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NO. 331962

(Consolidated with No. 332390)

**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.

REPLY BRIEF OF APPELLANT STATE OF WASHINGTON

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I. INTRODUCTION

The State's role in this case is to defend the validity and integrity of RCW 90.58.270. This reply therefore focuses first on the construction of statute offered by the City and Chelan Basin, which is contrary to the statute's plain meaning and history and would leave it without meaning. Second, it explains how the statute, properly construed by State, is valid under the public trust doctrine.¹

II. ARGUMENT

A. **RCW 90.58.270 Bars Chelan Basin's Claim Based on the Three Fingers Fill Impairing Public Rights of Navigation.**

Chelan Basin agrees that RCW 90.58.270(2) bars a "private right of action . . . based upon the impairment of public rights consented to in" subsection (1) of that statute. CB Br. at 25. It also agrees that RCW 90.58.270(1) consents to "the impairment of public rights of navigation, and corollary rights incidental thereto, caused by the retention and maintenance" of "fills . . . placed in navigable waters" prior to December 4, 1969. CB Br. at 24. Finally, it is undisputed that the summary judgment for Chelan Basin's claim for removal of the Three Fingers Fill was based on impairment of public rights of navigation.

¹ The State concurs with GBI Holding Co., Inc., that Chelan Basin lacks standing to bring its public nuisance and public trust doctrine claims and that even if the Court disagrees with the State's view of the statute, then the disputed issues of fact should have precluded summary judgment below, including the issue of the remedy.

CP 1569-70 (citing *Wilbour v. Gallagher*, 77 Wn.2d 306, 462 P.2d 232 (1969), and finding substantial impairment); 1615:17-18 (incorporating ruling); 1616 (public trust ruling). The summary judgment thus frames the issue before this Court: is Chelan Basin's right of action saved because the proviso in RCW 90.58.270(1) withheld consent to historic fills that "are in trespass or violation of state statutes"?

1. **The Language of RCW 90.58.270 Bars Private Rights of Action for Removal of Historic Fill When a Claim Is Based on Impairment of Public Rights of Navigation.**

RCW 90.58.270 addresses claims for removal of fill or development that existed on or before December 4, 1969. It addresses the cause of action recognized by *Wilbour* on that day. It consents "to the impairment of public rights of navigation . . . caused by the retention and maintenance of [pre-December 4, 1969] fills or developments structures, improvements, docks, fills or developments." The effect of this consent is confirmed by subsection (2): "[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.*" [Emphasis added.] These subsections consent to historic fill and development and thus abridge *Wilbour* actions claiming an impairment of public rights of navigation subject to the proviso.

The proviso denies consent to fills and development in trespass or “in violation of state statutes.” The superior court interpreted this phrase to include historic impairment of public rights of navigation that violates nuisance statutes. But that interpretation defeats the statutory consent in every application, leaving the statute with no meaning. In contrast, the State’s interpretation of “statutory violation” to exclude this circularity allows the statute to work and abridge a right of action based on impairment of public rights of navigation as intended.

Chelan Basin purports to agree that “RCW 90.58.270(2) abridges some private rights of action based on the impairment of navigation.” CB Br. at 25-26. But its statement is illusory because it also claims that no fill or development that impairs public navigation was authorized in light of the proviso. *See* CB Br. at 33-34 (as the Three Fingers impede navigation they are a nuisance excluded by proviso). This gives no effect to RCW 90.58.270(2)’s statement that private actions are abridged if “based upon the *impairment of the rights* consented to in subsection (1).”

Chelan Basin also fails to give any consideration to RCW 90.58.270(4). Under subsection (4), the consent given will apply “to *any case* pending in the courts of this state on June 1, 1971 relating to the removal of structures, improvements, docks, fills, or developments based on the impairment of public navigational rights.” This makes the

Legislature's understanding of RCW 90.58.270(1) and (2) unmistakable. The statute gave consent to defeat claims for removal of historic fills and development based on impairment of public rights of navigation, and it was intended to apply to cases pending. There would be little reason to include this statement if the proviso had already defeated the consent.

