No. 93381-2

FILED

JUN 22 2015

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By

No. 331962

(consolidated with No 332390)

IN THE COURT OF APPEALS
DIVISION III
OF THE STATE OF WASHINGTON

CHELAN BASIN CONSERVANCY,

Plaintiff/Respondent,

v.

GBI HOLDING CO., Defendant/Appellant

and

CITY OF CHELAN, Appellant, STATE OF WASHINGTON, Appellant, and CHELAN COUNTY PUBLIC UTILITY DISTRICT,

Additional Named Parties

RESPONDENT/CROSS-APPELLANT'S BRIEF

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I. INTRODUCTION

The Chelan County Superior Court issued several summary judgment orders over about three years of litigation, culminating in its order that the "Three Fingers Fill" be removed from Lake Chelan, which order has notable similarity to the Supreme Court's watershed 1969 decision ordering removal of the neighboring Gallagher Fill. *Wilbour v. Gallagher*, 77 Wn.2d 306, 452 P.2d 232 (1969). Because of the factual identity, *Wilbour* undoubtedly would be binding precedent but for changes in the law, including the 1971 adoption of the Shoreline Management Act ("SMA"). The City of Chelan ("City") believes the Superior Court correctly applied *Wilbour* and the law as developed over the intervening 45 years when it concluded that the Three Fingers Fill violates public nuisance laws and the Public Trust Doctrine.

The City appeals only that order of the Superior Court that denied the City's cross-motion for summary judgment related to a proffered interpretation of RCW 90.58.270(1) that would render the statute invalid under the Public Trust Doctrine, namely that novel interpretation advanced by GBI and the State that would convert the statute into a "blanket" grandfathering for all fills across the state. Such an interpretation of RCW 90.58.270(1) cannot be sustained under the Public Trust Doctrine and its Washington State progeny, particularly *Caminiti v. Boyle*, 107 Wn.2d 662,

732 P.2d 989 (1987). To that end, the Superior Court erred by denying the City's motion for summary judgment and reconsidering its decision based on its incorrect conclusion that it should analyze whether the obstruction (here, the Three Fingers Fills) provide a public benefit, whereas the *Caminiti* test clearly required it to analyze whether the legislation (here RCW 90.58.270(1)) provides a public benefit vis a vis the Three Fingers Fill and the waters of Lake Chelan that were displaced by it.

The City does not agree or join the appeals of GBI and the State that contend that the Superior Court prematurely decided the motions for summary judgment or that citizen group Chelan Basin Conservancy ("Chelan Basin") lacks standing. The City opposes the assignments of error alleged by GBI and the State, arguing that RCW 90.58.270(1) provides a blanket grandfathering for the Three Fingers Fill and arguing that an alleged public benefit of the Three Fingers Fill required trial.

In the event the Court reaches the statutory interpretation, the City requests this Court 1) reverse the Superior Court's summary judgment conclusion that *Caminiti* requires a factual consideration of public benefits created by the offending structure, and 2) reject an expansive interpretation of RCW 90.58.270(1) that would violate the Public Trust Doctrine. Because GBI has not appealed the Superior Court's conclusion that the appropriate abatement remedy is removal, the City believes that

this Court can resolve its assignments of error on appeal without remand to the Superior Court.

II. ASSIGNMENT OF ERROR AND ISSUE PRESENTED

A. Assignment of Error

The Superior Court erred when it reconsidered itself and concluded that the *Caminiti* test required a factual consideration of the public benefits created by a specific development, rather than a legal determination of whether RCW 90.58.270(1) either (a) promoted the interests of the public in the *jus publicum* associated with the waters displaced by the Three Fingers Fill, or (b) has not substantially impaired such *jus publicum*.

B. Issue Pertaining to the Assignment of Error.

The *Caminiti* test considers whether legislation, such as RCW 90.58.270(1), abdicates the state's public trust responsibility, by analyzing whether the legislation (a) promotes the interests of the public in the *jus publicum* of the waters of Lake Chelan displaced by the Three Fingers Fill, or (b) has not substantially impaired them, both of which standards require a legal determination. Did the Superior Court err in concluding the *Caminiti* test required an evidentiary hearing of public benefits created by the Three Fingers Fill itself when analyzing the validity of RCW 90.58.270(1)?

