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IN THE SUPREME COURT FOR THE STATE OF WASHINGTON **RECEIVED ELECTRONICALLY**

CHELAN BASIN CONSERVANCY,

Petitioner,

v.

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

Respondents.

Court of Appeals Case No. No. 331962-III, 332381-III and 332390-III
(Consolidated)

**BRIEF AMICUS CURIAE OF
PACIFIC LEGAL FOUNDATION
IN SUPPORT OF RESPONDENTS**

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**IDENTITY AND
INTEREST OF AMICUS CURIAE**

PLF was founded in 1973 and is widely regarded as the most experienced and successful nonprofit legal foundation of its kind. PLF attorneys litigate matters affecting the public interest at all levels of state and federal courts and represent the views of thousands of supporters nationwide who believe in limited government and private property rights. PLF attorneys have participated as lead counsel or amicus curiae in several cases before the U.S. Supreme Court, defending the right of individuals to make reasonable use of their property. *See, e.g., Koontz v. St. Johns River Water Mgmt. Dist.*, ___ U.S. ___, 133 S. Ct. 2586, 2592, 186 L. Ed. 2d 697 (2013); *Arkansas Game & Fish Comm'n v. United States*, ___ U.S. ___, 133 S. Ct. 511, 184 L. Ed. 2d 417 (2012); *Palazzolo v. Rhode Island*, 533 U.S. 606, 121 S. Ct. 2488, 150 L. Ed. 2d 592 (2001); *Suitum v. Tahoe Reg'l Planning Agency*, 520 U.S. 725, 117 S. Ct. 1659, 137 L. Ed. 2d 980 (1997); *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 107 S. Ct. 3141, 97 L. Ed. 2d 677 (1987). PLF also has extensive experience regarding property rights in Washington, having participated as lead counsel or amicus curiae in several property rights and takings cases before this Court, including *Dickgieser v. State*, 153 Wn.2d 530, 105 P.3d 26 (2005); *Benchmark Land Co. v. City of Battle Ground*,

146 Wn.2d 685, 49 P.3d 860 (2002); *Manufactured Housing Communities of Washington v. State*, 142 Wn.2d 347, 13 P.3d 183 (2000); *Sparks v. Douglas County*, 127 Wn.2d 901, 904 P.2d 738 (1995); *Sintra, Inc. v. City of Seattle*, 119 Wn.2d 1, 829 P.2d 765 (1992).

PLF has also participated in several cases raising similar questions regarding the public trust doctrine to those presented in this case. *See, e.g., State ex rel. Merrill v. Ohio Dep't of Natural Res.*, 130 Ohio St. 3d 30, 955 N.E.2d 935 (2011); *Severance v. Patterson*, 566 F.3d 490 (5th Cir 2009) (addressing a legislative expansion of public beach access effecting a taking of private property); *Envtl. Prot. Info. Ctr. v. California Dep't of Forestry & Fire Prot.*, 44 Cal.4th 459, 187 P.3d 888 (2008) (addressing a proposed expansion of the public trust doctrine over all wildlife). Moreover, PLF attorneys have contributed to the body of scholarly literature on the public trust doctrine and the background principles of property law. *See, e.g.,* David L. Callies & J. David Breemer, *Selected Legal and Policy Trends in Takings Law: Background Principles, Custom and Public Trust "Exceptions" and the (Mis)Use of Investment-Backed Expectations*, 36 Val. U. L. Rev. 339 (2002); James S. Burling, *Private Property Rights and the Environment After Palazzolo*, 30 B.C. Env'tl. Aff. L. Rev. 1 (2002). PLF has extensive

experience in shoreline matters, including the public trust doctrine and the Shoreline Management Act of 1971 (SMA). *Citizens for Rational Shoreline Planning v. Whatcom Cnty.*, 172 Wn.2d 384, 387, 258 P.3d 36 (2011); *Kitsap Alliance of Prop. Owners v. Cent. Puget Sound Growth Mgmt. Hearings Bd.*, 152 Wn. App. 190, 197-98, 217 P.3d 365 (2009); *Futurewise v. Western Washington Growth Mgmt. Hearings Bd.*, 164 Wn.2d 242, 189 P.3d 161 (2008); *Biggers v. City of Bainbridge Island*, 162 Wn.2d 683, 169 P.3d 14 (2007).

PLF's arguments based on this experience will assist the Court in understanding and deciding the important issues on review in this case.

