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NO. 331962

(Consolidated with No. 332390)

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

CHELAN BASIN CONSERVANCY,

Respondent,

v.

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

Appellants.

RESPONSE BRIEF OF CHELAN BASIN CONSERVANCY

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I. INTRODUCTION

In 1961 appellant GBI Holding Co. (“GBI”) dumped, without authority, nearly 100,000 cubic yards of fill material into the waters along the southeast shoreline of Lake Chelan forming the “Three Fingers fill” -- an area almost eight acres in size. Over the years, the Three Fingers fill has remained essentially unused and has provided no significant benefit to anyone. The fill has, however, continually and significantly interfered with the public’s dedicated right of access to the waters of Lake Chelan and with the public’s rights of navigation including boating, swimming and fishing, on the shoreline of Lake Chelan’s Lakeside Bay.

After remaining vacant for 50 years, in 2011 GBI filed an application with the City of Chelan to subdivide the Three Fingers. The Chelan Basin Conservancy (“CBC”) brought this action in the Chelan County Superior Court seeking abatement of the Three Finger fill for interfering public’s dedicated right of access and right of navigation as guaranteed by the public trust doctrine.

On February 27, 2015, Chelan County Superior Court, Judge Lesley A. Allan, granted CBC’s motion for summary judgment concluding that the Three Fingers fill violated the public’s right of navigation and thus violated

the public trust doctrine. The superior court ordered the Three Fingers fill be removed.

The superior court's February 27, 2015, decision, along with the court's previous rulings, supported the following findings and conclusions:

- CBC members have standing to bring their action for a violation of the public trust doctrine.
- Because the Three Fingers fill was a public nuisance, and thus a "violation of state statute," the fill is not protected by the Shoreline Management Act, ("SMA") at RCW 90.58.270(1).
- Because the Three Fingers fill substantially interferes with the public's right of navigation it violates the public trust doctrine and the proper remedy is abatement.

GBI and the State of Washington challenge all three of the superior court's findings and conclusions.

Washington recognizes that any member of the public has standing to bring an action for violation of the public trust doctrine. Moreover, even if, as appellants assert, a showing of special interest is necessary, CBC meets this enhanced standard through its members who live in close proximity to the Three Fingers fill and whose interests have been negatively impacted by the fill's obstruction to the use and enjoyment of Lake Chelan's Lakeside Bay.

RCW 90.58.270(1) provides protection against civil actions seeking abatement of certain fills that were placed prior to the enactment of the SMA. The protection, however, is limited only to fills that were not in trespass or in violation of state statutes. Because the Three Fingers fill rises to the level of a public nuisance, it is in violation of Washington's statutory prohibition of public nuisances and is thus "in violation of state statute." RCW 90.58.270(1) does not protect the Three Fingers fill.

This Court should affirm the decisions of the superior court in total.

If, *arguendo*, GBI and the State are correct in their assertion that RCW 90.58.270(1) grants protection for *all* historic fills, regardless of whether they constitute a public nuisance, then RCW 90.58.270(1) is an abdication of the State's requirement to protect the public trust. In that case, CBC supports the City of Chelan's Cross-Appeal and this Court should determine, as a matter of law, that RCW 90.58.270(1) violates the public trust doctrine and is invalid.

II. RESTATEMENT OF ISSUES

1. Does CBC have standing on behalf of its members to seek abatement of the Three Fingers fill for interfering with public's right of navigation protected by the public trust doctrine?

2. RCW 90.58.270(1) authorizes certain historic fills and development to remain despite interfering with the public right of navigation so long as the fills or development is not in trespass or violation of statute. Because the Three Fingers fill is a defined public nuisance, and therefore in violation of state statute, is the authorization in RCW 90.58.270 applicable?

3. If RCW 90.58.270(1) operates as an authorization for all historic development and fills, regardless of whether the fill substantially and interferes with the public's right of navigation, does RCW 90.58.270(1) violate the public trust doctrine?

III. STATEMENT OF THE CASE

A. Lake Chelan and the Three Fingers fill.

This case concerns the Three Fingers fill located on the southeastern shoreline of Lake Chelan.¹ The Three Fingers fill is located immediately

¹ Lake Chelan is a navigable body of water located in a glacial gorge in Chelan County. It is about 55 miles long and 1 to 2 miles wide. *Wilber.*, 77 Wn.2d at 307.

west of the fill described in *Wilbour v. Gallagher*, 77 Wn.2d 306, 462 P.2d 232 (1969). The Three Fingers fill is within the City of Chelan (“City”).²

Prior to 1927, the natural water level of Lake Chelan was 1079 feet above sea level. *Id.* at 307. In 1926, the Chelan Electric Company obtained a federal license to construct a new dam at the southeasterly end of Lake Chelan. The license permitted the annual raising of the level of the lake to 1,100 feet above sea level between June 15 and September of each year. After the dam is re-opened in September, the lake level drops again to its natural level of 1,079 feet above sea level. *Id.* at 308-09.

On May 2, 1927, the City vacated those streets abutting and in the vicinity of the lake which would be inundated by the dam and rising lake level. *Id.* at 307. On that same day the Chelan Electric Company and the Lake Chelan Box Factory executed a deed granting, “in perpetuity, the right of access, for itself *and the public*” to reach Lake Chelan over the vacated streets “at all stages of water.” *Id.*, at 307-08 (emphasis added); CP 392-94.

In 1961, GBI purchased the land identified as Block “9” on the 1891 Plat. CP 184, ¶ 3. Block 9 is located generally to the north of, and includes

² The area was first platted in 1891 as the Town of Lake Park. CP 391. The 1891 Plat dedicated and quit claimed all streets and alleys to the use of the public forever. *Id.* The Town of Lake Park thereafter became the Town of Lakeside, and subsequently the City of Chelan. *Wilbour*, 77 Wn.2d at 307.

the platted Boulevard Avenue. CP 395-396. Boulevard Avenue is one of the vacated streets enumerated in and subject to the rights conveyed in the 1927 deed and in the 1891 town plat dedication. CP 392-93. Because Block 9 was almost entirely below the 1,100 foot elevation, GBI's property the portion of vacated Boulevard Avenue crossing GBI's property was inundated by the lake's waters every year after the dam became operational. CP 395-96; CP 171 (photo).

Between 1961 and 1962 GBI dumped fill on its property into Lake Chelan raising its elevation from 1079 feet to approximately 1102 feet creating the Three Fingers fill. GBI used material it excavated in the course of highway construction and an upland development. CP 184-85. The Three Fingers fill cover a portion of the vacated Boulevard Avenue. CP 395-396. By raising its land to over the 1,100 foot level, the Three Fingers fill remains above the level of the lake year-around.

GBI has made no significant use of, or improvements to, the Three Fingers over the five decades that the fill has been in place. In 2010 GBI filed an application with the City of Chelan for a planned development on the Three Fingers. CBC and other members of the public objected and requested removal of the Three Fingers. After the City received public

comments, GBI withdrew the application. CP 269-270, ¶¶ 2-3; CP 272, ¶ 10. In 2011 GBI filed an application to subdivide the Three Fingers into six lots through the short plat process. *Id.* CBC and others again objected and requested removal of the Three Fingers. CP 288 295, ¶¶ 59-63. The City's Planning Director approved the short plat based on conditions including the requirement to provide public access to Lake Chelan over portions of the Three Fingers and the designation of two of the proposed lots as a public park. CP 298 – 301.