III. STATEMENT OF THE CASE

Chelan Basin seeks removal of the Three Fingers Fill because it obstructs the public's rights of navigation, fishing, and recreation. CP 3-4. GBI owns the underlying property, Block 9, Plat of Lake Park, and desires to develop it. CP 60. GBI requested the City approve its development plans for the Three Fingers Fill. CP 269-303. The City approved the application, imposing conditions based on the Three Fingers Fill's historic and current interference with the public's rights of navigation, fishing, and recreation. CP 298-302. Because the City did not order the Three Fingers Fill removed in the development decisions, Chelan Basin filed this action to have the Three Fingers Fill removed. CP 3, 270, 323. Meanwhile, GBI appealed the City's conditions, but that LUPA lawsuit is stayed pending a decision by the Court in this case.

A. The Three Fingers Fill on Block 9 and Vacated Boulevard Ave.

The Chelan Electric Company, based on a permit from the Federal Power Commission, constructed a dam over the Chelan River to periodically raise the waters of Lake Chelan to generate electricity from its natural elevation of 1,079 feet to 1,100 feet above sea level. *Wilbour*, 77 Wn.2d at 307-11. In preparation for the periodic annual inundation by Lake Chelan to the 1,100 foot level, the Town of Lakeside (now merged into and part of the City of Chelan) and the public, succeeded to the

perpetual right of access to Lake Chelan, at all stages of water, over vacated streets and alleys, through a series of interrelated conveyances. *Wilbour*, 77 Wn.2d at 307-09; CP 276. One of the vacated streets subject to the public's right of access is vacated Boulevard Avenue, which adjoins GBI's Block 9. CP 61, 276.

Because, at the 1090 ft. level, Lake Chelan completely covered Block 9, GBI's predecessor filled Block 9 (including the appurtenant vacated Boulevard Ave.) in 1961-62 to the level of 1,102 feet to provide three permanent above-lake peninsulas on Block 9. CP 61. Similarly, the neighboring Gallaghers filled their property with a substantially identical "fourth finger". CP 279. Unlike GBI, the Gallaghers were sued by their neighbors, the Wilbours, and the Supreme ordered the Gallagher Fill be removed. CP 279.

B. Applications to develop the Three Fingers Fill.

The Three Finger Fills have not been substantially used or developed since their creation in 1961-1962. CP 184-85, 1502. However, the laws regarding the development of the shore line of Lake Chelan have changed since *Wilbour*. GBI filed an application with the City in July 2010 to develop the Three Fingers Fill as a planned development district. CP 272, 1502. Chelan Basin and others objected to the development. CP 270. GBI withdrew the application for a planned development and filed an

application with the City in December 2010 to short plat the Three Fingers Fill (and the appurtenant vacated Boulevard Ave.) into 6 lots. CP 272. Chelan Basin and others objected and requested the City require GBI to remove the Three Fingers Fill. CP 288-295. The City's planning director approved the GBI short plat application, upon GBI satisfying conditions alleviating the Three Fingers Fill's impairment of public rights of access and public rights of navigation, fishing, and recreation. CP 298-301.

C. Appeal of the administrative decision and this resulting lawsuit.

Chelan Basin and GBI appealed the City's administrative decision to the City Hearing Examiner. CP 304-16. In a preliminary ruling, the Hearing Examiner also concluded it lacked authority to order the Three Fingers Fill removed. CP 317-22. Chelan Basin then filed this action in Superior Court seeking to have the Three Fingers Fill removed. CP 323. The City consequently counterclaimed and cross claimed seeking the Superior Court's review of the City's assessment of public trust rights in its decision. CP 18-26.

D. The rulings on summary judgment by the Superior Court.

The Court issued several summary judgment orders over the course of about three years:

July 11, 2012. The Superior Court held the Three Fingers Fill violated the Public Trust Doctrine and ordered GBI to remove it. CP 827-37. In response to GBI's assertion that RCW 90.58.270(1) consented to the Three Fingers Fill, the Superior Court determined, at least with regard to the Three Fingers Fill, RCW 90.58.270(1) impermissibly surrendered the *jus publicum* of the waters of Lake Chelan associated with Block 9, based on the *Caminiti* test. CP 836.

