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NO. 93381-2

SUPREME COURT OF THE STATE OF WASHINGTON

CHELAN BASIN CONSERVANCY,

Petitioner,

v.

GBI HOLDING CO. and STATE OF WASHINGTON,

Respondents.

BRIEF OF STATE OF WASHINGTON
IN RESPONSE TO AMICUS BRIEF OF CELP

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I. INTRODUCTION

The Center for Environmental Law and Policy (CELP) admits that RCW 90.58.270 of the SMA was “clearly intended to address the concern that *Wilbour*-type challenges could be brought against other shoreline fills[.]” CELP Br. at 16-17. CELP, however, claims that the public trust doctrine prevents the SMA from accomplishing this intent. In particular, CELP claims that courts can decide if the statutory limit on *Wilbour* actions is consistent with the public trust doctrine by analyzing every fill or development on an individual basis. CELP Br. at 4-5, 12, 16-17. CELP relies on a flawed analysis of the public trust doctrine, mischaracterization of case law, and misapplication of the framework for review of legislation in *Caminiti v. Boyle*, 107 Wn.2d 662, 732 P.2d 989 (1987).

CELP concedes that its theory is based on an article promoting “judicial intervention” using the public trust doctrine. See Sax, J.L., *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 Mich. L. Rev. 471, 557-65 (1970). Professor Sax’s article presents interesting theories, but it is not the law in Washington. The State has ““authority to define the limits of the lands held in public trust and to recognize private rights in such lands as they see fit.”” *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 (1988). Neither the constitution nor case

law supports CELP's theory that the statutory consent to historic fills in the SMA can be invalidated site-by-site.¹

CELP's argument, moreover, puts the judicial branch on a collision course with legislative branches. Since 1971, development and use of state shorelines complies with planning and regulation under the Shoreline Management Act (SMA). See *Buechel v. Dep't of Ecology*, 125 Wn.2d 196, 203, 884 P.2d 910 (1994). The SMA recognized "that shorelines are fragile and that the increasing pressure of additional uses being placed on them necessitated increased coordination in their management and development." *Id.* The SMA protects "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 the public right of navigation and corollary rights incidental thereto." *Id.* The SMA requires long-term land use planning based on science, robust regulation of use and development of shorelines, and action strategies that protect current and future use of navigable waters. RCW 98.58.020.

The historic fills and structures allowed by RCW 90.58.270 are subject to locally tailored SMA shoreline master programs, and each

¹ Professor Sax's article, moreover, relied on inaccurate descriptions of historical underpinnings of the public trust doctrine and inaccurate interpretations of case law such as the famous *Illinois Central* decision. See Huffman, J.L., *Speaking Of Inconvenient Truths—A History of The Public Trust Doctrine*, Duke Env'l L. & Pol'y F. 1 (Fall 2007); Kearney, J. D. and Merrill, T. W., *The Origins of the American Public Trust Doctrine: What Really Happened in Illinois Central*, 71 U. Chi. L. Rev. 799 (Summer 2004).

program was adopted in accordance with statewide guidelines and statutory goals. CELP's argument for a judicial power to "augment" the SMA demonstrably seeks to contradict or invalidate its application. Simply put, CELP argues that any person dissatisfied with SMA planning and regulations may also ask a judge to set different land use policies under the guise of implementing a common law doctrine, which has none of the standards for use and protection of the state's shorelines present in the SMA. CELP's argument should be rejected and RCW 90.58.270 applied as intended and written.

II. CELP OVERSTATES HOW THE PUBLIC TRUST DOCTRINE MAY BE USED BY PRIVATE LITIGANTS

CELP claims the public trust doctrine provides judicial authority to prevent RCW 90.58.270 from consenting to the Three Fingers fill to bar CBC's *Wilbour* action. CELP Br. at 16-17. Its arguments are contrary to public trust doctrine law in Washington.

