

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,

REPLY IN SUPPORT OF PETITION FOR REVIEW

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

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

I. INTRODUCTION TO REPLY 1

II. ARGUMENT IN REPLY 1

III. CONCLUSION..... 5

TABLE OF AUTHORITIES

Cases

<i>Caminiti v. Boyle</i> , 107 Wn.2d 662 (1987)	1
<i>Kemp v. Putnam</i> , 47 Wn.2d 530 (1955).....	3, 4
<i>Lampa v. Graham</i> , 179 Wash. 184 (1934).....	4
<i>SAVE v. City of Bothell</i> , 89 Wn.2d 862 (1978).....	3, 5
<i>Wilbour v. Gallagher</i> , 77 Wn.2d 306 (1969).....	2, 3

Statutes

RCW 7.48.210	4
RCW 90.58.270(1).....	3

Other Authorities

<i>The Public Trust Doctrine and Coastal Zone Management in Washington State</i> , 67 Wash. L. Rev. 521, 589 (1992).....	2
--	---

Constitutional Provisions

Const. art. 17, §1	1
--------------------------	---

Rules

RAP 13.4.....	1
---------------	---

I. INTRODUCTION TO REPLY

In its Answer to Chelan Basin Conservancy's Petition for Review, Respondent GBI Holding Co. ("GBI") cross-petitions the Court to consider whether CBC has standing to maintain this action in the first place. GBI insists that CBC's members must show "special injury" to bring their claims under the public trust doctrine and claims CBC failed to do so. While Washington law does not require proof of that CBC suffered "special injury" in this case, its members presented ample evidence to show that they have indeed suffered "special injury." The Court of Appeals decision that CBC has standing is consistent with controlling authority and there is no basis to revisit this conclusion under RAP 13.4.

II. ARGUMENT IN REPLY

CBC sued GBI under the public trust doctrine.¹ A plaintiff has standing under the public trust doctrine where recreational interests are at stake. *Caminiti v. Boyle*, 107 Wn.2d 662, 665 (1987) ("Petitioner and the members of the petitioner Committee for Public Shoreline Rights have recreational interests that are affected by their ability to acquire access to and use public aquatic lands and waters."); *see also* Ralph L. Johnson, *The Public Trust Doctrine and Coastal Zone Management in Washington*

¹ Const. art. 17, §1.

State, 67 Wash. L. Rev. 521, 589 (1992) (“the issue of standing should not pose a serious obstacle to suits by private citizens and private groups.”).

CBC’s members established the organization’s recreational interests. CP 374-388. CBC members live in the Lakeside Community surrounding GBI’s “Three Fingers” fill. The fill impairs individual members’ ability to both acquire access to and use public aquatic lands and waters. For instance, the fill restricts CBC member William Schuldt’s fishing rights and his ability to access the beach for swimming. CP 379-383. It restricts CBC member John Page’s ability to access the lake for kayaking. CP 384-88. And it restricts CBC president and member Tammy Lee Hague’s ability to access to the beach from her home. CP 374-74. The Court of Appeals found that these access and recreational interests were “precisely those the public trust doctrine is meant to protect.” Slip Op. at 10 (*citing Weden v. San Juan County*, 135 Wn.2d 678, 698 (1998)).

The decision that an association’s membership has standing under the public trust doctrine where an individual’s access rights and recreational uses are restricted is consistent with prior decisions from this Court. *See Wilbour v. Gallagher*, 77 Wn.2d 306, 312 (1969) (ordering abatement of nuisance fill that impaired use of lake for “navigation, fishing, swimming, boating and general recreational uses...”); *Kemp v.*

Putnam, 47 Wn.2d 530, 536 (1955); *see also*, *SAVE v. City of Bothell*, 89 Wn.2d 862 (1978) (holding that a nonprofit organization has standing where at least one of its members establish injury).

In its Answer requesting review of the standing determination, GBI argues that CBC must prove “special injury” under the public nuisance statute. But CBC did not bring this suit under the public nuisance statute.² The trial court understood but concluded nonetheless that the evidence presented established that the fill was a public nuisance contrary to state statute. The finding that the fill violated the public nuisance statute was the basis for the trial court’s conclusion that the fill was not exempted under the Shoreline Management Act’s ‘Savings Clause’ in RCW 90.58.270(1). *See* CP 1615-16.³ But the decision that the fill was a public nuisance does not convert this lawsuit, brought under the public trust doctrine, to a nuisance action under the nuisance statute that requires CBC to prove “special injury.” Indeed, the trial court ordered the fill removed

² The complaint raised three causes of action: (1) the Three Fingers fill constitutes a trespass; (2) the Three Fingers violated the public right of navigation under *Wilbour v. Gallagher*, *supra*; and (3) the Three Fingers violate rights to use and enjoy Lake Chelan as provided under the public trust doctrine. CP 1-11.