February 15, 2013. The Superior Court reversed portions of its July 11, 2012 Order, upon its erroneous conclusion that there existed genuine issues of material fact regarding the second prong of the *Caminiti* test. CP 1267-73, 1253-55. An evidentiary hearing or trial was scheduled for March 2015, but was stricken as no longer necessary. CP 2552-53.

October 3, 2014. The Superior Court again held the Three Fingers Fill violates the Public Trust Doctrine, that the placement of the Three Fingers Fill were a public nuisance and consequently not entitled to the protection of RCW 90.58.270(1). CP 1557-61, 1613-22.

February 27, 2015. The Superior Court held that because the Three Fingers Fill violated the Public Trust Doctrine, the appropriate remedy was for GBI to promptly remove it. CP 2547-51.

IV. ARGUMENT

A. Standard of review

The Court review orders on summary judgment de novo. *Weden v. San Juan Co.,* 135 Wn.2d 678, 689, 958 P.2d 273 (1998). The validity of RCW 90.58.270(1) under the Public Trust Doctrine also presents an issue the Court reviews de novo. *Id.* at 696-97. The City questions the State's assertion that a presumption of constitutionality applies in the context of Public Trust Doctrine challenges. The State has an inherent conflict in this lawsuit as it serves both as the trustee of the public's rights protected by the Public Trust Doctrine and as the defender of legislation under constitutional challenge.

Contrary to the State's position, and notably absent from the State's brief, caselaw in the Public Trust Doctrine area demonstrates that Washington Courts review legislation that may impair the public interest in the jus publicum with "[a] heightened degree of judicial scrutiny, 'as if they were measuring that legislation against constitutional protections.'" *Weden*, 135 Wash.2d at 698, citing Ralph W. Johnson et al., The Public Trust Doctrine and Coastal Zone Management in Washington State, 67 Wash. L. Rev. 521, 524 (1992). The 'heightened scrutiny' standard has been consistently recognized and applied by Washington Courts. See, e.g., *Wash. State Geoduck Harvest Ass'n v. Wash. State Dept. of Natural*

Resources, 124 Wash. App. 441, 451, 101 P.3d 891 (2004) and *Citizens Responsible for Wildlife Management v. State*, 124 Wash. App. 566, 570-71, 103 P.3d 203 (2004).

B. The expansive interpretation of RCW 90.58.270(1) proffered by the State and GBI cannot withstand scrutiny under the Public Trust Doctrine, and the applicable analysis does not require a trial of benefits created by the Three Fingers Fill.

The Public Trust Doctrine is a judicial doctrine with ancient legal foundations and overlapping constitutional protections, all of which ensure and protect availability and access for the public to navigate, fish, recreate, and enjoy the State's waters. The Public Trust Doctrine is a fundamental inalienable common law right of the public to use the waters of Washington State. In Lake Chelan, a body of water of great prominence and beauty in the State, the public's right is to navigate and recreate wherever the waters go. *Wilbour*, 77 Wn.2d at 316 (holding that the public's trust right is the "right to go where the navigable waters go, even though the navigable waters lie over privately owned lands"). Those who own shore lands periodically submerged by the fluctuating level of Lake Chelan have a "qualified fee subject to the right of the public to use the water over the lands consistent with navigational rights." *Id.* at 315.

1. The Public Trust Doctrine has always existed in Washington law and ensures protection of the *jus publicum*.

The Public Trust Doctrine implicates the public's rights to the State's waters through Article 17, Section 1 of the Washington Constitution. *See Caminiti,* 107 Wn.2d at 666-75. The State, as owner and trustee of these waters, must remain ever cognizant of the two "aspects" of its water ownership: (1) the *jus privatum* interest (or the state's title ownership) and (2) the *jus publicum* (or public authority interest). *Caminiti*, 107 Wn.2d at 666-75.

