Wn.2d 862, 576 P.2d 401 (1978). Because CBC challenges the Three Fingers fill as a public nuisance, it must show that one of its members has sustained a special injury by reason of the fill not common to the public as a whole. *See* RCW 7.48.210; *State v. Grant*, 156 Wash. 96, 101, 286 P. 63 (1930). The same test applies to CBC's claim regarding violation of a navigational right in public waters. *Lampa v. Graham*, 179 Wash. 184, 36 P.2d 543 (1934).

The Washington Supreme Court has held that individual plaintiffs “[do] not have a special interest either in . . . lake[s] or road[s]. Their interest in each is the same as that of the public and whatever loss they suffer in being deprived of access to the lake is the same kind of loss suffered by the public, differing only in degree.” *Olsen v. Jacobs*, 193 Wash. 506, 513, 76 P.2d 607 (1938). *See also Lampa*, 179 Wash. at 187 (denying standing to a fisherman who challenged an impediment to the navigability of the Columbia River because he “only . . . [used] the channel of the river as a highway, as it is or as it may be used by the general public”); *see also Oppen v. Aetna Ins. Co.*, 485 F.2d 252, 260 (9th Cir. 1973) (“The damage suffered on account of their loss of navigation rights in the Santa Barbara Channel and harbor is no different in kind from that suffered by the public generally.”).

When determining the existence of “special injury,” courts generally look for the existence of some economic injury, such as damage to property or business interests. *See, e.g., Anderson v. Nichols*, 152 Wn. 315, 322, 278 P. 161, (1929) (where a structure “affects the value of the surrounding property in any material degree, the owners of the property suffering the loss have the right to insist upon its removal”); *Morris v. Graham*, 16 Wash. 343, 346, 47 P. 752 (1897) (finding special injury where an obstruction prevented plaintiff from engaging in commercial fishing operations); *Sholin v. Skamania Boom Co.*, 56 Wash. 303, 307, 105 P. 632 (1909) (finding a “special injury” where an obstruction to navigation resulted in an economic loss); *Hulet v. Wishkah Boom Co.*, 54 Wash. 510, 515, 103 P. 814 (1909) (“[T]he owner of a wharf or other improvement on a stream *does* suffer an injury different in kind from that suffered by the public, when the value of his wharf is destroyed by the closing of the stream.”) (emphasis added).

Where, as here, a plaintiff alleges only the invasion of a common right to use a lake, courts have routinely held that no “special injury” exists. *See Lampa*, 179 Wash. at 186; *see also Olsen*, 193 Wash. at 513; *Oppen*, 485 F.2d at 260. Indeed, in *Lampa* the court specifically distinguished the plaintiffs—who only “use[d] . . . the channel of the river as a highway, as it is or as it may be used by the general public”—from

the plaintiffs in prior cases that had suffered the type of economic injury sufficient to confer standing. *Lampa*, 179 Wash. at 186-87.

As in *Lampa*, CBC members have not shown any special injury, but allege only an obstruction of the common interest in using Lake Chelan for fishing, boating, swimming and other navigational interests. CBC submitted only three declarations in support of its position, none of which demonstrate any allegation of the type of special use or economic injury that would be sufficient to confer standing. The only claims of “injury” are vague allegations of a desire to use the area in the future if the fill is removed. Mrs. Hauge lives “five minutes” from the fill site and removal of the fill will “open up a beautiful sandy beach for swimming, waterfowl up-lake views.” *See* Hauge declaration at section 6 (AR 376); CBC response at 7 (AR 360). Mr. Schuldt has lived in Chelan since 1971, does not own a waterfront home and removal of the Three Fingers fill would allow the bay to “revert to this type of high quality swimming beach and would include extremely rare and valuable dedicated public access.” *See* Schuldt declaration at section 2-3 (AR 379-80); CBC response at 7-8 (AR 360-61). Mr. Page has lived in Chelan for 18 years, views the Three Fingers fill as a hazard to kayakers and believes that “[r]emoving the fingers would significantly expand the limited public access and make kayaking, swimming and other water uses much more

available and enjoyable.” See Page declaration at section 2-8 (AR 385-86); CBC response at 9 (AR 362).

In short, CBC has only alleged future interests by its members in the waters surrounding the Three Fingers fill that are common to the public at large—the ability to navigate in the area and use the waters of Lake Chelan for recreational purposes. As the Washington Supreme Court has repeatedly recognized, this type of injury is insufficient to confer standing to challenge a claimed public nuisance. See *Olsen*, 193 Wash. 506; *Lampa*, 179 Wash. 184.

In an attempt to evade this clear authority, CBC cites *Kemp v. Putnam*, 47 Wn.2d 530, 288 P.2d 83 (1955), *overruled in part on representative standing by Save a Valuable Env’t (SAVE) v. City of Bothell*, 89 Wn.2d 862, 576 P.2d 401 (1978). In that case, the court stated that a plaintiff who had regularly fished a navigable portion of a stream would suffer a special injury if the stream he commonly used for fishing was blocked. But the court distinguished the plaintiff from others that had not previously used the river and who, as a result, did not have specific use and special injury as alleged by Mr. Kemp sufficient to warrant standing.<sup>6</sup>

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<sup>6</sup> “The evidence discloses that the only party to this controversy who has been prevented from fishing in the two rivers in question is the respondent Kemp, who testified that he had been in the habit of fishing these rivers since 1924 until ejected by the appellant William R. Putnam.” *Id.*

The *Kemp* decision supports the GBI position. Under *Kemp*, actual use for specific purposes was required to obtain standing to complain about navigational interference. That case would not confer standing on CBC, as none of CBC's members claim to have used, or have any other special attachment to, the relevant portion of Lake Chelan prior to the Three Fingers fill installation.

CBC also relied on *Wilbour v. Gallagher*, 77 Wn.2d 306, 462 P.2d 232 (1969), but the *Wilbour* plaintiffs were abutting property owners who suffered direct and immediate loss.

The plaintiffs have unquestionably sustained special damages as a result of defendants' wrongful activities, and of a character that sustains their right to maintain this action[.]

77 Wn.2d at 317-18.<sup>7</sup>

CBC also claims that while its members may not have achieved standing under the public nuisance doctrine, they still have standing under the public trust doctrine of protecting the public right of navigation. But the *Lampa* decision involved blockading a navigable waterway, and special injury was still a prerequisite to standing under the same public nuisance limitations remaining in the law to this date. RCW 7.48.210 ("A private person may maintain a civil action for a public nuisance, if it is

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<sup>7</sup> "The unfilled portion of Cross Street, now a shallow moat at high water, affords the Greens their only access by water to the lake." *Id.* at 311 n.10 (emphasis added).

specially injurious to himself or herself but not otherwise” a law in place since statehood.).

The Trial Court’s focus was whether the Three Fingers fill was “in violation of state Law” as a public nuisance under RCW 7.48.140(3) at the time of the adoption of the Shoreline Management Act and thus not entitled to the protection of the Shoreline Management Act. *See* RCW 90.58.270 (“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.”). *See* memorandum decision dated October 3, 2014 and final order dated February 27, 2015 (AR 1570 and AR 2547-51, respectively).

Under public nuisance laws, plaintiffs must have sufficient “special injury” to proceed with the case, RCW 7.48.210, and those plaintiffs were not before the Trial Court below. Absent in the present case were the material elements required for a finding that CBC’s members have “special injuries” that separate them from interests of the public as a whole.

The five-minute walk to a “better beach” for Mrs. Hauge; the easier access for fishing and swimming for Mr. Schuldt, Mrs. Hague’s neighbor; and the possible public safety gains for kayakers alleged by Mr.

Page (address unknown) are all inconveniences suffered by other members of the public who may live closer to or farther from the Three Fingers fill area than the affiants but who still use the lake for recreational purposes. While each affiant's interest may be more affected than some members of the public at large due to the relative ease of access when compared to the community at large, none is immediately proximate to the fill as was the case in the *Wilbour* decision, evidenced by a historic use as in *Kemp*, or provided any grounds to argue that his or her interest is any different (other than personal interest) from the many neighbors who are not objecting.<sup>8</sup>

As such, the derivative standing which CBC claims by reason of its members is even less significant than that of Mr. Lampa, for whom historic use was shown in the record. There is no allegation of any attachment to the filled property by use or other interest. For that reason CBC has no legal basis upon which to claim the right to challenge the Three Fingers fill.

The proper response by the Trial Court to GBI's motion to dismiss for lack of standing of CBC based on the absence of any allegation of

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<sup>8</sup> See Scott McKeller declaration filed July 23, 2012 (AR 890-93) who, among affiants, lives directly north from the Three Fingers fill and has no objections and sees some benefits). See map at AR 899.

special injury of its members is the same as that stated by the Washington State Supreme Court in the *Lampa* case.

Under these conditions can it be said that respondent, and those similarly situated, suffer an injury peculiar to themselves and different from that sustained by the public generally? We think not.

*Lampa*, 179 Wash. at 186.

The Trial Court erred at the outset in failing to dismiss the case for lack of standing to seek removal of fill in navigable waters by CBC, whose members allege no special interest sufficient for the Trial Court to proceed. As such, the decision below must be reversed and remanded with instructions to dismiss the case.

**B. The Three Fingers Fill Is Maintained Under the Authority of a Statute, RCW 90.58.270, and so as a Matter of Law May Not Be Considered a Public Nuisance -- RCW 7.48.160.**

In the proceedings below, significant time was spent discussing the role of the public trust doctrine, the Shoreline Management Act and a variety of related issues. But the final decision, entered by the Trial Court was that the Three Fingers fill was a public nuisance prior to 1969 under the terms of RCW 7.48.020 and .140(3)<sup>9</sup> and could therefore be abated by the Trial Court, RCW 7.48.200. *See* memorandum decisions dated

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<sup>9</sup>“(3) To obstruct or impede, without legal authority, the passage of any river, harbor, or collection of water[.]” RCW 7.48.140(3).

October 3, 2014 and February 27, 2015 (AR 1570 and AR 2552-53, respectively) and associated orders.

The problem with the Trial Court's decision is that, under the law of nuisance, "nothing which is done *or maintained* under the express authority of a statute can be deemed a nuisance." RCW 7.48.160 (emphasis added). As discussed in detail below, the Three Fingers fill was lawfully maintained in the waters of Lake Chelan under the provisions of the Shoreline Management Act and, specifically, RCW 90.58.270(1). As a consequence, the Trial Court's rulings below are erroneous as a matter of law and must be reversed.

- 1. The Three Fingers fill was lawfully maintained in public waters under the provisions of the Shoreline Management Act and, specifically, RCW 90.58.270(1).**

The Three Fingers fill was placed in the waters of Lake Chelan in 1961-62, (*see* Declaration of Terhaar filed January 25, 2012 (AR 184)), prior to the adoption of the Shoreline Management Act of 1971. Under the plain terms of the Shoreline Management Act, the state has granted consent to the continued maintenance of the Three Fingers fill, even if it impairs the public right of navigation on Lake Chelan. The relevant portion of the Shoreline Management Act, RCW 90.58.270(1), provides:

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.

(Emphasis added.)

The primary complaint below, and the complaint on which the Trial Court based its decision, was that the Three Fingers fill had been placed in the navigable waters of Lake Chelan prior to 1969 in violation of the public's rights of navigation and therefore interfered with the CBC's ability to use the displaced waters for recreational and navigational purposes. As a consequence, the Trial Court held that the Three Fingers fill should be removed as a public nuisance.<sup>10</sup> However, RCW 90.58.270(1) provides the legal authority required to bring the Three Fingers fill out of the prohibitions of RCW 7.48.140(3) for the lawful maintenance of pre-1969 fills, and as such the Three Fingers fill could not be a public nuisance as a matter of law. RCW 7.48.160. CBC's complaint

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<sup>10</sup> A companion claim was that the Three Fingers fill was a "trespass" of CBC's rights with respect to vacated Boulevard Avenue crossing the Three Fingers fill parallel to the state highway. CBC could allege no "ownership interest" in the public right of way and associated easement that precluded any relief based on a claim of trespass. *Jackass Mt. Ranch, Inc. v. S. Columbia Basin Irr. Dist.*, 175 Wn. App. 374, 400, 305 P.3d 1108 (2013). Trespass occurs when a person intentionally or negligently intrudes onto or into the property of another.

to the contrary fails to state a claim upon which any relief can be granted.

RCW 90.58.270(1).

**a. *Wilbour v. Gallagher* and the genesis of the Shoreline Management Act.**

In reviewing the elements of the case below and the grounds for reversal, it is useful to review the 1969 seminal case of *Wilbour v. Gallagher*, and the resulting response of the people of the State of Washington in approving the Shoreline Management Act and the protections of RCW 90.58.270 specifically.

In *Wilbour*, the defendant, Mr. Gallagher, filled two tracts of land referred to as “A” and “B.”<sup>11</sup> The lands at issue were above the historic line of navigation in Lake Chelan and therefore in private ownership, but were lawfully flooded annually for power purposes by reason of a 1927 flowage easement. Since the construction of a power dam, the waters in the lake were lowered in the winter to approximately the line of historic high water before the dam, and then raised in the spring and summer to the top of the flowage easement. 77 Wn.2d at 307-09.

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<sup>11</sup> See sketch from the decision, 77 Wn.2d 309-11 (AR 2540), attached as Appendix 2, Attachment 3 hereto. See also photo series attached to Beardslee declaration filed January 29, 2015, to see the prefill condition (1949) at Exhibit C-1 (AR 2386); the fill condition (1967) at Exhibits C-1 and C-2 (AR 2387-88); and the post-fill conditions (2006) (Exhibit C-4) (AR 2390-92) and (2014) (Exhibit C-3) (AR 2389), attached hereto as Appendix 2, Attachment 4.

Abutting property owners to the Gallagher fill brought suit claiming that the fill was a nuisance and had to be removed. In examining the case, the Supreme Court noted that the fluctuating levels of the lake created two conditions: (1) submerged when the lake was full and the public's right of navigation in waters of the state took precedence and (2) dry when the lake was lowered and the private property owner's rights were supreme. *Id.* at 314-16.

Two points in that case are important. First, the Trial Court went out of its way to confirm that the plaintiff had established the requisite standing through the demonstration of special circumstances. "The plaintiffs have unquestionably sustained special damages as a result of defendants' wrongful activities, and of a character that sustains their right to maintain this action." *Id.* at 317-18.

As can be seen from the Beardslee photos attached, the Gallagher fill A was directly in front of the plaintiffs' residences, cutting off the historic access to the lake. *See* Appendix 2, Attachment 4, at (AR 2388).

Having found special injury, the Trial Court determined that the fills intruded on the navigational interests of the plaintiffs when the lake was filled, and held:

It follows that the defendants' fills, insofar as they obstruct the submergence of the land by navigable waters at or below the 1,100 foot level, must be

removed. The court cannot authorize or approve an obstruction to navigation.

77 Wn.2d at 316. An important element in the Trial Court's decision was the recognition that while the fills at issue had to be removed due to special injury suffered by the plaintiffs, not all fill in navigable waters was impermissible or harmed the public. In fact, the Trial Court specifically recognized that fill in navigable waters could serve a valuable public need. The problem found by the Trial Court was not the fact of fill in navigable waters per se, but the lack of any control exercised by the state or other municipalities on the decision as to when or how such fill might be placed in navigable waters, or how it was to serve the public:

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

*Id.* at 316 n.13 (emphasis added). The court in *Wilbour* recognized the beneficial purpose of fills, when properly controlled. It was the lack of control combined with the special injury that led to the result in that case.

**b. The 1971 Shoreline Management Act.**

The Shoreline Management Act was the direct result of the uncertainties created by the *Wilbour* decision, and it was designed to provide the predictability, stability and control over navigable waters that the Washington State Supreme Court found missing in *Wilbour*.<sup>12</sup>

In the immediate aftermath of the *Wilbour* decision, the status of previously filled lands was called into question. Governor Evans declared a moratorium on all shoreline fills and the Washington Legislature was tasked with addressing the issue. The result was an initiative sent to the people in the fall of 1971 with two alternatives: Initiative 43, the shoreline protection act, and Initiative 43B, the Shoreline Management Act.<sup>13</sup>

A key distinction between the two initiatives was the treatment of existing fills. Initiative 43 provided:

SECTION 18. Public Navigation Rights. Except as permitted by this Act, there shall be no interference with or obstruction of the navigational rights of the public pursuant to common law as stated in such cases as the Washington State Supreme Court decision in *Wilbour v. Gallagher*, 77 Wash. Dec. 2d 307(1969).

Initiative 43, Section 18 (AR 939).

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<sup>12</sup> The history of the Shoreline Management Act is detailed in a lengthy law review article by Professor Crooks. Geoffrey Crooks, *The Washington Shoreline Management Act of 1971*, 49 Wash. L. Rev. 423 (1973-1974).

<sup>13</sup> Exhibit 1 to the declaration of Alexander Mackie filed July 23, 2012 is a copy of excerpts of the Official Voters Pamphlet published by Washington Secretary of State A. Ludlow Kramer for the general election held in Washington on November 7, 1972. (AR 934-47). See text of the pertinent sections in Appendix 2, Attachment 5.

The language meant that existing fills in navigable waters could be subject to the *Wilbour*-type challenges and potentially ordered removed, with the resulting disruption to historic expectations. Initiative 43B granted consent to the navigational intrusion imposed by pre-1969 fills and prohibited *Wilbour*-type suits challenging the navigational interference of such fills—precisely the type of suit filed by CBC. *See* Initiative 43B, Section 27.<sup>14</sup>

As you can see by the difference in the language used, Initiative 43B provided protective measures against the *Wilbour*-type suit that Initiative 43 did not provide, and it gave the owners of previously filled lands the assurance that they would not have to face *Wilbour*-type suits based solely on claims of navigational interference. The changes found in Initiative 43B, Section 27 were ultimately codified at RCW 90.58.270(1), (2).

In *Portage Bay-Roanoke Park Community Council v. Shorelines Hearings Board*, 92 Wn.2d 1, 593 P.2d 151 (1979) the Washington State Supreme Court made it clear that the Shoreline Management Act satisfied the legislative controls required to satisfy the public trust doctrine and as such it “preempted” any prior common law claims. *Id.* at 4 (“[A]ny

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<sup>14</sup> Compare Initiative 43, Section 18 with Initiative 43B, Section 27 to see the difference in language used. The language of Section 18 in Initiative 43 is omitted from Initiative 43B. *See* Appendix 2, Attachment 5.

common-law public benefit doctrine this state may have had prior to 1971 (*See Wilbour v. Gallagher*, 77 Wash.2d 306, 462 P.2d 232 (1969)), has been superseded and the SMA is the present declaration of that doctrine.”). This language is a complete repudiation of any implication that the common law rights referenced in Initiative 43, Section 18 claimed by CBC below survived the adoption of Initiative 43B.

The *Portage Bay* court went on to point out that one purpose of the statute was to provide the state’s consent to limited interference with navigational interests to serve the public interest.

(I)t is within the contemplation of the legislation that there will, of necessity, be some future and additional development along shorelines in the state, including over-the-water construction, and it does not purport to totally prohibit such development. Rather, the enunciated policy stresses the need that such future development be carefully planned, managed, and coordinated in keeping with the public interest.

*Id.* at 4 (internal quotation marks and citation omitted). *Portage Bay* was affirmatively cited in *Caminiti v. Boyle* for the proposition that “the requirements of the ‘public trust doctrine’ are fully met by the legislatively drawn controls imposed by the Shoreline Management Act of 1971, RCW 90.58.” Wn.2d 662, 670, 732 P.2d 989, (1987). *Caminiti* also held that the development of the shorelines and shorelands as controlled by the

Shoreline Management Act was in the public interest, referring specifically to the statement of legislative intent in RCW 90.58.020:

“[A]lterations of the natural condition of the shorelines of the state, in those limited instances when authorized, *shall be given priority for single family residences, . . . piers, and other improvements facilitating public access to shorelines of the state, . . .*” (Italics ours.) RCW 90.58.020 (part).

107 Wn.2d at 671.

RCW 90.58.270(1) and (2) of the Shoreline Management Act were thus adopted as the state’s exercise of control over the pre-1969 fills that occupied navigable waters such as Lake Chelan and protected those fills from *Wilbour*- type suits (RCW 90.58.270(2)).

**c. The state controls the terms of the public trust doctrine.**

Much of the argument from CBC was that the state could never “abandon” *jus publicum* nor abdicate its responsibility to protect it as such, and it argued and the Trial Court found that the Three Finger fill had to be removed. But the Trial Court statement that the *jus publicum* may not be abandoned does not mean that fills cannot be authorized in public waters or that the state has no control over the decision where and when to allow such fills.

To the contrary, the law is clear that the states are fully responsible for dictating the terms of reach of the public trust doctrine, including the

allowance of fills. This is precisely what was done by the Shoreline Management Act, and the Washington State Supreme Court has consistently held that the Shoreline Management Act was a proper exercise of the state's public trust authority and responsibility authority, not an unlawful abdication of the public trust. *See Caminiti*, 107 Wn.2d 662 and *Portage Bay*, 92 Wn.2d 1; .

The public trust doctrine arises out of the state's ownership and control of navigable waters and associated lands covered by navigable waters at the time of statehood. Both state and federal decisions make it clear, however, that it is the state that controls the terms of use. *See Citizens for Responsible Wildlife Mgmt. v. State*, 124 Wn. App. 566, 571-72, 103 P.3d 203 (2004) (“[I]ndividual States have the authority to define the limits of the lands held in public trust and to recognize the private rights in these lands as they see fit.”). *See State v. Longshore*, 141 Wn.2d 414, 427-28 5 P.3d 1256 (2000).

“[I]t has been long established that the 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.” *Phillips Petroleum Co.*, 484 U.S. at 475, 108 S. Ct. 791 (citing *Shively v. Bowlby*, 152 U.S. 1, 26, 14 S. Ct. 548, 38 L.Ed. 331 (1894)). Accordingly, we look *solely* to Washington law to determine whether the public trust doctrine provides the general public with the right to take naturally occurring shellfish from privately owned tidelands.

141 Wn.2d at 427-28. In the most recent U.S. Supreme Court decision on navigability, the Court noted:

[T]he public trust doctrine remains a matter of state law . . . . Under accepted principles of federalism, the States retain residual power to determine the scope of the public trust over waters within their borders . . . .

*PPL Montana, LLC v. Montana*, 132 S. Ct. 1215, 1235, 182 L. Ed. 2d 77 (2012). See also *State v. Sturtevant*, 76 Wash. 158, 171-72, 135 P. 1035 (1913).

In adopting Initiative 43B—and specifically providing, “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”—rather than retaining the common law right of litigation over prior fills in Section 18 of Initiative 43, the people of the state were exercising the state’s right of control over fill in navigable waters to serve public purposes. The legislation provides, on the one hand, that the pre-1969 fills could remain in navigable waters, but that thereafter any development on such fills was subject to the control of the state through the provisions of the Shoreline Management Act to ensure that development of the filled lands served state public purposes.

The adoption of the Shoreline Management Act and RCW 90.58.270 was an exercise of the power of the State of Washington to determine the fate of the pre-1969 fills in navigable waters of the state: they could remain with the state's specific consent. This is precisely the power the courts have held vests in the state in the management and control of the public trust doctrine.

In adopting Initiative 43B and RCW 90.58.270(1) to protect existing fills, the public was exercising sovereign power. *Citizens for Responsible Wildlife Mgmt. v. State*, 124 Wn. App. 566, 572, 103 P.3d 203 (2004) (“[W]hen the voters approve an initiative, they exercise the same power of sovereignty as the legislature does when it enacts a statute.”).

There is no higher authority or common law fiduciary duty imposed on the state in the management of the public trust doctrine as suggested, without authority, by CBC and the City of Chelan in the case below. The Washington State Supreme Court has specifically held that state law is the sole source of the scope and limitations on the public trust authority.

Individual states have the authority to define the limits of the lands held in public trust and to recognize the private rights in these lands as they see fit. *Longshore*, 141 Wash.2d at 428, 5 P.3d 1256 (looking “solely to Washington law to determine” the scope of the public trust doctrine).

124 Wn.App. at 571-72.

There is no question that the State of Washington exercised complete control over future development of the shorelines of the state, including previously filled lands such as the Three Fingers fill through the Shoreline Management Act. Through that act, the state controls every aspect of development on the state's shorelines and specifically prohibits the *Wilbour*-type claims asserted by CBC in this case. GBI was entitled to the protections of RCW 90.58.270(1) and (2), and the Trial Court erred in failing to give GBI the certainty and protection from vexatious public trust litigation to which it was entitled.

**2. RCW 90.58.270(1), (2) is a remedial statute designed to protect property holders such as GBI from suits claiming navigational interference.**

The purpose of legislative interpretation is to give every term of a statute its ordinary meaning and look to ascertain the intent of the Washington Legislature from the words used and the context in which it was adopted. *State v. J.P.*, 149 Wn.2d 444, 450, 69 P.3d 318 (2003).

Here, the intent of the Washington Legislature in giving the people a choice with respect to historic (pre-1969) fills could not be clearer. Initiative 43, the shoreline protection act, did not contain language protecting existing fills from *Wilbour*-type challenges or judicial findings that such fills could be ordered removed as a violation of navigational

interests as was the case in *Wilbour*. Section 18 of Initiative 43 effectively codified such challenges--but it was rejected by the voters.

In contrast, Initiative 43B contained the protective language found today in RCW 90.58.270, precluding *Wilbour*-type suits for those fills put in prior to 1969. The public had a choice and chose to protect existing fills rather than subject the owners to the uncertainty of future public trust-type litigation. By choosing Initiative 43B, with the protective language consenting to navigational intrusion by existing fills, as opposed to Initiative 43 which did not have such language, the people made a conscious choice to protect existing fills from claims of navigational interference where there is no trespass or violation of other state law involved.<sup>15</sup>

The Trial Court's rationale in the decision below was that the Three Fingers fill was a public nuisance in 1969, "in violation of state law" as a public nuisance pursuant to RCW 7.48.140(3), and therefore not entitled to protection by the provisions of the statute. *See* memorandum decision dated October 3, 2014 at 3 (AR 1568). But in so ruling, the Trial Court ignored the plain language and history of RCW 90.58.270(1) and (2) to protect fills such as the Three Fingers fill from challenges based on its intrusion to the navigational interests on Lake Chelan. The statute

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<sup>15</sup> They also specifically protected owners of such fills like GBI from the risk of *Wilbour*-type law suits by adopting RCW 90.58.270(2) and rejecting Section 18 of Initiative 43.

specifically grants consent to such fills, and precludes civil actions seeking removal based on navigational interference. The Trial Court below erred in failing to give GBI the full weight of the intended protection.

The Trial Court's conclusion that it could avoid the legislative intent to protect pre-1969 fills by looking at conditions prior to the adoption of the 1971 Shoreline Management Act is simply wrong. The whole purpose of RCW 90.58.270 was to clarify the status of pre-1969 fills as lawful. As such, the statute was "remedial," curing an existing problem in eliminating the uncertainty created by *Wilbour* with respect to existing fills that did not have specific state approval. After the adoption of Initiative 43B, the existing pre-1969 fills had such consent and were to be protected from the *Wilbour*-type suits. Initiative 43B was necessarily retroactive if it is to achieve its intended purpose. Otherwise the language has no meaning.

A statute ordinarily operates prospectively unless it is remedial in nature or the legislature indicates that it is to operate retrospectively. *A statute is remedial and has a retroactive application when it relates to practice, procedure or remedies* and does not affect a substantive or vested right.

*Johnston v. Beneficial Mgmt. Corp. of Am.*, 85 Wn.2d 637, 641, 538 P.2d 510, (1975) (emphasis added), *holding modified by Salois v. Mut. of Omaha Ins. Co.*, 90 Wn.2d 355, 581 P.2d 1349 (1978). Initiative 43B

specifically identified pre-1969 fills as those to be protected by granting the state's consent to the navigational impairment already in place. RCW 90.58.270(1). And it preempted *Wilbour*-type suits by stating that the consent granted by the legislature precluded suits based on navigational impairment to the extent of the existing fills. RCW 90.58.270(2). Two points that the error in the proceedings below:

a. In exercising sovereign authority, the people of the State of Washington granted consent, in 1971, to fills such as the Three Fingers Fill, which had been installed in waters of the state prior to 1969. That consent made the Three Fingers fill a fill thereafter “maintained under the authority of a statute,” and as such “not a nuisance” by state law. RCW 7.48.160.

b. In allowing CBC to pursue the case under the common law public trust/public nuisance theory of *Wilbour*—when that cause of action had been superseded by the Shoreline Management Act— the Trial Court failed to give GBI the protections of the second section of RCW 90.58.270(2) prohibiting such causes of action.

In proceeding with the case as a nuisance case, based solely on the fact of fill in navigable waters, the Trial Court purposely chose to ignore the remedial benefits granted to GBI by the Shoreline Management Act. The Trial Court's action is directly contrary to the choice made by the

people of the State of Washington, allowing previously uncontested fills to remain subject to the “controls” of the Shoreline Management Act and local zoning codes. Those controls are amply identified in the record.<sup>16</sup> They are the same controls pointed to in the *Caminiti* decision as sufficient to affirm a statute permitting intrusion into navigable waters (docks in that case), and not an abdication of responsibility for controlling *jus publicum*.

The Trial Court’s error below requires reversal.

**C. Approving Protection for pre-1969 Fills Did Not Violate the Public Trust Doctrine.**

The thrust of the CBC complaint and the City of Chelan counterclaim is that the Three Fingers fill in Lake Chelan, a navigable body of water, violated the public trust doctrine as articulated by the Washington State Supreme Court in *Wilbour* and *Caminiti*. But a review of that doctrine and the cases surrounding it, both in this state and in the U.S. Supreme Court, shows that the consents granted in the Shoreline Management Act, RCW 90.58.270, were in line with authorities granted to the states to manage public waters. The Trial Court erred in refusing to give those provisions the remedial attention to which they were entitled.

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<sup>16</sup> See January 29, 2015 declaration of Ryan Walker for the shoreline master program, City zoning ordinance and Comprehensive Plan (AR 1664-2374).

**1. The public trust background.**

The public trust doctrine arises out of the state's ownership and control of navigable waters and associated lands covered by navigable waters at the time of statehood. *Illinois Cent. R. Co. v. State of Illinois*, 146 U.S. 387, 435, 13 S. Ct. 110, 111, 36 L. Ed. 1018 (1892) (“It is the settled law of this country that the ownership of and dominion and sovereignty over lands covered by tide waters, within the limits of the several states, belong to the respective states within which they are found[.]”).

The public trust doctrine originates in common law and provides that the state holds an interest “*jus publicum*” in navigable waters, which it holds in trust for the people of the state:

This *jus publicum* interest as expressed in the English common law and in the common law of this state from earliest statehood, is composed of the right of navigation and the fishery. More recently, this *jus publicum* interest was more particularly expressed by this court in *Wilbour v. Gallagher*, 77 Wash.2d 306, 316, 462 P.2d 232 (1969) as the right 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. In *Caminiti*, the court was faced with whether a statute allowing docks in public waters may have violated the public trust doctrine. In reviewing the legislation, the court distinguished

the “abdication of control” (fill with no control found in the *Wilbour* case), which is prohibited by the public trust doctrine, from the “exercise of control,” which is the hallmark of proper public trust management.

We also observe that the legislation enacted here is a far cry from that confronting the United States Supreme Court in the leading “public trust doctrine” case of *Illinois Cent. R.R. v. Illinois*, 146 U.S. 387, 13 S.Ct. 110, 36 L.Ed. 1018 (1892). In that case, the Illinois Legislature had not only sold all of the land under one of the world’s largest harbors (the Harbor of Chicago) to a private railroad company, but had also surrendered all right to control the harbor. There it was held that by so doing the Illinois Legislature had abdicated state sovereignty and dominion over the *jus publicum* . . . ;

*Id.* at 675. In adopting the Shoreline Management Act, the salient question then is whether the state exercised control or abdicated control for the maintenance and development of fills, such as the Three Fingers fill, in public waters. The plain answer is that the state exercised significant control--sufficient to satisfy the requirements of protecting the *jus publicum*.

**2. The *Illinois Central v. Illinois* decision and the doctrine of abdication vs. control in Public Trust cases.**

Much of the discussion below turned on the claim by CBC and the City of Chelan that that the *jus publicum* could never be lost and that the state had abdicated its responsibility by allowing the Three Fingers fill to remain. See CBC brief filed March 22, 2012 at 15-18 (AR 368-71) and the City of Chelan brief filed February 28, 2012 at 11-13 (AR 236-38).

The *Caminiti* decision cited *Illinois Cent. R.R. v. Illinois*, 146 U.S. 387, 13 S. Ct. 110, 36 L. Ed. 1018 (1892), in which the U.S. Supreme Court upheld the invalidation of a contract the State of Illinois had previously signed with the Illinois Central Railroad.

In discussing title to lands under navigable waters, the *Illinois Central* court declared:

It is a title held in trust for the people of the state, that they may enjoy the navigation of the waters . . . .It is grants of parcels of lands under navigable waters that may afford foundation for wharves, piers, docks, and other structures in aid of commerce, and grants of parcels which, being occupied, do not substantially impair the public interest in the lands and waters remaining, that are chiefly considered and sustained in the adjudged cases as a valid exercise of legislative power consistently with the trust to the public upon which such lands are held by the state.

146 U.S. at 452. The second issue, and the one for which the case is most cited, involved the right of the State of Illinois to surrender control over the use and development of more than one mile of the Chicago harbor through the conveyance of the fee to the bed of the harbor lands covered by water to the railroad. Under such a grant,

the act put it in the power of the company to delay indefinitely the improvement of the harbor, or to construct as many docks, piers, and wharves and other works as it might choose, and at such positions in the harbor as might suit its purposes, and permit any kind of business to be conducted thereon, and to lease them out on its own terms for indefinite periods.

*Id.* at 451. It was the claimed right of the railroad to unfettered control of the submerged lands and waters remaining in the Chicago harbor by a private corporation to which the Supreme Court objected. As stated by the Court:

Such abdication is not consistent with the exercise of that trust which requires the government of the state to preserve such waters for the use of the public. *The trust devolving upon the state for the public, and which can only be discharged by the management and control of property in which the public has an interest, cannot be relinquished by a transfer of the property. The control of the state for the purposes of the trust can never be lost, except 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.*

*Id.* at 453 (emphasis added).<sup>17</sup> The “abdication” language in the *Illinois Central* decision was picked up by the *Caminiti* court in deciding whether the adoption of a statute allowing docks in certain circumstances, which would necessarily impede a certain degree of navigation, constituted “abdication” of the *jus publicum*. As stated by the court:

The control of the State for the purposes of the trust can never be lost, except 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.

