IN THE SUPREME COURT OF THE STATE OF WASHINGTON

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| CHELAN BASIN CONSERVANCY,<br><br>Petitioner,<br><br>v.<br><br>GBI HOLDING CO.,<br>STATE OF WASHINGTON,<br>and CITY OF CHELAN,<br><br>Respondents,<br><br>and<br><br>CHELAN COUNTY PUBLIC<br>UTILITY DISTRICT,<br><br>Additional Named Party. | No. 93381-2<br><br>En Banc<br><br>Filed MAR 15 2018 |

GONZÁLEZ, J.—Petitioner Chelan Basin Conservancy (Conservancy) seeks the removal of six acres of fill material that respondent GBI Holding Company added to its property in 1961 to keep the formerly dry property permanently above the artificially raised seasonal water fluctuations of Lake Chelan. The Conservancy brings this action more than 50 years later pursuant to Washington's public trust doctrine, which protects the public right to use water in place along navigable waterways. At issue is whether

the State consented to the fill's impairment of that right in 1971 and, if so, whether such consent violates the public trust doctrine.

The Court of Appeals held the "Three Fingers" fill was expressly protected by RCW 90.58.270 (the Savings Clause) from public trust challenges. We agree. As explained in this opinion,[1] the legislature expressly consented to the placement of pre-1969 fills, which includes the Three Fingers fill, when it enacted the Savings Clause and that consent does not violate the public trust doctrine. We therefore affirm.

## FACTS AND PROCEDURAL BACKGROUND

Our state constitution grants the State "ownership to the beds and shores of all navigable waters in the state." CONST. art. XVII, § 1 (article 17). We have interpreted this provision to mean the State possesses an alienable, fee-simple private property interest in those beds and shores subject to an overriding public servitude to use the waters in place for navigation and fishing, and other incidental activities. *Caminiti v. Boyle*, 107 Wn.2d 662, 668-69, 732 P.2d 989 (1987). The parties agree that Lake Chelan is a navigable body of water and that GBI's property along the lake is subject to the public trust servitude.

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[1] This opinion replaces the court's previously filed, but now withdrawn, opinion that was filed on July 6, 2017. Order on Mots. for Recons., No. 93381-2 (Wash. Nov. 13, 2017), https://www.courts.wa.gov/opinions/pdf/933812.pdf (unanimously withdrawing prior opinion).

In its natural state, GBI's property stood above the lake's peak water levels and was continuously dry throughout the year. *See Wilbour v. Gallagher*, 77 Wn.2d 306, 307, 462 P.2d 232 (1969). In 1927, GBI's predecessor in interest granted a flowage easement over the property to a power company to install a dam that would raise the lake's waters. *Id.* at 307-08 (discussing covenants related to the construction of the dam). After the dam was installed, GBI's once dry land became seasonally submerged by the lake's elevated waters.

In 1961, GBI added fill to its property to elevate it once more above the lake's seasonal fluctuations. The fill is locally referred to as "the Three Fingers" because it resembles, in aerial photographs, three rectangular protrusions into the lake.

Eight years after GBI filled its property, we held in *Wilbour*, a case involving a neighboring landfill abutting Lake Chelan, that the neighbor's fill violated the public trust doctrine and ordered the fill be abated. *Id.* at 315-16. Although we acknowledged the existence of other similarly situated fills along the lake, our *Wilbour* decision did not order their abatement. *Id.* at 316 n.13. Despite its limited disposition, *Wilbour* was publicly hailed as a watershed case that placed title to thousands of properties along Washington's shores in question. *See* 1 SENATE JOURNAL, 42d Leg., 1st Ex.

Sess., at 1411 (Wash. 1971). That is because much of Washington's shores and tidelands were improved during our early years of statehood, when private settlement and development were widely encouraged with little consideration given to the effect these developments would have on public trust rights. *See State v. Sturtevant*, 76 Wash. 158, 171, 135 P. 1035 (1913). By 1969, thousands of acres of Washington's tidelands and shorelands had been reclaimed and developed with significant improvements, including the creation of Harbor Island and much of downtown Seattle. Edward A. Rauscher, *The Lake Chelan Case—Another View*, 45 WASH. L. REV. 523, 531 (1970); *Port of Seattle v. Or. & Wash. R. R. Co.*, 255 U.S. 56, 59, 41 S. Ct. 237, 65 L. Ed. 500 (1921); Ralph W. Johnson & Eileen M. Cooney, *Harbor Lines and the Public Trust Doctrine in Washington Navigable Waters*, 54 WASH. L. REV. 275, 289 n.64 (1979) (noting that the state had sold approximately 60 percent of its tidelands to private parties between 1889 and 1971 (citing DEP'T OF ECOLOGY, WASH. STATE COASTAL ZONE MGMT. PROGRAM 73 (1976))).

The legislature responded to the *Wilbour* decision by enacting the Savings Clause, RCW 90.58.270, that gave post hoc consent to pre-*Wilbour* improvements expressly to protect them from public trust challenges. *See* 1 SENATE JOURNAL at 1411. The Savings Clause was enacted as part of a

much broader piece of legislation known as the Shoreline Management Act of 1971 (SMA), chapter 90.58 RCW, and directly responded to our directive to the legislature in *Wilbour* that it, as trustee of public trust resources, was responsible for determining how best to preserve and promote the State's public trust interests. *See Wilbour*, 77 Wn.2d at 316 n.13.

The legislature referred the SMA to the people the following year for ratification. *State of Washington Voters Pamphlet, General Election* 34-35, (Nov. 7, 1972) (App. to Supp'l Br. of Resp't State of Wash.). The legislature presented the SMA to Washington voters along with an alternative measure, Initiative 43. *Id.* at 32-33. Although both the SMA and Initiative 43 established guidelines for the development of Washington's waterways and shorelines, one major difference between the two plans was how they treated pre-*Wilbour* fills. *Id.* at 108. The SMA provided legislative consent to pre-*Wilbour* fills, whereas Initiative 43 did not. *Id.* The people ratified the SMA and rejected Initiative 43 by a substantial margin. WASH. SEC'Y OF STATE, *Initiative to the Leg. No. 43* (General Election Nov. 7, 1972) (285,721 voters preferred Initiative 43, while 611,748 voters preferred the SMA). Following ratification of the SMA,

little legal attention was given to pre-*Wilbour* fills.[2]

The Three Fingers fill gained attention in 2010 when GBI submitted a permit application to the city of Chelan to develop the fill. GBI later withdrew its application, following public opposition to the proposed development. Eventually, GBI submitted a second application, this time to subdivide the property into six short plats with no immediate plans for their development. The city approved the short plat application conditioned on the reservation of a public park and several public access points thereon. GBI appealed the city's conditional land use decision, but the appeal has been stayed pending resolution of this action.

