

FILED

JUL 22 2016

WASHINGTON STATE
SUPREME COURT

FILED

Jul 14, 2016
Court of Appeals

Division III
State of Washington

SC# 93381-2

NO. 331962

(Consolidated with No. 332390 and 332381)

**IN THE 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.

PETITION FOR REVIEW

David S. Mann, WSBA #21068
Michael W. Gendler, WSBA #8429
GENDLER & MANN, LLP
615 Second Ave., Suite 560
Seattle, WA 98104
(206) 621-8868

Russel J. Speidel, WSBA # 12838
David J. Bentsen, WSBA # 42107
SPEIDEL BENTSEN LLP
7 N. Wenatchee Avenue, Suite 600
Wenatchee, WA 98807
(509) 662-1211

Attorneys for Chelan Basin Conservancy

TABLE OF CONTENTS

	<u>Page</u>
I. INTRODUCTION.....	1
II. IDENTITY OF PETITIONER.....	4
III. CITATION TO COURT OF APPEALS DECISION.....	4
IV. ISSUES PRESENTED FOR REVIEW.....	4
V. STATEMENT OF THE CASE.....	5
A. Lake Chelan and the Three Fingers fill.	5
B. Proceedings Before the Trial Court.....	7
C. The Court of Appeals’ Decision.....	10
VI. ARGUMENT.....	11
A. The Court of Appeals’ Conclusion that RCW 90.58.270(1) Does Not Violate the Public Trust Doctrine Conflicts with Decisions of this Court and Raises Constitutional Issues.....	11
1. The Public Trust Doctrine protects the paramount public right of navigation and recreation over navigable waters.....	11
2. The Court of Appeals erred in failing to apply the <i>Caminiti</i> test to RCW 90.58.270(1).	13
B. The Court of Appeals’ Decision Declaring that all Public Nuisances in Place Prior to December 1969 Were Protected Conflicts with a Decision of this Court.	16

1.	RCW 90.58.270(1) does not protect fills in violation of state statutes.	17
2.	The Three Fingers fill is a public nuisance and therefore violates state statutes.....	17
VII.	CONCLUSION	20

TABLE OF AUTHORITIES

	<u>Page</u>
 <u>Cases</u>	
<i>Caminiti v. Boyle</i> , 107 Wn.2d 662, 732 P.2d 989 (1987).....	12, 13, 15, 16
<i>Chelan Basin Conservancy v. GBI Holding Co. et al.</i> , 33196-2-III, ___ P.3d ___ 2016 WL 3361470 (Wash. Ct. App. June 14, 2016) 4, 10, 11, 15	4, 10, 11, 15
<i>Grundy v. Thurston Cy.</i> , 155 Wn.2d 1 117 P.3d 1089 (2005).....	19
<i>Illinois Cent. R.R. v. Illinois</i> , 146 U.S. 387(1892).....	12
<i>Ralph v. Dep't of Natural Res.</i> , 182 Wn.2d 242, 343 P.3d 342 (2014)....	29
<i>Washington State Geoduck Harvest Ass'n v. Washington</i> , 124 Wn.App 441, 101 P.3d 891 (2004).....	13, 15
<i>Weden v. San Juan County</i> , 135 Wn.2d 678, 958 P.2d 273 (1998)....	13, 15
<i>Wilbour v. Gallagher</i> , 77 Wn.2d 306, 462 P.2d 232 (1969).....	2, 3, 8, 13,
 <u>Washington State Constitution</u>	
Wa. Const. Art. 7, §1	12
 <u>Statutes</u>	
RCW 7.48.120	18
RCW 7.48.140(3)	18
RCW 7.48.150	8, 18
RCW 7.48.160	8
RCW 90.58.270(1).....	<i>passim</i>
RCW 9.66.010	18

Court Rules

RAP 13.4(b)(1), (3)..... 11

Other Authorities

1 Senate Journal, 42d Leg., 1st Ex. Sess., at 1411 (Wash. 1971)..... 17

Ralph W. Johnson et al., *The Public Trust Doctrine and Coastal Zone
Management in Washington State*, 67 WASH L. REV. 521, 525-27
(1992)..... 15

I. INTRODUCTION

In 1961 GBI Holding Co. (“GBI”) dumped nearly 100,000 cubic yards of fill material into the waters along the southeast shoreline of Lake Chelan forming the “Three Fingers fill” -- an area almost eight acres in size.¹ Over the years, the Three Fingers fill has remained essentially unused and has provided no significant benefit to anyone. Instead the fill has continually and significantly interfered with the public’s rights of navigation and recreation on the waters of Lake Chelan.

After 50 years of inaction, in 2011 GBI filed an application with the City of Chelan to subdivide the Three Fingers. After the City Hearing Examiner confirmed that a decision on the legality of the Three Fingers would need to be made by the courts, the Chelan Basin Conservancy brought this action in the Chelan County Superior Court seeking abatement of the Three Finger fill for interfering with the public’s right of navigation as guaranteed by the Public Trust Doctrine.

After multiple motions and cross-motions, on February 27, 2015, The Honorable Leslie A. Allan, Judge, Chelan County Superior Court, finding no issues of material fact, granted CBC’s motion for summary judgment concluding that the Three Fingers fill was a public nuisance,

¹ CP 1392-93.

violated the public's right of navigation, and thus violated the Public Trust Doctrine. The Superior Court subsequently ordered abatement.

On June 14, 2016, the Court of Appeals, Division III, reversed. The Court of Appeals concluded that the Three Finger fill was protected against actions for abatement by RCW 90.58.270(1) – a “savings clause” within the 1971 Shoreline Management Act, Ch. 90.58 RCW (“SMA”). The Court of Appeals’ ruling raises two significant issues of first impression. The first is whether RCW 90.58.270(1) is an invalid attempt to nullify the Public Trust Doctrine with respect to fills that predated 1969; and second, if valid, did the Court of Appeals err in concluding that even statutory public nuisances are protected by the savings clause in RCW 90.58.270(1)?

In *Wilbour v. Gallagher*, 77 Wn.2d 306, 462 P.2d 232 (1969), this Court recognized that submerged lands, including those submerged only during dam controlled high water on Lake Chelan, were subject to the public's rights of fishing, boating, swimming, water skiing and other recreational uses. *Id.* at 316. Because the *Wilbour* fills obstructed those public rights, they were required to be removed, concluding: “[t]he court cannot authorize or approve an obstruction to navigation.” *Id.*

In partial response to *Wilbour*, and the Court's concern over the lack of input from the City of Chelan and State of Washington, *id* at 316, n. 13, the State adopted, after a referendum vote on two ballot titles, the SMA. This case turns on RCW 90.58.270(1), the clause within the SMA that purports to protect structures and fills that were placed in navigable waters prior to December 1969 (the date of the *Wilbour* decision). The savings clause in RCW 90.58.270(1) provides:

Nothing in this statute shall constitute authority for requiring or ordering the removal of any structures, improvements, docks, fills, or developments 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 structures, improvements, docks, fills or developments are hereby granted: PROVIDED, That the consent herein given shall not relate to any structures, improvements, docks, fills, or developments placed on tidelands, shorelands, or beds underlying said waters which are in trespass or in violation of state statutes.

