

IN THE COURT OF APPEALS  
OF THE STATE OF WASHINGTON  
DIVISION II

---

NO. 31816-4-II

---

CITY OF BAINBRIDGE ISLAND,  
a Washington municipal corporation,

Respondent,

v.

ANNETTE BRENNAN, et al,

Appellants.

---

PETITION FOR REVIEW OF CROSS-APPELLANTS LARSON

---

Michael W. Gendler  
WSBA No. 8429  
GENDLER & MANN, LLP  
1424 Fourth Avenue, Suite 1015  
Seattle, WA 98101  
(206) 621-8868  
Attorneys for Petitioners/Cross-Appellants  
Larson

TABLE OF CONTENTS

	<u>Page</u>
I. IDENTITY OF PETITIONERS .....	1
II. COURT OF APPEALS DECISION .....	1
III. ISSUES PRESENTED FOR REVIEW .....	2
IV. STATEMENT OF THE CASE .....	3
V. ARGUMENT .....	6
A. <u>The Court of Appeals Decision Conflicts with This Court's Decisions Applying the Public Trust Doctrine</u> .....	6
B. <u>Whether the Public Trust Doctrine Includes Pedestrian Travel over Unsubmerged Tidelands Is an Issue of Substantial Public Interest</u> .....	12
VI. CONCLUSION .....	20

Appendices

Appendix 1: Unpublished Opinion (Jul. 20, 2005).

Appendix 2: Order Denying Motion to Reconsider and Motions to Publish (Aug. 26, 2005).

Appendix 3: Glass v. Goeckel, 473 Mich. 667, 703 N.W.2d 58 (Jul. 29, 2005).

Appendix 4: Raleigh Avenue Beach Association v. Atlantic Beach Club, Inc., 185 N.J. 40, 879 A.2d 112 (Jul. 26, 2005).

Appendix 5: Leydon v. Town of Greenwich, 257 Conn. 318, 777 A.2d 552 (2001).

Appendix 6: Eaton v. Town of Wells, 2000 ME 176, 760 A.2d 232 (2000).

Appendix 7: Arizona Center for Law in the Public Interest v. Hassell, 172 Ariz. 356, 837 P.2d 158 (1991).

Appendix 8: Oregon Attorney General Opinion No. 8281 (Apr. 21, 2005).

Appendix 9: Garcia, Baltodano and Mazarella, Free the Beach! Public Access, Equal Justice, and the California Coast (April 2005).

Appendix 10: A Line in the Sand (New York Times editorial, Sep. 14, 2005).

Appendix 11: Public Beach Areas are Few and Far Between, Seattle Post-Intelligencer, p. 1, Sep. 12, 2005.

TABLE OF AUTHORITIES

Cases	Page
<u>Arizona Center for Law in the Public Interest v. Hassell</u> , 172 Ariz. 356, 837 P.2d 158 (1991) . . . . .	15
<u>Caminiti v. Boyle</u> , 107 Wn.2d 662, 732 P.2d 1989 (1987) . . . . .	6-9, 12
<u>Citizens for Responsible Wildlife Management v. State</u> , 124 Wn. App. 566, 103 P.3d 203 (2004) . . . . .	11
<u>Eaton v. Town of Wells</u> , 2000 ME 176, 760 A.2d 232 (2000) . . . . .	15
<u>Esplanade Properties, LLC v. City of Seattle</u> , 307 F.3d 978 (9 <sup>th</sup> Cir. 2002), <u>cert. denied</u> , 539 U.S. 926 (2003) . . . . .	16
<u>Glass v. Goeckel</u> , 473 Mich. 667, 703 N.W.2d 58 (Jul. 29, 2005) . . . . .	13, 16
<u>Leydon v. Town of Greenwich</u> , 257 Conn. 318, 777 A.2d 552 (2001) . . . . .	14
<u>New Whatcom v. Fairhaven Land Company</u> , 24 Wash. 493, 64 P. 735 (1901) . . . . .	6-8
<u>Orion v. State</u> , 109 Wn.2d 621, 747 P.2d 1062 (1987) . . . . .	7-10, 12, 14, 17
<u>Raleigh Avenue Beach Association v. Atlantic Beach Club, Inc.</u> , 185 N.J. 40, 879 A.2d 112 (Jul. 26, 2005) . . . . .	13, 14, 17
<u>Scranton v. Wheeler</u> , 179 U.S. 141 (1900) . . . . .	16

