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SUPREME COURT OF THE STATE OF WASHINGTON

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CHELAN BASIN CONSERVANCY,

Petitioner,

v.

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

Respondent.

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ANSWER TO AMICUS CURIAE BRIEF OF CENTER FOR  
ENVIRONMENTAL LAW AND POLICY

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## INTRODUCTION

Amicus Center for Environmental Law and Policy (“CELP”) argues that the Court of Appeals’<sup>1</sup> interpretation of RCW 90.58.270(1) was overbroad and that, under the statute as interpreted by the Court of Appeals, the public trust doctrine no longer applies to fills and structures pre-dating the enactment of the Shoreline Management Act of 1971 (“SMA”).<sup>2</sup> CELP advances various other theories, including that RCW 90.58.270(1) eliminates constitutionally based protections and that the Court of Appeals erred by not reviewing the validity of a statute of general applicability on a limited set of facts.

CELP’s theories of this case are not supported by Washington law and should be rejected. The Court of Appeals’ interpretation of RCW 90.58.270(1) did not supplant the public trust doctrine, which continues to apply to pre–December 4, 1969 developments. The effect of the Legislature’s enactment of the SMA with respect to these areas was to extinguish a *Wilbour*-based<sup>3</sup> common law abatement action and replace it with a comprehensive regulatory regime that is the present declaration of the public trust doctrine. The suggestion that the SMA eliminated constitutionally based protections misunderstands the basis of the doctrine

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<sup>1</sup> *Chelan Basin Conservancy v. GBI Holding Co.*, 194 Wn. App. 478, review granted, 186 Wn.2d 1032 (2016).

<sup>2</sup> Chapter 90.58 RCW.

<sup>3</sup> *Wilbour v. Gallagher*, 77 Wn.2d 306 (1969).

as it has been articulated by many decisions of this Court. Likewise, CELP's assertion that the Court of Appeals erred by not reviewing the validity of a statute of general applicability on a limited set of facts is wrong and misunderstands the procedural posture of this case. CELP's arguments are without merit, and the judgment of the Court of Appeals should be affirmed.

### ARGUMENT

- A. The Court of Appeals' Interpretation of the SMA's Savings Clause Is Not Overbroad and Does Not Supplant the Public Trust Doctrine**
- 1. The Court of Appeals correctly held that the SMA expresses the public trust doctrine as to matters that are regulated and controlled by the SMA.**

The Court of Appeals correctly held that the SMA fully expresses the public trust doctrine as to matters that are regulated and controlled by the SMA. Decision at 8. The relationship between the SMA and the public trust doctrine was described in *Caminiti v. Boyle*, 107 Wn.2d 662 (1987), in which this Court stated that "the requirements of the 'public trust doctrine' *are fully met by the legislatively drawn controls* imposed by the Shoreline Management Act of 1971, RCW 90.58." *Id.* at 670 (emphasis added).

CELP suggests that the quoted language in *Caminiti* was dicta and not controlling. Brief at 13. That is incorrect. *Caminiti* involved a public

trust doctrine challenge to RCW 79.90.105<sup>4</sup> of the Aquatic Lands Act. The Court upheld RCW 79.90.105 as consistent with the public trust doctrine because it “substantially accords with . . . and is supplemental” to the SMA. *Caminiti*, 107 Wn.2d at 671. The relationship between the SMA and the public trust doctrine was critical to the Court’s decision to uphold the statute. *See id.* at 671-72. It therefore was not dicta. *City of West Richland v. Dep’t of Ecology*, 124 Wn. App. 683, 692 (2004) (“When an interpretation of a statute is essential to a judicial decision, it is not dicta.”) (citing *Wagg v. Estate of Dunham*, 146 Wn.2d 63, 73 (2002)).

Because it fails to appreciate the significance of *Caminiti*, CELP argues that the “Court of Appeals was incorrect, and went far further than necessary, to hold that the Public Trust Doctrine has been supplanted by the [SMA].” Brief at 15-16. Those arguments are without merit.

Even before *Caminiti*, this Court recognized that, as to matters that the SMA regulates, the SMA “is the present declaration of [the public trust] doctrine.” *Portage Bay-Roanoke Park Cmty. Council v. Shorelines Hearings Bd.*, 92 Wn.2d 1, 4 (1979); *see also Samson v. City of Bainbridge Island*, 149 Wn. App. 33, 60 (2009) (“[T]he SMA satisfies the public trust doctrine.”). The SMA expanded upon the common law principles of the public trust doctrine and codified a comprehensive plan

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<sup>4</sup> Now codified as RCW 79.105.430.

to manage shoreline development and protect the public use of navigable waters.

