No. 93381-2

Court of Appeals No. 331962-III

SUPREME COURT OF THE STATE OF WASHINGTON

CHELAN BASIN CONSERVATORY,

Petitioner,

v.

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

Respondents.

ANSWER TO PETITION FOR REVIEW

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

CASES

STATUTES

RULES

OTHER AUTHORITIES

I. INTRODUCTION

In 1969, this Court held that existing fill, otherwise legally placed in navigable waters, was subject to abatement and removal on the ground that it interfered with navigation rights protected by the public trust doctrine. *Wilbour v. Gallagher*, 77 Wn.2d 306, 317-18 (1969). The *Wilbour* decision was noteworthy for its time. It cast a light of uncertainty on the legality of established fill areas then in use throughout the State for residential, recreational, commercial and industrial purposes. Reaction to this decision was swift and unambiguous. In 1971 the Legislature enacted, and in 1972 the people adopted by initiative, comprehensive legislation governing the use of shorelines and protecting the public uses and rights embodied in the public trust doctrine. This legislation is commonly known as the Shoreline Management Act ("the Act").[1] The Act expressly overruled *Wilbour* and precluded navigation-based abatement actions seeking the removal of existing fills. This has been settled law in the State of Washington for nearly fifty years.

However, on November 4, 2011, Petitioner filed suit seeking a ruling that the abrogation of *Wilbour* by the Act was invalid and that decades-old fills in State waters—including specifically the Three Fingers fill in Lake Chelan, which was placed there in 1961—is subject to removal based upon *Wilbour*-type claims. The court below unanimously rejected Petitioner's argument. Its decision is correct and does not warrant further review.

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[1] RCW 90.58.010-90.58.920.

The decision below does not conflict with any decision of this Court or the Court of Appeals. Petitioner seeks to create a conflict by citing cases holding that the State may not wholly abandon control of shorelines, but the Act did not do that. Instead, as this Court has consistently held, the Act embodies comprehensive *control* of shorelines. Authorizing existing fill and regulating any further development of these areas was not an abdication of control, it was an exercise of control.

The opinion below also does not raise constitutional issues or issues of substantial public interest. Petitioner's constitutional challenge to RCW 90.58.270 is foreclosed by *Caminiti v. Boyle*, 107 Wn.2d 662 (1987), precedent that was correctly interpreted and applied by the court below.

Petitioner further claims that even if the Act validly authorized pre-1969 fills, such fills should still be removed as a public nuisance. Petitioner did not plead—and expressly disavowed—any nuisance claim. Petitioner raises the issue of nuisance in an attempted end run around the Act's authorization of pre-1969 fills. But the type of "nuisance" Petitioner now seeks to argue—impairment of public navigational rights—was expressly authorized by the Act. It is settled law that "[n]othing which is done or maintained under the express authority of a statute[] can be deemed a nuisance." RCW 7.48.160. The court below correctly applied that statute and rejected Petitioner's attempt to nullify the Act's authorization of pre-1969 fills. The issue does not merit this Court's review.

Finally, even if the issues raised by Petitioner otherwise warranted review, this case would be a poor vehicle for addressing them. Petitioner does not suffer special injury from the fill at issue, and so lacks standing to bring a public interest claim. Petitioner does not suggest that the issue of standing independently warrants this Court's review, but this Court would have to confront it, and resolve it in Petitioners' favor, before it could reach the issues presented. The Petition should be denied.

II. ISSUES PRESENTED FOR REVIEW

1. Does RCW 90.58.270—which consents to and authorizes the impairment of public rights of navigation to fills made prior to December 4, 1969—violate the public trust doctrine?

2. Is there a public nuisance action before this Court, and if not, may a party challenge a fill expressly authorized by RCW 90.58.270 on the ground that it impedes the public's right to navigation?

3. Does Petitioner lack standing to assert a public interest claim when its members do not allege special injury, but instead say only that they would like to use the Three Fingers area for recreation?

