

NO. 93381-2

COURT OF APPEALS NO. 33196-2-III

SUPREME COURT OF THE STATE OF WASHINGTON

CHELAN BASIN CONSERVATORY,

Petitioner,

v.

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

Respondents,

**SUPPLEMENTAL BRIEF OF PETITIONER CHELAN BASIN
CONSERVATORY**

Brendan W. Donckers, WSBA No.39406
Daniel F. Johnson, WSBA No. 27848
Roger M. Townsend, WSBA No. 25525
BRESKIN JOHNSON & TOWNSEND, PLLC
1000 Second Avenue, Suite 3670
Seattle, WA 98104
Telephone (206) 652-8660

Michael W. Gendler
GENDLER LAW PLLC
5006 Greenwood North
Seattle, WA 98103
Telephone (206) 890-8808

Russel J. Speidel, WSBA No. 12838
David J. Bentsen, WSBA No. 42107
SPEIDEL BENTSEN LLP
7 N. Wenatchee Avenue, Suite 600
Wenatchee, WA 98807
Telephone (509) 662-1211

Attorneys for Chelan Basin Conservancy

TABLE OF CONTENTS

TABLE OF CONTENTS.....	I
I. INTRODUCTION	1
II. ARGUMENT.....	4
A. Public trust doctrine secures the public’s “paramount” and “inalienable” rights of navigation, the fishery, and related rights including recreation.....	4
B. Public trust doctrine precludes the SMA’s blanket consent to pre-existing fills without regard to impairing public trust rights.....	7
1. The SMA savings clause, like any legislation affecting the public trust, is reviewed under “heightened” scrutiny.....	7
2. The Court of Appeals did not review RCW 90.58.270(1) under “heightened” scrutiny.....	9
3. The Court of Appeals fails to accurately apply <i>Caminiti</i> ’s two-step test and imposes new limitations on public trust claimants.....	11
4. Under “heightened” scrutiny a blanket impairment to public navigation for all pre-December 4, 1969 fills on shorelands violates the public trust.....	14
C. The SMA’s savings clause makes no exception for historic fills that constitute a public nuisance.....	16
D. The Three Fingers fill is a public nuisance	19
E. Petitioner Chelan Basin Conservancy has standing	19
III. CONCLUSION.....	20

TABLE OF AUTHORITIES

Cases

<i>Ariz. Ctr. For Law in Pub. Interest v. Hassell</i> , 172 Ariz. 356, 371 (Ariz. Sep. 10, 1991).....	15
<i>Caminiti v. Boyle</i> , 107 Wn.2d 662 (1987).....	passim
<i>Chelan Basin Conservancy v. GBI Holding Co.</i> , 194 Wn. App. 478 (2016)	1
<i>Grundy v. Thurston County</i> , 155 Wn.2d 1, (2005).....	18
<i>Id.</i>	8, 9, 17
<i>Illinois Central Railroad Co. v. Ill.</i> , 146 U.S. 387 (1892).....	7, 8, 16
<i>Kemp v. Putnam</i> , 47 Wn.2d 530 (1955).....	20
<i>New Whatcom v. Fairhaven Land Co.</i> , 24 Wash. 493 (1901)	4, 5, 6
<i>Orion Corp. v. State</i> , 109 Wn.2d 621 (1987).....	2, 7, 15
<i>Phillips Petroleum Co. v. Mississippi</i> , 484 U.S. 469 (1988)	4
<i>Ralph v. Dep’t of Natural Res.</i> , 182 Wn.2d 242 (2014)	19
<i>Responsible Wildlife Mgmt v. State</i> , 124 Wn. App. 566 (2004)	15
<i>Rettkowski v. Dep’t of Ecology</i> , 122 Wn.2d 219 (1993).....	5
<i>San Francisco Baykeeper, Inc. v. State Lands Com.</i> , 242 Cal. App. 4th 202 (Cal. Nov. 18, 2015)	8
<i>State v. Surtevant</i> , 76 Wash. 158 (1913).....	6
<i>Weden v. San Juan County</i> , 135 Wn.2d 678 (1998).....	passim

Statutes

RCW 7.48.120	17
RCW 7.48.140	3
RCW 7.48.150	18
RCW 9.66.010	18
RCW 79.90.105	13

RCW 90.58.270 13
RCW 90.58.270(1)..... passim

Other Authorities

The Public Trust Doctrine and Coastal Zone Management in Washington State,
67 WASH L. REV. 521, 539-40 (1992) 10

