No. 94357-5

THE SUPREME COURT
OF THE STATE OF WASHINGTON

COALITION OF CHILIWIST RESIDENTS AND FRIENDS, an Association of multiple concerned residents of the Chiliwist Valley; et al

Appellants,

v.

OKANOGAN COUNTY, a Municipal Corporation, and Political Subdivision of the State of Washington; et al

Respondent.

OKANOGAN COUNTY'S ANSWER TO CHILIWIST PETITION FOR REVIEW

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I. NATURE OF THE CASE

In response to a request from a property owner, Okanogan County commenced a proceeding to vacate a portion of Three Devils Road in Okanogan County. After receiving its engineer's opinion (the road should be closed) and a recommendation from its hearings examiner (the road could serve a public purpose to local residents) and considering the totality of information presented, the County Commissioners elected to vacate the road on the grounds that it was dangerous and useless to the overall County road network. See Resolution 25-2015 and Final Order of Vacation, CP at 237, CP at 1132-1133.

A group of interested neighbors who testified against the closure filed suit in Okanogan County Superior Court under the name of COALITION OF CHILIWIST RESIDENTS AND FRIENDS, an Association of multiple concerned residents of the Chiliwist Valley, RUTH HALL, ROGER CLARK, WILLIAM INGRAM, LOREN DOLGE, Residents and property owners in the Chiliwist Valley, (herein referred to as "The Coalition") which was denied. (Court opinion dated September 25, 2015, CP at 79-83). That decision was appealed to the Court of Appeals which unanimously upheld the lower court by an unpublished decision dated March 16, 2017 sub nom *Coal. of Chiliwist v.*

Okanogan Cty., 34585-8-III, 2017 WL 1032774 (Wash. Ct. App. Mar. 16, 2017) (herein referred to as "the Decision").

By Petition for Review, this same group of interested neighbors, none of whom live on the vacated portion of Three Devils Road, are asking this court to rewrite the rules of road vacation appeals to serve their parochial interests by considering alleged errors in the Decision below. (A copy of the decision is appx. A to the petition). Okanogan County asks that the Court follow established precedent and deny the Petition for Review the reasons set forth below.

II. SUMMARY OF REASONS TO DENY THE PETITION FOR REVIEW

A. The Actions of County Commissioners in opening and closing public streets is a uniquely legislative activity and not subject to review by writ of review under Chapter 7.16 RCW.

B. None of the members of The Coalition live on or secure access to their property by means of the vacated road and hence have no protected interest in maintaining the road open.

C. The record provides ample grounds to support the road vacation on the grounds of safety and marginal utility against any claim of arbitrary or capricious conduct.

D. The record is devoid of any evidence of fraud or collusion warranting further review.

E. The Court of Appeals correctly affirmed dismissal of the federal claim under 42 U.S.C § 1983 and §1988.

As will be discussed in detail below, the Court of Appeals Decision follows well established precedent, is fully supported by the

uncontested material facts presented as evidence in the case below and The Coalition's Petition for Review should be rejected.

III. ARGUMENT

A. The Actions of County Commissioners in opening and closing public streets is a uniquely legislative activity and not subject to review by writ of review under Chapter 7.16 RCW.

1. Statutory and case law has changed on the use of writs of review since the *Bay Industry* decision relied on by Petitioners.

The heart of Petitioners' argument is that they are entitled to have the Court conduct a quasi-judicial review of the actions of Okanogan County in vacating Three Devils Road. They cite *Bay Indus., Inc. v. Jefferson Cty., Bd. of Comm'rs of Jefferson Cty.*, 33 Wn. App. 239, 653 P.2d 1355 (1982) as authority for using writs of review for review of legislative activity such as road vacations. *Bay Industries* was decided in 1982. Prior to 1989, the writ of review was used to review legislative actions because the standard of review was "arbitrary and capricious". For example, the writ of review has been held the proper method by which to "test the reasonableness and validity of a zoning ordinance." *Byers v. Board of Clallam Cy. Comm'rs*, 84 Wash.2d 796, 797, 529 P.2d 823 (1974). In *Murphy v. City of Seattle*, 32 Wn. App. 386, 647 P.2d 540, 543 (1982), decided the same year as *Bay Industries*, supra, the Court determined that

the standard of review under RCW 7.16.120(4) and (5) of the 1982 statute was the same as the "arbitrary and capricious standard". In the words of the court quoting from section 4 and 5 the statute:

> .... The last two subsections [4 and 5 quoted above] govern the court's review of factual matters and encompass, essentially, **the arbitrary and capricious standard used in non-writ cases.** *Andrew v. King County*, 21 Wash.App. 566, 586 P.2d 509 (1978); *Dulmage v. Seattle*, 19 Wash.App. 932, 578 P.2d 875 (1978); *State ex rel. Tidewater-Shaver Barge Lines v. Kuykendall*, 42 Wash.2d 885, 259 P.2d 838 (1953).
>
> 32 Wn. App. at 389–90

That standard was changed in 1989 when the legislature amended the language of RCW 7.16.120 to "substantial evidence". Laws of 1989 c 7 § 1. The importance of the 1989 language change was reflected in *Freeburg v. City of Seattle*, 71 Wn. App. 367, 370–71, 859 P.2d 610, 611–12 (1993), publication ordered (Sept. 29, 1993) noting the new language in RCW 7.16.120(4) and (5) and the shift to the substantial evidence test.

> "(4) Whether there was any competent proof of all the facts necessary to be proved, in order to authorize the making of the determination. (5) Whether the factual determinations were supported by substantial evidence". Surprisingly, in face of the explicit language of subsection (5), Atterberry and the City contend that the inquiry before this court is whether the Examiner's decision is arbitrary and capricious. They are incorrect. **The respondents rely on cases under the prior statutory language**3 **which are now of limited, if any, precedential value.4 The** substantial evidence test is well understood in the law and should be applied to review a hearing examiner's decision in a similar manner as the review of a decision of a trial judge sitting without a jury. **There is a plain and important distinction between the**

statutory "substantial evidence" standard and the "arbitrary and capricious" standard applied by case law under the prior statutory language.5

Freeburg, 71 Wn. App. at 370–71. Emphasis supplied

In 1992, a decade after the *Bay Industries* case relied on by Petitioners, the Supreme Court directly addressed the consequences of the change in the standard of review under Chapter 7.16 RCW by stating that where a legislative action is involved, in that case an area wide rezone, a writ was no longer appropriate model for review. *Raynes v. City of Leavenworth*, 118 Wn.2d 237, 244, 821 P.2d 1204, 1208 (1992). The Court found that the activity of zoning a portion of the town for RV's was a legislative not a quasi-judicial activity. For that reason:

> ...the correct standard of review is whether the actions of the Council were arbitrary or capricious. *Westside,* 96 Wash.2d at 176, 634 P.2d 862; *see also Teter v. Clark Cy.,* 104 Wash.2d 227, 234, 704 P.2d 1171 (1985). If the court can reasonably conceive of any facts which justify a legislative determination, then that determination will be sustained. *Teter,* at 234–35, 704 P.2d 1171....
>
> We affirm the trial court's **denial** of the petition for writ of review *Raynes v. City of Leavenworth*, 118 Wn.2d 237, 250, 821 P.2d 1204, 1211 (1992).

The other two cases relied on by Petitioners for authority to consider road vacations by writ of review provide no help to petitioners' cause. *DeWeese v. City of Port Townsend*, 39 Wn. App. 369, 372, 693 P.2d 726, 729 (1984) was decided in 1984 five years prior to the

amendment. The third case Petitioners reference is *City of Fed. Way v. King Cty.*, 62 Wn. App. 530, 534, 815 P.2d 790, 793 (1991). But that case was a declaratory judgment action which did reference *DeWeese* but without substantive effect as noted by the court, "Federal Way failed to timely file its challenge to the ordinance and failed to timely join an indispensable party. Consequently, it is barred from asking the court to review its claim" *City of Fed. Way v. King Cty.,* 62 Wn. App. 530, 533, 815 P.2d 790, 793 (1991).

None of the cases cited stand for the proposition that (post *Raynes* in any event) a writ of review could be used to challenge a legislative action for the simple fact that the pre-1989 cases concerning road vacations were tied to the "arbitrary and capricious" standard no longer in effect in Writ cases after the 1989 amendments.

The Court of Appeals below properly cited a host of cases identifying the activity of a City or County in vacating a public road a "legislative activity" and may only be challenged as such.