RCW 90.58.270(1) (emphasis added).

This Court should reverse the Court of Appeals and declare that RCW 90.58.270(1) violates the Public Trust Doctrine, and is invalid. In the alternative, this Court should reverse the Court of Appeals' conclusion that all placed prior to December 1969 can never be public nuisances, and

therefore, can never be a violation of state statutes and outside the protection of the savings clause.

II. IDENTITY OF PETITIONER

The Petitioner is the Chelan Basin Conservancy (“CBC”).

III. CITATION TO COURT OF APPEALS DECISION

CBC seeks review of the published decision in *Chelan Basin Conservancy v. GBI Holding Co. et al.*, 33196-2-III, ___ P.3d ___ 2016 WL 3361470 (Wash. Ct. App. June 14, 2016) (“Decision”). A copy of the Decision is attached.

IV. ISSUES PRESENTED FOR REVIEW

1. Can the Legislature abdicate complete control over the “paramount” and “inalienable” public rights of navigation?
2. The Superior Court concluded that the Three Fingers fill was a public nuisance and therefore in violation of state statutes and excluded from the savings clause in RCW 90.58.270(1). Did the Court of Appeals err in its application of RCW 7.48.160 and RCW 90.58.270(1) by concluding that because RCW 90.58.270(1) authorizes historic fills, the Three Fingers fill cannot be a public nuisance?

V. STATEMENT OF THE CASE

A. Lake Chelan and the Three Fingers fill.

This Three Fingers is fill located on the southeastern shoreline of Lake Chelan within the city of Chelan, immediately west, and uplake, of the fill described in *Wilbour*, 77 Wn.2d 306.² Prior to 1927, the natural water level of Lake Chelan was 1079 feet above sea level. *Id.* at 307.

In 1926, the Chelan Electric Company constructed a new dam at the southeasterly end of Lake Chelan. The dam license permitted the annual raising of the level of the lake to 1,100 feet above sea level during summer months. On May 2, 1927, the City vacated those streets abutting and in the vicinity of the lake which would be inundated by the rising lake level. *Id.* at 307. On that same day the Chelan Electric Company and the Lake Chelan Box Factory executed a deed granting, “in perpetuity, the right of access, for itself and the public” to reach Lake Chelan over the vacated streets “at all stages of water.” *Id.*, at 307-08.³

In 1961, GBI purchased the land identified as Block “9” on plat maps.⁴ Block 9 is located generally to the north of, and includes the

² Lake Chelan is a navigable body of water located in a glacial gorge in Chelan County. It is about 55 miles long and 1 to 2 miles wide. *Wilbour.*, 77 Wn.2d at 307.

³ CP 392-94.

⁴ CP 184, ¶ 3.

platted Boulevard Avenue.⁵ Boulevard Avenue is one of the vacated streets enumerated in and subject to the rights conveyed in the 1927 deed.⁶ Because Block 9 was almost entirely below the 1,100-foot elevation, GBI's property was inundated by the lake's waters every year after the dam became operational in approximately 1930.⁷

Between 1961 and 1962, while acting as a State contractor for the construction of SR 97, GBI dumped fill into Lake Chelan raising the elevation of its land at Block 9 from 1,079 feet to 1,102 feet creating the Three Fingers fill. GBI used fill material it excavated in the course of SR 97 construction and an adjacent hillside development.⁸ The Three Fingers fill cover a portion of the vacated Boulevard Avenue.⁹ By raising its land above the 1,100-foot level, the Three Fingers fill, and original Block 9, remain above the level of the lake year-around.

GBI has made no significant use of, or improvements to, the Three Fingers fill during the five decades that the fill has been in place. In 2010 GBI filed an application with the City of Chelan for a planned unit development on the Three Fingers. CBC and other members of the public

⁵ CP 395-96.

⁶ CP 392-93.

⁷ CP 395-96; CP 171.

⁸ CP 184-85

⁹

objected and instead requested removal of the Three Fingers. After receipt of the public comments, GBI withdrew the application.¹⁰ In 2011 GBI filed an application to subdivide the Three Fingers into six lots through the short plat process.¹¹ The City's Planning Director approved the short plat based on conditions including the requirement to provide public access to Lake Chelan over portions of the Three Fingers and the designation of two of the proposed lots as a public park.¹²

CBC and GBI both appealed the Short Plat decision to the City's Hearing Examiner.¹³ After preliminary briefing the Hearing Examiner concluded that he did not have jurisdiction to order removal of the Three Fingers fill.¹⁴ CBC thereafter withdrew its administrative appeal and, having no adequate remedy at law to restore the public rights of navigation, filed this action.¹⁵

B. Proceedings Before the Trial Court

CBC filed its Complaint for Removal of Filled Lands in November 2011.¹⁶ The Complaint alleged that that the Three Fingers violated the

¹⁰ CP 269-270, ¶¶ 2-3; CP 272, ¶ 10.

¹¹ *Id.*

¹² CP 298 – 301

¹³ CP 304-306; CP 307.

¹⁴ CP 317-322.

¹⁵ CP 323.

¹⁶ CP 1-17

public right of navigation as described in *Wilbour*; and violated the public's rights to use and enjoy the water of Lake Chelan protected by the public trust doctrine.¹⁷

GBI moved for summary judgment to dismiss CBC's complaint claiming CBC lacked standing and that the Three Fingers fill was protected against actions for abatement by RCW 90.58.270(1).¹⁸ The City cross-moved for summary judgment arguing that, as interpreted by GBI, RCW 90.58.270(1) violated the public trust doctrine.¹⁹ The Superior Court denied GBI's motion and granted the City's motion, concluding that RCW 90.58.270(1) violated the public trust doctrine and was unconstitutional. The Superior Court ordered removal of the Three Fingers.²⁰

On motions for reconsideration from the State and GBI, the Superior Court vacated summary judgment finding that issues of material fact remained concerning whether RCW 90.58.270(1) was applicable to

¹⁷ CP 1-11.

¹⁸ CP 106.

¹⁹ CP 236-38.

²⁰ CP 827-37.

the Three Fingers fill or whether the fill was “in trespass or violation of state statute.”²¹

CBC then sought summary judgment arguing: (1) that because the Three Fingers fill was “in violation of state statutes,” RCW 90.58.270(1) did not apply; and (2) without the protection of RCW 90.58.270(1) the Three Fingers fill violated the public trust doctrine.²² The Superior Court granted CBC’s motion on October 3, 2014, finding that the Three Fingers fill was a public nuisance and in violation of state nuisance statutes and consequently not protected by RCW 90.58.270(1). The Superior Court concluded that the fill significantly interfered with the public right of navigation.²³ CBC then moved for summary judgment seeking abatement of the Three Fingers fill.²⁴ On February 27, 2015, the Superior Court granted CBC’s motion and concluded that because the fill violated the Public Trust Doctrine, the appropriate remedy was abatement.²⁵

²¹ CP 1267-73. The trial court retained its original decision denying GBI’s motion for summary judgment and confirming that CBC had standing to pursue its claims. *Id.*

²² CP 1354-76.

²³ CP 1566-70; CP 1613-22.

²⁴ CP 1656-63.

²⁵ CP 2547-51.