Finally, Chelan Basin argues that the proviso limits the consent to situations where impairment is insubstantial or reasonable. CB Br. at 28, 29-30. Chelan Basin offers no examples of actual cases in which the statute could apply under such a construction. If the proviso was intended to consent to impairment of public rights of navigation only where the impairment was inconsequential, as Chelan Basin suggests, then subsection (1) would have been written to say so, and subsection (4) would not extend the statute to any pending case.

2. The State Provides a Sound Interpretation of the Phrase "Which Are in Trespass or in Violation of State Statutes" in the Proviso.

After ignoring how its construction of the proviso renders the statutory consent meaningless, Chelan Basin counters by labelling the State's interpretation "meaningless." CB Br. at 29; at 24-25 (claiming the State argues that the statute "abridges all private rights of action against" pre-1969 fill). But the State gives the proviso meaning by limiting the

statutory consent with regard to historic fills or developments that “are in trespass or in violation of state statutes.”

There can be no doubt that the State preserves application of the proviso to trespasses, which gives the proviso significant meaning. The State owns approximately 70 percent of shorelands and almost half of the tidelands within the state. *Caminiti v. Boyle*, 107 Wn.2d 662, 666, 732 P.2d 989 (1987) (origin of public ownership and history of state tideland and shoreland sales). The State owns nearly all permanently submerged lands (or “bedlands”)—lands below extreme low tide, below the line of navigability in rivers and lakes, and constitutional harbor areas. *Draper Machine Works, Inc. v. Dep’t of Natural Res.*, 117 Wn.2d 306, 313, 815 P.2d 770 (1991) (“the general rule is that lands lying waterward of shorelands and tidelands cannot be sold or leased”); *Davidson v. State*, 116 Wn.2d 13, 16, 802 P.2d 1374 (1991) (harbor areas); *Echo Bay Cmty. Ass’n v. Dep’t of Natural Res.*, 139 Wn. App. 321, 325-26, 160 P.3d 1083 (2007) (bedland leasing authority). Absent a lease or use authorization, fill or development can be in trespass. RCW 79.105.210(4) (power to lease State’s aquatic lands); WAC 332-30-127(1)(a) (activities that interfere with public use of aquatic lands require authorization); RCW 79.02.300 (trespass remedies for State).

The State also gives meaning to the phrase “which are . . . in violation of state statutes.” When RCW 90.58.270 was enacted, a host of statutes could be violated by fill or development in navigable water. For example, a dam or other obstruction across navigable waters must include fishways to allow fish to bypass the obstruction. Laws of 1949, ch. 112, § 47 (currently codified at RCW 77.57.030). The proviso denied consent to the impairment of public rights for fill or other development that was in violation of the fishway requirements. Another example is Initiative No. 25 from 1960, which prohibited construction of dams or other obstructions higher than 25 feet on certain rivers tributary to the Columbia River. Laws of 1961, ch. 4 (currently codified at RCW 77.55.191). Fill or development could be in violation of this statute. A 1927 law grants the right to common carriers to construct bridges across state waterways but only with plans approved by the Commissioner of Public Lands and the United States Corps of Engineers. Laws of 1927, ch. 255, § 95 (currently codified at RCW 79.110.140). Again, the proviso could apply. Still more statutes might be violated by development or fill on state-owned aquatic lands.²

² See, e.g., Laws of 1913, ch. 168, § 1 (now RCW 79.120.040) (permitting construction in waterways according to approved plans); Laws of 1927, ch. 255, § 85 (now RCW 79.110.100) (granting right of way for city or county wharfs as approved by state); Laws of 1931, ch. 70, § 1 (now RCW 79.120.030) (requiring approval of slopes and riprap on state-owned aquatic lands for roads); Laws of 1899, ch. 136, § 7 (now

This Court should reject Chelan Basin's claim that the State gives no meaning to the phrase "in violation of state statutes." The State's careful interpretation preserves the statutory purpose to give consent to historic fill or development after the cloud created by *Wilbour*. See pages 8-10 below. It ensures that the exception created by the proviso is "narrowly confined" and does not defeat the purpose of the statute, which Chelan Basin concedes is a "fundamental principal of statutory construction." CB Br. at 22-23 (string-citing cases).