The legislative consent to and authorization of “structures, improvements, docks, fills, or developments placed in navigable waters prior to December 4, 1969” (the date of the *Wilbour* decision) is not a *carte blanche* exemption, nor was it an elimination of the public trust doctrine, as argued incorrectly by CELP. *See* Brief at 5. Rather, the doctrine is applied to pre-December 4, 1969 developments by operation of the limited and narrow consent and authorization granted by RCW 90.58.270(1). Then, in common with almost every other shoreline in the State, these developments are brought under the control of the SMA and its expression of the public trust doctrine. These areas are subject to the regulation and control of “Master Programs” that embody a “comprehensive use plan . . . [and] the use regulations together with maps, diagrams, charts, or other descriptive material and text, a statement of desired goals, and standards developed in accordance with the policies in RCW 90.58.020.” WAC 242-03-030(19).

The Court of Appeals correctly held that the SMA is the embodiment of the doctrine as applied to pre December 4, 1969 developments that satisfy the requirements of RCW 90.58.270(1). Decision at 14-15. This holding necessarily forecloses a competing public

trust doctrine claim over such areas based on “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.” RCW 90.58.270(1).

**2. The Legislature appropriately exercised control over pre-1969 fill through RCW 90.58.270(1).**

CELP further argues that the “state, acting through the legislature or the executive and its agencies, cannot abdicate control over or substantially impair public rights to public resources (traditionally referred to as the *jus publicum*).” Brief at 4. The State has done no such thing.

This Court has recognized that it is the Legislature, not the judiciary, which has the authority to codify the public trust doctrine and regulate development for the public benefit. *See State v. Longshore*, 141 Wn.2d 414, 427-28 (2000) (“[T]he individual States have the authority to define the limits of the lands held in public trust and to recognize private rights in such lands as they see fit.”) (quoting *Phillips Petroleum Co. v. Mississippi*, 484 U.S. 469, 475 (1988)); *Rettkowski v. Dep’t of Ecology*, 122 Wn.2d 219, 232 (1993) (“[T]he duty imposed by the public trust doctrine devolves upon the State[.]”); *Caminiti*, 107 Wn.2d at 675 (“[T]he Legislature was the appropriate forum in which to do battle on that issue, and the Legislature’s decision to enact the statute in question was an entirely appropriate one for it to make.”); *Harris v. Hylebos Indus., Inc.*,

81 Wn.2d 770, 776-77 (1973) (“From its first session, the Washington State Legislature passed numerous laws for the purpose of encouraging the development of certain tidelands by lessees and purchasers thereof.”); *Wilbour*, 77 Wn.2d at 316 n.13 (noting “public authorities” should regulate fills to avoid similar outcomes in future).

By enacting the SMA, the Legislature did not “abdicate” its authority to control navigable waters; it exercised that authority. The State’s limited consent to impairment of public navigation expressed in RCW 90.58.270(1) was carefully drawn and contains specific criteria for identifying which pre–December 4, 1969 developments are permissible and which are not. The subsequent use and development of pre–December 4, 1969 fill is subject to strict compliance with the SMA and other state laws and regulations that govern such activities.<sup>5</sup> By placing all shorelines in the State (including pre–December 4, 1969 fills) within the statutory framework of the SMA, the Legislature replaced a limited *Wilbour* common cause of action to abate fill with a greatly enhanced and

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<sup>5</sup> The regulatory context the *Wilbour* court observed when it noted an absence of “interested public authorities” has changed dramatically over the last 45 years. *See* 77 Wn.2d at 316 n.13. Other legislative enactments augment the SMA and afford much broader and greater protections to shoreline resources and values than did the blunt instrument common law claim recognized in *Wilbour*. Those statutes and regulations now include the State Environmental Policy Act (Chapter 43.21C RCW), the Growth Management Act (Chapter 36.70A RCW), Hydraulic Project Approval (Chapter 77.55 RCW) and other federal, state and local laws regulating air quality, water quality, fish and wildlife, threatened or endangered species, forest practices, use of public lands, historic and cultural resources, and hazardous substances.

comprehensive regulatory framework. The statute significantly *increased* public control over these areas and struck an appropriate balance that fosters “reasonable and appropriate uses” while protecting “*generally* public rights of navigation and corollary rights incidental thereto.” RCW 90.58.020 (emphasis added).