A. Washington's Public Trust Doctrine.

1. Origins in Constitutional Sovereignty and Federalism.

One attribute of state sovereignty is the "absolute right to all of their navigable waters, and the soils under them, for their own common use" which is subject only to the powers "surrendered by the constitution to the general government." *Martin v. Waddell*, 41 U.S. 367, 410 (1842). This

sovereignty exists in the states, which have primary roles in our federalism to determine public uses of waters and aquatic lands, subject to specific, enumerated federal powers. *See id.* at 413; *Shively v. Bowlby*, 152 U.S. 1, 15 (1894) (states “succeeded to all rights of both crown and Parliament in the navigable waters and the soil under them”). Washington obtained this sovereignty by joining the Union on an equal footing with the original states. *Pollard’s Lessee v. Hagen*, 44 U.S. 212 (1845).

The drafters of Washington’s Constitution hotly debated how the future state would exercise its sovereignty to authorize public and private rights in navigable waters and submerged lands. *Hughes v. State*, 67 Wn.2d 799, 804, 410 P.2d 20 (1966) (“most vexing and politically sensitive problem confronting the convention was that of harbors, and the control, use, ownership, and disposal of the tidelands”), *rev’d* 389 U.S. 290 (1967). The debate arose because fill and structures in navigable waters already existed, would be desirable in the future, and the state would have to control such matters.²

² The history of these constitutional provisions is discussed in detail in articles by Justice Wiggins published in 1990. *See* Wiggins, Charles K., *The Battle for the Tidelands in the Constitutional Convention: Railroads, Jumpers, Squatters and the Public Interest*, *Washington State Bar News* 44 (March 1990): 15-21; *Part II: The Harbors Article*, *Washington State Bar News* 44 (April 1990): 15-19; and *Part III: The Lobby Almost Succeeds: The Stalemate*, *Washington State Bar News* 44 (May 1990): 47-52. A map in the first article tellingly portrays how large areas of Seattle south of King Street are built on fill where navigable waters once flowed.

After rigorous debate, the constitution asserted ownership and sovereignty to “beds and shores of all navigable waters[.]” Wash. Const. art. XVII, § 1. It provided for permanent publically owned harbor areas to be set by a harbor line commission. Wash. Const. art. XV, § 1. Notably, alienation of harbor areas is forbidden, but there is no such prohibition in article XVII. The first Legislature, comprised in part of the drafters, adopted laws for appraisal and disposal of tide and shore lands by the commissioner of public lands. Laws of 1889-90, p. 431, § 1. These provisions provide the constitutional basis for public trust sovereignty over certain public waters.³

2. Early Cases Recognize the Public Trust and Its Limits.

This Court’s first decisions recognized public use rights in the navigable waters. For example, two years after statehood, the Court described state title “as incidental to the sovereignty of the state[] . . . and held in trust for the public purposes of navigation and fishing” *Baer v. Moran Bros. Co.*, 2 Wash. 608, 613, 27 P. 470 (1891). This Court adopted the English principle that “ownership of the soil was regarded as a *jus privatum*, and could be conveyed to individuals, subject only to the public right of navigation and fishing, *which public right was under the absolute control of parliament.*” *Eisenbach v. Hatfield*, 2 Wash. 236,

³ As Respondent GBI explains, the lands at issue in this case do not have the constitutional root in article XVII.

240-41, 26 P. 539 (1891) (emphasis added). The trust, an aspect of sovereignty, assumes that public interests in navigable waters will be governed by laws.

The shellfish industry spawned cases that illuminated the public trust doctrine. For example, in *Palmer v. Peterson*, 56 Wash. 74, 75, 105 P. 179 (1909), a purchaser of state oyster lands (Palmer) sued Peterson for trespass, and Peterson raised public trust doctrine rights. This Court examined *Illinois Central* and upheld the order to *exclude* Peterson from the oyster beds. The sale of aquatic lands “is not a substantial impairment of the interest of the public in the navigable waters of the state” and did not interfere with paramount federal rights. *Id.* See also *State v. Longshore*, 141 Wn.2d 414, 427, 5 P.3d 1256 (2000) (public trust doctrine did not prevent state law from recognizing that ownership of tidelands encompassed proprietary ownership of embedded shellfish). Thus, Washington’s public trust doctrine does not preclude laws and property rights that allow private ownership of submerged lands and shellfisheries.