ISSUE ADDRESSED BY AMICUS

Whether the public trust doctrine, as codified in the SMA, RCW 90.58.270, authorizes the State to allow private development of shoreline property where such uses are consistent with the public interest.

INTRODUCTION

This case raises an important questions regarding Washington's common law of shoreline property ownership. Specifically, it asks whether the public trust doctrine prohibits the State from authorizing certain alterations to private shoreline property. It does not. To the extent petitioners

ask this Court to expand the public trust doctrine beyond its historic scope, their argument must be rejected because it would violate the State and Federal Constitutions. See Ralph W. Johnson, *et al.*, *The Public Trust Doctrine and Coastal Zone Management in Washington State*, 67 Wash. L. Rev. 521, 585 (1992) (An attempt to expand the public trust may give rise to a claim for an uncompensated taking.); *Stop the Beach Renourishment, Inc. v. Florida Dep't of Env'tl. Prot.*, 560 U.S. 702, 707-08, 130 S. Ct. 2592, 2601, 2614, 177 L. Ed. 2d 184 (2010) (a judicial ruling that redefines established principles of a state's property law will raise federal constitutional problems under the Due Process and Takings Clauses).

Petitioner's proposed extension of the public trust doctrine is part of a well-known strategy that aims to shift the management and control of shoreline development from the government to private activist organizations. The foundation for such an attack on coastal private property is already in place. For years, activists have argued for a change in the law that would allow citizen suits under the doctrine to force property owners to remove lawful shore defense structures. See, e.g., Benjamin Longstreth, *Protecting "The Wastes of the Foreshore": The Federal Navigational Servitude and its Origins in State Public Trust Doctrine*, 102 Colum. L. Rev. 471, 496-500

(2002) (proposing that the federal navigational servitude may be used to impose environmental conditions on private shoreline property); James G. Titus, *Rising Seas, Coastal Erosion, and the Takings Clause: How to Save Wetlands and Beaches Without Hurting Property Owners*, 57 Md. L. Rev. 1279, 1361-84 (1998) (proposing that the public trust be used to impose a rolling easement that would move with the extent of the high water mark, forcing property owners to remove bulkheads when the tide intersects with them). The public trust doctrine, however, is clear. The State is responsible for determining and administering the public trust. *State v. Longshore*, 141 Wn.2d 414, 427-28, 5 P.3d 1256 (2000) (quoting *Phillips Petroleum Co. v. Miss.*, 484 U.S. 469, 475, 108 S. Ct. 791, 98 L. Ed. 2d 877 (1988)). Thus, unless a private person can show that an approved use of the shoreline has caused some special harm, he or she lacks standing to sue under the public trust doctrine. *Wilbour v. Gallagher*, 77 Wn.2d 306, 317-18, 462 P.2d 232 (1969).

Moreover, petitioners' attempt to expand the public trust doctrine beyond its historical reach would harm the public's interest. Similar to the Three Fingers fill on Lake Chelan, thousands of parcels statewide (including much of the Seattle waterfront), only exist because of historic fills that

pre-date December 4, 1969. The very purpose of RCW 90.58.270, which grants consent under the public trust doctrine to historic fills, will be gutted. The result will be to open the door to myriad special-interest lawsuits seeking removal of historic fill that in any manner impacts navigable waters of the state. But such legal uncertainty is contrary to the public interest. The enactment of the SMA and RCW 90.58.270 protected the significant public interest in legal certainty and finality while simultaneously establishing a system of close regulation of the development of the Washington shorelines. This Court should not undo those policy choices by adopting a strained and wrong interpretation of RCW 90.58.270. The purpose and plain meaning of RCW 90.58.270 should be upheld and applied to the Three Fingers fill.

ARGUMENT

I

THE PUBLIC TRUST DOCTRINE ALLOWS THE STATE TO AUTHORIZE DEVELOPMENT OF PRIVATE SUBMERGED LANDS WHERE CONSISTENT WITH THE PUBLIC INTEREST