3. Chelan Basin Repeats the Superior Court's Error by Failing to Read the Proviso in RCW 90.58.270(1) Prospectively.

The State's Opening Brief showed how the superior court erred by construing the proviso with a strained retrospective approach. The court decided to examine if the fill *was* in trespass or violation of state *as of* December 4, 1969. CP 1619. By using this past date, the court could conclude that the fill was a statutory nuisance in 1969—before there was state consent to impairment of navigation. But nothing in the text supports this retrospective test. The proviso is about fills "which *are* in trespass or in violation of state statutes." RCW 90.58.270(1) (emphasis added). It asks if fill is trespassing or is violating a statute.

RCW 79.136.160) (restricting use to aquaculture); Laws of 1970, Ex. Sess., ch. 54, § 1 (now RCW 79.140.110) (authorizing removal and placement of gravel, rock, sand, and silt for public purposes such as flood control).

Chelan Basin defends the retrospective gloss but ignores the rule that “[s]tatutory language couched in the present and future tenses manifests a legislative intent that the statute should apply prospectively only.” *Anderson v. Pierce County*, 86 Wn. App. 290, 310, 936 P.2d 432 (1997); *see also State v. McClendon*, 131 Wn.2d 853, 861, 935 P.2d 1334 (1997) (“The presumption that [the statute] applies prospectively only is strengthened by the Legislature’s use of only present and future tenses in the wording.”). As in the case law, the proviso uses present tense. It provides “the consent herein given shall not relate to . . . fills or developments . . . which are in trespass or in violation of state statutes.”

Chelan Basin also fails to rehabilitate the superior court’s apparent misapprehension that the statute was enacted on December 4, 1969. CP 1620 (“The use of the present tense, ‘are in’, suggests a condition that was occurring or in existence at the same time of the enactment.”). As the State’s Opening Brief explained, the statute was enacted in 1971, voted upon in 1972, and had an effective date of June 1, 1971. RCW 90.58.920. The 1969 date is not the date of enactment. It is the date that ensured consent would be given only to fill or development that existed before *Wilbour*, 77 Wn.2d 306.

At times, Chelan Basin seems to admit that the statutory consent was needed because *Wilbour* held that the judiciary was not able to

consent to impairment of public rights of navigation. CB Brief at 45, citing *Wilbour*, 77 Wn.2d at 316. And Chelan Basin cannot dispute that *Wilbour* led to the governor putting a moratorium on development. See *Orion v. State*, 109 Wn.2d 621, 627, 747 P.2d 1062 (1987). That moratorium lasted until the Shoreline Act ensured that future development received focused government review and approval of impacts on public navigation interests. But Chelan Basin asks this Court to ignore how *Wilbour* placed a cloud over all existing fills by approving a potentially broad cause of action. See State's Op. Br. at 25-29. The 1969 date clearly relates to giving the consent required by that case.

It also makes no sense for the proviso to depend on whether the fill was in trespass or in violation of state statutes on the date of *Wilbour*. The proviso gives the State's consent as of the 1971 effective date and affects pending "*Wilbour*" claims. See RCW 90.58.270(4). Under Chelan Basin's theory, the proviso would consent to development that was in trespass in 1971 if it had been under a lease in 1969. Because the concern of the proviso is with the consent, the phrase "in violation" must also be concerned with the time when consent is given—as of 1971.

Curiously, Chelan Basin claims there is "no evidence" that the consent in RCW 90.58.270(1) was intended to bar *Wilbour*-type actions with respect to historic fills and development. CB Br. at 31. But that

connection is clear. The terms that describe the consent are the same terms used in the *Wilbour* Court's conclusion that fill that impaired public navigation interests without government consent could be removed. The use of the *Wilbour* terms confirms that the statute was passed to give the consent that Court found lacking. *Ralph v. Dep't of Natural Res.*, 182 Wn.2d 242, 249, 343 P.3d 342 (2014) (“[i]f the legislature uses a term well known to the common law, it is presumed that the legislature intended to mean what it was understood to mean at common law.”) (Citations omitted.). And the SMA not only used the language of *Wilbour*, it used a date that mirrors when *Wilbour* put a cloud over historic fill and development. This shows that the statute consented with the purpose to stem unpredictable and harmful litigation of *Wilbour* claims.