Turning to the underlying action, the Conservancy, a local environmental group, responded to GBI's permit applications by filing this action against GBI, which seeks the abatement and removal of the Three Fingers fill pursuant to the public trust doctrine and *Wilbour*.[3] The Conservancy additionally named the city of Chelan, the State of

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[2] We decline to address GBI's defense of laches, which it raised for the first time in its briefs before this court. Supp'l Br. for Resp't GBI Holding Co. at 12 n.13; Answer to Amicus Curiae Br. of Center for Envt'l Law & Policy at 19 n.9; *see Cummins v. Lewis County*, 156 Wn.2d 844, 851, 133 P.3d 458 (2006) ("It is a well-established maxim that this court will generally not address arguments raised for the first time in a supplemental brief and not made originally by the petitioner or respondent within the petition for review or the response to the petition." (citing *Douglas v. Freeman*, 117 Wn.2d 242, 258, 814 P.2d 1160 (1991))).

[3] The Conservancy also asserted a trespass claim that is not at issue in this appeal. *Chelan Basin Conservancy v. GBI Holding Co.*, 194 Wn. App. 478, 484 n.1, 378 P.3d 222, *review granted*, 186 Wn.2d 1032, 385 P.3d 769 (2016).

Washington, and the owner of the dam, Chelan County Public Utility District, as interested parties in this action.

GBI moved for summary judgment, arguing, among other things, that the Conservancy lacked standing to bring the present action and that any public trust claim seeking the removal of the Three Fingers was barred by the SMA's Savings Clause, RCW 90.58.270. The Conservancy moved for summary judgment on the applicability of the Savings Clause and the public trust doctrine as well.

Regarding the justiciable question of standing, the trial court found the Conservancy had standing to raise its public trust claim. As for the Savings Clause and its interplay with the public trust doctrine, the trial court initially found the Savings Clause violated the public trust doctrine but later rescinded that decision, choosing instead to avoid the public trust question altogether by holding the Savings Clause did not apply to the Three Fingers fill. After finding the legislature never consented to the creation of the Three Fingers fill, the court ordered the fill be removed.

GBI appealed to the Court of Appeals, which reversed the trial court's order and remanded for further proceedings. *Chelan Basin Conservancy v. GBI Holding Co.*, 194 Wn. App. 478, 495, 378 P.3d 222 (2016). The Court of Appeals agreed with the trial court that the Conservancy had standing to

sue but departed from the trial court's analysis regarding the applicability of the Savings Clause. *Id.* at 487-95. The Court of Appeals held the Savings Clause applied to the Three Fingers fill and the statute's corresponding bar on public trust claims was enforceable against the Conservancy's public trust claims since the Conservancy failed to prove the statute violated the public trust doctrine. *Id.* at 488-95.

The Conservancy petitioned this court for review regarding the applicability of the Savings Clause to the Three Fingers fill and whether the Savings Clause violates the public trust doctrine. In its answer, GBI requested pursuant to RAP 13.4(d) that if we grant review, we should also address the issue of standing. We granted review without limitation. *Chelan Basin Conservancy v. GBI Holding Co.*, 186 Wn.2d 1032, 385 P.3d 769 (2016). We therefore address three issues: (1) whether the Savings Clause, RCW 90.58.270, applies to the Three Fingers fill, (2) if so, whether the clause violates the public trust doctrine, and (3) whether the Conservancy has standing to bring this public trust action. We hold that while the Conservancy has standing to bring this public trust action, it nevertheless is barred by the Savings Clause from raising a public trust claim for the removal of the Three Fingers fill.

## WASHINGTON'S PUBLIC TRUST DOCTRINE

The public trust doctrine is an ancient common law doctrine that recognizes the public right to use navigable waters in place for navigation and fishing, and other incidental activities. *E.g.*, *Caminiti*, 107 Wn.2d at 668-69. The principle that the public has an overriding interest in navigable waterways and the lands underneath them has been dated by some jurists as far back as the Code of Justinian, which was developed in Rome during the 6th century. While there is some debate whether this attribution to Roman law holds water, it is generally accepted even among the most skeptical of critics that the public trust doctrine has a long history and was firmly ingrained in English and American common law by the 19th century. *See, e.g.*, James L. Huffman, *Speaking of Inconvenient Truths—A History of the Public Trust Doctrine*, 18 DUKE ENVTL. L. & POL'Y F. 1, 12-19 (2007).

Although the public trust doctrine originates from a common source, "'it has been long established that the individual [s]tates 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, 5 P.3d 1256 (2000) (quoting *Phillips Petrol. Co. v. Mississippi*, 484 U.S. 469, 475, 108 S. Ct. 791, 98 L. Ed. 2d 877 (1988)); *Grays Harbor Boom Co. v. Lownsdale*, 54 Wash. 83, 104, 104 P. 267 (1909) (per curiam)

("'The whole question [regarding the scope of the public trust doctrine] is for the state to determine for itself.'" (quoting *Shively v. Bowlby*, 152 U.S. 1, 56, 14 S. Ct. 548, 38 L. Ed. 331 (1894))); *Sequim Bay Canning Co. v. Bugge*, 49 Wash. 127, 132, 94 P. 922 (1908) (recognizing each state's prerogative to define and decide how to protect or dispose of its public trust property). We therefore "look *solely* to Washington law" when determining the scope and application of our public trust rights and obligations. *Longshore*, 141 Wn.2d at 428.

