

No. 93381-2

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SUPREME COURT OF THE STATE OF WASHINGTON

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CHELAN BASIN CONSERVANCY,

Petitioner,

v.

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

Respondent.

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SUPPLEMENTAL BRIEF FOR RESPONDENT  
GBI HOLDING CO.

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## INTRODUCTION

In 1969, this Court held in *Wilbour v. Gallagher*, 77 Wn.2d 306 (1969), that fills placed in navigable waters “must be removed” because a “court cannot authorize or approve an obstruction to navigation.” *Id.* at 316. Two years later, the Legislature responded to that decision by enacting the Shoreline Management Act (the “Act”),<sup>1</sup> which was ratified by a vote of the people in November 1972<sup>2</sup> as a comprehensive exercise of control by the State of Washington over State shorelines. The Act eliminated the right of private parties to bring common-law claims under *Wilbour* and gave the State’s express consent and authorization to development “placed in navigable waters prior to December 4, 1969.”<sup>3</sup>

The consent and authorization to development “placed in navigable waters prior to December 4, 1969” is codified at RCW 90.58.270(1). But that provision does not stand alone. It is an integral part of a larger and comprehensive regime of regulatory policies and controls that protect the public’s interest in “shorelines of bodies of water of virtually every description, including lakes and streams so small or so obscure as to be

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<sup>1</sup> RCW 90.58.010-90.58.920.

<sup>2</sup> Initiative 43B (CP 934-47).

<sup>3</sup> RCW 90.58.270(1). *See also* 1 S. JOURNAL, 42d Leg., 1st Ex. Sess. at 1411 (Wash. 1971) (colloquy in the Senate Journal evidencing express intent to legislatively overrule *Wilbour*); Section 27 of Initiative 43B (now codified at RCW 90.58.270(1)) (CP 946).

nameless.”<sup>4</sup> In so regulating, the Legislature exercised its authority to determine and administer the public’s interest in the beneficial use of navigable waters.

This Court has recognized that the Act expresses and fully protects the values embodied by the public trust doctrine:

[W]e first note that the requirements of the “public trust doctrine” *are fully met by the legislatively drawn controls* imposed by the Shoreline Management Act of 1971, RCW 90.58.

*Caminiti v. Boyle*, 107 Wn.2d 662, 670 (1987) (emphasis added) (citing *Portage Bay-Roanoke Park Cmty. Council v. Shorelines Hearings Bd.*, 92 Wn.2d 1, 4 (1979)). Indeed, the Court has recognized that the Act has “superseded” the common law public trust doctrine:

[A]ny common-law public benefit doctrine this state may have had prior to 1971 (*See Wilbour v. Gallagher*, 77 Wash.2d 306, 462 P.2d 232 (1969)), has been superseded and the SMA is the present declaration of that doctrine.

*Portage Bay-Roanoke Park Cmty. Council*, 92 Wn.2d at 4; *cf. Orion Corp. v. State*, 109 Wn.2d 621, 641 (1987) (the Washington Supreme Court has not defined the total scope of the public trust doctrine).

After more than forty years, Petitioner Chelan Basin Conservancy (“CBC” or “Petitioner”) now seeks to revisit the question whether the Act

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<sup>4</sup> Geoffrey Crooks, *The Washington Shoreline Management Act of 1971*, 49 WASH. L. REV. 423 (1974).

fully protects the values embodied by the public trust doctrine. In so doing, CBC asks this Court to disregard the long history of effective management of pre-*Wilbour* fills under RCW 90.58.270(1) and instead to eliminate one of the critical tools employed by the Act to exercise control over State shorelines, thus calling into question the legitimacy of every fill in the State of Washington that existed prior to December 4, 1969. CBC urges this Court to engage in a piecemeal dismantlement of the statutory scheme while disagreeing with the polices, regulations and controls that the Act provides as a whole.

The Court of Appeals correctly rejected CBC’s “as applied” challenge to a statute of general applicability for being too narrow in scope.<sup>5</sup> Even “as applied,” CBC’s challenge is based upon the false premise that judicial action is needed to abate a public nuisance. The undisputed facts in this case do not support a public nuisance claim. The area commonly known as “Three Fingers” was legally developed in 1961. (CP 782-83). Three Fingers fill does not constitute a trespass or violate

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<sup>5</sup> *Chelan Basin Conservancy v. GBI Holding Co.*, 194 Wn. App. 478, 494, *review granted* (2016). The Court of Appeals held:

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.