Deprived of historical or logical reasons to read the proviso to defeat the consent given to the Three Fingers, Chelan Basin retreats to a legalistic argument. It argues that if trespass or nuisance existed on December 4, 1969, it necessarily existed on June 1, 1971, and thereafter because trespasses and nuisances continue until abated. CB Br. at 29. This is an overstatement of the law. A nuisance premised on an unconsented-to impairment of public navigation rights ends when the government consents to that impairment. *See* RCW 7.48.160 (“Nothing which is done or maintained under the express authority of a statute, can

be deemed a nuisance.”); *Judd v. Bernard*, 49 Wn.2d 619, 621, 304 P.2d 1046 (1956) (killing of fish by agency is not a nuisance when authorized by statute for management purposes). Nuisances are not inherently perpetual. This legislative power to limit nuisance claims is longstanding. Farm and forestry might be attacked as a nuisance by encroaching residential development, but the law bars such claims. RCW 7.48.305 (“agricultural activities conducted on farmland and forest practices . . . established prior to surrounding nonagricultural and nonforestry activities, shall not be found a nuisance . . .”).

Chelan Basin similarly argues that the statutory consent cannot defeat its claim because “even lawful activity may be a nuisance.” CB Br. at 30. This point, however, cannot defend the summary judgment below. This statute abridged private rights of action based on impairment of public rights of navigation. Because the statute authorizes impairment of public rights of navigation by historic fills, the ruling below is error.

Thus, the State has shown that there is no grammatical basis to read the statute so that the proviso imposes a retrospective “December 4, 1969” test—a reading that serves no purpose except to avoid the consent given. Grammar focuses the reader on how to apply the phrase “are in violation of state statutes” at the time of consent. To do this, the Court must follow basic principles of statutory construction, and the proviso

must be interpreted to preserve, not defeat, the statutory consent. And properly interpreted, the statute consents to impairment of navigation interests caused by the fill. Therefore, the premise for the summary judgment was incorrect, and this Court should reverse.

4. The State's Argument on Appeal That RCW 90.58.270(1) Bars Nuisance Claims Based on Impairment of Public Rights of Navigation Is Consistent With Its Argument Below.

Chelan Basin spends many paragraphs discussing the State's arguments below. These arguments are irrelevant. The interpretation of the statute is a de novo question of law. Chelan Basin claims no prejudice from the arguments below and does not claim that the State's argument on appeal is unpreserved.

Chelan Basin also misapprehends and mischaracterizes the State's arguments. The State below argued that the proviso in RCW 90.58.270(1) should be applied prospectively. CP 1546. The State asserted that whether the Three Fingers are "in trespass or in violation of state statutes" depends on conditions today, not conditions as of December 4, 1969. CP 1548-49. And when addressing wide-ranging arguments by multiple parties, the State agreed that fill before December 4, 1969, could be a statutory public nuisance for other reasons and that RCW 90.58.270(1) was not intended to authorize public nuisances that exist for other reasons.

See RCW 90.58.270(3). But the State consistently argued that fill before December 4, 1969, could not be removed based solely on a “*Wilbour*” theory that the fill impaired public interests in navigation.

The blurring of nuisance claims by Chelan Basin obscures the legal issue presented by this case. The superior court relied on a theory that there was no consent to the impairment of public rights of navigation. It did not rule based on the alternative type of nuisance claim where “the reasonableness or unreasonableness of the . . . use of property at issue in the particular location in the manner and under the circumstances of the case.” *Grundy v. Thurston County*, 155 Wn.2d 1, 7 n.5, 117 P.3d 1089 (2005). Thus, Chelan Basin obtained a judgment based on the absence of consent to the impairment of public rights of navigation, and that is the theory that is error. The judgment should be reversed.³