<u>State v. Longshore,</u> 141 Wn.2d 414, 5 P.3d 1256 (2000) .....	2, 6, 12
<u>Trullinger v. Howe,</u> 53 Or. 219, 99 P. 880 (1909) .....	16
<u>Weden v. San Juan County,</u> 135 Wn.2d 678, 958 P.2d 273 (1998) .....	7, 10-12, 14
<u>West Virginia Board of Education v. Barnette,</u> 319 U.S. 624 (1943) .....	19
<u>Wilbour v. Gallagher,</u> 77 Wn.2d 306, 464 P.2d 232 (1969) .....	8
<u>Wooley v. Maynard,</u> 430 U.S. 705 (1977) .....	19
<u>Statutes</u> .....	<u>Page</u>
RCW 79A.05.600 .....	19
RCW 90.58.020 .....	19
RCW 90.58.030(3)(d) & (e) .....	18
<u>Rules</u> .....	<u>Page</u>
RAP 13.4(b)(1) .....	7
RAP 13.4(b)(3) .....	12, 18

<u>Other Authorities and Sources</u>	<u>Page</u>
<u>A Line in the Sand</u> (New York Times editorial, Sep. 14, 2005) . . . . .	18
Garcia, Baltodano and Mazzarella, <u>Free the Beach! Public Access, Equal Justice, and the California Coast</u> (April 2005) . . . . .	17
Justinian <u>Institutes</u> 2.1.1 . . . . .	14
<u>Public Beach Areas are Few and Far Between</u> , Seattle Post-Intelligencer, p. 1, Sep. 12, 2005) . . . . .	20
Ralph W. Johnson, et al., <u>The Public Trust Doctrine and Coastal Zone Management in Washington State</u> , 67 Wash. L. Rev. 525 (1992) . . . . .	10

## I. IDENTITY OF PETITIONERS

Petitioners Larson were cross-appellants in the court of appeals and are the parties who presented the claim that the public trust doctrine protects a right of pedestrian travel across privately-owned tidelands.

## II. COURT OF APPEALS DECISION

The court of appeals held that the public trust doctrine does not provide a right of pedestrian travel over privately-owned tidelands when not covered by water. Unpublished Opinion at 33-37 (Jul. 20, 2005) (Appendix 1). See also id. at 3-4 (“We hold that under the public trust doctrine, the public, including the Larsons, may use the neighboring tidelands when covered by water, but when the tide is out, the public has no right to walk across private property”). The court affirmed the trial court’s order requiring the City of Bainbridge Island to post signs on the Fletcher Landing tidelands prohibiting trespass onto adjacent privately owned tidelands. Id. at 37.

This Petition seeks review of the foregoing rulings.

The court also affirmed judgment in favor of the City on its claim of a public right of way on the tidelands fronting the Fletcher Landing road end. Id. at 4-32. The Larsons were defendants in the City’s action, because they had purchased a 1/80th undivided interest in those tidelands. Several other

tidelands owners (collectively referred to as “Lantz” by the court of appeals) resisted the City’s claim and appealed portions of the trial court judgment to the court of appeals. Lantz filed a motion for reconsideration, and the City filed a motion to publish. The court denied these motions on August 26, 2005. See Appendix 2.