The *jus publicum* interest rests on the principle that "[t]he public has an overriding interest in navigable waterways and lands under them is at least as old as the Code of Justinian . . . [and] is stated with clarity in the seminal opinions of this court interpreting Const. art. 17, § 1.15." *Id.* at 668-69. The *jus publicum* interest includes the 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.* at 669 (*citing Wilbour,* 77 Wn.2d 306).

The state cannot "convey or give away" the *jus publicum* interest just as it cannot "abdicate its police powers in the administration of government and the preservation of the peace." *Id.* at 669-670. The State's

"sovereignty and dominion" over its tidelands and shore lands, "as distinguished from title", cannot be alienated and "the state holds such dominion in trust for the public." *Id.*, citing *Illinois Cent. R.R. v. Illinois,* 146 U.S. 387, 453, 13 S.Ct. 110 (1892); *see also Weden*, 135 Wn.2d at 678; *Orion Corp. v. State,* 109 Wn.2d at 639-640, 747 P.2d 1062 (1987) ("while the state has authority to convey title to these properties, "[t]he Legislature has never had the authority . . . to sell or otherwise abdicate state sovereignty or dominion over such tidelands and shorelands"); *Long Sault Development Co. v. Call,* 242 U.S. 272, 279, 37 S.Ct. 79 (1916) (the public trust devolved to the states upon gaining statehood and is a trust that the state legislature cannot "relinquish by a transfer of the property").

Upon these principles, the present issue has arisen as to whether the SMA's provision, RCW 90.58.270(1), complies with the threshold protections of the Public Trust Doctrine and Washington Constitution. The City does not believe the validity of RCW 90.58.270(1) must be tested in this lawsuit, unless the Court entertains the State's and GBI's novel interpretation that RCW 90.58.270(1) provides a blanket grandfathering to all fills.

2. The Court should avoid the unconstitutional interpretation of RCW 90.58.270(1) proffered by GBI and the State because the Superior Court made alternate dispositive rulings that do not require such analysis.

The Court need not reach the interpretation issue for two reasons (i) the trial court concluded that the Three Fingers Fills constituted a public nuisance in violation of state statutes, an express proviso to the application of RCW 90.58.270(1), and (ii) RCW 90.58.270(1) only applies to "retention and maintenance" of fills, not the expansion, development, or construction put into motion by GBI here.

RCW 90.58.270(1) provides:

> [...] 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**. (Emphasis added).

First, the consent of RCW 90.58.270(1) expressly does not apply to fills which are in violation of state statutes, which includes nuisance statutes at RCW 7.48. The Superior Court determined the Three Fingers Fill constituted a public nuisance and is therefore not entitled to protection of RCW 90.58.270(1). CP 1613-1622. The City has not taken a position on whether the Three Fingers Fills constitute trespass or nuisance or

sought removal of the Fills. Rather, the City's interest has consistently been the proper application of the law to GBI's applications for development of the Three Fingers Fill. However, it cannot be overlooked that despite years of opportunity to do so, and the granting of reconsideration, GBI has failed to provide even a "mere scintilla of evidence" to contest Chelan Basin's claim of public nuisance. CP 1622.

Second, the City's primary position below was that RCW 90.58.270(1)'s application is limited to the "retention and maintenance" of the Three Fingers Fill. The genesis of this case was Chelan Basin's objection to GBI's earlier application for a 40-unit planned development district, which was later substituted with the present 6-parcel short plat application. CP 272. Chelan Basin appealed the City's decision on GBI's short plat, which decision concluded that the City did not have jurisdiction to order the Three Fingers Fill be removed. CP 317-322. Chelan Basin then dismissed its administrative appeal and filed this action. CP 323.

The phrase "retention and maintenance" has not been interpreted by Washington courts, but the Washington Shoreline Hearings Board decision, *In re Reed v. State of Wash.,* 1988 WL 161202, 3 (May 10, 1988), concluded that a pre-December, 1969 remnant log pile could not be upgraded into a functional bulkhead under the auspices of RCW 90.58.270(1), because the upgrade was neither retention or maintenance.