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³ Admittedly, Chelan Basin argues that a portion of the Three Fingers covers the vacated Boulevard Avenue and that portion of the fill constitutes a public nuisance. Chelan Basin Response at 34-35. The State has no direct interest in that issue. But we note that the City of Chelan’s hearing examiner ruled that “as conditioned, the Fills covering vacated Boulevard Avenue do not unreasonably interfere with the Public Right of Access with vacated Boulevard Avenue. CP 53. The decision creates several conditions which accommodate public access over filled portions of vacated Boulevard Avenue. CP 55, ¶ 11. The decision of the hearing examiner is currently on appeal. But it appears, at a minimum, there are issues of fact with respect to whether fill on that portion of the Fingers unreasonably impairs public access on vacated Boulevard Avenue.

B. The Consent Given by RCW 90.58.270 Is a Valid Part of the Shoreline Management Act and Does Not Violate the Public Trust Doctrine.

1. RCW 90.58.270(1) Is a Duly Enacted Statute Entitled to the Presumption of Validity.

Chelan Basin and the City try to avoid the rule that a challenger has a heavy burden when claiming that a statute is invalid. *Cf. School Dist. Alliance for Adequate Funding of Special Educ. v. State*, 170 Wn.2d 559, 605, 244 P.3d 1 (2010). But to conclude that a statute is invalid under the constitution, a court must be “fully convinced, after a searching legal analysis, that the statute violates the constitution.” *Id.* at 606, quoting *Island County v. State*, 135 Wn.2d 141, 147, 955 P.2d 377 (1998). This burden can be no lighter when determining validity under the common law public trust doctrine.

The City’s argument to the contrary relies on a flawed reading of authority. The City opposes the presumption of validity here because courts have described the public trust examination of a statute as a “heightened degree of judicial scrutiny.” City’s Br. at 8, citing *Weden v. San Juan County*, 135 Wn.2d 678, 698, 958 P.2d 273 (1998) (citing Ralph W. Johnson et al., *The Public Trust Doctrine and Coastal Zone Management in Washington State*, 67 Wash. L. Rev. 521, 524 (1992)). In this case and the article cited, “heightened scrutiny” refers only to the

searching legal analysis to examine if a statute is consistent with the public trust doctrine that is conducted under *Caminiti*. Johnson, 67 Wash. L. Rev. at 540 (“The public trust doctrine invites *another form* of heightened judicial scrutiny, not necessarily based on constitutional foundations but on historical common law traditions . . .”) (emphasis added). Applying the *Caminiti* or public trust tests does not nullify the presumption of validity for enacted statutes. *Wash. State Geoduck Harvest Ass’n v. Dep’t of Natural Res.*, 124 Wn. App. 441, 447, 101 P.3d 891 (2004) (challenger of statute under constitutional and public trust doctrine claims must demonstrate invalidity beyond reasonable doubt); *Citizens for Responsible Wildlife Mgmt. v. State*, 124 Wn. App. 566, 570, 103 P.3d 203 (2004) (“A statute . . . is presumed constitutional and the party challenging it bears the burden of proving it unconstitutional beyond a reasonable doubt. . . . Nonetheless, courts review legislation under the public trust doctrine with a heightened degree of judicial scrutiny . . .”).

The public trust doctrine is a common law doctrine by which courts evaluate property law or the exercise of state sovereign power. It is not an article of the state or federal constitution. There is no reason to abandon the presumption of validity whereby the judicial branch defers to the law-making power of the legislative branch.

2. RCW 90.58.270(1) Is Consistent With the Public Trust Doctrine.

Chelan Basin argues that if RCW 90.58.270(1) is interpreted to bar its *Wilbour* claim for removal of 45-year-old fill based on impairment of public rights of navigation, then the statute is invalid for “abdicating” public interests. CB Br. at 46-50. Chelan Basin’s dramatic conclusion ignores the limits of the statute and how it works as part of the Shoreline Management Act (SMA). In that context, consent to impairment of public rights of navigation by historic fills and development is undoubtedly a valid exercise of governmental power. There is no basis to invalidate the statute under the public trust doctrine.

a. The State Retains Adequate Control Over Public Trust Resources.