CBC and GBI both appealed the Short Plat decision to the City's Hearing Examiner. CP 304-306; CP 307. After a preliminary briefing the Hearing Examiner concluded that he did not have jurisdiction to order removal of the Three Fingers fill. CP 317-322. CBC thereafter withdrew its administrative appeal and, having no adequate remedy at law to restore the right of access and navigation, filed this action. CP 323.

B. Procedural History.

CBC filed its Complaint for Removal of Filled Lands in Lake Chelan on November 4, 2011. CP 1-17. The Complaint contained three causes of action: (1) that the Three Fingers constitute a trespass against the public right of access to Lake Chelan; (2) that the Three Fingers violate the

public right of Navigation as described in *Wilbour*; and (3) that the Three Fingers violate rights to use and enjoy the water of Lake Chelan protected by the public trust doctrine. CP 1-11. The Complaint named GBI as the defendant. The Complaint also named the City of Chelan, the State, and the Chelan County PUD as additional parties. CP 5-6.

GBI moved for summary judgment to dismiss CBC's claims for lack of standing. GBI's motion also sought dismissal based on the theory that the Three Fingers fill was protected against actions for abatement by RCW 90.58.270(1). CP 106. The City cross-moved for summary judgment arguing that, as interpreted by GBI, RCW 90.58.270(1) violated the public trust doctrine. CP 236-238.

The Chelan County Superior Court, Judge Lesley A. Allan, denied GBI's motion and granted the City's motion concluding that RCW 90.58.270(1) violated the public trust doctrine and was unconstitutional. The superior court ordered removal of the Three Fingers. CP 827-37.

On motions for reconsideration from the State and GBI, the superior court vacated summary judgment in favor of the City finding that issues of material fact remained concerning whether RCW 90.58.270(1) was applicable to the Three Fingers fill or whether the fill was "in trespass or

violation of state statute. CP 1267-73. The court retained its original decision denying GBI's motion for summary judgment and confirming that CBC had standing to pursue its claims. *Id.*

CBC then filed a motion for summary judgment arguing: (1) that because the Three Fingers fill was "in violation of state statutes" RCW 90.58.270(1) did not apply; and (2) without the protection of RCW 90.58.270(1) the Three Fingers fill violated the public trust doctrine. CP 1354-1376. The superior court granted CBC's motion on October 3, 2014, finding that the Three Fingers fill was a public nuisance and therefore violated state statutes and consequently not protected by RCW 90.58.270(1). The superior court also concluded that the fill significantly interfered with the public right of navigation and violated the public trust doctrine. CP 1566-1570; CP 1613-1622. The court did not decide the appropriate remedy.

CBC followed with a motion for summary judgment seeking abatement of the Three Fingers. CP 1656-1663. On February 27, 2015, the superior court granted CBC's motion and concluded that because the Three Fingers fill violated the public trust doctrine, the appropriate remedy is abatement. CP 2547-2551.

The State and GBI appealed. The City cross-appealed seeking review of the court's order granting reconsideration and denying the City's cross-motion for summary judgment.

IV. ARGUMENT

A. **CBC Has Standing to Seek Abatement of the Three Fingers Fill for Violating the Public Trust Doctrine.**

GBI and the State challenge's CBC's standing. GBI asserts that "[b]ecause CBC challenges the Three Fingers 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." GBI Brief at 12. GBI's argument that CBC lacks standing fails for at least three reasons: (1) CBC did not bring an action under Washington's public nuisance statute and therefore RCW 7.48.210 is inapplicable; (2) CBC has standing to bring an action for violation of the public trust doctrine; and (3) even if special injury were required, CBC has met the test.³

At the outset, while RCW 7.48.210, allows a private person to maintain a civil action for a public nuisance, CBC did not bring this case as a public nuisance action. To the contrary, CBC's complaint raised three

³ GBI does not dispute that CBC, as an association, has the right to file a civil action on behalf of its members if one or more of its members have standing. *SAVE v. City of Bothell*, 89 Wn.2d 362, 576 P.2d 401 (1978).

cause of action: (1) that the Three Fingers constitute a trespass against the public right of access to Lake Chelan; (2) that the Three Fingers violate the public right of Navigation as described in *Wilbour*; and (3) that the Three Fingers violate rights to use and enjoy the water of Lake Chelan protected by the public trust doctrine. CP 1-11. Because CBC did not bring an action pursuant to RCW 7.48.210, the requirement within RCW 7.48.210 to demonstrate special injury is not applicable.

GBI's mistaken belief that CBC was pursuing a claim under RCW 7.48.210 may arise from CBC's successful effort to demonstrate 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. *Infra* at 33-40. But simply because CBC demonstrated that the Three Fingers fill met the statutory definition of a public nuisance under RCW 7.48.140, does not mean that CBC was pursuing a private public nuisance action under RCW 7.48.210. To the contrary, while CBC demonstrated that the Three Fingers fill was a public nuisance, *see* CP 1613-1616⁴, the ultimate judgment was

⁴ The court's December 9, 2014, Order Granting Summary Judgment concluded:

... the Three Fingers fill was placed in violation of a state statute as a public nuisance and is not entitled to the protection of RCW 90.58.270(1).

The court finds further that the Three Fingers Fill violates the public trust doctrine. CP 1615-1616.

for removal as a violation of the public trust doctrine and not as a public nuisance. CP 2547-2551.⁵

In contrast with RCW 7.48.210, anyone whose interests in using aquatic lands have been affected, has standing to challenge actions under the public trust doctrine. It is not necessary to show additional specialized injury.⁶ For example, in *Caminiti v. Boyle*, 107 Wn.2d 662, 665, 732 P.2d 989 (1987), the supreme court recognized Benella Caminiti's right to challenge a state statute as unconstitutional in violation of the public trust doctrine. As the court stated:

Petitioner Caminiti and the members of the petitioner Committee for Public Shoreline Rights have recreational interests that are affected by their ability to acquire access to and use public aquatic lands and waters. These include, but are not limited to, their ability to fish, swim, navigate, water ski, beachcomb, procure shellfish, sunbathe, observe natural and undisturbed wildlife, play on open beaches, and enjoy seclusion. These interests are impacted to some extent

⁵ The court's February 27, 2015, Final Order concluded: "that because the Three Fingers fill violate the Public Trust Doctrine, the appropriate remedy is abatement." CP 2550.

⁶ GBI cites *Lampa v. Graham*, 179 Wash. 184, 36 P.2d 543 (1934), for the proposition that CBC's claim regarding a violation of navigation rights also requires a demonstration of special injury. GBI Brief at 12, 16-17. *Lampa*, however, was not brought as a public trust case. *Lampa* instead involved a private action for injunctive relief challenging a public nuisance. It was brought under the former version of RCW 7.48.210. *Id.* at 185 quoting Rem. Rev. Stat. § 9921. The plaintiff did not allege a violation of the public trust.

by the presence, location, and private use of private recreational docks on these public aquatic lands and waters.