III. COUNTERSTATEMENT OF THE CASE

In 1961, the Three Fingers fill was created on the shores of Lake Chelan when Respondent GBI Holding Co. ("GBI") was hired to widen an adjacent highway. (CP 184-85.) In accordance with the practice of the day, the Three Fingers was made by placing fill on private land which would otherwise be covered by the waters of Lake Chelan during the summer. (*Id.*; CP 782-83.) The Three Fingers houses no structures. It has been used

over the decades to provide lateral support to a State highway, as a corn field, as a parking lot, and as a staging area for work on the Holden Mine hazardous waste superfund cleanup. (CP 1502.)

In November 2011, Petitioner sued GBI, demanding removal of the Three Fingers on the grounds that it interfered with the public's ability to navigate the lake, and that the Act's authorization of pre-1969 fills was invalid. (CP 3-11.) Three of Petitioner's members submitted declarations explaining that they would like to use the area where the Three Fingers is located for fishing, kayaking, birdwatching, and swimming. (CP 374-76, 379-81, 384-86.) None alleged that they had used the area before the Three Fingers was created. None owns property abutting the Three Fingers.

Without holding a trial, the Superior Court ordered the Three Fingers to be removed. (CP 456-61; *see also* CP 463-64.) It did so despite evidence of the massive cost that the order would impose, the impact it would have on other pre-1969 fill across the State, the beneficial uses of the Three Fingers fill, and the hazards of removing the Three Fingers (most notably that it would destabilize the adjacent road). (CP 206-09; *see also* CP 466, 472-76, 486, 499-503.)

Division III of the Court of Appeals reversed in a unanimous decision ("Op."). It held that while Petitioner had standing, its claims were barred because the Act validly authorized pre-1969 fills like the Three Fingers.

IV. ARGUMENT WHY REVIEW SHOULD BE DENIED

"A petition for review will be accepted by the Supreme Court only" if the decision under review conflicts with a decision of this Court or the Court of Appeals, involves a significant question of law under the State or federal constitutions, or presents an issue of substantial public interest that should be decided by this Court. RAP 13.4(b). The decision under review does not qualify, as it simply applied settled law to the facts of this case.

A. The Act Bars Petitioner's Claims

In *Wilbour*, the Court interpreted the public trust doctrine to authorize the abatement and removal of established fill areas throughout the State as an obstruction of the public's rights of navigation and its "incidental rights of fishing, boating, swimming, water skiing, and other related recreational purposes." *Wilbour*, 77 Wn.2d at 316. Recognizing the breadth of its decision and its potential consequences, the Court was careful to identify the problem not as fill *per se*, but rather, the lack of control then being exercised by the State over the placement of fill in shoreline areas:

> There undoubtedly are places on the shore of the lake where developments, such as those of the defendants, would be desirable and appropriate. This presents a problem for the interested public authorities and perhaps could be solved by the establishment of harbor lines in certain areas within which fills could be made, together with carefully planned zoning by appropriate authorities to preserve for the people of this state the lake's navigational and recreational possibilities.

Id. at 316 n.13.

The Legislature responded to *Wilbour* by adopting the Act as a comprehensive exercise of control over State shorelines and as a means to protect the values embodied by the public trust doctrine. The people of the State of Washington subsequently considered, by initiative, two different versions of the new law. (CP 852.) One version would have left *Wilbour's* holding largely in place. (*See* Initiative 43 (CP 935-40), Section 4(5).) The other, which the people adopted and became law, provided that:

> Nothing in this section shall constitute authority for requiring or ordering the removal of any . . . fills . . . placed in navigable waters prior to December 4, 1969, *and the consent and authorization of the state of Washington to the impairment of public rights of navigation, and corollary rights incidental thereto, caused by the retention and maintenance of said . . . fills . . . are hereby granted*[.]

(Initiative 43B (CP 940-47), Section 27 (emphasis added.))