> The long-standing rule in Washington is that road vacation is a political function that belongs to municipal authorities, and is not judicially reviewable absent fraud, collusion, or interference with a vested right. *Capitol Hill Methodist Church of Seattle v. City of Seattle,* 52 Wn.2d 359, 368, 324 P.2d 1113 (1958) (city road); *Fry v. O'Leary*, 141 Wash. 465, 469, 252 P. 111 (1927) (city road); *Thayer v. King County*, 46 Wn. App. 734, 738, 731 P.2d 1167

(1987) (county road); *Banchero v. City Council of City of Seattle*, 2 Wn. App. 519, 523, 468 P.2d 724 (1970) (city road).

Coal. of Chiliwist v. Okanogan Cty., 34585-8-III, 2017 WL 1032774, at *4 (Wash. Ct. App. Mar. 16, 2017).

The Court of Appeals adhered to long standing precedents of this court and other Courts of Appeal concerning the legislative nature of road vacations. The cases relied on by the Petitioners to claim error or conflict by rejecting a writ of review under Chapter 7.16 RCW are out of date, *Bay Industries* and *DeWeese,* or wholly inapposite, *Federal Way*. For this reason, Petitioners' claim of conflict with existing law provides no basis for this court to grant the petition for review.

2. The fact that a private party petitioned for vacation does not make the actions of the County quasi-judicial.

A second thrust of Petitioners' Request for Review is that the County was taking action at the request of a specific property owner, which Petitioners claim made the action quasi-judicial and therefore subject to review by writ of review. Petitioners rely on *Raynes v. Leavenworth*, Supra and *Cathcart-Maltby-Clearview Comm'ty Coun. v. Snohomish Cy.*, 96 Wn.2d 201,634 P.2d 853 (1981), in support of this claim.

As with the reliance on the writ materials above, Petitioners mischaracterize the actions before the County, claiming that, because the County is acting on the request of a private individual, members of the

public, with no legal or property right to the roadway in question, nevertheless, have standing to challenge the County's decision under quasi-judicial review. The reliance on *Raynes* and *Cathcart Maltby* in support of that proposition is wholly misplaced.

The Court of Appeals below properly explained why a road vacation is not a judicial function subject to quasi-judicial review:

> Application of the four-part test reinforces prior judicial holdings that vacation of county roads is a legislative function. First, RCW 36.87.080 vests the various county legislative authorities with the power to vacate roads by majority vote. Courts are not charged with vacating roads. Second, since at least 1937, when the legislature enacted chapter 36.87 RCW, the action of vacating county roads has been done by the various county legislative authorities, not courts. Third, the action of vacating county roads involves obtaining an engineer's report, holding a hearing for public input, and the county legislative authority answering two simple statutory considerations—(1) whether the subject road is useless as part of the county road system, and (2) whether the public will be benefitted by its vacation and abandonment. RCW 36.87.020. Such a process does not involve the application of existing law to past or present facts for the purpose of declaring or enforcing liability. Although here, the hearing examiner issued findings of fact and conclusions of law in its recommendation to the BOCC, nothing in RCW 36.87.060(2) requires this. Fourth, the action of vacating county roads requires public input and opinion. Requesting public input in making decisions is not the ordinary business of courts; ***it is instead the ordinary business of legislators***.
>
> *Coal. of Chiliwist v. Okanogan Cty.*, 34585-8-III, 2017 WL 1032774, at *4 (Wash. Ct. App. Mar. 16, 2017)

In *Harris v. Pierce Cty.*, 84 Wn. App. 222, 229, 928 P.2d 1111, 1115 (1996), the Court of Appeals pointed to the activity of vacating roads as a

"distinctly legislative decision" and in discussing the use of public opinion as part of the decision-making process (a trail plan in that case rather than a road, but analogizing to road projects) the Court said:

> Finally, the consideration of public opinion and the use of public comment and debate are legislative functions, not judicial ones.2
>
> *Harris*, 84 Wn. App. at 229

The *Cathcart Maltby* decision also relied on by Petitioners is wholly inapposite because it was a 1981 "rezone" action, prior to the legislative changes to Chapter 7.16, in which the Courts have distinguished Legislative actions from what is appropriate for writ proceedings.[1]

3. The receipt of a recommendation from the hearings examiner did not change the proceeding into a quasi-judicial action.