Similarly, GBI cannot avail itself of protections under RCW 90.58.270(1), which applies only to "retention and maintenance" of the Three Fingers Fill by its plain language, not GBI's current endeavors to develop, plat, sub-divide, or expand the use and structure of the Three Fingers Fill.

3. If reached, GBI's and the State's sweeping interpretation of RCW 90.58.270(1) fails the *Caminiti* test, which test does not consider collateral benefits of the structures offending the public's rights.

The alternative, expansive interpretation of RCW 90.58.270(1) proffered by GBI and the State violates the Public Trust Doctrine and *Caminiti.* In the Superior Court, the City raised this argument in the alternative, and again represents that the Court need not reach the validity of the statute. The applicable test of a statute's validity under such a challenge is set forth in *Caminiti.* In the event this Court reaches that analysis, this Court should reject the Superior Court's incorrect conclusion, on motions for reconsideration by GBI and the State, that "genuine issues of material fact as to the second prong of the *Caminiti* Test ... [based on] potential beneficial uses of the Three Fingers Fill" require a trial or evidentiary hearing. CP 1253-55. The *Caminiti* test is a legal analysis of legislation, not a case-by-case analysis of possible benefits collaterally created by offending structures, and the Superior

Court erred in concluding that there were issues of material fact regarding the second prong of the *Caminiti* test.

The Court clearly so held in *Caminiti,* stating the test is "[w]hether or not *an exercise of legislative power* with respect to tidelands and shorelands violates the 'public trust doctrine.'" *Caminiti,* 107 Wn.2d at 670 (emphasis added). The Court in *Caminiti* focused on a specific statute: RCW 79.90.105, which authorized owners of residential property abutting state-owned tidelands and shore lands to install and maintain docks without charge. After an introductory review of the SMA, the Supreme Court "turn[ed] next to the above stated test for violations of the 'public trust doctrine', and appl[ied] that test *to the questioned statute (RCW 79.90.105)*". *Caminiti,* 107 Wn.2d at 671 (emphasis added). The Supreme Court's analysis and decision did not assess the public benefit of a specific structure or fill or a class of structures or fills, nor did it weigh the benefits of the structures and fills against the public's right of navigation. Instead, its analysis was limited to the scope of RCW 79.90.105 and specifically reviewed the legislative history and findings, as well as the history and degree of infringement and other competing state policies before concluding whether it amounted to an impermissible conveyance of the *jus publicum* at issue by the Legislature. *Id.*

The decisions applying *Caminiti* have consistently tested legislation, not structures. For example, at issue in *Washington State Geoduck Harvest Ass'n* was RCW 79.96.080, which established procedures whereby DNR grants authority to harvest geoducks on specific tracts. The Court of Appeals concluded the statute allowed commercial geoduck harvesting only through specific procedures and requirements that the state implements and enforces. The court recognized that no title to state land is conveyed by the statute, and the DNR is responsible for appraising the resources in the water bids for the harvest of geoducks. As in *Caminiti*, the state retained the right to revoke a commercial harvesting agreement. Consequently, the Court of Appeals concluded the state had not given up its right of control over the state's geoduck resources. The Court of Appeals also concluded that the statute protected the public's right to recreation, commerce and commercial fishing, and the proceeds from the sale of harvesting rights supported aquatic resource management and the enhancement of aquatic lands for all uses by the public. *Wash. St. Geoduck*, 124 Wn.App. at 452.

Similarly, in *Weden,* the Supreme Court reviewed a San Juan County ordinance prohibiting the operation of personal watercraft on designated marine waters. The *jus publicum* at issue in *Weden* was the public use of personal watercraft. The Court in *Weden* focused solely on

the scope of the ordinance, concluding that while the ordinance prohibits a particular form of recreation, the waters were open to access by the entire public, including owners of personal water craft who utilize some other method of recreation. *Weden,* 135 Wn.2d at 699. The Court concluded that the ordinance did not lose control over the *jus publicum* and under *Caminiti* did not relinquish the County's right of control over marine waters. *Id.*