Even though Washington's public trust right to use navigable waters in place is sometimes described as a right that can be "neither destroy[ed] nor abridge[d]," *New Whatcom v. Fairhaven Land Co.*, 24 Wash. 493, 499, 64 P. 735 (1901), this does not mean that the State must hold all the beds and shores of navigable waters inviolate. *Davidson v. State*, 116 Wn.2d 13, 16, 802 P.2d 1374 (1991); *Caminiti*, 107 Wn.2d at 668. Under article 17 of our state constitution, "the state of Washington has the power to dispose of, and invest persons with, ownership of tidelands and shorelands subject only to the paramount right of navigation and the fishery." *Id.* at 667. This is because the State owns article 17 lands in two distinct capacities. *Longshore*, 141 Wn.2d at 427; *Caminiti*, 107 Wn.2d at 668-69; *Orion Corp.*

*v. State*, 109 Wn.2d 621, 639, 747 P.2d 1062 (1987); *Eisenbach v. Hatfield*, 2 Wash. 236, 240-41, 26 P. 539 (1891).

First, as title owner, "the [S]tate holds full proprietary rights in tidelands and shorelands and has fee simple title to such lands" so that it "may convey title to [those lands] in any manner and for any purpose not forbidden by the state or federal constitutions and its grantees take title as absolutely as if the transaction were between private individuals." *Caminiti*, 107 Wn.2d at 668. This title interest is referred to as the State's jus privatum interest.

Second, because such land is also held by the State in trust and for the benefit of the people, any right conveyed generally remains subservient to the public right to use water in place for navigation, *see Hill v. Newell*, 86 Wash. 227, 231, 149 P. 951 (1915), much like "'a covenant running with the land.'" *Orion*, 109 Wn.2d at 640 (quoting Scott W. Reed, *The Public Trust Doctrine: Is it Amphibious?*, 1 J. ENVTL. L. & LITIG. 107, 118 (1986)). This public servitude is referred to as the State's jus publicum interest.

Although title to property burdened by the public trust remains continuously subject to the servitude, the competing rights and interests of the public and private owner rise and fall with the water. "As the level rises, the rights of the public to use the water increase since the area of water

increases; correspondingly, the rights of the landowners decrease since they cannot use their property in such a manner as to interfere with the expanded public rights." *Wilbour*, 77 Wn.2d at 315. "As the level and the area of the water decreases, the rights of the public decrease and the rights of the landowners increase as the waters drain off their land, again giving them the right to exclusive possession until their lands are again submerged." *Id.*

A private landowner whose lands are burdened by the public trust cannot unilaterally extinguish the public right to use navigable waters in place by artificially elevating his or her property above the high-water mark absent legislative consent. *Id.* at 314-16. GBI contends the legislature and Washington voters consented to the retention of the Three Fingers fill when the legislature enacted and the people ratified the Savings Clause. We agree.

## I. The Legislature Consented to the Impairment of Navigable Waters by the Three Finger Fill When It Enacted the Savings Clause

The Savings Clause, RCW 90.58.270, provides legislative consent to the impairment of public trust rights by pre-*Wilbour* improvements and bars private actions challenging that impairment *unless* the improvements were "in trespass or in violation of state statutes." RCW 90.58.270(1), (2). GBI argues that because the Three Fingers fill was created pre-*Wilbour*, the Savings Clause protects the fill and bars this action. The Conservancy

disagrees. It argues the Savings Clause is inapplicable in this case because the Three Fingers fill "'obstruct[ed] or impede[d] . . . the passage of [a] river, harbor, or collection of water'" in violation of the public nuisance statute. Suppl. Br. of Pet'r Conservancy at 17 (quoting RCW 7.48.140(3)). According to the Conservancy, this violation of the public nuisance statute disqualifies the Three Fingers fill from the protections of the Savings Clause since the fill was "'in violation of state statutes'" at the time the Savings Clause was enacted. *Id.* at 3 (quoting RCW 90.58.270(1)). GBI disagrees with the premise of the Conservancy's argument that the Three Fingers fill constitutes a public nuisance. To resolve this debate, we must construe the public nuisance statute as it relates to the Savings Clause.[4]

"Issues of statutory construction . . . are questions of law" subject to de novo review. *State v. Evans*, 177 Wn.2d 186, 191, 298 P.3d 724 (2013). However, because we are dealing with a public trust impairment, albeit one passed directly by the people, the statute must be strictly construed in preservation of the public trust interest absent express contrary language or

[4] The city of Chelan believes we can avoid this public nuisance question. The city contends that since the Savings Clause consents only to the "'retention and maintenance'" of existing structures, such consent does not extend to GBI's proposed 2010 developments, which in its view should end our analysis. Supp'l Br. of City of Chelan at 5-7 (quoting RCW 90.58.270(1)). The city misapprehends the Conservancy's claims. Although this litigation was triggered by GBI's development proposals, those proposals do not form the bases of the Conservancy's complaint. The Conservancy seeks the removal of the existing fill, not an injunction against future development. We therefore cannot avoid the public nuisance question, as the city suggests.

necessary implication. *See Hill*, 86 Wash. at 229 ("'The general rule of construction applying to grants of public lands by a sovereignty to corporations or individuals is that the grant must be construed liberally as to the grantor and strictly as to the grantee, and that nothing shall be taken to pass by implication.'" (quoting 26 AMERICAN AND ENGLISH ENCYCLOPAEDIA OF LAW 425 (2d ed. 1904))); *City of Berkeley v. Superior Ct.*, 26 Cal. 3d 515, 528, 606 P.2d 362, 162 Cal. Rptr. 327 (1980) ("[S]tatutes purporting to abandon the public trust are to be strictly construed; the intent to abandon must be clearly expressed or necessarily implied; and if any interpretation of the statute is reasonably possible which would retain the public's interest in tidelands, the court must give the statute such an interpretation.").

RCW 7.48.140(3) declares it a public nuisance, among other enumerated actions, "[t]o obstruct or impede, *without legal authority*, the passage of any river, harbor, or collection of water." (Emphasis added.) Another statute further explains that "[n]othing which is done or *maintained under the express authority of a statute*[ ] can be deemed a nuisance." RCW 7.48.160 (emphasis added). GBI and the State interpret the Savings Clause as providing the requisite legal and express statutory authority for the retention and maintenance of pre-*Wilbour* improvements on navigable

waterways and thereby insulating them from any public nuisance claim based on that same impairment of navigable waters. We agree.