The question of whether RCW 90.58.270(1) was intended to overrule *Wilbour* is not at issue.[2] As the Court of Appeals explained, the

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[2] The Court of Appeals referred to the following colloquy in the Senate Journal:

> **Senator Whetzel:** "Another question. Over on page 20 in the amendment to line 6 that changes the date to December 4, 1969, this I assume relates to the *Wilbour vs. Gallagher* case and . . . "
> **Senator Gissberg:** "Yes."
> **Senator Whetzel:** "I think makes legal any fills that took place prior to December 4, 1969."
> **Senator Gissberg:** "Yes."
> . . . .
> **Senator Whetzel:** "Are we changing the result in the *Wilbour* case or any other case by, I guess my question includes both the amendment to the date and the . . . ."
> **Senator Gissberg:** "Yes, I think in the entire section in subsection (3), you are, the state of Washington is giving its consent to the impairment of public rights of navigation as to those structures, improvements, docks, fills or developments which were placed in navigable waters prior to December 4, 1969. And it is a savings clause for those structures that were placed there prior to *Wilbour vs. Gallagher*. If it is not there, then every dock, most of industry in the state that is on the water, of course, is there illegally and subject to mandatory injunction to

provision "indicates a clear intent to eliminate *Wilbour*-type suits for preexisting fills." (Op. at 12). Petitioner does not take issue with the court's conclusion and has not requested further review of that issue.

B. In Upholding the Validity of the Act, the Decision Below Does Not Conflict with Any Other Decisions

Instead, Petitioner asserts that RCW 90.58.270(1) violates the public trust doctrine. The Court of Appeals correctly recognized that Petitioner's argument is foreclosed by this Court's decision in *Caminiti*:

> Reviewing the SMA's savings clause under the *Caminiti* test *requires looking at the legislation as a whole, not a particular application.* Indeed, *Caminiti* did not review the reasonableness of the legislation at issue by examining its application to a specific dock. Instead, the court examined the statute's statewide impact. *Caminiti,* 107 Wn.2d at 672. Because vast areas of water were unaffected, the court concluded the legislature had not substantially given up control over the public's navigational rights. *Id.* ("By enacting RCW 79.90.105, the [l]egislature has given up relatively little right of control over the jus publicum.").

(Op. at 18) (emphasis added.)

Rather than seeking review of the reasonableness of the legislation at issue by examining its statewide impact, Petitioner challenged the application of the legislation to a particular eight-acre fill. Petitioner contends that, by authorizing this fill, the "legislature fully abdicated

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> being removed by anyone that wants to bring the lawsuit. Consequently, that is why the savings clause is there, and the state is giving, or purports to give its consent to the impairment of the navigable rights of the public generally which are impeded by the construction of those docks and facilities that are in the navigable waters."

1 S. JOURNAL, 42d Leg., 1st Ex. Sess. 1411 (Wash. 1971).

control over the *jus publicum*." (Pet. at 13.) The Court of Appeals correctly rejected this myopic view of the public trust doctrine, and guided by *Caminiti*, it explained that "[w]hether or not the Three Fingers fill serves a legitimate public purpose is not particularly relevant to the legality of the SMA's savings clause." (Op. at 18). Rather, "[b]ecause the Three Fingers fill is clearly protected by the SMA's savings clause, CBC's public trust claims can only go forward if the savings clause, *applied as a whole throughout the state*, is invalid," which it is not. (Op. at 18-19)(emphasis added.)

This Court has consistently confirmed that the Act is valid under the public trust doctrine because it embodies comprehensive management and *control* of shorelines. *Caminiti*, 107 Wn.2d at 670 ("[T]he requirements of the 'public trust doctrine' are fully met by the legislatively drawn controls imposed by the Shoreline Management Act of 1971."); *Portage Bay-Roanoke Park Cmty. Council v. Shorelines Hearings Bd.*, 92 Wn.2d 1, 4 (1979) (the Act "is designed to insure the development of these shorelines in a manner which, while allowing for limited reduction of rights of the public in the navigable waters, will promote and enhance the public interest"); *Orion Corp. v. State*, 109 Wn.2d 621, 640 n.11 (1987) ("We have also observed that trust principles are reflected in the SMA's underlying policy[.]"). Courts review legislation under the public