CELP refers to this Court’s holding in *Orion Corp. v. State*, 109 Wn.2d 621 (1987), in support of a contrary conclusion. Its reliance on that case is misplaced. *Orion* does not limit the Legislature’s power to articulate the public trust doctrine, as it did in the SMA, in a manner that balances public and private interests. To the contrary, the Court in *Orion* made clear that it did “not mean to suggest that once the state conveys to a private party property subject to the trust the property will always be burdened by trust requirements.” *Id.* at 640 n.9. *Orion* is consistent with *Caminiti* and a long line of prior cases that recognize that the proper articulation of the public trust doctrine by the State does not constrain a broad consideration of the public interest. The Court in *Orion* directly addressed this point in stating that “[t]he trust’s relationship to navigable waters and shorelands resulted not from a limitation, but rather from a recognition of where the public need lay.” *Id.* at 640-41.

*Orion* does not suggest that the Legislature made any error in judgment in discerning where the public need lay when it enacted the

SMA. To the contrary, the Court stated in *Orion* that “[w]e have also observed that [public] trust principles are reflected in the SMA’s underlying policy.” *Id.* at 641 n.11; *see Portage Bay*, 92 Wn.2d at 4. These policies are set out in RCW 90.58.020 and reflect a broad consideration of public interests:

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

This balance of interests struck by the Legislature advances the overall objective of protecting “the public interest associated with the shorelines of the state while, at the same time, recognizing and protecting private property rights consistent with the public interest.” *Id.*

The public trust doctrine does not create an absolute prohibition on impairments to navigation. The SMA’s pragmatic balance of interests recognized the reality that shorelines serve and must accommodate multiple purposes and uses. The Legislature’s articulation of the public trust doctrine, by operation of the policies, regulations, consents, and

grants of authority set forth in the SMA, is entirely consistent with this Court's precedent.

The *Orion* Court went on to observe that “[r]esolution of this case does not require us to decide the total scope of the doctrine.” 109 Wn.2d at 641. That is equally true here. This case falls squarely within the “trust principles” articulated by the Legislature. Accordingly, it is irrelevant that the doctrine may extend to things that the Legislature or the courts have yet to address, because here, the Legislature has expressly spoken to the gravamen of Chelan Basin Conservancy’s (“CBC”) complaint, which is an alleged impairment of public rights of navigation, and corollary rights incidental thereto. RCW 90.58.270(1) is controlling and is dispositive of CBC’s cause of action.<sup>6</sup>

**3. The Court of Appeals interpreted RCW 90.58.270(1) exactly as the Legislature intended.**

CELP suggests that the Court of Appeals’ interpretation of RCW 90.58.270(1) was “grossly overbroad,” but that is not so. Brief at 11. To the contrary, the Court of Appeals interpreted RCW 90.58.270(1) according to its text, which precludes “requiring or ordering the removal

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<sup>6</sup> Citing law-review articles and decisions of other jurisdictions, CELP presents an aspirational articulation of the public trust doctrine. *See* Brief at 6-9. But CELP’s formulation of the public trust doctrine is not grounded in Washington law. Nor is *Esplanade Properties, LLC v. City of Seattle*, 307 F.3d 978 (9th Cir. 2002), cited by CELP, relevant to this case other than for the proposition that “[t]he public trust doctrine, reflected in part in the SMA, unquestionably burdens Esplanade’s property,” just as it “burdens” the Three Fingers Fill. *Id.* at 986.

of any structures, improvements, docks, fills, or developments placed in navigable waters prior to December 4, 1969.” That result is exactly what the Legislature intended. During the Senate hearings, Senator Gissberg explained that the purpose of the statute was to protect pre-*Wilbour* fills:

[RCW 90.58.070(1)] is a savings clause for those structures that were placed there prior to *Wilbour vs. Gallagher*. If it is not there, then every dock, most of industry in the state that is on the water, of course, is there illegally and subject to mandatory injunction to being removed by anyone that wants to bring the lawsuit. Consequently, that is why the savings clause is there, and the state is giving, or purports to give its consent to the impairment of the navigable rights of the public generally which are impeded by the construction of those docks and facilities that are in the navigable waters.