The Savings Clause provides legislative "consent and authorization" "to the impairment of public rights of navigation, and corollary rights incidental thereto, caused by the retention and maintenance of" "structures, improvements, docks, fills, or developments placed in navigable waters prior to December 4, 1969." RCW 90.58.270(1).[5] The only way for the Savings Clause to have any practical effect is to interpret it as giving pre-*Wilbour* improvements the requisite legal and statutory authority to impair navigable

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[5] RCW 90.58.270 provides in relevant part:

> (1) 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 on tidelands, shorelands, or beds underlying said waters which are in trespass or in violation of state statutes.
>
> (2) Nothing in this section shall be construed as altering or abridging any private right of action, other than a private right which is based upon the impairment of public rights consented to in subsection (1) of this section.
>
> (3) Nothing in this section shall be construed as altering or abridging the authority of the state or local governments to suppress or abate nuisances or to abate pollution.
>
> (4) Subsection (1) of this section shall apply to any case pending in the courts of this state on June 1, 1971 relating to the removal of structures, improvements, docks, fills, or developments based on the impairment of public navigational rights.

waters so they no longer violate the public nuisance statute. Otherwise, prior consent would be a necessary prerequisite for obtaining post hoc consent under the Savings Clause. That reading is absurd and renders the entire statute practically meaningless; we therefore avoid it. *State v. Riles,* 135 Wn.2d 326, 340, 957 P.2d 655 (1998) ("Courts should not construe statutes to render any language superfluous and must avoid strained or absurd interpretations." (citing *Wright v. Engum*, 124 Wn.2d 343, 351-52, 878 P.2d 1198 (1994))). Worse, such a reading would require us to construe the statute's limited proviso exception so broadly that it swallows the general rule entirely. *Wash. State Legislature v. Lowry*, 131 Wn.2d 309, 327, 931 P.2d 885 (1997) (Provisos "'should be strictly construed with any doubt to be resolved in favor of the general provisions, rather than the exceptions.'" (quoting *State v. Wright*, 84 Wn.2d 645, 652, 529 P.2d 453 (1974))).

The legislature undeniably intended the Savings Clause to foreclose private actions for the removal of pre-*Wilbour* improvements based on their impairment of navigable waters alone. As one of the prime sponsors of the statute, Senator Gissberg, explained during a senate floor debate, the purpose of the Savings Clause was to "make[] legal any fills that took place prior to December 4, 1969," which is the date *Wilbour* was decided. 1 SENATE

JOURNAL at 1411. Senator Gissberg further explained the reasoning for and the intended effect of the Savings Clause as follows:

> Yes, I think in the entire section in subsection [(1)[6]], 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 navigable waters.

*Id.* We therefore interpret the Savings Clause as authorizing the retention and maintenance of the Three Fingers fill and barring private public nuisance claims based on the fill's impairment of navigable waters.[7] Unless that legislative authorization itself violates the public trust doctrine, the

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[6] According to the Senate Journal, the senator said "subsection (3)," but that reference must have been a mistake or scrivener's error because subsection (3) addresses the authority of state and local governments to bring nuisance and abatement actions notwithstanding the legislative consent provided in subsection (1). *See* LAWS OF 1971, 1st Ex. Sess., ch. 286, § 27.

[7] We decline to address whether the Three Fingers fill is abatable as a public nuisance for reasons other than its impairment of navigable waters because that issue is not before us. The Conservancy has expressly disavowed bringing a public nuisance claim based on any reason other than the public trust. *Chelan Basin*, 194 Wn. App. at 492; Supp'l Br. of Pet'r Conservancy at 20 ("[T]his case was not brought as a nuisance action."). Nor has the Conservancy presented any facts that would trigger the application of *Grundy v. Thurston County*. 155 Wn.2d 1, 7 n.5, 117 P.3d 1089 (2005) ("'[E]ven though an act or a structure was lawful when made or erected, if for any reason it later becomes or causes a nuisance, the legitimate character of its origin does not justify its continuance as a nuisance.'" (footnote omitted) (quoting 66 C.J.S. *Nuisances* § 15, at 551-52 (1998))).

Conservancy's claims for the removal of the Three Fingers fill based on the fill's impairment of navigable waters must be dismissed.

But before we can consider whether legislative consent to the Three Fingers fill was consistent with the legislature's public trust obligations, we must first address GBI's assertion that judicial review of the Savings Clause is precluded by legislative preemption.

## II. Legislation That Impairs Public Trust Rights Is Subject to Judicial Review

GBI argues that since legislative action preempts the common law, it follows that the SMA and its corresponding Savings Clause should preempt Washington's common law public trust doctrine and preclude judicial review as well. We disagree. While GBI correctly identifies the doctrine's common law origin, it overlooks the doctrine's constitutional footing.

As we have explained, the public trust doctrine is "partially encapsulated" in article 17 of our state constitution. *Rettkowski v. Dep't of Ecology*, 122 Wn.2d 219, 232, 858 P.2d 232 (1993). Because of the doctrine's constitutional underpinning, any legislation that impairs the public trust remains subject to judicial review. This includes the SMA. "Holding otherwise [would] elevate[ ] an exercise of the legislative power above the constitution, which is anathema to our system of law." *Freedom Found. v. Gregoire*, 178 Wn.2d 686, 706, 310 P.3d 1252 (citing *Marbury v. Madison*,

5 U.S. (1 Cranch) 137, 178, 2 L. Ed. 60 (1803)). While we have at times described the SMA as embodying the common law public trust rights, *e.g.*, *Portage Bay–Roanoke Park Cmty. Council v. Shorelines Hr'gs Bd.*, 92 Wn.2d 1, 4, 593 P.2d 151 (1979), we have always embraced our constitutional responsibility to review challenged legislation, including legislation encompassed by the SMA, to determine whether that legislation comports with the State's public trust obligations. *Caminiti*, 107 Wn.2d at 670. We decline to abdicate that responsibility now.