As both parties agree, the claim of invalidity under the public trust doctrine requires application of the test articulated by the *Caminiti* Court. CB Br. at 47-48. As both briefs agree, that test asks if the statute conveys state control over the public interest or *jus publicum* in navigable waters. If no, there can be no violation. If yes, the statute is valid so long as it still promotes the overall public interest in navigable waters or does not substantially impair the *jus publicum*. *Caminiti*, 107 Wn. 2d at 672. This is a demanding standard that Chelan Basin and the City do not meet.

Chelan Basin's analysis of the first step—whether “the state has retained adequate control over trust resources,” *Caminiti*, 107 Wn.2d at 672—is wrong because it relies on a flawed analysis of the statute. Chelan Basin continues its exaggeration that the State is arguing that statute authorizes all historic fills. As shown above, their exaggeration is inaccurate. The statute consents only to fills and development not in trespass or in violation of state statutes. And where consent is given, it has a very limited effect. It “precludes new *Lake Chelan* type actions against most existing uses” but does “not preclude private challenges based on theories other than the public rights of navigation.” Geoffrey Crooks, *The Shoreline Management Act of 1971*, 49 Wash L. Rev. 423, 460-61 (1974). Thus, Chelan Basin's arguments inaccurately describe the barrier to its claim as if the statute gave up control over trust resources.

Furthermore, as Chelan Basin concedes, in *Caminiti*, the questioned legislation was valid in part because it did not convey title to any state-owned tidelands or shorelands. CB Br. at 48 (citing *Caminiti*, 107 Wn.2d at 672). Likewise, RCW 90.58.270(1) does not convey any state-owned aquatic lands. It does not even allow for private use of public aquatic lands, in contrast to the statute upheld in *Caminiti*. The proviso makes clear that no consent is given to trespasses on public lands. And the statute does not cede control by allowing navigable waters to be filled or

developed. The effect of the statute is limited to certain property already filled or developed.

Read fairly, the statute has two effects on public trust interests. First, it eliminates the *Wilbour* cause of action for many locations. At best, this effect on public trust values is mostly hypothetical, because the effect exists only to the extent that a *Wilbour* action might have been used to advance public trust values. Chelan Basin, who faces this effect, decries it as an abdication of the public trust. But this effect is insignificant by any reasonable measure. This case appears to be the first case *in decades* that has complained that the statute barred a *Wilbour* action. This intended effect of the statute is not a significant loss of control over the *jus publicum*.⁴

Even if barring *Wilbour* actions is considered a loss of control under the *Caminiti* test, it is not a net loss of control. Rather, the statute is part of the SMA, which *increased* government control over public trust interests. After RCW 90.58.270, the state and local government have

⁴ Indeed, it takes two levels of speculation to believe that barring a private *Wilbour* action abdicates control over the *jus publicum*. First, one must speculate that some party would have used *Wilbour* actions. Chelan Basin concedes the cause of action is rare. CB Br. at 45 (“Only one reported Washington decision has addressed the appropriate remedy where an obstruction violated the public trust doctrine”).

Second, one must speculate that the hypothetical *Wilbour* action would have advanced the public trust. But such actions are a crude defender of the public trust, because they are based solely on the absence of governmental permission for interference with navigation. As recognized in *Wilbour*, those actions had the potential to be harmful to otherwise unobjectionable development that, in substance, served public trust interests. *Wilbour*, 77 Wn.2d at 316 n.13 (“there undoubtedly are places on the shore of the lake

significantly more tools to protect the *jus publicum*. If historic fill or development is consented to by the statute, it must also now comply with SMA plans and local shoreline master program regulations designed to advance public trust values. *Caminiti*, 107 Wn.2d at 670-71 (SMA policy “will promote and enhance the public interest” in navigable waters) (citations omitted). Fills and development also remain subject to federal control for navigation under the Commerce Clause. *See Caminiti*, 107 Wn.2d at 673 (“None of which is to mention the . . . controls over such docks which may be imposed pursuant to the Commerce Clause . . .”).