Broadly stated, Washington's public trust doctrine is a common law property doctrine under which the State holds certain waters, and the submerged lands, open to the public for commerce, navigation, fishing,

bathing, and related activities, regardless of who owns the submerged land.¹ *Caminiti v. Boyle*, 107 Wn.2d 662, 669, 732 P.2d 989 (1987); *PPL Montana, LLC v. Montana*, __ U.S. __, 132 S. Ct. 1215, 1234, 182 L. Ed. 2d 77 (2012). Historically, the public rights established by the doctrine have ended at the water's edge, where the adjacent shoreline property remains private and is fully protected by the State and Federal Constitutions. *See, e.g., Citizens for Responsible Wildlife Mgmt. v. State*, 124 Wn. App. 566, 570, 103 P.3d 203 (2004) (“No Washington case has applied the public trust to terrestrial wildlife or resources.”); *see also Stop the Beach Renourishment*, 560 U.S. at 708 (recognizing that shoreline property owners hold special rights’ with regard to the foreshore”); Joseph J. Kalo, *North Carolina Oceanfront Property and Public Waters and Beaches: The Rights of Littoral Owners in the Twenty-First Century*, 83 N.C. L. Rev. 1427, 1439 (2005).

¹ This common law tradition passed to the original thirteen states at the time they attained sovereignty over the beds of the sea following the revolution. *Martin v. Lessee of Waddell*, 41 U.S. (16 Pet.) 367, 385, 410, 10 L. Ed. 997 (1842) (United States Supreme Court held that the crown’s interest in tidelands passed to New Jersey upon the American Revolution). It then passed on to the later-admitted states, including Washington, by virtue of the Tenth Amendment, which reserved to the states all powers not delegated to the federal government. *Oregon v. Corvallis Sand & Gravel Co.*, 429 U.S. 363, 370-71, 97 S. Ct. 582, 50 L. Ed. 2d 550 (1977).

The purpose of the trust is not to transfer some sort of veto power over the use of private property to the public, as petitioners claim. Instead, the doctrine is intended only to ensure that the public can use and enjoy certain waters (not all waters) for commerce, navigation, fishing, bathing, and related activities. *Id.* To preserve the public trust, the doctrine places limits on the sovereign's authority to transfer its interest in submerged or submersible lands into exclusive private ownership.² *Illinois Central R.R. Co. v. Illinois*, 146 U.S. 387, 435, 13 S. Ct. 110, 36 L. Ed. 1018 (1892); see also Jose L. Fernandez, *Untwisting the Common Law: Public Trust and the Massachusetts Colonial Ordinance*, 62 Alb. L. Rev. 623, 628 (1998) (under English common law, the land beneath the seabed was held by the sovereign in trust for public navigation and fishing). The doctrine operates by dividing state ownership of submerged or submersible lands into two categories. *Caminiti*, 107 Wn.2d at 669; see also *Shively v. Bowlby*, 152 U.S. 1, 11, 14

² The public trust was limited to the land beneath the waters since the doctrine was first set forth in Roman law out of recognition that the land beneath the sea was unsuitable for private use. David C. Slade, *Putting the Public Trust Doctrine to Work* xvii (National Public Trust Study, 1990); see also George P. Smith II & Michael W. Sweeney, *The Public Trust Doctrine and Natural Law: Emanations Within a Penumbra*, 33 B.C. Env'tl. Aff. L. Rev. 307, 310 (2006) (In 530 A.D. the Institutes of Justinian pronounced that watercourses should be protected from private acquisition.).

S. Ct. 548, 38 L. Ed. 331 (1894); Callies & Breemer, 36 Val. U. L. Rev. at 355-61. On the one hand, the doctrine establishes a public right to use and enjoy the water—the res of the trust—for certain purposes. *Caminiti*, 107 Wn.2d at 669 (citing *Shively v. Bowlby*, 152 U.S. at 11). This is the so-called jus publicum. *Id.* On the other hand, the doctrine recognizes that traditional private property rights also exist in many such lands and waters. *Id.* This is called the jus privatum. *Id.* The doctrine balances those public and private rights by holding that the state can only alienate the jus privatum—it must reserve the jus publicum in trust for its citizens. *Id.* Thus, properly understood, the doctrine operates *first* as a “limitation on legislative power to give away resources held by the state in trust for its people . . .” and *second* as an obligation to supervise and administer the res of the trust. *San Carlos Apache Tribe v. Superior Court ex rel. Cnty. of Maricopa*, 193 Ariz. 195, 215, 972 P.2d 179 (1999).