*Id.* at 49.

any State statutes.<sup>6</sup> No claim of public nuisance has been pleaded or prosecuted by CBC or any other party. No one complained about the Three Fingers fill for decades,<sup>7</sup> nor is any development proposal before this Court.<sup>8</sup> No further development of Three Fingers fill can occur without securing all development approvals required for any shoreline development under current law (e.g., the property is designated for purposes of the Act as “Urban” under the shoreline master program and is zoned for Waterfront Commercial uses). (CP 272, 280, 2150).

Petitioner claims only that it uses Lake Chelan for recreational purposes in common with the public. *See* Complaint at 8 (CP 10); (CP 376, 379-80, 385-86). But Petitioner has never actually used the Three Fingers for recreational purposes. The only “injury” CBC’s members have suffered is an unfulfilled desire to use an area for recreation that has not been so used for decades. The same could be said by any person about any other legally authorized development of private property on Lake Chelan, or for that matter, anywhere else in the State.

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<sup>6</sup> CBC’s trespass claim was not pursued on appeal. *Chelan Basin Conservancy*, 194 Wn. App. at 484 n.1. The only alleged violation of a “state statute” requires that this Court, as CBC urges, to reinterpret or repeal RCW 90.58.270(1).

<sup>7</sup> The Court of Appeals notes: “We see no reason to deviate from this precedent, particularly since the challengers have waited over 40 years to bring suit.” *Id.* at 494 (emphasis added).

<sup>8</sup> *Id.* at 491 n.5 (“GBI’s development plans are not currently before this court.”).

The Court of Appeals rejected CBC’s challenge to the Act because CBC did not meet its burden of proof and the dismissal should be affirmed on these grounds. *Chelan Basin Conservancy v. GBI Holding Co.*, 194 Wn. App. 478, 494-95, *review granted* (2016) (the “Decision”). But more fundamentally, Petitioner’s claim misapplies the doctrine upon which it relies. By enacting RCW 90.58.270(1), the Legislature and the people of the State exercised rather than relinquished control over pre-December 4, 1969 fill of navigable waters. RCW 90.58.270(1) therefore easily passes the test of public trust doctrine validity established in *Caminiti*.

Petitioner argues further that the Court of Appeals erred in its application of RCW 7.48.160 and by not finding the Three Fingers fill to be a public nuisance.<sup>9</sup> The Decision states “[b]ecause CBC has disavowed a public nuisance claim, we technically need not address this issue.” *Chelan Basin Conservancy*, 194 Wn. App. at 492. The Court of Appeals should have stopped there. Claims that were neither pleaded nor prosecuted by CBC were not properly before the Chelan County Superior Court or the Court of Appeals, and are not properly before this Court.

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<sup>9</sup> On February 27, 2015, the Honorable Leslie A. Allan, Judge, Chelan County Superior Court, entered an order directing GBI to promptly remove the fill in question as a public nuisance. This order was issued notwithstanding the fact that CBC never pleaded, and expressly disclaimed—any public nuisance claims. *See* Memorandum Decisions and associated Orders dated October 3, 2014 and February 27, 2015, respectively (CP 1570, 2552-53).

Should this Court nevertheless choose to entertain these arguments, they fail as an effort to make an end-run around the clear and express terms of the Act. These arguments overlook RCW 7.48.160 and inappropriately construe RCW 90.58.270 so as to render it meaningless. These arguments also suffer from a misplaced reliance on *Grundy v. Thurston County*, 155 Wn.2d 1 (2005).

Finally, the Court of Appeals erred in deciding that CBC had standing to bring an action to abate and remove the Three Fingers fill as a public trust doctrine claim under *Wilbour*.<sup>10</sup> CBC's common law public trust doctrine claim should be dismissed for lack of standing.

#### **ARGUMENT**

**A. RCW 90.58.270(1) Does Not Violate the Public Trust Doctrine.**

**1. The public trust doctrine is based on principle that the State has control over navigable waters.**

The public trust doctrine expresses the State's right and obligation to determine and control the public's rights of navigation over public

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<sup>10</sup> The Court of Appeals overlooked the express language in *Wilbour* (and other decisions cited therein) that require "special injury" for a private party to bring a public trust doctrine claim:

The 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, *Kemp v. Putnam*, 47 Wash.2d 530, 288 P.2d 837 (1955); *Dawson v. McMillan*, 34 Wash. 269, 75 P. 807 (1904); *Carl v. West Aberdeen Land and Improvement Co.*, 13 Wash. 616, 43 P. 890 (1896).