C. The Court of Appeals' Decision.

The State and GBI appealed. The City cross-appealed seeking review of the Superior Court's order granting reconsideration and denying the City's cross-motion for summary judgment.

The Court of Appeals reversed the Superior Court's orders on summary judgment. The Court of Appeals held first that in enacting the savings clause in RCW 90.58.270(1) the Legislature intended to forever foreclose claims that fills existing prior to December 4, 1969, could be impediments to navigation. And therefore, because the Three Fingers were in place prior to December 4, 1969, they were protected against claims that they were a public nuisance and a violation of state statute.²⁶

After concluding that the Three Fingers fill was protected by RCW 90.58.270(1), the Court of Appeals next concluded that there was insufficient evidence to demonstrate that the savings clause violated the Public Trust Doctrine.²⁷

CBC petitions for review of the Court of Appeals' Decision

²⁶ Decision at 10-16.

²⁷ Decision at 16-19.

VI. ARGUMENT

Before the Court of Appeals' Decision, no court has analyzed whether the savings clause in RCW 90.58.270(1) can survive heightened scrutiny under the public trust doctrine. Nor has any court addressed whether a pre-December 1969 fill that rises to the level of being a public nuisance is a "violation of state statutes" and therefore falls outside the savings clause in RCW 90.58.270(1). The Decision raises constitutional issues and conflicts with decisions of this Court confirming the public's paramount interest in the right to navigation. RAP 13.4(b)(1), (3).

A. The Court of Appeals' Conclusion that RCW 90.58.270(1) Does Not Violate the Public Trust Doctrine Conflicts with Decisions of this Court and Raises Constitutional Issues.

1. The Public Trust Doctrine protects the paramount public right of navigation and recreation over navigable waters.

Courts review legislation that may impair the public interest in navigation with a "heightened degree of judicial scrutiny" due to the "universally recognized need to protect public access to and use of such unique resources as navigable waters" *Weden v. San Juan County*, 135 Wn.2d 678, 698, 958 P.2d 273 (1998) 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).

The Public Trust Doctrine originates in the State constitution: “the state of Washington asserts its ownership to the beds and shores of all navigable waters in the state ... up to and including the line of ordinary high water within the banks of all navigable rivers and lakes ...” Const. art.17, §1. *Caminiti v. Boyle*, 107 Wn.2d 662, 666-67, 732 P.2d 989 (1987).

Under the Public Trust Doctrine, the State maintains the power to sell ownership in shorelands, but only subject to the “paramount public right of navigation and the fishery.” *Id.* at 667. The State’s ownership interest is known as the *jus privatum* interest. *Id.* at 668. The interest of the public in using shorelines for navigation and recreational purposes, is known as the *jus publicum*. *Id.* at 667. While the State can sell its *jus privatum* interest to shorelands, “[t]he state can no more convey or give away this *jus publicum* interest than it can ‘abdicate its police powers in the administration of government and the preservation of the peace.’” *Caminiti*, 107 Wn.2d at 669, quoting *Illinois Cent. R.R. v. Illinois*, 146 U.S. 387, 453 (1892).

Based on *Illinois*, the *Caminiti* Court adopted a test for determining whether legislation violates the Public Trust Doctrine:

we must inquire as to: (1) whether the State, by the questioned legislation, has given up its right of control over the *jus publicum* and (2) if so, whether by doing so the State (a) has promoted the interests of the public in the *jus publicum*, or (b) has not substantially impaired it.

Caminiti, 107 Wn.2d at 670.²⁸

2. **The Court of Appeals erred in failing to apply the *Caminiti* test to RCW 90.58.270(1).**
 - a) **The legislature fully abdicated control over the *jus publicum*.**

The first *Caminiti* test asks whether the whether the State has given up its right of control over the *jus publicum*. In RCW 90.58.270(1) the State gave up control over the *jus publicum* impaired by fills statewide based solely on the date of placement of the fills, with no consideration of the magnitude or severity of the fills by purporting to provide “consent and authorization” for the “impairment of public rights of navigation, and corollary rights incidental thereto... .” The State agreed before the Court of Appeals that the State had given up control over the *jus publicum*. Opening Brief of State at 25-28. Indeed, the State argued that RCW

²⁸ The *Caminiti* test has been applied multiple times to evaluate whether legislation violates the Public Trust Doctrine *See, e.g., Weden*, 135 Wn.2d 699 (review of county ordinance banning personal watercraft); *Washington State Geoduck Harvest Ass'n v. Washington*, 124 Wn. App 441, 452, 101 P.3d 891 (2004) (review of statute authorizing state to regulate commercial geoduck harvesting).

90.58.270(1) “unambiguously responded to, and created a statutory barrier to, the claim in *Wilbour v. Gallagher*.” *Id.*

The intent to abdicate control further borne out by the legislative history cited by the Court of Appeals.²⁹ As Senator Gissberg made clear in the referenced colloquy:

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 these docks and facilities that are in navigable waters.

1 Senate Journal, 42d Leg., 1st Ex. Sess., at 1411 (Wash. 1971).

Following *Caminiti*, the Superior Court recognized the irreconcilable conflict between inalienable public trust rights and legislation that purported to extinguish them wholesale:

The inescapable conclusion that must be reached is the first part of the *Caminiti* test is met: that is, by granting a blanket authorization to any fills or other improvements existing as of December 4, 1969, the state has surrendered its right of control over the *jus publicum*. RCW 90.58.270(1) makes no effort of any kind at qualitative analysis as to the effect these fills and other improvements might have on the public’s rights in the state’s navigable waters; rather, the statute simply accepts impairment of the public’s right, no matter the magnitude. The legislature simply waved the white flag and conveyed away the public’s interest in contravention of the public rights doctrine.³⁰

²⁹ Decision at 12-13.

³⁰ CP 836 (emphasis added).

Because RCW 90.58.270(1) authorizes *all* fills in existence on December 4, 1969, regardless of their interference with navigation, the state abdicated control over the retention and maintenance of these fills.³¹

- b) **RCW 90.58.270(1) does not promote the interests of the public in the *jus publicum* but instead substantially impairs it.**

Turning to the second part of the *Caminiti* test, there is no evidence that the State has “promoted the interests of the public in the *jus publicum*” by providing a blanket authorization for pre-December 1969 development and fills. To the contrary, the legislative history confirms that there was no consideration of the whether the blanket savings clause substantially impaired the public’s interest in the *jus publicum*. The stated legislative intent was to protect all existing fills and structures against any public trust rights.³²

During argument the State suggested that some pre-*Wilbour* fills might be useful in affording access to deep water. But there is no

³¹ RCW 90.58.270(1) is significantly different than the statute allowing installation of private docks over state lands reviewed in *Caminiti*. There the court found no loss of state control because (1) the state had not conveyed title to the land; (2) DNR was authorized to regulate access and could revoke the dock rights; (3) local regulations governed construction, size, and length of the dock; and (4) the docks had to comply with regulations adopted under the SMA, hydraulics act, and state flood control laws. *Caminiti*, 107 W.2d at 672-73. See also, *Geoduck*, 124 Wn.App at 452; *Weden*, 135 Wn.2d at 699-700.

