

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

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

FILED
Sep 23, 2015
Court of Appeals
Division III
State of Washington

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

Respondents.

v.

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

Appellants,

**REPLY BRIEF OF APPELLANT
GBI HOLDING CO.**

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I. NATURE OF THE ISSUES BEFORE THE COURT

The trial court ordered, on summary judgment, the removal of over 100,000 yards of material from the shores of Lake Chelan—at a massive cost—on the sole basis that the material was in a location occupied fifty years ago by navigable waters of Lake Chelan. CBC attempts to justify the decision below by ignoring the law of standing; claiming the trial court was warranted in ignoring the plain language and history of the Shoreline Management Act; characterizing the Three Fingers as unlawful; and arguing that, if the Shoreline Management Act does preclude CBC's suit, then the Shoreline Management Act is a violation of the Public Trust Doctrine. The arguments are made without authoritative support and provide no basis for upholding the decision below.

First, contrary to statute and well-established precedent, the trial court allowed the respondent, CBC, to challenge the material, known now as the Three Fingers, as an intrusion into public navigation without evidence of specific harm to any member of the organization. CBC's members' general interests in using the area for future recreation are insufficient to establish standing and the court below was incorrect to hold otherwise.

Second, the people of the State of Washington have given their consent to the limited intrusion of such fills. The consent granted was

accompanied by a substantial regulatory control program imposed by the State's Shoreline Management Act and related master program assuring that any further development of the property would be directed to use in the public interest and in satisfaction of the requirements of the public trust doctrine. For that reason, the Three Fingers was not unlawful as a public nuisance merely because it intruded into previously navigable waters. Nor does the Three Fingers break any other laws. And, for the same reasons, the Shoreline Management Act is not a violation of the Public Trust Doctrine, but rather indicates the State's control over its navigable waters.

The trial court allowed the case to proceed in the face of a specific statutory prohibition against such suits based solely on allegations of interference with navigable waters for which the consent had been granted. The trial court's decision is unprecedented and without legal support, and should be reversed.

II. ARGUMENT

A. CBC Lacks Standing Because Its Members Have Not Shown Special Injury

1. CBC must establish special injury.

CBC does not dispute that a party bringing a public nuisance action must show special injury under RCW 7.48.210. Instead, CBC contends that it does not have to meet this requirement because it did not

plead “public nuisance” as a cause of action, but instead sought to declare the Three Fingers a violation of the Public Trust Doctrine. CBC’s argument is specious. CBC concedes, as it must, that the crux of the trial court’s decision was that CBC “*demonstrate[d] that the Three Fingers Fill constitutes a public nuisance*, was thus contrary to state statute, and therefore RCW 90.58.270(1) was not applicable.” CBC Response at 11 (emphasis added). CBC litigated the issue of whether the Three Fingers was a public nuisance before the trial court, and a litigant must always possess standing, meeting both constitutional requirements and any other requirements imposed by law. *See Sabey v. Howard Johnson & Co.*, 101 Wn. App. 575, 584, 5 P.3d 730, 735 (2000) (“The standing doctrine requires that a plaintiff must have a personal stake in the outcome of the case in order to bring suit.”); *Gustafson v. Gustafson*, 47 Wn. App. 272, 276, 734 P.2d 949, 952-53 (1987) (same). Otherwise, one seeking to remove another’s property could simply bypass the public nuisance statute by claiming a public trust violation instead of public nuisance. This would gut the purpose of the standing requirement of the public nuisance statute, which limits such claims to those with special injury. *See* RCW 7.48.210; *State v. Grant*, 156 Wn. 96, 100, 286 P. 63 (1930) (“Our statute is declaratory of the rule that it is essential to the right of an individual to relief against a public nuisance, that the individual show he has suffered or

will suffer special injury other than that in which all the general public share alike.”).