Constitutional Provisions

Const. art. XVII, §1..... 1, 4

I. INTRODUCTION

This case asks whether the state may consent by statute to allowing all fills placed in navigable waters before 1969 to remain in place, regardless of their effect on the inalienable public trust rights associated with navigation. Specifically, it concerns how the public trust doctrine applies to a large fill placed in Lake Chelan by Respondent and Cross-Petitioner GBI Holding Co. (“GBI”). The fill is comprised of approximately 100,000 cubic yards of dirt and material deposited into and around Lake Chelan starting in 1961. The fill is approximately eight acres and juts outward from Lake Chelan’s southeastern shoreline into Lakeside Bay. Since 1962, the fill has been unimproved and essentially unused. It is commonly referred to as the “Three Fingers.”

The public trust doctrine secures the public’s “paramount” and “inalienable” rights to navigation and corollary rights over navigable waters and shorelands. *Caminiti v. Boyle*, 107 Wn.2d 662, 667-68 (1987) (citing *New Whatcom v. Fairhaven Land Co.*, 24 Wash. 493, 499-504 (1901)). The Washington constitution vests the state with ownership to the beds and shores of all navigable waters. Const. art. XVII, §1. “Along with this right of ownership came a duty of public trust,” “always recognized” as the public trust doctrine. *Chelan Basin Conservancy v. GBI Holding Co.*, 194 Wn. App. 478, 485-86 (2016).

In *Caminiti*, this Court recognized that the public’s right of navigation is inalienable, and can no more be given away than can the state “abdicate its police powers in the administration of government and the preservation of the peace.” 107 Wn.2d at 669 (internal citation omitted). In *Orion Corp. v. State*, 109 Wn.2d 621 (1987) the Court held that the public trust doctrine justified curtailing a development over shorelands where the proposed fill conflicted with the public’s interest in navigable waters.

The Court of Appeals erred when it concluded that the state, through the Shoreline Management Act, RCW 90.58.270(1), had not abdicated its public trust duties by purporting to consent to all fills put in place prior to December 4, 1969. The court did not properly apply the “heightened” scrutiny that is required when evaluating legislation against a “paramount” and “inalienable” right. *Weden v. San Juan County*, 135 Wn.2d 678, 698 (1998).

The Court of Appeals also failed to apply *Caminiti*’s two-step test for evaluating challenged legislation under the public trust doctrine. *Caminiti* requires review of whether the state has given up control of the public’s inalienable right of navigation, and if so, whether the state has promoted the interest of the public or has not substantially impaired it. 107 Wn.2d at 670. The Court of Appeals concluded that reliance upon

these factors was “mistaken” and then purported to require public trust claimants to evaluate the impact of the challenged statute statewide, regardless of whether the suit is site-specific. The court excused abdicating control over pre-existing fills because “vast areas of water” remained “unaffected” and the SMA results in an overall increase in shoreline regulation. 194 Wn. App. at 495. But this ignores the fill at issue, sets insurmountable barriers for public trust claimants, and erodes the public’s “paramount” and “inalienable” right.

The Court of Appeals also failed to apply the plain meaning of the proviso in RCW 90.58.270(1) to the Three Fingers. The statute withholds the public’s consent to fills that “are in trespass or in violation of state statutes.” RCW 90.58.270(1). The court erred when it determined that the statute’s plain language was ambiguous. 194 Wn. App. at 489. It also erred in concluding that the legislative history consisting of a single statement during a committee hearing commanded a finding that “state statutes” excluded public nuisance, a right codified in 1875. *See* RCW 7.48.140; Code of 1875 p 79 §2.