³² Decision at 12-13.

evidence that this is the case. Moreover, even if some pre-*Wilbour* fills did aid the public interest in navigation, that is not an excuse to bootstrap and protect *all* pre-existing obstructions to navigation, including those with no navigational or recreational benefits.

The Three Fingers fill, as just one example, does nothing to promote the public interest. Tracking *Caminiti*, the Superior Court found,

[T]he second part of the test is also met. Specifically, there is no evidence whatsoever that the surrender of the *jus publicum* to a private party vis-à-vis the Three Finger fill in any way promotes the public interest. ... To the contrary, it is undisputed that public access to the lake is impaired and the existence of the fill wholly obliterated the ability to utilize that portion of the lake for navigation and recreation. CP 836.

While Legislature *could* have enacted standards to guide the determination of whether pre-existing fill could remain consistent with the public trust rights as subsequently explained by *Caminiti*, it did not. RCW 90.58.270(1) goes too far by granting blanket protection without regard to the paramount and inalienable public rights of navigation and recreation. RCW 90.58.270(1) violates the Public Trust Doctrine and is invalid.

B. The Court of Appeals' Decision Declaring that all Public Nuisances in Place Prior to December 1969 Were Protected Conflicts with a Decision of this Court.

The Superior Court concluded that because the Three Fingers fill was a public nuisance it was a "violation of state statutes" and therefore

outside the savings clause in RCW 90.58.270(1). The Court of Appeals reversed concluding instead that “the moment the SMA passed, the ability to file a public nuisance claim against a pre-existing fill was extinguished.”³³ The Court of Appeals’ Decision conflicts with *Grundy v. Thurston Cy.*, 155 Wn.2d 1, 7, n. 5, 117 P.3d 1089 (2005).

1. RCW 90.58.270(1) does not protect fills in violation of state statutes.

RCW 90.58.270(1) provides in relevant part:

Nothing in this statute shall constitute authority for requiring or ordering the removal of any structures, improvements, docks, fills, or developments placed in navigable waters prior to December 4, 1969,
PROVIDED, That the consent herein given shall not relate to any structures, improvements, docks, fills, or developments placed on tidelands, shorelands, or beds underlying said waters which are in trespass or in violation of state statutes.

(emphasis added). Thus, by its plain language, RCW 90.58.270(1) does not apply to protect fills that are in violation of state statutes.

2. The Three Fingers fill is a public nuisance and therefore violates state statutes.

An actionable nuisance includes “unlawfully doing an act, or omitting to perform a duty, which act or omission ... obstructs or tends to

³³ Decision at 15.

obstruct, or render dangerous for passage, any lake or navigable river, bay, stream, canal or basin, or any public park, square, street or highway.” RCW 7.48.120 (emphasis added). A “Public nuisance” includes any action “to obstruct or impede, without legal authority, the passage of any river, harbor, or collection of water.” RCW 7.48.140(3). A violation of a statutory public nuisance is illegal. “No lapse of time can legalize a public nuisance, amounting to an actual obstruction of public right.” RCW 7.48.150. A public nuisance constitutes “a crime against the order and economy of the state.” RCW 9.66.010.

Based on the evidence before it, the trial court concluded that there were no disputes of material fact and the Three Fingers fill was a public nuisance, finding in part: “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.”³⁴

Relying on RCW 7.48.160,³⁵ the Court of Appeals concluded that because RCW 90.58.270(1) authorized certain fills, the Three Fingers fill could no longer a nuisance after the statute’s enactment.³⁶ The Court of

³⁴ CP 1569.

³⁵ RCW 7.48.160 provides that “[n]othing which is done or maintained under the express authority of a statute, can be deemed a nuisance.”

³⁶ Decision at 14-16

Appeals erred in two ways. First, the Decision ignores that despite RCW 7.48.160 even a lawful action may be an unlawful nuisance. *Grundy*, 155 Wn.2d at 7, fn.5. The test for whether an otherwise lawful action may constitute a nuisance “is the reasonableness or unreasonableness of making the use of the property complained of in the particular locality and in the manner and under the circumstances of the case.” *Id.*

This is precisely the analysis conducted by the Superior Court.³⁷ Based on the evidence before it, the Superior Court concluded that even if legal when placed, the impacts were unreasonable and rose to the level of a public nuisance. CP 1566-70.

Second, and more importantly, the Court of Appeal’s conclusion, Decision at 14, that “a trespass or statutory claim cannot be utilized as an end run around the prohibition on public trust claims,” incorrectly renders the exception in RCW 90.58.270(1) superfluous. *See, Ralph v. Dep’t of Natural Res.*, 182 Wn.2d 242, 248, 343 P.3d 342 (2014) (Courts must read the entire statute and avoid interpretations that renders any portion meaningless). The better reading that uses all portions of the statute is that

³⁷ CP 1569.

RCW 90.58.270(1) protects pre-existing fills. *unless* the fills are public nuisances and thus a violation of state statutes.

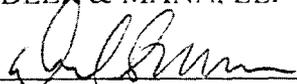
The Court of Appeals' conclusion that RCW 7.48.160 in combination with RCW 90.58.270(1) prohibited the Three Fingers fill from ever being declared a public nuisance and in violation of state statutes, was erroneous.

VII. CONCLUSION

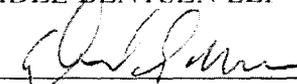
For the foregoing reasons, the Court should affirm the decisions of the Superior Court ordering abatement of the Three Fingers fill.

Respectfully submitted this 19th day of July, 2016.

GENDLER & MANN, LLP

By: 
David S. Mann, WSBA # 21068
Michael W. Gendler, WSBA#8429
615 Second Ave., Suite 560
Seattle, WA 98104
(206) 621-8868

SPEIDEL BENTSEN LLP

By: 
Russell J. Speidel, WSBA # 12838
David J. Bentsen, WSBA # 42107
7 N. Wenatchee Avenue, Suite 600
Wenatchee, WA 98807
(509) 662-1211

Attorneys for Chelan Basin Conservancy

CERTIFICATE OF SERVICE

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:

David S. Steele
Perkins Coie, LLP
1201 Third Avenue, Suite 4900
Seattle, WA 98101-3099
dsteele@perkinscoie.com
[x] By Electronic Mail

Erik K. Wahlquist
Chelan County PUD
P.O. Box 1231
Wenatchee, WA 98807-1231
Erik.wahlquist@chelanpud.org
[x] By Electronic Mail

Markham A. Quehrn
Perkins Coie LLP
10885 NE 4th St., Ste 700
Bellevue, WA 98004-5579
mquehrn@perkinscoie.com
[x] By Electronic Mail

Kenneth W. Harper
Menke Jackson Beyer Ehlig
& Harper, LLP
807 N. 39th Ave.
Yakima, WA 98902
kharper@mjbe.com
[x] By Electronic Mail

Terrence Pruitt
Attorney General's Office
P.O. Box 40100
Olympia, WA 98504-0100
TerryP@atg.wa.gov
[x] By Electronic Mail

Nicholas J. Lofing
Davis, Arneil Law Firm, LLP
P.O. Box 2136
Wenatchee, WA 98801
nick@dadkp.com
[x] By Electronic Mail

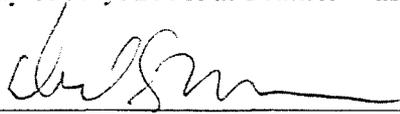
J. Kirk Bromiley
Bromiley Law, PLLC
227 Ohme Garden Rd.
Wenatchee, WA 98801
kirk@bromileylaw.com
[x] By Electronic Mail

Allan Galbraith
Allan Galbraith, PLLC
949 Wheeler Hill Road
Wenatchee, WA 98801-9705
allan@hillatty.com
[x] By Electronic Mail

John M. Groen
Pacific Legal Foundation
930 G. Street
Sacramento, CA 95814-1812
jmg@pacificlegal.org
[x] By Electronic Mail

Russell J. Speidel
David J. Bentsen
Speidel Bentsen LLP
P.O. Box 881
Wenatchee, WA 98807-0881
Russ.speidel@speidellaw.com
David.bentsen@speidellaw.com

DATED this 19th day of July, 2016, at Seattle, Washington.