Moreover, by statute, when a party seeks to remove an obstruction in a public water way, the claim sounds in public nuisance (and thus special injury is required). RCW 7.48.120; 210. In *Wilbour v. Gallagher*, the Supreme Court identified the public’s rights to use navigable waters as a basis for action, but it was the neighbors—whose access to the waters of Lake Chelan were substantially and uniquely diminished by fill—who had standing to challenge the obstruction. *Wilbour*, 77 Wn.2d at 317. *See also Lampa v. Graham*, 179 Wn. 184, 187, 36 P.2d 543, 544 (1934) (plaintiffs lacked standing to enjoin obstruction to the Columbia River where they only alleged “use of the channel of the river as a highway, or as it may be used by the general public); *Olsen v. Jacobs*, 193 Wn. 506, 513, 76 P.2d 607, 610 (1938) (plaintiffs lacked standing to challenge a county order vacating a street where “[t]heir 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.”); *Carl v. W. Aberdeen Land & Imp. Co.*, 13 Wn. 616, 619, 43 P. 890, 891 (1896).

CBC’s claim that there exists a cause of action to remove an obstruction to navigable waters under the Public Trust Doctrine—

independent of the public nuisance statutes—is made without citation of any authority. *Caminiti v. Boyle*, 107 Wn.2d 662, 732 P.2d 989 (1987), relied on by CBC for its standing in these proceedings, is not contradictory. As an initial matter, *Caminiti* does not directly address standing at all, as standing appears to not have been in dispute on appeal. Regardless, the facts cited by the Washington Supreme Court simply support the unsurprising proposition that parties whose interests are affected by a statute may challenge the constitutionality of a statute. 107 Wn.2d at 663-65 (petitioner could challenge constitutionality of statute allowing private recreational docks without payment to the state where he and others had interests affected by the revenue generated by the State from public resources and recreational interests impacted by the docks).¹

In other words, the parties do not disagree that a personal interest required to achieve standing to challenge the constitutionality or scope of a statute requires a special interest directly affected by the statute. Where the challenge is to a specific intrusion, however, standing must be based on a special injury caused by the specific intrusion into navigable waters. *See, e.g., Lampa*, 179 Wn. at 186; *Kemp v. Putnam*, 47 Wn.2d 530, 288

¹ The Washington Law Review article quoted by CBC is merely noting the same fact regarding *Caminiti*—first, that standing was not in dispute and, second, that property owners with personal interests impacted by a statute had standing to challenge the constitutionality of the statute. Response at 13, *citing* Ralph L. Johnson, *The Public Trust Doctrine and Coastal Zone Management in Washington State*, 67 Wash. L. Rev. 521, 589 (1992).

P.2d 837 (1955), *overruled by Save a Valuable Env't (SAVE) v. City of Bothell*, 89 Wn.2d 862, 576 P.2d 401 (1978). As discussed below, CBC has not established this special injury.

2. CBC has not established the requisite special injury.

CBC also claims that, if special injury is required to pursue their claim for removal of the Three Fingers, they have established it. This claim fails for three separate reasons.

First, the declarations of CBC's members amount only to unverified claims that removal of the Three Fingers will result in a "sandy beach" or a "swimming beach" and would improve fishing and make kayaking safer and more enjoyable. Response at 13-15. These are not special injuries different in kind from the public as a whole. They instead are generalized, future recreational interests that could be asserted by *any* member of the public. CBC cites the 1927 deed to access Lake Chelan as establishing special injury, but, as it recognizes, that deed granted a right of access to "the public." Response at 18. Nothing in the deed's language eliminates the need for a member of the public to show special injury in order to bring an action for public nuisance—particularly because blocking a public right of way is a public nuisance. RCW 7.48.120.

Second, CBC's members make no claim that they historically used the area before the Three Fingers appeared. Such historical claims are

present in *Lampa*, *State v. Grant*, and *Kemp*.² The court in *Kemp* specifically found Mr. Kemp's regular use of the river for fishing *before* it was blocked to be the basis for his standing. *Kemp*, 47 Wn. 2d at 535.