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<sup>17</sup> For a map of the Chicago harbor laying out the details of the harbor at issue in *Illinois Central*, see Map “2” to the declaration of Dale Weaver (AR 2470) attached hereto as Appendix 2, Attachment 6.

*Caminiti*, 107 Wn.2d at 670. In ruling that the Washington Legislature had not abdicated its *jus publicum* responsibilities in adopting the statute in question, the *Caminiti* court focused on the issue of public interest and control. Providing access to the water through docks can serve the public interest, and the size, location, and propriety of a dock in a given location are controlled through zoning, the state hydraulics code, the Shoreline Management Act, and other regulations ensuring that the intrusions on navigable waters are still subject to public control. *Id.* at 672-73.

We also observe that the legislation enacted here is a far cry from that confronting the United States Supreme Court in the leading “public trust doctrine” case of *Illinois Cent. R.R. v. Illinois*, 146 U.S. 387, 13 S.Ct. 110, 36 L. Ed. 1018 (1892). In that case, the Illinois Legislature . . . had also surrendered all right to control the harbor. There it was held that by so doing the Illinois Legislature had abdicated state sovereignty and dominion over the *jus publicum*; here, the Washington Legislature has not abdicated state sovereignty or dominion over the *jus publicum*.

*Id.* at 675. CBC asserted that the adoption of the Shoreline Management Act and the consent to navigation impairment to pre-1969 fills in RCW 90.58.270 was an abdication of the state’s control over navigable waters and hence not protective of the *jus publicum*. But a simple review of the key cases on point (*State v. Longshore*, 141 Wn.2d 414, 5 P.3d 1256 (2000); *Citizens for Responsible Wildlife Mgmt. v. State*, 124 Wn. App. 566, 103 P.3d 203 (2004); *Caminiti v. Boyle*, 107 Wn.2d 662, 732 P.2d 989

(1987); *Montana v. United States*, 450 U.S. 544, 566, 101 S. Ct. 1245, 67 L. Ed. 2d 493 (1981)) makes it clear that the state has the authority and discretion to determine how the *jus publicum* rights are to be used and protected within the state and that allowing fill under controlled circumstances is very much part of exercising that responsibility.

The state was fully within its rights to grant consent to existing fills such as the Three Fingers fill, which had been in the water without prior objection or legal claim, and the Trial Court erred in failing to recognize the rights granted to GBI and the protections of its property in the Three Fingers fill. The error requires reversal and dismissal of the case.

**D. The Trial Court Erred in Entering a Final Judgment When Issues of Material Fact Were Present/**

As noted above, resolution of the case on either standing or Shoreline Management Act issues discussed in sections A, B and C above requires dismissal of the case. But even if the Court finds that CBC members had special injuries sufficient to permit the association to seek removal of the Three Fingers fill from the waters of Lake Chelan, and that the protections of RCW 90.58.270 are not applicable protection for the Three Fingers fill, the decision below must be reversed for reasons of dispute of material fact.

In the *Caminiti* and *Illinois Central* cases discussed above, the central issue faced by the courts with a modification of a shoreline that affected the public's rights in navigable waters was whether disturbance to navigational interests by reason of the modification was "substantial" and if so whether it served the public interest. As the *Caminiti* court noted, when the navigational interests of the public are affected by legislation:

we must inquire as to: (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. As noted above, the state clearly did not surrender control of the fills for which consent to the retention of existing fills was given in Initiative 48B, since after the adoption of that provision the development of any such properties was carefully controlled by Chapter 90.58 RCW and the associated local shoreline master programs.

In granting consent to the fill of navigable waters by pre-1969 fills, the people clearly granted the owners of those tracts the right to "maintain" them in their then current condition. But the consent to maintain the fills subject to future development control was not an abdication of control, as in the State of Illinois grant to the Illinois Central Railroad to determine where and when future fill or development may

occur, but rather a tightly controlled consent in which any further development (or fill) would be determined and permitted by the terms of the Shoreline Management Act. Under that act:

*Alterations of the natural condition of the shorelines of the state, in those limited instances when authorized, shall be given priority for single-family residences and their appurtenant structures, ports, shoreline recreational uses including but not limited to parks, marinas, piers, and other improvements facilitating public access to shorelines of the state, industrial and commercial developments which are particularly dependent on their location on or use of the shorelines of the state and other development that will provide an opportunity for substantial numbers of the people to enjoy the shorelines of the state.*

RCW 90.58.020 (emphasis added).

The uncontested record before the Trial Court below showed that on fills in Lake Chelan similar to the Three Fingers fill, Washington Department of Ecology (“WDOE”), the state’s controlling agency, and the City of Chelan, as its managing agent for shorelines, had allowed more than 200 parcels on the filled shores of Lake Chelan, most of which are developed. *See* Beardslee declaration filed January 25, 2012 (AR 138-140) and its Exhibits B 1, 2, 3, 4 and Exhibit C (AR 171-74 and 175-78, respectively). Declaration exhibits attached as Appendix 2, Attachment 7 hereto.

As the hearings proceeded, a second set of declarations called the Trial Court's attention to a number of priority uses that had been built on similar fills and could be built on the Three Finger fill.

a. Single-family housing -- Bardin-Leduc, Beardslee declaration filed January 29, 2015, at 2 and Exhibits A1 and A2 (AR 2376 and AR 2381-82, respectively).

b. Resort properties allowing substantial numbers of people to enjoy the waters of Lake Chelan -- Peterson's resort, Beardslee declaration filed January 29, 2015, at 3 and Exhibits E-1 to E-4 (AR 2377 and AR 2399-2402, respectively).

c. Mixed use residential (water enjoyment) and marina water-dependent uses -- Howe Sound properties, Beardslee declaration filed January 29, 2015, at 3 and Exhibits D1 to D4 (AR 2377 and AR 2394-97, respectively).

d. Water-dependent uses such as the marine terminal presently located on Gallagher fill B, but which remains to this day and was approved with a shoreline permit to serve terminal needs for the Holden mine cleanup. Walker declaration filed January 29, 2015, at 2-3 and Exhibits 7.1-7.6 (AR 1665-6 and AR 2334-59, respectively) describing the shoreline permit issued and Beardslee declaration filed

January 29, 2015, at 2 and Exhibits C1-C4, for current use (2015) (AR 2376 and AR 2386-92, respectively).<sup>18</sup>

The Shoreline Management Act specifically required WDOE, as the agency managing the public trust doctrine under the Shoreline Management Act, to recognize and appropriately designate portions of the shoreline that have been altered, whether through natural or man-made causes.

Alterations of the natural condition of the shorelines and shorelands of the state shall be recognized by the department. Shorelines and shorelands of the state shall be appropriately classified and these classifications shall be revised when circumstances warrant regardless of whether the change in circumstances occurs through man-made causes or natural causes.

RCW 90.58.020.

The record below showed (1) that the City had adopted a shoreline master program by 1977, and the GBI property was designated as “Urban” under the shoreline master program regulating and controlling all future development, and (2) that the City had subsequently zoned the property for Waterfront Commercial uses (CW zone, CMC Chapter 17.40 (AR 2150), which is the City’s most intense zone.<sup>19</sup>

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<sup>18</sup> See copies of referenced photos attached hereto in Appendix 2, Attachment 8.

<sup>19</sup> The zoning and shoreline designation may be found in the short plat decision of the City planner, Gildroy, dated July 25, 2011, attached to the declaration of Craig Gildroy as Exhibit “A” at pages 2 and 10 thereof (AR 272 and 280, respectively).

The declarations of Terhaar and McKellar previously referenced pointed out historic uses, including the preliminary use for the Holden staging (*see* Terhaar declaration filed July 23, 2012, at 3-7, (AR 872-76)), but in fact the site had not been fully developed, although it did have water and access to the public streets.

The GBI sites were “alterations of the natural condition of the shorelines” which was approved by the enactment of RCW 90.58.270(1) in the state’s administration of the public trust doctrine. *Portage Bay*, 92 Wn.2d 1.

WDOE and the City recognized the altered shorelines of Lake Chelan and, until this case, have proceeded to approve projects on similarly situated fills consistent with the controls of the Shoreline Management Act and implementing master program. The Trial Court’s ruling that the GBI property could not serve a public purpose was contradicted by substantial evidence in the record and requires reversal and, if not erroneous as a matter of law, at the very least requires a trial.

Likewise, there were disputed issues of material fact as to whether CBC showed substantial interference sufficient to support its claim for nuisance. As noted above, none of CBC’s affiants had ever used the waters of the bay in question by 1961 when such use was cut off by the Three Fingers fill. The Three Fingers fill is approximately 2% of the total

no wake zone and a tiny portion/small fraction of the lower lake recreation area. *See* Beardslee declaration filed January 29, 2015, at 4 and Exhibits H and I thereto (AR 2378 and AR 2408 and 2410, respectively).

In the absence of any facts in the record about actual use by CBC members for specific purposes, and given the hypothetical projections as to possible future use, and given the very small impediment in Lake Chelan overall, the Trial Court's conclusion below that the three Fingers fill substantially interfered with the waters of Lake Chelan as a matter of law is not supported by the facts in the record and certainly requires reversal and remand for trial.

## VII. SUMMARY AND CONCLUSION

The Trial Court below erred on multiple grounds in entering the orders below:

1. The Trial Court granted CBC standing to secure the removal of fill owned by GBI and in place since 1962 with no member of CBC alleging the special needs required by RCW 7.48.210 to secure removal of a public nuisance under RCW 7.48.140(3). The decision violates RCW 7.48.210 requiring proof of special injury prior to the Trial Court's having jurisdiction to address the issue on the merits, *Lampa*, 179 Wash. 184 and requires reversal of the decision below and dismissal of the cause of action for want of standing.

2. The Trial Court failed to give the Three Fingers fill the protections to which it was entitled under RCW 90.58.270(1)(2), which was a remedial statute written to address the issues of the public trust doctrine and pre-1969 fills. And in doing so, the state exercised its authority under the public trust doctrine to recognize the benefit of retaining the existing fills, under adequate control, provided by the provisions of Chapter 90.58 RCW. Further, by providing that protection to existing fills in the Shoreline management Act, the Three Finger fill is protected from abatement by RCW 7.48.160, as a fill maintained under the authority of statutes.

3. The Trial Court erred as a matter of law and the decision below reversed and dismissed as a matter of law as CBC has no standing to seek removal of the pre-1969 fills under the facts of the case, and the fills are protected from such suits by the provisions of Chapter 7.48 RCW.

#### **VIII. REQUESTED RELIEF**

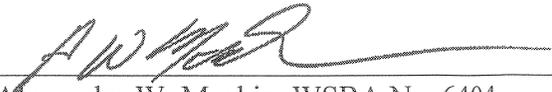
The Court of Appeals is requested to reverse the decision of the Trial Court below based on the following errors: (1) That CBC had standing to pursue the remedy of removing the Three Fingers fill from the waters of Lake Chelan, and ( 2).That GBI and the Three Fingers fill were not protected by the terms of RCW 90.58.270(1) and (2) from precisely the type of proceeding filed by CBC.

And for both reasons, the case should be remanded and dismissed.

Alternatively, the case must be reversed and remanded for trial due to the existence of material facts below on the issues of lack of substantial interference and authorized development serving the public interest .

DATED: May 15, 2015

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	Chelan Municipal Code, 17.40.010, Permitted uses.
<b>Appendix 2</b>	<b>Attachments from the Record</b>
Attachment 1	Site view of Three Fingers property as it existed at the time the lawsuit was filed, as shown in Exhibit C-4 to January 29, 2015 Beardslee Declaration (AR 2391) [For convenience a color version of this page from the original declaration is also included]
Attachment 2	Declarations of Hauge (AR 375-78), Schuldt (AR 379-83) and Page (AR 384-88)
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Attachment 5	Pertinent excerpts of the Official Voters Pamphlet published by Washington Secretary of State A. Ludlow Kramer for the general election held in Washington on November 7, 1972, which was attached as Exhibit 1 to the Declaration of Alexander Mackie filed July 23, 2012 (AR 935, 939, 940, 946)
Attachment 6	Map of the Chicago harbor laying out details of the harbor at issue in <i>Illinois-Central</i> , which is Map "2" to the Declaration of Dale Weaver (AR 2470) [For convenience a color version of this page from the

	original declaration is also included]
Attachment 7	Exhibits to Beardslee declaration filed January 25, 2012: Exhibits B 1, 2, 3, 4 and Exhibit C (AR 171-74 and 175-78, respectively) [For convenience a color version of several of these pages from the original declaration is also included]
Attachment 8	Photos from Exhibits to Beardslee Declaration filed January 29, 2015 [For convenience a color version of these pages from the original declaration is also included]

# **APPENDIX 1**

## **Pertinent Statutes and Ordinances**

**RCW 7.48.020**

**Who may sue — Judgment for damages — Warrant for abatement — Injunction.**

Such action may be brought by any person whose property is, or whose patrons or employees are, injuriously affected or whose personal enjoyment is lessened by the nuisance. If judgment be given for the plaintiff in such action, he or she may, in addition to the execution to enforce the same, on motion, have an order allowing a warrant to issue to the sheriff to abate and to deter or prevent the resumption of such nuisance. Such motion shall be allowed, of course, unless it appear on the hearing that the nuisance has ceased, or that such remedy is inadequate to abate or prevent the continuance of the nuisance, in which latter case the plaintiff may have the defendant enjoined.

[1994 c 45 § 5; 1891 c 50 § 1; Code 1881 § 606; 1877 p 126 § 611; 1869 p 144 § 560; 1854 p 207 § 406; RRS § 944.]

**Notes:**

**Findings -- Declaration -- Severability -- 1994 c 45:** See notes following RCW 7.48.140.

**RCW 7.48.140****Public nuisances enumerated.**

It is a public nuisance:

(1) To cause or suffer the carcass of any animal or any offal, filth, or noisome substance to be collected, deposited, or to remain in any place to the prejudice of others;

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

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

(4) To obstruct or encroach upon public highway, private ways, streets, alleys, commons, landing places, and ways to burying places or to unlawfully obstruct or impede the flow of municipal transit vehicles as defined in RCW 46.04.355 or passenger traffic, access to municipal transit vehicles or stations as defined in \*RCW 9.91.025(2)(a), or otherwise interfere with the provision or use of public transportation services, or obstruct or impede a municipal transit driver, operator, or supervisor in the performance of that individual's duties;

(5) To carry on the business of manufacturing gun powder, nitroglycerine, or other highly explosive substance, or mixing or grinding the materials therefor, in any building within fifty rods of any valuable building erected at the time such business may be commenced;

(6) To establish powder magazines near incorporated cities or towns, at a point different from that appointed by the corporate authorities of such city or town; or within fifty rods of any occupied dwelling house;

(7) To erect, continue, or use any building, or other place, for the exercise of any trade, employment, or manufacture, which, by occasioning obnoxious exhalations, offensive smells, or otherwise is offensive or dangerous to the health of individuals or of the public;

(8) To suffer or maintain on one's own premises, or upon the premises of another, or to permit to be maintained on one's own premises, any place where wines, spirituous, fermented, malt, or other intoxicating liquors are kept for sale or disposal to the public in contravention of law;

(9) For an owner or occupier of land, knowing of the existence of a well, septic tank, cesspool, or other hole or excavation ten inches or more in width at the top and four feet or more in depth, to fail to cover, fence or fill the same, or provide other proper and adequate safeguards: PROVIDED, That this section shall not apply to a hole one hundred square feet or more in area or one that is open, apparent, and obvious.

Every person who has the care, government, management, or control of any building, structure, powder magazine, or any other place mentioned in this section shall, for the purposes of this section, be taken and deemed to be the owner or agent of the owner or owners of such

RCW 7.10.101 & 7.10.102 REPEALED BY CHAPTER 1450 OF 2012

building, structure, powder magazine or other place, and, as such, may be proceeded against for erecting, contriving, causing, continuing, or maintaining such nuisance.

[1994 c 45 § 2; 1955 c 237 § 1; 1895 c 14 § 1; Code 1881 § 1246; RRS § 9913.]

**Notes:**

**\*Reviser's note:** The reference to RCW 9.91.025(2)(a) appears to be erroneous. Reference to RCW 9.91.025(2) was apparently intended.

**Findings -- Declaration -- 1994 c 45:** "The legislature finds that it is important to the general welfare to protect and preserve public safety in the operation of public transportation facilities and vehicles, in order to protect the personal safety of both passengers and employees. The legislature further finds that public transportation facilities and services will be utilized more fully by the general public if they are assured of personal safety and security in the utilization.

The legislature recognizes that cities, towns, counties, public transportation benefit areas, and other municipalities that offer public transportation services have the independent authority to adopt regulations, rules, and guidelines that regulate conduct in public transportation vehicles and facilities to protect and preserve the public safety in the operation of the vehicles and facilities. The legislature finds that this act is not intended to limit the independent authority to regulate conduct by these municipalities. The legislature, however, further finds that this act is necessary to provide statewide guidelines that regulate conduct in public transportation vehicles and facilities to further enhance the independent regulatory authority of cities, towns, counties, public transportation benefit areas, and any other municipalities that offer public transportation services." [1994 c 45 § 1.]

**Severability -- 1994 c 45:** "If any provision of this act or its application to any person or circumstance is held invalid, the remainder of the act or the application of the provision to other persons or circumstances is not affected." [1994 c 45 § 6.]

**Crimes**

malicious mischief: Chapter 9.61 RCW.  
nuisance: Chapter 9.66 RCW.

Devices simulating traffic control signs declared public nuisance: RCW 47.36.180.

**RCW 7.48.160**

**Authorized act not a nuisance.**

Nothing which is done or maintained under the express authority of a statute, can be deemed a nuisance.

[Code 1881 § 1238; 1875 p 79 § 4; RRS § 9916.]

**RCW 7.48.200 Remedies.**

The remedies against a public nuisance are: Indictment or information, a civil action, or abatement. The remedy by indictment or information shall be as regulated and prescribed in this chapter. When a civil action for damage is resorted to, the practice shall conform to RCW 7.48.010 through 7.48.040.

[1957 c 51 § 12; Code 1881 § 1242; 1875 p 80 § 8; RRS § 9920.]

**RCW 7.48.210**

**Civil action, who may maintain.**

A private person may maintain a civil action for a public nuisance, if it is specially injurious to himself or herself but not otherwise.

[2011 c 336 § 218; Code 1881 § 1243; 1875 p 80 § 9; RRS § 9921.]

RCW 90.58.020: Legislative findings — State policy enunciated — Use preference. Page 1 of 2

## **RCW 90.58.020**

### **Legislative findings — State policy enunciated — Use preference.**

The legislature finds that the shorelines of the state are among the most valuable and fragile of its natural resources and that there is great concern throughout the state relating to their utilization, protection, restoration, and preservation. In addition it finds that ever increasing pressures of additional uses are being placed on the shorelines necessitating increased coordination in the management and development of the shorelines of the state. The legislature further finds that much of the shorelines of the state and the uplands adjacent thereto are in private ownership; that unrestricted construction on the privately owned or publicly owned shorelines of the state is not in the best public interest; and therefore, coordinated planning is necessary in order to protect the public interest associated with the shorelines of the state while, at the same time, recognizing and protecting private property rights consistent with the public interest. There is, therefore, a clear and urgent demand for a planned, rational, and concerted effort, jointly performed by federal, state, and local governments, to prevent the inherent harm in an uncoordinated and piecemeal development of the state's shorelines.

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

The legislature declares that the interest of all of the people shall be paramount in the management of shorelines of statewide significance. The department, in adopting guidelines for shorelines of statewide significance, and local government, in developing master programs for shorelines of statewide significance, shall give preference to uses in the following order of preference which:

- (1) Recognize and protect the statewide interest over local interest;
- (2) Preserve the natural character of the shoreline;
- (3) Result in long term over short term benefit;
- (4) Protect the resources and ecology of the shoreline;
- (5) Increase public access to publicly owned areas of the shorelines;
- (6) Increase recreational opportunities for the public in the shoreline;
- (7) Provide for any other element as defined in RCW 90.58.100 deemed appropriate or necessary.

In the implementation of this policy the public's opportunity to enjoy the physical and aesthetic qualities of natural shorelines of the state shall be preserved to the greatest extent

feasible consistent with the overall best interest of the state and the people generally. To this end uses shall be preferred which are consistent with control of pollution and prevention of damage to the natural environment, or are unique to or dependent upon use of the state's shoreline. Alterations of the natural condition of the shorelines of the state, in those limited instances when authorized, shall be given priority for single-family residences and their appurtenant structures, ports, shoreline recreational uses including but not limited to parks, marinas, piers, and other improvements facilitating public access to shorelines of the state, industrial and commercial developments which are particularly dependent on their location on or use of the shorelines of the state and other development that will provide an opportunity for substantial numbers of the people to enjoy the shorelines of the state. Alterations of the natural condition of the shorelines and shorelands of the state shall be recognized by the department. Shorelines and shorelands of the state shall be appropriately classified and these classifications shall be revised when circumstances warrant regardless of whether the change in circumstances occurs through man-made causes or natural causes. Any areas resulting from alterations of the natural condition of the shorelines and shorelands of the state no longer meeting the definition of "shorelines of the state" shall not be subject to the provisions of chapter 90.58 RCW.

Permitted uses in the shorelines of the state shall be designed and conducted in a manner to minimize, insofar as practical, any resultant damage to the ecology and environment of the shoreline area and any interference with the public's use of the water.

[1995 c 347 § 301; 1992 c 105 § 1; 1982 1st ex.s. c 13 § 1; 1971 ex.s. c 286 § 2.]

**Notes:**

**Finding -- Severability -- Part headings and table of contents not law -- 1995 c 347:**  
See notes following RCW 36.70A.470.

**RCW 90.58.270**

**Nonapplication to certain structures, docks, developments, etc., placed in navigable waters — Nonapplication to certain rights of action, authority — Floating homes and floating on-water residences must be classified as a conforming preferred use.**

(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.

(2) Nothing in this section shall be construed as altering or abridging any private right of action, other than a private right which is based upon the impairment of public rights consented to in subsection (1) of this section.

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**Chapter 17.40**  
**ZONE C-W – WATERFRONT COMMERCIAL DISTRICT**

Sections:

17.40.010 Permitted uses.

**17.40.010 Permitted uses.**

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Permitted uses are as follows:

- A. Any use permitted in the R-1 Residential District, the R-M Residential District, and the C-L Commercial District;
- B. Boat building;
- C. Service stations with appertaining uses, provided that no vehicle shall be repaired, painted, rented, built or sold upon or from the premises;
- D. Commercial water transportation facilities, which may include a protected aboveground tank as an accessory use, subject to the conditions set forth in Section 17.40.020D;
- E. Industrial docks with appertaining machinery, which may include a protected aboveground tank as an accessory use, subject to the conditions set forth in Section 17.40.020D; provided, that no product is manufactured on the premises;
- F. Boat servicing and fueling facilities which may include a protected aboveground tank as an accessory use, subject to the conditions set forth in Section 17.40.020D;
- G. Radio and TV studios;
- H. Transient businesses;
- I. Marina facilities, which may include a protected aboveground tank as an accessory use, subject to the conditions set forth in Section 17.40.020D;
- J. Adult entertainment facilities subject to the provisions of Section 17.04.125;
- K. Boat sales, including the display and sale of not more than three motor vehicles at any time as an accessory use to the principal permitted use of boat sales under the following minimum conditions:
  - 1. The display and sale of motor vehicles is permitted only when operated as an accessory use to the principal permitted use of the premises when that principal use is boat sales;

2. No more than three motor vehicles shall be displayed for sale on the subject premises at any time;
3. All motor vehicles for sale shall be maintained in an operable condition at all times that such motor vehicles are located on the subject premises;
4. Motor vehicles for sale shall be licensed and registered with the state at all times that such motor vehicles are located on the subject premises;
5. Motor vehicles and motor vehicle parts shall not be stored, painted, repaired, dismantled, built, restored, or modified in any way on the subject premises;
6. The renting and leasing of motor vehicles is not permitted;
7. The motor vehicle sales activities shall be owned and operated by the owner of the boat sales business located on the subject premises and shall not be delegated or otherwise conveyed to other individuals or entities; and
8. Termination of the boat sales activities located on the subject premises shall terminate any motor vehicle sales business operated on the premises. (Ord. 1204 §§ 1, 2, 2001; Ord. 1189 § 4, 2000; Ord. 1104 § 2, 1998; Ord. 911 § 1, 1991; Ord. 837 § 3, 1988; Ord. 724 § 4, 1983; Ord. 355 § 2, 1966; Ord. 314 § 11A, 1962).

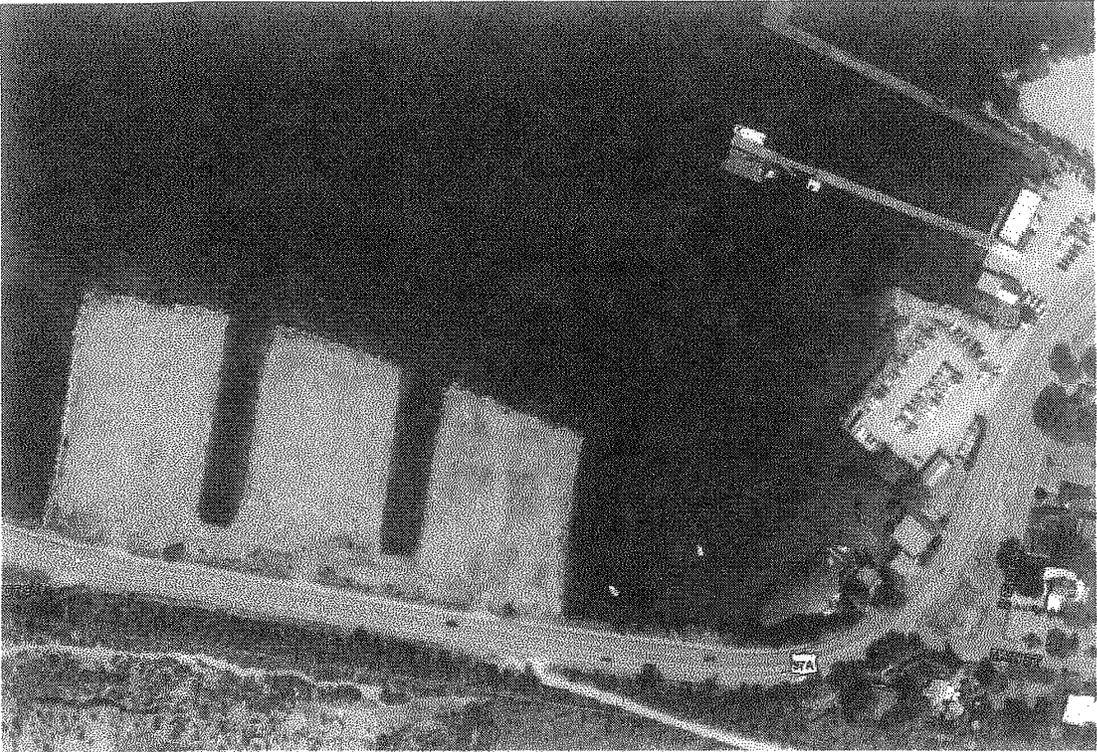
# **APPENDIX 2**

## **Attachments from the Record**

# **APPENDIX 2**

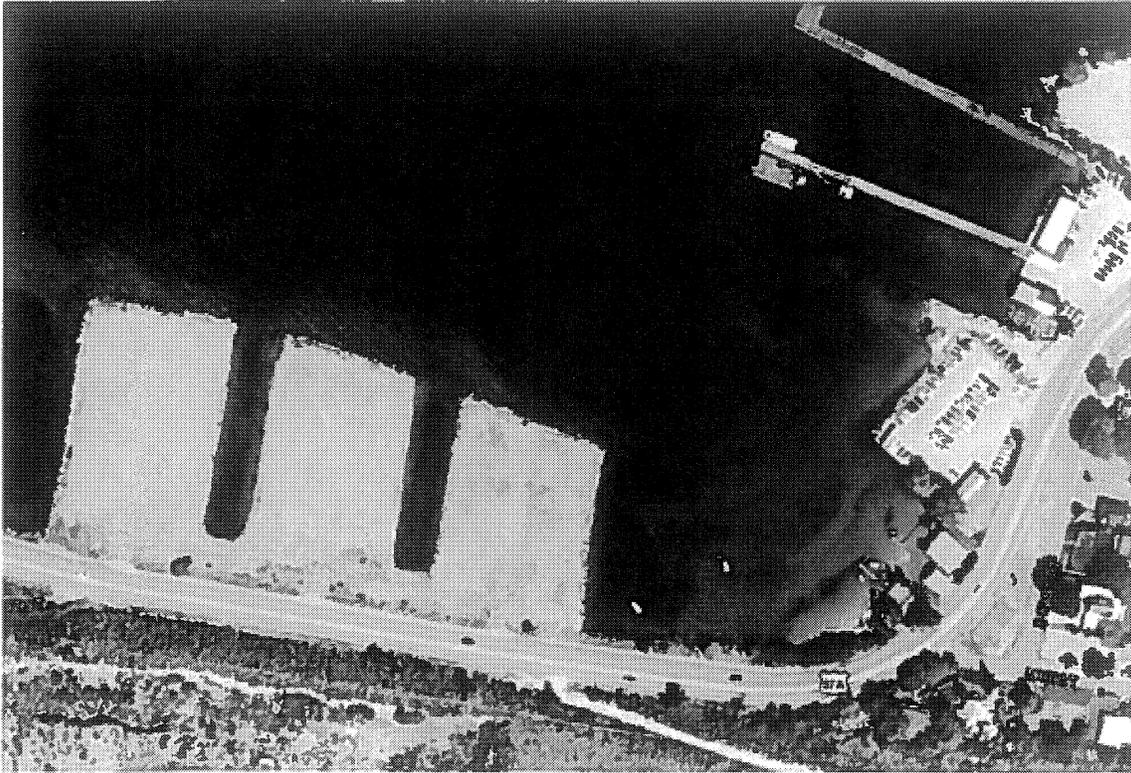
## **Attachment 1**

GALLAGHER FILL B, C. 2011



0-2391

GALLAGHER FILL B, C. 2011



[This is a color version of AR 2391 from the original declaration]

# **APPENDIX 2**

## **Attachment 2**

FILED

MAR 22 2012

KIM MORRISON  
CHELAN COUNTY CLERK

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IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON  
FOR CHELAN COUNTY

CHELAN BASIN CONSERVANCY,

Plaintiff,

NO. 11-2-01267-5

v.

GBI HOLDING CO.,

DECLARATION OF TAMMY  
HAUGE

Defendant

and

CITY OF CHELAN; STATE OF  
WASHINGTON; and CHELAN  
COUNTY PUBLIC UTILITY  
DISTRICT,

Additional Named  
Parties.

I, Tammy Hauge, declare as follows:

1. I am over the age of 18 and competent to testify. The information in this  
declaration is based on my personal knowledge and belief.

2. I am a director and a member of the Chelan Basin Conservancy, the  
plaintiff in this action. The Chelan Basin Conservancy is a Washington non-profit

1 corporation organized to protect the rights of its members, itself, and the public with  
2 respect to the use and enjoyment of the navigable waters of Lake Chelan, among other  
3 things.

4 3. I reside at 2129 W. Prospect, Chelan, Washington. My home is within the  
5 Lakeside community – just to the west of, and within walking distance of, the Goodfellow  
6 “Three Fingers” fill. I do not own waterfront property and so my access to and enjoyment  
7 of Lake Chelan is dependent upon access through limited public access points.  
8

9 4. As a resident of the community of Lakeside, I believe that the 1927 deed  
10 granted a perpetual right of access to Lake Chelan “at all stages of water” over the vacated  
11 Boulevard Avenue. A portion of this perpetual right of access has been blocked by the  
12 “Three Fingers” fill.  
13

14 5. While I currently use other public access points to reach Lake Chelan, I  
15 believe that the Goodfellow fill blocks my use of significantly better public access.  
16 Because the public access blocked by the Goodfellow fill is so close to my home, my  
17 injury is greater than the general public of Chelan and far greater than the general public of  
18 Washington.  
19

20 6. The Lakeside Bay is unique on Lake Chelan. It is the only sandy bay  
21 intended as Public Access into Lake Chelan. This bay is shallow with very fine sand.  
22 Spader Bay is on the North side of the lake, but is all private property. The PUD owns  
23 property on the west side of the bay. There is a narrow access point there that has been  
24 made even narrower because the PUD has lease private docks on the left and right side of  
25 this access. There is another sandy beach access point on the east side of the Goodfellow  
26 fill. This narrow access is also a vacated street. Unifying these access points by restoring  
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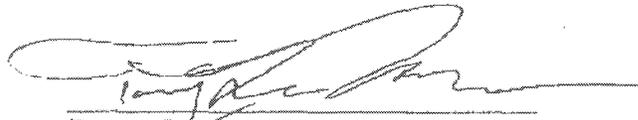
the Lakeside Bay will open up a beautiful sandy beach area for swimming, waterfowl up-lake views. There is not another bay like it and it is a five minute walk from my home.

7. I enjoy bird watching. In the winter mud hens come into the Lakeside Bay and in turn so do eagles. I have observed swans, osprey, hawks and many species of waterfowl taking refuge in the calm bay at dusk. Allowing development on the Goodfellow fill will significantly impact this valuable habitat and cause even further harm to my enjoyment of the bay.

8. I strongly support Chelan Basin Conservancy's effort to bring this action on behalf of myself and other members similarly situated.

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

Dated this 10 day of March, 2012, in Lakeside/Chelan, Washington.

  
\_\_\_\_\_  
Tammy Lee Hauge

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IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON  
FOR CHELAN COUNTY

CHELAN BASIN CONSERVANCY,

Plaintiff,

v.

GBI HOLDING CO.,

Defendant

and

CITY OF CHELAN; STATE OF  
WASHINGTON; and CHELAN  
COUNTY PUBLIC UTILITY  
DISTRICT,

Additional Named Parties.