II. ARGUMENT

A. Public trust doctrine secures the public’s “paramount” and “inalienable” rights of navigation, the fishery, and related rights including recreation

The Washington constitution asserts state ownership to the “beds and shores of all navigable waters in the state...” Const. art. XVII, §1. Title to these lands is subject to the public’s “paramount right of navigation and the fishery.” *Caminiti v. Boyle*, 107 Wn.2d 662, 667 (1987). The public’s interest in these lands is preserved as a public “easement in such waters for purposes of travel.” *New Whatcom v. Fairhaven Land Co.*, 24 Wash. 493, 504 (1901). It is an “inalienable” right. *Caminiti*, 107 Wn.2d at 668 (1987) (*citing New Whatcom*, 24 Wash. at 504). In addition to the core rights of navigation and fishing, courts recognize the public trust doctrine’s application to “incidental” recreational interests including boating, swimming and water skiing. *Caminiti* at 669 (*citing Wilbour v. Gallagher*, 77 Wn.2d 306, 316 (1969)).¹

While the Court of Appeals minimized the public trust doctrine as “little-known,” 194 Wn. App. at 482, it has been recognized since ancient times. Its origins go back to sixth century Rome, where the Code of Justinian in 533 A.D. recognized an “overriding public interest” in navigable waterways. *Caminiti*, 107 Wn.2d at 668-69 (internal citation

¹ See also *Phillips Petroleum Co. v. Mississippi*, 484 U.S. 469, 476-482 (1988) (“the States have interests in lands beneath tidal waters which have nothing to do with navigation” including “bathing, swimming, recreation, fishing, and mineral development.”).

omitted); *Rettkowski v. Dep't of Ecology*, 122 Wn.2d 219, 239 (1993) (internal citations omitted). Regional French law in the 11th century recognized that running water and springs were to be maintained so that “people may always use them.” *Rettkowski* at 239 (internal citations omitted). English common law provided that tidelands were “vested in the king, as a public trust, to subserve and protect the public right to use them as a common highway for commerce, trade, and intercourse.” *New Whatcom*, 24 Wash. at 499. While the king could grant rights to the soil as private property, in “every such grant, there was an implied reservation of the public right.” *Id.* *New Whatcom* recognized that the state’s ownership in the beds of navigable waters was necessarily limited “to the same extent the crown had in England in the sea.” *Id.* at 500.

The state’s ownership interest in tidelands and shorelands is referred to as *jus privatum*. *Caminiti* at 668-69. The public’s interest in using shorelines for navigation and recreation is referred to as *jus publicum*. *Id.* While the state can convey the *jus privatum*, it “can no more convey or give away the *jus publicum* interest than it can ‘abdicate its police powers in the administration of government and the preservation of the peace.’” *Caminiti* at 669 (quoting *Illinois Cent. R.R. v. Illinois*, 146 U.S. 387, 453 (1892)). It is “the sovereignty and dominion over this state’s tidelands and shorelands, as distinguished from *title* that always remains in the State, and the State holds such dominion in trust for the public.” *Id.* (emphasis in original).

While early decisions from this Court did not expressly recognize the public trust doctrine by name, they recognized the public's "paramount" interest in navigation. *See New Whatcom v. Fairhaven Land Co.*, 24 Wash. 493, 503 (1901). The Court also recognized that the public right of navigation is unique, "the only right which the state has ever undertaken to maintain in trust for the whole people. *State v. Surtevant*, 76 Wash. 158, 165 (1913). In 1987, this Court expressly recognized the public trust doctrine, finding that it has "always existed in the State of Washington." *Caminiti*, at 670 (internal citation omitted).

Caminiti concerned the constitutionality of a statute allowing private property owners to install and maintain docks over state owned shorelands without paying for the license. Permission was revocable. *Caminiti* adopted a two-part test for courts to apply when evaluating a challenge to legislation under the public trust doctrine. First, the court determines whether the state has given up control over the jus publicum; if so, the court evaluates whether the state has promoted the interest of the public in the jus publicum or has not substantially impaired it. 107 Wn.2d at 670. *Caminiti* determined that the state had not ceded control over the jus publicum because the license was revocable. Further, the statute promoted public trust interests by allowing homeowners and their guests to obtain recreational access to navigable waters, and was supported by a regulatory framework that ensured that private docks could not block public access to public tidelands and shorelands. *Id.* at 673-74.