Importantly, the doctrine does not divest the State of its authority to dispose of or to allow development on submerged lands. *See Bowlby v. Shively*, 22 Or. 410, 427, 30 P. 154 (1892), *aff’d sub nom Shively v. Bowlby*, 152 U.S. 1 (1894) (the state may dispose of the lands beneath navigable waterways as it sees fit, “subject only to the paramount right of navigation

and commerce”); see also *Morse v. Oregon Division of State Lands*, 285 Or. 197, 203, 590 P.2d 709 (1979) (public trust doctrine did not prohibit issuance of an estuarian fill permit, because “there is no grant here to a private party which results in such substantial impairment of the public’s interest as would be beyond the power of the legislature to authorize”).

The undisputed source of the modern public trust doctrine is *Illinois Central R.R.*, 146 U.S. 387. In that case, a railroad company claimed title to 1,000 acres of submerged lands under Lake Michigan, stretching for nearly a mile along Chicago’s shoreline, which it proposed to fill and develop. The railroad obtained title under a specific fee simple grant from the Illinois legislature. Finding that navigable waters, and lands under them, were held by the state in trust for the public, the United States Supreme Court concluded that the state could not convey or otherwise alienate the entire parcel in fee simple, free of the public trust. The state could, however, sell small parcels of public trust land for development, so long as this could be done without impairing the public’s right to make use of the remaining submerged land and water. *Id.* at 450-64.

This Court reached a similar conclusion in *Wilbour* (discussed at length in respondents’ briefs), noting that there will “undoubtedly” be

circumstances where the State could lawfully authorize development—such as fills—consistent with the public trust. 77 Wn.2d 316 n.13. And in 1971, the Legislature codified the public trust doctrine when it enacted the SMA, which expressly includes those aspects of the doctrine that allow for development of the shorelines when consistent with the public interest.³ *Portage Bay-Roanoke Park Cmty. Council v. Shoreline Hearings Bd.*, 92 Wn.2d 1, 4, 593 P.2d 151 (1979); *see also Caminiti*, 107 Wn.2d at 670 (“[T]he requirements of the ‘public trust doctrine’ are fully met by the legislatively drawn controls imposed by the Shoreline Management Act[.]”).

³ RCW 90.58.020. *See, e.g., Biggers v. City of Bainbridge Island*, 162 Wn.2d 683, 697, 169 P.3d 14 (2007) (J.M. Johnson, J., lead opinion); *Biggers*, 162 Wn.2d at 702 (Chambers, J., concurring); *Nisqually Delta Ass’n v. Dupont*, 103 Wn.2d 720, 726, 696 P.2d 1222 (1985); *Futurewise v. W. Wash. Growth Mgmt. Hearings Bd.*, 164 Wn.2d 242, 243, 189 P.3d 161 (2008) (J.M. Johnson, J., lead opinion) (“The SMA meant to strike a balance among private ownership, public access, and public protection of the State’s shorelines.”); *Buechel v. State Dep’t of Ecology*, 125 Wn.2d 196, 203, 884 P.2d 910 (1994) (“The SMA provides that it is the policy of the State to provide for the management of the shorelines by planning for and fostering all ‘reasonable and appropriate uses’.”); *Overlake Fund v. Shoreline Hearings Board*, 90 Wn. App. 746, 761, 954 P.2d 304 (1998) (The purpose of the SMA “is to allow careful development of shorelines by balancing public access, preservation of shoreline habitat and private property rights through coordinated planning.”); *State, Dep’t of Ecology v. City of Spokane Valley*, 167 Wn. App. 952, 963, 275 P.3d 367 (2012) (noting that protecting private property is an express policy of the SMA); *see also* Geoffrey Crooks, *The Washington Shoreline Management Act of 1971*, 49 Wash. L. Rev. 423, 423-24 (1974).

II

RCW 90.58.270 AUTHORIZES THE THREE FINGERS FILL AND EXPRESSLY BARS THE CLAIM ADVANCED BY CHELAN BASIN CONSERVANCY

The genesis of RCW 90.58.270 was this Court's controversial decision in *Wilbour*, 77 Wn.2d 306. As here, that case also involved Lake Chelan and its fluctuating water levels. The natural water level of Lake Chelan is 1,079 feet above sea level. However, during the summer months, the Chelan Electric Company's dam artificially raised the water level to an elevation of 1,100 feet above sea level, after which it subsided to its natural level. *Wilbour*, 77 Wn.2d at 309. Many properties that were completely dry and above the 1,079-foot level were submerged during the summer months including Gallagher's property. For 35 summers, the public used the waters over the Gallagher property for fishing, swimming, and general recreational use. However, in 1961, Gallagher filled the private property to five feet above the 1,100-foot level, thereby precluding its annual summer inundation.