The proposed closure of the portion of Three Devils Road bounded by the Gebbers' property generated a great deal of public interest which was manifest in the letters and public comment which the Board of County Commissioners asked the hearings examiner to receive and make his

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[1] See e.g. *Parkridge v. City of Seattle*, 89 Wn.2d 454, 460, 573 P.2d 359, 363 (1978) ("In a rezone action, adjudicatory in nature, the required relationship to the public interest is not to be presumed as it would be in an original comprehensive zoning action by the city council, which we have held to be legislative in nature.")

"...recommendation to the county legislative authority concerning the proposed vacation " as authorized by RCW 36.87.060. But the examiner's report was just that, a "recommendation." Public comment is often filled with hypotheticals, emotional testimony and hearsay, which express hopes and fears and policy proposals, but bear very little on the facts of the case. That was certainly true in the present case.

When depositions were taken in the present proceeding under oath, the very limited actual use of the road, including the complete absence of any use of the road during recent fires, was confirmed. (This point is detailed at pp. 5 of Gamble's Answer in Opposition to Petition for Review).

The final responsibility for County policy with respect to roads is to be made by the County Commissioners. RCW 36.87.010, 070. In the present case, the Commissioners by a majority vote of 2-1 concluded the primitive road was both unsafe and useless to the overall county road network. See Resolution 25-2015 and Final Order of Vacation, CP at 237, CP at 1132-1133. In doing so, the Commissioners accepted the recommendation of the County Engineer rather than the recommendation of the hearings examiner. That is the type of legislative policy making done by elected officials after considering public and technical input

which is entitled to great deference by the Courts and is not amenable to review by writ. *Raynes*, supra, *Harris,* supra,

4. The fact that a road vacation may benefit the adjoining owners does not make a road vacation a quasi-judicial activity.

Petitioners' final claim is that a road vacation which benefits a specific individual warrants quasi-judicial review. This contention has been specifically rejected as grounds for altering the legislative nature of the decision being made. In *Banchero v. City Council of City of Seattle*, 2 Wn. App. 519, 524, 468 P.2d 724, 728 (1970), a writ of prohibition was sought by non-abutting property owners claiming the benefit of a proposed road vacation was to a single property owner, and therefore was improper. That assertion was rejected as a basis for objecting to a road vacation. As stated by the court:

> The appellant argues that the vacation here will benefit only one party, Consolidated Dairy Products Co. The fact that some one private party may benefit directly or incidentally from a street vacation does not mean that the vacation will not also serve a public use or purpose. *Freeman v. City of Centralia*, 67 Wash. 142, 120 P. 886 (1912).
>
> *Banchero*, 2 Wn. App. at 524.

In discussing the nature of a road proceeding sought on at the behest of a single property owner, the court made it clear that the decision was still legislative, noting that the municipality,

> .. may vacate a street when it is no longer required for public use; or when its use as a street is of such little public benefit as not to justify the cost of maintaining it; or when it is desired to substitute a new and different way more useful to the public; and, *of course, it is within the power of a city to vacate a street where all of the property owners adversely affected consent to the vacation.*
>
> *Banchero*, 2 Wn. App. at 523. Emphasis supplied

Recognizing the limited role courts play in such legislative/policy based decisions, the *Banchero* Court went on to note:

> This is not to say, however, that a court will, without good cause, delve into the wisdom of the legislative act. **The legislature or, in this case, the city council is the proper body to weigh the benefit to the public**. Only where there is **no possible** benefit to the public will this court review the legislative determination.
>
> *Banchero*, 2 Wn. App. at 523.

In this case, the record fully supported the Decision of the County to vacate a portion of Three Devils Road. The road was identified to be dangerous, subject to unanticipated closures, and cost substantially more to maintain than any revenues attributed to it and connected to roads on public lands which could be closed by others. See generally CP at 187, 261, 411-413, 417, 421-429, 910-914, and 1132-1133. Combined with the conclusion that the short segment was "useless" to the needs of the overall County road network, the County had sufficient grounds to warrant the legislative action vacating that portion of Three Devils Road as requested by the abutting owners.