David S. Mann

Renee S. Townsley
Clerk/Administrator

(509) 456-3082
TDD #1-800-833-6388

**The Court of Appeals
of the
State of Washington
Division III**



500 N Cedar ST
Spokane, WA 99201-1905

Fax (509) 456-4288
<http://www.courts.wa.gov/courts>

June 14, 2016

Markham Allen Quehrn
Perkins Coie LLP
The PSE Bldg
10885 NE 4th St Ste 700
Bellevue, WA 98004-5579
mquehrn@perkinscoie.com

John Maurice Groen
Pacific Legal Foundation
930 G St
Sacramento, CA 95814-1802
jmg@pacificlegal.org

Erik K Wahlquist
Chelan County PUD
PO Box 1231
327 N Wenatchee Ave
Wenatchee, WA 98807-1231
erik.wahlquist@chelanpud.org

Kenneth W. Harper
Menke Jackson Beyer, LLP
807 N 39th Ave
Yakima, WA 98902-6389
kharper@mjbe.com

Michael W. Gendler
Gendler & Mann LLP
615 2nd Ave Ste 560
Seattle, WA 98104-2242
gendler@gendlermann.com

David Scott Mann
Gendler & Mann LLP
615 2nd Ave Ste 560
Seattle, WA 98104-2242
mann@gendlermann.com

David Joel Bentsen
Speidel Bentsen LLP
PO Box 881
Wenatchee, WA 98807-0881
david.bentsen@speidellaw.com

John Kirk Bromiley
Bromiley Law, PLLC
227 Ohme Garden Rd
Wenatchee, WA 98801-9047
kirk@bromileylaw.com

David Scott Steele
Perkins Coie LLP
1201 3rd Ave Ste 4900
Seattle, WA 98101-3099
DSteele@perkinscoie.com

Terence Pruitt
Attorney General's Office
1125 Washington St SE
PO Box 40100
Olympia, WA 98504-0100
TerryP@ATG.WA.GOV

No. 33196-2-III (consol. w/ No. 33239-0-III)
Chelan Basin Conservancy v. GBI Holding Co.

Allan Galbraith
Allan Galbraith, PLLC
949 Wheeler Hill Rd
Wenatchee, WA 98801-9705
allan@hillatty.com

Nicholas James Lofing
Davis, Arneil Law Firm
617 Washington St
Wenatchee, WA 98801-2600
nick@dadkp.com

Russell John Speidel
Speidel Bentsen LLP
PO Box 881
Wenatchee, WA 98807-0881
russ.speidel@speidellaw.com

CASE # 331962 (consol. w/ # 332390)
Chelan Basin Conservancy v. GBI Holding Co.
CHELAN COUNTY SUPERIOR COURT No. 112012675

Counsel:

Enclosed please find a copy of the opinion filed by the Court today.

A party need not file a motion for reconsideration as a prerequisite to discretionary review by the Supreme Court. RAP 13.3(b); 13.4(a). If a motion for reconsideration is filed, it should state with particularity the points of law or fact which the moving party contends the court has overlooked or misapprehended, together with a brief argument on the points raised. RAP 12.4(c). Motions for reconsideration which merely reargue the case should not be filed.

Motions for reconsideration, if any, must be filed within twenty (20) days after the filing of the opinion. Please file an original and two copies of the motion (unless filed electronically). If no motion for reconsideration is filed, any petition for review to the Supreme Court must be filed in this court within thirty (30) days after the filing of this opinion (may be filed by electronic facsimile transmission). The motion for reconsideration and petition for review must be received (not mailed) on or before the dates they are due. RAP 18.5(c).

Sincerely,



Renee S. Townsley
Clerk/Administrator

RST:btb
Attachment
c: Email Honorable Lesley A. Allan

FILED
June 14, 2016
In the Office of the Clerk of Court
WA State Court of Appeals, Division III

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

CHELAN BASIN CONSERVANCY,)	No. 33196-2-III
)	(consolidated with
Respondent,)	No. 33239-0-III)
)	
v.)	
)	
GBI HOLDING CO. and)	
STATE OF WASHINGTON,)	
)	
Appellants and)	
Cross Respondents,)	
)	
CITY OF CHELAN,)	PUBLISHED OPINION
)	
Respondent and)	
Cross Appellant,)	
)	
and)	
)	
CHELAN COUNTY PUBLIC UTILITY)	
DISTRICT,)	
)	
Additional Named)	
Party.)	

PENNELL, J. — Since the early 1960s, GBI Holding Co. and its predecessors (collectively GBI) have maintained a private landfill commonly known as the “Three Fingers” on the shore of Lake Chelan. For members of the Chelan Basin Conservancy

(CBC), the Three Fingers fill is a blot on the otherwise pristine shores of the lake and unreasonably interferes with access to the beach and navigable waters. After GBI initiated plans to develop the Three Fingers fill in 2010, CBC took legal action. Relying on the little-known “public trust doctrine,” CBC sought not simply to thwart GBI’s development plans, but to force it to abate its long-held fill.

CBC’s legal challenge to the Three Fingers fill requires analyzing the relationship between the public trust doctrine and the Shoreline Management Act of 1971 (SMA), ch. 90.58 RCW. The SMA was approved by voter referendum in 1972 and designed to handle public trust disputes through regulation. It also included a savings clause that grandfathered in preexisting landfills against claims for violation of the public rights of navigation. We are confronted with whether the SMA’s savings clause applies to the Three Fingers fill and, if so, whether this portion of the SMA itself violates the public trust doctrine. We hold that (1) the SMA’s savings clause does plainly protect long-held fills such as the Three Fingers, and (2) CBC has not shown the SMA to be invalid. We therefore reverse the superior court’s orders requiring GBI to abate its fill.

FACTS

The Three Fingers fill is an area of land, approximately six to eight acres in size, owned by GBI. The fill is located on the southeastern shoreline of Lake Chelan,

No. 33196-2-III (consol. w/ No. 33239-0-III)
Chelan Basin Conservancy v. GBI Holding Co.

immediately west of the fill addressed in the Washington Supreme Court case of *Wilbour v. Gallagher*, 77 Wn.2d 306, 462 P.2d 232 (1969). As more fully described in *Wilbour*, the completion of Lake Chelan Dam in 1927 artificially raised the level of the lake from 1,079 feet to 1,100 feet above sea level during peak summer months. 77 Wn.2d at 307, 309. The Three Fingers fill is on lands that were dry when the lake was at its lowest level but covered with water during the spring and summer when the lake was at its peak level. In 1961, GBI acquired the property as part of a project to widen State Route 97A. From 1961 to 1962, GBI filled the property with materials excavated during roadway construction, raising the elevation of the land from 1,090 feet to 1,102 feet above sea level and extending it 250 to 300 feet into the lake. After GBI raised the property, it remained above lake level year round.