*Id.*⁷ See also Ralph L. Johnson, *The Public Trust Doctrine and Coastal Zone Management in Washington State*, 67 Wash. L. Rev. 521, 589 (1992)(“the issue of standing should not pose a serious obstacle to suits by private citizens and private groups”).

CBC’s documented its members’ interests. For example, CBC president and member Tammy Lee Hauge lives in the Lakeside Community and within walking distance of GBI’s fill. CP 374-76, ¶3. The Lakeside Bay in which the GBI fill is located is important to her:

The Lakeside Bay is unique on Lake Chelan. It is the only sandy bay intended as Public Access into Lake Chelan. This bay is shallow with very fine sand. Spader Bay is on the North side of the lake, but is all private property. The PUD owns property on the west side of the bay. There is a narrow access point there that has been made even narrower because the PUD has leased private docks on the left and right side of this access. There is another sandy beach access point on the east side of the

⁷ Washington’s rule for standing to enforce the Public Trust Doctrine is consistent with California’s. See *Marks v. Whitney*, 6 Cal.3d 251, 261-262, 491 P.3d 374 (1971)(confirming that “members of the public” are permitted to enforce the Public Trust Doctrine). It should also be noted that California’s public nuisance statute is similar to Washington’s in its requirement that a party seeking to abate a public nuisance must be specially injured. See, Ca Civil §3479, §3480, and § 3493.

[GBI] fill. This narrow access is also a vacated street. Unifying these access points by restoring the Lakeside Bay will open up a beautiful sandy beach area for swimming, waterfowl [,and] up-lake views. There is not another bay like it and it is a five minute walk from my home.

Id., ¶ 6. While Ms. Hauge currently uses other public access points to reach Lake Chelan, the Three Fingers fill blocks her use of significantly better public access – access that is within minutes of her home. *Id.* at ¶ 5.

Similarly member William Schuldt has lived in the Lakeside Community within 3 blocks of the Three Fingers fill since 1971. He is a regular user of Lake Chelan for fishing and swimming. CP 379-83, ¶ 2.

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

swimming beach and would include extremely rare and valuable public access.

While I currently use the small public access beach both for swimming and for access to fishing, I believe that the [GBI] fill blocks my use of significantly better public access. Because the public access blocked by the [GBI] fill is so close to my home, my injury is greater than the general public of Chelan and far greater than the general public of Washington.

Id., ¶¶ 3-4.

CBC member John Page, Jr. has lived in Chelan for 18 years and is also dependent on public access in order to enjoy the Lake for kayaking. As he explains:

My wife, who passed away last year, regularly kayaked in Lake Chelan. I continue to do so. ... I am very familiar with the location of the [GBI] “Three Fingers” fill from both the water and land. The small public access beach to the east of the Three Fingers is a nice little spot in summer months and a nice place to pull the kayaks out. Unfortunately, during the summer months, this small public access is often crowded and difficult to use.

Because of heavy summer boat traffic in Lake Chelan, the best place to kayak safely is close to the shoreline, in shallower water.
... .

Because the Three Fingers jut out into the lake, they make kayaking in this area awkward, if not difficult. In order to get around the Three Fingers kayakers are forced to paddle out into an area that has quite a bit of summer boat traffic. In my opinion this makes kayaking, especially for beginners, quite difficult and more than a bit daunting. I currently do not take beginners into this area of the lake because the kayakers are forced away from the shallow shore out to the area of heavier boat traffic.

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.

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.

CP 384-88, ¶¶ 4-8.

CBC's members certainly have "recreational interests that are affected by their ability to acquire access to and use public aquatic lands and waters." These interests include the ability to fish, swim, navigate, and

observe wildlife. Because CBC's member's "interests are impacted to some extent by the presence and location" of the Three Fingers fill CBC and its members also have standing to pursue their claim for violation of the public trust doctrine. *Caminiti*, 107 Wn.2d at 665.

But even if, *arguendo*, CBC had pursued a private action to abate a public nuisance under RCW 7.48.210, it has demonstrated its special injury. GBI relies principally on the 1934 decision in *Lampa v. Graham*, 179 Wash.184, 36 P. 543 (1934), and the 1930 decision in *State v. Grant*, 156 Wash. 96, 286 P.63 (1930). Both of these cases are readily distinguishable both in law and in fact.

State v. Grant was a mandamus action brought by a local taxpayer seeking removal of market stalls along Seattle's Pike place as public nuisance. 156 Wash at 97. As the Court explained:

[t]he respondent does not own the property abutting the sidewalk nor does he own any property in the vicinity of Pike Place; in fact he resides seven miles distant from the obstruction of which he complains. He is a taxpayer and a resident of the city of Seattle but has no special interest, apart from his interest as one of the general public...

Id. at 99-100. Without any evidence that the claimant was injured, or even used the streets at issue, the court reversed for dismissal.

In contrast, all members of the public have a special right under the 1927 deed to access Lake Chelan. The 1927 deed expressly granted, “in perpetuity, the right of access, for [the Town of Lakeside] *and the public*,” over the lands now covered in part by GBI’s fill “at all stages of water.” CP 392 (emphasis added). Unlike the situation in *Grant*, the public here enjoys an express dedicated right of access to Lake Chelan – a right distinct from the right afforded the City. Under GBI’s argument this express public dedication is completely unenforceable by *anyone* other than the City. Outdated case law should not be read to nullify the right to enforce an express dedicated public right. Any member of the public should be able to enforce their express perpetual right of access.

Lampa concerned whether installation of a fish trap would interfere with general navigation along a river. The plaintiff’s use was not under an express dedication – but instead under a general public right to use a “public highway.” *Id.* at 186-87. The court concluded that because the plaintiff only used the river as a “highway in passing to and from... daily labors” and were not affected in any degree by appellant’s trap, that he did not have standing.” 179 Wash. at 185-186.

In contrast, as described above, members of CBC live in close proximity to the Three Fingers and actually either use the area on a regular basis for swimming and boating or would do so if they Three Fingers were removed. In each case, their use has been curtailed by the Three Fingers. These members' interests have been specifically injured.

Lampa and *State v. Grant* are also outdated. In *Kemp v. Putnam*, 47 Wn.2d 530, 288 P.2d 837 (1955), *overruled in part on other grounds by Save a Valuable Env't (SAVE) v. City of Bothell*, 89 Wn.2d 862, 576 P.2d 401(1978), the court once again addressed whether fishermen could restrain an adjacent landowner from interfering with their fishing along a navigable river. In distinguishing *Lampa*, the court concluded:

[Lampa] is not authority for the proposition that one who regularly engages in fishing in a stream, the use of which is obstructed, does not suffer an injury different from or greater than that suffered by the general public.

Kemp, 47 Wn.2d at 536.⁸ In contrast with *Lampa*, the *Kemp* court recognized regular use of a stream confers standing where that use is

⁸ While the *Kemp* court denied standing to two plaintiff organizations because they failed to produce evidence of injury to the corporations themselves, this holding was overruled by *SAVE*, 89 Wn.2d at 867, fn.1. After *SAVE* a non-profit corporation or association has standing if one or more of its members have standing. 89 Wn.2d at 867-68.

obstructed. After *Kemp*, a person that regularly uses the public right sought to be protected, has standing to bring a claim for public nuisance to protect future use.