As noted in the *Raynes* case on which the Petitioners attempt to rely:

> A series of public hearings was held, and a survey of public opinion was conducted. **Policymaking decisions which are based on careful consideration of public opinion are clearly within the purview of legislative bodies and do not resemble the ordinary business of the courts.**
>
> *Raynes*, 118 Wn.2d at 245. Emphasis supplied

Petitioners have provided the Court with no factual or legal basis for this Court to now consider their request to change road vacations into a quasi-judicial proceeding, merely because some members of the traveling public object to the county's action.

B. None of the members of The Coalition live on or secure access to their property by means of the vacated road and hence have no protected interest in maintaining the road open.

As noted by the Court of Appeals below, an uncontested fact in the case below is that none of the petitioners lived on or secured legal access to their property by means of the road to be vacated. See Decision at pp. 16-18. The Declaration of Brad Munson attached to Okanogan County's Motion to Dismiss includes a map of the area locating identified members of the Chiliwist organization in relation to the road to be vacated and other roads in the area. CP at 1377-1379. The map shows that the complaining parties live a considerable distance away from the road section to be

vacated. For most, the distance from the vacated road is measured in miles, and there was no evidence before the court that any party needed to use the road to access any portion of their property. *Ibid.*

Courts have long held that in road vacation cases, only those with a protected property interest in the road would have standing to sue and challenge a road vacation.

> The law of this state has long held that those whose property does not abut on the street to be vacated, or whose access is not substantially impaired by the vacation, have no standing to challenge a procedurally correct vacation. *State v. Wineberg*, 74 Wash.2d 372, 444 P.2d 787 (1968); *Capitol Hill Methodist Church of Seattle v. Seattle,* 52 Wash.2d 359, 324 P.2d 1113 (1958); *Smith v. St. Paul, M. & M. Ry. Co.*, 39 Wash. 355, 81 P. 840 (1905). This doctrine allows compensation to those only who suffer an injury unlike that suffered by the public.
>
> *Banchero v. City Council of City of Seattle*, 2 Wn. App. 519, 522, 468 P.2d 724, 727 (1970)

As noted by the Court of Appeals below, the trial court determined that the Coalition had standing because of the safety concerns (Decision at p. 3), and thereafter did not address the issue of standing, choosing to affirm the trial court on other grounds noted.

As depositions in this case showed, the fire escape, "safety" argument (specifically rejected as a legal basis for standing of non-abutting owners in *Capitol Hill Methodist Church of Seattle*, supra) was a fiction because the road was frequently closed due to hazards such as

washouts, downed trees, and actions by others such as gate closures and not used by any of the Petitioners during the recent fires. (See details at pp. 3 Gamble's Answer in Opposition to Petition for Review).

This Court should reject the petition for review as to do otherwise would be to grant review to a group which has no legal basis for making a claim. As noted in *DeWeese v. City of Port Townsend*, 39 Wn. App. 369, 372, 693 P.2d 726, 729 (1984),

> ..., standing is a substantive, not jurisdictional, question. *Hoskins v. Kirkland,* 7 Wash.App. 957, 961, 503 P.2d 1117 (1972). Nevertheless, it is desirable in the interests of an orderly proceeding that it be determined, as here, as if it were jurisdictional, before other substantive issues are considered.[3]
>
> *Deweese*, 39 Wn. App. at 372

Justiciability is a specific requirement for any declaratory judgment action which is the proper vehicle for challenging a legislative action. *To-Ro Trade Shows v. Collins*, 144 Wn.2d 403, 416, 27 P.3d 1149, 1155 (2001). But in such cases, standing is a prerequisite for any court to engage in the requested Civil Action (CR 57). For without standing, a justiciable case or controversy does not exist:

> Where the four justiciability factors are not met, "the court steps into the prohibited area of advisory opinions." *Diversified Indus. Dev. Corp.*, 82 Wash.2d at 815, 514 P.2d 137.
>
> *To-Ro Trade Shows*, 144 Wn.2d at 416.

Petitions for review should be granted only when all elements necessary for a full adjudication of rights are present before the court, *To-Ro Trade Shows* Supra. Because they lack legal standing, Petitioners have not met that test. And without a justiciable controversy, the elements of RAP 13.4(b) cannot be met and the Petition must be dismissed.

C. The record provides ample grounds to support the road vacation on the grounds of safety and marginal utility against any claim of arbitrary or capricious conduct.