Other early state laws permitted and promoted navigation and commerce, leading to more cases affirming the legislative power to eliminate public trust uses by allowing fill or development. In *Hill v. Newell*, 86 Wash. 227, 149 P. 951 (1915), owners along an ox bow bend of the Duwamish River sued to prevent state abandonment and sale of the

channel. The Court evaluated the public trust and ruled that it allows “improvement or development” to occur that will cut off tidelands or submerged lands from the public channels, “destroying the public easement in such portion of the lands and giving them over to the grantee, free from public control and use.” *Hill*, 86 Wash. at 231 (quoting *People v. Cal. Fish Co.*, 166 Cal. 576, 584, 138 Pac. 79 (1913)). In contrast, there is no holding that applies the absolutist inalienability claimed by CELP for the public interests in navigable waters or submerged lands.

3. Modern Cases Continue to Hold That the Public Trust Doctrine Allows the State to Consent to Fill in Navigable Waters Using the SMA.

CELP’s arguments also overlook holdings in this Court’s modern public trust cases, such as *Harris v. Hylebos Indus.*, 81 Wn.2d 770, 771, 505 P.2d 457 (1973). In *Harris*, a property owner objected to fill of private tidelands abutting the Hylebos Waterway in Commencement Bay on the theory that he had a right to cross such tidelands. *Id.* This Court limited its then-recent *Wilbour* holding by concluding that the tidelands had been sold for use in commerce and industry with no bar to fill. The Court contrasted Lake Chelan at the time of *Wilbour*, where there was no legislative permission with regard to where fill should be allowed. *Id.* at 785-86, discussing *Wilbour v. Gallagher*, 77 Wn.2d 306, 316 n.13, 462 P.2d 232 (1969).

CELP reaches the wrong conclusion from cases holding that submerged lands are subject to *jus publicum* rights and that private owners lack constitutionally protected property rights to fill. *See Orion v. State*, 109 Wn.2d 621, 641-42, 747 P.2d 1062 (1987) (“Since a property right must exist before it can be taken . . . neither the SMA nor the [shoreline master program] effected a taking by prohibiting Orion’s dredge and fill project”). CELP cites *Orion* and a Ninth Circuit case to argue that this holding means that *jus publicum* interests are completely inalienable. CELP Br. at 14. But *Orion* did not overrule the century of Washington case law culminating in *Caminiti*, which expressly recognizes that public trust rights may be lost. Like *Caminiti*, *Orion* observed that *jus publicum* rights do not imply a limit on state power to extinguish public uses based on “a recognition of where the public need lay.” *Id.* at 640-41. Moreover, *Orion* acknowledged that state control can be lost where lands have been rendered essentially valueless for public use, such as where tidelands have been filled. *Id.* at 640 n.9 (citing *Berkeley v. Superior Court*, 26 Cal. 3d 515, 606 P.2d 362 (1980), *cert. denied sub nom., Santa Fe Land Improvement Co. v. Berkeley*, 449 U.S. 840 (1980)).⁴

⁴ The *Orion* Court’s approval of the *Berkeley* case is directly relevant here, because that California case confronted a problem similar to the problem of historic fill confronted by Washington lawmakers when they adopted the SMA. Specifically, the California Supreme Court evaluated how a ruling that public trust easements apply to private submerged lands should apply to previously filled lands. After holding that

The *Orion* line shows that Washington has a meaningful public trust doctrine empowering the state to protect public uses. The *Caminiti* line shows that Washington's public trust doctrine provides for judicial review as a guard against irrational disposal of public trust rights. The trust in Washington, however, also reflects practicalities of managing submerged lands in a state that makes extensive use of waterfronts. The trust, therefore, has always allowed the legislative branch to make choices regarding appropriate locations for development and use in navigable waters, including fills. More to the point, no court has used the trust to revise or invalidate legislative decisions permitting development, aquaculture, structures, or fills in navigable waters. Rather, legislative actions are authorized when consistent with the public trust under the deferential review set forth in *Caminiti*.