NO. 11-2-01267-5

DECLARATION OF DAVID S.  
MANN REGARDING FILING OF  
FACSIMILE TRANSMISSION

I, David S. Mann, declare as follows:

1. I am an attorney with the law firm of Gendler & Mann, LLP, attorneys for plaintiff in the above-captioned action. I make this declaration in order to satisfy the requirements of GR 17(a)(2).

2. The document to be filed is the Declaration of Tammy Hauge.

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3. I have examined the document, determined that it consists of five (5) pages, including this declaration and excluding exhibits, and that it is complete and legible.

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

Dated this 21<sup>st</sup> day of March, 2012, at Seattle, Washington.



David S. Mann

**FILED** *FS*  
MAR 22 2012  
KIM MORRISON  
CHELAN COUNTY CLERK

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IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON  
FOR CHELAN COUNTY

CHELAN BASIN CONSERVANCY,

Plaintiff,

NO. 11-2-01267-5

v.

GBI HOLDING CO.,

DECLARATION OF WILLIAM  
SCHULDT

Defendant

and

CITY OF CHELAN; STATE OF  
WASHINGTON; and CHELAN  
COUNTY PUBLIC UTILITY  
DISTRICT,

Additional Named  
Parties.

I, William Schuldt, declare as follows:

1. I am over the age of 18 and competent to testify. The information in this  
declaration is based on my personal knowledge and belief.

2. I am 68 years old and have lived in the Lakeside area of Chelan,  
Washington, since 1971. My home is within three blocks of the GBI or Goodfellow

DECLARATION OF <sup>0-0379</sup> WILLIAM SCHULDT - 1

GENDLER & MANN, LLP  
1424 Fourth Avenue, Suite 715  
Seattle, WA 98101  
Phone: (206) 621-8868  
Fax: (206) 621-0512

1 "Three fingers" landfill area. I am a regular user of Lake Chelan for both fishing and  
2 swimming.

3 3. I do not own waterfront property so I am dependent upon public access sites  
4 to reach the lake. The bay where the Three Fingers are located is the closest public access  
5 point to me. At present there is only one small public access point on the bay where the  
6 fingers are located. The neighborhood has fought hard to keep this beach public for over  
7 40 years. This small beach is the only on this part of the Lake that has a very gradual  
8 sloped sandy bottom extending well out into the lake. Because of the contouring, this  
9 beach is the best place on the lake for swimming and for young children learning to swim.  
10 If the Three Fingers were removed this entire bay would revert to this type of high quality  
11 swimming beach and would include extremely rare and valuable dedicated public access.  
12

13 4. While I currently use the small public access beach both for swimming and  
14 for access to fishing, I believe that the Goodfellow fill blocks my use of significantly better  
15 public access. Because the public access blocked by the Goodfellow fill is so close to my  
16 home, my injury is greater than the general public of Chelan and far greater than the  
17 general public of Washington.  
18

19 5. I am also very concerned that if the Three Fingers area is allowed to  
20 develop into condos or single family homes that the bay will become a boat basin for  
21 anchoring or even docking boats. This will mean that the whole area will be lost to  
22 swimming and fishing.  
23

24 6. We have already lost most of our public access to the lake. I am a member  
25 of Chelan Basin Conservancy and strongly support its effort to bring this action on behalf  
26  
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1 of myself and other members similarly situated so that we can protect and improve this  
2 dedicated public access.

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

5 Dated this 7th day of March 2017 in Lakeside/O'Fallon Washington

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9 William Schuldt

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IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON  
FOR CHELAN COUNTY

CHELAN BASIN CONSERVANCY,

Plaintiff,

v.

GBI HOLDING CO.,

Defendant

and

CITY OF CHELAN; STATE OF  
WASHINGTON; and CHELAN  
COUNTY PUBLIC UTILITY  
DISTRICT,

Additional Named Parties.

NO. 11-2-01267-5

DECLARATION OF DAVID S.  
MANN REGARDING FILING OF  
FACSIMILE TRANSMISSION

I, David S. Mann, declare as follows:

1. I am an attorney with the law firm of Gendler & Mann, LLP, attorneys for plaintiff in the above-captioned action. I make this declaration in order to satisfy the requirements of GR 17(a)(2).

2. The document to be filed is the Declaration of William Schuldt.

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3. I have examined the document, determined that it consists of five (5) pages, including this declaration and excluding exhibits, and that it is complete and legible.

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

Dated this 21<sup>st</sup> day of March, 2012, at Seattle, Washington.



David S. Mann

FILED *LS*  
MAR 22 2012 *5*

KIM MORRISON  
CHELAN COUNTY CLERK

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IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON  
FOR CHELAN COUNTY

CHELAN BASIN CONSERVANCY,

Plaintiff,

NO. 11-2-01267-5

v.

GBI HOLDING CO.,

DECLARATION OF JOHN PAGE JR.

Defendant

and

CITY OF CHELAN; STATE OF  
WASHINGTON; and CHELAN  
COUNTY PUBLIC UTILITY  
DISTRICT,

Additional Named Parties.

I, John Page Jr., declare as follows:

1. I am over the age of 18 and competent to testify. The information in this  
declaration is based on my personal knowledge and belief.



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7. Because the Three Fingers are located in what would be a quiet bay, if they were removed it would significantly increase the ability to enjoy kayaking in this area. It would also make kayaking the south shore much safer and more enjoyable. In addition to making kayaking safer, it would both open up a nice beach area.

8. Public access to Lake Chelan is quite difficult in the Chelan area. There is very little public access left. Removing the fingers would significantly expand the limited public access and make kayaking, swimming, and other water uses much more available and enjoyable.

9. Because the Three Fingers already significantly interfere with use of the lake for kayaking, I believe that allowing additional development of the Three Fingers would even further increase the problems by bringing even more large boat traffic to this area further limiting the ability to kayak or swim.

10. Additional development of the Three Fingers, especially with condos or apartments, would also block everyone's view of the lake as they come into town.

11. I am a member of Chelan Basin Conservancy and strongly support its effort to bring this action on behalf of myself and other members similarly situated.

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

Dated this 19 day of March, 2012, in Chelan, Washington.

  
John Page Jr.

DECLARATION OF JOHN PAGE JR. - 3

GENDLER & MANN, LLP  
1424 Fourth Avenue, Suite 715  
Seattle, WA 98101  
Phone: (206) 821-8868  
Fax: (206) 821-0512

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IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON  
FOR CHELAN COUNTY

CHELAN BASIN CONSERVANCY,

Plaintiff,

NO. 11-2-01267-5

v.

GBI HOLDING CO.,

Defendant

DECLARATION OF DAVID S.  
MANN REGARDING FILING OF  
FACSIMILE TRANSMISSION

and

CITY OF CHELAN; STATE OF  
WASHINGTON; and CHELAN  
COUNTY PUBLIC UTILITY  
DISTRICT,

Additional Named Parties.

I, David S. Mann, declare as follows:

1. I am an attorney with the law firm of Gendler & Mann, LLP, attorneys for plaintiff in the above-captioned action. I make this declaration in order to satisfy the requirements of GR 17(a)(2).

2. The document to be filed is the Declaration of John Page, Jr.

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3. I have examined the document, determined that it consists of five (5) pages, including this declaration and excluding exhibits, and that it is complete and legible.

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

Dated this 21<sup>st</sup> day of March, 2012, at Seattle, Washington.

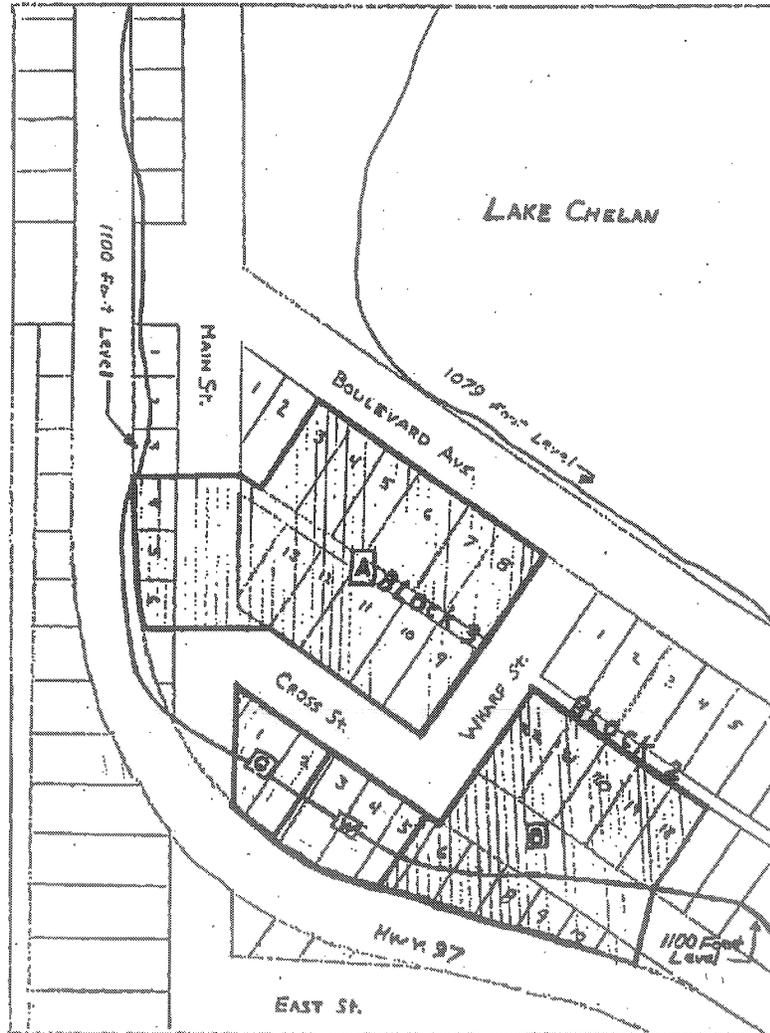


David S. Mann

# **APPENDIX 2**

## **Attachment 3**

and 1,100 foot levels. The lots, blocks, streets and alleys are as shown in the plat of Lake Park, and State Highway 97 has been superimposed. Unfortunately, the block numbers, other than 2 and 3, were omitted, and they will be supplied in our narrative explanation of the drawing.



- A - GALLAGHER FILL, BLOCKS 3 and 6, MAIN and CROSS STREETS
- B - GALLAGHER FILL, BLOCKS 2 and 4, CROSS STREET
- C - GREEN PROPERTY
- W - WILBOUR PROPERTY

# **APPENDIX 2**

## **Attachment 4**

GALLAGHER FILL AREA B, C. 1949

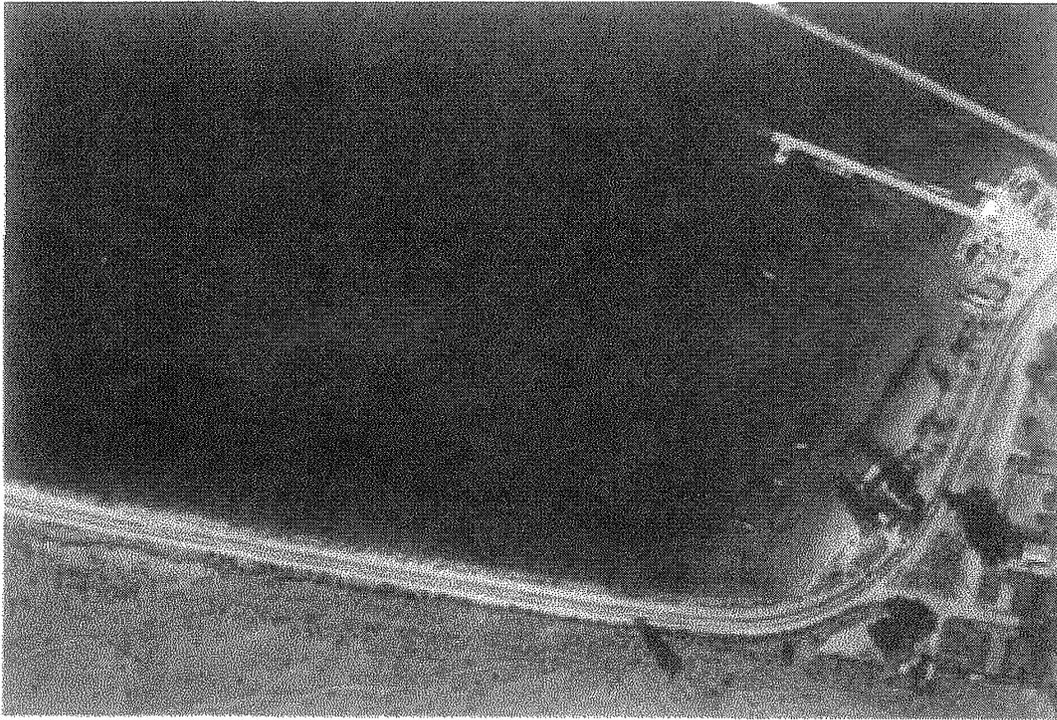


EXHIBIT C-1

0-2386

GALLAGHER FILL AREA B, C. 1949

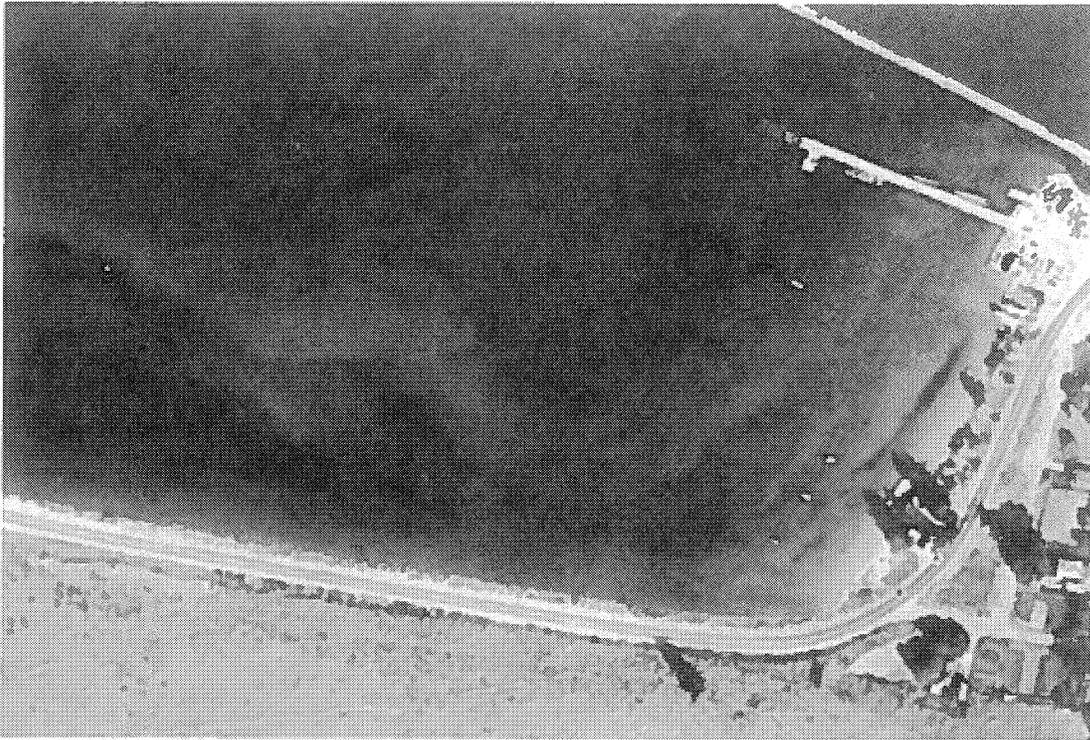
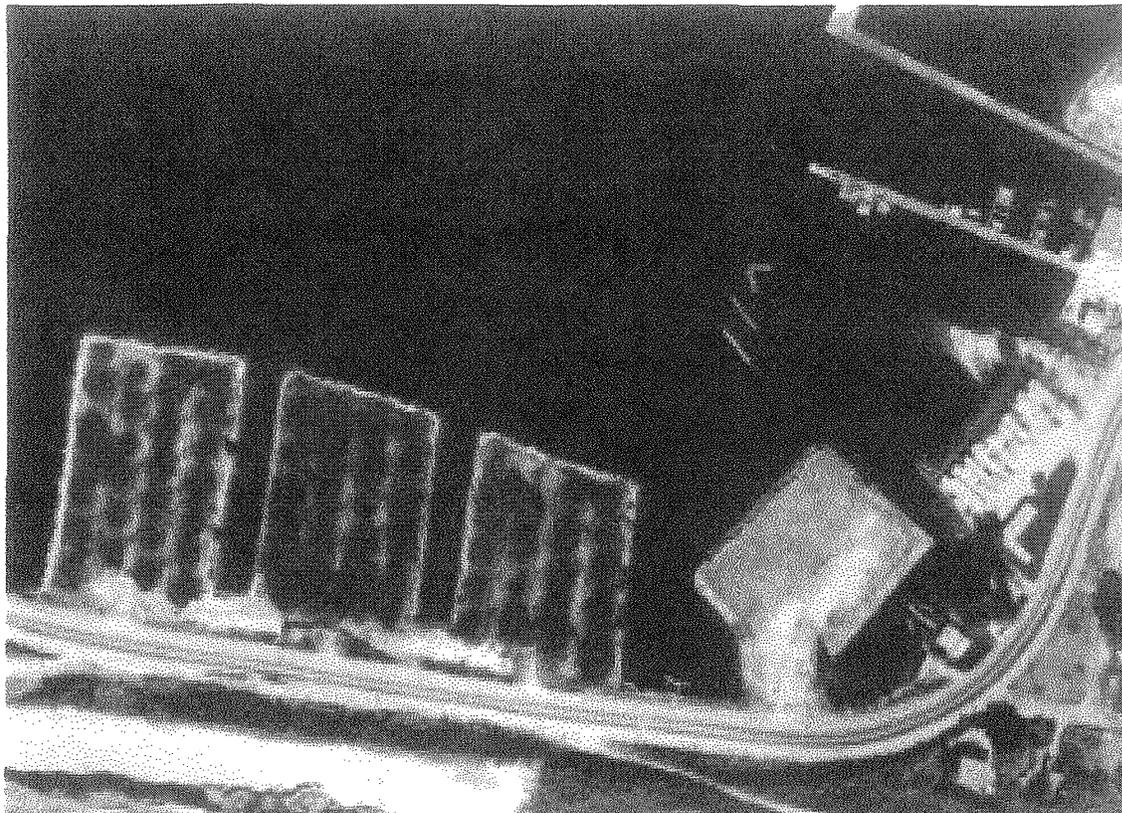


EXHIBIT C-1

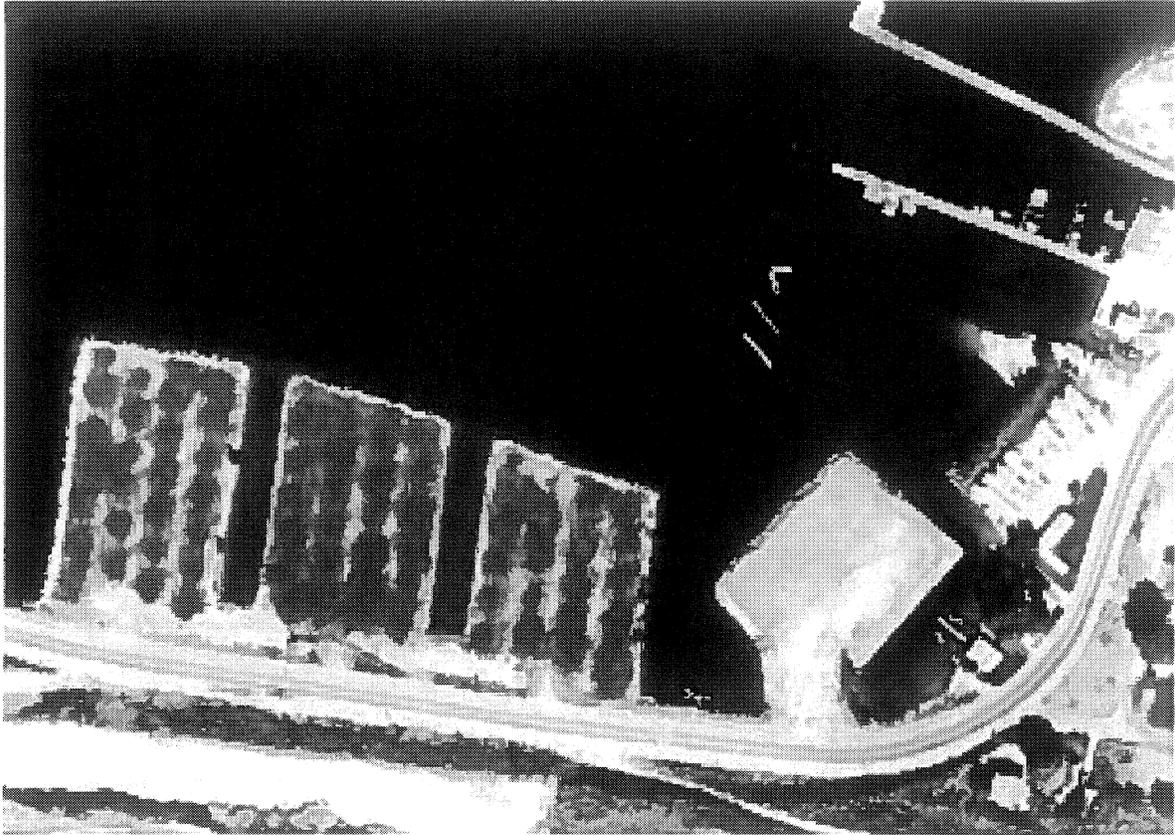
[This is a clearer version of AR 2386 from the original declaration]

GALLAGHER FILL B, C. 1967

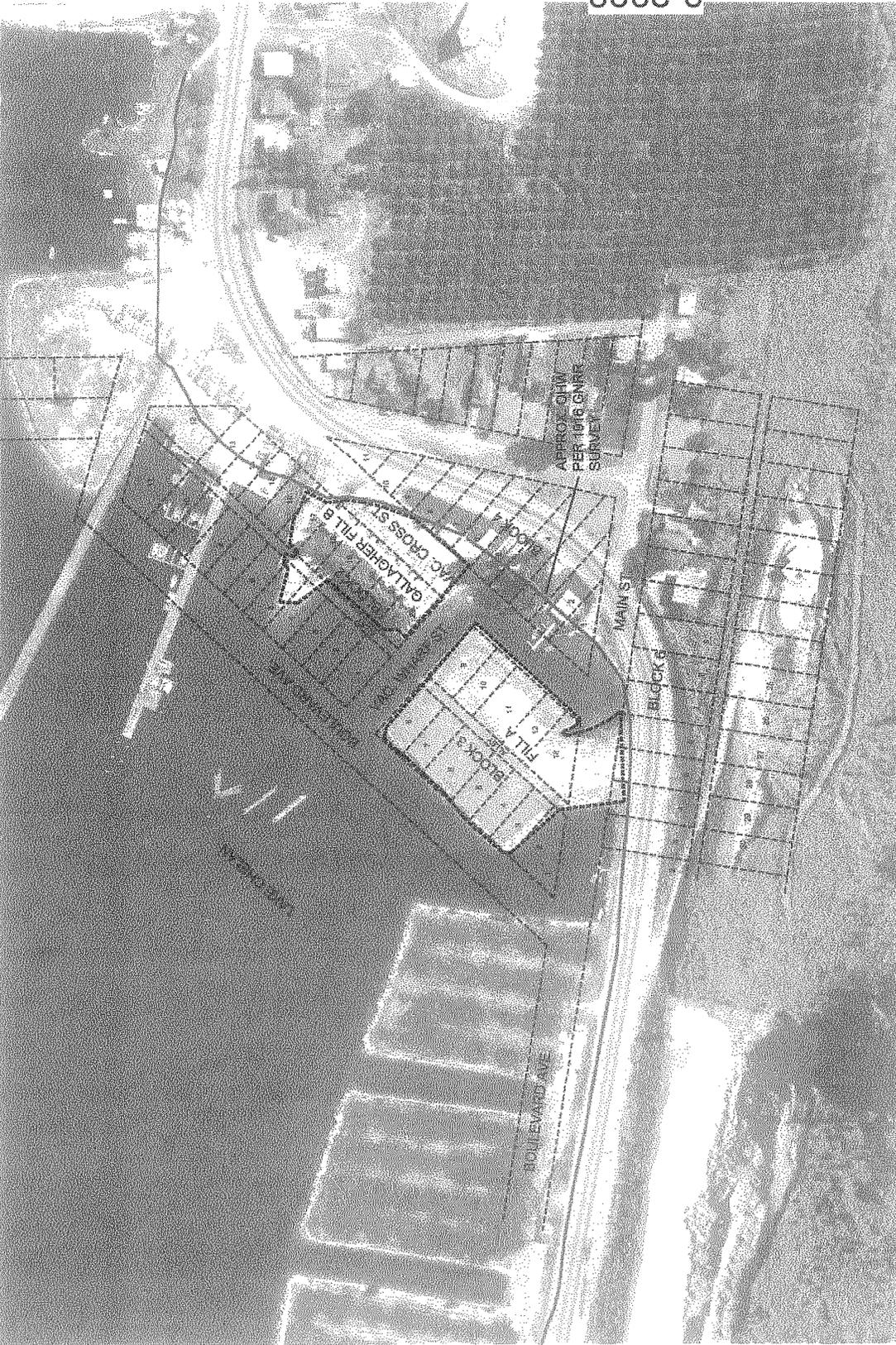


0-2387

GALLAGHER FILL B, C. 1967



[This is a color version of AR 2387 from the original declaration]



0-2388

EXHIBIT C2

**Erlandsen**  
 ENGINEERS | PLANNERS | SURVEYORS | GIS

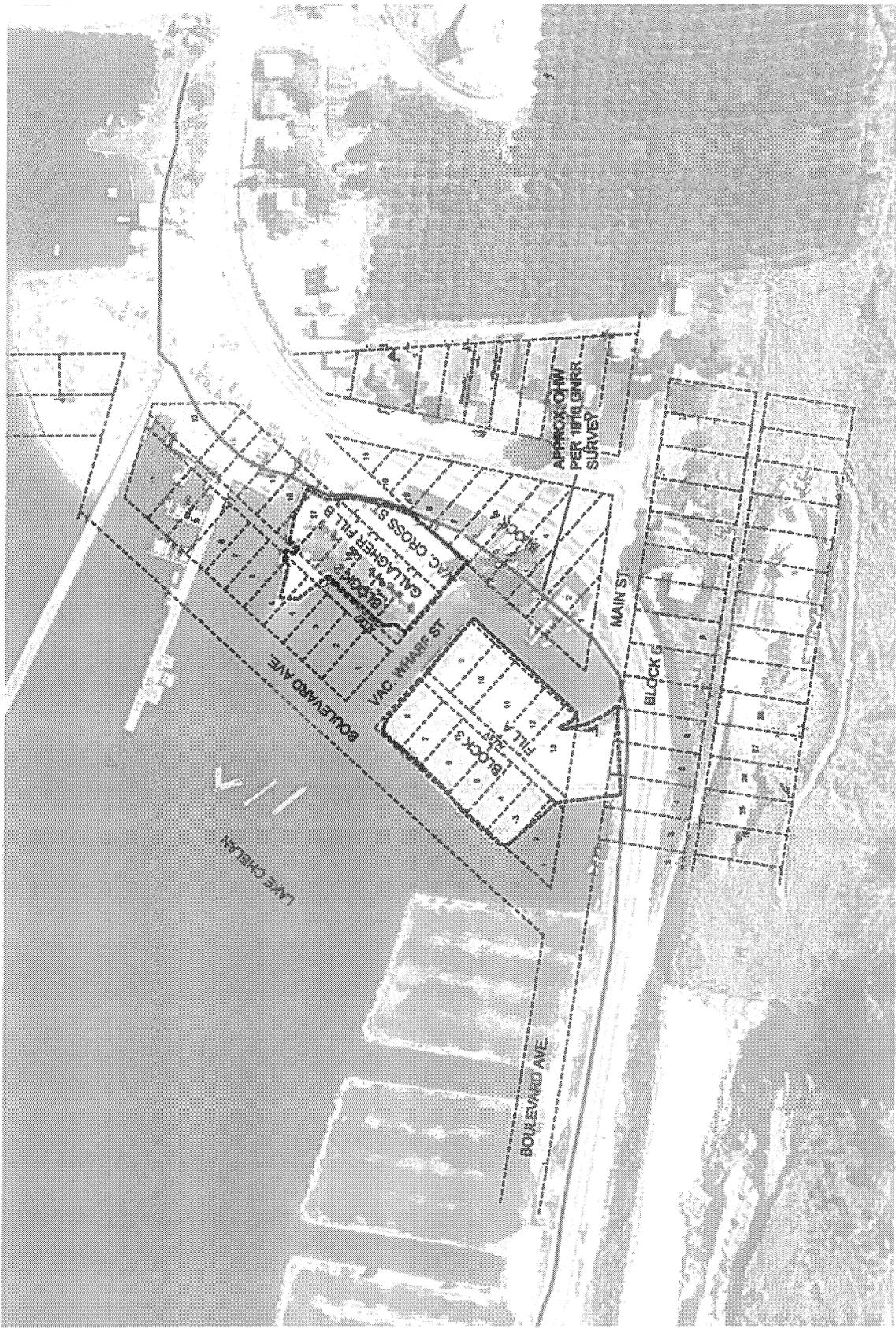
1425 W. WASHINGTON AVE  
 MILWAUKEE, WI 53233  
 (414) 333-3333  
 (414) 333-3334  
 (414) 333-3335

PROJECT: GALLAGHER FILL A, B, C, D, E, F, G, H, I, J, K, L, M, N, O, P, Q, R, S, T, U, V, W, X, Y, Z  
 DATE: 10/15/2010  
 SCALE: 1" = 100'

SHEET 1 OF 1

**GALLAGHER FILLS AT ISSUE  
 IN WILBOUR V. GALLAGHER  
 1967 PHOTO FROM WSDOT**

GALLAGHER FILL A AND B PER  
 1969 SUPREME COURT  
 DECISION - REMOVED



GALLAGHER FILL A AND B PER  
 1869 SUPREME COURT  
 DECISION - REMOVED

**GALLAGHER FILLS AT ISSUE**  
**IN WILBOUR V. GALLAGHER**  
**1867 PHOTO FROM WSDOT**

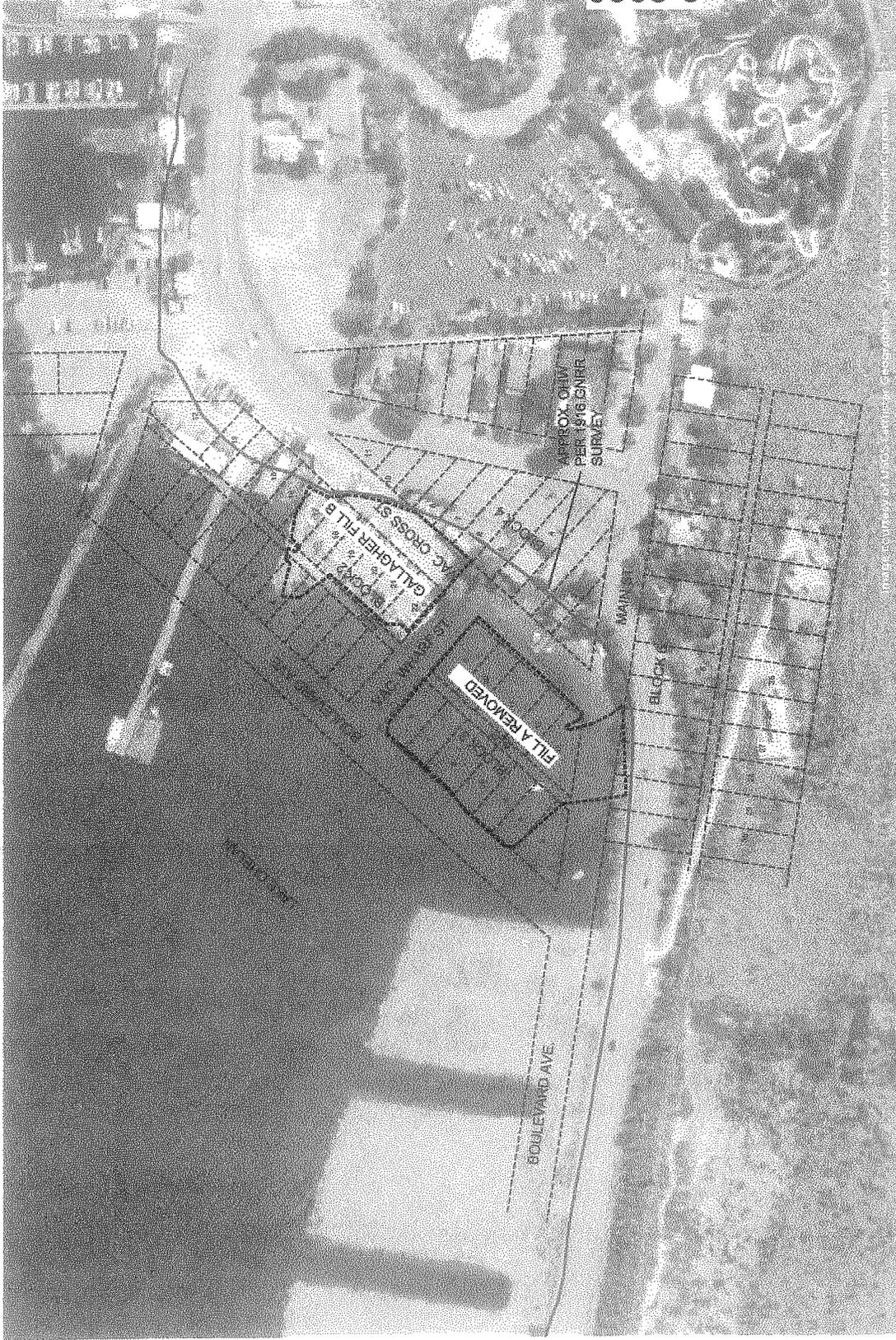
**Erlandsen**  
REGISTERED PLANNERS | SURVEYORS | GIS

**SHEET 1 OF 1**

Erlandsen Associates, Inc.  
 10000 N. 30th Street  
 Suite 100  
 Redmond, WA 98073  
 (206) 881-3228  
 (206) 881-1025  
 (206) 881-2992  
 FAX: (206) 881-3228  
 TOLL FREE: (800) 728-2442