1 S. JOURNAL, 42d Leg., 1st Ex. Sess. at 1411 (Wash. 1971); Decision at 11-13.

The Court of Appeals’ interpretation and application is also identical to what the people of the State intended. The people had a choice between Initiative 43, which would have authorized *Wilbour*-type claims to continue, and Initiative 43B, which abolished *Wilbour*-type claims. The people chose Initiative 43B, which granted an explicit (but limited) consent to all pre-1969 fills across the State, later codified as RCW 90.58.270(1). By rejecting CBC’s public trust doctrine claim, the Court of Appeals interpreted RCW 90.58.270(1) appropriately to reflect the express intent of the Legislature and the people to bar such claims.

**B. CELP Mischaracterizes the Issue Before the Court as a Constitutional Issue**

**1. No constitutionally based protections are implicated in this case.**

CELP argues that the “legislature may not enact a statute that purports to eliminate constitutionally based protection[] for public water resources” and that “the Legislature cannot abrogate the Public Trust Doctrine through legislative enactments.” Brief at 14-15. The Legislature did no such thing. CELP’s arguments reflect a misunderstanding of the public trust doctrine and how it interacts with the Washington Constitution.

Article XVII, Section 1 of the Washington Constitution provides in relevant part:

The state of Washington *asserts its ownership* to the beds and shores of all navigable waters in the state up to and including the line of ordinary high tide, in waters where the tide ebbs and flows, and up to and including the line of ordinary high water within the banks of all navigable rivers and lakes: Provided, that this section shall not be construed so as to debar any person from asserting his claim to vested rights in the courts of the state.

(Emphasis added.) The Washington Constitution merely declares what the State possessed by virtue of its sovereignty at the time of statehood—*i. e.*, that the State owned the beds and tide lands of all navigable waters. As the Court explained in *Caminiti*, the State’s sovereign ownership of

tidelands and shorelands is not limited to the ordinary incidents of legal title, but comprises two distinct aspects:

The first aspect of such state ownership is historically referred to as the *jus privatum* or private property interest. As owner, the state holds full proprietary rights in tidelands and shorelands and has fee simple title to such lands.

.....

The second aspect of the state's ownership of tidelands and shorelands is historically referred to as the *jus publicum* or public authority interest. The principle that the public has an overriding interest in navigable waterways and lands under them is at least as old as the Code of Justinian, promulgated in Rome in the 5th Century A.D. It is also found in the English common law, from whence our own common law is derived, as early as the 13th Century A.D.

107 Wn.2d at 668-69 (footnotes omitted). This case has nothing to do with the State's title or the *jus privatum*. Only the second aspect, *jus publicum*, is implicated in this case, and only to the limited scope defined by *Wilbour* and the application of the doctrine to the periodic inundation of privately owned lands.<sup>7</sup>

The *jus privatum*, not the *jus publicum*, is the constitutionally based aspect of the State's sovereign ownership of tidelands and

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<sup>7</sup> Lake Chelan functions as a reservoir for a hydroelectric plant. CP 143. As the Court observed in *Wilbour*: "We have here, however, not only the raising of the lake level by artificial means, but the distinctive features that the level does not remain constant and that the owners of the land between the 1,079 and the 1,100 foot level can occupy their property during most of the year." 77 Wn.2d at 314.

shorelands. This distinction has been consistently drawn in cases addressing the public trust doctrine:

The public trust doctrine evolved out of the public necessity for access to navigable waters and shorelands. It is partially encapsulated in the language of our state constitution which reserves state ownership in “the beds and shores of all navigable waters in the state.” Const. art. 17, § 1.

*Rettkowski*, 122 Wn.2d at 232 (citations omitted). Article XVII, Section 1 provides no textual support for constraining the authority of the Legislature to regulate navigable waters; nothing in this clause suggests that it is for the courts to decide which regulations are appropriate and which are too permissive.

Article XVII, Section 1 is not implicated in this case because the Three Fingers Fill has always been private land. It was located above the natural “line of ordinary high water” in Lake Chelan, and it was never owned by or acquired from the State. CP 143-4, 717-8; *see also Wilbour*, 77 Wn.2d at 307-08. The navigational servitude arose only because the construction of a dam resulted in the artificial seasonal flooding of private land. CP 143-4, 717-8; *Wilbour*, 77 Wn.2d at 307-08.

Thus, only the *jus publicum* is applicable in this case, and that aspect of the public trust doctrine is a common law rule, not a constitutional rule. *Orion* analogized this aspect of the public trust doctrine to a common law covenant or easement, explaining that “[t]he

public trust doctrine resembles ‘a covenant running with the land (or lake or marsh or shore) for the benefit of the public and the land’s dependent wildlife.’” *Orion Corp.*, 109 Wn.2d at 640 (citation omitted). The Washington Constitution does not grant the public an easement as a means to impress the *jus publicum* on private property. That this Court opted to do so in *Wilbour* was an extension of the common law, and not based on the Washington Constitution. Therefore, in extinguishing a *Wilbour*-based common law abatement actions, RCW 90.58.270(1) does not implicate any constitutional rights.