B. CELP Does Not Show That RCW 90.58.270 Violates the Public Trust Standards Described in *Caminiti*.

CELP strenuously objects to the court of appeals' reliance on this Court's decisions recognizing how compliance with the SMA provides

submerged lands conveyed by deeds under an 1870 act were subject to public trust uses, the Court also held that "[p]roperties that have been filled, whether or not they have been substantially improved, *are free of the trust* . . . provided that the fill and improvements were made in accordance with applicable land use regulations." *Berkeley*, 606 P.2d at 373-74 (emphasis added).

In other words, the California Supreme Court decided that California's public trust doctrine would accommodate historic fill in the same way that Washington's Legislature and people did in the SMA with RCW 90.58.270.

consistency with the public trust doctrine. CELP Br. at 13. CELP claims it will “interpret” RCW 90.58.270(1). CELP Br. at 11-12. But CELP offers no interpretation; it argues the public trust doctrine “augments” the SMA and invalidates consent given by RCW 90.58.270 with “case-specific analysis and resolution.” CELP Br. at 12, 16. CELP’s argument is inconsistent with *Caminiti* and case law, harmful, and should be rejected.

1. Review of Legislative Action for Consistency With the Public Trust Doctrine Must Consider the Actual Legislative Plan, Which Is the SMA.

CELP cites the *Caminiti* standard of review under the public trust doctrine, but misapplies it to justify the superior court’s decision to substitute its judgment for the Legislature’s judgment in RCW 90.58.270. *Caminiti* does not allow a court to review the effect of the SMA on every parcel or fill to compare advantages and harms to public uses. The Court there asks if “questioned legislation” amounts to a loss of state control over the *jus publicum* and, if so, whether the legislation promotes the public interest in the *jus publicum* or does not substantially impair it. *Caminiti*, 107 Wn.2d at 670. These inquiries examine objectives and effects of legislation, not every site affected by the legislation.

Caminiti relied on cases that examined statutes or legislatively authorized plans as a whole to address a claimed violation of the public trust doctrine. This occurred in the cases that examined legislation that

authorized significant shoreline development, cutting off tide or shore lands from navigable channels. *See, e.g., Hill, supra; Harris, supra.* Those Courts held that elimination of navigable waters on a site is consistent with the public trust doctrine when the legislation overall promotes public interests in navigation and related interests, or where the effect on the waters that remain is minimal. *See Hill*, 86 Wash. at 231-32, quoting *Cal. Fish Co.*, 166 Cal. at 584; *Harris*, 81 Wn.2d at 778 (discussing examples); *see also Berkeley*, 606 P.2d at 366-67 (discussing development of San Francisco business district on filled tidelands behind harbor line as consistent with promotion of navigation and public trust); *Caminiti*, 107 Wn. 2d at 670. Thus, CELP is wrong when it argues that *Caminiti* “could be applied to a specific parcel.” CELP Br. at 18. If legislative actions were tested on a site-specific level, it would turn courts into quasi-permitting agencies, contrary to *Wilbour*. 77 Wn.2d at 316, n.13.

Caminiti also emphasizes deferential review of legislation. For example, it observed that the statute there was “a far cry” from the law addressed in *Illinois Cent. R.R. v. Illinois*, 146 U.S. 387 (1892). The Illinois Legislature “had not only sold all of the land under one of the world’s largest harbors (the Harbor of Chicago) to a private railroad company, but had also surrendered all right to control the harbor.” *Caminiti*, 732 P.2d at 997. The limited consent in RCW 90.58.270, which is relevant only if a

Wilbour claim would have been brought, is a far cry from the Illinois Legislature's abdication of state sovereignty over extensive and critical harbors. *Cf. Orion*, 109 Wn.2d at 640 n.9; *Hill*, 86 Wash. at 231.

