

Feb 15, 2017, 4:30 pm

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NO. 93381-2

COURT OF APPEALS NO. 33196-2-III

SUPREME COURT OF THE STATE OF WASHINGTON

CHELAN BASIN CONSERVANCY,

Petitioner,

v.

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

Respondents,

ANSWER TO AMICUS CURIAE BRIEF OF PACIFIC LEGAL
FOUNDATION IN SUPPORT OF RESPONDENTS

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 ORIGINAL

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I. INTRODUCTION

The Pacific Legal Foundation asks the Court to find that the public's "paramount" and "inalienable" right to navigation and recreation over shorelands and tidelands has been subsumed by the Shoreline Management Act. But as recent decisions from this Court have indicated, the public trust doctrine has not been replaced by the SMA. Public navigation and recreation interests cannot be abdicated by the state and the Court's authority to review legislation that impairs these interests is enduring. See *Orion Corp. v. State*, 109 Wn.2d 621 (1987); *Weden v. San Juan County*, 135 Wn.2d 678 (1998). PLF largely ignores these decisions in its brief, as well as the two-part test for evaluating legislation under the public trust doctrine from *Caminiti v. Boyles*, 107 Wn.2d 662 (1987). PLF does not acknowledge that both *Orion* and *Weden* apply *Caminiti's* framework to review legislation that impairs the public trust.

PLF also inaccurately characterizes CBC's position as seeking an "expansion" of the public trust doctrine that, if adopted, would "outright prohibit government approved and historically established shorefront development" and pose a threat to fills in other parts of the state. Br. Amicus Curiae of PLF 16. CBC's case is based on the public trust doctrine as articulated and applied by this Court, no "expansion" of the public trust doctrine is required. CBC is claiming that the Three Fingers

fill on Lake Chelan, consisting of dirt and rock that has been an unused obstacle to navigation and related activities since the 1960s, violates the public trust doctrine. Development on the Seattle waterfront and dikes in Skagit County erected for agricultural purposes are not at all comparable to this case.

II. ARGUMENT

A. PLF Ignores *Caminiti v. Boyles* and its Progeny

The Pacific Legal Foundation contends that the “rigorous permitting procedure for future shoreline development” under the Shoreline Management has abrogated the public trust doctrine. Br. Amicus Curiae of PLF 12-16. According to PLF, the legislature, through the SMA, has already ensured “the public interest, including rights of navigation, are appropriately balanced and considered in future development.” *Id.* at 16.

But this case does not concern “future development.” It asks the Court to apply the now well-established *Caminiti* two-step test to a specific fill on the shores of Lake Chelan that has sat unused for sixty years. *See Caminiti v. Boyle*, 107 Wn.2d 662 (1987). PLF’s argument that a court is precluded from reviewing legislation that impairs the public’s “paramount” right to navigation is plainly wrong. *See Caminiti*, 107 Wn.2d at 669 (state “can no more convey or give away the jus publicum interest than it can ‘abdicate its police powers in the administration of government and the preservation of the peace.’”) (*quoting*

Illinois Cent. R.R. v. Illinois, 146 U.S. 387, 453 (1892)). Even where the state transfers title to publicly owned lands, this Court has recognized that “[t]he Legislature has never had the authority...to sell or otherwise abdicate sovereignty or dominion over such tidelands and shorelands.” *Orion Corp. v. State*, 109 Wn.2d 621, 639 (1987) (internal citation omitted). The public trust doctrine is “inalienable” and the “only right which the state has ever undertaken to maintain in trust for the whole people.” *Caminiti* at 667; *State v. Surtevant*, 76 Wash. 158, 165 (1913).

Nearly 30 years after the legislature enacted the SMA, this Court confirmed that the courts retain a continuing duty to ensure the vitality of the public trust doctrine. *Weden v. San Juan County*, 135 Wn.2d 678, 698 (1998) clarified that legislation impairing the public right to navigation and recreation is subject to “heightened” scrutiny. This review is akin to “measuring that legislation against constitutional protections.” *Id.* at 698 (quoting Ralph W. Johnson et al., *The Public Trust Doctrine and Coastal Zone Management in Washington State*, 67 WASH. L. REV. 521, 525-27 (1992))). PLF’s argument is contrary to the review principles established in *Weden*, indeed PLF does not even acknowledge them.

Contrary to PLF’s urging, the SMA did not simply replace the public trust doctrine. *Caminiti* stated that the requirements of the public trust doctrine are met by the “controls imposed by the Shoreline Management Act,” but the same Court, ten months, later clarified that this does not extinguish the public trust doctrine. *Orion Corp. v. State*, 109 Wn.2d 621 (1987) determined that dredging and filling a shoreline on

Padilla Bay for residential construction was inconsistent with the public trust doctrine, regardless of the proposal's compliance with the SMA and other pertinent legislation.

11 years after *Orion*, the Court in *Weden* again reviewed legislation under the public trust doctrine. The Court there evaluated a ban on personal watercraft under several statutes, including the SMA, as well as the public trust doctrine. *Weden's* review of the ban under public trust doctrine was separate and distinct from review under the SMA. See 135 Wn.2d at 695-700. The SMA has not *replaced* the public trust doctrine.