Finally, GBI has established questions of material fact regarding the members' claims that removing the Three Fingers would actually improve their access to Lake Chelan. CBC's allegation that removal of the Three Fingers would result in improved recreational access, or, specifically, a sandy beach suitable for swimming as well as better fishing and kayaking are flatly inconsistent with the available evidence. In fact, contrary to CBC's claims the bottom of the lake by the Three Fingers is rocky (not sandy). Thorpe Declaration at 25, p.8, CP 0-0907. And when the lake is full, the water is 6-10 feet deep, and washes onto a steep rock retaining wall abutting the state highway, making public access to the water difficult and dangerous and precluding the future "sandy beach" on which plaintiffs Schuldt and Hague base their claimed interest. Thorpe Declaration at 9, p. 3, CP 0-0902 and exhibits 7 and 8 at CP 0-0925-098.

None of this would be changed by removal of the Three Fingers. There is no evidence of fishing in the area prior to the Three Fingers, Talley Declaration at 7, p. 2, CP 0-0416, and making forecasts regarding

² Contrary to CBC's implication, nothing in *Kemp* overruled *Lampa* or *State v. Grant*, and it is a leap for CBC to call these cases "outdated." CBC Response at 19. Rather, *Kemp* applied the principles in *Lampa* to the facts before it and found that Mr. Kemp would have had standing based on his historical use. *Kemp v. Putnam*, 47 Wn. 2d at 535.

future fishing in the area purely speculative. Moreover, the water around the Three Fingers contains a “no wake” zone and is already considered perfectly safe to kayak by people (including children) who live there. McKeller Declaration at 10, p. 4, CP 0-0893.

In sum, CBC can neither circumvent the requirements of special injury—given that it is seeking to remove the Three Fingers by litigating the very question of whether the Three Fingers is a public nuisance—nor has it met the special injury requirements of the public nuisance statute. As such, the Court should reverse the trial court’s decision.

B. The Shoreline Management Act Precludes this Action

Assuming CBC has standing to bring this action, the case before the Court is one of first impression, and ultimately presents the issue of whether the Shoreline Management Act approved the development and maintenance of pre-1969 fills and protected them from claims that such fills are public nuisances. The answer is yes. The Shoreline Management Act grants “the consent and authorization of the State of Washington to the impairment of public rights of navigation, and corollary rights incidental thereto, caused by the retention and maintenance of [such] . . . developments. . . .” RCW 90.58.270(1). Section (2) of Shoreline Management Act then explicitly abridges private rights for any civil action, such as this one, “based upon impairment of public rights

consented to in subsection (1) of this section.” RCW 90.58.270(2). RCW 90.58.270(1), therefore, provides the necessary consent to take the fill out of the class of property that could be challenged as an impairment of public rights.³

CBC’s sole response on this matter is that the Shoreline Management Act provides no protection to preexisting 1969 fills from claims that such fills violated the public trust doctrine because such fills were public nuisances.⁴ CBC Response at 22 et seq. But the fallacy of CBC’s circular logic is apparent when put this way: CBC is arguing that, in 2012, the Three Fingers Fill is a public nuisance because it blocked a public waterway in 1969, and it therefore violates state law and cannot be protected by the consent to the navigational intrusions for pre-1969 fills granted by the Shoreline Management Act.

But the Shoreline Management Act did grant such consent and the pre-1969 fills were “done or maintained” under this authority: They, therefore, could no longer be subject to claims that they interfered with navigable waters under RCW 7.48.120 because an obstruction can only be

³ There is also no proof that the fill was unauthorized when it was created. CBC never sought to prove as much, and no evidence was presented to the trial court on this question. Indeed, given that the Three Fingers was created in 1961-2, it likely would be difficult to prove such lack of authorization.

⁴ While CBC mentions the trial court initially ruled that RCW 90.58.270(1) was an abdication of public trust, the trial court reversed this decision on a motion for reconsideration. *See* Decision at CP 0-1253-54.

a nuisance if it is unlawful or without legal authority. RCW 7.48.120 (“Nuisance consists in unlawfully doing an act . . .”); RCW 7.48.140(3) (further defining nuisance to specifically include an activity that “obstruct[s] or impede[s], *without legal authority*, the passage of any river, harbor, or collection of water”) (emphasis added).