CELP also relies on cases that "extend" the public trust doctrine flexibly beyond navigation and fisheries to corollary uses like recreation. *E.g. Caminiti*, 107 Wn.2d at 669. This is immaterial. The State recognizes that public trust values are flexible and the doctrine may enhance the state power to promote public trust values. But that flexibility confirms that the public trust doctrine manifests itself in conservation projects and in public works projects that involve fill. Indeed, the flexibility of the public trust increases the likelihood of conflicts among uses and confirms why courts must leave room for legislative reasoning and decisions addressing conflicting uses. RCW 79.105.010 and 43.143.005(3) (state aquatic lands face conflicting use demands); RCW 90.58.020 (SMA).

Moreover, this Court has recognized that the doctrine does not provide criterion for choosing between public trust uses, such as fill to support navigation versus conservation. *See Rettkowski v. Dep't of Ecology*, 122 Wn.2d 219, 233-34 n.6, 858 P.2d 232 (1993) ("the doctrine could provide no guidance as to *how* Ecology is to protect those waters"). Lawmakers make such choices. *See Citizens for East Shore Parks v. Cal. State Lands Comm'n*, 202 Cal. App. 4th 549, 577, 136 Cal. Rptr. 3d 162

(2012) (state is free to choose between public trust uses); *Wilbour*, 77 Wn.2d at 316 n.13. Lawmakers provided a framework that made such choices in the SMA.⁵ In doing so, the Legislature acknowledged, as it must, that certain choices preclude others. “[L]imited reduction of rights of the public in the navigable waters” may occur when “planning for and fostering all reasonable and appropriate uses” in a way that “will promote and enhance the public interest.” RCW 90.58.020.⁶

2. SMA Planning and Regulation Protects Public Use of Navigable Waters So That RCW 90.58.270 Easily Meets the Framework for Public Trust Doctrine Consistency.

As shown above, this Court must examine RCW 90.58.270 in context of the SMA to resolve CELP’s attack on the statute. In context, RCW 90.58.270 is consistent with the public trust doctrine and easily meets the *Caminiti* framework.

The SMA responded to a “clear and urgent demand for a planned, rational, and concerted effort . . . to prevent harm in an uncoordinated and

⁵ See also *R.D. Merrill Co. v. Pollution Control Hearings Bd.*, 137 Wn.2d 118, 134, 969 P.2d 458 (1999) (“the public trust doctrine does not serve as an independent source of authority” for agency and “resort to the public trust doctrine as an additional canon of construction is not necessary in light of the specific provisions at issue and the water law policies expressed in the state water codes”); *Postema v. Pollution Control Hearings Bd.*, 142 Wn.2d 68, 99, 11 P.3d 726 (2000) (public trust “doctrine does not serve as an independent source of authority for Ecology to use in its decision-making apart from code provisions intended to protect the public interest.”).

⁶ CELP’s parcel-specific approach is also demonstrably harmful to the public interest by opening the door to litigation. For example, CELP’s theory would support a challenge to any parcel on Harbor Island or within the lands in the vibrant commercial district of South Seattle formerly in the Duwamish estuary and filled as part of the creation of the East, West, and Duwamish Waterways.

piecemeal development of the state's shorelines." RCW 90.58.020. It allows permitting of development "which, while allowing for limited reduction of rights of the public in the navigable waters, will promote and enhance the public interest. . . ." RCW 90.58.020. Both local government and the Department of Ecology administer the SMA. Local governments draft and implement permitting and use regulations—the "shoreline master program." RCW 90.58.050. Ecology supervises statewide and local shoreline planning by approving local master programs and updates. RCW 90.58.080. Thus, private uses in navigable waters and on shorelines must meet statewide goals in the SMA (RCW 90.58.020) as well as meet locally tailored goals in shoreline master programs and critical area ordinances, all developed according to requirements of WAC 173-26. *See also Buechel*, 125 Wn.2d 196 (giving overview of SMA permitting).