His neighbor, *Wilbour*, sued Gallagher to remove the fill. This Court concluded that the artificial raising of the lake level did not preclude rights of navigation and other public uses pursuant to the public trust doctrine.

Following the reasoning of these cases we hold that when the level of Lake Chelan is raised to the 1,100 foot mark (or such level as submerges the defendants' land), that land is subjected to the rights of navigation, together with its incidental rights of fishing, boating, swimming, water skiing, and other related recreational purposes generally regarded as corollary to the right of navigation and the use of public waters. When the level of the lake is lowered so that the defendants' land is no longer submerged, then they are entitled to keep trespassers off their land, and may do with the land as they wish consistent with the right of navigation when it is submerged.

Wilbour, 77 Wn.2d at 316 (citations omitted). Having found that the navigational and public use rights attach to the waters when artificially raised, the Court quickly determined that the fill must be removed: "It follows that the defendants' fills, insofar as they obstruct the submergence of the land by navigable waters at or below the 1,100 foot level, must be removed. The court cannot authorize or approve an obstruction to navigation." *Id.*

This remarkable decision placed a cloud of uncertainty over all fills in navigable waters throughout Washington. Indeed, this Court itself recognized the potential impact of requiring pre-existing fill in navigable waters to be removed: "We come to this conclusion with some reluctance since there have been other fills in the neighborhood about which there has apparently been no protest." *Id.* at 316 n.13. The Court likewise recognized that many fills of navigable waters are desirable:

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

Id. Indeed, the Court recognized that its *Wilbour* decision “engendered considerable controversy.” *Harris v. Hylebos Industries, Inc.*, 81 Wn.2d 770, 784, 505 P.2d 457 (1974).

While the Court did not have power to approve even desirable or appropriate fill or development that blocked public navigation rights, other governing bodies could exercise that power. As it later explained in *Harris*, 81 Wn.2d at 787, “we had in mind [in *Wilbour*] the right of appropriate governing bodies to authorize fills and commercial uses of lands situated on the shores of navigable bodies of water.”

The Court identified the State Legislature (and the majority of voters who approved the SMA) as appropriately authorizing fills.

As part of the Shoreline Management Act, the language of RCW 90.58.270 (1) provides clear authority and consent for fills and other shoreline developments that pre-dated the *Wilbour* decision (December 4,

1969). In direct response to *Wilbour*, section 90.58.270 provides:

Nothing in this section shall constitute authority for requiring or ordering 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.

The Three Fingers fill has been in place since 1961, pre-dating *Wilbour*, and clearly falls within the consent and authorization of RCW 90.58.270. Despite this authorization, petitioner latches on to the second part of RCW 90.58.270 (1) which forbids consent related to fills or developments “which are . . . in violation of state statutes.” Petitioner argues that because the Three Fingers fill obstructed or impeded passage of a lake, it was an unlawful nuisance prior to 1969, and therefore was in “violation of state statutes.” Pacific Legal Foundation agrees with, and does not need to repeat, the well developed argument of the State of Washington that the Three Fingers fill cannot be construed as a nuisance in violation of state statutes. *See State Supp’l Br. at 11-12; see also GBI Holding Supp’l Br. at 16-12.*

Importantly, the SMA did two things. First, it granted consent to pre-existing fills and developments, thereby allowing a limited reduction of

rights in navigable waters. Second, the SMA established a rigorous permitting procedure for future shoreline development. Accordingly, any development of the Three Fingers property must be pursuant to a shoreline substantial development permit.

In short, the people of the State of Washington struck a balance that serves the overall public interest. Rather than allowing *Wilbour*-type claims to cast legal uncertainty over pre-existing fills and developments, consent is granted to those fills, thereby allowing a limited reduction of rights in navigable waters. The SMA's regulatory processes ensure that the public interest, including rights of navigation, are appropriately balanced and considered in future development.