DRAWN BY: DDB    LAYOUT: 2/21/18  
 DATE: 8/12/2015    FILE NO: GALLAGHER FILL 3 - PLAT OVERLAY  
 SCALE: 1" = 100'    JOB NO: 20101316

0-2389



GALLAGHER FILL A PER 1989  
 SUPREME COURT DECISION  
 REMOVED

**GOODFELLOW FINGERS  
 PER 1971 STIPULATION  
 USGS PHOTO C. 2014**

EXHIBIT C3

**Erlandsen**  
 SURVEYING PLANNING | ENGINEERING | GIS

PROJECT: www.erlandsen.com  
 PROJECT NO: 0803028  
 PROJECT: CHELAN  
 PROJECT NO: 0803028  
 PROJECT: 0803028

DRAWN BY: DBB  
 DATE: 07/20/16  
 SCALE: 1" = 100'

LAYOUT: 28x16  
 FILE NO: GALLAGHER FILL A - PLAT COVERLAY  
 JOB NO: 0803028  
 TOLL FREE: (800) 753-2422

SHEET 1 OF 1



EXHIBIT C3

**GOODFELLOW FINGERS**  
**PER 1971 STIPULATION**  
**USGS PHOTO C. 2014**

 GALLAGHER FILL A PER 1969  
 SUPREME COURT DECISION  
 REMOVED

**Erlandsen**  
 SURVEYING | PLANNING | ENGINEERING | INC.

1927 Howe Building  
 1927 HOWE BLDG  
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 1927 HOWE BLDG

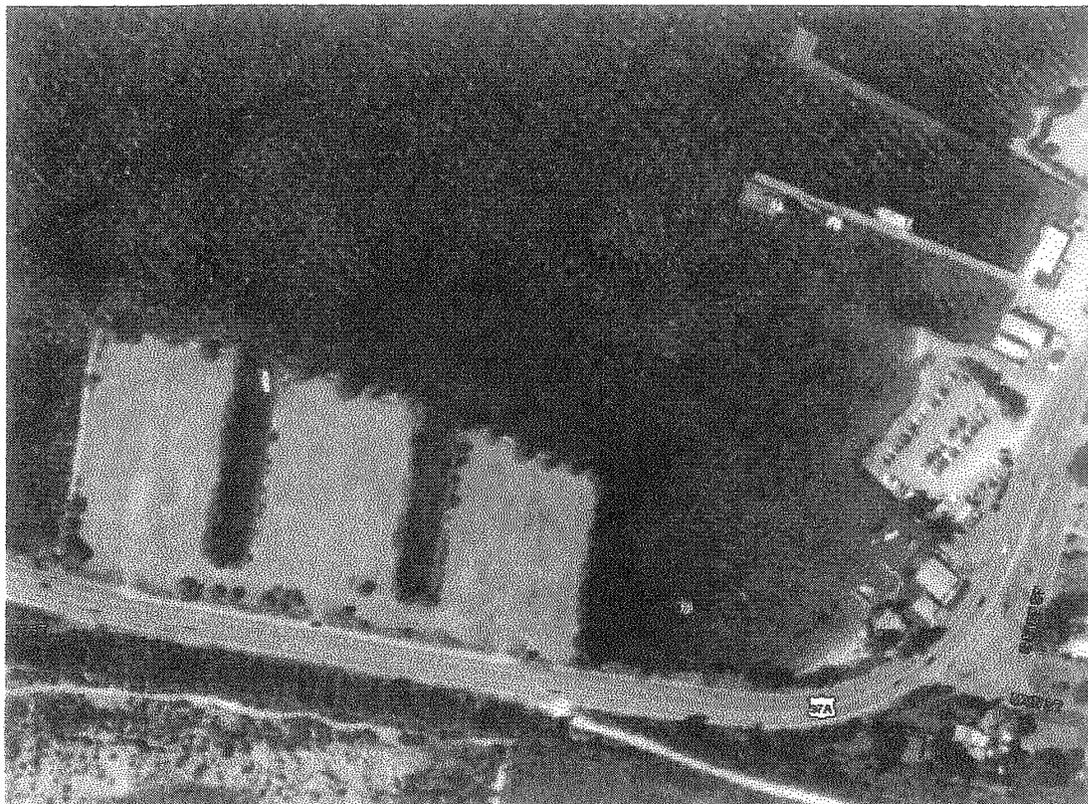
DRAWING DESIGNED BY: PETER GALLAGHER  
 DATE: 08/14/14  
 SCALE: 1" = 100'

LAYOUT: 2014  
 FILE NO: GALLAGHER FILL A - PLAT CASE NO. 14-000000-000000  
 JOB NO: 2014-000000

SHEET 1 OF 1

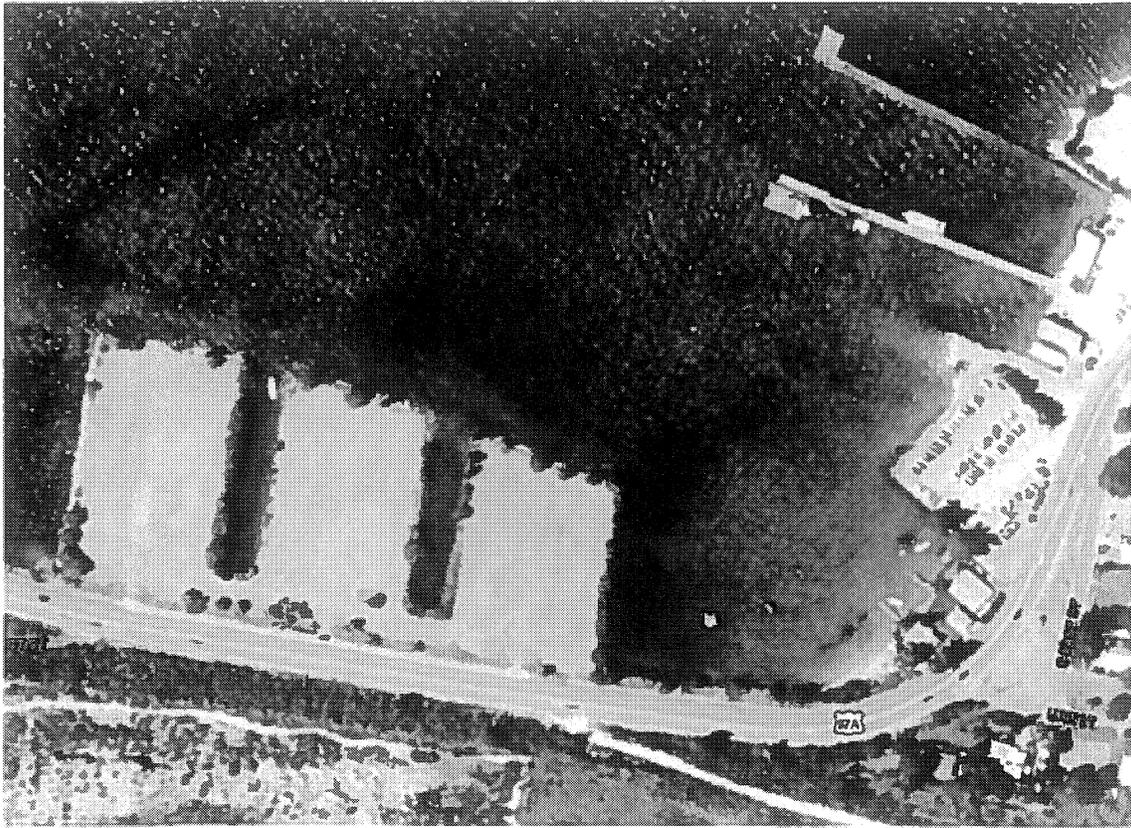
REV: 12/14/14

GALLAGHER FILL B, C. 2006



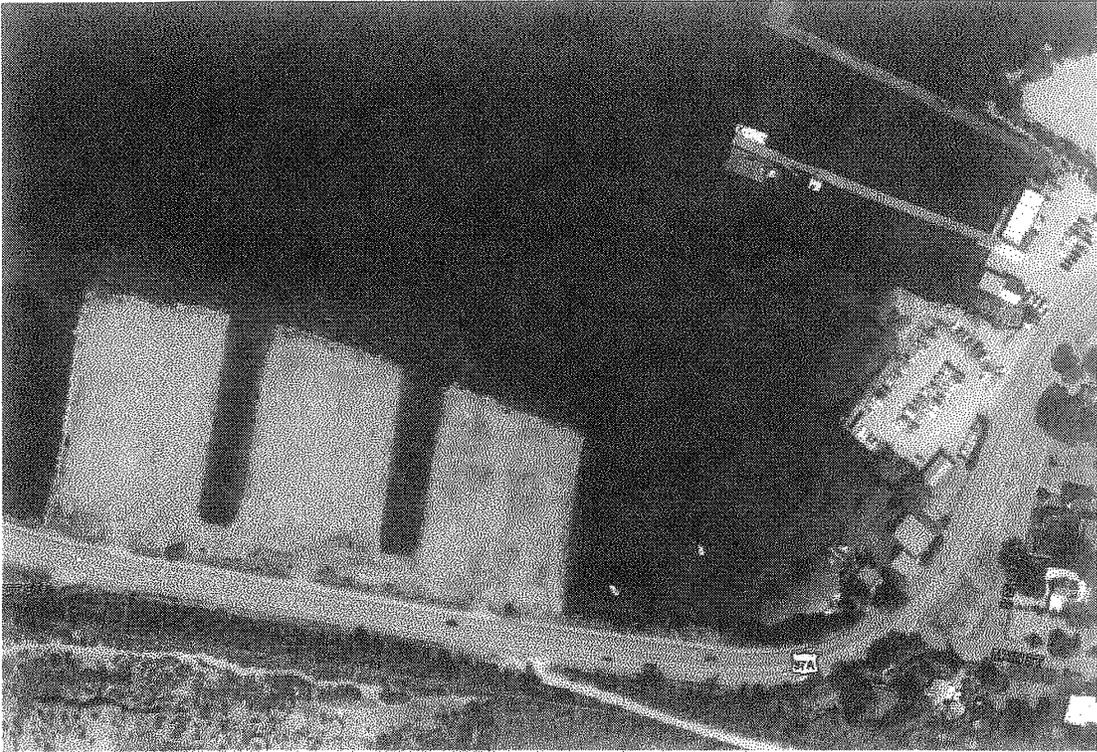
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GALLAGHER FILL B, C. 2006



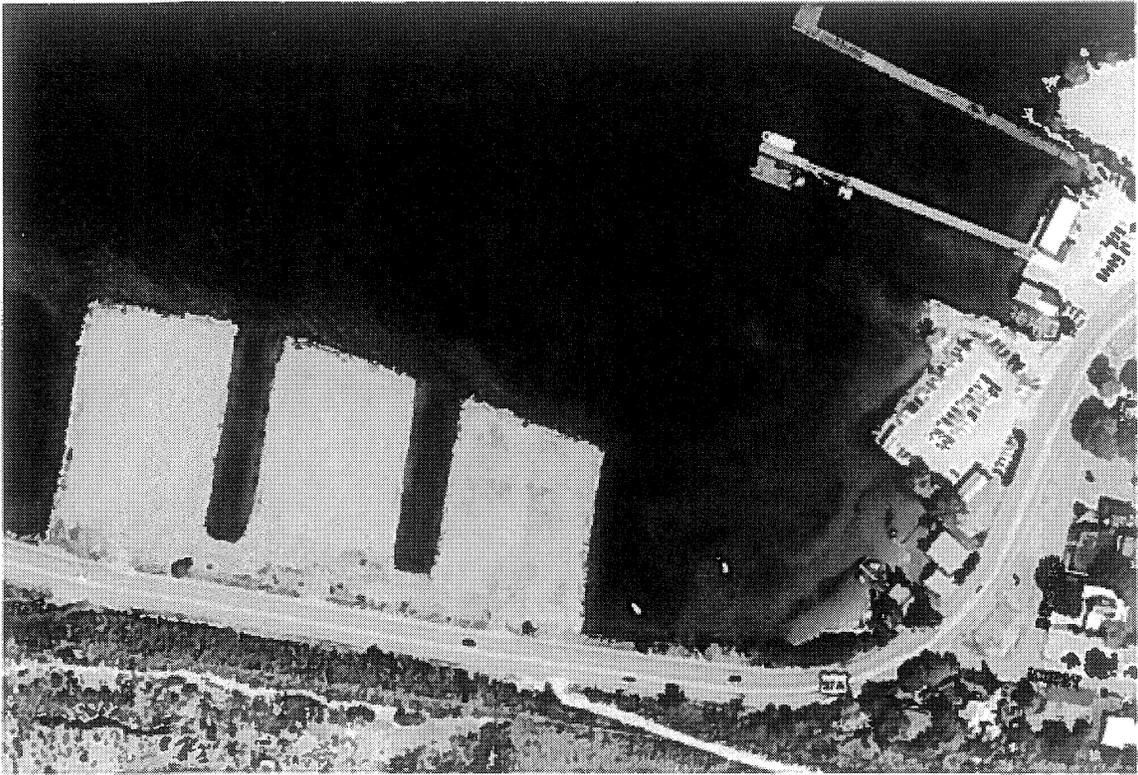
[This is a color version of AR 2390 from the original declaration]

GALLAGHER FILL B, C. 2011



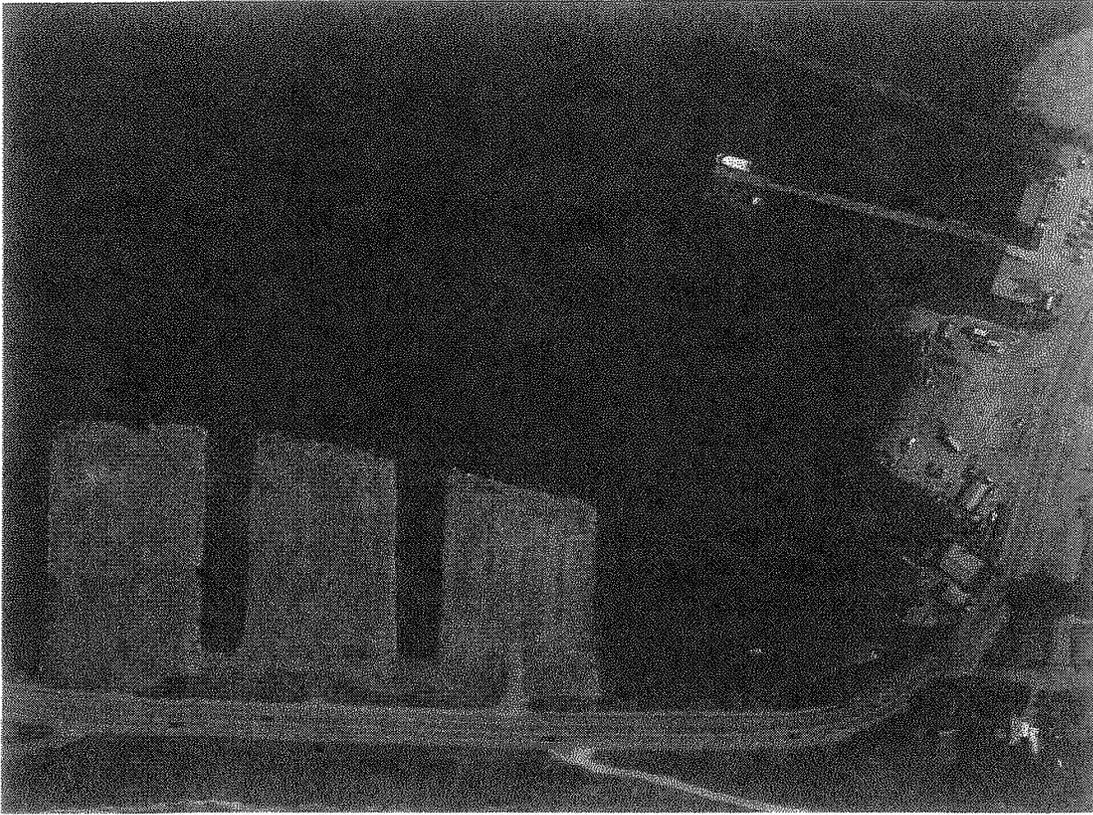
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GALLAGHER FILL B, C. 2011



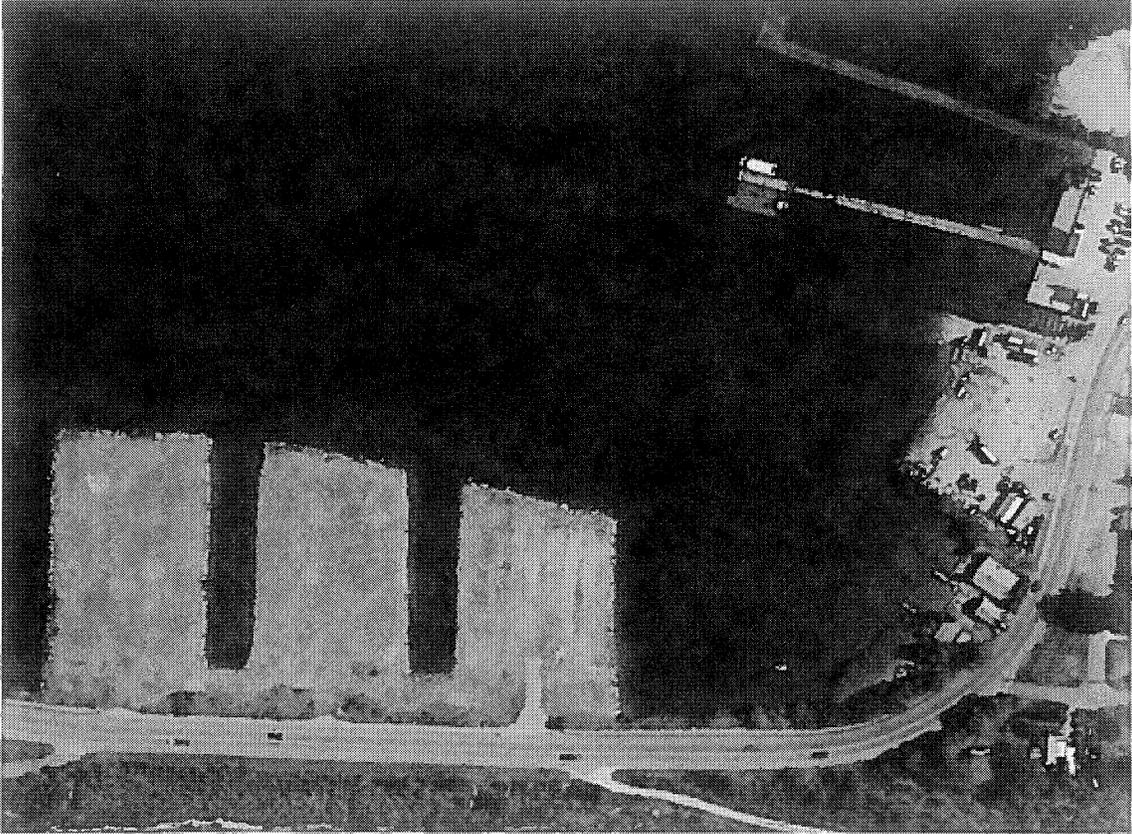
[This is a color version of AR 2391 from the original declaration]

GALLAGHER FILL B, C. JULY, 2013



0-2392

GALLAGHER FILL B, C. JULY, 2013



[This is a color version of AR 2392 from the original declaration]

# **APPENDIX 2**

## **Attachment 5**

cially provided for shall be punished by a fine of not more than ten dollars for each such violation.

**NEW SECTION.** Sec. 24. The following acts are each hereby repealed:

(1) Section 1, chapter 36, Laws of 1909, section 1, chapter 73, Laws of 1931, section 49, chapter 281, Laws of 1969 ex. sess. and RCW 9.61.120;

(2) Section 2, chapter 85, Laws of 1967 and RCW 9.66.060;

(3) Section 3, chapter 85, Laws of 1967, section 50, chapter 281, Laws of 1969 ex. sess. and RCW 9.66.070;

(4) Section 2, chapter 52, Laws of 1965, section 51, chapter 281, Laws of 1969 ex. sess. and RCW 46.61.650.

**NEW SECTION.** Sec. 25. If any provision of this 1971 amendatory act or its application to any person or circumstance is held invalid, the remainder of the act, or the application of the provisions to other persons or circumstances is not affected.

**NEW SECTION.** Sec. 26. This 1971 amendatory act is necessary for the immediate preservation of the public peace, health and safety, the support of the state government and its existing public institutions, and shall take effect immediately.

**NEW SECTION.** Sec. 27. This 1971 amendatory act constitutes an alternative to Initiative 40. The secretary of state is directed to place this 1971 amendatory act on the ballot in conjunction with Initiative 40 at the next general election.

This 1971 amendatory act shall continue in force and effect until the secretary of state certifies the election results on this 1971 amendatory act. If affirmatively approved at the general election, this 1971 amendatory act shall continue in effect thereafter.

Passed the Senate May 10, 1971.

Passed the House May 10, 1971.

Approved by the Governor May 21, 1971 with the exception of one item which is vetoed.

Filed in Office of Secretary of State May 21, 1971.

NOTE: Governor's explanation of partial veto is as follows:

#### VETO MESSAGE

"... This bill is a comprehensive litter control act. It established new litter control powers in the Department of Ecology, and imposes a tax upon those businesses which produce or sell items relating to the litter problem, in order to finance the administration of the act. However, by reason of the fact that the definition of "person" in section 3(7) includes state and local government, the act would by its terms impose the tax upon the State Liquor Control Board, and possibly upon certain local governmental agencies. I believe this result to be unwarranted, and accordingly have vetoed that item from section 3(7) of the act.

With the exception of the above item, Engrossed Senate Bill No. 428 is approved."

## COMPLETE TEXT OF

# Initiative Measure

# 43

## Initiative Measure To The Legislature

*Ballot Title as issued by the Attorney General:*

### Regulating Shoreline Use and Development

AN ACT relating to the use and development of salt and fresh water shoreline areas, including lands located within 500 feet of ordinary high tide or high water and certain wetlands; requiring the State Ecological Commission, with the advice of regional citizens councils, to adopt a state-wide regulatory plan for these areas; requiring cities and counties to adopt plans to regulate shoreline areas not covered by the state plan; requiring both local and state-wide plans to be based upon considerations of conservation, recreation, economic development and public access; and providing both civil and criminal remedies for violations of the act.

BE IT ENACTED, *by the people of the State of Washington:*

SECTION 1. Title. This act shall be known and cited as the "Shorelines Protection Act."

SECTION 2. Declaration of Policy. The people of the state of Washington hereby find and declare:

(1) That the saltwater and freshwater shoreline areas of this state are held in public trust for all the people of the state and their descendants; and that they are a valuable and endangered natural resource:

(2) That the present pattern of haphazard, inappropriate and uncoordinated development of the shorelines is:

(a) Threatening the public health, safety, welfare, comfort and convenience;

(b) Diminishing the values of the shorelines held in trust;

(c) Destroying the ecological balance of plant and animal communities;

(d) Reducing open space available for public recreation and esthetic enjoyment;

(e) Diminishing the capacity of lands and waters to produce food;

(f) Diminishing public access to publicly owned shoreline areas;

(g) Obstructing the view of the shorelines;

(h) Increasing air, water, solid waste, noise, visual and other pollution;

(i) Preventing the existence and development of property situated and designed commercial and industrial developments requiring location in the shoreline areas;

(j) Reducing present and future job opportunities for the people of this state;

(k) Limiting public navigation;

(l) Reducing the value of private property;

(m) Reducing the attractiveness of the state to tourists, thereby jeopardizing an important state industry.

(3) That the adoption, implementation and enforcement of a comprehensive plan for the shorelines will have a significantly beneficial effect on the preservation and development of the shorelines for the public good.

printed advertisement or offer for sale or transfer and in any instruments of sale or transfer the following notice in ten-point bold-face type or larger, or if by typewriter, in capital letters:

"NOTICE: Part or all of the lands and waters concerned herein are within the shoreline area of the state of Washington and subject to the environmental protection restrictions of the Shorelines Protection Act. Developments and modifications of these lands or waters are subject to regulation. Contact the Department of Ecology, Olympia, Washington, for information regarding the regulations applying to these lands and waters, or see a copy of the regulations at the office of your County Auditor."

Failure to comply with this section shall not affect the title to any property except that such failure shall be grounds for rescission by the purchaser or transferee.

**SECTION 15. Oil and Gas Exploration and Production.** No permit shall be issued to any person pursuant to this act to bore, excavate, drill, test drill, conduct seismic explorations or remove any oil and/or gas from the shoreline areas of Puget Sound, including Hood Canal and the San Juan Islands; provided, that the department may conduct explorations necessary to carry out the study provisions of this section.

Within thirty-six months of the effective date of this act the director shall submit to the governor a study report and recommendations on the exploration and production of oil and gas from the shoreline areas of the state of Washington.

**SECTION 16. High Rise Structures.** No permit shall be issued pursuant to this act for any new or expanded building of more than thirty-five feet above average grade level on shorelines that obstructs the view of the shoreline from a substantial number of residences on areas adjoining the shoreline, except as the comprehensive plan shall designate specific areas where such buildings shall be permitted.

**SECTION 17. Private Property Rights.** Nothing in this act shall be construed to authorize the taking of private property without just compensation, nor impair or affect private riparian rights of owners of property in the shoreline areas as against another private individual, group, association, corporation, partnership or other private legal entity.

**SECTION 18. Public Navigation Rights.** Except as permitted by this act, there shall be no interference with or obstruction of the navigation rights of the public pursuant to common law as stated in such cases as the Washington State Supreme Court decision in *Wilbour v. Gallagher*, 77 Wash. Dec. 2d 307 (1969).

**SECTION 19. Administration.** To administer this act and pursuant to the Environmental Quality Reorganization Act of 1970, Chapter 62, Laws of 1970, there shall be established within the department a shoreline protection division responsible to the director and supervised by an assistant director.

The commission shall adopt regulations for the administration of this act, consistent with the policy of this act; provided, that prior to the adoption of any such administrative regulations, a public hearing after reasonable public notice shall be held in Thurston County.

The department is authorized and directed to assign staff to assist the commission, regional citizens' councils, and other committees or task forces established pursuant to this act, and to furnish such administrative and informational services as the director may find necessary.

**SECTION 20. Right of Review.** Any plans or regulations adopted pursuant to this act by the commission or any city or county, any permits granted, denied or rescinded by the pollution control hearings board or any permits granted, denied or rescinded by a city or county pursuant to sections 10 or 11

of this act shall be subject to judicial review pursuant to the provisions of Chapter 34.04 RCW. Any judicial proceedings brought by any party relating to this act shall be instituted in the superior court of the county where the property affected is located, or in the superior court of Thurston County if no definite property is related to the proceeding.

**SECTION 21. Public Documents.** Upon request and at the expense of the requesting party the department, city or county acting pursuant to this act shall make available for public inspection and copying during regular office hours or shall copy and mail any of the following materials:

- (1) Each permit application;
- (2) All final orders, made in the granting or denying of permit applications;
- (3) Proposed and adopted comprehensive plans, comprehensive plan amendments and related administrative regulations;
- (4) Interdepartmental memoranda, permit findings and other recorded material related to permit functions;
- (5) Administrative staff manuals and instructions to staff relating to the planning and permit functions herein that affect the public;
- (6) Minutes of commission, board or council meetings relating to the planning and permit functions herein that affect the public;
- (7) All evidence provided by applicants for permits.

**SECTION 22. Enforcement.** The attorney general shall enforce this act, including the provisions of any permit issued pursuant thereto and shall, at the request of the director or upon his own initiative, or upon the request of a private person, bring injunctive, declaratory, or other legal actions necessary to such enforcement.

If a private person has requested the attorney general to enforce this act, and the attorney general has declined to do so, the private person may institute an appropriate civil suit to enforce this act, including the provisions of any permit issued pursuant thereto, in the name of the public, and if he prevails, shall be entitled to reasonable attorney's fees. One-half of such attorney's fees shall be assessed against defendant and one-half of such attorney's fees shall be assessed against the state. If the court finds that the suit was commenced without reasonable cause, the defendant shall be entitled to reasonable attorney's fees from the plaintiff.

**SECTION 23. Damages.** Any person who violates any provision of this act or permit issued pursuant thereto shall be liable for all damage to public or private property arising from such violation, and for the cost of restoring the affected area to its condition prior to violation. The attorney general shall bring suit for damages under this section on behalf of the state, any of its agencies, or local governments. Private persons shall have the right to bring suit for damages under this section on their own behalf and on the behalf of all persons similarly situated. The court, if liability has been established for the cost of restoring an area affected by a violation, shall either compel the violator to restore the affected area at his own expense, or make other provision for assuring that restoration will be done within a reasonable time. In addition to such appropriate relief, including money damages, which is provided by the court under this or other acts, a private person bringing a damage suit in his own behalf or on the behalf of others may, in the discretion of the court, recover his reasonable attorney's fees and court costs.

**SECTION 24. Civil Penalties.** Any person who violates any provision of this act except section 14 shall incur in addition to any other penalties provided by the law a penalty in an amount not less than fifty dollars (\$50.00) nor more than one-thousand dollars (\$1,000.00) a day for every such violation. Each and every such violation under this section shall be

a separate offense, and in case of a continuing violation, every day's continuance shall be a separate violation. Prosecution to enforce this section may be brought by either the attorney general or prosecutor of the county where the affected property is located; provided, that if both the attorney general and the prosecutor of the county where the affected property is located refuse to prosecute under this section, a private person shall be entitled to do so. Fines collected pursuant to this section through prosecution by the prosecutor shall go to the general fund of the county. Fines collected pursuant to this section through prosecution by the attorney general shall go to the state's general fund. Fines collected pursuant to this section through prosecution by a private person shall go to the person bringing the suit.

**SECTION 25. Criminal Penalties.** Any person who violates any provision of this act except section 14 shall be guilty of a misdemeanor. Prosecutions pursuant to this section shall be brought in the county where the affected property is located by either the prosecutor of said county or the attorney general. Any fines collected pursuant to this section from prosecution by the county prosecutor shall go to the general fund of the county. Any fines collected pursuant to this section from prosecution by the attorney general shall go to the state general fund.

**SECTION 26. Financing.** To carry out the purposes of this act, there shall be appropriated to the department from the state general fund in the fiscal biennium in which this act takes effect the sum of \$500,000, and for the ensuing fiscal biennium the sum of \$900,000; provided, that such moneys as are not expended shall be returned to the state general fund.

To help meet the costs of administering this act, the department, or a city or a county issuing permits pursuant to this act shall by regulation or ordinance adopt a fee schedule for permit applications based on the estimated costs of processing different classes of permit applications. A permit applicant shall be required to pay the appropriate fee based on the fee schedule adopted by the governmental body issuing the permit. All fees collected pursuant to this section by the department shall be deposited in the state general fund. All fees collected pursuant to this section by a city or county shall go to the respective city or county general fund.

**SECTION 27. Cooperation With Local Governments and Private Persons.** The department shall cooperate, consult with and assist appropriate government agencies and private persons developing plans, studies, surveys, recommendations, or information on shorelines.

State and local government agencies shall cooperate fully with the department in furthering the purposes of this act.

**SECTION 28. Department's Authority to Contract.** For the purposes of administering this act, the department may enter into contracts or agreements with or receive funds from the state of Washington, the federal government or any governmental department, agency or any person.

**SECTION 29. Official Representative.** The department is authorized to be the official representative of the state of Washington to the United States and its agencies, Canada, the states of Oregon and Idaho, the Province of British Columbia, and other interested state governments, organizations and individuals, in the fields of shoreline management and policy.

**SECTION 30. Severability.** If any provision of this act, or its application to any person or legal entity or circumstance is held invalid, the remainder of the act, or the application of the provision to other persons or legal entities or circumstances shall not be affected.

**SECTION 31. Section Headings Not Part of Law.** Section headings as used in this act shall not constitute any part of the law.

#### EXPLANATORY COMMENT

Initiative to the Legislature No. 43 (Regulating Shoreline Use and Development)—Filed September 25, 1970 by the Washington Environmental Council. Signatures (160,421) filed December 31, 1970 and found sufficient and the measure was certified to the Legislature as of January 29, 1971. The Legislature took no action insofar as Initiative No. 43 but did pass an alternative measure (Sub. H.B. No. 584) now identified as Chapter 286, Laws 1971, 1st Ex. Session which became effective law as of June 1, 1971. However, as provided by the state constitution, both measures must be submitted to the voters for final decision at the November 7, 1972 state general election. If both are approved, the measure receiving the most favorable votes will become law.

#### COMPLETE TEXT OF

## Alternative Measure 43B

*Ballot Title as issued by the Attorney General:*

#### Legislative Alternative—Shoreline Management Act

AN ACT relating to the use and development of certain salt and fresh water shoreline areas including lands located within 200 feet of the ordinary high water mark and certain other adjacent designated wetlands; establishing an integrated program of shoreline management between state and local governments; requiring local governments, pursuant to guidelines established by the state department of ecology, to develop master programs for regulating shoreline uses and providing that if they do not the department will develop and adopt such programs; granting the state's consent to certain existing impairments of public navigational rights; and providing civil and criminal sanctions.

CHAPTER 286, LAWS 1971, 1ST EX. SESSION  
(Sub. House Bill No. 584)

BE IT ENACTED, by the Legislature  
of the State of Washington:

**NEW SECTION.** Section 1. This chapter shall be known and may be cited as the "Shoreline Management Act of 1971".

**NEW SECTION.** Sec. 2. The legislature finds that the shorelines of the state are among the most valuable and fragile of its natural resources and that there is great concern throughout the state relating to their utilization, protection, restoration, and preservation. In addition it finds that ever increasing pressures of additional uses are being placed on the shorelines necessitating increased coordination in the management and development of the shorelines of the state. The legislature further finds that much of the shorelines of the state and the uplands adjacent thereto are in private ownership; that unrestricted construction on the privately owned or

tion on behalf of the state or local governments. Private persons shall have the right to bring suit for damages under this section on their own behalf and on the behalf of all persons similarly situated. If liability has been established for the cost of restoring an area affected by a violation the court shall make provision to assure that restoration will be accomplished within a reasonable time at the expense of the violator. In addition to such relief, including money damages, the court in its discretion may award attorney's fees and costs of the suit to the prevailing party.