The City of Chelan helps illustrate how the SMA works. The City's shoreline master program is 162 pages long with plans and regulations for public access, recreation, transportation, shoreline use and modification, conservation, historic, cultural, and other values. It has maps defining SMA jurisdiction and showing which "environment designation" and regulations apply in the City's shorelines. It incorporates critical area regulations developed under the Growth Management Act. *See* RCW 90.58.610 (referencing RCW 36.70A.480). It was based on a comprehensive inventory

of the environmental functions and values Lake Chelan shorelines provide, which was also used for restoration planning.⁷

Local groups like CBC and statewide groups like CELP have significant roles under the SMA. The Ecology guidelines in WAC 173-26 and local master programs are created with public input. RCW 90.58.060 (public notice and comment for adoption of guidelines); RCW 90.58.120 (public notice and hearings prior to adoption of rules, regulations, master programs, and amendments); RCW 90.58.130 (participation requirements); WAC 173-26-100 (public process for approving or amending local SMPs); WAC 173-26-120 (state public process).

With these substantive and procedural advantages, the SMA and related laws protect public trust values including public access, navigation, and recreation. RCW 90.58.020; RCW 90.58.100 (duties for preparing SMPs); RCW 90.58.140 (prohibiting development unless consistent with SMA policy and SMP or guidelines); WAC 173-26-201(3) (describing multi-step process of preparing or amending an SMP); WAC 173-26-251 (requirements for shorelines of statewide significance). If one's goal is coherent protection of public use of navigable waters, it is accomplished by the robust public trust values defined and promoted by the SMA. In

⁷ The comprehensively amended City master program is available at <http://www.ecy.wa.gov/programs/sea/shorelines/smp/mycomments/chelan/smp.pdf>. All these maps and additional regulations are available at <http://www.ecy.wa.gov/programs/sea/shorelines/smp/mycomments/Chelan.html>.

comparison, resurrection of *Wilbour* lawsuits by using an ad-hoc public trust claim to avoid RCW 90.58.270 does almost nothing.

The SMA and RCW 90.58.270 therefore easily meet the public trust doctrine requirements of *Caminiti* and prior cases. By allowing some historic fill or development to be free of *Wilbour* claims subject to SMA regulation, the legislation promotes broader public trust interests in navigable waters in at least three ways. First, it facilitates planning and regulation and statewide achievement of trust values by addressing existing conditions and giving certainty to what would be subject to the SMA.⁸ Second, by eliminating the cloud of potential *Wilbour* lawsuits, the legislation served public trust interests associated with the historic development and fills that directly promote navigation such as by providing access to deep water. *E.g., Harris*, 81 Wn.2d at 778 (“unless deep water can be reached conveniently for the loading of vessels, commerce by water is seriously hampered.”). Third, by providing certainty, RCW 90.58.270 promotes investment and use of historic areas, but in a manner consistent with SMA requirements.

⁸ Under RCW 90.58.030(2)(d), “shorelands” “means those lands extending landward for two hundred feet . . . from the ordinary high water mark.” Without the statute, planners would be called upon to plan for a contingency that private lawsuits might require areas to be unfilled under *Wilbour*. Such a “springing” application of the SMA to new areas would be difficult for government and citizens alike. *See* RCW 90.58.580 (“[h]ardship may occur when a shoreline restoration project shifts shoreline management act regulations into areas that had not previously been regulated . . .”).

The Legislature can limit *Wilbour* claims for removal of structures or fill as part of a statewide plan to “insure the development of . . . shorelines in manner which, while allowing for limited reduction of the rights of the public in the navigable waters, will promote and enhance the public interest.” RCW 90.58.020. That legislative choice is consistent with the public trust doctrine and does not require judicial review of each fill or structure benefitting from the consent.

3. CELP’s Arguments to Diminish the Relevance of the SMA for Public Trust Requirements Lack Merit.

CELP attacks as dicta the court of appeal’s reliance on this Court’s ruling that “the requirements of the “public trust doctrine” are fully met by the legislatively drawn controls imposed by the [SMA].” Opinion at 14, n.5, citing *Caminiti*, 107 Wn.2d at 670. This statement was necessary to the *Caminiti* Court’s holding regarding the limited review of legislation. But even if it was dicta, other cases also hold that SMA permitting forecloses challenges to development based on impairment of public rights of navigation. *Portage Bay-Roanoke Park Comm. Council v. Shorelines Hearings Bd.*, 92 Wn.2d 1, 4, 593 P.2d 151 (1979) (“SMA is the present declaration of doctrine”); *Eastlake Comm. Council v. Roanoke Assocs., Inc.*, 82 Wn.2d 475, 499-500, 513 P.2d 36 (1973).