While it is, of course, impossible to use the area of Lake Chelan currently occupied by the Three Fingers fill, members of CBC certainly use the area around the fill and testified both that their current use is restricted and that their use would increase if the Three Fingers are removed. As the superior court found:

The undisputed facts of this case demonstrate that the plaintiff satisfies the requirements necessary to bring this action. Plaintiff has submitted declarations from three of its members outlining the specific injury to these members resulting from the existence and potential future development of the Three Fingers. Two of the members live within walking distance of the small public access site near defendant's fill. Two of the members regularly use the bay where the fill is located for water activities, including swimming and kayaking. These members describe the adverse effect on their activities cause by the existence of the Three Fingers. The third member does not use this small public access site even though it is the closest access to her home because of the obstruction caused by the fill. Finally, one member expresses concern that further development of the fill will result in boats being anchored or docked in the immediate vicinity, further

interfering with or even precluding water activities in the bay.

These declarations establish the special injury to three of plaintiff's members what is being sustained and/or will be sustained with future development of the fill area.

CP 458.⁹

The court's determination that CBC has standing to pursue its public trust action seeking removal of the Three Fingers should be affirmed.

B. Because the Three Fingers Fill Violates State Statutes, It is not Protected by RCW 90.58.270(1)

1. Background

After the superior court concluded that RCW 90.58.270(1) was an abdication of the public trust, the State moved for reconsideration arguing that the superior court's conclusion was pre-mature. CP 715-728. The State's primary argument was that before the court addressed the validity of RCW 90.58.270(1) it should first determine whether the statute was even applicable to the Three Fingers. The State argued that the court should first determine whether the Three Fingers were "in trespass or violation of state statute. CP 719. In its January 15, 2013, letter ruling on reconsideration,

⁹ While the superior court ultimately reconsidered its May 30, 2012, decision the court retained its original decision denying GBI's motion for summary judgment and confirmed CBC's standing. CP 1267-73.

the superior court agreed with the State's argument that prior to ruling on the validity of RCW 90.58.270(1) it should first determine whether the fill was "lawful at the time of creation and therefore entitled to the protection of the statute." CP 1253-54.

As discussed below, because the Three Fingers fill meets the statutory definition of a "public nuisance" it was constructed in "violation of state statute." RCW 90.58.270(1). Consequently, RCW 90.58.270(1) is not applicable and does not protect the Three Fingers fill against abatement as a violation of the public trust doctrine.

2. The Shoreline Management Act Must be Broadly Construed to Protect State Shorelines.

The Legislature directed that SMA be "liberally construed to give full effect to the objectives and purposes for which it was enacted." RCW 90.58.900; *Hayes v. Yount*, 87 Wn.2d 280, 289, 552 P.2d 1038 (1976). In other words, "[t]he Shoreline Management Act is to be broadly construed in order to protect the state shorelines as fully as possible." *English Bay Enterprises, Ltd. v. Island County*, 89 Wn.2d 16, 20, 568 P.2d 783, 786 (1977).

It is a fundamental principal of statutory construction that, "[a] policy requiring liberal construction is a command that the coverage of an

act's provisions be liberally construed and that its exceptions be narrowly confined.” *Pub. Util. Dist. No. 1 of Clark County v. Pub. Employment Relations Comm'n*, 110 Wn.2d 114, 119, 750 P.2d 1240, (1988) quoting *Nucleonics Alliance, Local Union No. 1-369, Oil, Chem. & Atomic Workers Int'l Union, AFL-CIO v. Washington Pub. Power Supply Sys. (WPPSS)*, 101 Wn.2d 24, 29, 677 P.2d 108, (1984). Here, because RCW 90.58.270(1) creates an exception to the public trust doctrine and its prohibition on obstructing navigable waters, it must be narrowly construed.

3. RCW 90.58.270(1) neither abridges private rights of action challenging historic fills nor legitimizes public nuisances.

a) By its plain language RCW 90.58.270(1) is not a blanket exemption for all historic development.

CBC agrees with the State that the starting point for this Court’s review is the plain language of the statute. *Dep’t of Ecology v. Campbell & Gwinn, LLC*, 146 Wn.2d 1, 11, 43 P.3d 4 (2002).¹⁰

¹⁰ GBI’s discussion regarding the differences between Initiative 43B, the Shoreline Management Act, and proposed Initiative 43, the Shoreline Protection Act, is irrelevant for at least two reasons. First, RCW 90.58.270(1) is not ambiguous. The Court “will turn to other extrinsic sources such as the voter’s pamphlet, only if an initiative is ambiguous.” *Brown v. State*, 155 Wn.2d 254, 268, 119 P.3d 341 (2005); *Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 149 Wn.2d 660, 671, 72 P.3d 151 (2003). And second, it is impracticable – and likely impossible – for anyone to determine why individual voters preferred the Shoreline Management Act, and the provisions of the proposed Shoreline Protection Act

RCW 90.58.270(1) provides:

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.**

(emphasis added).

According to the State, the plain language in RCW 90.58.270(1) “explicitly” authorizes impairment of public rights of navigation. State Brief at 17. Indeed, the State argues that the authorization applies “in any case” regardless of the particulars of the fill. *Id.* at 18. The State arrives at this conclusion, however, by necessarily ignoring the plain language of the

do not make it any more or less likely that RCW 90.58.270(1) applies to permit or prohibit an action for removal of the Three Fingers fill.

last sentence in RCW 90.58.270(1) expressly providing that not all fills or structures are protected – only those that are not “in trespass or in violation of state statute.” Thus, contrary to the State’s assertion, RCW 90.58.270(1) does not show an “unambiguous intent” to authorize historic development. Read as a whole, including the final sentence, the “unambiguous intent” of RCW 90.58.270(1) was to authorize only certain development – development that was not in trespass or a violation of state statute.¹¹

The State’s argument that its reading is supported by RCW 90.58.270(2) is similarly flawed. RCW 90.58.270(2) provides in full:

[n]othing 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.

According to the State, because RCW 90.58.270(1) authorizes all historic development that impairs public rights of navigation, RCW 90.58.270(2) necessarily abridges all private rights of action against such development. State’s Brief at 18.

But since RCW 90.58.270(1) does not authorize development “in trespass or violation of state statute” the State’s argument that RCW

¹¹ The title of RCW 90.58.270 confirms this intent: “Nonapplication to *certain* structures, docks, development, etc., placed in navigable waters.”