The fact that the State never acquired title ownership to the Three Fingers property under article 17 does not mean the public trust doctrine has no constitutional force as to this property. As previously mentioned, article 17 recognized two distinct interests: the State's responsibility to protect Washington's public trust interests and the State's title ownership in specific lands. *See id.* at 666-67. Therefore, any legislative act arguably in dereliction of the State's constitutional responsibility to protect the public trust interest is subject to judicial review regardless of article 17 title ownership.

This leads us to the parties' primary dispute: Did the legislature violate the public trust doctrine when it enacted the Savings Clause?

## III. Savings Clause Does Not Violate the Public Trust Doctrine

When evaluating a public trust claim, we generally use the *Caminiti* test, which considers: "(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 so doing the State (a) has promoted the interests of the public in the jus publicum, or (b) has not substantially impaired it." 107 Wn.2d at 670.

Both parties request that we apply the *Caminiti* test and uphold the Savings Clause, but they disagree about how the Savings Clause affects the public's ability to challenge individual fills under the public trust doctrine. The State insists we apply *Caminiti* in a jurisdiction-wide approach and prohibit any private public trust actions involving pre-*Wilbour* fills. While the State's approach protects the Savings Clause, secures the settled property interests of Washington residents against repeat upheaval, and ensures industry and trade can continue uninterrupted, that approach requires us to uphold the impairment of what could be a significant amount of navigable waters (the parties dispute how much property would be subject to removal absent the Savings Clause's protections) under a test meant to protect the public's jus publicum interest from just this type of legislative action. *Caminiti* was supposed to be a judicial check on the legislature, not

automatic consent.[8] Yet, no party is asking that we hold the Savings Clause invalid either.

The problem with applying the *Caminiti* test to legislation regarding historical fills is that the test does not adequately account for the legislation's unique circumstances. For that reason, the Conservancy insists we allow it to pursue an as-applied challenge so it can ensure all bodies of water are protected without unearthing all pre-*Wilbour* fills. But allowing the Conservancy and other members of the public to pursue piecemeal, as-applied challenges means that all historical fills could at any time be subject to public trust litigation, which is exactly what the Savings Clause is intended to prevent. Many lands once submerged but now filled with a city or township erected upon them could fail scrutiny under *Caminiti* and be subject to abatement. The fact that the filling of navigable waters for the development of a similar city or township now should fail public trust scrutiny does not mean historical cities and towns must be demolished and abated as a result. Again, none of the parties want this, and neither did Washington voters when they overwhelmingly voted for the enactment of

[8] The issue in *Caminiti* was a *facial* challenge against the State's authority to waive leasehold fees for private docks on state waters. 107 Wn.2d at 664-65. No specific dock or body of water was at issue. *Id.* at 665.

the Savings Clause.[9]

As discussed earlier, the legislature enacted the Savings Clause in response to our decision in *Wilbour*. The *Wilbour* decision had a significant effect on land titles throughout Washington not because it ushered in a new rule (the public trust doctrine had already been recognized), but because it awoke the doctrine from a decades-long slumber. *See Caminiti*, 107 Wn.2d at 670 ("Although not always clearly labeled or articulated as such . . . the doctrine has always existed in the State of Washington." (citing Johnson & Cooney, *supra*, at 285-87)). Following the doctrine's awakening, the legislature grappled with the possibility that the long-settled property expectations of Washington residents and businesses who had relied on legislative encouragement in building homes and investing significant resources in the improvement of Washington's shorelands and tidelands could be upended by public trust claims. *Sturtevant*, 76 Wash. at 171; 1 *Senate Journal* at 1411 (explaining "most of industry in the state that is on the water . . . is there illegally and subject to mandatory injunction to being removed by anyone that wants to bring the lawsuit"). Indeed, Washington's then governor Evans was so concerned about color of title in these properties

[9] The concurrence is critical of the majority for using an analysis not raised by the parties and in the next breath argues that we could decide the current case based on laches—even though the parties did not raise that argument either. *See* concurrence at 7.

that he placed a statewide moratorium on all tideland fill projects, which slowed Washington's economy. *See Orion*, 109 Wn.2d at 627. The legislature quickly responded with a single piece of legislation, the Savings Clause, which cleared title to all properties clouded by *Wilbour* and restored the economy. *See* 1 *Senate Journal* at 1411.

The *Caminiti* test does not adequately account for the special circumstances leading to the development of these fills, the awakening of the public trust doctrine from judicial slumber, and the critical need for settled property titles in these fills for Washington's economy, resident companies, and private citizens. For these reasons, we decline to apply it in this case.[10]

The Savings Clause was designed to swiftly and decisively preserve property titles while reinforcing the state's commitment to protecting public trust interests. Other states have responded to the issue of historical fills similarly. Maine responded by enacting legislation that granted all fills a 30-year easement to protect them temporarily from public trust claims. *Op. of Justices*, 437 A.2d 597, 599 (Me. 1981). When that temporary easement proved inadequate, Maine sought a permanent solution and enacted a single

[10] The concurrence takes issue with our analysis and asserts that we should follow the *Caminiti* test, which we have historically applied to public trust actions, and not decide this case by judicial fiat. Concurrence at 1. This creative argument ignores the fact that the test we have historically used is one which we created in 1987 by judicial fiat after the SMA. *See Caminiti*, 107 Wn.2d at 670. This argument also ignores that the *Caminiti* test does not address the unique aspects of historical fills. Instead, the concurrence would have us force the facts of this case into a test created for a narrower purpose.

bill to release all filled lands from any public trust servitude. *See id.* The California Supreme Court took a similar approach and extinguished the public trust interest over all historical fills in a single opinion. *Berkeley*, 26 Cal. 3d at 534-35. This is essentially what our state legislature did, with the approval of Washington voters, in enacting the Savings Clause.