### III. ISSUES PRESENTED FOR REVIEW

1. Does the public trust doctrine include a right of pedestrian travel across privately-owned tidelands for recreational purposes corollary to navigation and fishing, when the tidelands are exposed as well as when they are submerged? This question was reserved in State v. Longshore, 141 Wn.2d 414, 429, n.9, 5 P.3d 1256 (2000) (“We need not determine whether and under what circumstances the public has a right to . . . cross over private tidelands on foot”); Unpublished Opinion at 33 (quoting Longshore).<sup>1</sup>

2. Can Petitioners be compelled to place “No Trespass” signs on their tidelands for the benefit of adjacent tideland owners?

---

<sup>1</sup> This case does not present a claim of right to traverse privately-owned uplands to reach tidelands. The court of appeals affirmed the trial court’s judgment that the Fletcher Landing road end is a public right-of-way subject to public rights of use and enjoyment for the same purposes recognized by prior decisions of this court to be within the public trust rights. CP 2509-13, 2518. It ruled also that the City and public rights in the road end extend to the tidelands and to the Puget Sound waters. Id.

#### IV. STATEMENT OF THE CASE

Plaintiff City of Bainbridge Island brought this action in 1999 asserting a public easement to reach the water of Puget Sound across the road end at N.E. Fletcher Landing Road and over the tidelands fronting that road end. CP 1-20. Defendants are owners of fractional undivided interests in the road end tidelands and other tideland owners who built a fence and locked gate across the road to exclude the public from the road end tidelands. CP 2509. The road end had been open for almost 100 years to pedestrian use by the public and provided public access to the tidelands and water. Id.

Cross-appellant Vincent Larson is among the owners of fractional undivided interests in the road end tidelands who were named as defendants by the City. CP 575-81. Unlike other owners, the Larsons supported the City's claim. CP 577. The Larsons also filed cross-claims against the defendants (Nichols, Challman and Fenton) who own tidelands north and south of the road end tidelands, claiming a public right of pedestrian travel across those tidelands under the public trust doctrine. Id.

Vince Larson has owned and resided on a high bluff waterfront property about one-half mile south of Fletcher Landing since 1971. CP 831. Karin Larson has lived there since 1993. Id. The property has a steep trail

to the beach, which is suitable for walking but very difficult for bringing a small boat to the water. CP 832. The Larson family has used the Fletcher Landing road end for three decades to launch their kayaks as well as for level foot access to the tidelands and Puget Sound as an alternative to descending their steep bluff. CP 831. They regularly walk the tidelands between their home and Fletcher Landing, enjoying all of the typical recreational activities associated with walking along the water (exercise, enjoying the weather, nature, views, and sunsets, seeing and meeting other people). CP 833. The Fletcher Landing road end provides the area's only public access from uplands to the tidelands fronting the road end, as well as to the tidelands north and south of the road end tidelands. CP 834.

Vince Larson's use and enjoyment of the road end and tidelands was unimpeded from 1971 to about 1996, when other tideland owners locked the gate and refused him passage. CP 833. In 2000, Larson purchased a 1/80th undivided interest in the road end tidelands that had been reserved when the owner sold other property in the area and moved away. CP 836.<sup>2</sup> However, the other owners refused to acknowledge the Larsons' ownership interest in the road end tidelands and have refused them access through the locked gate.

---

<sup>2</sup> Those undivided fractional interests were created in the course of platting nearby uplands in the 1940's. CP 2504-05.

CP 578. After Larson acquired this interest, the City amended its complaint to add the Larsons (and other owners) as defendants. CP 497-515.

The Larsons moved for summary judgment on their public trust cross-claim. CP 842-56. The superior court denied Larsons' motion, and granted summary judgment dismissing the public trust claim. CP 1870-72. The court did not state any reason for its order. Id.; Appendix 1 at 33, n.32.