*Wilbour*, 77 Wn.2d at 317-19 (emphasis added).

waters. The doctrine is derived from the common law. *Caminiti*, 107 Wn.2d at 669 (“This *jus publicum* interest as expressed in the English common law and in the common law of this state from earliest statehood, is composed of the right of navigation and the fishery.”). *Wilbour* judicially extended the doctrine to recreational purposes, as a right corollary to the right of navigation. 77 Wn.2d at 316. *Wilbour* did not, however, alter the fundamental purpose of the doctrine: to protect the development and use of public waters for navigational purposes.

The right protected is not a right to natural or unobstructed water courses. To the contrary, the development of harbors, marinas, wharves, docks and piers and related waterfront commercial uses are as essential to the public’s right of navigation as is the water itself. The United States Supreme Court in *Illinois Central Railroad Co. v. Illinois*, 146 U.S. 387, 13 S. Ct. 110, 36 L. Ed. 1018 (1892) recognized the value of such developments as an aspect of the public trust doctrine:

*The interest of the people in the navigation of the waters and in commerce over them may be improved in many instances by the erection of wharves, docks, and piers therein, for which purpose the state may grant parcels of the submerged lands; and, so long as their disposition is made for such purpose, no valid objections can be made to the grants.*

*Ill. Cent. R.R. Co. v. State of Illinois*, 146 U.S. at 452 (emphasis added).

The *Wilbour* court similarly determined:

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.

77 Wn.2d at 316 n.13 (emphasis added). The “problem” identified by the *Wilbour* court was not the fact of development. Rather, the “problem” was the failure of “interested public authorities” to determine which such developments were “desirable and appropriate.”

**2. The Legislature has the authority to regulate the development and use of public waters.**

The State of Washington is the “interested public authority” summoned by *Wilbour* to determine and administer the public trust doctrine. “[T]he 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. Miss.*, 484 U.S. 469, 475, 108 S. Ct. 791, 98 L. Ed. 2d 877 (1988)). The duty imposed on the public trust

doctrine devolves upon the State. *Rettkowski v. Dep't of Ecology*, 122 Wn.2d 219, 232 (1993).<sup>11</sup>

In this context, the Legislature speaks for the State. The Legislature has held and fulfilled this role from statehood. *See Harris v. Hylebos Indus., Inc.*, 81 Wn.2d 770, 776-77 (1973) (“From its first session, the Washington State Legislature passed numerous laws for the purpose of encouraging the development of certain tidelands by lessees and purchasers thereof.”); *Caminiti*, 107 Wn.2d at 675 (“[T]he Legislature was the appropriate forum in which to do battle on that issue, and the Legislature’s decision to enact the statute in question was an entirely appropriate one for it to make.”). The Legislature fulfilled this responsibility when it enacted the Act. *Wash. State Farm Bureau Fed’n v. Gregoire*, 162 Wn.2d 284, 302 (2007) (“When the legislature enacts laws, it speaks as the chosen representative of the people.”).<sup>12</sup>

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<sup>11</sup> *See PPL Montana, LLC v. Montana*, 132 S. Ct. 1215, 1235, 182 L. Ed. 2d 77 (2012) (“[T]he public trust doctrine remains a matter of state law . . . . Under accepted principles of federalism, the States retain residual power to determine the scope of the public trust over waters within their borders.”). *See also State v. Sturtevant*, 76 Wash. 158, 171-72 (1913).

<sup>12</sup> *See also Arnold v. Mundy*, 6 N.J.L. 1, 13-14 (1821), a leading case on the origin of the public trust doctrine in this country, cited by the U.S. Supreme Court in *Illinois Central*, who explained that “this power of disposition and regulation can be exercised only by the legislative body, who are the representatives of the people for this purpose.”

**3. Legislation is presumed valid and must be upheld if any conceivable set of facts would support it.**

Like all statutes, RCW 90.58.270(1) is presumptively valid. *See School Dists.' Alliance for Adequate Funding of Special Educ. v. State*, 170 Wn.2d 599, 605 (2010); *Sofie v. Fibreboard Corp.*, 112 Wn.2d 636, 643, *amended*, 780 P.2d 260 (1989) (“[T]he courts will presume that an act regularly passed by the legislative body of the government is a valid law, and will entertain no presumptions [against] its validity.”) (citations omitted). 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).