**NEW SECTION.** Sec. 24. In addition to any other powers granted hereunder, the department and local governments may:

(1) Acquire lands and easements within shorelines of the state by purchase, lease, gift, or eminent domain, either alone or in concert with other governmental entities, when necessary to achieve implementation of master programs adopted hereunder;

(2) Accept grants, contributions, and appropriations from any agency, public or private, or individual for the purposes of this chapter;

(3) Appoint advisory committees to assist in carrying out the purposes of this chapter;

(4) Contract for professional or technical services required by it which cannot be performed by its employees.

**NEW SECTION.** Sec. 25. The department is directed to cooperate fully with local governments in discharging their responsibilities under this chapter. Funds shall be available for distribution to local governments on the basis of applications for preparation of master programs. Such applications shall be submitted in accordance with regulations developed by the department. The department is authorized to make and administer grants within appropriations authorized by the legislature to any local government within the state for the purpose of developing a master shorelines program.

No grant shall be made in an amount in excess of the recipient's contribution to the estimated cost of such program.

**NEW SECTION.** Sec. 26. The state, through the department of ecology and the attorney general, shall represent its interest before water resource regulation management, development, and use agencies of the United States, including among others, the federal power commission, environmental protection agency, corps of engineers, department of the interior, department of agriculture and the atomic energy commission, before interstate agencies and the courts with regard to activities or uses of shorelines of the state and the program of this chapter. Where federal or interstate agency plans, activities, or procedures conflict with state policies, all reasonable steps available shall be taken by the state to preserve the integrity of its policies.

**NEW SECTION.** Sec. 27. (1) Nothing in this statute 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.

(2) Nothing in this section shall be construed as altering or abridging any private right of action, other than a private right which is based upon the impairment of public rights consented to in subsection (1) hereof.

(3) Nothing in this section shall be construed as altering or

abridging the authority of the state or local governments to suppress or abate nuisances or to abate pollution.

(4) Subsection (1) of this section shall apply to any case pending in the courts of this state on the effective date of this chapter relating to the removal of structures, improvements, docks, fills, or developments based on the impairment of public navigational rights.

**NEW SECTION.** Sec. 28. The provisions of this chapter shall be applicable to all agencies of state government, counties, and public and municipal corporations and to all shorelines of the state owned or administered by them.

**NEW SECTION.** Sec. 29. The restrictions imposed by this act shall be considered by the county assessor in establishing the fair market value of the property.

**NEW SECTION.** Sec. 30. The department of ecology is designated the state agency responsible for the program of regulation of the shorelines of the state, including coastal shorelines and the shorelines of the inner tidal waters of the state, and is authorized to cooperate with the federal government and sister states and to receive benefits of any statutes of the United States whenever enacted which relate to the programs of this chapter.

**NEW SECTION.** Sec. 31. Additional shorelines of the state shall be designated shorelines of state-wide significance only by affirmative action of the legislature.

The director of the department may, however, from time to time, recommend to the legislature areas of the shorelines of the state which have state-wide significance relating to special economic, ecological, educational, developmental, recreational, or aesthetic values to be designated as shorelines of state-wide significance.

Prior to making any such recommendation the director shall hold a public hearing in the county or counties where the shoreline under consideration is located. It shall be the duty of the county commissioners of each county where such a hearing is conducted to submit their views with regard to a proposed designation to the director at such date as the director determines but in no event shall the date be later than sixty days after the public hearing in the county.

**NEW SECTION.** Sec. 32. No permit shall be issued pursuant to this chapter for any new or expanded building or structure of more than thirty-five feet above average grade level on shorelines of the state that will obstruct the view of a substantial number of residences on areas adjoining such shorelines except where a master program does not prohibit the same and then only when overriding considerations of the public interest will be served.

**NEW SECTION.** Sec. 33. The department of ecology, the attorney general, and the harbor line commission are directed as a matter of high priority to undertake jointly a study of the locations, uses and activities, both proposed and existing, relating to the shorelines of the cities, and towns of the state and submit a report which shall include but not be limited to the following:

(1) Events leading to the establishment of the various harbor lines pertaining to cities of the state;

(2) The location of all such harbor lines;

(3) The authority for establishment and criteria used in location of the same;

(4) Present activities and uses made within harbors and their relationship to harbor lines;

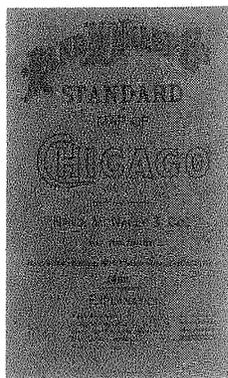
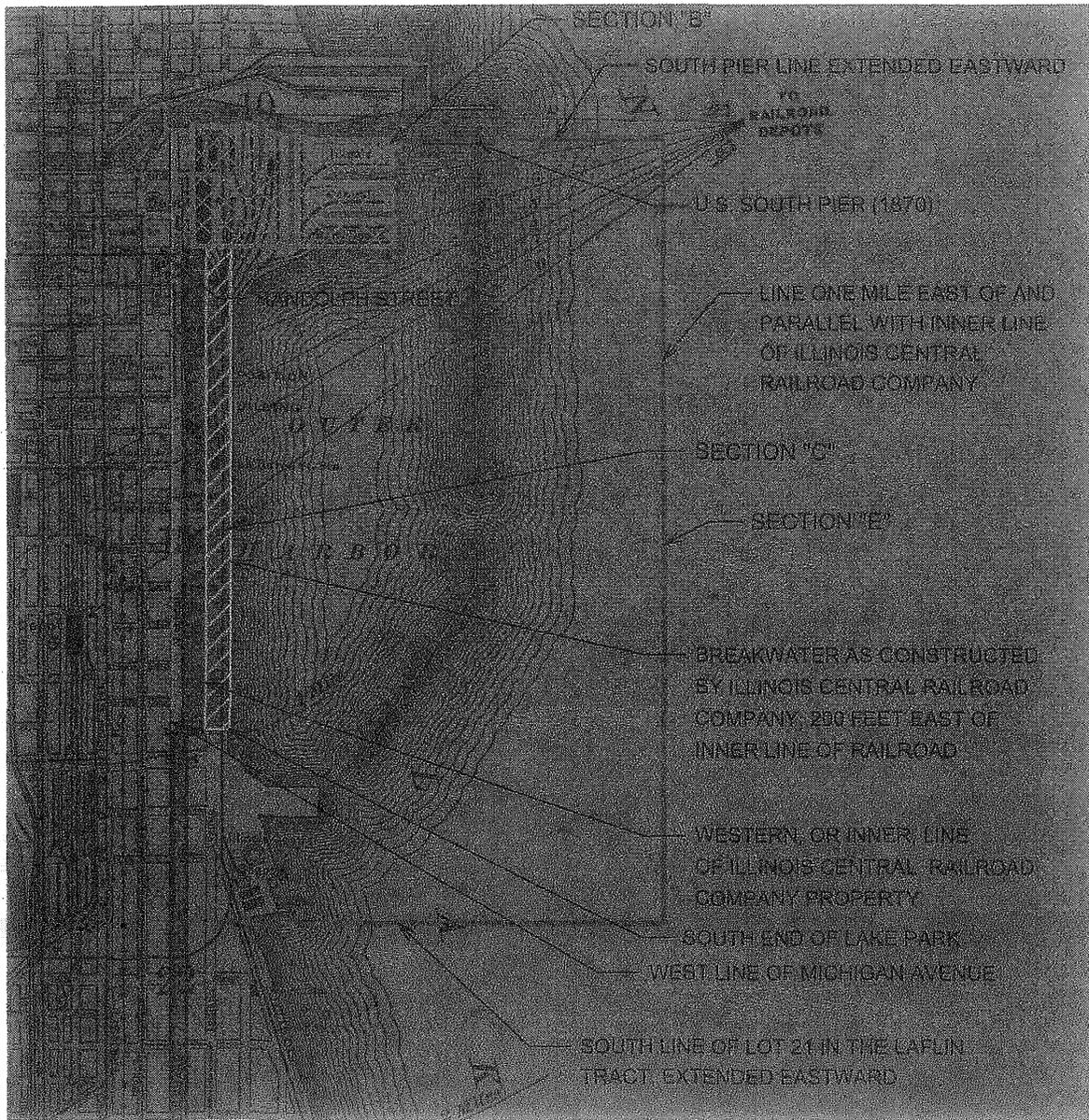
(5) Legal aspects pertaining to any uncertainty and inconsistency; and

(6) The relationship of federal, state and local govern-

# **APPENDIX 2**

## **Attachment 6**

# MAP "2"



0' 1000' 2000' 4000'

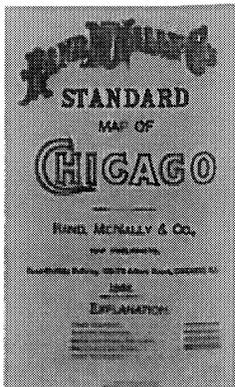
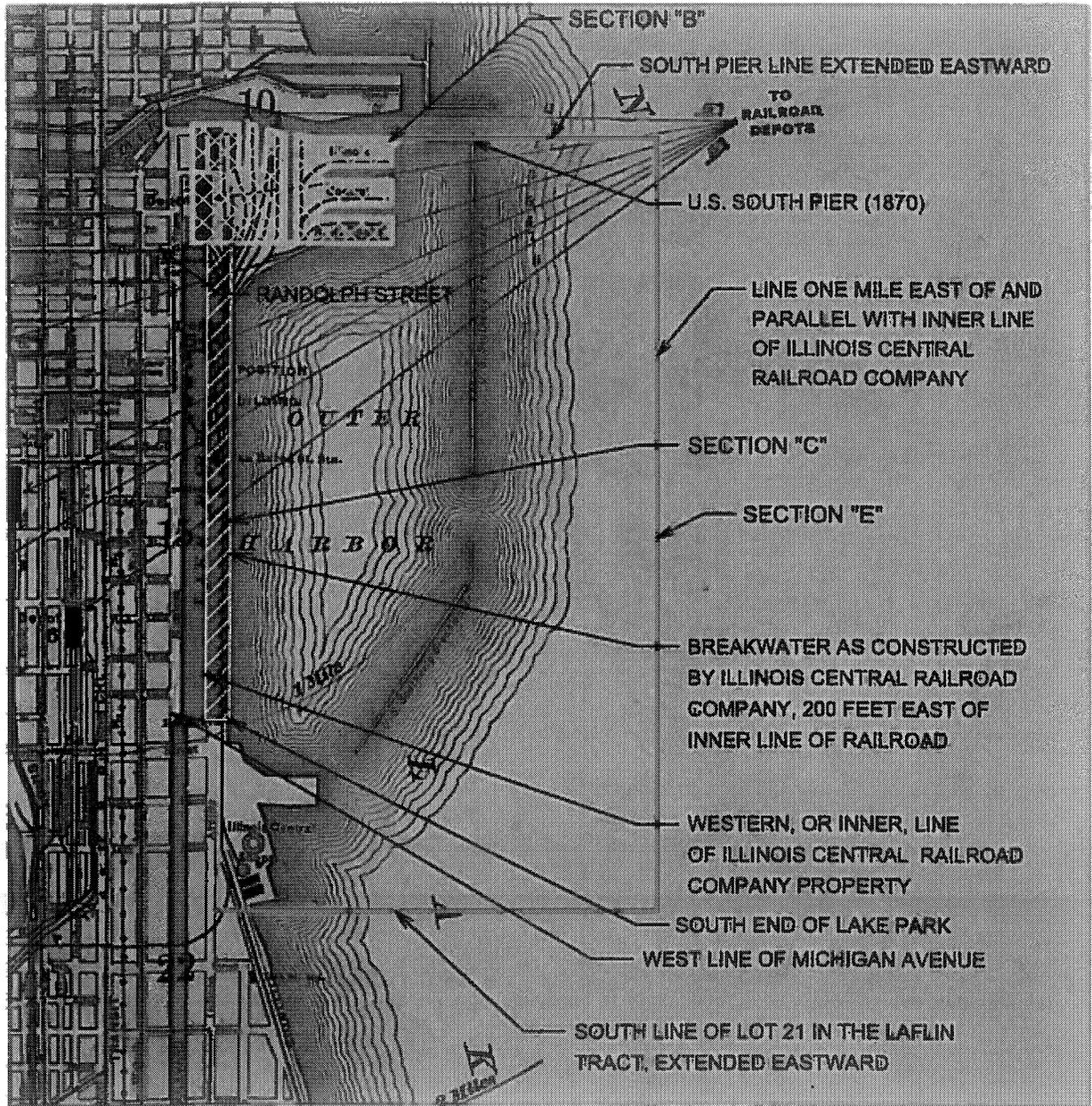


SCALE: 1" = 2000'

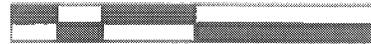
MAP "2"	2/10/2015-CLB
PERKINS COIE	JOB NO. 61530101
1892 RAND MCNALLY & CO. STANDARD MAP OF CHICAGO	
<b>AES</b> AES SERVICES, INC. 111 S. WACKER DRIVE, SUITE 3910 CHICAGO, IL 60606 PH: 312-235-6783 EMAIL: AESSER@AESSER.COM PROFESSIONAL DESIGN FIRM 184-001397	

0-2470

# MAP "2"



0' 1000' 2000' 4000'



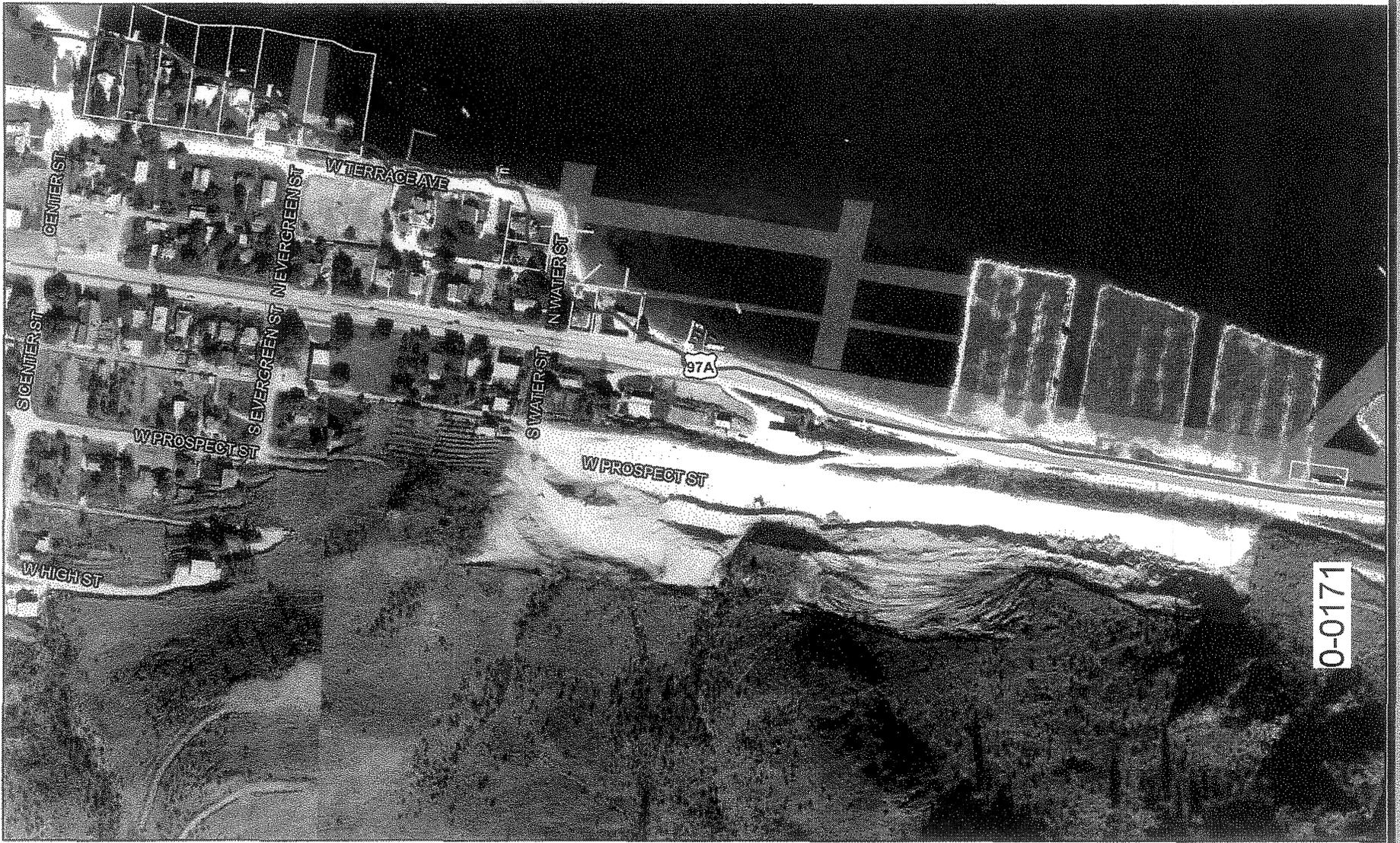
SCALE: 1"= 2000'

MAP "2"	2/10/2015-CLB
PERKINS COIE	JOB NO. 61530101
1892 RAND MCNALLY & CO. STANDARD MAP OF CHICAGO	
<b>AES</b> AES SERVICES, INC. 111 S. WACKER DRIVE, SUITE 3910 CHICAGO, IL 60606 PH: 312-235-6783 EMAIL: AESSER@AESSER.COM AESSER.COM	PROFESSIONAL DESIGN FIRM 184-001397

[This is a color version of AR 2470 from the original declaration]

# **APPENDIX 2**

## **Attachment 7**



0-0171

RED LINE INDICATES ORIGINAL  
1100 FT. CONTOUR -- PRIOR TO DAM  
CONSTRUCTION -- DIGITIZED FROM  
1912 GNRR SURVEY MAPS

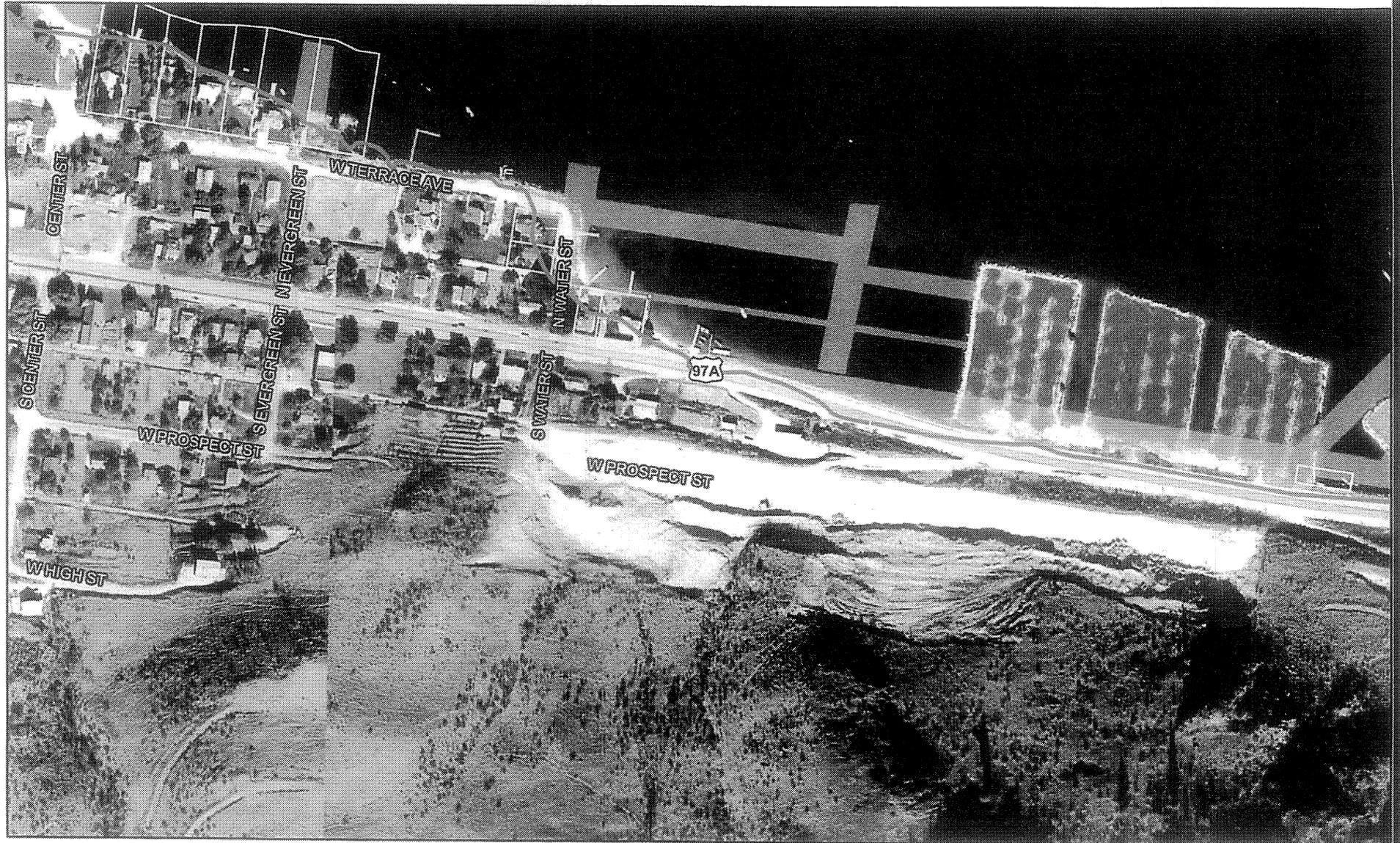
1" = 300'



STREETS AND ALLEYS VACATED  
BY ORDINANCE 24, 1927

PHOTOGRAPHY PROVIDED BY WASHINGTON STATE  
DEPARTMENT OF TRANSPORTATION -- DATED 1967

Erlandsen  
ENGINEERS ARCHITECTS SURVEYORS P.C.



RED LINE INDICATES ORIGINAL  
1100 FT. CONTOUR - PRIOR TO DAM  
CONSTRUCTION - DIGITIZED FROM  
1912 GNRR SURVEY MAPS

1" = 300'

STREETS AND ALLEYS VACATED  
BY ORDINANCE 24, 1927

PHOTOGRAPHY PROVIDED BY WASHINGTON STATE  
DEPARTMENT OF TRANSPORTATION - DATED 1967

Erlandson  
CONSULTING - PLANNING - ENGINEERING - LLC

[This is a color version of AR 0171 from the original declaration]

Exhibit B-1



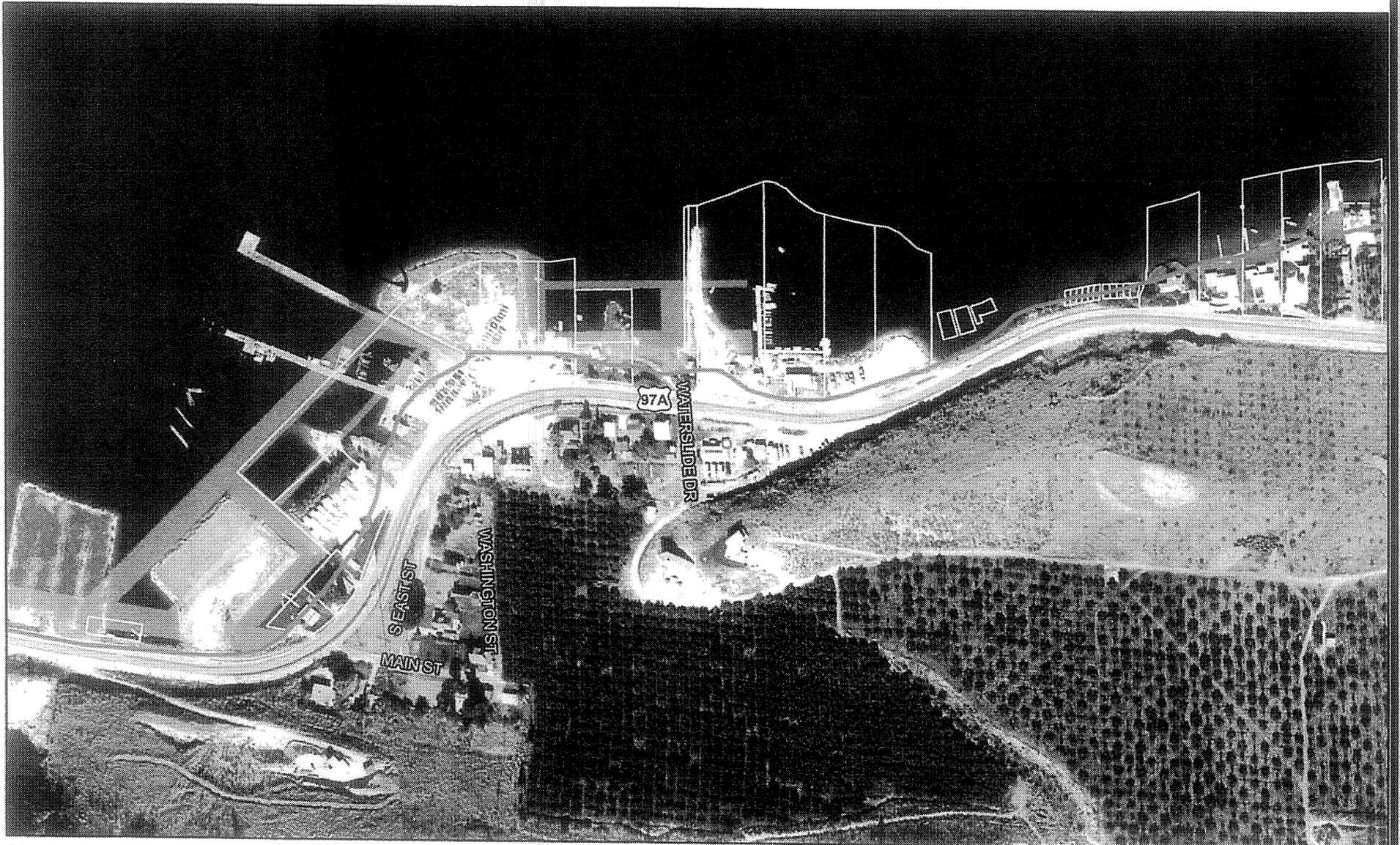
RED LINE INDICATES ORIGINAL  
1100 FT. CONTOUR - PRIOR TO DAM  
CONSTRUCTION - DIGITIZED FROM  
1912 GNRR SURVEY MAPS

1" = 300'

STREETS AND ALLEYS VACATED  
BY ORDINANCE 24, 1927

PHOTOGRAPHY PROVIDED BY WASHINGTON STATE  
DEPARTMENT OF TRANSPORTATION - DATED 1967

Erlandsen  
SURVEYING PLANNING ENGINEERING INC.



RED LINE INDICATES ORIGINAL  
1100 FT. CONTOUR - PRIOR TO DAM  
CONSTRUCTION -- DIGITIZED FROM  
1912 GNRR SURVEY MAPS

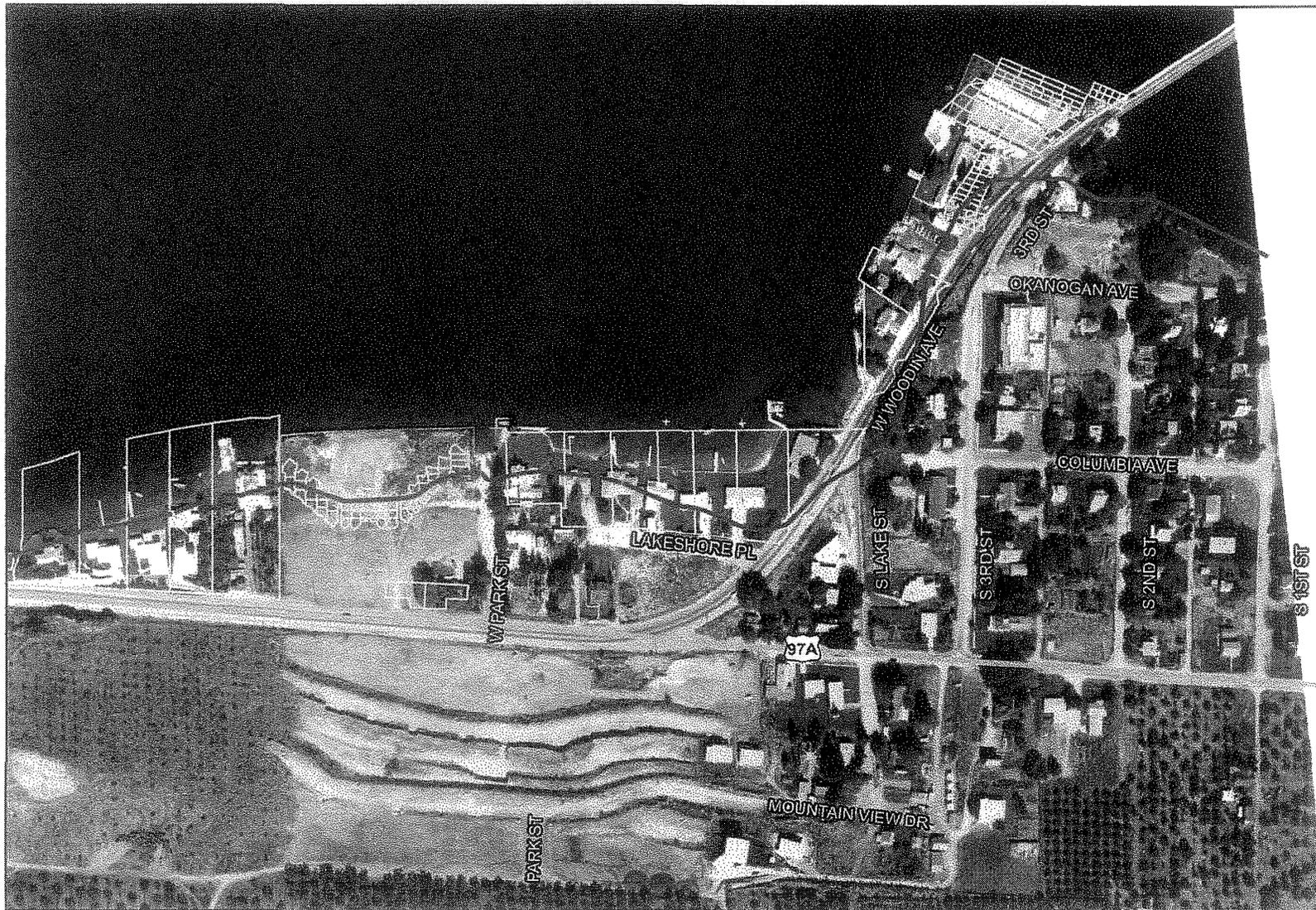
1" = 300'

STREETS AND ALLEYS VACATED  
BY ORDINANCE 24, 1927

PHOTOGRAPHY PROVIDED BY WASHINGTON STATE  
DEPARTMENT OF TRANSPORTATION -- DATED 1967



[This is a color version of AR 0172 from the original declaration]



RED LINE INDICATES ORIGINAL  
1100 FT. CONTOUR -- PRIOR TO DAM  
CONSTRUCTION -- DIGITIZED FROM  
1912 GNRR SURVEY MAPS

1" = 300'



STREETS AND ALLEYS VACATED  
BY ORDINANCE 24, 1927

PHOTOGRAPHY PROVIDED BY WASHINGTON STATE  
DEPARTMENT OF TRANSPORTATION -- DATED 1967

Erlandsen  
SURVEYING & ENGINEERING

0-0173



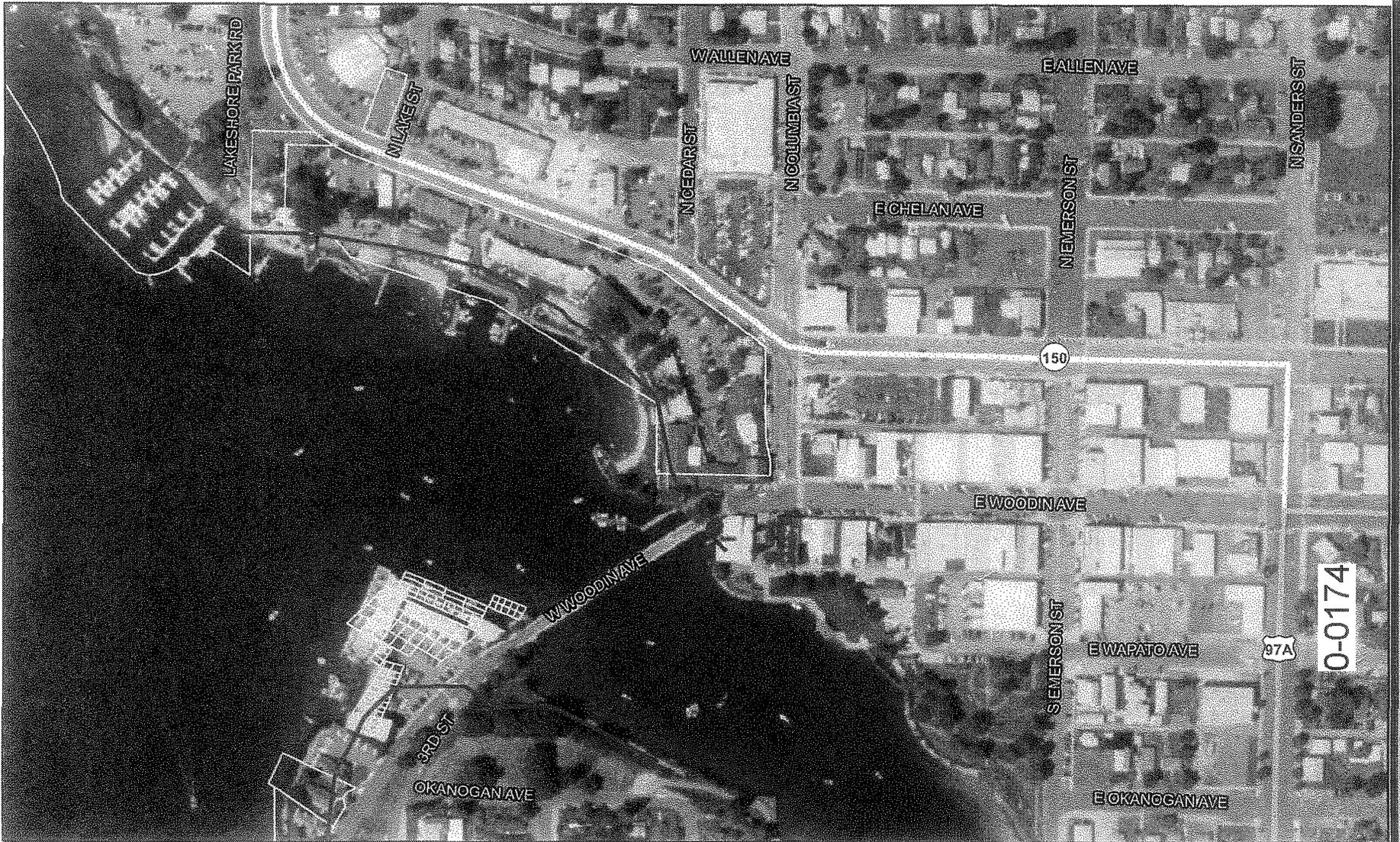
RED LINE INDICATES ORIGINAL  
1100 FT. CONTOUR -- PRIOR TO DAM  
CONSTRUCTION -- DIGITIZED FROM  
1912 GNRR SURVEY MAPS