The case went to trial in September 2002 on the City's claim of public rights to the Fletcher Landing road end and tidelands and on Larsons' claim to quiet title as an owner of an undivided interest in the road end tidelands. The court determined that the Fletcher Landing road end "is a public road right-of-way," which extends across the tidelands fronting Fletcher Landing and out to navigable waters. CP 2509 ("the Court concludes that Erlandsen intended to dedicate the Tidelands to the public to permit members of the public to move from the land highway across the intervening tidelands to connect to the marine highway and that the public accepted this dedication"); CP 2513. The court quieted title in Larsons' undivided fee interest in the road end tidelands, and also quieted the title of the other fee owners in that tideland. CP 2515-16.<sup>3</sup>

---

<sup>3</sup> Some of the co-owners appealed the judgment in favor of the City, but none of them appealed the portion of the Judgment in favor of the

The court further held that the public has the right to use Fletcher Landing and its adjoining tidelands as an access point to the marine waters for swimming, wading, boating, fishing and public viewing. CP 2516. However, the court ordered the City to “post and maintain permanent signs demarcating the north-south boundaries of the tidelands access to the water, which sign shall include a statement that [walking on tidelands] to the north or south of the tidelands [fronting Fletcher Landing] constitutes trespass.” Id. The court of appeals affirmed all rulings of the superior court. Appendix 1.

## V. ARGUMENT

The court should answer the question it reserved in State v. Longshore, *supra*.

### A. The Court of Appeals Decision Conflicts with This Court’s Decisions Applying the Public Trust Doctrine

This court’s cases recognize an “inalienable” right to travel across tidelands as a “public highway,” which right encompasses the “lands under tide waters” as well as the waters themselves. Caminiti v. Boyle, 107 Wn.2d 662, 667-68, 732 P.2d 1989 (1987); New Whatcom v. Fairhaven Land

---

Larsons. Therefore, the Larsons’ rights as owners of a 1/80th undivided fee interest in the tidelands are definitively established and are not before the court. Yet the other owners continue to deny access to the Larsons through the locked gate barring the Fletcher Landing road end.

Company, 24 Wash. 493, 499, 504, 64 P. 735 (1901). This court also has recognized that public trust rights extend beyond navigation and commerce to include “recreational purposes” incidental and corollary to navigation. Orion v. State, 109 Wn.2d 621, 640-41, 747 P.2d 1062 (1987) (“state courts have extended the doctrine beyond its navigational aspects”); Caminiti, 107 Wn.2d at 669. See also Weden v. San Juan County, 135 Wn.2d 678, 698-99, 958 P.2d 273 (1998) (“universally recognized need to protect public access to and use of such unique resources as navigable waters, beds, and adjacent lands”).

The court of appeals’ decision is inconsistent with all of these cases. RAP 13.4(b)(1). This court has recognized “the public right to use [tidelands] as a common highway for commerce, trade, and intercourse,” New Whatcom, 24 Wash. at 499, but the decision below restricts that right. Appendix 1, pp. 3-4, 36. This court recognized that the public right to use tidelands as a common highway encompassed the “lands under tide waters,” New Whatcom, 24 Wash. at 499, contrary to the decision of the court below limiting the right of travel to the hours when the tidelands are submerged (and travel is more difficult).

In addition to recognizing tidelands as a “common highway,” this court has held that the public trust doctrine includes rights to use tidelands for recreational purposes “incidental” and “corollary” to navigation and commerce. Orion, 109 Wn.2d at 640-41 (“incidental rights of fishing, boating, swimming, water skiing and other related recreational purposes”), quoting Wilbour v. Gallagher, 77 Wn.2d 306, 316, 464 P.2d 232 (1969); Caminiti, 107 Wn.2d at 669 (“recreational purposes generally regarded as corollary to the right of navigation and the use of public waters”).<sup>4</sup> Walking on tidelands to enjoy the waters, to launch and land small boats, and to go fishing are activities squarely within the recreational uses listed in these decisions, independent of and in conjunction with the public right of travel on the tideland “common highway.”<sup>5</sup> Yet the decision below denies the basic right to walk, constricting the corollary recreational rights in a manner inconsistent with this court’s decisions.