We hold the Saving Clause does not violate the public trust doctrine. The *Caminiti* test simply does not apply and remains unchanged as a result.[11] As we previously suggested in another case, the resolution of title to historical fills alone could be sufficient to remove such property completely from public trust protections. *See Orion*, 109 Wn.2d at 640 n.9 (explaining how in California properties already dredged and filled based on earlier land grants were no longer subject to the trust (citing *City of Berkeley*, 26 Cal. 3d 515)). Statewide restoration of the entire shore and all tidelands is not a realistic option. Even the Conservancy—an environmental protection group—recognizes it would be too disruptive for us to undo all historical fills, hence its insistence on pursing a limited, as-applied challenge. Suppl.

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[11] The concurrence contends that with this opinion we have overturned *Caminiti* as incorrect and harmful. Concurrence at 4-5. We have done no such thing. Determining that a test does not apply to a particular case does not accordingly mean a rejection or abrogation of that test. Nor have we extinguished the public trust interests over all fills within the Savings Clause. The public trust remains in place for fills that are in trespass or in violation of state statutes. RCW 90.58.270(1). The concurrence's hypotheticals concerning fills built between 1970 and 1975 and advice as to what the State may do if fills within the Savings Clause change in degree or character are just speculation.

Br. of Pet'r Conservancy at 13 ("This case . . . is a site-specific claim."); Pet'r Conservancy's Answer to Resp'ts' Mots. for Recons. at 3 ("[Conservancy] did not bring a facial challenge."), 7-8 ("[Conservancy] challenged the Savings Clause under the public trust doctrine *as applied*").[12]

## IV. The Conservancy Had Standing To Raise Its Public Nuisance Claim Based on a Public Trust Violation

Finally, we address GBI's challenge to the Conservancy's standing to raise a public trust claim (though that claim is not legally viable, as explained above). GBI classifies this action as a public nuisance action and argues the Conservancy has failed to allege the Three Fingers fill is "specially injurious" to its members as is statutorily required under RCW 7.48.210.[13] The Conservancy denies it is raising a public nuisance claim. Instead, the Conservancy describes this action as a public trust action distinct from a public nuisance action. Both parties are partially correct in

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[12] Because we do not apply the *Caminiti* test in this case, we do not address the parties' dispute over who has the burden of proving a public trust violation. We, however, note that Washington courts have generally treated public trust claims as constitutional challenges in presuming the constitutionality of the challenged legislation and placing the burden on the challenging party to prove otherwise. *E.g.*, *Chelan Basin*, 194 Wn. App. at 494; *Samson v. City of Bainbridge Island*, 149 Wn. App. 33, 58, 202 P.3d 334 (2009); *Citizens for Responsible Wildlife Mgmt. v. State*, 124 Wn. App. 566, 570, 103 P.3d 203 (2004); *Wash. State Geoduck Harvest Ass'n v. Dep't of Nat. Res.*, 124 Wn. App. 441, 447, 101 P.3d 891 (2004).

[13] RCW 7.48.210 provides, "A private person may maintain a civil action for a public nuisance, if it is specially injurious to himself or herself but not otherwise."

that this is a public nuisance action based on an alleged breach of the public trust doctrine.

There are many types of public nuisance actions, including actions to remove an animal carcass or an impediment on a river or highway and actions to abate pollution or the manufacture of dangerous chemicals near businesses. RCW 7.48.140. An action seeking the removal of an impediment on a waterway because it interferes with the public's right to use that waterway is simply a specific type of public nuisance action. RCW 7.48.140(3). "Where the state has not approved impairment of state sovereign resources, private encroachment upon public use of the resources is treated as a public nuisance." 2 WATERS AND WATER RIGHTS § 30.02(c) at 30-35 (Amy K. Kelley ed., 3d ed. 2013). GBI is therefore correct that a plaintiff must be "specially injur[ed]" in order to have standing to raise a public trust claim, but that requirement is not a particularly high bar.

Although RCW 7.48.210 requires the plaintiff be "specially injur[ed]," it does not indicate the injury needed to satisfy that requirement is more demanding or exacting than the injury needed for noneconomic standing generally. For an organization to have standing to raise noneconomic injuries, it must allege an "'injury in fact.'" *Save a Valuable Env't v. City of Bothell*, 89 Wn.2d 862, 866, 576 P.2d 401 (1978) (*SAVE*)

(quoting *United States v. Students Challenging Regulatory Agency Procedures (SCRAP)*, 412 U.S. 669, 722, 93 S. Ct. 2405, 37 L. Ed. 2d 254 (1973) (White, J., dissenting in part)). That means the organization "must show that it or one of its members will be specifically and perceptibly harmed by the action." *Id.* (citing *SCRAP*, 412 U.S. 669). An interest that is only speculative or indirect is not enough. *Id.* at 867 (citing *Warth v. Seldin*, 422 U.S. 490, 514, 95 S. Ct. 2197, 45 L. Ed. 2d 343 (1975)). Thus, in the absence of a statutory definition, we will treat "specially injurious" harms needed for public nuisance claims the same as "specific and perceptible" "injuries in fact" needed for noneconomic claims.

Injury to the aesthetic appeal and environment of an area is sufficient to support standing if the plaintiff establishes that he or she uses that area for recreational purposes. *Sierra Club v. Morton*, 405 U.S. 727, 734-35, 92 S. Ct. 1361, 31 L. Ed. 2d 636 (1972). The Conservancy satisfies that showing. Its members claim, with detail, that they are recreational users of Lake Chelan and that the Three Fingers fill obstructs their desire and right to use navigable waters over the property during the lake's high-water season.

We hold the harms alleged by the Conservancy's members are sufficiently distinct from the general public to satisfy the standing requirements of RCW 7.48.210. Moreover, that the Conservancy's members

have never been able to use the lake waters over GBI's property despite their desire to do so shows their injury is real, not just speculative.