Any other result would not only contravene the plain language of the Shoreline Management Act but also its purpose. The Shoreline Management Act was adopted to resolve the status of fills put in place before 1969. *Wilbour*, 77 Wn.2d at 317. *See also* Geoffrey Crooks, *The Washington Shoreline Management Act of 1971*, 49 Wash. L. Rev. 423, 425 (1974). If every fill before 1969 could now be challenged as a nuisance, the very purpose of the Shoreline Management Act would be gutted and the status of the State’s shorelines would be uncertain. The trial court’s decision on summary judgment must be reversed.

C. The Public Trust Doctrine Is Not Violated

CBC argues that either the Three Fingers violates the Public Trust Doctrine or, that if the Shoreline Management Act precludes CBC’s suit, the Shoreline Management Act violates the Public Trust Doctrine. These arguments must fail.

The Washington Supreme Court has already decided, in *Caminiti v. Boyle*, 107 Wn.2d 662, 670, 732 P.2d 989, 995 (1987), that the

Shoreline Management Act does not violate the Public Trust Doctrine.⁵ 107 Wn.2d at 670 (“We first note that the requirements of the ‘public trust doctrine’ are fully met by the legislatively drawn controls imposed by the Shoreline Management Act of 1971, RCW 90.58.”). While CBC attempts to distinguish *Caminiti* because it addressed a different portion of the Shoreline Management Act, the basis for *Caminiti*’s holding was that the Shoreline Management Act properly exercised the state’s control over navigable waters. *Caminiti*, 107 Wn.2d at 670. That reasoning is applicable here.

For any development on the shoreline, property owners are required to demonstrate compliance with the locally adopted shoreline master program which controls allowed uses, bulk, and density requirements for all shorelines approved as compliant with the requirements of the Shoreline Management Act. *See* WAC 173.26.010 (for most projects (exemptions are relatively rare) parties are required to get a shoreline substantial development permit demonstrating compliance with the requirements of the master program); WAC 173.27.020. In

⁵ The State acted within its authority when it adopted the Shoreline Management Act. The authority of the state to determine the scope and extent of the public’s interests in navigable waters was articulated in *State v. Longshore*, 141 Wn.2d 414, 427-28, 5 P.3d 1256, 1263 (2000). In that case, following federal law on the point, the Supreme Court specifically ruled that it is up to the states to “define the limits” of the Public Trust Doctrine. *Id.* at 427. CBC does not contest this point.

Chelan, the shoreline designation is urban, allowing high intensity uses under the adopted master program. *See* CP 0-0504-560.

CBC misses the point when it claims that the State can never “abdicate” its control over navigable waters, because that is not what the Shoreline Management Act does. Allowing a use is not abdicating control. As the Washington Supreme Court held in *Caminiti*, the Shoreline Management Act properly exercises state control over navigable waters. *Caminiti*, 107 Wn.2d at 670. As a consequence, the Supreme Court has already answered the determinative question in this case: whether the State, by the questioned legislation, has given up its right of control over the jus publicum. *Caminiti*, 107 Wn.2d at 670. The answer is no. The State has exercised the requisite control over navigable waters, and directly controls when and how development may occur on the Three Fingers Fill allowed by RCW 90.58.270. There was no abdication of responsibility. Indeed, CBC’s suggestion that SMA’s authorization of fills is in violation of the public trust is directly contrary to the *Wilbour* court’s own observation that “[t]here undoubtedly are places on the shore of the lake where developments, such as those of the defendants, would be desirable and appropriate,” a “problem for the interested public authorities” that the Court suggested should be addressed by government regulation. *Wilbour*, 77 Wn.2d at 316 n.13.

In the court below, GBI submitted detailed evidence of pre-1969 fills on the south shore of Lake Chelan which were subsequently developed under the auspices and control of the Shoreline Management Act, including Peterson's Resort, Howe Sound and the Marine Commerce Terminal. *See* GBI Appellant's Brief at 45-48. CBC has provided no justification for singling out the Three Fingers for removal when other similarly-situated properties intruding in previously navigable waters have been approved for uses consistent with the Shoreline Management Act. Either allowing all pre-1969 fill sites on the lake to develop is an abdication of public trust responsibility as claimed by CBC, or allowing them to develop under the controls of the Shoreline Management Act and applicable master program is a proper exercise of the Public Trust Doctrine. The case law supports the latter position.