RCW 90.58.270 thus passes the first step of *Caminiti*. It does not give up control over the *jus publicum*. The statute only bars a seldom-used cause of action. It affected only development that, today, is at least 45 years old. It does not convey title to public aquatic lands, it does not authorize use of public aquatic lands, and it does not allow new fill or development.

b. RCW 90.58.270(1) Promotes the Public Interest in Navigable Waters.

Assuming for argument the statute is deemed to have given up control over the *jus publicum* for purposes of *Caminiti*, the statute easily exceeds the alternative basis for validity by promoting public trust interests. Rather than consider how the statute promotes the public

where developments, such as those of the defendants, would be desirable and appropriate.”).

interest as called for by *Caminiti* and case law, Chelan Basin argues that the statute is invalid because the Three Fingers fill does not benefit the *jus publicum*. But that is not the test for statutory validity. The benefits of the Three Fingers fill to the *jus publicum* or public trust can be disputed. See GBI Op. Br. at 45-46 (discussing potential uses of Three Fingers). But *Caminiti* asks whether the statute promotes the public interest in navigable waters on a broader scale. 107 Wn.2d at 670. As clarified by later cases, that factor examines whether a statute promotes the “overall interest of the public” in navigable waters. *Weden*, 135 Wn.2d. at 698-99. Just as *Caminiti* focused on the benefits of the statute as a whole, not the benefits of a single dock authorized under the statute, this case asks what benefits are promoted by RCW 90.58.270, not whether this particular fill promotes the public trust. See *Caminiti*, 107 Wn.2d at 673-74.

By resolving that certain historic fill and development could remain after *Wilbour*, the statute promoted important public trust interests in navigable waters in at least three ways. First, as discussed above, the statute is integral to the SMA by which the state and local jurisdiction ensure statewide protection of public trust values. To facilitate planning and regulation and statewide achievement of trust values, the statute

addressed existing conditions and provided certainty for what areas were subject to the SMA. *See* State's Op. Br. at 38-39.⁵

Second, by eliminating a cloud over historic development, the statute served public trust interests associated with historic development. It is beyond dispute that shoreline development can be rationally connected to promoting public trust interests in navigable waters. Both development and fill, for example, are used to provide the interface between dry land and the deep water where vessels navigate. *E.g. Harris v. Hylebos Indus., Inc.*, 81 Wn.2d 770, 778, 505 P.2d 457 (1973) (“common observation should reveal that unless deep water can be reached conveniently for the loading of vessels, commerce by water is seriously hampered.”). But *Wilbour* created uncertainty regarding what, if any, past development would be safe from challenge. *See* Charles E. Corker, *Thou Shalt Not Fill Public Waters Without Public Permission – Washington's Lake Chelan Decision*, 45 Wash. L. Rev. 65, 71-74 (1970) (“Must all fills in navigable waters be abated?”).

⁵ A first step in shoreline planning and regulation is determining what shorelines are to be planned. 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*. The Legislature has recognized that a “springing” application of the SMA to new areas can be unfair. *See* RCW 90.58.580 (exempting certain lands that become subject to SMA jurisdiction by virtue of restoration projects and noting that “[h]ardship may occur when a shoreline restoration project shifts shoreline management act regulations into areas that had not previously been regulated . . .”).

Wilbour, itself, recognized that fills and development “would be desirable and appropriate” in many places and acknowledged the need for a statutory response to the ruling. *Wilbour*, 77 Wn.2d at 316 n.13. The Legislature may thus reasonably conclude that limiting future *Wilbour* claims in favor of an SMA regulatory regime would, on the whole, promote public trust values.

Third and related, the statute promotes the future maintenance and investment in those historic fills and development that serve the public interest. The cloud created by *Wilbour*, if not cleared, would chill such investment or maintenance. *See* State’s Op. Br. at 37. By limiting the *Wilbour* claim, RCW 90.58.270 promoted investment in historic fills and development. However, future investment would now answer to the requirements of the SMA and thus serve public trust interests.

c. RCW 90.58.270(1) Does Not Substantially Impair the Public Interest in Navigable Waters.