90.58.270(2) abridges all private actions necessarily fails. While RCW 90.58.270(2) abridges *some* private rights of action based on the impairment of public rights of navigation, it expressly only abridges actions against development authorized by RCW 90.58.270(1). Indeed, when read together with RCW 90.58.270(1), RCW 90.58.270(2) actually *protects*, and does not alter or abridge, private rights of action based on an impairment to public rights of navigation where the development is in trespass or violation of state statute.¹²

- b) The superior court’s conclusion that a public nuisance constitutes a violation of state statute and thus is not protected by RCW 90.58.270(1) does not frustrate the intent of the statute.**

In its argument below, the State agreed that RCW 90.58.270(1) “was not intended to authorize public nuisances.” CP 1397. The State also agreed that an obstruction to navigation is a public nuisance. *Id.* Instead of creating a blanket exemption for public nuisance, the State urged the superior court to determine whether the Three Fingers fill was a public nuisance based on “the reasonable or unreasonable ... making the use of

¹² The Legislature also expressly protected “the authority of state or local governments to suppress or abate nuisance or to abate pollution.” RCW 90.58.270(3).

the property complained of in the particular locality and in the manner and under the circumstances of the case.” CP 1398, *quoting Grundy v. Thurston Cy.*, 155 Wn.2d 1, 7-8, 117 P.3d 1089, n. 5 (2005).¹³

The State now appears to abandon its theory below and instead takes the position the superior court erred in concluding that because the Three Fingers fill “substantially and unreasonably” interfered with navigation that it was a public nuisance and excluded from protection by RCW 90.58.270(1). State’s Brief at 19-24. But as the State itself urges, this Court must read the entire statute and should avoid an interpretation that renders any portion meaningless or absurd. *Ralph v. Dep’t of Natural Res.*, 182 Wn.2d 242, 248, 343 P.3d 342 (2014). If the Legislature had intended RCW 90.58.270(1) to apply to all fills “in any case” then there was no need for the Legislature to expressly exclude development in trespass or violation of statute from the authorization.

¹³ The *Grundy* Court confirmed also that “a lawful action may still be a nuisance:”

When a nuisance actually exists, it is not excused by the fact that it arises from a business or erection which is of itself lawful; and, even though an act or a structure was lawful when made or erected, if for any reason it later becomes or causes a nuisance, the legitimate character of its origin does not justify its continuance as a nuisance. 155 Wn.2d at 7, fn 5, *quoting* 66 C.J.S. *Nuisances* § 15, at 551–52 (1998).

Contrary to the State's position, rather than providing a blanket exemption for all pre-December 1969 structures and fills, the more reasonable reading of RCW 90.58.270(1) is the reading applied by the superior court, *and urged by the State below*, that where a particular fill or development substantially and unreasonably interferes with navigation at the particular location it may be deemed a public nuisance and therefore lose the protection of RCW 90.58.270(1).

The State also faults the superior court for concluding that the proper time frame for determining whether the Three Fingers was a public nuisance was December 4, 1969. The State argues instead that the court should have made the determination after the SMA's June 1, 1971, effective date. And therefore, under the State's theory, since RCW 90.58.270(1) authorized the fill it was no longer a public nuisance. State's Brief at 22-23. This argument fails for at least three reasons.

First, the statute expressly calls out the effective date of December 4, 1969. RCW 90.58.270(1) provides consent to the "retention and maintenance of ... fills" that were "placed in navigable waters prior to December 4, 1969" with the exception of "fills ... which are in trespass or violation of state statute." The plain language, therefore focuses solely on

fills that existed prior to December 4, 1969, and whether those fills were in trespass or violation of state statute.

Second, both trespasses and nuisances continue as trespasses and nuisances until abated. Until a trespass is abated it is a continuing trespass. *Wallace v. Lewis County*, 134 Wn.App 1, 14, 137 P.3d 101 (2006). Similarly, the right to maintain a nuisance cannot be acquired through the lapse of time. As a result, successive owners are liable for abating nuisances on real property. RCW 7.48.190, RCW 7.48.170; *Elves v. King County*, 49 Wn.2d 201, 202, 299 P.2d 206 (1956). Thus, if the Three Fingers fill was a public nuisance in December, 1969, it remained one upon adoption of the SMA in 1971, and to date.

Third, the State's theory renders the proviso itself meaningless. The proviso is a component part of RCW 90.58.270(1) and not a subsection of the statute. RCW 90.58.270(1) only concerns structures, improvements, docks, fills and developments placed in navigable waters prior to December 4, 1969. If, as the State suggests, the proviso only "applies prospectively", or "as of the effective date of the statute, June 1, 1971," there is no need for the proviso since any claims would be eliminated as of December 4, 1969.

If the State's theory is correct, the proviso is an unnecessary component of the statute.

Relying on RCW 7.48.160, the State and GBI argue that because RCW 90.58.270(1) authorized certain fills, the Three Fingers fill was no longer a nuisance after the statute's enactment. State Brief at 24, GBI Brief at 20-21. This ignores however, that even a lawful action may be a nuisance. *Grundy v. Thurston County*, 155 Wn.2d 1, 7, fn.5, 117 P.3d 1089 (2005); *Kitsap Cnty. v. Kitsap Rifle & Revolver Club*, 184 Wn. App. 252, 281, 337 P.3d 328 (2014), *review denied*, (July 8, 2015) (noise code exemption for shooting ranges did not foreclose a shooting range from constituting a public noise nuisance).

As recognized by the State below, the test for whether an otherwise lawful action may constitute a nuisance "is the reasonableness or unreasonableness of making the use of the property complained of in the particular locality and in the manner and under the circumstances of the case." *Grundy*, 155 Wn.2d at 5. Thus, even if looked at on the effective date of the statute, if, as the superior court found, the Three Fingers fill presented a "substantial and unreasonable" obstruction or impediment to

navigation it was a public nuisance, violated state statutes, and was not authorized by RCW 90.58.270(1).

c) In adopting the Shoreline Management Act the Legislature did not eliminate future actions against all historic fill.

Both GBI and the State point to the history between the Court's decision in *Wilbour* and adoption of the SMA as extrinsic evidence supporting their claims that RCW 90.58.270(1) provides a blanket exemption for all historic fills and development. State Brief at 25-28; GBI Brief at 25-32. The State goes so far as to claim that RCW 90.58.270(1) "unambiguously responded to, and created a statutory barrier to, the claim in *Wilber v. Gallagher*." State Brief at 25. While it is true that the *Wilbour* decision, and in particular the Court's concern raised in footnote 13, 77 Wn.2d at 316, n. 13, resulted in adoption of the SMA, there is no evidence that the legislative intent was to preclude *all* future claims seeking removal of historic fills.¹⁴

¹⁴ The State cites Geoffrey Cooke's article in support of its claim that RCW 90.58.270(1) precludes *Wilbour* type claims. To the contrary, the Crooks article states only that RCW 90.58.270(1) precludes such claims against "most existing uses..." Moreover, the articles does not mention, much less discuss, the last sentence in RCW 90.58.270(1) authorizing actions against development in trespass or violation of state statute. Geoffrey Crooks, *The Washington Shoreline Management Act of 1971*. 49 Wash. L. Rev. 423, 461 (1974).

To the contrary, and as discussed above, read as a whole, the more reasonable reading of RCW 90.58.270(1) is the reading applied by the superior court, *and urged by the state below*, that where a particular fill or development substantially and unreasonably interferes with navigation at the particular location it may be deemed a public nuisance and therefore lose the protection of RCW 90.58.270(1).

4. The Three Fingers fill violates Washington’s public nuisance statute and thus “violates state law.”

a) Statutory Public Nuisances.

Public and private nuisances are defined and declared illegal pursuant to statute. A nuisance:

consists in unlawfully doing an act, or omitting to perform a duty, which act or omission either annoys, injures or endangers the comfort, repose, health or safety of others, offends decency, or unlawfully interferes with, *obstructs or tends to obstruct, or render dangerous for passage, any lake or navigable river, bay, stream, canal or basin, or any public park, square, street or highway*; or in any way renders other persons insecure in life, or in the use of property.

RCW 7.48.120 (emphasis added).