**2. *Wilbour*-based common law claims may be abrogated by legislation.**

Since the *Wilbour* claims at issue in this case are derived entirely from the common law, these claims can be limited or extinguished by legislation. As the California Supreme Court recognized, in a case on which CELP relies, “[i]t is a political question, within the wisdom and power of the Legislature acting within the scope of its duties as a trustee, to determine whether public trust uses should be modified or extinguished.” *Marks v. Whitney*, 6 Cal. 3d 251, 260-61 (Cal. 1971); accord *Ill. Cent. R.R. Co. v. Illinois*, 146 U.S. 387, 453 (1892) (“The control of the State for the purposes of the trust can never be lost, except as to such parcels as are used in promoting the interests of the public

therein, or can be disposed of without any substantial impairment of the public interest in the lands and waters remaining.”).

Indeed, the very purpose of the *Caminiti* test is to evaluate “whether or not an exercise of legislative power with respect to tidelands and shorelands violates the ‘public trust doctrine.’” 107 Wn.2d at 670. Legislation that totally gives up control (i.e., extinguishes the easement) is entirely appropriate and permissible if in “so doing the state (a) has promoted the interests of the public in the jus publicum, or (b) has not substantially impaired it.” *Id.* at 670-71; *see also Rettkowski*, 122 Wn.2d at 232 (“The doctrine prohibits the State from disposing of its interest in the waters of the state in such a way that the public’s right of access is substantially impaired, *unless the action promotes the overall interests of the public.*”) (emphasis added).

The Legislature could have extinguished the public trust doctrine with respect to pre-December 4, 1969 developments, but it did not do so. These areas are controlled by the SMA. By enacting RCW 90.58.270(1), the Legislature did extinguish a *Wilbour*-based common law abatement action and replaced it with a comprehensive regulatory regime. That was a permissible exercise of the Legislature’s authority.

**3. Review of RCW 90.58.270(1) does not warrant heightened scrutiny.**

CELP argues that, as “with all constitutional matters, the courts are the final arbiters of the scope and content of the Doctrine, and review public trust matters with heightened scrutiny.” Brief at 2. In support of this argument CELP “concur[s] in the arguments set forth in the Supplemental Brief of Petitioner Chelan Basin Conservancy at 7-14” and cites a case from Iowa.

As explained above, however, RCW 90.58.270(1) extinguished a common law cause of action, not a constitutional right, in the context of legislation that articulated the policies, regulations, consents, and grants of authority that greatly expanded upon the common law and the protections afforded to the public. The test to be applied to assess the validity of this type of legislation is derived from *Illinois Central* and stated in *Caminiti*.<sup>8</sup>

The inquiry is to be undertaken within the established rules under which courts review legislation. Statutes are presumed valid. *See Sch. Dists. All. for Adequate Funding of Special Educ. v. State*, 170 Wn.2d 599, 605 (2010). The challenger bears a heavy burden of proof. *Island County v. State*, 135 Wn.2d 141,146 (1998). If this Court can conceive of

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<sup>8</sup> “[W]e must inquire as to: (1) whether the state, by the questioned legislation, has given up its right of control over the jus publicum and (2) if so, whether by so doing the state (a) has promoted the interests of the public in the jus publicum, or (b) has not substantially impaired it.” *Caminiti*, 107 Wn.2d at 670.

any set of facts that would sustain a legislative enactment, it must assume that set of facts existed when the Legislature passed the statute. *Rafn Co. v. State*, 104 Wn. App. 947, 951 (2001). See also *Williamson v. Lee Optical of Okla., Inc.*, 348 U.S. 483, 487 (1955) (upholding statute based upon entirely hypothetical facts); *Weden v. San Juan County*, 135 Wn.2d 678, 704-05 (1998); *State ex rel. Faulk v. CSG Job Ctr.*, 117 Wn.2d 493, 504 (1991) (“In determining whether . . . particular legislation tends to promote the welfare of the people of the State of Washington, [the court] must presume that if a conceivable set of facts exists to justify the legislation, then those facts do exist and the legislation was passed with reference to those facts.”). Under this framework, CBC has not met its burden, and RCW 90.58.270(1) must be upheld.