STREETS AND ALLEYS VACATED  
BY ORDINANCE 24, 1927

1" = 300'

PHOTOGRAPHY PROVIDED BY WASHINGTON STATE  
DEPARTMENT OF TRANSPORTATION -- DATED 1967

[This is a color version of AR 0173 from the original declaration]



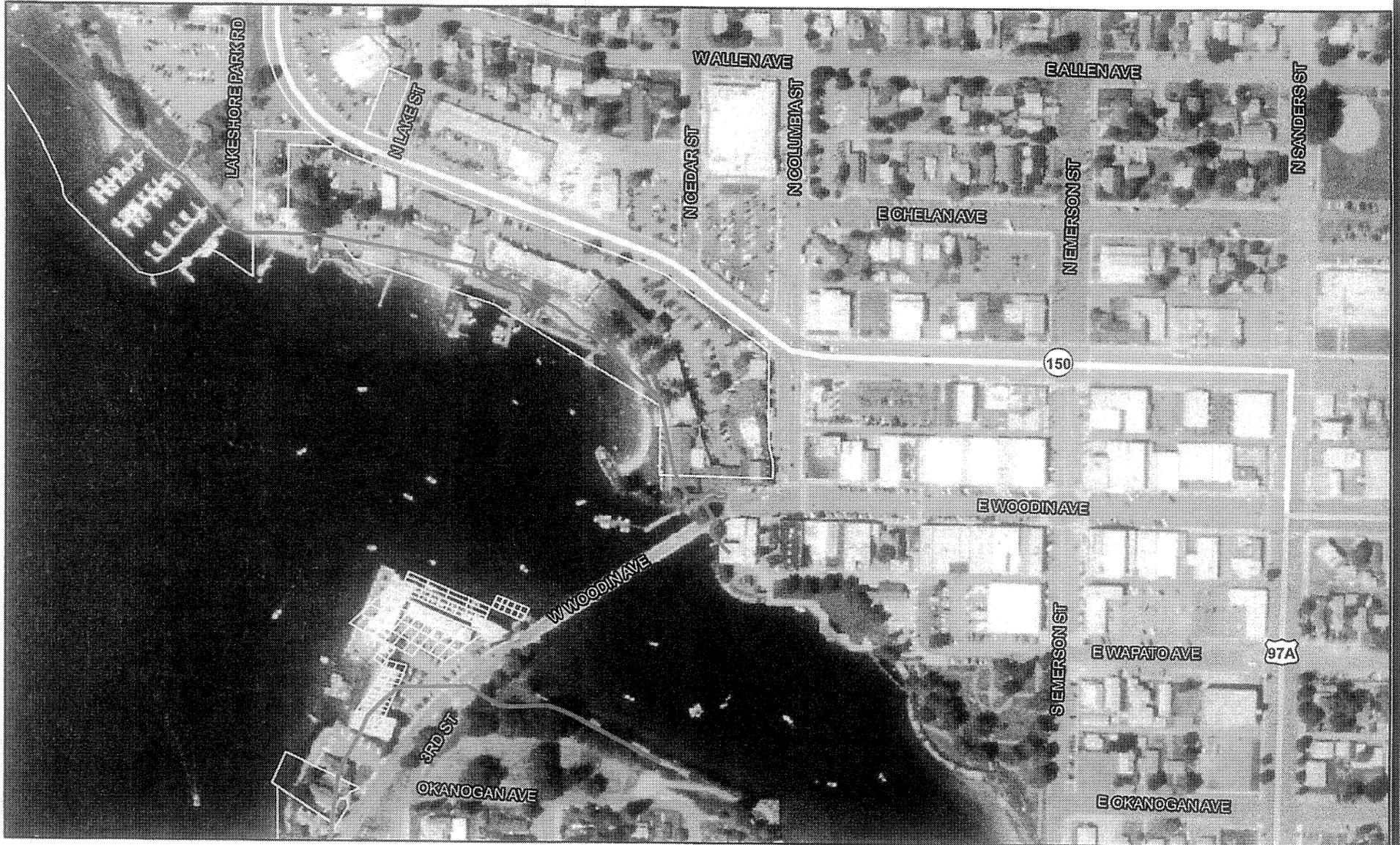
RED LINE INDICATES ORIGINAL  
1100 FT. CONTOUR - PRIOR TO DAM  
CONSTRUCTION -- DIGITIZED FROM  
1912 GNRR SURVEY MAPS

1" = 300'

PHOTOGRAPHY PROVIDED NRCS C. 2006



0-0174



RED LINE INDICATES ORIGINAL  
1100 FT. CONTOUR - PRIOR TO DAM  
CONSTRUCTION - DIGITIZED FROM  
1912 GNRR SURVEY MAPS

1" = 300'

PHOTOGRAPHY PROVIDED NRCS C. 2006

Erlandsen  
SURVEYING • PLANNING • ENGINEERING • LLC

[This is a color version of AR 0174 from the original declaration]

Exhibit B-4

**SAMPLING OF PARCELS  
WATERFRONT WITH AT LEAST SOME FILL  
LAKESIDE PARK TO DON MORSE PARK  
CHELAN, WASHINGTON**

PARCEL NUMBER	OWNER	ASSESSED VALUATION
272213592510	TERRY JOHNSON INESTMENTS INC	\$198,275
272213592511	CARAVEL LLC	\$162,540
272213592520	TERRY JOHNSON INESTMENTS INC	\$206,000
272213592521	CARAVEL LLC	\$162,540
272213592512	TERRY JOHNSON INESTMENTS INC	\$192,885
272213592513	TERRY JOHNSON INESTMENTS INC	\$192,885
272213592522	STRONG HOWARD A & PATRICIA G	\$200,400
272213592523	AYE RALPH W & KATHLEEN A	\$200,400
272213592514	DAVIS JEFFREY & KATHIE A	\$192,885
272213592515	TERRY JOHNSON INESTMENTS INC	\$192,885
272213592524	TERRY JOHNSON INESTMENTS INC	\$200,400
272213592525	TERRY JOHNSON INESTMENTS INC	\$200,400
272213592516	FRALEY PETER A & CINDY L	\$192,885
272213592517	FCJP LLC	\$192,885
272213592526	TERRY JOHNSON INESTMENTS INC	\$200,400
272213592527	TERRY JOHNSON INESTMENTS INC	\$200,400
272213592518	FCJP LLC	\$206,700
272213592528	VENTURES IN PARADISE LLC & IDYLIC WATERS LLC	\$206,700
272213592530	CARAVEL LLC	\$88,051
272213592540	CARAVEL LLC	\$88,051
272213592531	CARAVEL LLC	\$88,051
272213592541	CARAVEL LLC	\$88,051
272213592532	CARAVEL LLC	\$88,051
272213592542	CARAVEL LLC	\$88,051
272213592533	CARAVEL LLC	\$88,051
272213592543	CARAVEL LLC	\$88,051
272213587160	WALCKER ELMER E & STELLA C	\$76,131
272213587170	WALCKER ELMER E & STELLA C	\$40,677
272213591340	WALCKER ELMER E & STELLA C	\$23,293
272212330500	CITY OF CHELAN	\$3,594,909
272213240500	U S FOREST SERVICE	\$175,000
272213240550	U S FOREST SERVICE	\$175,000
272213525413	CITY OF CHELAN	\$282,516
272213587010	GARGUILE TIMOTHY P	\$424,125
272213587020	OLSON DANIEL P	\$424,125
272213587030	CLMJ CHELAN LLC	\$424,125
272213587040	DEAN JAMES R ETAL	\$424,125
272213587050	SEKOUR BERTRAND	\$456,639
272213587060	WASKIEWICZ RICHARD E	\$456,639
272213587070	GOODFELLOW CINDY TRTEE	\$504,751
272213587100	SCHMITTEN INVESTMENTS LLC	\$51,751
272213587110	WALCKER ELMER E	\$51,751
272213587140	CLARK D EDSON & BARBARA	\$51,751
272213587150	VENTURES IN PARADISE LLC	\$51,751
272213590010	JACOBSON R M	\$424,612
272213590020	SULLIVAN DAVID	\$444,675
272213590030	DELAYE DENNIS L	\$444,675
272213590040	DI BENEDETTO SCOTT M & MICHELLE RAE	\$444,675
272213590050	MURPHY PROPERTIES & INVESTMENT LLC ETAL	\$405,000
272213590060	OLYMPIC COAST INVESTMENT INC	\$405,000
272213590070	HARVEY PATRICK W	\$405,000
272213590080	DEUTSCHE BANK NATIONAL TRUST COMPANY	\$405,000
272213590090	RACE TONY L	\$405,000
272213590100	GIBSON MARK	\$405,000
272213590110	STOTT JOHN & MARILYN	\$405,000
272213590120	RUBIN WAYNE	\$405,000
272213590130	VENTURES IN PARADISE LLC	\$405,000
272213590140	WALCKER ELMER E	\$82,500

0-0175

**SAMPLING OF PARCELS  
WATERFRONT WITH AT LEAST SOME FILL  
LAKESIDE PARK TO DON MORSE PARK  
CHELAN, WASHINGTON**

PARCEL NUMBER	OWNER	ASSESSED VALUATION
272213590150	SCHMITTEN INVESTMENTS LLC	\$82,500
272213590160	VENTURES IN PARADISE LLC	\$82,500
272213590170	CLARK D EDSON & BARBARA	\$82,500
272213590180	PACIFICA LOAN POOL LLC	\$379,800
272213591010	WILMART THOMAS & MARILYN	\$340,545
272213591020	RUBIN WAYNE	\$340,545
272213591030	GODFELLOW RICHARD E	\$340,545
272213591040	ALLEN KEITH E & KYLA M	\$340,545
272213591050	CITIMORTGAGE INC	\$340,545
272213591060	TAYLOR JEFFREY R ETAL	\$340,545
272213591070	MILLER BROCK & CAROL	\$340,545
272213591080	HATTENBURG TIMOTHY R ETAL	\$340,545
272213591090	TOBEY THOMAS J	\$340,545
272213591100	RACE TONY L	\$340,545
272213591110	BUSH CURT	\$340,545
272213591120	POTTER GARY&PATRICIA	\$340,545
272213591130	HILL DENNIS & ELLEN	\$340,545
272213591140	AURORA LOAN SERVICES LLC	\$340,545
272213591150	FEDERAL NATIONAL MORTGAGE ASSOCIATION	\$340,545
272213591160	HARVEY PATRICK W	\$340,545
272213591170	GINTER RYAN & LORI	\$340,545
272213591180	TERRY JOHNSON INESTMENTS INC	\$340,545
272213591190	ROBERTS BRETT J & KARIN M	\$340,545
272213591200	RACE BRYAN A	\$340,522
272213591210	WENBOURNE GABRIEL	\$340,545
272213591220	TERRY JOHNSON INESTMENTS INC	\$340,545
272213591230	BOYD DONALD A & LAURI	\$340,545
272213591240	TERRY JOHNSON INESTMENTS INC	\$340,545
272213591250	TERRY JOHNSON INESTMENTS INC	\$340,545
272213591260	TERRY JOHNSON INESTMENTS INC	\$340,545
272213591270	WALCKER JOHN	\$517,500
272213591280	TERRY JOHNSON INESTMENTS INC	\$340,545
272213591290	SULLIVAN INVESTMENT SERVICES LLC	\$340,545
272213591300	PETERSON ROBERT&RENEE	\$340,545
272213591310	TOBEY THOMAS J	\$340,545
272213591320	WEEDMAN SCOTT & HELENE	\$340,545
272213591330	CARAVEL LLC	\$517,500
272213761010	BOWEN RAYMOND L	\$323,679
272213761020	CHAPLIN KENT	\$338,639
272213761030	CHILDERS GLEN	\$351,779
272213761040	COONS ROBERT L	\$338,639
272213761050	ALLEN KENNETH R	\$333,199
272213761060	BLUME RODNEY A	\$333,199
272213761070	ERICKSON MICHAEL J	\$338,639
272213761080	LIDKE KATHLEEN	\$351,771
272213761090	PEARSON FLORENCE E	\$338,639
272213761100	ERICKSON STEVEN B	\$333,199
272213761110	GORDON NEAIL MCDUGALL FAMILY	\$384,255
272213761120	SOLIGON PETER P TRTEE	\$338,639
272213761130	HOWELL R BRIAN	\$351,771
272213761140	DRAKE JOHN M	\$338,639
272213761150	SHUMAKER JOHN W	\$384,255
272213761160	ALLEN KENNETH R	\$465,695
272213761170	PIEROTTI GLADYS L ETAL	\$482,943
272213761180	LYTLE CHARLES S	\$465,695
272213762410	FOSTER FAMILY TRUST	\$483,143
272213762420	BOWEN RAYMOND I	\$492,751
272213762430	ROEGLIN GENE & GINNIE	\$559,739

**SAMPLING OF PARCELS  
WATERFRONT WITH AT LEAST SOME FILL  
LAKESIDE PARK TO DON MORSE PARK  
CHELAN, WASHINGTON**

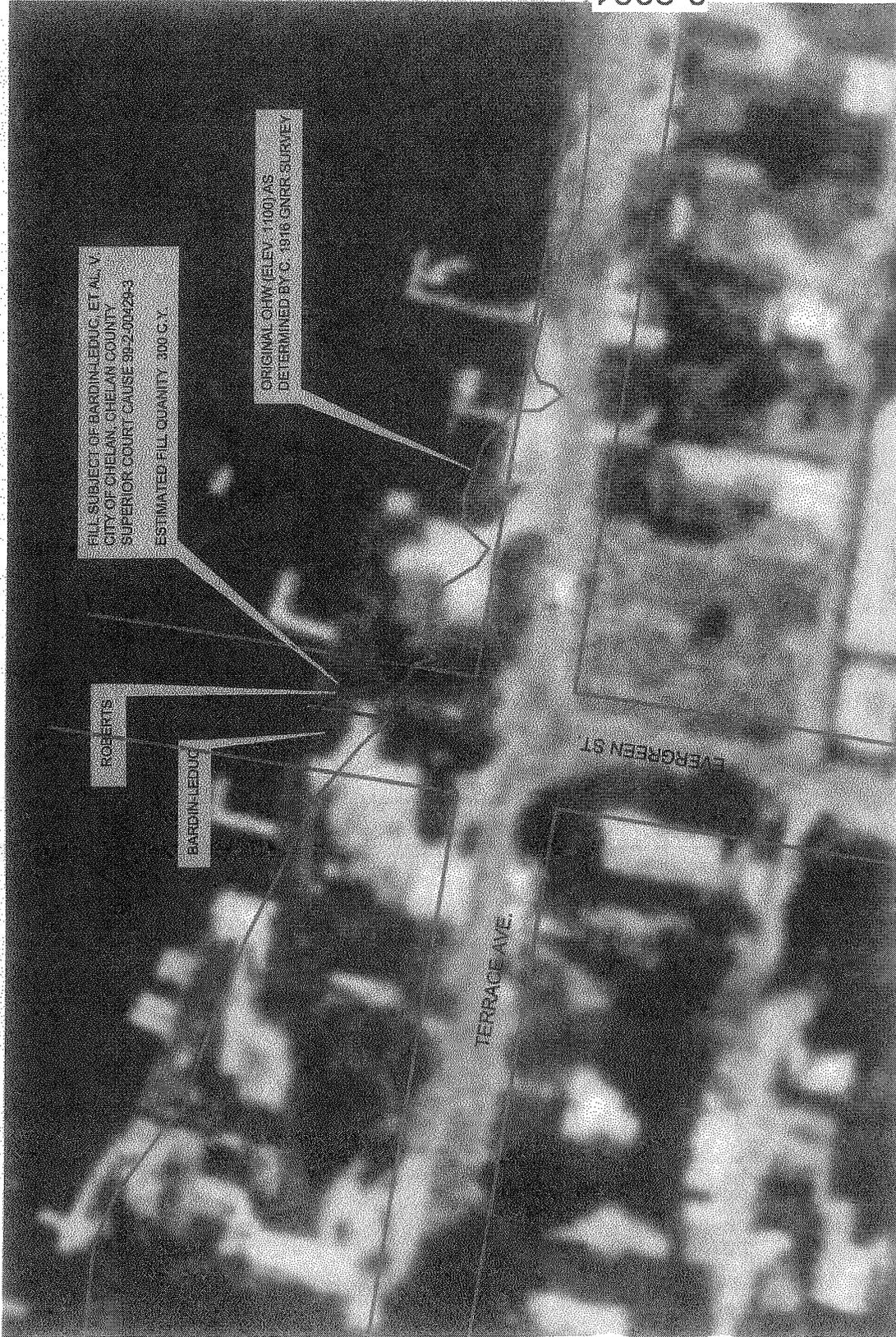
PARCEL NUMBER	OWNER	ASSESSED VALUATION
272213762440	BERG DONALD	\$508,059
272213763511	GARBARINO FRANK L & PEGGY L	\$498,943
272213763512	PETERSON'S WATERFRONT INC	\$498,943
272213817010	KRONSCHNABLE BRADLEY A & ELIZABETH	\$1,365,176
272213817015	CAMPBELL ARTHUR&DIANA TRUSTE	\$1,103,888
272213817020	CURZON GWENDOLYN E	\$957,178
272213817030	MILLER LEO S	\$1,433,468
272213817035	HIGGINS BEN C	\$947,610
272213525190	CAMPBELL'S LODGE INC	\$11,623,572
272213848080	LIPE RALPH & LYNDA	\$1,934,058
272213848055	LIPE RALPH & LYNDA	\$1,352,810
272214410050	ALLEN KENNETH R	\$1,627,289
272214410100	BOGGS ALLEN W	\$1,314,364
272214410150	GAVIN RICHARD T	\$1,010,652
272214410250	ASIMAKOPOULOS EDWIN	\$1,212,215
272214410350	JARO, INC	\$1,226,234
272214410400	HIGGINS WINSTON R	\$796,320
272214410600	SUNNFJORD PROPERTIES LLC	\$1,520,805
272214494210	SUNSET CONDOMINIUMS LLC	\$1,716,380
272214545010	TELLEVIK HAROLD	\$378,362
272214545020	CARBONEAU PAUL E	\$366,597
272214545030	CONNELLY FRANK	\$355,212
272214545040	GRAY STEVEN & NATALIE	\$344,586
272214545050	STRUAS JONATHAN J	\$344,586
272214545060	LICHTER BARRY & STAFFORD JEANNE TRUSTEE	\$344,586
272214545070	ASHE JOHN P & CHRISTINE	\$342,689
272214545080	ROBERTS EDWARD N	\$360,146
272214545090	HOLMES TODD&KATHLEEN	\$366,597
272214545100	SWEENEY TERRANCE J	\$377,982
272214545110	LAGASSEY ROBERT J	\$387,470
272214550010	BAY HOUSE AT CHELAN LLC	\$894,600
272214550020	BAY HOUSE AT CHELAN LLC	\$894,600
272214550030	CHELAN TOWNHOUSE LLC	\$1,076,250
272214662003	SUNSET CONDOMINIUMS LLC	\$918,000
272214662004	SUNSET MARINA LLC	\$296,000
272214662033	LAKE CHELAN RECREATION INC	\$1,569,209
272214662036	LAKE CHELAN BOAT COMPANY	\$1,208,933
272214494080	GREEN RANDALL L	\$470,000
272214494090	ELI LAND AND DEVELOPMENT CO	\$971,056
272214494020	BREEZY POINT LLC	\$203,988
272214494025	BREEZY POINT LLC	\$7,000
272214494030	CHITTY FAMILY TRUST ETAL	\$1,519,885
272214662054	GREEN JAMES B	\$631,167
272214662078	STANSFIELD CHRISTOPHER	\$70,000
272214662231	ROBERTS LAKE CHELAN LLC	\$1,197,209
272214662258	GACEK JON W	\$1,454,338
272214662441	HALL CHRISTOPHER	\$601,376
272214662453	LUKER TERRY	\$1,124,689
272214662066	LAGOZZINO, PETER & WENDY	\$1,076,649
272215662243	GAUKROGER JAMES G	\$949,913
272215662246	GAUKROGER ROBIN R	\$550,240
272215662249	KNUTSON RONALD L	\$1,192,904
272215662252	HARLE ELOISE TRT	\$730,957
272215662255	MANOR MYRTLE G TRT	\$1,039,333
272213593010	CARAVEL LLC	\$150,652
272213593020	CARAVEL LLC	\$256,465
272214494010	ELI LAND AND DEVELOPMENT CO	\$777
272214662370	GILBERTSON ROBERT A	\$343,737

**SAMPLING OF PARCELS  
WATERFRONT WITH AT LEAST SOME FILL  
LAKESIDE PARK TO DON MORSE PARK  
CHELAN, WASHINGTON**

PARCEL NUMBER	OWNER	ASSESSED VALUATION
272214662375	MC KELLAR SCOTT	\$378,348
272213594010	CARAVEL LLC	\$69,750
272213594011	CARAVEL LLC	\$69,750
272213594012	CARAVEL LLC	\$69,750
272213594013	CARAVEL LLC	\$69,750
272213594014	CARAVEL LLC	\$101,925
272213594020	CARAVEL LLC	\$69,750
272213594021	CARAVEL LLC	\$129,750
272213594022	CARAVEL LLC	\$69,750
272213594023	CARAVEL LLC	\$69,750
272213594024	CARAVEL LLC	\$71,127
272213153200	PETERSON W D	\$235,599
272213153100	PETERSON W D	\$235,599
272213152500	PETERSON W D	\$235,599
272213152400	PETERSON W D	\$235,599
272213152300	PETERSON W D	\$235,599
272213152200	PETERSON W D	\$235,599
272213152100	PETERSON W D	\$172,902
272213151500	PETERSON W D	\$235,599
272213151400	PETERSON W D	\$235,599
272213151300	PETERSON W D	\$235,119
272213151200	PETERSON W D	\$235,599
272213151100	PETERSON W D	\$172,368
272213153300	PETERSON W D	\$235,599
272213163300	PETERSON W D	\$235,599
272213163200	PETERSON W D	\$235,599
272213163100	PETERSON W D	\$235,599
272213162500	PETERSON W D	\$235,599
272213162400	PETERSON W D	\$235,599
272213162300	PETERSON W D	\$235,599
272213162200	PETERSON W D	\$235,599
272213162100	PETERSON W D	\$235,599
272213161500	PETERSON W D	\$235,599
272213161400	PETERSON W D	\$235,599
272213161300	PETERSON W D	\$235,599
272213161200	PETERSON W D	\$235,599
272213161100	PETERSON W D	\$235,599
<b>TOTAL VALUATION</b>		<b>\$102,915,418</b>

# **APPENDIX 2**

## **Attachment 8**



0-2381

EXHIBIT A-1



ROBERTS  
 BARDIN-LEDUC  
 FILL SUBJECT OF BARDIN-LEDUC, ET AL. V.  
 CITY OF CHELAN, CHELAN COUNTY  
 SUPERIOR COURT CAUSE 99-2-004293  
 ESTIMATED FILL QUANTITY 300 C.Y.  
 ORIGINAL OHW/ELEV. 1100, AS  
 DETERMINED BY C. 1916 GNR SURVEY

**BARDIN-LEDUC FILL**  
**EXHIBIT**

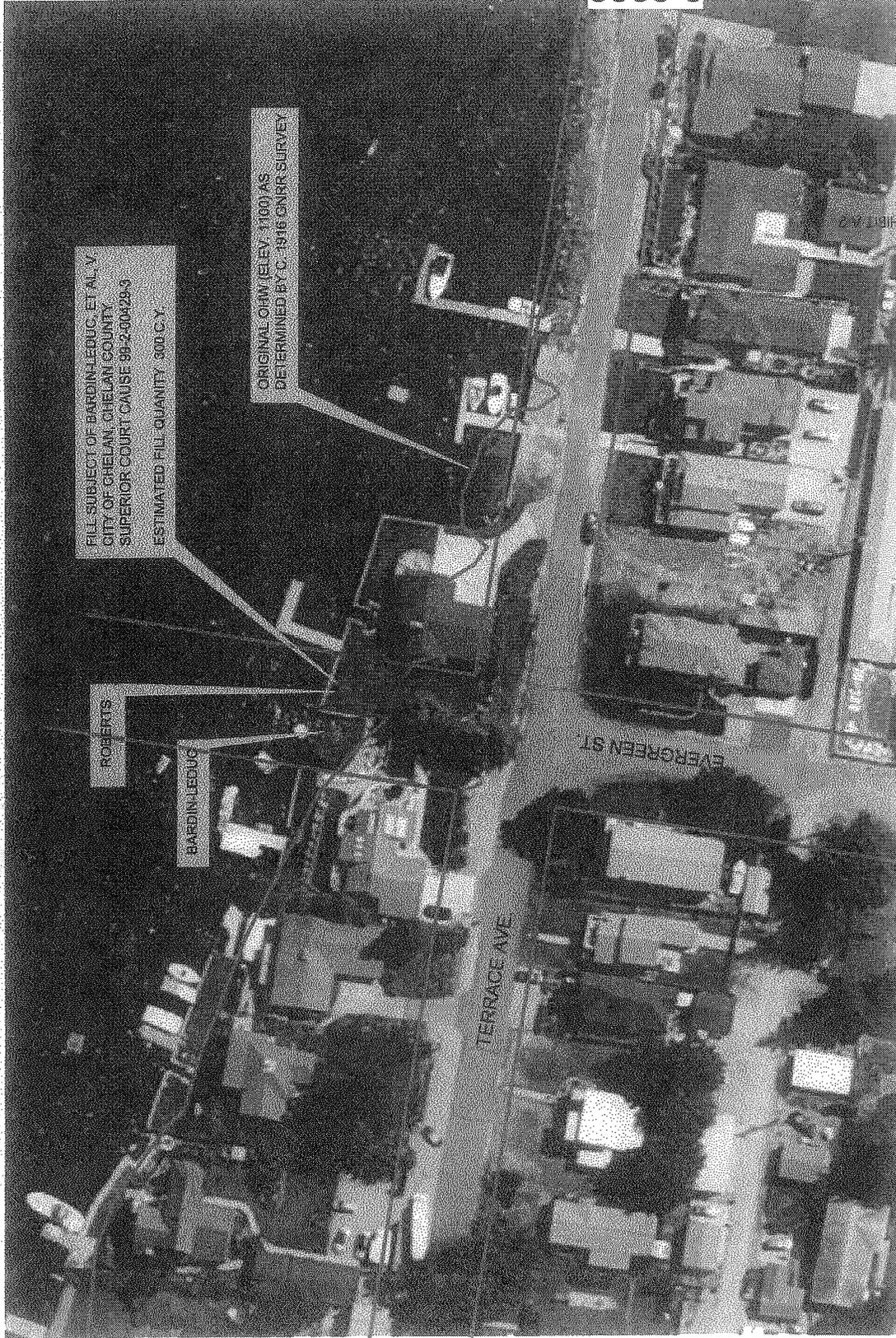
ERLANDSEN  
 INCENTIVES | PLANNING | ENGINEERING | EIR  
 1400 W. 10TH AVE.  
 SUITE 100  
 CHELAN, WA 98822  
 TEL: (509) 825-2300  
 FAX: (509) 825-2301  
 WWW.ERLANDSEN.COM

GOOGLE EARTH IMAGE C. 1998  
 PORT OF WASH. LANE OF ROBERTS SPAN DEPICTED ON MAP  
 PARKS & RECREATION DEPARTMENT OF CHELAN  
 VACATED, C. 1987

SHEET 1 OF 1

DRAWN BY: DEB  
 DATE: 1-22-15  
 SCALE: 1"=40'  
 LAYOUT: JAVP  
 FILE NO: BARDIN-LEDUC FILL 10218  
 JOB NO: 20150155  
 TOLL FREE: (800) 752-8442





RIGHT OF WAY LINES OF RIGHTS OF WAY DEDICATED ON LAKE PARK PLAT, ENBERGREN STREET NORTH OF ELEVATION 1000 VACATED 4-1927



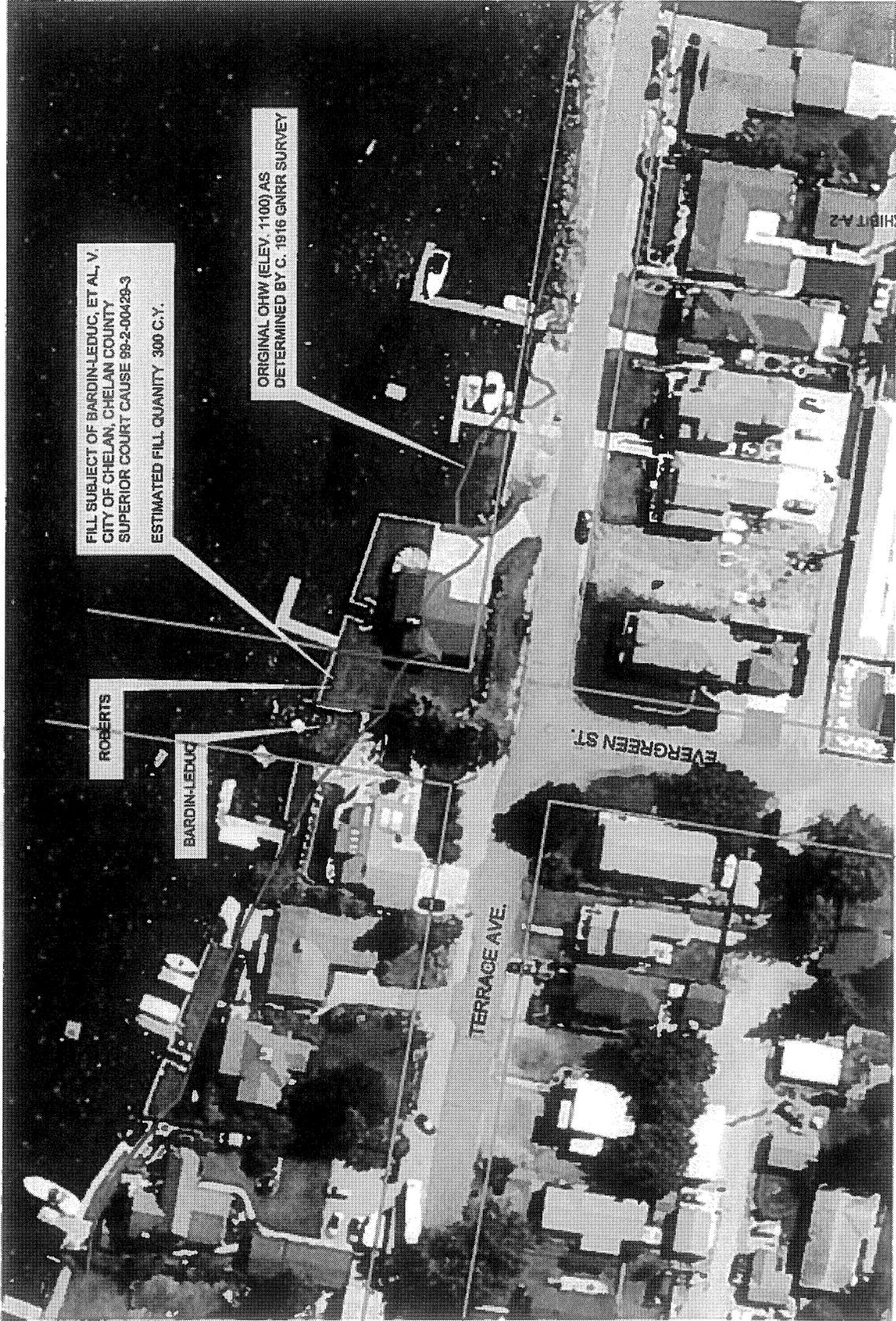
# BARDIN-LEDUC FILL EXHIBIT



DRAWN BY: DEB      FILE NO: BARDIN-LEDUC FILL 10245  
 DATE: 1-22-18      LAYOUT: 248E      JOB NO: 20170155  
 SCALE: 1"=40'      JOB: FILL      (800) 793-2485

SHEET 1 OF 1

0-2382



NOTE: ANY LINES OF BOUNDARY OR PROPERTY RIGHTS OF ANY KIND SHOWN ON THIS MAP ARE THE PROPERTY OF ERLANDSEN & ASSOCIATES, INC.