A “Public nuisance” is further defined to include any action:

(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

RCW 7.48.140(3)-(4).

A violation of a statutory public nuisance is illegal. “No lapse of time can legalize a public nuisance, amounting to an actual obstruction of public right.” RCW 7.48.150. A public nuisance constitutes “a crime against the order and economy of the state.” RCW 9.66.010. Consequently, if the Three Fingers fill is a public nuisance, it violates state statutes and the authorization within by RCW 90.58.270(1) does not apply.

b) The Three Fingers are a Defined Public Nuisance.

(1) The Three Fingers obstruct or impede Lake Chelan.

There should be no reasonable dispute that the Three Fingers obstruct or impede navigation along the shoreline of Lake Chelan and particularly within Lakeside Bay. Indeed, the Supreme Court declared the two immediately adjacent fills to the west an “obstruction to navigation.” *Wilbour*, 77 Wn.2d at 313. The public’s right to navigate includes all

“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. *Wilbour*, 77 Wash. 2d at 316. The Three Fingers take up a significant portion of Lake Chelan’s Lakeside Bay and are plainly visible in photographs and aerial photographs. *See e.g.*, CP 392-393, CP 390. As explained by CBC’s declarants the Three Fingers fill significantly blocks use of what would otherwise be a large, undeveloped bay on Lake Chelan’s south shore – a bay that could be used for swimming, kayaking and fishing. *Supra* at 13-16.

(2) The Three Fingers fill obstruct or encroach upon streets, commons and landing places

There is also no dispute that blocking a public easement such as the perpetual easements created by the 1927 Deed, is a “public nuisance” under RCW 7.48.140(4). As discussed above, the 1891 Plat of the Town of Lake Park dedicated and quit claimed all streets and alleys to the use of the public forever. This includes Boulevard Avenue and Pine Street. AR 1380. While the City, in 1927, vacated those streets abutting and in the vicinity of the lake which would be inundated by the dam and rising lake level, the Chelan Electric Company and the Lake Chelan Box Factory executed a deed

granting, “in perpetuity, the right of access, for itself *and the public*” to reach Lake Chelan over the vacated streets “at all stages of water.” See *Wilbour*, at 307-08 (emphasis added); CP 1382-83.

There is no dispute that the Three Fingers block use of Boulevard Ave., as public access to reach the waters of Lake Chelan “at all stages of water.” CP 1388. *See also*, CP 375, ¶¶ 4-5. But for the Three Fingers, at high water, the public could access Lake Chelan from the US 97A right-of-way and the vacated Boulevard Ave. Similarly, at low water, and all points in time between high and low water, the public could access Lake Chelan by along Boulevard Ave. toward the west and its intersection with the vacated Division Street extending to low water. CP 1388, 1390.¹⁵

Because it is beyond dispute that the Three Fingers obstruct and encroach upon streets, and common areas, they are a defined public nuisance and violate state statute.

c) GBI failed to demonstrate a genuine issue of material fact.

GBI’s attempt below to create a genuine issue of material fact failed. GBI offered two lines of evidence: (1) aerial photographs showing other fill

¹⁵ The 1927 Deed confirms that the public’s perpetual right of access over Division Street extends from the “1100 foot contour above mean sea level to Lake Chelan.”

on Lake Chelan, and (2) declarations from individuals attesting to prior “use” of the Three Fingers. On close examination however, GBI’s evidence is not convincing and does not demonstrate that the Three Fingers are anything but an unreasonable and substantial public nuisance.

GBI’s attempt to justify the Three Fingers fill by pointing to other fills on Lake Chelan is not convincing. As can plainly be seen in the aerial photos offered in the January 25, 2012, Beardsley declaration, the Three Fingers take up a large portion of Lakeside Bay. *See*, CP 171 (Beardsley declaration Ex. B.1). In sharp contrast, the smaller fills shown at CP 171-174 are largely residential nowhere near as substantial.¹⁶ Nor do they appreciably block navigation. The presence of minor and potentially authorized or permitted fills, *infra* at 39-40, does not somehow justify the Three Fingers fill as appropriate.

GBI’s attempt to demonstrate that the Three Fingers indeed served an important purpose similarly failed. For example, GBI argued that Highway 97A may be “partially” built on fill, but offered no credible evidence no credible evidence that removal of the Three Fingers could

¹⁶ The one notable exception is the fill immediately east of the Three Fingers and visible on the left side of AR 172 (Beardsley dec., Ex. B.2). This is one of the original fills at issue in *Wilbour*. While the *Wilbour* Court ordered its removal, on remand it appears that the parties reached a settlement to allow the fill to remain. *See* AR 2533-2540.

“destabilize the highway, making it unsafe and unfit for use.” GBI offered only the statement of Dan Beardsley, a surveyor and *not* a road engineer, that if “all of the fill were removed” it could “potentially” destabilize the road. CP 485-87, ¶ 7. This is nothing but unsupported speculation. Moreover, even if some of the Highway is located on fill, the quantity of fill that might support the highway is miniscule in comparison to the total size of the Three Fingers fill. Simply because a minor portion of the landfills may serve a useful purpose it does not justify allowing the remaining significant portion of the Three Fingers to impede the public’s right to navigate and recreate over those waters.

GBI next offered the statement of Scott McKellar to claim that the fills provide “a habitat for bass” and that the “fishery would be adversely affected if the Fingers were removed.” CP 892-93. Mr. McKellar is not, however, a fisheries biologist and has no qualifications to opine on the impacts to Lake Chelan’s bass fishery by removal of the Three Fingers. It is just as likely, if not more likely, that the fishery would be improved by opening up the remainder of the relatively shallow Lakeside Bay for fishing.

The superior court agreed:

[a]lthough reasonableness is typically a question of fact, it may be determined by the

court if reasonable minds could come to only one conclusion. *Lahey v. Puget Sound Energy*, 176 Wn.2d 909, 924 (2013). Reasonableness is determined by “weighing the harm to the aggrieved party against the social utility of the activity.” *Id.*

this court must continue on to consider whether the obstruction of the passage upon the lake was both substantial and unreasonable as a matter of law, or whether a trial on this issue is necessary. In this regard, the court is compelled to return to its original discussion of this issue in its decision in May 2012. At that time the court noted that the fill area does not preserve the natural character of the shoreline, does not protect the resources or ecology of the shoreline and does not enhance or increase public access to the shoreline or to the navigable waters of Lake Chelan. To the contrary, it is undisputed that public access to the lake is impaired and the existence of the fill wholly obliterates the ability of the public to utilize that portion of the lake for navigation and recreation.

CP 1620-21.¹⁷

¹⁷ The superior court was referencing the Legislative declaration in RCW 90.58.020:

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;

d) The Three Fingers fill is not authorized by the City's Shoreline Master Program.