After *Caminiti*, the Court decided *Orion Corp. v. State*, 109 Wn.2d 621 (1987). *Orion* involved the proposed dredging and development of more than 5,600 acres of tidelands that had been acquired by the developer between 1963 and 1971. *Id.* at 626. *Orion* held that the proposal violated the public trust doctrine because the doctrine “resembles a covenant running with the land (or lake or marsh or shore) for the benefit of the public and the land’s dependent wildlife.” *Id.* at 640 (internal citation omitted). Thus, when “it purchased its tidelands, Orion could make no use of the tidelands which would substantially impair the trust.” *Id.*

B. Public trust doctrine precludes the SMA’s blanket consent to pre-existing fills without regard to impairing public trust rights

1. The SMA savings clause, like any legislation affecting the public trust, is reviewed under “heightened” scrutiny

When *Caminiti* expressly recognized the public trust doctrine, it relied heavily on an 1892 decision from the U.S. Supreme Court, *Illinois Central Railroad Co. v. Ill.*, 146 U.S. 387 (1892). In that case, the Court affirmed the Illinois legislature’s repeal of a grant issued to the Illinois Central Railroad encompassing more than a mile of the Chicago waterfront and the adjacent bed of Lake Michigan. *Illinois Central* described the public trust doctrine as a “title held in trust for the people of the State that they may enjoy the navigation of the waters, carry on commerce over them, and have liberty of fishing therein freed from the obstruction or interference of private parties.” 146 U.S. at 452. The Court recognized inherent limitations on legislative power:

It is grants of parcels of lands under navigable waters, that may afford foundation for wharves, piers, docks and other structures in aid of commerce, and grants of parcels which, being occupied, do not substantially impair the public interest in the lands and waters remaining, that are chiefly considered and sustained in the adjudged cases as a valid exercise of legislative power.

Id. The Court continued, stating:

a state can no more abdicate its trust over property in which the whole people are interested, like navigable waters and soils under them so as to leave them entirely under the use and control of private parties, except in the instance of parcels mentioned for the improvement of navigation and use of the waters, or when parcels can be disposed of without impairment of the public interest in what remains, than it can abdicate its police powers in the administration of government and the preservation of the peace.

Id. at 453. Any decision that fails to account for the state’s enduring trust over the shorelands and tidelands must be reviewed carefully, “read and construed with reference to the special facts of particular cases.” *Id.*; see also *San Francisco Baykeeper, Inc. v. State Lands Com.*, 242 Cal. App. 4th 202 (Cal. Ct. App. 2015), *review denied*, 2016 Cal. LEXIS 1429 (Cal., Mar. 9, 2016) (“courts should ‘look with considerable skepticism upon any governmental conduct which is calculated...to subject public uses to the self-interest of private parties’”) (internal citation omitted).

11 years after *Caminiti*, this Court reviewed another legislative challenge based on the public trust doctrine. Citing both *Caminiti* and *Illinois Central, Weden v. San Juan County*, 135 Wn.2d 678 (1998) acknowledged the “universally recognized need to protect public access to

and use of such unique resources as navigable waters, beds, and adjacent lands” and therefore required legislation reviewed under the public trust doctrine to be considered under a “heightened degree of judicial scrutiny, as if they were measuring that legislation against constitutional protections.” 135 Wn.2d at 698 (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)).

Weden involved a challenge to an ordinance banning the use of personal watercraft (“PWC”) on navigable waters in San Juan County. The Court applied heightened scrutiny to evaluate the restriction and concluded that the county had not given up its control over its waters: although the ordinance prohibited one form of recreation, it promoted the *jus publicum* by ensuring navigable waters were “open to access by the entire public, including owners of PWC who utilize some other method of recreation.” 135 Wn.2d at 699. It was also consistent with the goals of statewide environmental protection statutes. *Id.*

2. The Court of Appeals did not review RCW 90.58.270(1) under “heightened” scrutiny

The SMA’s savings clause, at RCW 90.58.270(1), provides in pertinent part:

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...are hereby

granted...PROVIDED, That the consent herein given shall not relate to any structures, improvements, docks, fills, or developments...which are in trespass or in violation of state statutes.

The Court of Appeals did not review this provision under “heightened” scrutiny.