Contrary to GBI's arguments, neither *Lampa v. Graham* nor *Kemp v. Putnam* support its claim that the Conservancy lacks standing. *Lampa v. Graham*, 179 Wash. 184, 36 P.2d 543 (1934); *Kemp v. Putnam*, 47 Wn.2d 530, 288 P.2d 837 (1955), *overruled on other grounds by SAVE*, 89 Wn.2d at 867 n.1. In *Lampa*, we held a fisherman would have standing to challenge the construction of a wing dam on a river channel if the dam harmed his fishing activities along that channel, but later opined that he would not have standing if his sole claim was an interference with his right to navigate along the channel since that injury would be the same as the injury sustained by the public generally. 179 Wash. at 186. We, however, later clarified the *Lampa* decision was fact specific. *Kemp*, 47 Wn.2d at 535-36. After *Lampa*, we held in *Kemp* that a person who regularly engages in recreational fishing in a stream would have standing to challenge the unlawful obstruction of that stream. *Id.* at 536.

## CONCLUSION

The Conservancy seeks the abatement of fill material GBI added to its property to elevate it above the waters of Lake Chelan because the increased property elevation obstructs the public right to use navigable waters in place

over that property. We hold the Conservancy has standing to bring this claim and conclude the legislature expressly consented to the fill's impairment of navigable waters when it enacted, with the approval of Washington voters, the Savings Clause, RCW 90.58.270. We further hold that consent by the legislature and the Washington voters did not violate the public trust doctrine. We therefore affirm.

González, J.

WE CONCUR:

Fairhurst, C.J.

Owens, J.

Gordon McCloud, J.

Yu, J.

No. 93381-2

MADSEN, J. (concurring)—I agree with the majority that the legislature expressly consented to the "Three Fingers" fill's impairment of navigable waters when it enacted RCW 90.58.270, the savings clause. I also agree with the majority that by enacting the savings clause, the legislature did not violate the public trust doctrine. I write separately because the majority decides this case by way of judicial fiat, rather than applying our established precedent. In doing so, the majority is concerned that applying our test in *Caminiti v. Boyle*, 107 Wn.2d 662, 732 P.2d 989 (1987), will not resolve the broader implications that might flow from this decision. Specifically, the majority states,

> The *Caminiti* test does not adequately account for the special circumstances leading to the development of these fills, the awakening of the public trust doctrine from judicial slumber, and the critical need for settled property titles in these fills for Washington's economy, resident companies, and private citizens.

Majority at 23. I acknowledge the importance of the majority's concerns, but we would have reached the same conclusion by relying on our established precedent, avoiding the uncertainty created by the majority as to when to apply the *Caminiti* test and when to simply declare it to be so.

Discussion

In 1971, the legislature enacted the savings clause as a means of post hoc consent to the impairment of public trust rights "caused by the retention and maintenance of . . . structures, improvements, docks, fills, or developments" "placed in navigable waters prior to December 4, 1969." RCW 90.58.270(1). However, the savings clause does not extend to impairments that "are in trespass or in violation of state statutes." *Id.*

Additionally, any legislative act concerning the impairment of a navigable waterway, including the savings clause, must not violate the public trust doctrine. Under the public trust doctrine, the State maintains an interest in tidelands and shorelands known as the jus publicum. *Caminiti*, 107 Wn.2d at 668. Pursuant to the jus publicum, "sovereignty and dominion over this state's tidelands and shorelands, as distinguished from *title*, always remains in the State, and the State holds such dominion in trust for the public." *Id.* at 669. Specifically, the State must ensure the public's right

> "of navigation, together with its incidental rights of fishing, boating, swimming, water skiing, and other related recreational purposes generally regarded as corollary to the right of navigation and the use of public waters."

*Id.* (quoting *Wilbour v. Gallagher*, 77 Wn.2d 306, 316, 462 P.2d 232 (1969)).

Historically, this court has assessed whether a legislative act violates the public trust doctrine under the *Caminiti* test. Indeed, the majority agrees that the savings clause must not violate the public trust doctrine. The majority also agrees that any legislation that impairs the public trust remains subject to judicial review, and that "we generally use the *Caminiti* test" to evaluate public trust claims. Majority at 19. However, the majority

rejects the *Caminiti* test here because the test is "supposed to be a judicial check on the legislature, not automatic consent" to the actions of the legislature. *Id.* at 20. So, rather than assess whether the savings clause violates the public trust doctrine under the *Caminiti* test, or any other test, the majority holds that the best option is to simply extinguish the public trust right over fills and impairments created prior to December 4, 1969. This is both improper and unnecessary.

By declining to follow precedent, the majority strips our public trust doctrine jurisprudence of any meaningful bite. The majority makes it clear that depending on the desired outcome, the court may pick and choose when to apply *Caminiti*. While the majority argues special treatment is necessary in light of the unique circumstances surrounding the savings clause, its approach creates problematic consequences. Specifically, the majority argues that we must *extinguish* the public trust right over the fills and impairments that fall within the savings clause because there is a "critical need for settled property titles in these fills for Washington's economy, resident companies, and private citizens." *Id.* at 23. While settling these historical fills is important, there are undoubtedly also fills and impairments along Washington's shorelands and tidelands that fall outside the savings clause but share these same unique circumstances. For example, a fill or impairment built between 1970 and 1975 has roughly the same historical, commercial, and economical value as a fill built between 1965 and 1969. Under the majority's approach, if the court feels strongly enough about a post-1969 fill or impairment, it may simply extinguish the public interest right for the same reasons of

settling expectations, rather than risk the possibility of abatement under *Caminiti*.[1] In my view, the *Caminiti* test sets forth the correct balance for assessing public trust violations and I see no reason to depart from its principled approach.

> The *Caminiti* test requires us to assess
>
> (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 so doing the State (a) has promoted the interests of the public in the jus publicum, or (b) has not substantially impaired it.

107 Wn.2d at 670.

The majority's main concern with using the *Caminiti* test is the potential for piecemeal litigation under the public trust doctrine, as much of Washington's tidelands and shorelands have been filled and developed. However, the doctrine of stare decisis requires a showing "that an established rule is incorrect and harmful before it is abandoned." *In re Rights to Waters of Stranger Creek*, 77 Wn.2d 649, 653, 466 P.2d 508 (1970).