While PLF lauds the "regulatory processes" that were implemented through the SMA, it fails to acknowledge that these processes apply to shoreline uses *prospectively* and that this case does not concern prospective shoreline uses. Indeed, the Three Fingers was never subject to regulatory review because RCW 90.58.270(1) purports to confer blanket authorization to all pre-December 4, 1969 fills. There is simply no authority to support the proposition advanced by PLF that the Three Fingers's impairment to public trust rights should be balanced against an overall increase in regulatory control elsewhere. Indeed, where other states have confronted legislation that cedes navigational rights under the public trust doctrine without providing a mechanism for "particularized assessment" of the land that is relinquished, including "conditions that may be necessary to any transfer to assure that public trust interests remain

protected,” it has been invalidated. *Ariz. Ctr. for Law in Pub. Interest v. Hassell*, 172 Ariz. 356, 837 P.2d 158, 173 (1991).

B. CBC’s Challenge to the SMA under the Public Trust Doctrine is Site-Specific

PLF’s other contention relies on the false predicate that CBC is challenging the general application of RCW 90.58.270(1). CBC is challenging how this statute applies to 100,000 cubic yards of dirt and rocks that have been blighting a shoreline, unused, for nearly sixty years. The fully developed and productively used waterfront and historic districts of south downtown Seattle and farming dikes in Skagit County, discussed extensively by PLF, are not comparable to this case. *See Br. Amicus Curiae of PLF at 16-20.*¹

While PLF sounds the alarm bells of a judicial onslaught on pre-*Wilbour* fills (just as Respondents State and GBI have done), PLF has not

¹ PLF also cites to *Harris v. Hylebos*, 81 Wn.2d 770 (1973). *Br. Amicus Curiae of PLF at 14.* *Harris* concerned whether the owner of property adjacent to tidelands adjoining the Hylebos Waterway in Tacoma was entitled to an easement over the tidelands to access the waterway. The Court did not reference the public trust doctrine by name but recognized that the Hylebos Waterway was used for navigational purposes by ocean-going vessels and that certain tidelands in city harbors have been regarded by the legislature and Washington courts to be “most suitable for reclamation and for dedication to the purposes of commerce and industry.” *Id.* at 785-86. *Harris* specifically distinguished tidelands along the Hylebos Waterway, an “area dedicated to heavy industry,” from the shorelands surrounding Lake Chelan, “a recreational area.” *Id.* at 786. There was “no assertion” that the tidelands in *Harris* “are accessible to or are used by the public.” *Id.* at 772. CBC, by contrast, has presented ample evidence showing that the area obstructed by the Three Fingers is used by CBC’s members and the general public. CP 379-88.

identified a single fill anywhere in Washington waters that is at all similar to the obstructive Three Fingers. The failure of PLF (and Respondents State and GBI) to identify even a single comparable circumstance suggests that there is not one. The only fill that is before the Court is one that has been put to no use, promoted no public interests, and interferes with navigation and related corollary public trust doctrine rights.

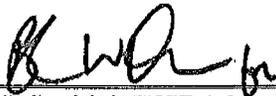
Superior court judge Leslie Allan ordered the fill removed after extensive briefing of the issues by the parties. Between 2012 and 2015, she issued six summary judgment orders, letter decisions, and supplemental orders. The record was fully developed. Based on the evidence put forth by all of the parties involved, the trial court applied *Caminiti's* two-step framework to the Three Fingers and concluded that it "does not preserve the natural character of the shoreline, does not protect the resources or ecology of the shoreline and does not enhance or increase public access to the shoreline or to the navigable waters of Lake Chelan." CP 460. Instead, "it is undisputed that public access to the lake is impaired and the existence of the fill wholly obliterates the ability of the public to utilize that portion of the lake for navigation and recreation." *Id.* These findings were affirmed twice in 2014 and again in 2015. CP 1569, 1615, 2550.

III. CONCLUSION

The Court should reject PLF's argument that the SMA has replaced the public's paramount and inalienable right to navigation and related uses of shorelands and tidelands. The Court should also reject PLF's characterization of the case as an "expansion" of the public trust doctrine. CBC is claiming that an unused obstacle to navigating and recreating along the southeast shoreline of Lake Shoreline violates the public trust doctrine. The Court should affirm the trial court's order finding that the Three Fingers violates the public trust doctrine and require the fill to be removed.

DATED this 15th day of February, 2017.

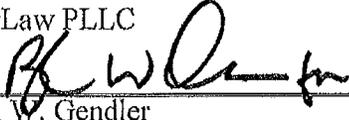
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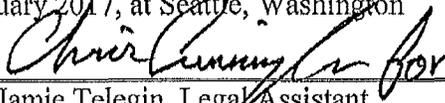
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Good afternoon,

Attached for filing is the Answer to Amicus Curiae Brief of Pacific Legal Foundation in Support of Respondents. The case and attorney information is below. Thank you.

Chelan Basin Conservatory v. GBI Holding Co., et al.

Case No. 93381-2

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