Nor is there substance to CELP's rhetoric that by giving effect to the SMA, the court of appeals "eliminated" the public trust doctrine on land. CELP Br. at 12. This claim is hollow because *Caminiti* and cases reviewed above recognize that legislation has always been able to authorize actions that result in minimal losses to *jus publicum* interests or losses accompanied by increased state control over *jus publicum* interests.

C. No Out-of-State Case Supports CELP's Argument to Use the Public Trust Doctrine to Avoid RCW 90.58.270.

CELP relies on *Marks v. Whitney*, 491 P.2d 374 (Cal. 1971), to claim the public trust doctrine is "flexible" and that courts may expand the doctrine. CELP Br. at 6. The holdings in that case, however, do not support CELP. Citing prior cases, *Marks* explains that California may permit its tidelands to be cut off from water access and be rendered "useless for trust purposes." *Id.* A legislature may "free" lands "from the trust" resulting in "absolute private ownership." *Id.* "It is a political question, within the wisdom and power of the Legislature, acting within the scope of its duties as trustee, to determine whether public trust uses should be modified or extinguished[.]" *Id.* Or, as the California court stated in *Berkeley* (discussed at footnote 3), "[p]roperties that have been

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filled, whether or not they have been substantially improved, are free of the trust . . .” *Berkeley*, 606 P.2d at 373.⁹

CELP also relies on New Jersey law discussing legislative power to approach the public trust uses with flexibility. Again, CELP conflates the idea of broad legislative power with a judicial power to make environmental policy. CELP Br. at 7, citing *Matthews v. Bay Head Imprv. Ass’n*, 471 A.2d 355 (N.J. 1984). New Jersey case law does not support CELP’s theory, because *Matthews* deals with the question of how to define the public use rights on existing ocean sand beaches, not the power of a court to invalidate a statute permitting fill or development.

VI. CONCLUSION

The court of appeals correctly applied the *Caminiti* framework by examining the effect of the legislation. Opinion at 18. The consent given by the Legislature in RCW 90.58.270 bars some *Wilbour* claims, but it does

⁹ In one case, a lower California appellate court ruled that the public trust doctrine required the state lands commission to give “consideration of the state’s public interest” in its environmental review of a sand mining permit renewal application and to “take the public trust into account . . . and to protect public trust uses whenever feasible.” *San Francisco Baykeeper, Inc. v. Cal. State Lands Comm’n*, 194 Cal. Rptr. 3d 880, 905, 242 Cal. App. 4th 202, 234 (2015) (ellipsis in original). This Court, however, rejected that view of supplemental agency power in *Rettkowski* and subsequent cases. See n.5. Moreover, the policies of the SMA and local SMPs expressly take such uses and their protection into account, as explained above. In any event, the ruling in *Baykeeper* is inapposite, because the question is not whether a permitting agency considered public trust interests. This case concerns validity and application of legislation.

not substantially impair control over the *jus publicum*. Moreover, the SMA imposed substantive and procedural public rights to enhance public control of the *jus publicum*. CELP, therefore, offers no reason to invalidate the statute. Nor does it dispute that the language of the statute as written provides consent to the Three Fingers fill, which bars CBC's *Wilbour* claim.

RESPECTFULLY SUBMITTED this 9th day of February, 2017.

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I certify that I caused a copy of the foregoing document to be served on all parties or their counsel of record on February 9, 2017, as follows:

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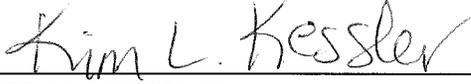
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I certify under penalty of perjury, under the laws of the State of Washington, that the foregoing is true and correct.

DATED this 9th day of February, 2017, at Olympia, Washington.



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