Instead of carefully examining the statute in light of public trust principles, the Court of Appeals got it backwards. The Court of Appeals applied the provision categorically, to protect “all pre-1969 fills.” 194 Wn. App. at 489. It then imposed a higher burden on petitioner, CBC. Without citation to authority or explanation, the court stated, the “ability to assert a public trust claim should not be *easier* than in the constitutional context.” *Chelan* at 494 (emphasis added). This statement confuses the heightened scrutiny that must be given to statutes implicating “paramount” and “inalienable” rights with the usual deference given to legislative judgment when reviewing other statutes.² In the usual case, if a court finds a rational basis for a challenged statute, it will decline to substitute its own judgment for the legislature.³ But the courts “make an exception to this deferential review, however, when certain constitutional issues” such as fundamental rights are implicated.⁴ The public trust doctrine requires scrutiny based not only on constitutional foundations, but on ‘historical common law traditions and the unique value and importance of

² See Ralph W. Johnson et al., *The Public Trust Doctrine and Coastal Zone Management in Washington State*, 67 WASH. L. REV. 521, 539-40 (1992) (internal citations omitted)).

³ *Id.* (internal citation omitted).

⁴ *Id.* at 540.

navigable waters and coastlines,” and “the legislature cannot divest the courts of their responsibility to consider the public trust doctrine.”⁵

Weden relied on these principles in requiring that legislation under the public trust doctrine is reviewed “with a heightened degree of judicial scrutiny, ‘as if they were measuring that legislation against constitutional protections.’” 135 Wn.2d at 698 (*citing Johnson supra*). The Court of Appeals failed to do so.

Proper application of “heightened” scrutiny under *Weden* and *Caminiti*, requires analyzing first, whether the state has given up control over the jus publicum and if so, whether the interest in the jus publicum are promoted or are not substantially impaired. *Caminiti*, 107 Wn.2d at 670 (internal citation omitted).

3. The Court of Appeals fails to accurately apply *Caminiti*’s two-step test and imposes new limitations on public trust claimants

The Three Fingers fill is located on the southeast shoreline of Lake Chelan within the City of Chelan on Lakeside Bay. The parties do not dispute Lake Chelan’s navigability. The parties also do not dispute whether the lakeshore upon which the Three Fingers lie is subject to the public trust doctrine.

While the Court of Appeals acknowledged *Caminiti*’s two-step analysis, it was not applied. The first question is whether the state has given up control over the jus publicum. 107 Wn.2d at 670. The State

⁵ *Id.*

admitted to the Court of Appeals that it had ceded control over the jus publicum, *see* State of Washington’s Opening Br. at 25-28. The Court of Appeals reached the same conclusion, relying heavily upon a statement made by Senator Gissberg stating that he understood the savings clause applied, without limitation, to “those structures placed there prior to [December 4, 1969],” otherwise, he quipped, “every dock, most of industry in the state that is on water, of course, is there illegally and subject to mandatory injunction to being removed by anyone that wants to bring the lawsuit.” 194 Wn. App. at 490-91 (*citing* 1 SENATE JOURNAL, 42d Leg., 1st Ex. Sess., at 1411 (Wash. 1971)). The state has given up control over the jus publicum.

The Court of Appeals did not evaluate the second step in *Caminiti*, whether the Three Fingers fill promoted public interests or did not substantially impair them. The court stated that these factors were “not particularly relevant to the legality of the SMA’s savings clause.” 194 Wn. App. at 495. This is improper under *Caminti* and *Weden*; *see also* Johnson, et al., *supra* note 2 at 540 (legislature cannot divest courts of their responsibility under the public trust doctrine).

The Court of Appeals engrafted a new element in public trust jurisprudence by requiring a claimant to make some factual showing to prove that the “savings clause, applied as a whole throughout the state, is

invalid.” *Id.*⁶ But this again misconstrues *Caminiti*, a case that challenged the general validity of a law allowing private docks on shorelands to be installed and maintained without paying fees to the state. The nature of *Caminiti* was to challenge the general application of RCW 79.90.105. This case, by contrast, is a site-specific claim that one particular fill on Lake Chelan impermissibly interferes with the Plaintiff’s (and the public’s) navigation and related activities under the public trust doctrine.

The State’s musings at oral argument in the Court of Appeals that there may be bays in other waters that facilitate navigation are irrelevant. No case supports the Court of Appeals’ rationale that local citizens seeking to remedy a public trust violation that affects them need to analyze similar situations “throughout the state.” 194 Wn. App. at 495. No public trust claimant has lost their case because there are “vast areas of other water” elsewhere. The plaintiffs in *Weden* were not told that San Juan’s ban on PCWs was valid because they could ride their PWCs elsewhere. *See* 135 Wn.2d at 699. The developer in *Orion* was not told to find another bay to fill and develop. 109 Wn.2d at 641 (proposal to dredge and fill tidelands in Padilla Bay, Skagit County would “substantially impair the public’s right to navigation” and “incidental rights”).