That the court of appeals relied exclusively on this court’s decision in Orion for the proposition “that our Supreme Court did not contemplate

---

<sup>4</sup> “Corollary” is defined by Webster’s New World Dictionary as “supplemental to.”

<sup>5</sup> The New Whatcom court’s words “commerce, trade, and intercourse” indicate a scope broader than navigation and commerce. Walking on tidelands to meet and talk with other people is “intercourse.”

pedestrian passage over tidelands” further confirms that the decision below is inconsistent with the decisions of this court. Appendix 1 at 35-36. First, the court of appeals misread and misapplied Orion. The passage it quoted was discussing the effect on Orion’s property rights of a state law establishing Padilla Bay as a marine sanctuary in response to Orion’s takings claim, and had nothing to do with the public trust doctrine. Orion, 109 Wn.2d at 664-65. In its public trust discussion, this court held that “Orion could make no use of the tidelands which would substantially impair the trust.” 109 Wn.2d at 640. This statement confirms the court of appeals’ error in applying the court’s takings language to the public trust doctrine. Reply Brief of Cross-Appellants Larson at 11 & n.9 (Sep. 7, 2004).<sup>6</sup>

Second, the court of appeals’ reliance on the takings statement from Orion to restrict public rights is contrary to the heart and soul of this court’s recognition that the doctrine is flexible and has evolved historically out of public need for access to water for navigation and commerce:

The trust relationship to navigable waters and  
shorelands resulted not from a limitation, but

---

<sup>6</sup> Appellants argued below that Caminiti and Orion were wrongly decided, describing them as “remarkable” departures from precedent which “merit further review” (i.e., should be overruled). See Larson’s Reply Brief at 3. Such arguments support the need for review by this court and also signal that the court of appeals’ decision is inconsistent with Orion.

rather from a recognition of where the public need lay. Recognizing modern science's ability to identify the public need, state courts have extended the doctrine beyond its navigational aspects.

Orion, 109 Wn.2d at 640-41 (emphasis added). This statement establishes two points with which the decision below is inconsistent. First, the public trust encompasses “shorelands” as well as “navigable waters.” See also id. (likening public trust doctrine to “a covenant running with the land (or lake or marsh or shore) for the benefit of the public”) (emphasis added); Weden, 135 Wn.2d at 698 (doctrine provides “flexible method to protect public interest in coastal lands and waters”) (emphasis added). Second, its scope has been “extended” in response to recognition of public need, in contrast to the “limitation” of the court of appeals’ decision. Id.

This court has affirmed that the public trust doctrine protects public access to and use of unsubmerged land as well as water, citing “the universally recognized need to protect public access to and use of such unique resources as navigable waters, beds, and adjacent lands.” Weden v. San Juan County, 135 Wn.2d at 698, quoting Ralph W. Johnson, et al., The Public Trust Doctrine and Coastal Zone Management in Washington State, 67 Wash. L. Rev. 525, 526-27 (1992). The court explained that the doctrine

“preserves a public property interest, the *jus publicum* in tidelands and the waters flowing over them, despite the sale of these lands into private ownership.” 135 Wn.2d at 698 (emphasis added). The court of appeals’ restriction of the public right to “the waters flowing over [the tidelands]” is inconsistent with Weden; the Weden court did not say that the public right was only in “the waters flowing over [tidelands].”

The decision below is inconsistent also with a concurring opinion in the same court’s recent case, Citizens for Responsible Wildlife Management v. State, 124 Wn. App. 566, 575-77, 103 P.3d 203 (2004). Chief Judge Quinn-Brintnall (author of the opinion in our case) wrote that the “public trust doctrine prohibits disposing of the public interest in the State’s natural resources in a manner that substantially impairs the public’s right of access.” Id. at 576. This recognizes that the State was without authority to sell its tidelands, if such sale would “impair” the “public’s right of access” to them. Moreover, she emphasized the State’s trust duty to protect those “not yet born” as “the primary beneficiaries” of the trust, against “disposition” as well as “potential exhaustion” of our natural resources. Id. at 576-77. Applying these principles to pedestrian travel, the State’s sale of tidelands into private ownership cannot “dispose” of the public’s *jus publicum* rights of access and

use of tidelands. As this court held in Orion, title to tidelands was “subject to” the public trust. 109 Wn.2d at 639-40.