# BARDIN-LEDUC FILL EXHIBIT

**Erlandsen**  
 ENGINEERING PLANNING & CONSULTING, INC.  
 10000 N. 10TH AVENUE, SUITE 100  
 SPokane, WA 99218  
 PHONE: (509) 325-1100  
 FAX: (509) 325-1101  
 TOLL FREE: (800) 723-2442

SHEET 1 OF 1

DATE: 1-21-15  
 DRAWN BY: GEB  
 LAYOUT: 2/6/15  
 JOB NO.: BARDIN-LEDUC FILL 1-23-15

GALLAGHER FILL AREA B, C. 1949

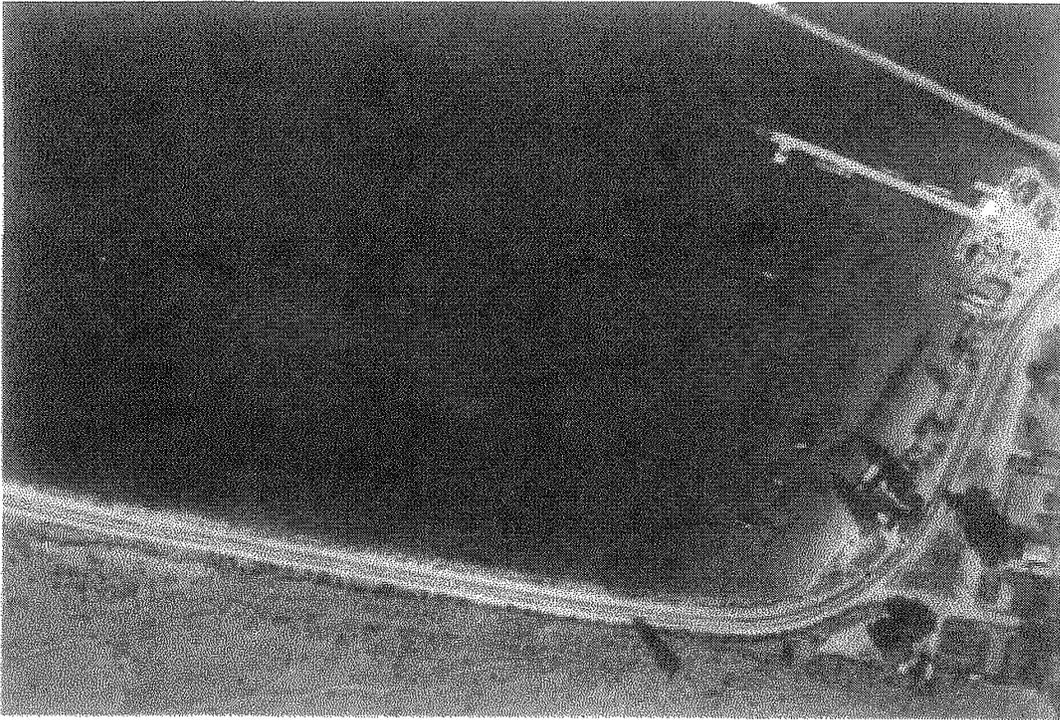


EXHIBIT C-1

0-2386

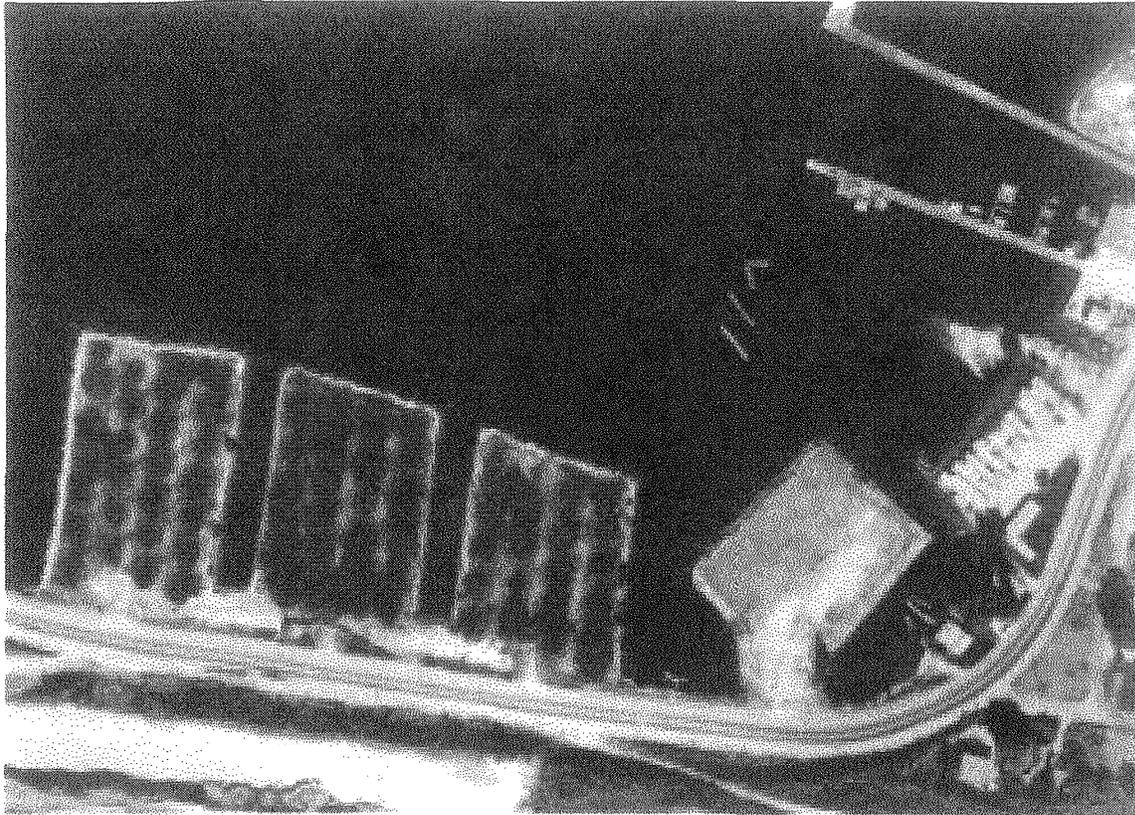
GALLAGHER FILL AREA B, C. 1949



EXHIBIT C-1

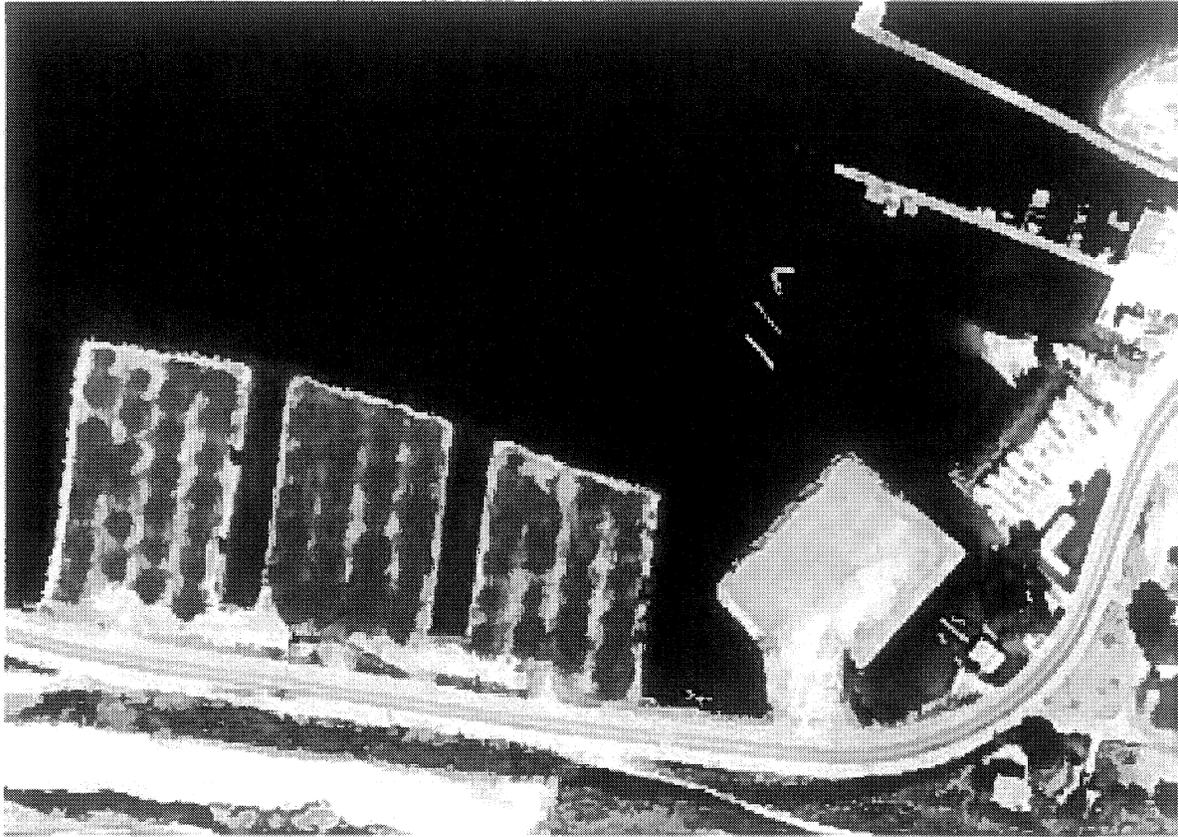
[This is a clearer version of AR 2386 from the original declaration]

GALLAGHER FILL B, C. 1967

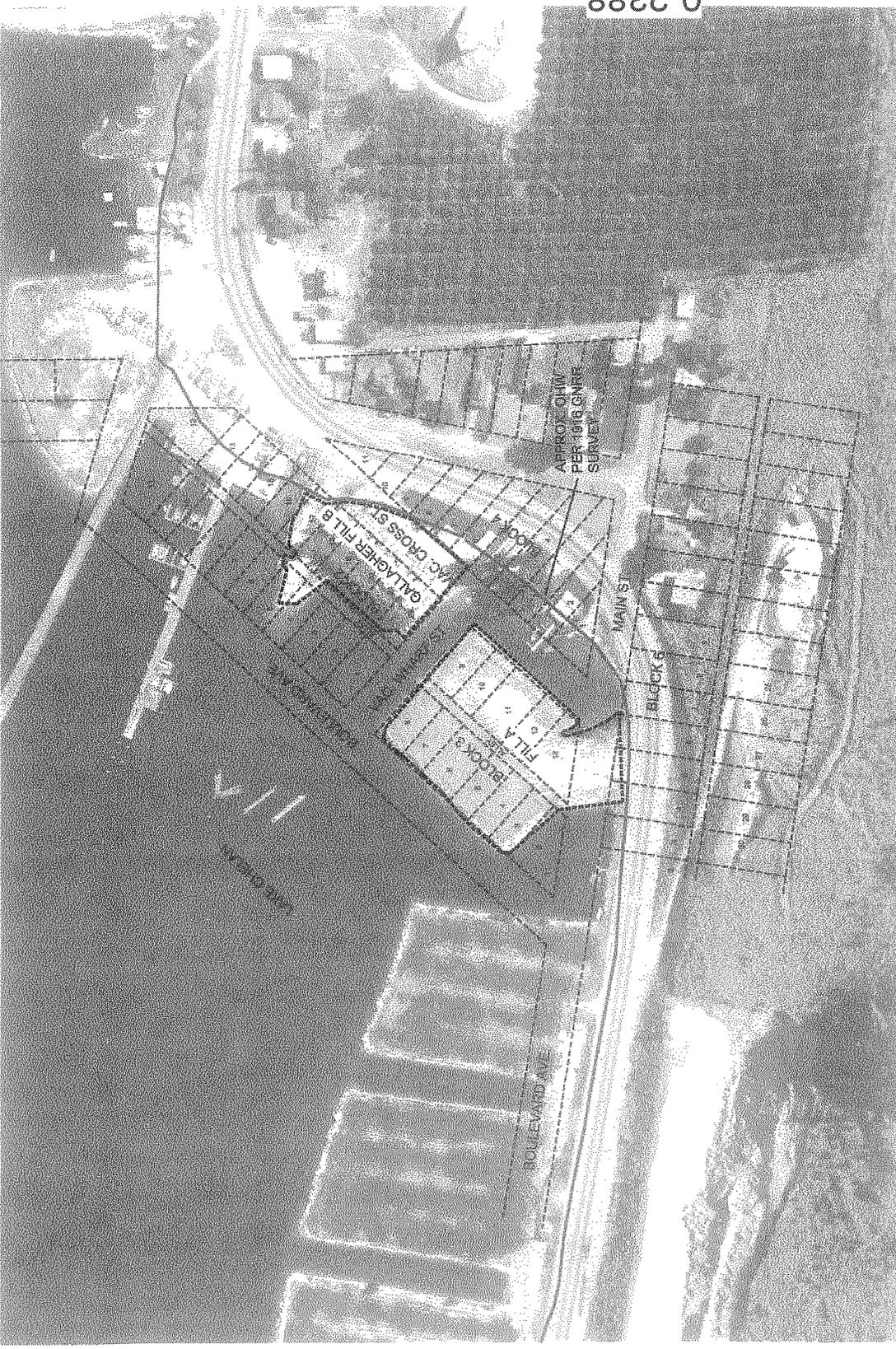


0-2387

GALLAGHER FILL B, C. 1967



[This is a color version of AR 2387 from the original declaration]



0-2388

EXHIBIT C2

**Erlandsen**  
 PLANNING | ENGINEERING | CO.

1850 W. WISCONSIN AVE.  
 MILWAUKEE, WI 53233  
 TEL: (414) 353-4432  
 FAX: (414) 353-4433

PROJECT: WILBOUR V. GALLAGHER  
 DATE: 10/15/18  
 SCALE: 1" = 100'

DESIGNED BY: J. J. JENSEN  
 CHECKED BY: J. J. JENSEN  
 DATE: 10/15/18

SHEET 1 OF 1

**GALLAGHER FILLS AT ISSUE  
 IN WILBOUR V. GALLAGHER  
 1867 PHOTO FROM WSDOT**

GALLAGHER FILL A AND B PER  
 1867 SUPREME COURT  
 DECISION - REMOVED



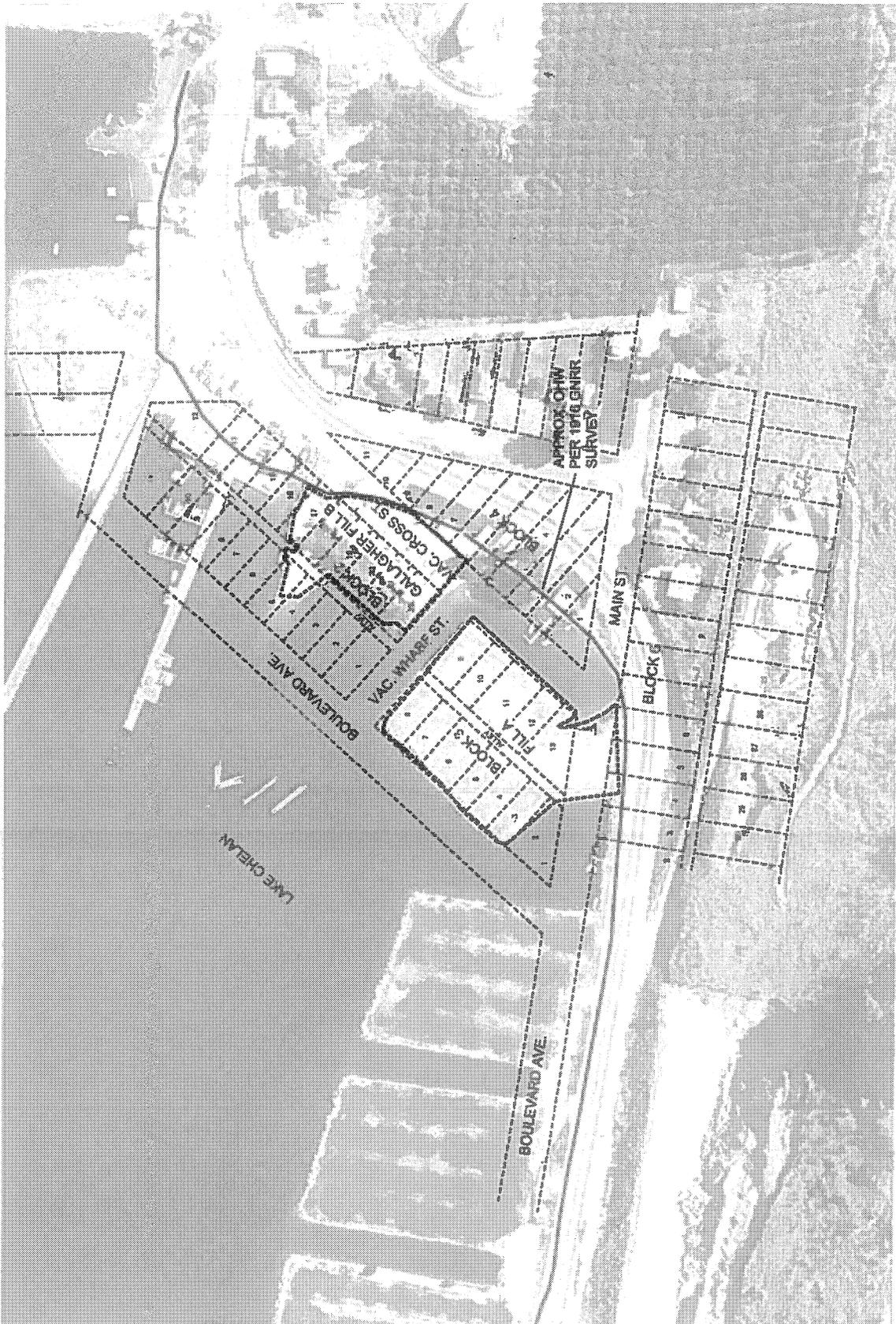


EXHIBIT C2

SHEET 1 OF 1

**Erlandsen**  
 SURVEYING & PLANNING | CONSULTING | INC.  
 1407 10th Street  
 E. WENATCHEE, WA 98903  
 TEL: 509.665.3229  
 FAX: 509.665.3222  
 www.erlandsen.com

OWNER: CDR  
 DATE: 8/21/2015  
 SCALE: 1" = 100'  
 LAYOUT: 2015  
 FILE NO: GALLAGHER FILL 2 - PLAT OVERLAY  
 JOB NO: 2010015  
 TEL. FREQ: (509) 732-7442

**GALLAGHER FILLS AT ISSUE  
 IN WILBOUR V. GALLAGHER  
 1967 PHOTO FROM WSDOT**

GALLAGHER FILL A AND B PER  
 1969 SUPREME COURT  
 DECISION - REMOVED



0-2389

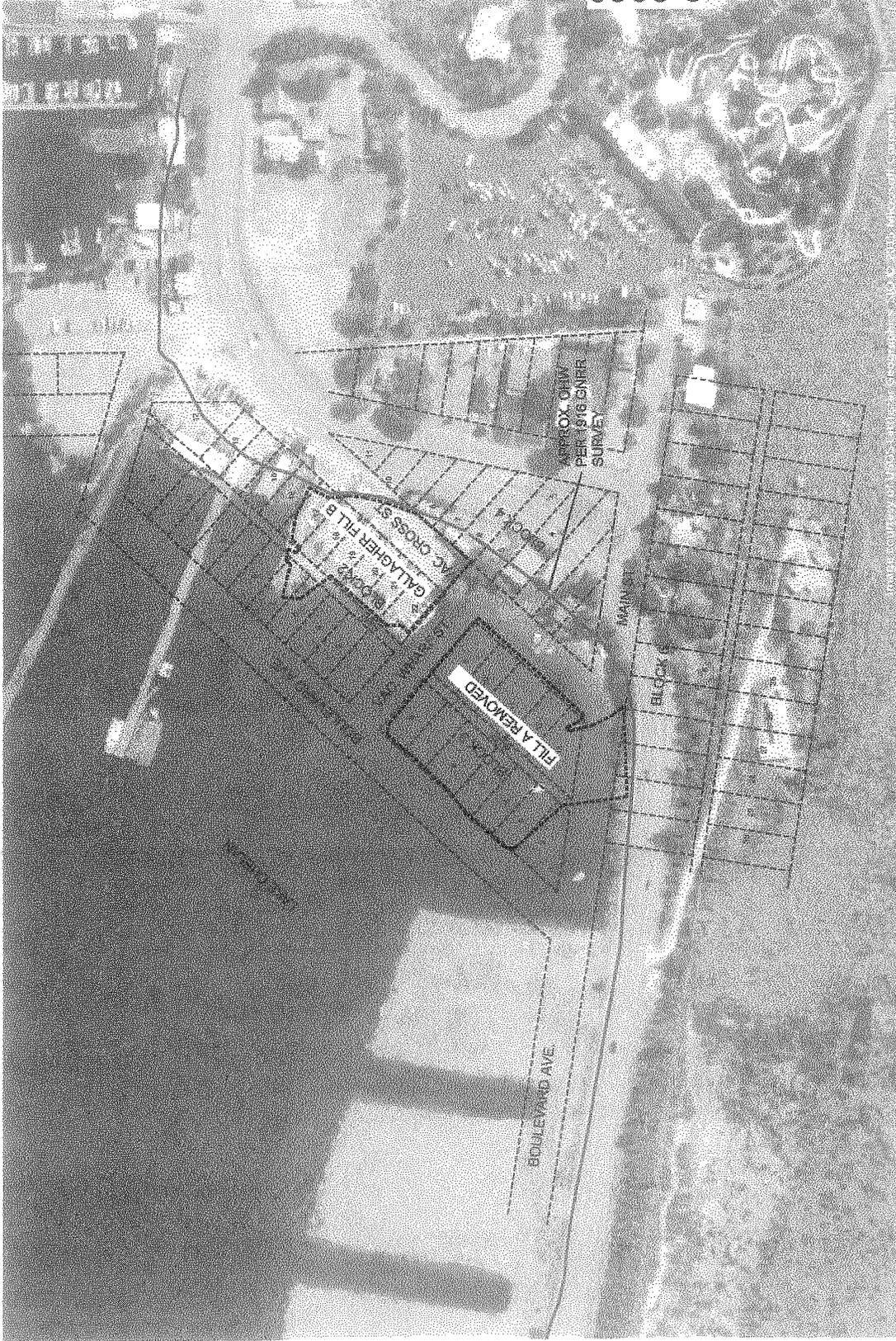


EXHIBIT C3

**Erlandsen**  
SURVEYING PLANNING ENGINEERING

1821/1822 Main Street  
Canaan, NY 12024  
E. WEINSTEIN (518) 884-2552

PROJECT: GALLAGHER FILL, 2 - PLAT OVERLAY  
DATE: 07/27/16  
SCALE: 1" = 50'

SHEET 1 OF 1

**GOODFELLOW FINGERS  
PER 1971 STIPULATION  
USGS PHOTO C. 2014**

GALLAGHER FILL A PER 1989  
SUPREME COURT DECISION  
REMOVED



EXHIBIT C3

**Erlandsen**  
 ENGINEERS PLANNERS ARCHITECTS INC.  
 1020 Howe Avenue, Suite 200  
 Berkeley, CA 94709  
 (916) 841-2000  
 FAX: (916) 841-2002

FILE NO: GALLAGHER FILL 3 - PLAT OVERLAY  
 JOB NO: 20020189  
 TOLL FREE: (800) 782-7442

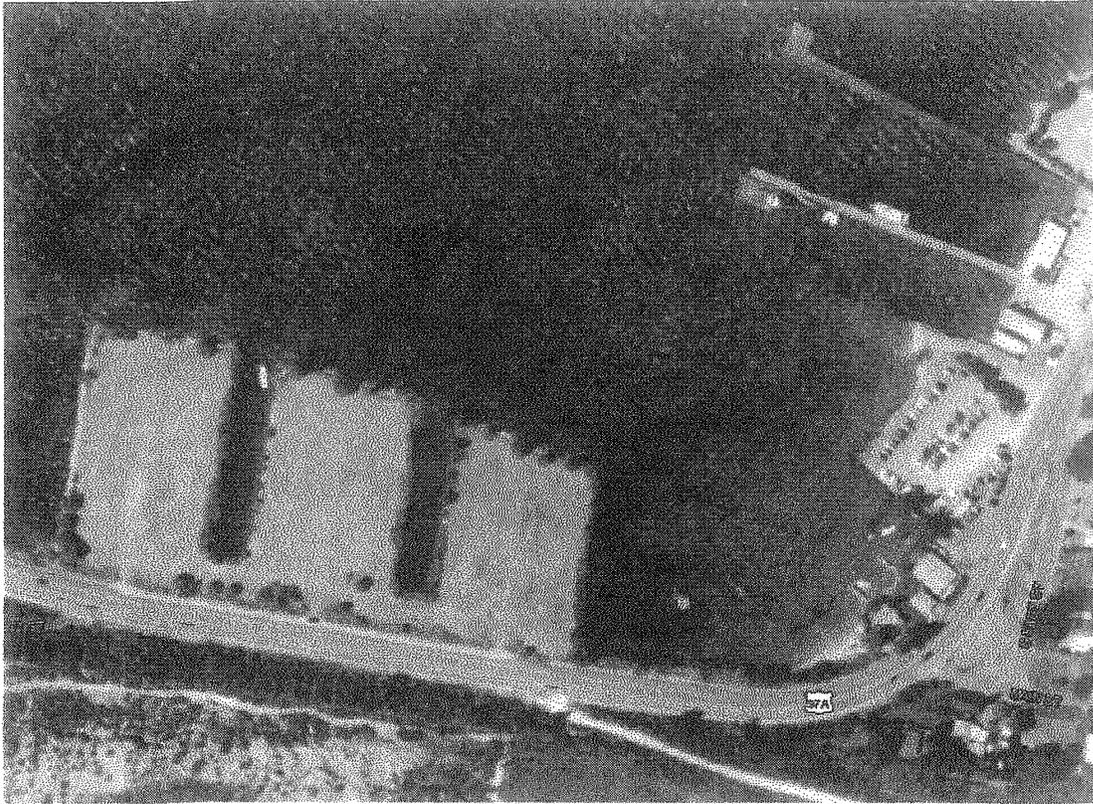
DATE: 04/20/13  
 DRAWN BY: DEB  
 LAYOUT: 2413

SHEET 1 OF 1

**GOODFELLOW FINGERS**  
**PER 1971 STIPULATION**  
**USGS PHOTO C. 2014**

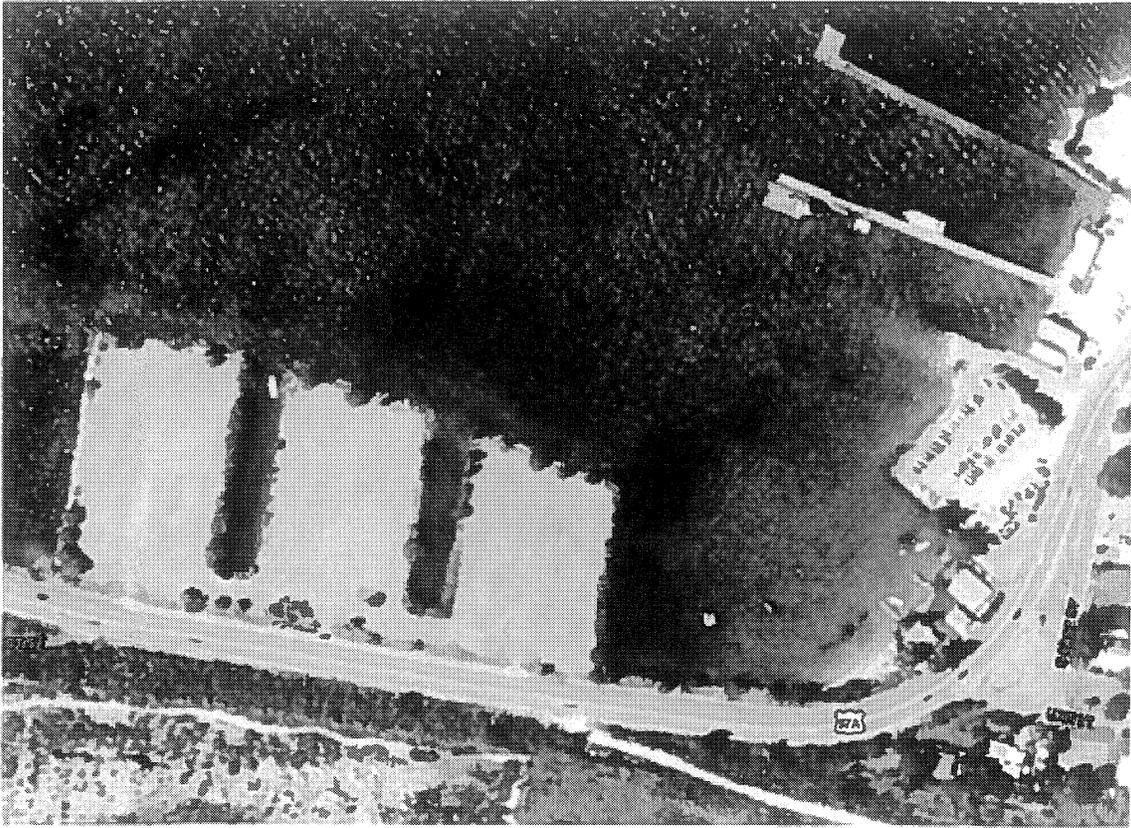
GALLAGHER FILL A PER 1969  
 SUPREME COURT DECISION  
 REMOVED

GALLAGHER FILL B, C. 2006



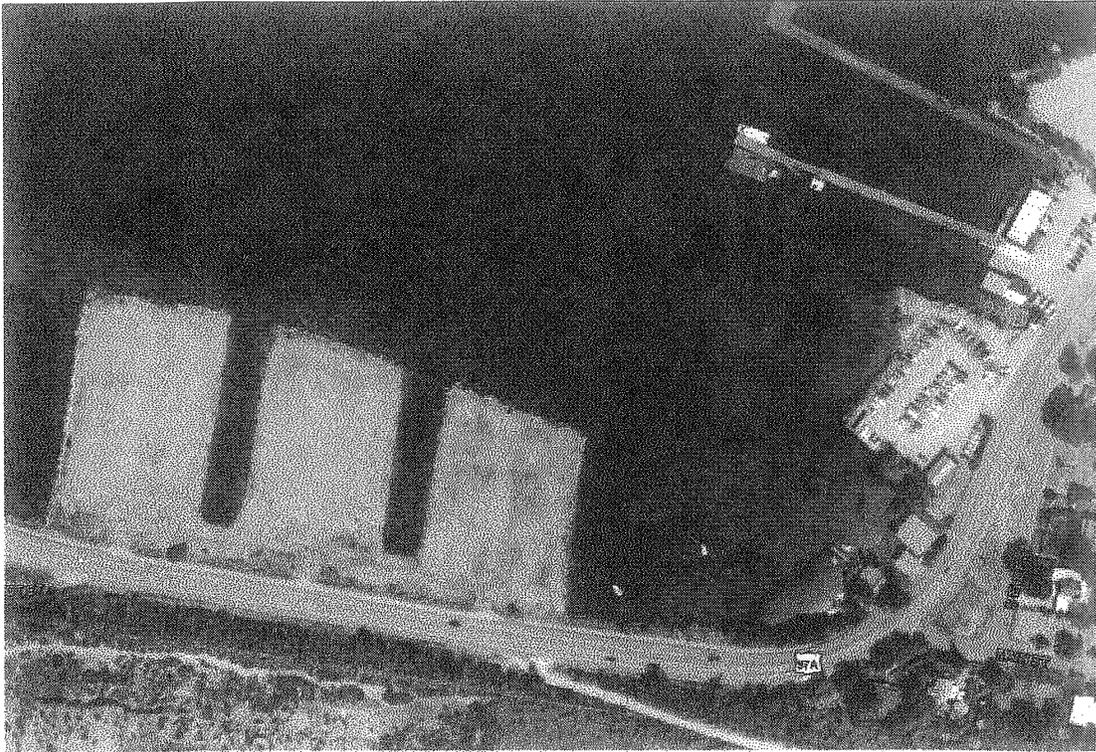
0-2390

GALLAGHER FILL B, C. 2006



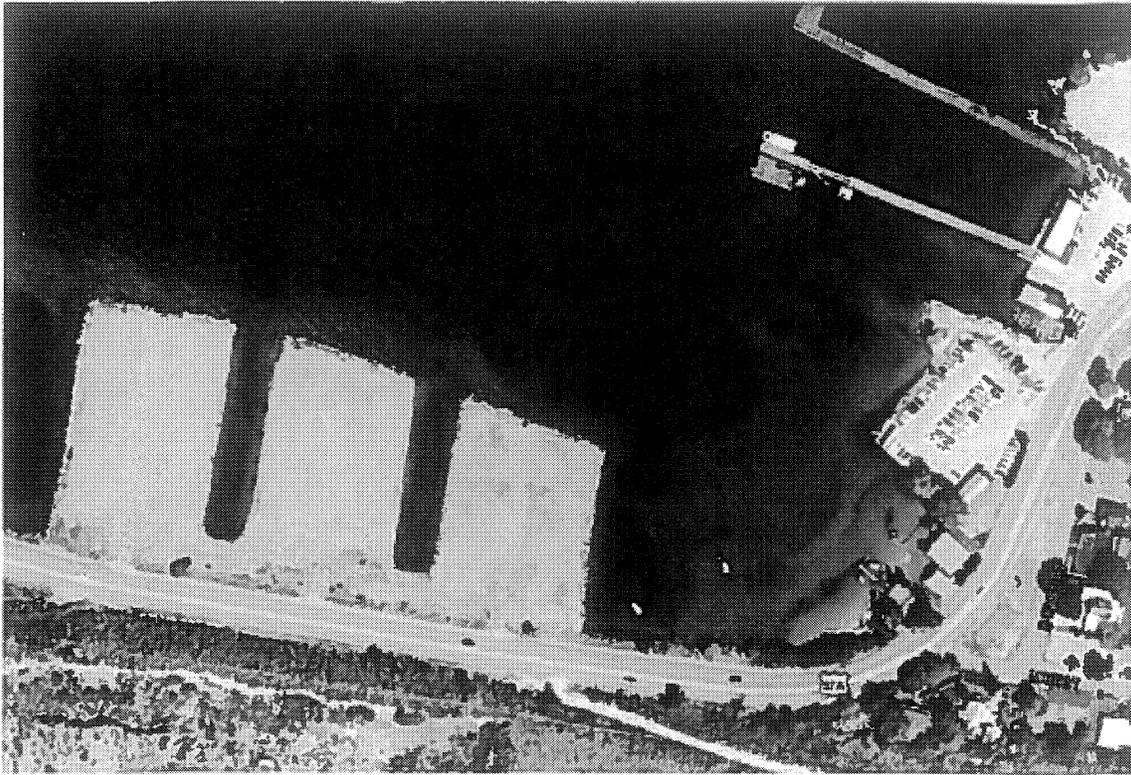
[This is a color version of AR 2390 from the original declaration]