The County order vacating the road contained the following findings:

> WHEREAS the [BOCC finds] from the record that alternate routes exist out of the Chiliwist area,
> WHEREAS the [BOCC finds] the record discloses that the Three Devils Road has been impassable by vehicles due to rock slides, road being washed out by a flood event, road blocked by trees and logs crossing the road way,
> WHEREAS the [BOCC] finds the record discloses the use of the road is low and is not on the County's rotation for regular vehicle counts,
> WHEREAS the [BOCC] finds the record discloses the road has seen very little traffic as evidenced by photos included in the County Engineer's report.
>
> CP at 1132-33.

There was nothing in the BOCC's decision that could even arguably meet the "arbitrary and capricious" standard under the evidence before it. As noted in *Raynes*, *supra,* the arbitrary and capricious test for reviewing legislative matters provides:

> "If the court can reasonably conceive of any facts which justify a legislative determination, then that determination will be sustained."
>
> *Raynes*, 118 Wn.2d at 250.

Not one of the facts identified in the order vacating Three Devils Road identified above was contradicted by any competent evidence in the summary judgment proceedings. Therefore, such facts must be considered as "uncontested facts" for purposes of judicial review. The uncontested material facts stated in the resolution provide a rational basis for the County to vacate the road. The absence of any genuine contest should preclude any reason for this Court to review the decision below.

D. The record is devoid of any evidence of fraud or collusion warranting further review.

After the ruling on summary judgment concerning the legislative nature of the road vacation, the Trial Court held open the issue of potential fraud and collusion pending presentation of further evidence. As detailed in Gamble's Answer in Opposition to the Petition for Review, Petitioners had no such evidence and a subsequent judgment dismissing that portion of their claim was properly entered on October 21, 2015. See CP at 17-21, 60-64.

E. The Court of Appeals correctly affirmed dismissal of the federal claim under 42 U.S.C. § 1983 and § 1988.

Just as there were no grounds to reverse the Trial Court's approval of the road vacation under Washington State law so, too, the Court of Appeals properly affirmed the Trial Court's dismissal of the federal due process claim. To sustain a due process claim under 42 U.S.C. § 1983, a plaintiff must show he has been deprived of a protected interest in life, liberty or property. Absent deprivation of a constitutionally protected property or liberty interest, the court must dismiss a due process claim under section 1983. *Board of Regents v. Roth*, 408 U.S. 564, 577, 92 S.Ct. 2701, 33 L. Ed. 2d 548 (1972). A constitutionally-protected property interest exists only where the plaintiff demonstrates that he possessed and was deprived of a reasonable expectation or entitlement created by an independent source such as federal or state law. A mere subjective expectation on the part of the plaintiff that a benefit would be provided or continued does not create a property interest protected by the Constitution. *Clear Channel Outdoor v. Seattle Popular Monorail Authority*, 136 Wn. App. 781, 784-86, 150 P.3d 649 (2007).

In this case, Coalition members did not own property abutting Three Devil's Road, nor depend on the road for access to their properties. Indeed, none of the Coalition members lived within one mile of the section of road that was vacated by the county. Coalition members alleged that they had used the road for purposes of recreation and as a

potential fire escape route. But the Court of Appeals properly upheld the dismissal of the due process claim because such considerations are not reasonable expectations defined by an independent source such as federal or state law.

The appellants' claim of deprivation of a "liberty interest" was even more strained. No Court has held that a citizen possesses a constitutionally-protected liberty interest in traveling on a remote unimproved rural road. As the Court of Appeals correctly noted, if it were to recognize such a right, no street or road vacation would ever be possible.

In short, the Court of Appeals' decision affirming dismissal of the Section 1983 claim was appropriate. There is no need for Supreme Court review.

IV. SUMMARY AND CONCLUSION

Discretionary Review should only be granted for compelling reasons or to resolve irreconcilable splits in authority below. None of that exists in the present case and the Request for Discretionary Review should be denied.

Respectfully submitted,

DATED: May 9 ,2017

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CERTIFICATE OF SERVICE

I certify under penalty of perjury under the laws of the State of Washington that I am over the age of eighteen (18) years, not a party to the above-entitled action, competent to be a witness, and on the day set forth below, I served the document(s) to which this is attached, in the manner noted on the following person(s):

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Dated this 9th day of May, 2017, at Okanogan, Washington.

Julie Daigneau

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