A consistent *Caminiti* analysis of legislation was undertaken in *Citizens for Responsible Wildlife Management*, 124 Wn.App. 566, 103 P.3d 203 (2004). The *jus publicum* at issue was the title to animals *ferae naturae*. The legislation at issue were Initiatives 655 and 713, which prohibited certain hunting and trapping practices. The Court of Appeals, in concluding the state did not give up control over the *jus publicum* through the Initiatives, focused solely on the scope of the Initiatives, and reviewed no facts associated with hunting and trapping practices. In following the *Caminiti*, the Court of Appeals noted the Initiatives were subject to important exceptions, and otherwise cited several ways where the state retained control over hunting and trapping. *Id.*

Applying *Caminiti* to GBI's blanket grandfathering interpretation of RCW 90.58.270(1) cannot be viewed as anything but the state's wholesale abandonment of control over the *jus publicum*. Neither GBI nor

the State have ever argued otherwise. In the words of the Superior Court's May 30, 2012 memorandum decision:

> [T]he inescapable conclusion that must be reached is the first part of the Caminiti test is met: that is, by granting a blanket authorization to any fills or other improvements existing as of December 4, 1969, the state has surrendered its right of control over the jus publicum. RCW 90.58.270(1) makes no effort of any kind at qualitative analysis as to the effect these fills and other improvements might have on the public's rights in the state's navigable waters; rather, the statute simply accepts impairment of the public's right, no matter the magnitude. The legislature simply waved the white flag and conveyed away the public's interest in contravention of the public rights doctrine. CP 836.

Rather, the dispute between the parties falls under the second prong of the *Caminiti* test: whether the legislation benefits the public interest. The State's and GBI's focuses on collateral public benefits created by the Three Fingers Fills themselves is error. The critical question is the public benefit of the legislation, RCW 90.58.270(1). Here, there is no public benefit to a wholesale, state-wide grandfathering of offending fills and structures, and the statute, if given such an interpretation, must fail. The Superior Court was correct when it concluded in its May 30, 2012 memorandum decision:

> [T]he second part of the test is also met. Specifically, there is no evidence whatsoever that the surrender of jus publicum to a private party vis-à-vis the Three Fingers Fill in any way promotes the public interest. As persuasively noted by plaintiff, this fill area does not preserve the natural character of shoreline, does not protect the resources or ecology of the shoreline and does not enhance or

increase public access to the shoreline or navigable waters of Lake Chelan. To the contrary, it is undisputed that public access to the lake is impaired and the existence of the fill wholly obliterates the ability to utilize that portion of the lake for navigation and recreation. The impairment can only be characterized as substantial and any benefit inures only to defendant's private interest. CP 836.

V. CONCLUSION

If the Court determines the Superior Court erred by holding the Three Fingers Fill was public nuisance and not entitled to the protection of RCW 90.58.270(1), the Superior Court's first decision on July 12, 2012, holding RCW 90.58.270(1) fails the *Caminiti* test should be reinstated as it correctly applied the *Caminiti* test to RCW 90.58.270(1). The *Caminiti* test analyzes whether legislation either (a) promotes the interests of the public in the *jus publicum* of the waters of Lake Chelan displaced by the Three Fingers Fill, or (b) has not substantially impaired them, both of which standards require a legal determination, not analysis of the benefits of a specific development.

Respectfully submitted this 19th day of June 2015.

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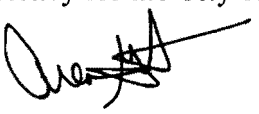

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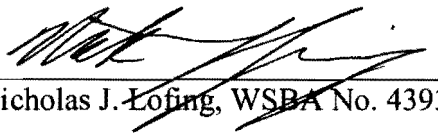

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FILED

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CITY OF CHELAN'S CERTIFICATE OF SERVICE

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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 Brief of Appellant City of Chelan to which this is attached, in the manner noted on the following person(s):

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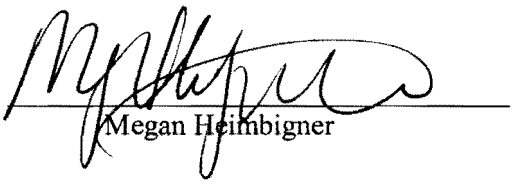
DATED this 19th day of June, 2015 at Wenatchee, Washington.



Megan Heimbigner