B. Whether the Public Trust Doctrine Includes Pedestrian Travel over Unsubmerged Tidelands Is an Issue of Substantial Public Interest

The substantial public interest in having this court decide whether pedestrian travel across unsubmerged tidelands is within public trust rights is evident from this court’s prior public trust decisions, from recent cases of other states’ highest courts, and from increasing public attention to the scarcity and growing public demand for beach access. This court has decided the cases confirming the public trust doctrine and establishing its guiding parameters. Weden; Orion; Caminiti. In Weden, the court equated public trust rights with fundamental constitutional rights that are entitled to “heightened” judicial scrutiny. 135 Wn.2d at 698.<sup>7</sup> The Longshore court’s careful preservation of the issue of pedestrian travel demonstrates the importance this court sees in this specific issue. 141 Wn.2d at 429, n.9.<sup>8</sup>

---

<sup>7</sup> This suggests that this court views public trust rights to be fundamental such that review is warranted under RAP 13.4(b)(3) for significant questions of law under the Washington Constitution.

<sup>8</sup> Appellants may argue that this court should decline review because they raised affirmative defenses to prevent reaching the merits. See Appendix 1 at 37, n.36 (acknowledging the affirmative defenses; “because we reject the Larsons’ claims of [sic] substantive grounds, we do not address

The supreme courts of two other states have issued public trust rights decisions this year, one on the same issue presented here. A week after the court of appeals' decision, the Michigan Supreme Court held that the public trust includes a right of pedestrian travel across unsubmerged private littoral lands of Lake Huron:

We hold, therefore, that defendants cannot prevent plaintiff from enjoying the rights preserved by the public trust doctrine. Because walking along the lakeshore is inherent in the exercise of traditionally protected public rights of fishing, hunting, and navigation, our public trust doctrine permits pedestrian use of our Great Lakes, up to and including the land below the ordinary high water mark.

Glass v. Goeckel, 473 Mich. 667, 703 N.W.2d 58, 62 (Jul. 29, 2005) (copy included as Appendix 3). The court's analysis demonstrates the trend to strengthen public trust rights and shows the importance of granting review.

The New Jersey Supreme Court also issued a public trust decision subsequent to the decision of the court of appeals. Raleigh Avenue Beach Association v. Atlantic Beach Club, Inc., 185 N.J. 40, 879 A.2d 112 (Jul. 26,

---

these asserted procedural bars"). These affirmative defenses were not deemed substantial enough to prevent the court of appeals from reaching the merits. Id. See also Opening Brief of Cross-Appellants Larson at 24-33 (Mar. 22, 2004); Larsons' Reply Brief at 12-19. Nor should such defenses sidetrack this court.

2005) (Appendix 4). The court decided that the public had a right to use “the dry sand ancillary to use of the ocean for recreation purposes.” 879 A.2d at 120, 124. It held that “the shores of the sea” as well as the water were “common to mankind” and therefore were “subject to the same law as the sea itself, and the sand or ground beneath it.” Id. at 119. The court found guidance dating to Roman law providing for use of the shore for purposes related to navigation and fishing, just as this court has in recognizing the public trust doctrine. Id. at 120 (“everyone could use the seashore to dry his nets there, and haul them from the sea”), quoting Justinian Institutes 2.1.1.

Just as this court held in Orion and Weden that the public trust doctrine adapts to public need, the New Jersey Supreme Court explained, “Archaic judicial responses are not an answer to a modern social problem.” It saw the doctrine as not “fixed or static,” but one to “be molded and extended to meet changing conditions and needs of the public it was created to benefit.” Id. at 121 (citation omitted).