The Three Fingers fill does not hold any structures. It has been used in the past for growing corn, parking, and as a staging area for work on the Holden Mine hazardous waste cleanup. In 2010, GBI filed an application with the City of Chelan (City) to improve the Three Fingers fill as a planned development district. CBC, a local group interested in protecting the “use and enjoyment of the navigable waters of Lake Chelan,” and others objected to the development. Clerk’s Papers at 4. GBI thereafter withdrew its application for planned development and then filed a new application to subdivide the

land into six parcels. CBC and others again objected and requested removal of the Three Fingers fill. In 2011, the City approved a short plat to subdivide the property subject to conditions, which included requiring (1) a public park be developed from two of the lots, and (2) public access to the lake for recreation. Both CBC and GBI appealed the short plat decision to the City's hearing examiner. In a preliminary ruling, the hearing examiner concluded the City lacked authority to order removal of the Three Fingers fill. CBC thereafter withdrew its administrative appeal and in late 2011 filed an action in superior court for removal of the Three Fingers fill.

CBC's complaint alleged the Three Fingers fill (1) constitutes a trespass against the public right of access to Lake Chelan,¹ (2) violates the public rights of navigation as described in *Wilbour*, and (3) violates rights to use and enjoy the waters of Lake Chelan as protected by the public trust doctrine. The complaint named GBI as the defendant and the City,² State,³ and Chelan County Public Utility District (PUD)⁴ as additional parties.

¹ CBC's trespass claim has not been pursued on appeal and, therefore, is not addressed in this decision.

² The City is the local municipal corporation that chose to participate in the case by counterclaiming and cross claiming for review of the City's assessment of public trust rights in its administrative decision.

³ Though CBC made no specific claim against the State, the State has participated because the case involves questions about the State's authority under the public trust doctrine.

After several years of litigation, the superior court resolved CBC's complaint on summary judgment. The court held the Three Fingers fill violated the public trust doctrine, subsequently ordering GBI to abate the fill. We are now presented with the case on appeal.

ANALYSIS

Standard of Review

This court reviews summary judgment orders de novo, "engaging in the same inquiry as the trial court." *Weden v. San Juan County*, 135 Wn.2d 678, 689, 958 P.2d 273 (1998). "Summary judgment is appropriate only if the pleadings, affidavits, depositions, and admissions on file demonstrate the absence of any genuine issues of material fact and that the moving party is entitled to judgment as a matter of law." *Citizens for Responsible Wildlife Mgmt. v. State*, 124 Wn. App. 566, 569, 103 P.3d 203 (2004); *see also* CR 56(c).

At issue here are questions of both statutory construction and constitutional limits on state authority. "Issues of statutory construction and constitutionality are questions of law" also subject to de novo review. *State v. Evans*, 177 Wn.2d 186, 191, 298 P.3d 724 (2013). Regularly enacted statutes are presumed constitutional, unless the provision

⁴ CBC named the PUD because it holds flowage rights in Lake Chelan, but the PUD announced early on that it was not participating in the case.

No. 33196-2-III (consol. w/ No. 33239-0-III)
Chelan Basin Conservancy v. GBI Holding Co.

“involves a fundamental right or a suspect class, in which case the presumption is reversed.” *Weden*, 135 Wn.2d at 690. The statute’s challenger has the heavy burden of overcoming the presumption of constitutionality. *Island County v. State*, 135 Wn.2d 141, 146, 955 P.2d 377 (1998).

The Public Trust Doctrine

The public trust doctrine has both common law and constitutional roots. With statehood, Washington asserted ownership to “the beds and shores of all navigable waters in the state” WASH. CONST., art. XVII, §1. Along with this right of ownership came a duty of public trust. Although not always clearly labeled as such, Washington courts have always recognized this duty under the “public trust doctrine.” *Caminiti v. Boyle*, 107 Wn.2d 662, 669-70, 732 P.2d 989 (1987). According to the doctrine, the State holds an interest in navigable waters akin to a permanent easement: while the State has the power to convey the title to lands covered by navigable waters, it can never alienate the public’s right to use navigable waters. *City of New Whatcom v. Fairhaven Land Co.*, 24 Wash. 493, 499, 504, 64 P. 735 (1901). Instead, the State retains inalienable power over navigable waters “in trust for the whole people. . . .” *State v. Sturtevant*, 76 Wash. 158, 165, 135 P. 1035 (1913). Under the public trust doctrine, the State’s private interest, which may be sold, is referred to as the “jus privatum.” *Caminiti*, 107 Wn.2d at 668. The

No. 33196-2-III (consol. w/ No. 33239-0-III)
Chelan Basin Conservancy v. GBI Holding Co.

public interest that cannot be divested is called the “jus publicum.” *Id.*

Despite the public trust doctrine’s ever presence, Washington’s early history was marked by a preference for development over conservation. ROBERT F. UTTER & HUGH D. SPITZER, *THE WASHINGTON STATE CONSTITUTION* 232 (2d ed. 2013). This trend shifted in 1969 with the *Wilbour v. Gallagher* decision. As noted, *Wilbour* involved litigation over a landfill bordering the Three Fingers. The Wilbours lived next to the Gallaghers and filed suit shortly after construction of the Gallagher fill. The Wilbours argued the Gallagher fill must be abated because it interfered with their rights of navigation. The Supreme Court agreed. The court reasoned the public has an inalienable right to access the waters of Lake Chelan, regardless of seasonal fluctuations in lake levels. *Wilbour*, 77 Wn.2d at 316. The Gallaghers were thus prohibited from obstructing access through creating a fill. *Id.* As explained by the court, “the public has the right to go where the navigable waters go, even though the navigable waters lie over privately owned lands.” *Id.* at 315-16.

Wilbour marked “the modern genesis of the public trust doctrine” in Washington. Ralph W. Johnson et al., *The Public Trust Doctrine and Coastal Zone Management in Washington State*, 67 WASH. L. REV. 521, 537 (1992). The decision also generated quite a stir, with both developers and conservationists confused about the extent of their legal

No. 33196-2-III (consol. w/ No. 33239-0-III)
Chelan Basin Conservancy v. GBI Holding Co.

rights and obligations. Geoffrey Crooks, *The Washington Shoreline Management Act of 1971*, 49 WASH. L. REV. 423, 425 (1974). Shortly after *Wilbour*, Governor Evans imposed a moratorium on all tideland fill projects until 1971 when the SMA was enacted. *Orion Corp. v. State*, 109 Wn.2d 621, 627, 747 P.2d 1062 (1987).