GBI argues that the SMA, the City of Chelan's zoning and the City's Shoreline Master Program ("SMP"), have addressed the issues raised in *Wilbour*, and that under these laws the Three Fingers now constitute a reasonable use of the shoreline. GBI Brief at 46-48. GBI cites to the City's zoning of the shoreline as "commercial waterfront" for support of their argument that the GBI's property is an appropriate location for landfill. But this ignores that the City's zoning regulations do not authorize landfills within the commercial waterfront zone. *See* CMC Chapter 17.40 (CP 2150). Instead, the City's zoning requirements only control the type of uses or structures that may be developed within the commercial waterfront zone. Those uses do not include landfills. *Id.*

The ability to place landfill material within the shoreline is controlled instead by the City's 1975 SMP. CP 1473-86. In sharp contrast

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- (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.

with GBI's assertions to the contrary, the Three Fingers landfill would *not* be allowed under the City SMP. While the SMP appears to allow landfills on fully submerged lots, fills are only allowed "that do not infringe on neighboring properties, navigation and recreation possibilities ... where no building site meeting setback requirements of the Master Program and applicable zoning ordinances exist." CP 1481 (City's SMP, §22.1.5).

Moreover, the City's SMP:

- limits fill for residential uses to 2000 square feet, CP 1481, §22.1.5;
- only allows non-residential landfills where they are "a necessary part of a project defined as 'water dependent.'" CP 1482 § 22.1.6;
- prohibits the alteration or expansion of a "non-conforming use" where it would make the use more non-conforming, CP 1483, § 33.1; and
- prohibits a non-conforming use from being re-established if discontinued for more than one year. CP 1483, § 33.3.

The Three Fingers landfill is not allowed under the applicable SMP.

Adoption of the SMA and SMP did not render this impediment to navigation "reasonable."¹⁸

¹⁸ The State and GBI cite *Caminiti*, 107 Wn.2d at 671, for its statement that the "requirements of the 'public trust doctrine' are fully met by the legislatively drawn controls imposed by the Shoreline Management Act." This ignores that shortly after *Caminiti*, the supreme court still distinguished the difference between the SMA and the public trust

5. Abatement is the property remedy.

After finding that Three Fingers fill was not protected by RCW 90.58.270(1) and violates the public trust doctrine, the superior court properly ordered that because the Three Fingers fill violate the public trust doctrine, the appropriate remedy is abatement. CP1566-1570; CP 1613-1622. CP 2547-2551.

a) The State lacks authority to abdicate sovereignty or dominion of the *jus publicum*.

The public trust has always existed in Washington. *Orion Corp. v. State*, 109 Wn.2d 621, 639, 747 P.2d 1062 (1987). The public trust acts as a covenant that runs with the land for the benefit of the public at large. *Id.* at 640. In the Washington Constitutions the State claimed ownership of the beds and shores of all navigable waters of the State. WA. CONST, art. 17 §1. The State can sell lands to private parties, so long as “its acts do not unreasonably interfere with the primary right of navigation.” *State v.*

doctrine. *See, Orion*, 109 Wn.2d at 660-62. As Professor Johnson explained, “[i]n *Orion*, however, the public trust doctrine made a strong reappearance as something distinct from the Shoreline Act. Thus, while the Shoreline Act may reflect elements and policies of the public trust doctrine, it does not supercede it.” Ralph W. Johnson, *The Public Trust Doctrine in Washington*, 67 Wash. L. Rev. 521, 544 (1991).

Sturtivant, 76 Wash. 158, 167, 135 P. 1035 (1913). The State ownership interest is known as the *jus privatum* interest. *Caminiti*, 107 Wn.2d at 668.

The interest of the public in using shorelines for navigation, together with its incidental rights of fishing, boating, swimming, water skiing, and other recreational purposes is referred to as the *jus publicum* or public interest. *Caminiti*, 107 Wn.2d at 667; *Orion*, 109 Wn.2d at 639-640. The control of the State over its shorelands “always remains in the state and the state holds such dominion in trust for the public.” *Caminiti*, 107 Wn.2d at 669. While the *Caminiti* Court confirmed that the state had the authority to convey the *jus privatum* title to tidelands and shorelands, it also confirmed that “[t]he 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.’” *Id.* at 669, quoting *Illinois Cent. R.R. v. Illinois*, 146 U.S. 387, 453 (1892).

Nine months after *Caminiti*, in *Orion* the court again confirmed the public trust doctrine existed over and above the SMA. *Orion* concerned a claim by a private tideland owner that the State’s adoption of the SMA amounted to inverse condemnation by excessive regulation. 109 Wn.2d at 624-25. In rejecting the landowner’s claims, the Court issued five

significant holdings: (1) that consistent with its earlier decision in *Caminiti*, that the “public trust has always existed in Washington” and that Orion’s land was so burdened before its purchase; (2) that even if the state has the authority to sell the underlying *jus privatum*, it had no authority to convey the *jus publicum*; (3) that Orion’s property had always been subject to the public trust doctrine; (4) that “Orion had no right to make use of its property that would substantially impair the public rights of navigation and fishing, as well as the incidental rights and purposes recognized previously by the court;”¹⁹ and (5) that “Orion never had the right to dredge and fill its tidelands, either for a residential community or farmlands.” *Orion*, 109 Wn.2d at 638-642.

Washington has not adopted a “balancing test” to determine whether tidelands, once filled, lose their *jus publicum*. To the contrary, the Washington Supreme Court has repeatedly confirmed that the *jus publicum* can never be conveyed or abdicated.²⁰ Instead, *Caminiti* and *Orion* both

¹⁹ Citing *Wilbour*, the *Orion* Court confirmed that it had extended the public trust “doctrine beyond navigational and commercial fishing rights to include “incidental rights of fishing, boating, swimming, water skiing and other related recreational purposes.” *Orion*, 109 Wn.2d at 641, quoting *Wilbour*, 77 Wn.2d at 316.

²⁰ See, *Orion*, 109 Wn.2d at 639-640; *Caminiti*, 106 Wn.2d at 666, *Weden v. San Juan County*, 135 Wn.2d 678, 698, 958 P.2d 273 (1998). Washington instead looks to the underlying legislative act to determine (1) whether the State has given up its right of control over the *jus publicum*; and if so, (2) whether the State has promoted the public interest in

confirmed that while the state can sell private interests in tideland, the state cannot give away the *jus publicum*. Indeed, “[t]he Legislature has never had the authority ... to sell or otherwise abdicate state sovereignty or dominion over such tidelands or shorelands.” *Caminiti*, 107 Wn.2d at 667; *Orion*, 109 Wn.2d at 639-640.²¹

The Washington Supreme Court has expressly found that the waters of Lake Chelan, are subject to the right of navigation. *Wilbour*, 77 Wn.2d at 316. Consequently, the Three Fingers fill is subject to the *jus publicum* interest. The State is obligated to exercise control over this public interest for the benefit of the public – not as the State advocates here, for the protection of private interests over the public interest. Consistent with *Orion*, GBI’s property is subject to the Public Trust Doctrine. GBI had no right to make use of its property that would substantially impair the public rights of navigation, fishing, or the other incidental rights recognized by the supreme court. And GBI never had the right to fill its lands below the high water mark. *Orion*, 109 Wn.2d at 638-642.

the *jus publicum*; or (3) the State has not substantially impaired the *jus publicum*. *Caminiti*, 107 Wn.2d at 670, quoting in part, *Illinois Cent. RR.*, 146 U.S. at 453.

²¹ And more specifically, in *Wilbour*, the court confirmed that fill placed in Lake Chelan under nearly identical circumstances needed to be removed.

b) The superior court properly ordered abatement.