Recent cases from other states show the scope of trust rights to be of high public interest nation-wide. Connecticut recognizes a public trust “right to access the portion of any beach extending from the mean high tide to the water.” Leydon v. Town of Greenwich, 257 Conn. 318, 332, n.17, 777 A.2d

552 (2001) (Appendix 5). Courts that have not yet embraced a complete right of pedestrian travel have recognized the importance of the question. Eaton v. Town of Wells, 2000 ME 176, 760 A.2d 232, 248-50 (2000) (Saufley, J., concurring) (precedent allowing citizens carrying a gun or fishing rod to walk on tidelands, but not those carrying a surfboard or empty-handed, is “clearly flawed” and should be overruled) (Appendix 6). Justice Saufley’s observation that Maine has the longest coastline on the eastern seaboard, such that the “potential for multiple disputes, for continuing uncertainty, and for extensive litigation is obvious,” id. at 249, speaks to the importance and interest in Washington of having a published decision of this court on the issue. See also Arizona Center for Law in the Public Interest v. Hassell, 172 Ariz. 356, 837 P.2d 158, 167, n.13 (1991) (all 38 states that have considered issue have decided that lands beneath navigable waters are subject to public trust) (Appendix 7).<sup>9</sup> Granting review here will add to a body of law that promotes the public interest beyond our own state.

Also this year, the Oregon Attorney General issued a detailed opinion addressing public rights on waterways and their beds, in response to a request by the Oregon Land Board. Oregon Attorney General Opinion No. 8281

---

<sup>9</sup> The State of Washington was one of eight states that appeared as *amici curiae* in the Arizona case. 837 P.2d at 161.

(Apr. 21, 2005) (Appendix 8). The Attorney General concluded that “navigable-for-public-use” waterways are open to public use, even if the bed is privately owned. Id. at 1-2. The “public right of passage” is the “dominant right,” but must be exercised “without unnecessarily interfering with the riparian proprietor.” Id. at 26, quoting Trullinger v. Howe, 53 Or. 219, 222-23, 99 P. 880 (1909). Oregon courts have recognized that the public trust doctrine encompasses recreation, but have not yet applied these principles to decide the issue of pedestrian travel. Id. at 15-17, 24-26.

Appellants argued below that recognizing a right of pedestrian travel would constitute a “theft” of their property rights. CP 1207. Several courts have joined this court in holding that the public trust doctrine is not a taking. See, e.g., Scranton v. Wheeler, 179 U.S. 141, 163 (1900) (ownership of tidelands is “a qualified title, a bare technical title”); Esplanade Properties, LLC v. City of Seattle, 307 F.3d 978, 986-87 (9<sup>th</sup> Cir. 2002) (rejecting takings claim because “the public trust doctrine . . . unquestionably burdens Esplanade’s property”), cert. denied, 539 U.S. 926 (2003);<sup>10</sup> Glass v. Goeckel, 703 N.W.2d at 62 (“although defendants retained full rights of

---

<sup>10</sup> The Ninth Circuit also rejected the argument that Orion was inconsistent with the Supreme Court’s later takings cases. Id. Appellants here argued that Orion was wrongly decided. Larson Reply Brief at 3.

ownership in their littoral property, they hold these rights subject to the public trust”); Raleigh Avenue Beach Association, 879 A.2d at 124 (“bundle” of property rights “sticks” does not include right to exclude others because “exclusivity of use ... has long been subject to the strictures of the public trust doctrine”); Orion, 109 Wn.2d at 639-40 (Orion was a “private party that purchased the property subject to the terms of the trust;” “Orion’s property was burdened by the public trust doctrine”).

Appellants’ “theft” of property rights argument may be misplaced, but it points (along with their argument that the court’s decision may affect the rights of all tidelands owners in Washington) to substantial public interest in this case. It is appellants who erected and locked a gate across the upland road end which bars the public and their co-owner Larson from the public road end tidelands. CP 2509. Appellants also put up a sign on their road end fence warning the public not to trespass on the beach, citing a fake ordinance to create a false impression of force of law. Trial Ex. 74.