The SMA created a regime to manage the competing interests of development and conservation. Because the act regulates shorelines in a manner that promotes and enhances the public's interest in navigation, compliance with the SMA forecloses any claim that a land use action violates the public trust doctrine. *Caminiti*, 107 Wn.2d at 670. In this manner, the SMA largely addressed prospective claims under the public trust doctrine. But the SMA also did more. To address development that had taken place prior to the SMA, the legislature adopted the following savings clause:

Nothing in this section shall constitute authority for requiring or ordering the removal of any structures, improvements, docks, fills, or developments 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 structures, improvements, docks, fills or developments are hereby granted: PROVIDED, That the consent herein given shall not relate to any structures, improvements, docks, fills, or developments placed in tidelands, shorelands, or beds underlying said waters which are in trespass or in violation of state statutes.

RCW 90.58.270(1). Notably, the controlling date in this clause is the same as the *Wilbour v. Gallagher* decision.

No. 33196-2-III (consol. w/ No. 33239-0-III)
Chelan Basin Conservancy v. GBI Holding Co.

After the SMA's enactment, property developments and landfills predating *Wilbour* were left unchallenged. CBC's legal suit has altered this state of repose. Now, over 40 years later, we are confronted with discerning the meaning and validity of the SMA's savings clause in the context of a public trust challenge.

CBC's Claim for Relief

Standing

As a preliminary matter, GBI claims we need not address the merits of CBC's suit because CBC lacks standing to challenge the validity of the Three Fingers fill. GBI's argument is rooted in the law regarding public nuisances. To bring a public nuisance claim, a plaintiff must show special injury. RCW 7.48.210. GBI argues CBC, whose members have general interests in lake access and recreation, is not specially injured by the Three Fingers fill.

GBI's standing analysis fails because this is not a public nuisance case. CBC has explicitly disavowed making a public nuisance claim. Instead, the current suit involves a public trust claim. The issue of standing, therefore, turns on whether either CBC or its members can claim the type of injury required in the public trust context.

Because cases interpreting Washington's public trust doctrine are limited, the requirements for establishing standing are not well defined. In *Wilbour v. Gallagher*, the

No. 33196-2-III (consol. w/ No. 33239-0-III)
Chelan Basin Conservancy v. GBI Holding Co.

plaintiffs' property bordered the Gallagher fill, yet this proximity did not form the basis for the Wilbours' ultimate relief. The Wilbours had originally sued based on impairment of their view as well as "inability to use the water over the filled land for navigation, fishing, swimming, boating and general recreational uses" *Wilbour*, 77 Wn.2d at 312. The Supreme Court denied relief based on impairment to the Wilbours' view but found in their favor based on navigational rights. *Id.* at 313. This was not a right specific to the Wilbours, but one shared by the public. While the Wilbours' interest in their view may have been greater than the public's, their interest in utilizing navigational waters was not. It would thus appear the action brought by the Wilbours could have been brought by others with an interest in accessing Lake Chelan's waters.

Affidavits from CBC's members demonstrate they have various recreational interests in Lake Chelan similar to those outlined in *Wilbour*. The interests claimed by CBC's members are precisely those the public trust doctrine is meant to protect. *Weden*, 135 Wn.2d at 698. CBC has thus sufficiently established standing.

Applicability of the SMA's savings clause

Having established standing, the next hurdle in CBC's quest for abatement is the SMA's savings clause. RCW 90.58.270(1) authorizes impairment of public navigational rights caused by fills preexisting the 1969 *Wilbour* decision. This authorization would

No. 33196-2-III (consol. w/ No. 33239-0-III)
Chelan Basin Conservancy v. GBI Holding Co.

appear on its face to prevent CBC's claim. However, there is a limiting provision. The provision permits suits against pre-*Wilbour* fills if they "are in trespass or in violation of state statutes." RCW 90.58.270(1). CBC seizes on this limiting provision. According to CBC, if it can establish the Three Fingers fill violates some sort of state statute (such as the statute prohibiting public nuisances) then the restriction on claims regarding impairments to the public rights of navigation is lifted.

Resolving CBC's claim under RCW 90.58.270(1) requires us to engage in statutory interpretation. "The purpose of statutory interpretation is to 'determine and give effect to the intent of the legislature.'" *Evans*, 177 Wn.2d at 192 (quoting *State v. Sweany*, 174 Wn.2d 909, 914, 281 P.3d 305 (2012)). "If the plain language is subject to only one interpretation, our inquiry ends because plain language does not require construction." *HomeStreet, Inc. v. Dep't of Revenue*, 166 Wn.2d 444, 451, 210 P.3d 297 (2009). But where there is ambiguity, the court will engage in statutory construction and may "look to legislative history for assistance in discerning legislative intent." *Evans*, 177 Wn.2d at 193.

The debate during the superior court proceedings reveals an ambiguity in the SMA's savings clause. Does the savings clause protect all pre-1969 fills from public navigational claims? Or are preexisting fills vulnerable to navigational claims if a

No. 33196-2-III (consol. w/ No. 33239-0-III)
Chelan Basin Conservancy v. GBI Holding Co.

plaintiff can first establish a statutory violation or trespass claim? The plain language of the statute favors the former approach. For example, RCW 90.58.270(4) states the protection against public navigation claims extended to pre-1969 fills that were involved in litigation at the time of the SMA's enactment. Had the legislature intended navigational claims to go forward as long as a plaintiff alleged an additional cause of action, this provision would not have been written in such broad terms. Nevertheless, given the different opinions of reasonable minds during the superior court proceedings, we turn to legislative history.

What little legislative history exists regarding the SMA's savings clause indicates a clear intent to eliminate *Wilbour*-type suits for preexisting fills. The following colloquy in the Senate Journal is telling:

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

CBC’s construction of the savings clause would undermine this intent. At the time the SMA was enacted in 1971, Senator Gissberg recognized most if not all of the State’s numerous landfills violated the terms of *Wilbour*. The goal of the savings clause was to avoid the automatic removal of preexisting fills that was threatening to take place post-*Wilbour*. If CBC’s analysis was correct, then vast numbers of preexisting fills would again be put at risk. Any statutory violation, even ones having nothing to do with navigation or conservation, could justify a *Wilbour* public trust claim. This outcome cannot be reconciled with the SMA’s unambiguous legislative history.

The SMA’s savings clause reads naturally when considered in light of the intent expressed in the Senate Journal. While RCW 90.58.270(1) eliminates claims based on impairment of the public rights of navigation, preexisting fills are not wholly immune

No. 33196-2-III (consol. w/ No. 33239-0-III)
Chelan Basin Conservancy v. GBI Holding Co.

from suit. Claims can still be made for trespass or violation of state statutes.⁵ But a trespass or statutory claim cannot be utilized as an end run around the prohibition on public trust claims. Instead, a claim for trespass or a statutory violation must stand on its own, separate from any claim under the public trust doctrine.

During the superior court proceedings, the trial court addressed not only CBC's public trust claim, but also the argument that the Three Fingers fill constitutes a statutory public nuisance. Because CBC has disavowed a public nuisance claim, we technically need not address this issue. Nevertheless, because the matter has been fully briefed and may reoccur in the future, we will also analyze whether the SMA's savings clause can bar a navigational claim filed under Washington's nuisance statute.

