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STATE BOARD OF LAND COMMISSIONERS
C.L. "Butch" Otter, Governor
Ben Ysursa, Secretary of State
Lawrence G. Wasden, Attorney General
Donna M. Jones, State Controller
Tom Luna, Sup't of Public Instruction

GEORGE BACON, DIRECTOR
EQUAL OPPORTUNITY EMPLOYER

GEORGE B. BACON
Director
Idaho Department of Lands
300 North 6th Street, Suite 103
P.O. Box 83720
Boise, Idaho 83720-0050

BEFORE THE STATE OF LANDS COMMISSIONERS
STATE OF IDAHO

In the Matter of;)
)
Encroachment Permit No. ERL-96-S-219B)
Peter Kaseburg, Applicant)
_____)

FINAL ORDER

I. NATURE OF PROCEEDINGS

A reconsideration hearing was held on August 17, 2009 at 10:00am at the Idaho Department of Lands Pend Oreille Supervisory Office in Sandpoint, Idaho. Carl Washburn served as Hearing Coordinator. The Hearing Coordinator issued his Recommendations on January 5, 2010.

As director of the Idaho Department of Lands (IDL) my responsibility is to render a decision on behalf of the State Board of Land Commissioners based on the record reviewed in the context of my personal expertise gained through education, training and experience. In making this determination I have relied on the record provided. Specifically,

- I have read the transcript of the reconsideration hearing conducted in Sandpoint, Idaho on August 17, 2009.
- I have reviewed the record including all documents and exhibits.

- I have examined the Hearing Coordinator's Recommendations in light of the Encroachments, including docks, piling, and the water intake line placed on the navigable waters requiring a permit issued by IDL pursuant to the requirements of Title 58, chapter 13, Idaho Code and the Rules for the Regulation of Beds, Waters, and Airspace over Navigable Lakes in the State of Idaho, IDAPA 20.03.04, as promulgated by the State Board of Land Commissioners.

II. Findings of Facts

I concur with the Findings of Fact presented by the Hearing Coordinator.

III. Conclusions of Law


I concur with the Conclusions of Law presented by the Hearing Coordinator.

IV. FINAL ORDER

Based on the information provided to me by the Hearing Coordinator, and the encroachment application and comments generated from the notice of encroachment and agency notification, this is my final order. The Pend Oreille Supervisory Area of the Department shall deny the applicant's request for a non-navigational permit due to the lack of demonstrating an environmental, economic, or social benefit to the citizens of Idaho.

This is a final order of the agency.

DATED this 11 day of January, 2010.


GEORGE B. BACON
Director
Idaho Department of Lands

CERTIFICATE OF SERVICE

I hereby certify that on this 11th day of January, 2010, I caused to be served a true and correct copy of the foregoing document, by the method indicated:

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GEORGE BACON, DIRECTOR
EQUAL OPPORTUNITY EMPLOYER

December 29, 2009

MEMORANDUM

TO: George B. Bacon, Director
FROM: Carl Washburn, Specialist Navigable Water/Submerged Lands Leasing
SUBJECT: Reconsideration Hearing-Kaseburg Encroachment Application ERL-96-S-219B

I. INTRODUCTION

This document, which includes a recommendation for your consideration, is prepared and offered following a reconsideration hearing conducted pursuant to Idaho Code §58-1306(d) and IDAPA 20.03.04.030.08.b. by the Idaho Department of Lands (IDL). The hearing was conducted on August 17, 21009, pursuant to the Applicant's request in accordance with the processing of an encroachment application to replace a non-navigational encroachment (piling) on Lake Pend Oreille, which is a navigable lake in Idaho. Jurisdiction rests with IDL in this matter pursuant to Idaho Code §58-1303, which empowers the State Board of Land Commissioners to regulate, control, and permit encroachments on, in, or over the beds, airspace, or waters of navigable lakes in Idaho.

II. FINDING OF FACT

1. On or about December 29, 1974, Douglas C. McLean submitted a "Notice of an Encroachment on a Navigable Lake or Stream" to IDL. This "Notice" provided notice to IDL of the existence of encroachments located in Lake Pend Oreille below the natural high water mark, several piling, a small dock and a water line. According to the drawings accompanying the "Notice,"¹ there were fifteen (15) individual piling and two (2) clusters of three (3) piling, and an approximately 7' X 30' dock of cedar logs. The drawing also showed

¹ This "Notice" was apparently submitted pursuant to what is now Idaho Code §58-1312.

a buried waterline generally paralleling the piling to a point below low water before the Albeni Falls dam was constructed, where it was then suspended from the last two (2) piling. IDL gave the "Notice" Identification No. ERL-96-S-219. This "Notice" is located in IDL's files on this matter, and was also submitted as part of "Exhibit 1" submitted by the Applicant at the reconsideration hearing.²