Moreover, the factual basis of a challenge to RCW 90.58.270(1) does not depend or turn upon the limited set of facts presented in this case. Rather, if this Court can “conceive of *any set of facts* that would sustain a legislative enactment as constitutional[,]” it must assume *that set of facts existed* when the Legislature passed the statute. *Rafn Co. v. State*, 104 Wn. App. 947, 951 (2001) (emphasis added). *See also Williamson v. Lee Optical of Okla., Inc.*, 348 U.S. 483, 487, 75 S. Ct. 461, 99 L. Ed. 563 (1955) (upholding statute based upon entirely hypothetical facts); *Weden v. San Juan County*, 135 Wn.2d 678, 704-05 (1998); *State ex rel. Faulk v. CSG Job Ctr.*, 117 Wn.2d 493, 504 (1991) (“In determining whether . . .

particular legislation tends to promote the welfare of the people of the State of Washington, [the court] must presume that if a conceivable set of facts exists to justify the legislation, then those facts do exist and the legislation was passed with reference to those facts.”). An adjudication of the characteristics of an isolated eight-acre fill in Lake Chelan is not the inquiry called for in order to determine the validity of RCW 90.58.270(1).

**4. RCW 90.58.270(1) reflects a reasonable legislative judgment that is consistent with the public trust doctrine.**

In enacting RCW 90.58.270(1), the Legislature recognized no more than what was recognized by this Court in *Wilbour* and by the U.S. Supreme Court in *Illinois Central*: that some development in navigable water does not substantially impair, and in fact may benefit, the public interest in navigation. *This is a conceivable set of facts.* The Legislature embraced, rather than ignored the *Wilbour* “problem” and made a reasonable judgment consistent with the public trust doctrine. As the Court noted in *Caminiti*, by 1971, approximately 60 percent of the tidelands and 30 percent of the shorelands acquired at statehood were being transferred to private ownership. *Caminiti*, 107 Wn.2d at 666. By enacting RCW 90.28.270(1), the Legislature decided not to allow these substantial public and private improvements to be subject to multiple and vexing *Wilbour*-like challenges. Instead, the Legislature recognized that

the interest of the people in the navigation of the waters and in commerce *as a whole* would be benefited, and would not be substantially impaired, by these developments. To achieve this policy and to afford the public these protections, the Legislature enacted RCW 90.58.270(1) as a narrow grant of consent to these developments.

CBC argues now, more than forty years after the fact, that the Legislature went too far. Its argument is not only untimely<sup>13</sup> but is also based on a revisionist misreading of the statute. RCW 90.58.270(1) consents only to the effect of development on navigation. The consent does not extend to any development “in trespass or in violation of state statutes.” *Id.* Nor does the statutory consent extend to any future development, which will be controlled by plans, policies and regulations of the Act and the other land use and environmental controls that apply uniformly to shoreline development. The narrow and limited scope of the consent granted by RCW 90.58.270(1) is well stated by the State of Washington in its Response to the Petition:

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<sup>13</sup> While not argued below, when private parties bring public trust claims, some courts have upheld laches as an affirmative defense. *See, e.g., Reynolds v. City of Calistoga*, 223 Cal. App. 4th 865, 167 Cal. Rptr. 3d 591 (2014) (“Lastly, even if the complaint could be considered as including a claim for violation of the public trust for which plaintiff had standing, the claim would nevertheless be barred by laches, as a matter of law, based on plaintiff’s unreasonable and prejudicial delay in bringing the claims”).

The proviso in RCW 90.58.270(1) makes clear that no consent is given to fill or development trespassing on public lands. Moreover, the statute does not cede control by allowing future fill or development—future fill or development will be controlled by plans and regulations of the SMA. Thus, the effect of the statute is restricted to property already filled or developed almost half a century ago, and the effect is limited to preventing a *Wilbour* action based on the absence of historic government consent. The minimal effect of this legislative action is shown by the fact that *Wilbour* challenges are rare. This case appears to be the first case in decades to rely on *Wilbour* and the first to complain that the statute barred a *Wilbour* action.

State’s Response to Petition for Review at 10, *Chelan Basin Conservancy v. GBI Holding Co.*, No. 93381-2 (Wash. Aug. 15, 2016) (“State’s Response”). RCW 90.58.270(1) reflects a reasonable legislative judgment and exercise of control that is consistent with the public trust doctrine.