⁶ The State endorsed this view, contending that CBC failed to offer sufficient evidence to show that RCW 90.58.270 would have an “impermissible effect on navigable waters generally.” State of Washington’s Response to Petition for Review at 8.

4. Under “heightened” scrutiny a blanket impairment to public navigation for all pre-December 4, 1969 fills on shorelands violates the public trust

Under heightened scrutiny and the facts of this case, RCW 90.58.270(1) violates the public trust doctrine. First, the Superior Court recognized that the savings clause constituted a complete abdication of state control over the jus publicum: “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.” CP 836.

Second, there is no evidence showing that the Three Fingers promotes the public interest in navigation and fishing or recreational interests. The evidence, by contrast, shows that public navigation and access to the lake is substantially impaired. Indeed, the Superior Court recognized that the fill “wholly obliterated the ability to utilize that portion of the lake for navigation and recreation.” CP 836.

In their responses to CBC’s petition for review, GBI and the State relied primarily on the adoption of a land use framework in the SMA to support their contention that allowing all pre-existing fills to remain in place, even those that substantially impair navigational interests, was permissible because the SMA represented an overall increase in regulation of shorelines. But an overall increase in state regulation of shorelines does not justify a total abdication of control over each and every fill that existed prior to December 4, 1969. Indeed, reviewing a site-specific fill that totally impairs the jus publicum is consistent with *Orion*, where this Court confirmed that dredging and filling a shoreline on Padilla Bay was not

allowed under the public trust doctrine regardless of its consistency with other regulations. 109 Wn.2d at 640-42.⁷ It is also consistent with other jurisdictions reviewing legislation that cede navigational rights under the public trust doctrine without providing a “mechanism for particularized assessment” of the land that is relinquished, including “conditions that may be necessary to any transfer to assure that public trust interests remain protected.” *Ariz. Ctr. For Law in Pub. Interest v. Hassell*, 837 P.2d 158, 173 (Ariz. Ct. App. 1991), *petition dismissed*, 837 P.2d 158 (Oct. 6, 1992) (invalidating legislation that relinquished riverbeds for the purpose of ‘unclouding title’ but failing to ensure each transfer protect public trust interests). “That generations of trustees have slept on public rights does not foreclose their successors from awakening.” *Id.* at 171.

Any increased control and promotion of public interests conferred by the adoption of the SMA applied to shoreline uses prospectively, following the 1971 enactment of the SMA. Thus, a common thread in public trust litigation since 1971 is the existence of some regulatory framework that applied to the use questions at issue. *See Weden; Caminiti; Responsible Wildlife Mgmt v. State*, 124 Wn. App. 566 (2004). The installation of Three Fingers fill was not subject to regulatory review. And none of these cases support the proposition that an intrusion on public

⁷ *Orion* did not state whether the development proposal was consistent with other regulations governing shoreline uses but noted that the developer believed that the SMA precluded the project. 109 Wn.2d at 627. The case was remanded because the court “cannot determine whether Orion’s property is adaptable to any use that does not impair the trust.” *Id.* at 642.

trust rights should be balanced against an overall increase in other, possibly unrelated, regulatory control.⁸

The state and GBI also argued that development in public water can benefit the public interest in navigation, but this does not address the “special facts of particular cases” required by *Illinois Central*. 146 U.S. at 453. And under *Illinois Central*, the “control of the State for the purposes of the trust can never be lost, except as to such parcels as are used in promoting the interests of the public therein[.]” *Caminiti*, 107 Wn.2d at 670 (citing *Illinois Central* at 453). In this case, the evidence demonstrates that the fill is not a single parcel and it does not improve public access to the shorelines of the state, it substantially *impedes* public access to them. While some historic fills may promote navigation without substantially impairing it, that does not rescue the Three Fingers fill.