*Caminiti* is neither incorrect nor harmful. Because this case is a challenge to the savings clause, which treats all pre-1969 fills in the aggregate, the *Caminiti* test should also be applied in the aggregate, taking into account the combined impact of every

[1] The majority argues that our concerns are mere speculation, but we offer our concerns regarding fills created between 1970 and 1975 only to demonstrate the danger in the majority's decision to extinguish the public trust right over fills that fall within the savings clause. This is in stark contrast to the speculation that underpins the majority's decision to abandon *Caminiti*: that applying the *Caminiti* test *may* adversely affect "Washington's economy, resident companies, and private citizens." Majority at 23. Such speculation is not a valid reason for sidestepping our precedents because speculation knows no bounds.

historical fill falling under the protection of the savings clause. In *Caminiti*, this court used this test to assess whether RCW 79.90.105 violated the public trust doctrine. 107 Wn.2d at 665-66. Similarly, here, we should use the *Caminiti* test to assess whether the savings clause provision violates the public trust doctrine. By addressing the validity of the savings clause, using the *Caminiti* test, we leave no room for as-applied challenges to developments protected by the savings clause or for inconsistent results while preserving challenges to future changes in degree or character to those developments.

Still, the majority rejects the *Caminiti* test, and holds, without relying on any legal standard or any of this court's precedents, that the savings clause does not violate the public trust doctrine.[2] The majority cites to cases from California and Maine dealing with the public trust doctrine, but does not rely on the analysis used by these jurisdictions in coming to their respective conclusions, only their results. In those cases, the courts extinguished the public trust interest over the historical fills within their respective jurisdictions. The majority follows suit, which is in direct conflict with this court's public trust doctrine jurisprudence.[3] Specifically, this court cannot strip the State of its jus publicum interest. *See id.* at 669 ("the sovereignty and dominion over this state's

[2] The majority contends that we "take[] issue with [its] analysis" and that the *Caminiti* test too was "created by judicial fiat." Majority at 23 n.10. Not so. Rather, we are concerned by the majority's lack of analysis. Unlike the majority, the *Caminiti* court constructed an objective test that balances the State's jus publicum interest and the public's interest and creates precedent that lower courts can apply generally to any alleged public trust violation.

[3] Interestingly, the majority states that "*Caminiti* was supposed to be a judicial check on the legislature, not automatic consent," and then proceeds in its opinion to give automatic consent to fills under the savings clause. Majority at 20.

tidelands and shorelands, as distinguished from *title*, always remains in the State, and the State holds such dominion in trust for the public"). By extinguishing the public trust right over all of the fills that fall within the savings clause, the majority effectively stripped the State of its jus publicum interest over those properties.

In a footnote, the majority says that it has not extinguished the public trust right over all fills within the savings clause because "[t]he public trust remains in place for fills that are in trespass or in violation of state statutes." Majority at 24 n.11. But, the primary purpose of the public trust doctrine is not to protect the public from trespass or violations of state statutes. Rather, the purpose of the public trust doctrine is to ensure the public's right to navigate Washington's waters free from any impediments, such as fills and improvements. The savings clause consents only to the "retention and maintenance" of the existing fills. By extinguishing the public trust right over these fills, landowners may further improve or develop fills that fall within the savings clause and the State will no longer be able to protect the public under its jus publicum authority unless alterations or improvements constitute trespass, nuisance, or violate other state statutes.

The *Caminiti* test accounts for and balances both the State's jus publicum interest and the public's interest. *Caminiti*, 107 Wn.2d at 670. Importantly, the key distinction between the majority's approach and the *Caminiti* test is that under *Caminiti*, the State retains its jus publicum interest and, thus, may continue to protect the public. Under the majority's approach, if at some point the fills and impairments that fall within the savings

clause change in degree or character (i.e., a change unrelated to the retention or maintenance of the fill), the State could not reassess its consent over these fills.

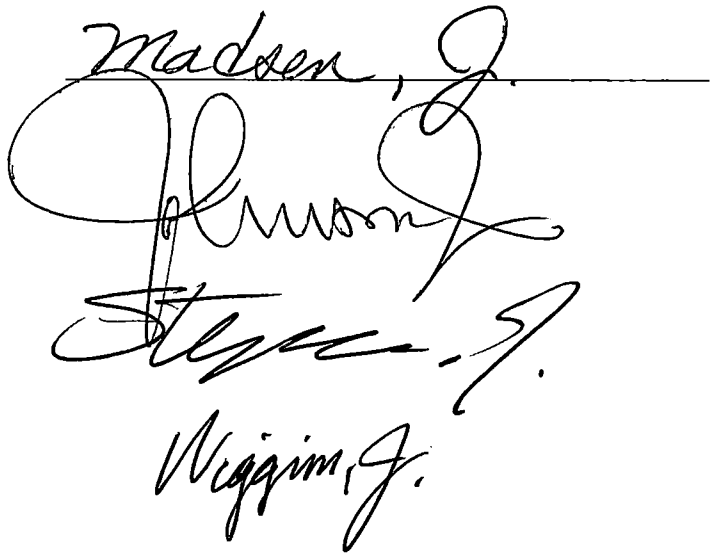
Finally, it is noteworthy that *neither party* asked this court to deviate from *Caminiti*, and there is no reason to do so. In applying the *Caminiti* test, we must first decide if the legislature gave up its right of control over the jus publicum by enacting the savings clause. I would hold that it did not. The legislature has merely consented to fills and other impairments existing before December 4, 1969. The State still maintains control over the jus publicum in all other respects.

Second, I would hold that the savings clause promotes the public's interests. The legislature passed the savings clause in response to this court's decision in *Wilbour*. In that case, we held that a landfill abutting Lake Chelan violated the public trust doctrine. 77 Wn.2d at 318. Had the legislature not enacted the savings clause in response, our *Wilbour* decision might have resulted in the abatement of thousands of properties along Washington's tidelands and shorelands. In other words, the savings clause promotes the public's interests because it protects the improvements to our tidelands and shorelands that were made before our public trust doctrine jurisprudence was fully developed.

Finally, I would hold that the savings clause does not substantially impair the jus publicum. These fills have been in existence for 50 years or more and have not been challenged, strong evidence that the legislature's action caused no injury to the public.[4]

Accordingly, I concur in the majority.

[4] While not raised by the parties, laches could appropriately be applied to bar such tardy challenges as this.


Madsen, J.
Stephens, J.
Wiggins, J.