trust doctrine as if they were measuring it against constitutional protections, by presuming it constitutional and placing a heavy burden on the challenger to prove otherwise. *Island County v. State*, 135 Wn.2d 141, 146 (1998). That is especially so with respect to shorelines, because the proper balance between public navigation and private use on shorelines is best decided by the Legislature. *See Harris v. Hylebos Indus., Inc.*, 81 Wn.2d 770, 787 (1973) (in deciding *Wilbour*, this Court "had in mind the right of appropriate governing bodies to authorize fills and commercial uses of lands situated on the shores of navigable bodies of water"). Indeed, "it has long been established that individual States have the authority to define the limits of the lands held in public trust and to recognize private rights in such lands as they see fit." *State v. Longshore*, 141 Wn.2d 414, 427-28 (2000) (quoting *Phillips Petroleum Co. v. Mississippi*, 484 U.S. 469, 475 (1988)). Authorizing existing fill and regulating any further development of these areas was not an abdication of control by the Legislature, it was an exercise of control.

Petitioner's misplaced reliance on *Illinois Cent. R.R. Co. v. Illinois*, 146 U.S. 387 (1892) does not compel a different conclusion. This argument was also raised, and rejected, by the Court in *Caminiti.* The extreme case presented in *Illinois Central* bears no resemblance to the comprehensive statutory controls put in place by the Act:

> We also observe that the legislation enacted here is a far cry from that confronting the United States Supreme Court in the leading "public trust doctrine" case *of Illinois Cent. R.R. v. Illinois*, 146 U.S. 387, 13 S.Ct. 110, 36 L.Ed. 1018 (1892). In that case, the Illinois Legislature . . . had also surrendered all right to control the harbor. There it was held that by so doing the Illinois Legislature had abdicated state sovereignty and dominion over the jus publicum; here, the Washington Legislature has not abdicated state sovereignty or dominion over the jus publicum.

Caminiti, 107 Wn.2d at 675.

Here, by enacting RCW 90.58.270, the Legislature had "given up relatively little right of control over the *jus publicum*, and has not conveyed title to any state-owned tidelands or shorelands" and thus the Legislature complied with the public trust doctrine. *Caminiti*, 107 Wn.2d at 672. The decision not to require the removal of fill based on impairment of navigation, but instead to authorize the impairment and regulate these areas was well within the legislative power. Indeed, this Court and the Courts of Appeal have regularly deferred to legislative judgment on the scope and exercise of the public trust doctrine, rejecting attempts by litigants to use the public trust doctrine to prohibit private docks, *id.* at 675, to nullify an ordinance banning personal watercraft, *Weden v. San Juan County*, 135 Wn.2d 678, 680 (1998), and to override an initiative banning hunting and trapping practices, *Citizens for Responsible Wildlife Mgmt. v. State*, 124 Wn. App. 566, 568 (2004). The Act also furthers the goal of certainty, which this Court has held is crucial in land use decisions.

See Thurston County v. W. Wash. Growth Mgmt. Hearings Bd., 164 Wn.2d 329, 345 (2008) ("Finality is important because '[i]f there were not finality, no owner of land would ever be safe in proceeding with development of his property.'") (citation omitted).

There are no conflicting decisions on these points of law, and this case presents no new or unresolved constitutional questions.

C. The Court Below Correctly Rejected Petitioner's Attempt to Circumvent the Approval of Pre-1969 Fills by Claiming a Nuisance

In an effort to end-run the express terms and clear intent of the Act, Petitioner seeks to rely on the second half of the section authorizing pre-1969 fills. In Petitioner's view, any interference with navigation is a public nuisance and is therefore subject to the proviso that the Act's authorization does not apply to fills "which are in trespass or in violation of state statutes." RCW 90.58.270(1). That argument confounds the Act's plain language and ignores the Legislature's express intent to authorize lawful historic development against *Wilbour*-type claims.