C. The SMA’s savings clause makes no exception for historic fills that constitute a public nuisance

RCW 90.58.270(1) states, in pertinent part, that while the statute does not provide “authority for requiring or ordering the removal of any structures...placed in navigable waters prior to December 4, 1969...the consent given shall not relate to any structures...which are in trespass or in violation of state statutes.” The Superior Court found that the Three

⁸ For example, the SMA regulates upland uses within 200 feet of the ordinary high water mark. That the statute may have increased overall regulation of multi-family housing near the water might have little or nothing to do with the inalienable rights secured by the public trust doctrine. Yet the State and Court of Appeals urge that one can be traded off against the other.

Fingers fill constituted a public nuisance under RCW 7.48.120 and thus violated a ‘state statute’ under RCW 90.58.270(1).

While the Court of Appeals acknowledged its duty to apply the plain language of RCW 90.58.270(1), it found the provision ambiguous. 194 Wn. App. at 489. Relying on a comment from Senator Gissberg in a committee hearing stating that the savings clause made fills that existed prior to December 4, 1969 legal, the Court of Appeals determined that a “claim for trespass or a statutory violation must stand on its own, separate from any claim under the public trust doctrine.” *Id.* at 491-92. But the savings clause is not ambiguous, and has the opposite effect from that urged by the Court of Appeals. The savings clause did not insulate existing fills against public trust claims while preserving other grounds to seek abatement. Instead, it limited consent to circumstances where statutory violations or trespass were not present. And there is no basis, applying the plain language of RCW 90.58.270(1), to conclude that the legislature intended to exclude a public nuisance claim as a matter of law. There is no clause in RCW 90.58.270(1) that excepts Chapter 7.48 from the statute’s reference to structures “in violation of state statutes.”

The nuisance statute was first codified in Washington in 1875. It involves “unlawfully doing an act, or omitting to perform a duty, which act or omission...unlawfully interferes with, obstructs or tends to obstruct, or render dangerous for passage, any lake...” RCW 7.48.120. A public nuisance includes any action to “obstruct or impede, without legal authority, the passage of any river, harbor, or collection of water.” *Id.*

Under RCW 7.48.150, “No lapse of time can legalize a public nuisance, amounting to an actual obstruction of public right.” A public nuisance is a “crime against the order and economy of the state.” RCW 9.66.010.

The Court of Appeals speculated that the goal of the savings clause was to avoid the “automatic removal of preexisting fills that was threatening to take place post-*Wilbour*,” but there is no reason to conclude that the right to use the public nuisance statute under the savings clause would result in the ‘automatic’ removal of all preexisting fills. Nothing in the statutory language nor in the sparse legislative history of a committee colloquy supports the exclusion of the public nuisance statute as a basis for negating the consent of the savings clause.

Instead of applying the public nuisance statute to the Three Fingers under the proviso, the Court of Appeals concluded that because the savings clause of RCW 90.58.270(1) permitted historic fills, and because RCW 7.48.160 precludes a nuisance if “done or maintained under the express authority of a statute,” there can be never be claim that a historic fill is a nuisance. *Chelan* at 492. This not only fails to apply the plain language of RCW 90.58.270(1), but ignores that a permitted act may become a public nuisance. *Grundy v. Thurston County*, 155 Wn.2d 1, 8 (2005) (“When a nuisance actually exists, it is not excused by the fact that it arises from a business or erection which is of itself lawful...the legitimate character of its origin does not justify its continuance as a nuisance”) (internal citation omitted). The linchpin depends on the facts of each case, including facts supporting the “reasonableness or

unreasonableness” of the property “in the particular locality and in the manner and under the circumstances of the case.” *Id.* at 7 fn. 5.

The Court of Appeals failed to follow the rules of statutory construction in holding that “the ability to file a public nuisance claim was extinguished.” 194 Wn. App. at 493. Courts must read the entire statute and avoid interpretations that render any portion meaningless. *Ralph v. Dep’t of Natural Res.*, 182 Wn.2d 242, 248 (2014).

D. The Three Fingers fill is a public nuisance

Between 1961 and 1962, GBI dumped fill that had been excavated during the course of highway construction on its property into Lake Chelan. CP 184-185. GBI has made no significant use of, or improvements to, the Three Fingers since that time.

The trial court concluded that there were no disputes of material fact regarding whether the Three Fingers fill constitutes a public nuisance. The court ruled 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.” CP 1569. The trial court properly concluded that the Three Fingers is a public nuisance to which the public did not consent under RCW 90.58.270(1).