Like the court below, Chelan Basin focuses on the Three Fingers fill to argue that the statute substantially impairs the public trust. Again, Chelan Basin misconstrues the *Caminiti* test. Using Chelan Basin’s approach, any square yard would be a substantial impairment and violation of the public trust doctrine. CB Br. at 44; 49-50. Its approach

cannot be squared with *Illinois Central*, the Supreme Court case from which the *Caminiti* test is derived. The Court there explained:

grants of parcels of lands under navigable waters, that may afford foundation for wharves, piers, docks and other structures in aid of commerce, *and grants of parcels which, being occupied, do not substantially impair the public interest in the lands and waters remaining*, that are chiefly considered and sustained in the adjudged cases as a valid exercise of legislative power . . .”

Illinois Cent. R.R. Co. v. Illinois, 146 U.S. 387, 453, 13 S. Ct. 110, 36 L. Ed. 1018 (1892) (emphasis added).

The test for substantial impairment is, therefore, whether the public interest in the lands affected by statute “can be disposed of without any substantial impairment of the public interest *in the lands and waters remaining*.” *Weden*, 135 Wn.2d at 699 (emphasis added). The summary judgment record confirms that giving the statute its intended effect does not substantially impair the *jus publicum* in the lands and waters of Lake Chelan.

Even looking only at the waters in proximity to the Three Fingers, the fill does not substantially impair the public interest in the remaining lands and waters. CP 182, 495. There are four public parks in a one-mile radius. *Id.* Shorelands on both sides of the Three Fingers are vacant. *Id.*; CP 171. In the same bay, the public enjoys access to the lake over the vacated Water Street which provides a sandy beach. CP 891-92, 895.

And the simple fact there have been nearly five decades of public use of the lake before this case arose confirms that the fill is not a substantial impairment of the public trust. The facts of this case are utterly different than *Illinois Central*, where the state conveyed ownership and control over the Chicago Harbor to a private railroad. See *Caminiti*, 107 Wn.2d at 675 (discussing *Illinois Central*).

Other than its misdirected argument that fill displaces navigation on the site of the fill itself, Chelan Basin offers nothing to show a substantial impairment to the *jus publicum* interests in Lake Chelan. And it certainly offers no showing of how the barrier to *Wilbour* claims in this statute substantially impairs the *jus publicum* for other navigable waters of the state. See State's Op. Br. at 39-41.

This statute does not violate the public trust by limiting future application of the cause of action found in *Wilbour*. It does not convey title or allow new fill or development. Given the nature of the statute, its effect on the public trust is not substantial and provides no basis for invalidation under the common law public trust doctrine.

III. CONCLUSION

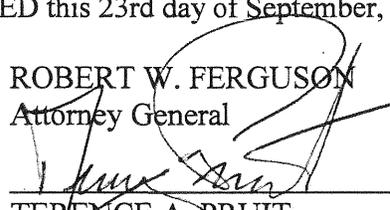
The plain language of RCW 90.58.270, read in context and as a response to *Wilbour*, shows that the statute applies here. It bars Chelan Basin's claim for removal of historic fill to the extent the claim is

based on impairment of public rights of navigation. By creating this limited barrier to future *Wilbour* cases, RCW 90.58.270 allows greater public control over shorelines through the SMA and promotes the overall public trust interests by preserving those historic fills that long served public interest in use of navigable waters. And because the statute pertains only to fill and development made more than 45 years ago and bars only a single, rarely used action for removal, any impairment of public trust values in navigable waters is insignificant, whether viewed in light of the waters of Lake Chelan or if evaluated in the statewide context in which the statute applies.

For all these reasons, the Court should reverse the superior court and dismiss Chelan Basin's claim.

RESPECTFULLY SUBMITTED this 23rd day of September, 2015.

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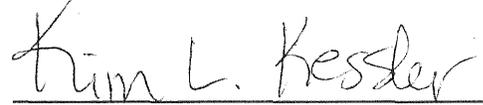
I certify that I caused a copy of the foregoing document to be served on all parties or their counsel of record on September 23, 2015, as follows:

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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 23rd day of September, 2015, at Olympia, Washington.

Handwritten signature of Kim L. Kessler in cursive script.

KIM L. KESSLER
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