The Courts have also further determined that the Shoreline Management Act superseded the common law Public Trust Doctrine in Washington State. *See Portage Bay-Roanoke Park Cmty. Council v. Shorelines Hearings Bd.*, 92 Wn.2d 1, 4, 593 P.2d 151, 153 (1979) (“[A]ny common-law public benefit doctrine this state may have had prior to 1971 has been superseded and the SMA is the present declaration of that doctrine.”) (internal citation omitted). This point, ignored by the trial court below, precludes CBC's argument that it has a common law public

trust case independent of the requirements of the Shoreline Management Act or the statutory nuisance claims based on special injury and actions not otherwise authorized by statute.

CBC's sole authority for claiming that the Shoreline Management Act should not be given full weight in this case is the language in *Caminiti* that the state can no more convey or give away this jus publicum interest than it can "abdicate its police powers in the administration of government and the preservation of the peace." 107 Wn.2d at 669-70. That quote refers to Illinois' decision—at issue in *Illinois Cent. R. Co. v. State of Illinois*, 146 U.S. 387, 435, 13 S. Ct. 110, 111, 36 L. Ed. 1018 (1892)—to delegate to a railroad company all control over future development of Chicago harbor. Needless to say, allowing existing fills to remain is a far cry from giving a company complete development authority of a harbor.

In sum, the State did not abdicate responsibility for the public trust. By enacting the Shoreline Management Act, it instead exercised full control by granting consent to retaining pre-1969 fills and at the same time subjecting them to strict controls to assure future development is in the public interest. CBC provides no citation or compelling evidence to support its position that the Shoreline Management Act or the Three Fingers violated the Public Trust Doctrine.

1. There was no violation of state law exempting the Three Fingers from the protections of the Shoreline Management Act.

To avoid the proscriptions of the Shoreline Management Act, RCW 90.58.270, the trial court considered whether the Three Fingers was a public nuisance as of December 1969, before the Shoreline Management Act was adopted. As discussed above, that approach is without legal authority.

CBC attempts to circumvent the statutory consent and protection offered by RCW 90.58.270 and RCW 7.48.160 by referring to *Grundy v. Thursday County*, 155 Wn.2d 1, 117 P.3d 1089 (2005). But that case is of no help. It involved a discretionary permit issued by a local government, not a specific statutory authorization declaration of approval. And it stands for the unremarkable proposition that a development which is given a land use permit—and hence is “authorized”—may still cause an impact to an adjoining property which may be a nuisance.

CBC does not contend that any provision of law of the state was violated in this case other than the claimed public nuisance statute. Because RCW 90.58.270(1) and (2) provide complete protection from claims based solely on the displacement of navigable waters by pre-1969 fills, the claim to avoid the prohibitions of RCW 90.58.270(1) and (2) must fail.

2. CBC's remarks about trespass provide no basis for supporting the decision below.

The trial court's order specifically identified 'public nuisance' as the sole basis for the order of violation and abatement. There is no mention of trespass, nor could there be. Yet in an attempt to avoid the consent granted in the Shoreline Management Act, CBC cites RCW 90.58.270(1) (proviso) to claim that there was also a trespass of the rights of its members. CBC Response at 3, 28. CBC's claims are without support in either fact or law.

Trespass requires a violation of a possessory interest. *Bradley v. Am. Smelting & Refining Co.*, 104 Wn.2d 677, 691, 709 P.2d 782, 790 (1985) (citation omitted). CBC has not alleged a possessory interest in the property covered by the fill, which is owned by GBI.