³ The statute provides, in pertinent part, “Nothing in this section shall constitute authority for requiring or ordering the removal of any...fills...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...fills...are hereby granted: Provided That the consent herein shall not relate to any...fills...which are in trespass or in violation of state statutes.” RCW 90.58.270(1).

as a violation of the public trust doctrine (not abated as a public nuisance under RCW 7.48.210). CP 2550.

GBI either ignores or misrepresents controlling authority under the public trust doctrine. For instance, GBI cites to *Lampa v. Graham*, 179 Wash. 184 (1934) and *Kemp v. Putnam*, 47 Wn.2d 530 (1955) in support of its assertion that special injury must be proven here. But *Kemp* confirmed that an interference with recreational uses such as fishing can cause “special” damages. *Kemp* stated, “[*Lampa*] is not authority for the proposition that one who regularly engages in fishing in a stream, the use of which is obstructed, *does not suffer* an injury different from or greater than that suffered by the general public.” 47 Wn.2d at 536 (emphasis added). Indeed, *Kemp* stands for the uncontroversial proposition that an individual’s regular use of a stream confers standing when that person’s use is impaired, whether the use is recreational or commercial. *Id.* at 536 (finding no “material difference” to special injury suffered by recreational fisherman from special injury by commercial fisherman).

CBC members testified to both impaired access rights and impaired recreational interests. CP 374-88. GBI ignores this testimony. The trial court found that this testimony was sufficient to “establish the special injury to three of plaintiff’s members...” CP 458 (emphasis

added).⁴ The trial court's conclusion that CBC had standing was properly affirmed by the Court of Appeals.

Additionally, CBC's members were given special rights under a 1927 deed to be able to access Lake Chelan. The deed grants, "in perpetuity, the right of access, for [the Town of Lakeside] and the public" over the lands now covered in part by GBI's fill "at all stages of water." CP 392. This dedication gave CBC members and the public an express right of access to Lake Chelan. GBI also ignores this evidence. Although CBC was not required to show special injury under the public trust doctrine, its members have met this hurdle. CBC has standing to pursue this action. The Court should decline GBI's request to accept review of this issue.


III. CONCLUSION

For the foregoing reasons, CBC's Petition for Review should be Granted.

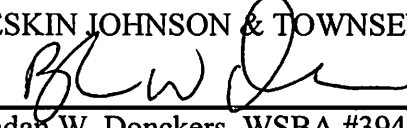
⁴ A nonprofit corporation or association has standing if one or more of its members have standing. *SAVE v. City of Bothell*, 89 Wn.2d 862 (1978).

DATED this 26th day of August, 2016.

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

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, W A 98862-0607

By U.S. Mail

Terence Pruitt & Jay Geck
Attorney General's Office
P.O. Box 40100
Olympia, WA 98504-0100

By U.S. Mail

Kenneth W. Harper
Menke Jackson Beyer Ehlis
& Harper, LLP
807 N. 39th Ave.
Yakima, W A 98902

By U.S. Mail

Nicholas J. Lofing
Davis, Arneil Law Firm, LLP
P.O. Box 2136
Wenatchee, WA 98801

By U.S. Mail

Markham Allen Quehrn
Perkins Coie LLP
The PSE Building
10885 NE 4th St. Suite 700
Bellevue, WA 98004-5579

By U.S. Mail

J. Kirk Bromiley
Bromiley Law, PLLC
227 Ohme Garden Road
Wenatchee, WA 98801

By U.S. Mail

Allan Galbraith
Allan Galbraith, PLLC
949 Wheeler Hill Road
Wenatchee, W A 98801-9705

By U.S. Mail

David S. Steele
Katherin Gustafson Galipeau
Perkins Coie LLP
1201 3rd Ave. Ste 4900
Seattle, W A 98101-3099

By U.S. Mail

Erik K. Wahlquist
Chelan County PUD
P.O. Box 1231
Wenatchee, WA 98807-1231

By U.S. Mail

John M. Groen
Pacific Legal Foundation
930 G Strret
Sacramento, CA 95814

By U.S. Mail

Michael Gendler
GendlerLaw PC
5006 Greenwood North
Seattle, WA 98103

By U.S. Mail

DATED this 26th day of August 2016, at Seattle, Washington



Sara Hill, Legal Assistant