E. Petitioner Chelan Basin Conservancy has standing

GBI and the state petitioned the Court to review whether CBC has standing to bring its claims under the public trust doctrine. This argument was properly rejected by the Court of Appeals and the trial court. A party has standing under the public trust doctrine where recreational interests are

at stake. *Caminiti*, 107 Wn.2d at 665. The record is replete with evidence establishing that CBC's members established recreational interests specific to the Three Fingers area. CP 379-88. Indeed, these interests are "precisely those the public trust doctrine is intended to protect." 194 Wn. App. at 489 (*citing Weden*, 135 Wn.2d at 698). While GBI has contended that CBC must prove special injury under the nuisance statute, this case was not brought as a nuisance action. The trial court concluded that the evidence supports a finding that the Three Fingers is a public nuisance, but this decision does not convert the case to a nuisance action. And even if proof of "special injury" were required, it has been established by proving interference with recreational interests. *See Kemp v. Putnam*, 47 Wn.2d 530 (1955). Moreover, CBC's members were given special access rights under the 1927 dedication for "the public" to Lake Chelan at all levels of water in perpetuity, including lands covered by GBI's fill. CP 392.

III. CONCLUSION

CBC respectfully requests that the Court reverse the decision of the Court of Appeals concluding that RCW 90.58.270(1) does not violate the public trust doctrine and offers permanent and unqualified protection to pre-December 4, 1969 fills and affirm the Superior Court's decision finding that the fill is in violation of the public trust doctrine, constitutes a public nuisance, and should therefore be promptly abated.

DATED this 9th day of January, 2017.

SPEIDEL BENTSEN LLP

By: 

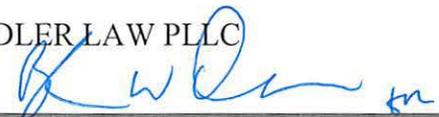
Russel J. Speidel, WSBA No. 12838
David J. Bentsen, WSBA No. 42107
7 N. Wenatchee Avenue, Suite 600
Wenatchee, WA 98807
Telephone (509) 662-1211

BRESKIN JOHNSON & TOWNSEND, PLLC

By: 

Brendan W. Donckers, WSBA #39406
Daniel F. Johnson, WSBA #27848
Roger M. Townsend, WSBA #25525
1000 Second Avenue, Suite 3670
Seattle, WA 98110
Telephone (206) 652-8660

GENDLER LAW PLLC

By: 

Michael W. Gendler
5006 Greenwood North
Seattle, WA 98103
Telephone (206) 890-8808

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:

Alexander W. Mackie
Attorney at Law
P.O. Box 607
Winthrop, WA 98862-0607
[x] By U.S. Mail

J. Kirk Bromiley
Bromiley Law, PLLC
227 Ohme Garden Road
Wenatchee, WA 98801
[x] By U.S. Mail

Terence Pruitt & Jay Geck
Attorney General's Office
P.O. Box 40100
Olympia, WA 98504-0100
[x] By U.S. Mail

Allan Galbraith
Allan Galbraith, PLLC
949 Wheeler Hill Road
Wenatchee, WA 98801-9705
[x] By U.S. Mail

Kenneth W. Harper
Menke Jackson Beyer Ehlis
& Harper, LLP
807 N. 39th Ave.
Yakima, WA 98902
[x] By U.S. Mail

David S. Steele
Katherin Gustafson Galipeau
Perkins Coie LLP
1201 3rd Ave. Ste 4900
Seattle, WA 98101-3099
[x] By U.S. Mail

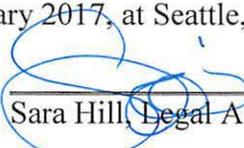
Nicholas J. Lofing
Davis, Arneil Law Firm, LLP
P.O. Box 2136
Wenatchee, WA 98801
[x] By U.S. Mail

Erik K. Wahlquist
Chelan County PUD
P.O. Box 1231
Wenatchee, WA 98807-1231
[x] By U.S. Mail

Markham Allen Quehrn
Perkins Coie LLP
The PSE Building
10885 NE 4th St. Suite 700
Bellevue, WA 98004-5579
[x] By U.S. Mail

John M. Groen
Pacific Legal Foundation
930 G Strret
Sacramento, CA 95814
[x] By U.S. Mail

DATED this 9th day of January 2017, at Seattle, Washington



Sara Hill, Legal Assistant