CBC tries to claim a trespass-related interest in the road vacation and resulting easement to the public for access "to the waters of lake Chelan" granted to "the public" in 1927. The record is devoid of any evidence of prior use or "unreasonable interference" necessary to make a claim of breach of easement. Moreover, the record indicates that the Three Fingers may actually improve access to Lake Chelan, as removal of the Three Fingers would leave a very steep slope to the water. Thorpe Declaration at 14, pp. 4-5, CP0-0903-904.

If CBC is to prevail on a claim that RCW 90.58.270(1) is not applicable because of a trespass—a claim not found by the trial court—it must first point to a possessory or property right in the property in question. As a group representing members of the public, CBC has no special rights to claim that the fill trespasses the easement rights granted “to the people” and not to any specific individual. Crucially, the record below does *not* show that:

1. Any use had been made of Boulevard Road prior to the installation of the fill for purposes of accessing Lake Chelan. Note the testimony of Mr. Thorpe that the area has no parking is on a busy highway and the only access is down a steep rocky revetment to waters that are 6-10 feet deep over all of Boulevard road when the lake is full. CPO-093-904.

2. The fill “unreasonably interfered” with any of the CBC members’ ability to access Lake Chelan, which access they admit exists at the PUD site closer to their homes and other sites claimed to be less convenient but with no specification as to where or why.

D. Material Issues of Fact Require Reversal of the Trial Court’s Decision on Summary Judgment

On summary judgment, “[a]ll facts are considered in the light most favorable to the nonmoving party.” *Vallandigham v. Clover Park Sch.*

Dist. No. 400, 154 Wn.2d 16, 26, 109 P.3d 805, 810 (2005). The court below turned that standard on its head, repeatedly construing the facts to favor CBC, the moving party. The contested facts in the case that warrant trial on the merits if CBC gets beyond statutory preclusion and standing issues include at least the following:

1. Whether removal will result in a new sandy beach suitable and safe for swimming, as CBC's members Hague and Schuldt claim. In reality, the bottom is rocky and on a busy state highway, and the waters flow against a steep highway fill covered by rocks at depths of 6-10 feet. *See Thorpe Declaration at exhibits 7 and 8 at CP 0-0925-928 (copies attached as Appendix 1).*

2. Whether the area is currently unsafe for kayaking. The McKeller Declaration explains that the area is currently safe for boating and kayaking. CP 0-0892-893.

3. Whether fills are identified as urban areas suitable to serve the public interest, as required by RCW 90.58.020. Determining the public interest is inherently factual, as it must consider and balance a wide variety of potential uses.

Independent of the legal arguments for reversing the decision of the court below, the summary judgment decision cannot stand given these questions of material fact that go to the very heart of whether CBC has

standing, whether the Three Fingers is actually a nuisance or violates the public trust, and whether the Three Fingers should be abated. If GBI's statutory and standing arguments fail, the material disputes of fact require remand for trial.

E. The City Has No Basis to Object to the Court's Dismissal of Its Summary Judgment

In its motion for summary judgment, the City asked for an advisory opinion about possible remedies in this and another pending case. The motion was without support in fact and law and was properly dismissed.

III. SUMMARY AND CONCLUSION

At the outset of this case, the trial court stunned the parties by concluding, in response to a simple motion to dismiss on standing and statutory grounds, that the Three Fingers violated the public trust doctrine and had to be removed. While the trial court reconsidered that initial blatant error, it then proceeded to reach the same result through a series of summary judgment motions without legal or factual support. Because CBC has no standing, the Three Fingers Fill is plainly authorized by statute, and disputed material facts abound, the decision below must be reversed.