Petitioner's argument fails at the outset because Petitioner did not plead a nuisance claim and in fact expressly disavowed any nuisance claims.[3] The Court of Appeals so noted (Op. at 9.) and recognized that it

[3] In its response brief on appeal, CBC stated: "At the outset, while RCW 7.48.210 allows a private person to maintain a civil action for a public nuisance, CBC did not bring this case as a public nuisance action." (Response Br. at 10.) Although the issue was not reached by the lower court, CBC's trespass claims are unsustainable due to the lack of a possessory interest in the subject property, the Three Fingers fill. *See Bradley v. Am. Smelting & Refining Co.*, 104 Wn.2d 677, 684-85 (1985)(a trespass claim requires an intentional invasion of the plaintiff's interest in the exclusive possession of property).

need not address this issue at all (*id.* at 14). Similarly, this Court need not address this issue, and that alone is sufficient reason to deny review.

On the merits, Petitioner's claim is not defensible and does not warrant review. Petitioner observes (Pet. at 17-18) that, under RCW 7.48.120, impairing the public's ability to navigate waters may constitute a nuisance. But the nuisance statutes separately provide that "[n]othing which is done or maintained under the express authority of a statute[] can be deemed a nuisance." RCW 7.48.160. The Act's authorization of pre-1969 fills is that express authority. By passing the authorization, the Legislature precluded any argument that pre-1969 fills could be nuisances merely because they impair navigation. Were it otherwise, the authorization would be meaningless; every pre-1969 fill impairs navigation and so, under Petitioner's theory, is a public nuisance that violates a statute and is not authorized. That would violate the basic precept that statutes should be interpreted so that no part is meaningless. *City of Seattle v. Fuller*, 177 Wn.2d 263, 274 (2013).

Petitioner nevertheless contends that the decision below, by relying on the rule that actions expressly authorized cannot be nuisances, conflicts with *Grundy v. Thurston County*, 155 Wn.2d 1 (2005). The Court in *Grundy* held that:

> When a nuisance actually exists, it is not excused by the fact that it arises from a business or erection which is of itself lawful; and, even though an act or a structure was lawful when made or erected, if for any reason it later becomes or causes a nuisance, the legitimate character of

its origin does not justify its continuance as a nuisance.

Id. at 7 n.5. The decision below does not conflict with that holding. If the Three Fingers were put to a new use that is a nuisance—if, for example, it started emitting noxious fumes—then that could form the basis of a nuisance suit. But the fact that the Three Fingers impairs navigation—the only fact on which Petitioner's nuisance argument is based—cannot be the basis for a nuisance claim. The Act's express authorization for that impairment precludes the argument. The decision below does not conflict with *Grundy*, or any other decision of this Court or the Court of Appeals. It represents a straightforward application of long-settled law which need not be disturbed.

D. Petitioner Lacks Standing in Any Event

Even if the issues raised by Petitioner otherwise merited review, this case would not be the proper vehicle to address them because Petitioner lacks standing to bring them. The court below held to the contrary, reasoning that special injury is not required for an individual to bring a public interest claim. That conclusion is a necessary premise for the issues as stated by Petitioner, and therefore a conclusion that Petitioner lacks standing would preclude this Court from addressing the issues Petitioner raises.

As an association, Petitioner has standing on behalf of its members only if one or more of its members have standing. *SAVE v. City of Bothell*, 89 Wn.2d 862, 866-67 (1978). The public trust doctrine does not generally give rise to an individual cause of action because individual plaintiffs

"[do] not have a special interest either in . . . lake[s] or road[s]. Their interest in each is the same as that of the public and whatever loss they suffer in being deprived of access to the lake is the same kind of loss suffered by the public, differing only in degree." *Olsen v. Jacobs*, 193 Wash. 506, 513 (1938). To have standing under the public trust doctrine based on an alleged public nuisance, Petitioner's members must show "special injury." *See* RCW 7.48.210; *State ex rel. Vandervort v. Grant*, 156 Wash. 96, 101 (1930). When determining the existence of "special injury," courts generally look for the existence of some economic injury, such as damage to property or business interests. *See, e.g.*, *Anderson v. Nichols*, 152 Wash. 315, 322 (1929) (where structure "affects the value of the surrounding property in any material degree, the owners of the property suffering the loss have the right to insist upon its removal"); *Morris v. Graham*, 16 Wash. 343, 346 (1897) (finding special injury where an obstruction prevented plaintiff from engaging in commercial fishing operations); *Sholin v. Skamania Boom Co.*, 56 Wash. 303, 307 (1909) (finding a special injury where an obstruction to navigation resulted in economic loss).