III

PETITIONER'S PROPOSED EXPANSION OF THE PUBLIC TRUST DOCTRINE WILL HAVE SERIOUS IMPACTS TO THE PUBLIC INTEREST

The petitioners' proposed expansion of the public trust doctrine to outright prohibit government approved and historically established shorefront development directly threatens the economic and social well-being of Washington's citizens. Indeed, much of downtown Seattle, including the waterfront and stadium district, is built on fill and relies on seawalls to

protect the City from inundation.⁴

Petitioners' proposed rule also threatens our agricultural economy, which relies on shorefront development to create and protect some of our most productive agricultural lands. Prior to western settlement, the deltas and floodplains of the Skagit and Samish Rivers of the Skagit Valley were ill-suited for agriculture. Although the valley was extremely fertile, saltwater intrusion rendered the soil unusable for nearly all crops.⁵ In the mid-1800s, settlers began clearing and draining the lowlands and constructing dikes to protect the newly created agricultural land. By 1884, the settlers constructed 150 miles of dikes along the seaward edge of the delta to prevent saltwater intrusion, and a system of tide gates, sloughs, and pumps to drain high volumes of surface water that accumulated behind the dikes. This essential infrastructure continues to provide desperately needed flood control to protect

⁴ S.L. Kramer & M.O. Eberhard, *Seismic Vulnerability of the Alaskan Way Viaduct: Summary Report* at 15, 58-59 (prepared for Washington State Dep't of Transportation and U.S. Dep't of Transportation July 1995). Available at <http://www.wsdot.wa.gov/research/reports/fullreports/363.4.pdf>.

⁵ Skagit County Planning and Permitting Center, *Draft Programmatic Environmental Impact Statement: Development of a Critical Areas Ordinance for Application to Designated Agricultural Natural Resources Lands (Ag-NRL) Rural Resource Natural Resource Lands (Rrc-NRL) Engaged in Ongoing Agricultural Activity, Volume 1* at 5-13 (Skagit County, Wash. Feb. 2003).

the region's commercial agriculture.

Currently, the Skagit Valley contains over 700 farms on 93,000 acres of arable land. The region's agriculture contributes significantly to Washington State's economy. Skagit County is the second most productive agricultural county in Western Washington with revenues of approximately \$256 million.⁶ The industry also generates over \$143 million in secondary revenue through related industries and agritourism, such as the Tulip Festival, Harvest Celebration, and County Fair. County agriculture directly employs over 3,300 individuals and supports secondary employment of 2,350 for a total of 5,650 jobs. The importance of these jobs is underscored by the fact that this employment represents 8 percent of the entire County workforce, which is 5 percent higher than the same measure for Washington State as a whole. But continued production in the valley depends on the network of tide gates, sloughs, and pumps. *Swinomish Indian Tribal Community v. Western Washington Growth Mgmt. Hearings Bd.*, 161 Wn.2d 415, 425, 166 P.3d 1198 (2007).

The threat to Skagit Valley agriculture is very real. From 2002 to 2007, the Swinomish tribe unsuccessfully used Washington's growth

⁶ See U.S. Department of Agriculture 2007 Census, Skagit County.

management appeals process to try to force Skagit Valley farmers to return productive agricultural land to its pre-settlement condition. *Id.* If the tribe had succeeded in that case, approximately a third of this land (30,000 acres) would have been inundated by the sea at high tide. The tribe, nonetheless remains focused on forcing Skagit Valley farmers to remove shoreline structures that protect their land from the sea. In 2008, the Swinomish Tribe filed a lawsuit with the Federal District Court for the Western District of Washington alleging that the County's repair of three failing tide gates violated the Clean Water Act and Endangered Species Act. *Swinomish Indian Tribal Community v. Skagit Cnty. Dike District No. 22*, 618 F. Supp. 2d 1262 (W.D. Wash. 2008). The district court granted summary judgment in favor of the tribe, *id.* at 1271, after which the County settled the case by agreeing to remove the tide gates and allow 400 acres of private agricultural land to be inundated by sea water.

CONCLUSION

The consent granted for pre-existing fill and developments under the SMA pursuant to RCW 90.58.270 should be applied to the Three Fingers fill at Lake Chelan. Any other conclusion will cast the same cloud of uncertainty that was cast by the *Wilbour* decision. The public interest in continued

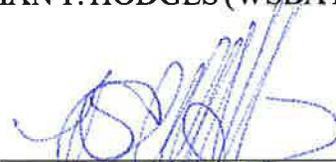
certainty and finality concerning long-established structures, docks, fills, and other shorefront developments should be protected. That policy choice was made with the enactment of RCW 90.58.270, and should not now be disturbed by this Court. For the foregoing reasons, amicus Pacific Legal Foundation urges the Court to uphold the decision of the court of appeals.

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Respectfully submitted,

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By



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