These obstructions call to mind a long history in California of actions to prevent the general public (and especially people of color) from using even public beaches. See Garcia, Baltodano and Mazzarella, Free the Beach! Public Access, Equal Justice, and the California Coast at 10-11, 15-17, 37-38

(April 2005) (detailing history of restrictive racial covenants, racial violence, and revising bus routes to hinder travel from inner cities to beaches) (Appendix 9); A Line in the Sand (New York Times editorial, Sep. 14, 2005) (owners illegally bulldozed sand to shorten public beach) (Appendix 10). Appellants' locked gate and bogus sign is conduct similar to that detailed and photographed in Free the Beach!. Appendix 9, at 12-14, 27-28.

In California, the state responded by enforcing statutes which prohibit beach signs without a shoreline development permit. Appendix 9 at 27 & nn. 148-51. But here, the lower courts required signs which impose additional restriction on public rights and on Larsons' rights. The superior court ordered the City to erect two no trespassing signs at the boundaries of its (and Larsons') tideland. CP 2516; Appendix 1 at 37. This order violates Larsons' rights, and warrants this court's review pursuant to RAP 13.4(b)(3) (significant constitutional question) and (4) (substantial public interest).<sup>11</sup>

The Larsons own an undivided interest in these tidelands. The order compels Larsons to endorse speech with which they do not agree and to suffer an unsightly intrusion on their tidelands. No authority supports

---

<sup>11</sup> The order might also violate the Shoreline Management Act, because the signs constitute "development" under RCW 90.58.030(3)(d) & (e). Cf. Appendix 9 at 27 & nn. 148-51 (bogus no trespass signs constitute "development" which violates California Coastal Act).

requiring a property owner to have signs on his property to protect other owners against the possibility of a trespass on other land. An order compelling speech is contrary to long-settled and famous Supreme Court cases. See, e.g., Wooley v. Maynard, 430 U.S. 705 (1977) (automobile owners cannot be required to display “Live Free or Die” on their license plates); West Virginia Board of Education v. Barnette, 319 U.S. 624 (1943) (students cannot be required to say the Pledge of Allegiance). The order also invades the Larsons’ property right to keep their property free of signs that interfere with their aesthetic enjoyment of the tidelands and which convey a message they deem obnoxious. The forced signage treats the rights of the City, public, and Larsons as inferior to that of other tideland owners.

The scarcity and value of shoreline resources has been long recognized in Washington. See, e.g., RCW 90.58.020 (legislative findings that shorelines “are among the most valuable and fragile of [state’s] natural resources;” citing “great concern throughout the state relating to their utilization, protection, restoration, and preservation”); RCW 79A.05.600 (“increasing public pressure” of beach and ocean use requires statutory dedication of use of ocean beaches to public recreation and regulation to preserve recreational opportunities for future generations). Notwithstanding

these legislative efforts, a new study by the Trust for Public Lands found that only 16 percent of Puget Sound shoreline is publicly accessible, and some of that only by boat. Appendix 11 (Public Beach Areas are Few and Far Between, Seattle Post-Intelligencer, p. 1, Sep. 12, 2005).

The Trust's study does not directly implicate the issue presented here of the right of pedestrian travel across privately-owned tidelands, but does highlight the currency of the substantial public interest regarding the availability and accessibility of Washington's beaches and tidelands.

## VI. CONCLUSION

The question whether Washington citizens enjoy a right of pedestrian travel across privately-owned unsubmerged tidelands for recreational purposes corollary to navigation and commerce is a question of great public importance. The court should grant review.

Dated this \_\_\_\_\_ day of September, 2005.

Respectfully submitted,

GENDLER & MANN, LLP

By:

\_\_\_\_\_  
Michael W. Gendler, WSBA No. 8429  
Attorneys for Petitioners Larson