Indeed, in finding standing, the *Wilbour* Court cited *Kemp v. Putnam*, 47 Wn.2d 530 (1955), *overruled on other grounds by SAVE v. City of Bothell*, 89 Wn.2d 862 (1978), involving lake access, which held that standing based on a public nuisance requires "special damages." *Wilbour*, 77 Wn.2d at 317-18; *Kemp*, 47 Wn.2d at 535-36. Under RCW 7.48.210, "[a] private person may maintain a civil action for a public

nuisance . . . [only] if it is specially injurious to himself or herself but not otherwise." Accordingly, the *Wilbour* Court determined that "[t]he plaintiffs have unquestionably sustained *special damages* as a result of defendants' wrongful activities, and of a character that sustains their right to maintain this action." *Wilbour*, 77 Wn.2d at 317-18 (emphasis added). Thus, in evaluating an individual plaintiff's standing in a navigational public trust action, the *Wilbour* Court applied the special injury requirement found in public nuisance actions involving lakes and navigational waterways.

Likewise, in *Lampa v. Graham*, 179 Wash. 184 (1934), the Court rejected a public nuisance claim involving a violation of a navigational right in public waters because the plaintiff could not make a showing of special injuries beyond a mere navigational interest; the plaintiff "only . . . [used] the channel of the river as a highway, as it is or as it may be used by the general public." *Id.* at 185-88; *see also Olsen*, 193 Wash. at 510-13 (plaintiffs lacked standing in public nuisance case involving lake access since "it must appear that the complaining parties suffered special damage different in kind and nor merely in degree from that sustained by the general public"); *Hulet v. Wishkah Boom Co.*, 54 Wash. 510, 515 (1909) ("[T]he owner of a wharf or other improvement on a stream *does* suffer an injury different in kind from that suffered by the public, when the value of his wharf is destroyed by the closing of the stream.") (emphasis added).

As in *Kemp* and *Lampa*, Petitioner's members have not shown any interest in the Three Fingers beyond a common interest in fishing, boating,

swimming, and similar activities. (CP 374-76, 379-81, 384-86.) None have alleged any kind of economic injury or damage to property or business interests, nor are any of them abutting property owners like the plaintiff in *Wilbour*. Indeed, none of Petitioner's members lived in Chelan before the fill was in place, and none lives in proximity to the Three Fingers. The only "injury" offered is an unfulfilled desire to use a part of Lake Chelan that has not been used for decades. That is not enough.

Petitioner thus lacks standing. As a result, even if the issues in the petition warranted review, this Court should deny the Petition because it would be unable to reach those issues.

V. CONCLUSION

Petitioner attempted to use a novel legal theory to require removal of fill that had sat undisturbed for more than fifty years and which was specifically authorized by the Act. The court below properly rejected its attempt, and nothing in its decision deserves this Court's review.

DATED: August 12, 2016

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The undersigned certifies under penalty of perjury under the laws of the State of Washington that I caused this document to be served on the following individuals in the manner listed below:

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Signed this 12th day of August, 2016, at Seattle, Washington

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Attachments: Answer to Petition for Review.pdf

Dear Clerk of the Court,

Attached please find the Answer to Petition for Review to be filed in this case on behalf of Respondent GBI Holding Co.:

Chelan Basin Conservatory, Petitioner v. GBI Holding Co., State of Washington, and City of Chelan, Respondents
Supreme Court No. 93381-2
Court of Appeals No. 331962-III

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