**5. RCW 90.58.270(1) passes the *Caminiti* test.**

These appropriate presumptions of validity and fact must be employed in the application of the test established by *Caminiti*: The threshold question is “whether the state, by the questioned legislation, has given up its right of control over the *jus publicum*.” *Caminiti*, 107 Wn.2d at 670. Here, the Legislature and the people of the State of Washington expressly considered the fact of preexisting development and two different tools to exercise control over preexisting development. One tool was an express savings clause that would have permitted *Wilbour*-like

challenges.<sup>14</sup> The Legislature and the people rejected this approach. Instead, they chose Initiative 43B, which expressly abolished *Wilbour*. Section 27 of Initiative 43B (RCW 90.58.270(1)) granted an explicit and limited consent to pre-1969 fills and brought these areas under the comprehensive and prospective regulatory regime put in place by the Act as a whole. This was an exercise of control, not an abrogation of control.

That conclusion is a sufficient basis to uphold the statute without even reaching the second prong of the *Caminiti* test, which applies only if the State has been found to have relinquished its control over the *jus publicum*. If RCW 90.58.270(1) is so viewed, the inquiry then turns to whether the statute promoted the interest of the public in the *jus publicum*.

As the State has explained, it does promote this interest:

Given the cloud created by *Wilbour*, the Legislature reasonably concluded that limiting *Wilbour* claims in favor of an SMA regulatory regime authorizing planning and regulation that promotes public trust values—even for historic development and fills—promotes the overall interest of the public in navigable waters.

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<sup>14</sup> Compare Section 27 of Initiative 43B (now codified at RCW 90.58.270), with Section 18 of Initiative 43 (rejected by the voters); had Initiative 43 been approved by the voters, it would have provided (CP 934-47):

Except as permitted by this Act, there shall be no interference with or obstruction of the navigational rights of the public pursuant to common law as stated in such cases as the Washington State Supreme Court decision in *Wilbour v. Gallagher*, 77 Wn.2d 306 (1969).

State's Response at 13-14. RCW 90.58.270(1) also provides certainty that historical development in navigable water providing public benefits may remain in place, including development such as roads, port infrastructure, and significant urban areas all across the State.<sup>15</sup>

A final and disjunctive question posed by *Caminiti* is whether RCW 90.58.270(1) substantially impairs the interests of the public in the *jus publicum*. It does not. Again, the State argues and we agree that:

CBC's claim does not involve a substantial impairment of the *jus publicum* as required by the third step in *Caminiti*. As discussed above, the statute's intended effect of limiting *Wilbour* is insignificant because *Wilbour* claims are infrequently brought and may not benefit the *jus publicum* at all. CBC's claims also fail because they rely entirely on a flawed analysis regarding the effect of a single fill.

State's Response at 14. The "interests of the public" presented in this case are limited to an eight-acre perspective on the use and enjoyment of Lake Chelan. Even here, CBC makes no allegation that its members are prevented or even substantially impaired from using Lake Chelan in common with the public. Indeed, the Three Fingers does not impair this right any more or less than any other legal developments on private

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<sup>15</sup> The legislative history notes: "If it [a savings clause] 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. . . ." 1 S. JOURNAL, 42d Leg., 1st Ex. Sess. at 1411 (Wash. 1971).

property that have occurred on the shorelines of Lake Chelan, subsequent to the Act. The Act (inclusive of RCW 90.58.270(1)) fully protects the values embodied by the public trust doctrine. For these reasons, the Decision should be affirmed.

**B. The Court of Appeals Correctly Applied RCW 7.48.160 in Dismissing CBC’s “Nuisance Claims.”**

In its Petition for Review, CBC argues that the “Three Fingers fill is a public nuisance and therefore violates state statutes.” CBC Petition for Review at 17-19, *Chelan Basin Conservancy v. GBI Holding Co.*, No. 93381-2 (Wash. July 14, 2016). But Petitioner did not plead—and expressly disavowed—any nuisance claims below.<sup>16</sup> The Court of Appeals noted that “[b]ecause CBC has disavowed a public nuisance claim, we technically need not address this issue.” *Chelan Basin Conservancy*, 194 Wn. App. at 492. As a matter of law, and not a technicality, the Court of Appeals should not have rendered an advisory opinion on a matter that is not a “case or controversy.” *To-Ro Trade Shows v. Collins*, 144 Wn.2d 403, 411 (2001). Claims that were neither pleaded nor prosecuted by CBC were not properly before the Court of Appeals and this Court’s consideration of those claims should end here.

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<sup>16</sup> 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.” CBC Response Br. at 10. See also CBC’s Complaint which does not contain a public nuisance claim. (CP 3-11).