Washington's nuisance laws have been codified in chapter 7.48 RCW. "A nuisance 'which affects equally the rights of an entire community or neighborhood' is a

⁵ In addition, the savings clause applies only to the retention and maintenance of preexisting fills. A fill that is falling apart or was in disrepair at the time of the SMA's savings clause is not protected. *See, e.g., Reed v. Dep't of Ecology*, No. 87-34, 1988 WL 161202, at *3 (Wash. Shorelines Hr'gs Bd. May 10, 1988). CBC argues the savings clause does not protect GBI because GBI is no longer maintaining its fill. Instead, GBI has proposed to develop the area. However, GBI's development plans are not currently before this court. Besides, the issue of whether proposed development violates public trust interests is properly addressed through the SMA's regulatory provisions. *Caminiti*, 107 Wn.2d at 670 ("the requirements of the 'public trust doctrine' are fully met by the legislatively drawn controls imposed by the [SMA].").

No. 33196-2-III (consol. w/ No. 33239-0-III)
Chelan Basin Conservancy v. GBI Holding Co.

public nuisance.” *Grundy v. Thurston County*, 155 Wn.2d 1, 6, 117 P.3d 1089 (2005) (quoting RCW 7.48.130). Public nuisances can include “obstruct[ing] or imped[ing], without legal authority, the passage of any river, harbor, or collection of water. . . .”

RCW 7.48.140(3). In other words, public nuisance claims can extend to impairment of the public rights of navigation. While the public nuisance statute creates a broad cause of action that can undoubtedly apply to some landfills, the legislature has exerted significant control over nuisance suits. The law explicitly provides “[n]othing which is done or maintained under the express authority of a statute, can be deemed a nuisance.” RCW 7.48.160.

The legislative control over public nuisance suits bars navigational claims in the current context. By consenting to the existence of pre-*Wilbour* fills against public navigational claims, the legislature invoked application of RCW 7.48.160, which forbids a cause of action based on public nuisance. Thus, the moment the SMA passed, the ability to file a public nuisance claim against a preexisting fill was extinguished.⁶

The fact that a once-authorized fill can later become a public nuisance, *see Grundy*, 155 Wn.2d at 7 n.5, does not create an opening for suit in the current context. In

⁶ Legal claims pending at the time of passage were also eliminated. RCW 90.58.270(4).

No. 33196-2-III (consol. w/ No. 33239-0-III)
Chelan Basin Conservancy v. GBI Holding Co.

order for this exception to apply, a fill must deviate in some way from its initial authorization. For example, if a fill starts to degrade or expand beyond its original intrusion into navigable waters, it may well become a public nuisance. But the record here is devoid of any such facts. GBI's fill is thus protected from a public nuisance suit by the combined forces of RCW 90.58.270 and RCW 7.48.160.

The SMA's savings clause and the public trust doctrine

Because the Three Fingers fill is protected from suit under either a public trust or public nuisance theory by the SMA's savings clause, we are confronted with whether the savings clause itself violates the public trust doctrine. This is a challenge distinct from the kind of challenge raised in *Wilbour*. When a legislative challenge is made under the public trust doctrine, the court "must inquire as to (1) whether the State, by the questioned legislation, has given up its right of control over the jus publicum [i.e. the public's inalienable rights of navigation] and (2) if so, whether by so doing the State (a) has promoted the interests of the public in the jus publicum, or (b) has not substantially impaired it." *Caminiti*, 107 Wn.2d at 670.

The Supreme Court engaged in this legislative analysis in *Caminiti*. The court held that a Washington statute allowing residential property owners to maintain private docks without charge passed all components of the test. *Id.* at 675. Other statutes

No. 33196-2-III (consol. w/ No. 33239-0-III)
Chelan Basin Conservancy v. GBI Holding Co.

challenged under the public trust doctrine have met the same fate. *Weden*, 135 Wn.2d at 699; *Citizens*, 124 Wn. App. at 573-74. While these outcomes may seem frustrating to public trust advocates, they are consistent with the Supreme Court's observation in *Wilbour* that public trust issues are often best sorted out by the legislature through regulation. 77 Wn.2d at 316 n.13. See also *Harris v. Hylebos Indus., Inc.*, 81 Wn.2d 770, 787, 505 P.2d 457 (1973) (“[The *Wilbour* 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.”).

A challenge to legislation under the public trust doctrine is akin to a constitutional challenge. *Citizens*, 124 Wn. App. at 570-71. Given this similarity, the burden of proving invalidity of the statute properly rests on the challenging party. *Id.* at 570. This means CBC. Both CBC and the City object to this allocation. They note the following Supreme Court passage: “[C]ourts review legislation under the public trust doctrine with a heightened degree of judicial scrutiny, ‘as if they were measuring that legislation against constitutional protections.’” *Weden*, 135 Wn.2d at 698 (quoting *Johnson, supra*, at 526-27).

Allocating the burden of proof to CBC does not violate the principle recognized in *Weden*. If the burden of proving a statute's invalidity rests with the party asserting a

No. 33196-2-III (consol. w/ No. 33239-0-III)
Chelan Basin Conservancy v. GBI Holding Co.

constitutional challenge, the same should be true here. Public trust claims are merely quasi-constitutional. The ability to assert a public trust claim should not be easier than in the constitutional context. We have previously allocated the burden of proof to the challenger in the public trust context. *Citizens*, 124 Wn. App. at 570. We see no reason to deviate from this precedent, particularly since the challengers have waited over 40 years to bring suit.

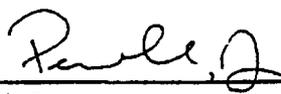
Reviewing the SMA's savings clause under the *Caminiti* test requires looking at the legislation as a whole, not a particular application. Indeed, *Caminiti* did not review the reasonableness of the legislation at issue by examining its application to a specific dock. Instead, the court examined the 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*").

During the superior court proceedings, CBC's focus was on whether the Three Fingers fill met terms of the test outlined in *Caminiti*. This was mistaken. Whether or not the Three Fingers fill serves a legitimate public purpose is not particularly relevant to the legality of the SMA's savings clause. Because the Three Fingers fill is clearly

No. 33196-2-III (consol. w/ No. 33239-0-III)
Chelan Basin Conservancy v. GBI Holding Co.

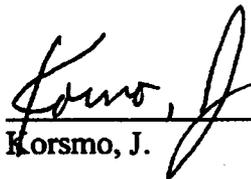
protected by the SMA's savings clause, CBC's public trust claims can only go forward if the savings clause, applied as a whole throughout the state, is invalid. No such showing has been made. Given the passage of time, it is unclear whether any such showing can ever be made. During oral argument, the State suggested the SMA's savings clause promoted the public trust in navigable waters because most pre-*Wilbour* fills were useful and afforded access to deep waters. We have no facts to verify this claim. Nor do we have facts to refute it. Because the burden of proof falls on CBC, the challenge to the savings clause must fail.

Based on the foregoing, the superior court's order granting summary judgment and the order for abatement are reversed. This matter is remanded to the superior court for proceedings consistent with this opinion.

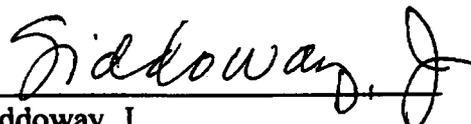


Pennell, J.

WE CONCUR:



Korsmo, J.



Siddoway, J.