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APPENDIX 1

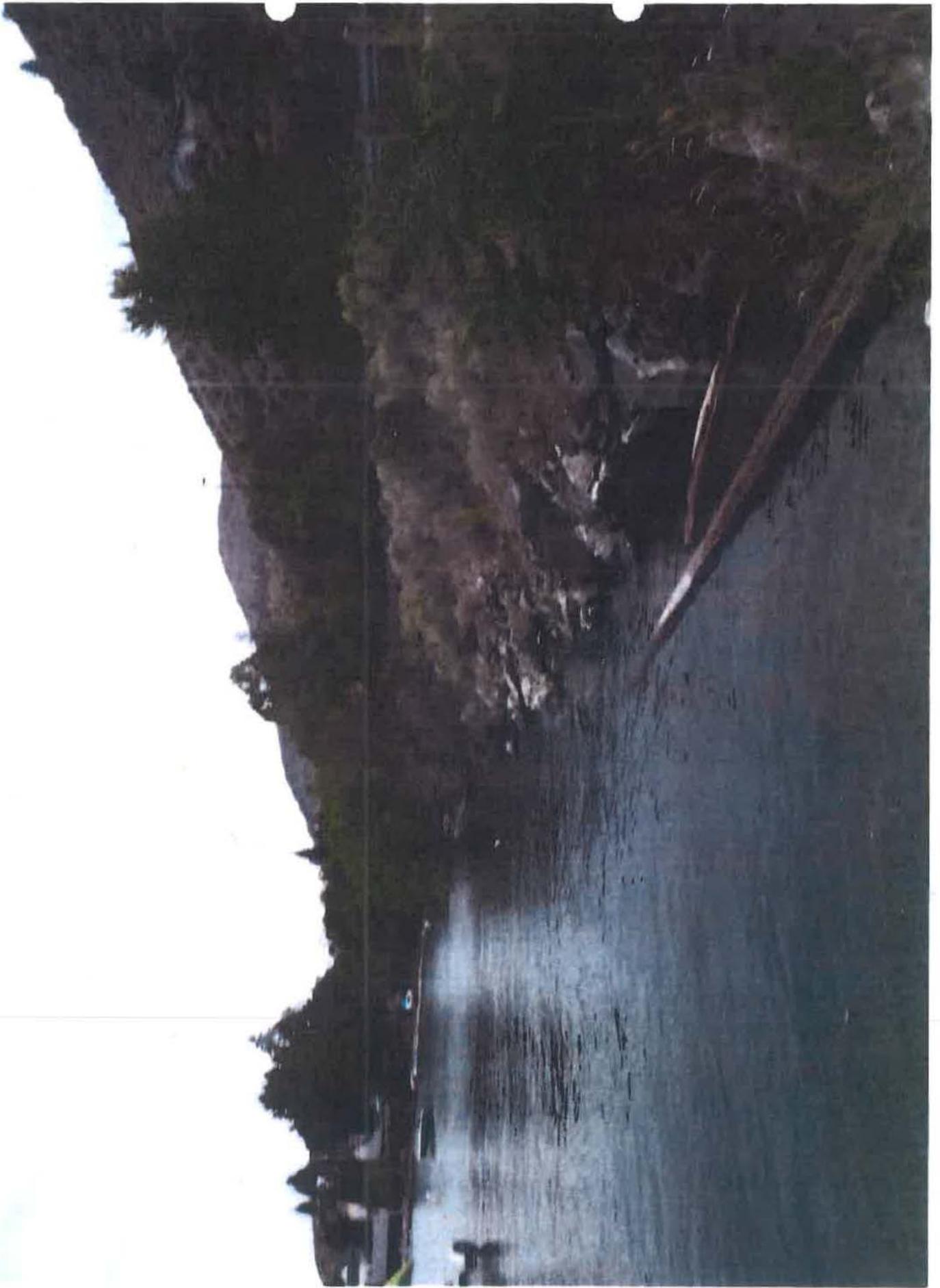


EXHIBIT 7

0-0925



0-0926

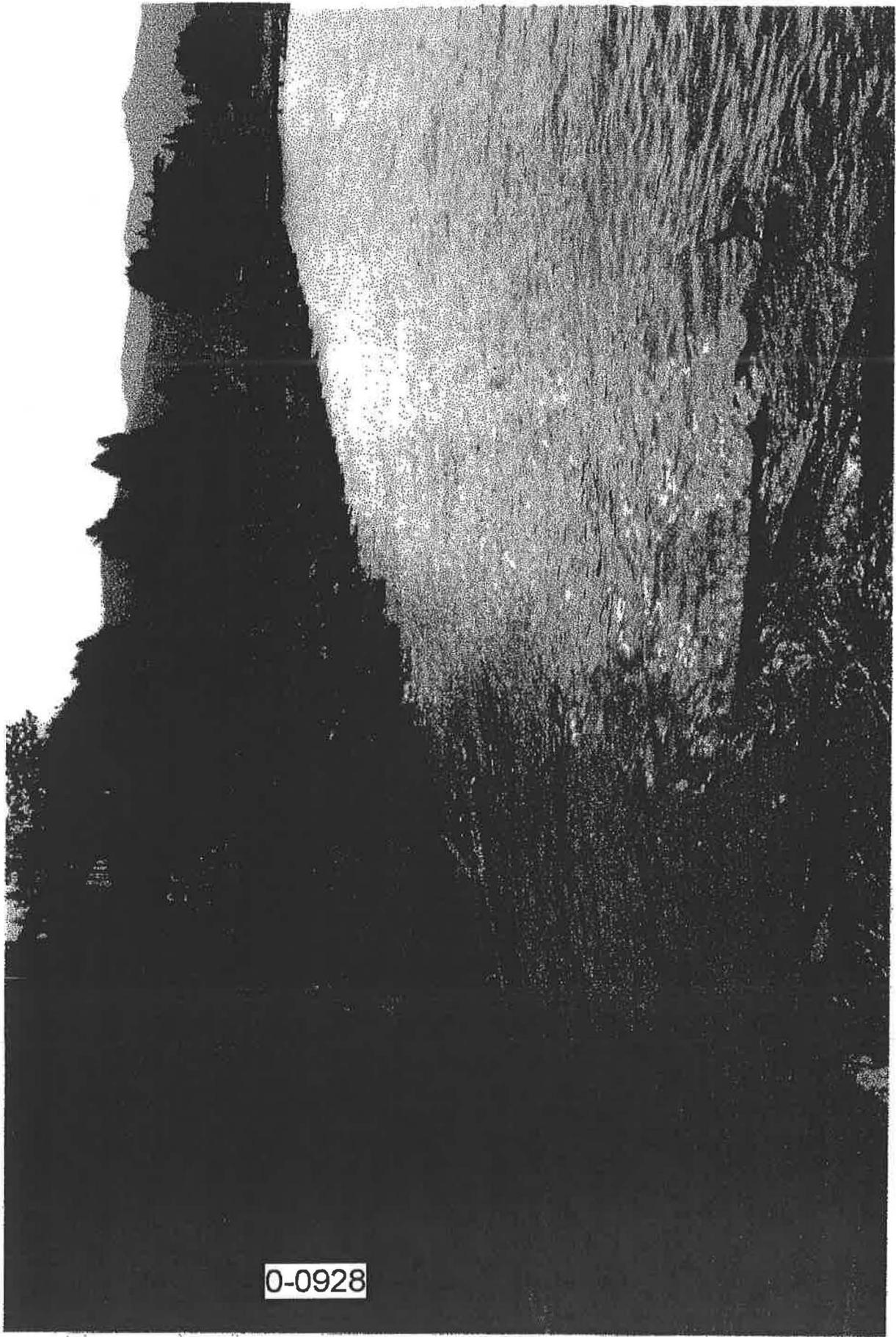


[This is a clearer version of 0-0926 from the original declaration.]



EXHIBIT 8

0-0927



0-0928



[This is a clearer version of 0-0928 from the original declaration.]

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

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

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

Appellants,

v.

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

Respondents.

CERTIFICATE OF SERVICE

I, Cheryl Robertson, under penalty of perjury under the laws of the State of Washington, declare that on September 23, 2015, I caused to be served the following documents: (1) REPLY BRIEF OF APPELLANT GBI HOLDING CO., and (2) this CERTIFICATE OF SERVICE as indicated below:

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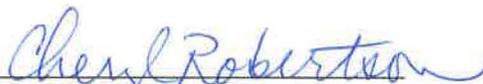
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Signed this 23th day of September, 2015, at Seattle, Washington .


Cheryl Robertson, Legal Secretary