Only one reported Washington decision has addressed the appropriate remedy where a Court determined that an obstruction violated the public trust doctrine. The *Wilbour* Court concluded:

[i]t 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. Here, as in *Wilbour*, once the superior court concluded that the Three Finger fill obstructs navigation. The court could not “authorize or approve an obstruction to navigation” and was required to order prompt removal of the fill. *Id.*²²

GBI argues, in effect, that the *Wilbour* Court mandate to abate obstructions to navigation has been supplanted by the SMA and the City's SMP. GBI Brief at 44-47. But as discussed above, *supra* at 39-40, the City's 1975 SMP only allows landfills on fully submerged lots “that do not

²² While removal will obviously require permitting and approval, the permitting process will dictate how the fill is to be removed.

infringe on neighboring properties, navigation and recreation possibilities ... where no building site meeting setback requirements of the Master Program and applicable zoning ordinances exist.” CP 1481, §22.1.5. Because the Three Fingers fill “infringe[s] on ... navigation and recreation possibilities” it is thus is not allowed under the SMP. The fill would not be allowed under the City’s 1975 SMP.²³

C. If, *Arguendo*, RCW 90.58.270(1) Grants Authority for all Historic Fills the Court Should Rule that RCW 90.58.270(1) Violates the Public Trust Doctrine

The superior court correctly interpreted RCW 90.58.270(1) and concluded that the authorization to obstruct navigation did not apply to the Three Fingers fill because it was a public nuisance and therefore in “violation of state statutes.”

If, however, this court agrees with the State and GBI that RCW 90.58.270 authorizes *all* historic fills, in “*any case*,” regardless of whether they substantially interfere with the public’s right under the *jus publicum*,

²³ And further, even if they did not infringe on navigation and recreation there no dispute that the fill is significantly larger than the 2000 square foot maximum allowed for a residential use and is not part of a “water dependent” use. Landfills are also not identified as a permitted, accessory, or conditional use in the City’s Waterfront Commercial zoning district. *See* Chelan Municipal Code Chapter 17.40.

then the Court should conclude that RCW 90.58.270(1) violates the public trust as a matter of law.

As discussed above, “[t]he 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.’” *Id.* a 669, quoting *Illinois Cent. R.R. v. Illinois*, 146 U.S. 387, 453 (1892). Because on its face RCW 90.58.270(1) attempts to provide a blanket authorization for the impairment of the *jus publicum* for virtually all “structures, improvements, docks, fills or developments” it must be reviewed for consistency with the public trust doctrine.²⁴

Based on *Illinois Cent. RR.*, the *Caminiti* Court adopted the following test for determining whether the exercise of legislative power violates the public trust doctrine:

we must inquire as to: (1) whether the State,
by the questioned legislation, has given up

²⁴ The State latches onto and quotes the *dictum* in footnote 9 of the *Orion decision* for the proposition that property, once sold, may not always be burdened by trust requirements. State Brief at 33. But the court’s discussion in footnote 9 is based on *Berkeley v. Superior Court*, 26 Cal.3d 515, 606 P.2d 362 (1980), a case clearly inapplicable to this situation. To the contrary, *Berkeley* concerned whether 79 acres of tidelands in the San Francisco Bay that had been granted into private ownership in 1870 – prior to California’s 1879 adoption of article XV, sections 2 and 3 of its Constitution that prohibited the obstruction of “free navigation of tidelands on navigable waters nor the right of way to such waters” – were subject to the public trust. 26 Cal.3d at 521-23. While confirming the pre-1879 grants were indeed subject to the trust, the court balanced the private and public interests and determined that lands, once filled, were valueless to the trust. 26 Cal.3d at 534.

its right of control over the jus publicum and (2) if so, whether by doing so 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.

In enacting the authorization for impairment in RCW 90.58.270(1) the State has given up its right of control over the *jus publicum* impaired by the purportedly grandfathered fills. On its face the statute provides “consent and authorization” for the “impairment of public rights of navigation, and corollary rights incidental thereto... .” This is significantly different than the statute allowing installation of private docks over state lands reviewed in *Caminiti*. There the court found no loss of state control because (1) the state had not conveyed title to the land; (2) DNR was authorized to regulate access and could revoke the dock rights; (3) local regulations governed construction, size, and length of the dock; and (4) the docks had to comply with regulations adopted under the SMA, hydraulics act, and state flood control laws. *Caminiti*, 107 W.2d at 672-73.²⁵ If, as the State and GBI

²⁵ Similarly, in its review of a statute authorizing the Department of Natural Resources to regulate commercial geoduck harvesting the appellate court found that the state had not given up its right to control because (1) harvesters were required to follow specific procedures; (2) no state lands were conveyed; and (3) DNR maintained the right to revoke or suspend a harvesting agreement. *Washington State Geoduck Harvest Ass’n v. Washington*, 124 Wn.App 441, 452, 101 P.3d 891 (2004). See also, *Weden*, 135 Wn.2d at 699-700 (Finding that San Juan County ordinance banning personal watercraft did not

suggest, RCW 90.58.270 authorizes *all* fills in existence on December 4, 1969, regardless of their interference with navigation, the state has abdicated control over the retention and maintenance of historic fills.

Turning to the second part of the *Caminiti* test, there is no evidence that the State has “promoted the interests of the public in the *jus publicum*” by providing a blanket authorization for pre-December 1969 development and fills. To the contrary, as the evidence in this case alone demonstrates, such a blanket authorization interferes the public’s right of navigation.

As the superior court found, the retention of three large fills into Lake Chelan do not preserve the natural character, resources, or ecology of the shoreline. Nor does the fill increase public access to publicly owned areas of the shoreline or increase recreational opportunities for the public in the shoreline. CP 1621. To the contrary, unlike the private recreational docks allowed for riparian owners in *Caminiti*, retention and maintenance of the Three Fingers significantly interferes with the natural character of the shoreline, blocks public access and use, and interferes with navigation and recreational use. *See, e.g.* CP 374-388. Similarly, unlike the private

give up control over navigable waters because while the ordinance banned a certain type of recreation, “the waters are open to access by the *entire* public including owners of PWC who utilize some other method of recreation.”

recreational docks allowed in *Caminiti* which were subject to revocation and subject to regulation under the SMA and other laws, *Caminiti*, 107 Wn.2d 673-674, fills purportedly authorized under RCW 90.58.270(1) to remain in place permanently, do not provide similar protection. While development *on* the Three Fingers is subject to regulation, the Three Fingers themselves, under the purported authority in RCW 90.58.270(1), are not subject to removal and may be retained and maintained.

Therefore, if this Court agrees with the State and GBI that RCW 90.58.270(1) protects *all* historic fills the Court should conclude that RCW 90.58.270(1) violates the Public Trust Doctrine.

V. CONCLUSION

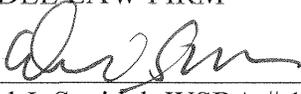
For the foregoing reasons, the Court should affirm the decisions of the superior court ordering abatement of the Three Fingers fill.

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CERTIFICATE OF SERVICE

The undersigned certifies under penalty of perjury under the laws of the State of Washington that I caused this document to be served on the following individuals in the manner listed below:

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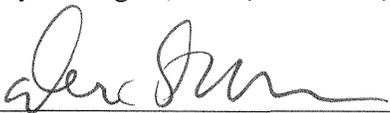
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