CBC argues that the proviso to RCW 90.58.270(1) somehow provides a platform to consider a claim that was not made. Petitioner contends that if a public nuisance claim were brought and established, then the proviso to RCW 90.58.270(1) would support an abatement action. There are three flaws with CBC's theoretical nuisance claim.

First, CBC does not have standing to bring a public nuisance claim. RCW 7.48.210 provides that “[a] private person may maintain a civil action for a public nuisance, if it is specially injurious to himself or herself but not otherwise.” Petitioner has alleged no special injury.<sup>17</sup> Should any members of CBC identify a harm specially injurious to themselves and not common to the public, they may bring a public nuisance action in an appropriate case. That case has not been filed.

Second, CBC argues for an interpretation of the proviso to RCW 90.58.270(1) that would render the statute meaningless. CBC's putative public nuisance claim springs from RCW 7.48.140(3) (it is a public nuisance to obstruct, without legal authority, “the passage of any river, harbor, or collection of water”). But RCW 90.58.270(1) controls and

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<sup>17</sup> 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 has alleged any kind of economic injury or damage to property or business interests, nor are any of them abutting property owners. None of Petitioner's members lived in Chelan before the fill was in place.

authorizes “any structures, improvements, docks, fills, or developments placed in navigable waters prior to December 4, 1969” to the extent that they impair the public rights of navigation. CBC’s interpretation turns this on its head, contending that any pre-1969 fill that is authorized by RCW 90.58.270(1) is nevertheless subject to abatement as nuisance pursuant to RCW 7.48.140(3). This renders the consent granted by RCW 90.58.270(1) meaningless.

CBC’s attempt to circumvent RCW 90.58.270(1) must be turned back. As a matter of nuisance law, it reads out of existence RCW 7.48.160, which states: “Nothing which is done or maintained under the express authority of a statute, can be deemed a nuisance.” There can be no doubt that by enacting RCW 90.58.270(1) the Legislature intended to authorize pre-1969 fill. The Court of Appeals correctly concluded:

*CBC’s construction of the savings clause would undermine this [legislative] 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.*

*Chelan Basin Conservancy*, 194 Wn. App. at 491 (emphasis added).

The Decision comports with well-established rules of statutory interpretation. It applies the rule that a court should “determine and give effect to the intent of the legislature.” *State v. Evans*, 177 Wn.2d 186, 192 (2013) (quoting *State v. Sweany*, 174 Wn.2d 909, 914 (2012)). It also applies the rule that courts should not interpret statutes so as to render them meaningless or absurd. See *Ralph v. Dep’t of Nat. Res.*, 182 Wn.2d 242, 248 (2014) (courts review statutes “as a whole so that, if possible, no clause, sentence, or word shall be superfluous, void, or insignificant”) (citations and internal quotation marks omitted); *City of Seattle v. Fuller*, 177 Wn.2d 263, 274 (2013).

Third, as a last ditch effort, CBC argues that its theoretical nuisance claims, although not asserted and otherwise barred by RCW 90.58.270, are saved by this Court’s decision in *Grundy*, 155 Wn.2d 1. *Grundy* stands for the proposition that a legally established use may become a nuisance. That rule has no application here. The allegation that (absent RCW 90.58.270(1)) Three Fingers unlawfully impairs navigation is the only allegation upon which Petitioner’s nuisance argument is based. The Act’s express authorization of that impairment is controlling. In this regard, the Court of Appeals again correctly concluded:

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 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.

*Chelan Basin Conservancy*, 194 Wn. App. at 493.

CBC's nuisance claims were never pleaded and were expressly disavowed by CBC. CBC's arguments fly in the face of RCW 7.48.160 and require an interpretation of RCW 90.58.270(1) that renders it meaningless. CBC's theoretical claims are not saved by the inapposite rule expressed in *Grundy*.

### **CONCLUSION**

The judgment of the Court of Appeals with respect to the validity of RCW 90.58.270(1) should be affirmed. CBC's public nuisance claims were not properly raised and should be dismissed; in the alternative, the Court of Appeals' disposition of these claims should be affirmed. The judgment of the Court of Appeals with respect to CBC's standing to bring an action to abate and remove the Three Fingers fill as a common law public trust doctrine claim should be reversed.

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Respectfully submitted,

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## DECLARATION OF SERVICE

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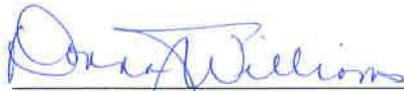
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I declare under penalty of perjury under the laws of the State of  
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