GALLAGHER FILL B, C. 2011



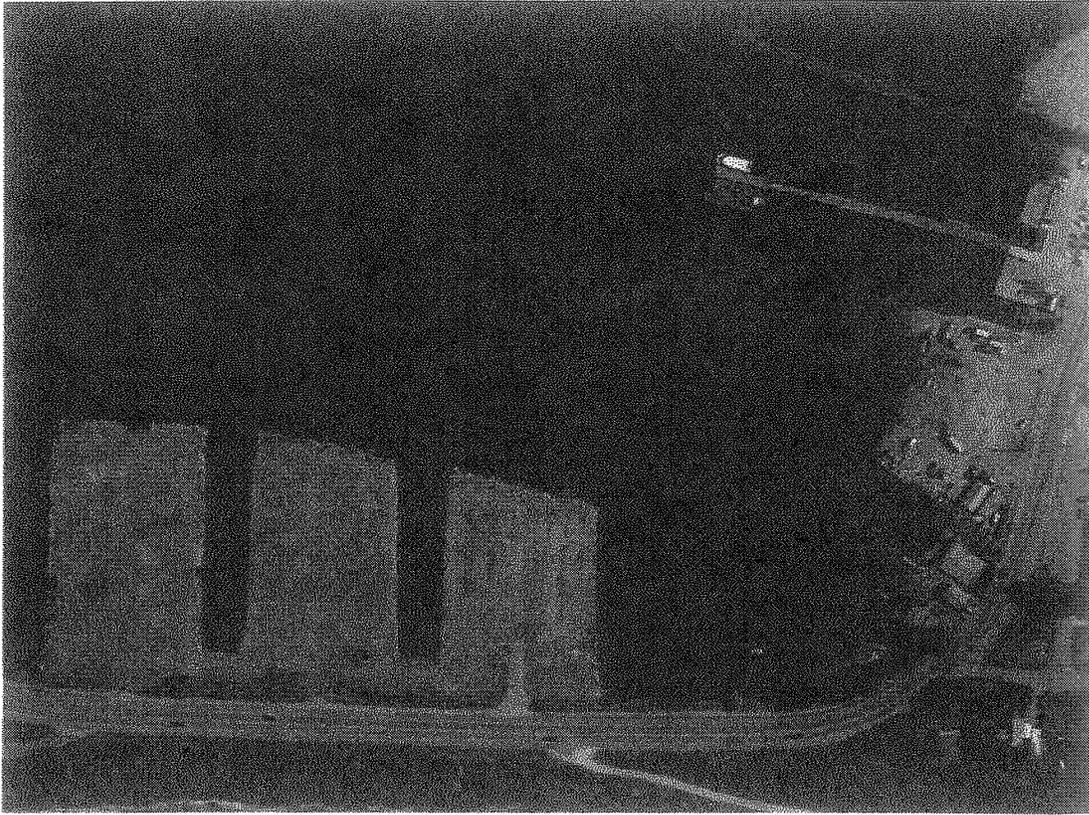
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GALLAGHER FILL B, C. 2011



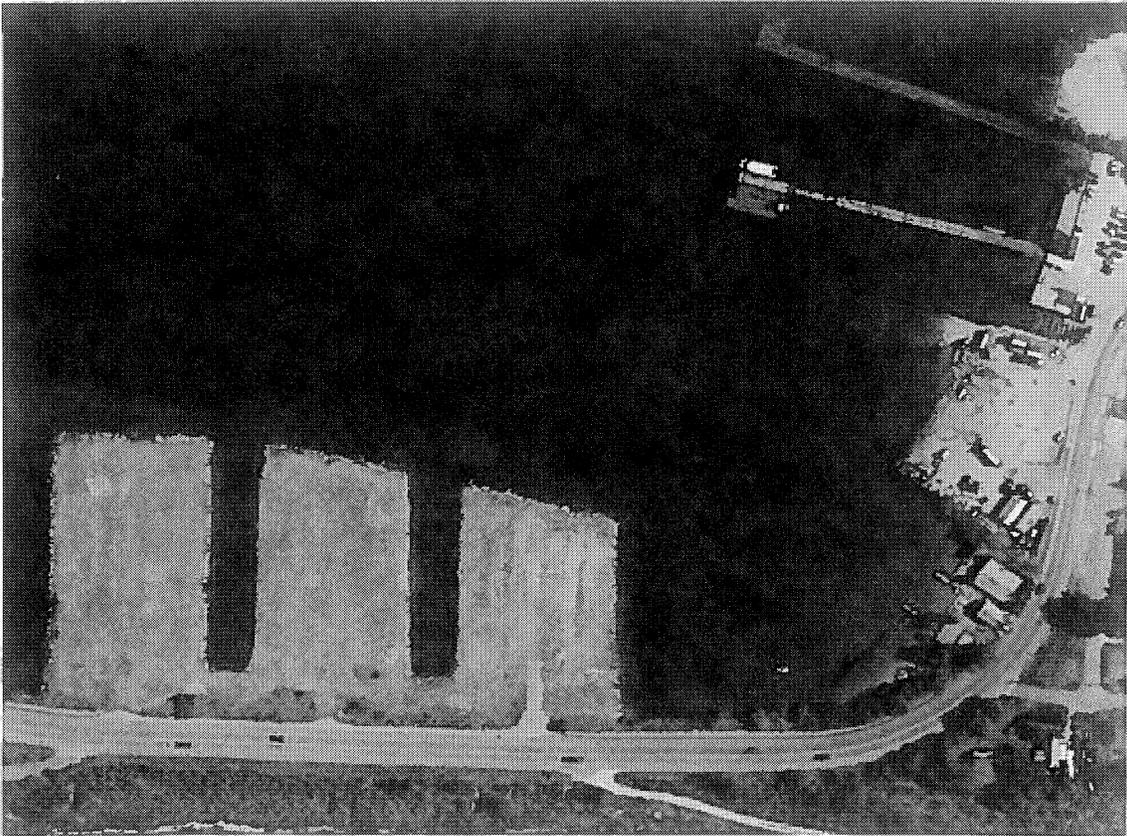
[This is a color version of AR 2391 from the original declaration]

GALLAGHER FILL B, C. JULY, 2013



0-2392

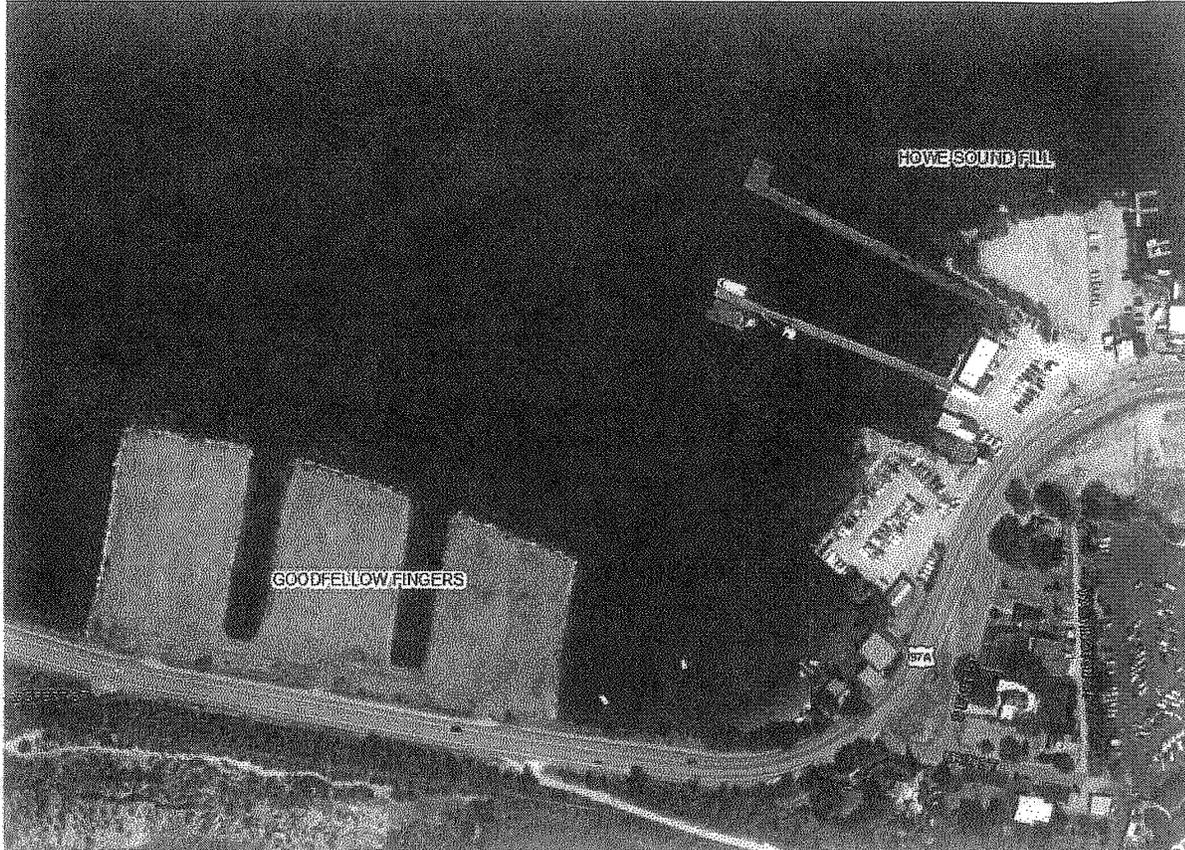
GALLAGHER FILL B, C. JULY, 2013



[This is a clearer version of AR 2392 from the original declaration.]

# HOWE SOUND FILL HISTORIC PHOTOS

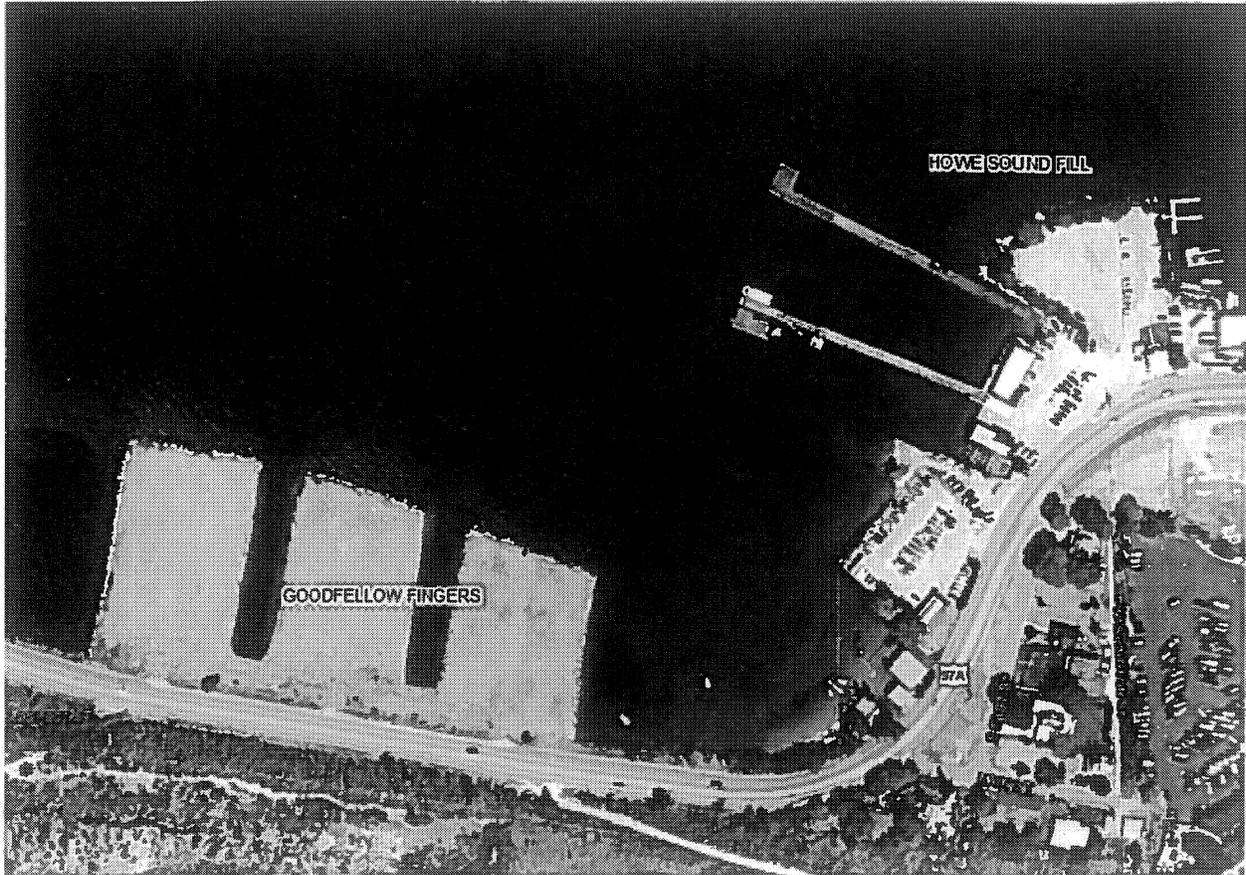
## INDEX MAP



0-2394

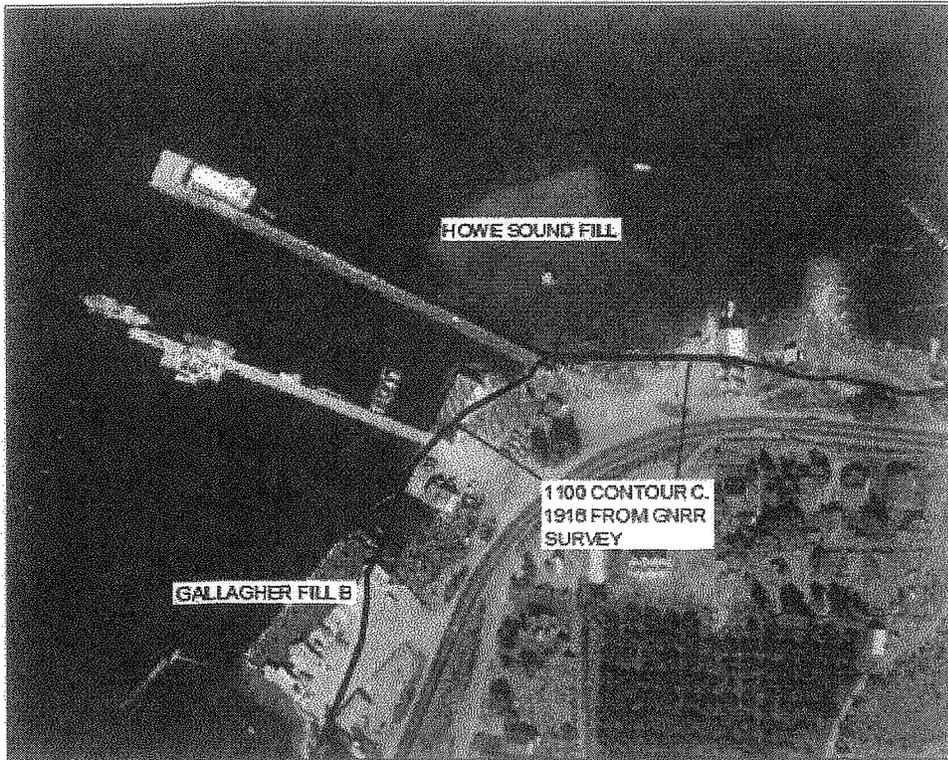
# HOWE SOUND FILL HISTORIC PHOTOS

## INDEX MAP



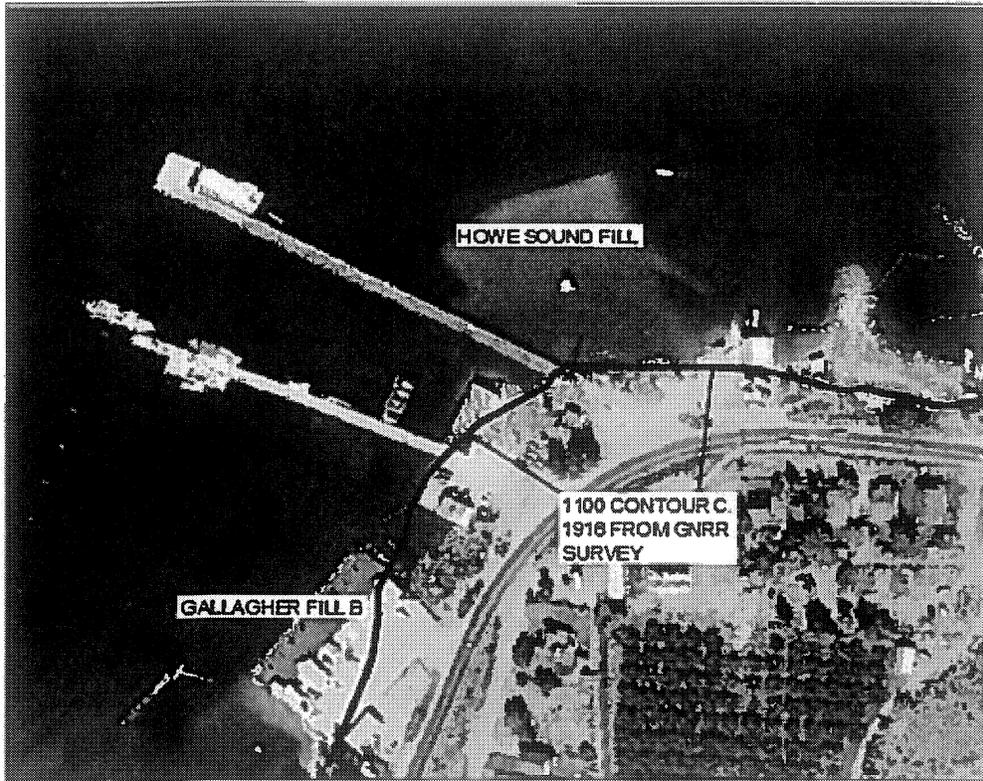
[This is a color version of AR 2394 from the original declaration.]

1961



0-2395

1961



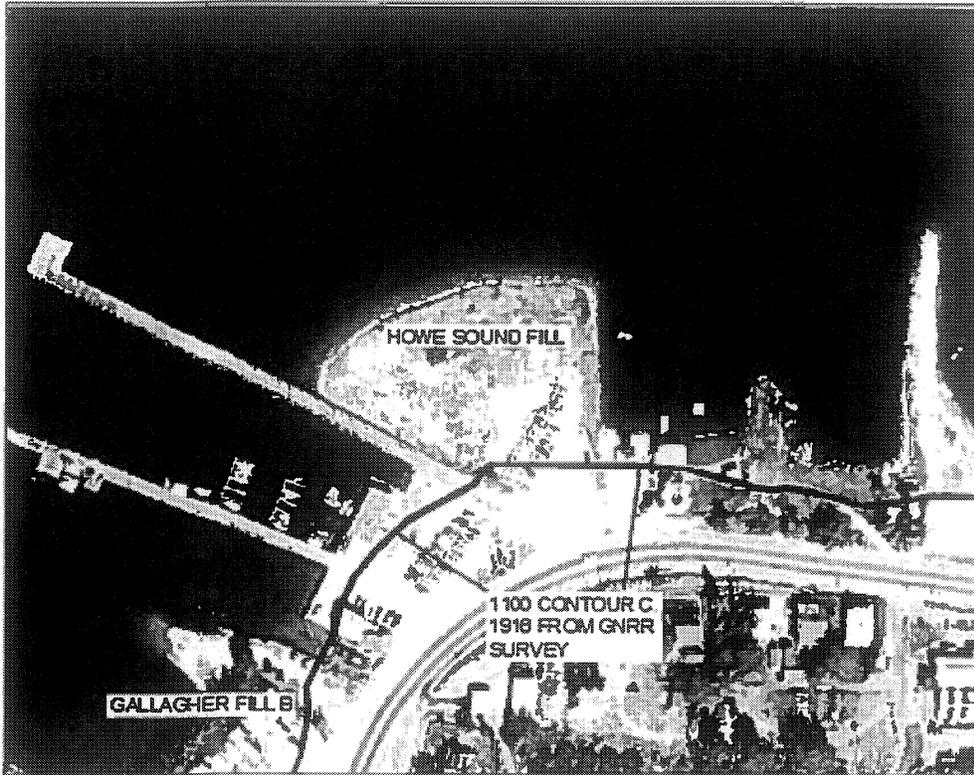
[This is a clearer version of AR 2395 from the original declaration.]

1967



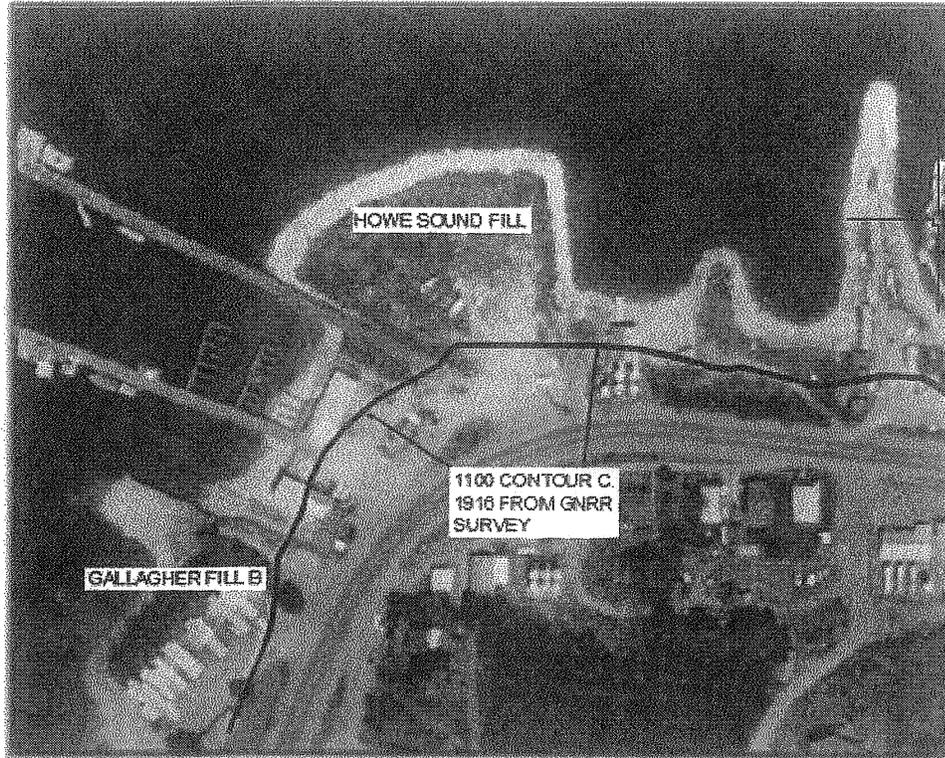
0-2396

1967



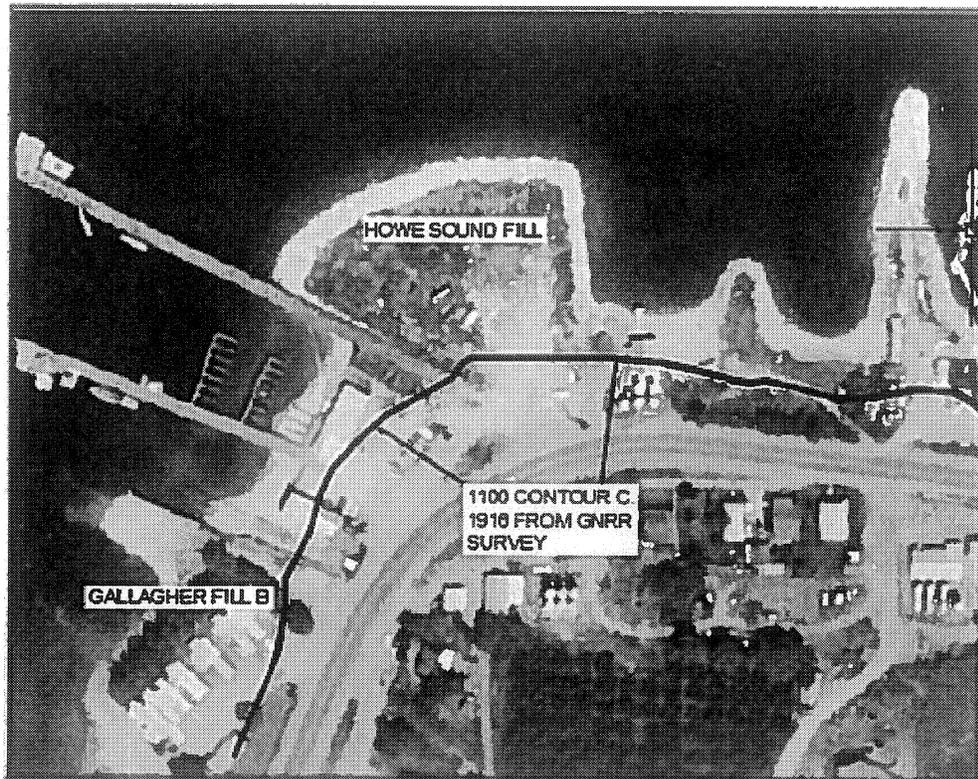
[This is a color version of AR 2396 from the original declaration.]

1972



0-2397

1972



[This is a clearer version of AR 2397 from the original declaration.]

PETERSON'S WATERFRONT  
HISTORIC PHOTOS

1961



0-2399

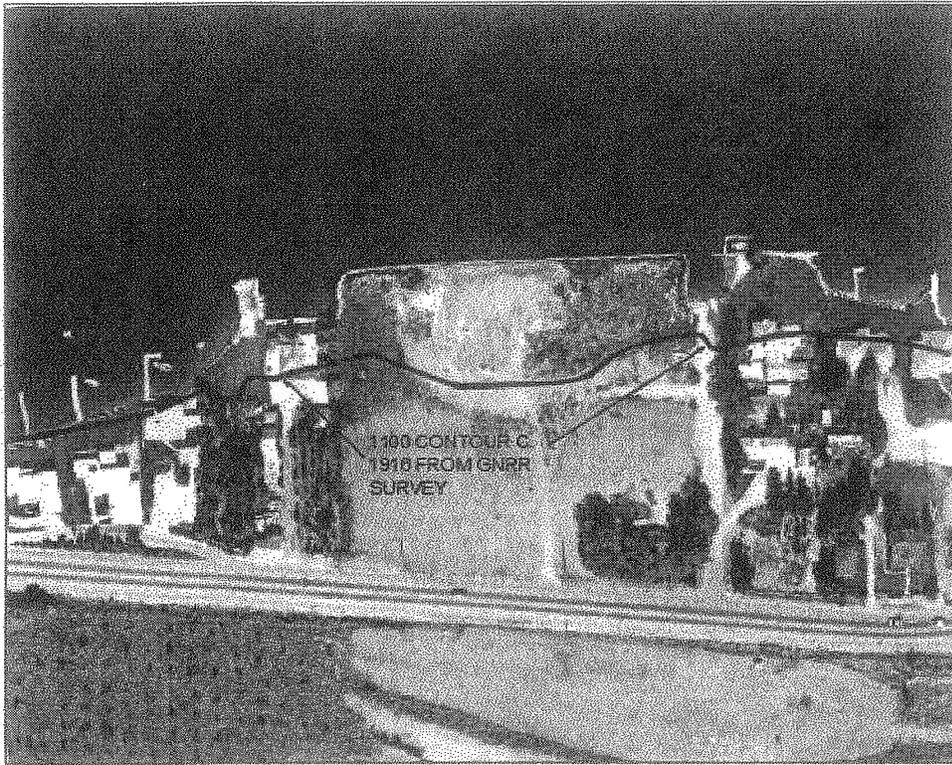
# PETERSON'S WATERFRONT HISTORIC PHOTOS

1961



[This is a clearer version of AR 2399 from the original declaration.]

1967



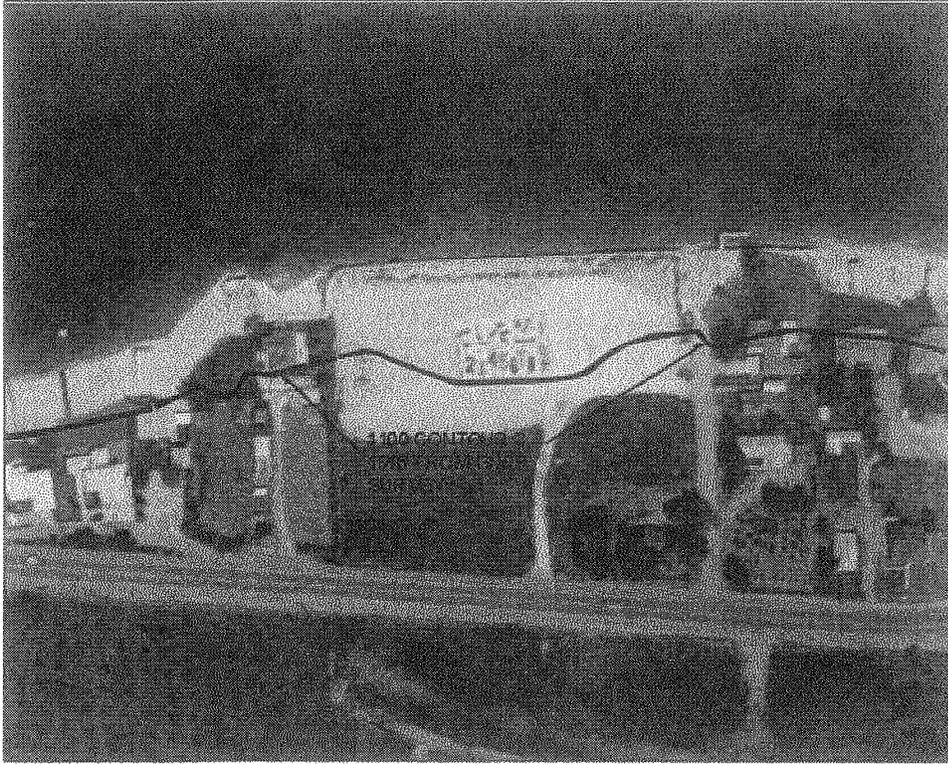
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1967



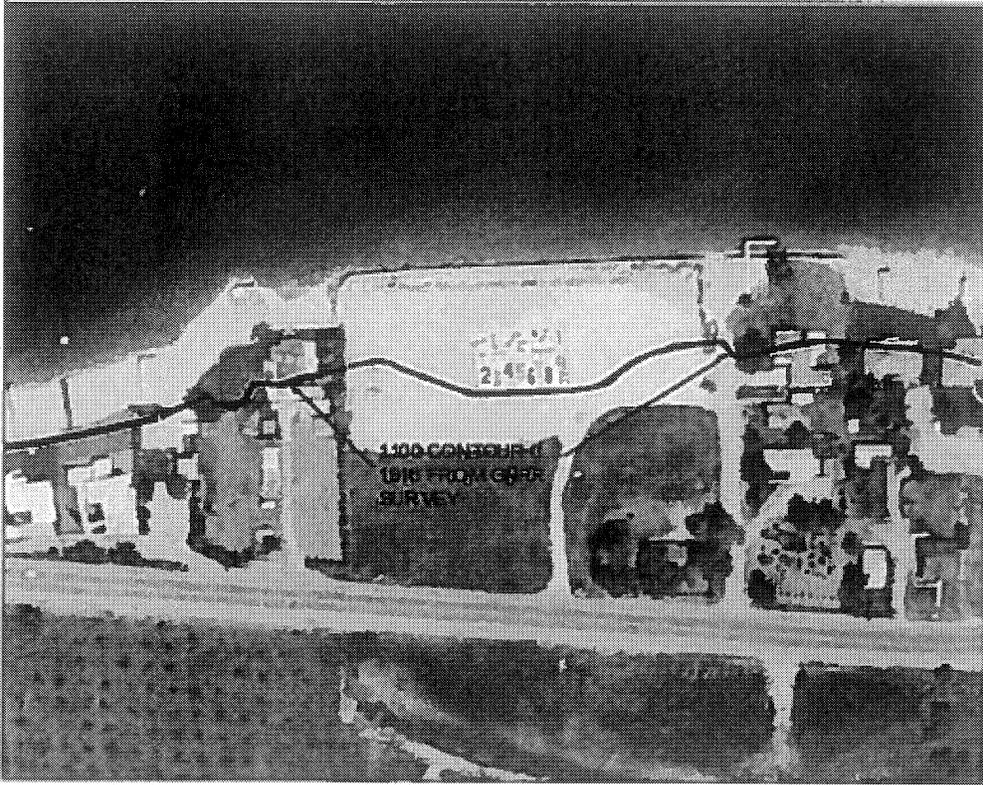
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1972



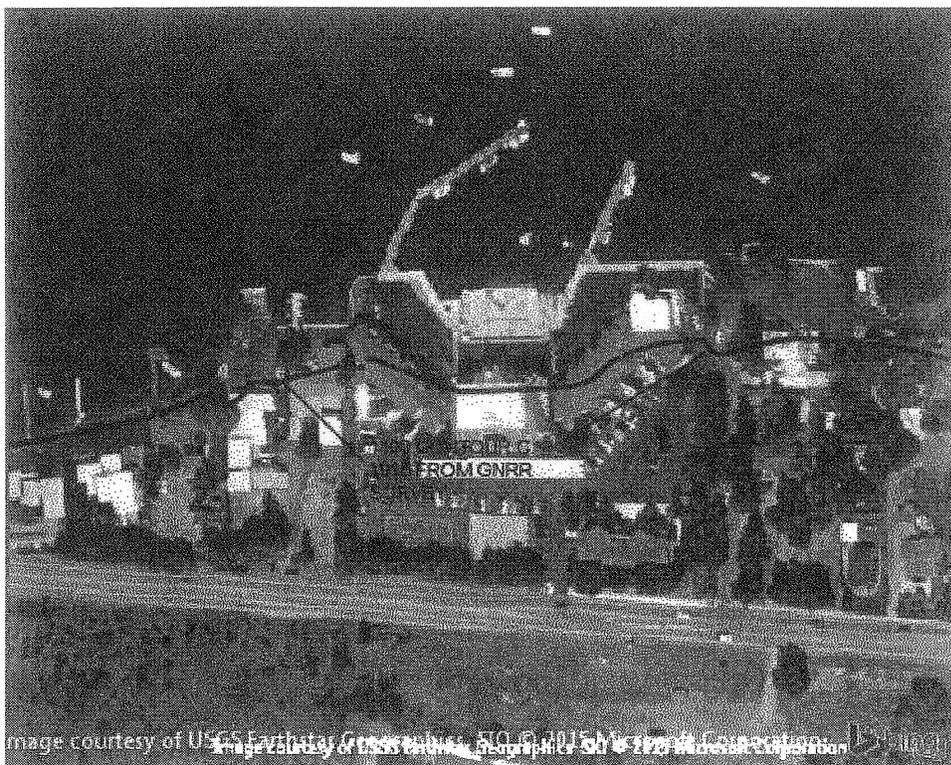
0-2401

1972



[This is a clearer version of AR 2401 from the original declaration.]

2015



0-2402

2015



[This is a color version of AR 2402 from the original declaration.]