**C. The Court of Appeals Correctly Evaluated RCW 90.58.270(1) as Generally Applied**

CELP’s argument that the Court of Appeals erred in analyzing the general validity of RCW 90.58.270(1), Brief at 16, misunderstands the Court of Appeals’ decision and the procedural background of this case. Each decision made by the Court of Appeals was necessary and correct.

CBC’s original claim was an as-applied common law public trust doctrine claim. In its complaint, CBC alleged trespass actions (claims it subsequently abandoned) and also alleged that the “Three Fingers fill violates the rights of plaintiffs members to use and enjoy the submerged

waters of Lake Chelan which rights are protected by the public trust doctrine.” Complaint ¶ 29; CP 10.

The Superior Court erroneously ruled that RCW 90.58.270(1) did not bar this claim because the Three Fingers Fill impaired the navigability of Lake Chelan. As a result, a threshold question before the Court of Appeals was whether RCW 90.58.270(1) did or did not extinguish CBC’s cause of action.

As discussed above, RCW 90.58.270(1) was enacted to be a comprehensive, State-wide abrogation of all *Wilbour*-like claims. Therefore, the Court of Appeals correctly evaluated the validity of RCW 90.58.270(1) generally under *Caminiti* to determine whether it violated the public trust doctrine. Its analysis appropriately considered the validity of any *Wilbour*-like cause of action, not the specific cause of action brought by CBC.

Only after conducting a general analysis under *Caminiti* as to the validity of RCW 90.58.270(1) could the Court of Appeals consider CBC’s as-applied public trust doctrine challenge to abate the Three Fingers Fill. Since the Court of Appeals determined that RCW 90.58.270(1) was valid and extinguished CBC’s cause of action, the court correctly determined that an as-applied analysis as to this claim and the specific circumstances surrounding the Three Fingers Fill was no longer necessary or possible.

Decision at 18-19. The Court of Appeals' analysis was therefore correct, complete, and dispositive of CBC's "as applied" common law public trust doctrine claims. Had the Court of Appeals found RCW 90.58.270(1) to be invalid, only then would CBC's claims have been reviewable by the Superior Court on summary judgment.

**D. The Court of Appeals Did Not Find that CBC's Claims Lapsed Due to the Passage of Time**

CELP assigns error to the Court of Appeals' statement that CBC "waited over 40 years to bring suit," and that "[g]iven the passage of time" it is unclear whether Petitioners could ever show that the public trust protects any shoreline in the State. Brief at 9. The Court of Appeals did not dismiss CBC's claims on the grounds that they were time-barred. Rather, the implication of the Court of Appeals' statement was nothing more than parties that are substantially harmed (as CBC alleged) typically do not wait 40 years to bring a cause of action. It was well within the court's discretion to note that any challenge to RCW 90.58.270(1), more than 40 years after the fact, is dubious for its implicit lack of substantiality.<sup>9</sup>

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<sup>9</sup> CELP goes on to argue that "Public trust benefits, such as public rights of navigation, access to fisheries, and environmental protections, do not expire." Brief at 9. However, the cases cited by CELP are not dispositive of the issue of lapse, had it been raised or decided. A private party's right to bring a common law public trust doctrine claim can lapse with the passage of time: In *Reynolds v. City of Calistoga*, 223 Cal. App. 4th 865, 167 Cal. Rptr. 3d 591 (2014), the trial court held that laches could deny a public trust claim ("Lastly, even if the complaint could be considered as including a claim for

## CONCLUSION

The judgment of the Court of Appeals should be affirmed.

DATED: February 8, 2017    Respectfully submitted,

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violation of the public trust for which plaintiff had standing, the claim would nevertheless be barred by laches, as a matter of law, based on plaintiff's unreasonable and prejudicial delay in bringing the claims." In *Fort Trumbull Conservancy, LLC v. City of New London*, No. X03CV054031891S, 2009 WL 3084998 (Conn. Super. Ct. Aug. 20, 2009), the court denied a motion for summary judgment based on laches finding that there were issues of material fact, suggesting that laches could be a defense to a public trust claim.

**DECLARATION OF SERVICE**

On said day below I deposited in the U.S. Mail a true and accurate copy of the ANSWER TO AMICUS CURIAE BRIEF OF CENTER FOR ENVIRONMENTAL LAW AND POLICY to the following:

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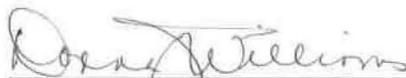
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I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED: February 8, 2017, at Seattle, Washington.



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