2. On or about August 20, 2008, IDL received from the Applicant a "Request for Assignment of Encroachment Permit" from the Kaseburg Family Trust. This assignment of ERL-96-S-219 was requested as the former permittee, Douglas McLean was deceased and the property had been purchased by the Kaseburg Family Trust. This assignment was approved by IDL in a September 11, 2008, letter from IDL to the Kaseburgs and a "Transfer of Encroachment Permit" document, identifying Kaseburgs as the encroachment permit holder. The latter two documents were included as part of Exhibit 1 at the reconsideration hearing. This approval included the same structures identified in the "Notice" in 1974.
3. On or about November 24, 2008, Peter Kaseburg submitted an application to the U.S. Army Corps of Engineers to replace the 21 wood piling with 10 steel piling. This application and supporting drawings and narrative were submitted by the Applicant as "Exhibit 2" at the reconsideration hearing.
4. On or about January 29, 2009, the U.S. Army Corps of Engineers approved the application referenced in ¶3, *supra*. This approval was submitted by the Applicant as "Exhibit 3" at the reconsideration hearing.
5. On or about March 12, 2009, IDL received an encroachment application from Peter Kaseburg (Applicant) requesting an encroachment permit to replace 21 deteriorating wooden piling with ten (10) new steel piling. The Application included the two-page application form, a photograph of Glengary Bay at low water showing the wood piling, Attachment A, and a scaled drawing showing the piling to be removed and new ones installed, Attachment B. The Applicant proposed cutting off the existing wood piling using a hydraulic powered underwater chain saw. The proposed new piling would extend approximately 225 feet waterward of the artificial high water mark (AHWM) of Lake Pend

² Documents referenced in these Findings and Conclusions are all incorporated into this decision document by reference and are considered part of the administrative record in this matter.

Oreille at Glengary Bay. The existing wood piling extend to approximately this same distance into the lake. The Applicant also included a March 10, 2009, letter with explanation of the Attachments and stating that the original wood piling were driven in about 1933.

6. "Exhibit 4" from the reconsideration hearing included the application materials, as well as a copy of a December 2, 2008, e-mail from Jim Brady of IDL to the Applicant, explaining why the replacement of the piling would be considered a non-navigational encroachment and a new encroachment permit would be required.
7. IDL processed the encroachment application as a non-navigational encroachment pursuant to the Lake Protection Act, Idaho Code §58-1306, and the associated Rules IDAPA 20.03.04.030, The Regulation of Beds, Waters, and Airspace over Navigable Lakes in the State of Idaho.
8. On March 16, 2009, the application was published as a legal notice in the Bonner County Daily Bee once a week for two (2) consecutive weeks on March 19 and again on March 26, 2009. In addition, a notice of application was sent to several federal, state, and local agencies along with adjacent property owners and other groups.
9. IDL received written comments from ten (10) individuals or governmental entities in response to the legal notice and agency notification. All commentors were opposed to the Application. The primary concern and objection stated by commentors that the existing piling are a hazard to navigation and have long been unused for any navigational purpose and replacement of them would continue the hazard.
 - a. The Bonner County Sheriff's Office was in favor of removing the old pilings but opposed to the installation of any new pilings as the piling pose a hazard to navigation and no longer serve their original purpose. The Idaho Department of Fish and Game, Panhandle Region, objected and noted the navigation hazard presented by the piling, that they have never been used as part of a dock, that the pilings are in an advanced stage of decay, and that the permit should be denied if no purpose for the piling. Fish and Game also noted that the light on the piling is not an approved navigational light.
 - b. Several neighbors commented on the proposal, and provided a detailed history of the bay and piling going back to the 1920's. For example, Mark Nelson owns property on Glengary Bay and has family history in the area going back to his great-grandparents who owned property on the bay going back to 1925, when they ran a then-existing store and post

office. The wood piling were originally placed in about 1933, and a float home was moored to them at one time, but that the use of the piling had been abandoned by the time the Albeni Falls dam was built in the 1950's. There is no evidence of any navigational use of the pilings in recent memory and going back to at least the early 1950's. Other commentators had similar historical background and knowledge of the use of the property in the area, corroborated Mr. Nelson's historical observations and added additional observations of their own. The property owner adjoining the Applicant, George Congleton, also provided a detailed analysis of the proposal and his observations of wave and flow patterns in the bay.

10. On or about May 17, 2009, the Applicant sent an email to Jim Brady of IDL notifying him that he was modifying the pending application to a revised piling configuration, adding piling near high water, plus the addition of a floating dock 8 feet wide with an area of approximately 1,640 square feet. This May 17, 2009, email and attached drawing were submitted as "Exhibit 5" at the reconsideration hearing. Mr. Brady responded to the Applicant in a May 19, 2009, email, which reiterated past conversations with Applicant, and stated, *inter alia*, that he would need to make application for a dock if that is what he now wants.
11. On June 9, 2009, the Pend Oreille Supervisory Area of IDL denied Encroachment Application ERL-96-S-219B to replace 21 deteriorating wooden piling with ten (10) new steel piling. The denial by IDL was based on a failure to show or demonstrate any environmental, economic, or social benefits to the general public of Idaho for the proposed nonnavigational encroachment. The modified application submitted in May as described in ¶ 10, *supra*, was not considered for this decision. This letter was also submitted as "Exhibit 6" at the reconsideration hearing.
12. A request for reconsideration pursuant to subsection 030.08b of IDAPA 20.03.04 of the Pend Oreille Supervisory Area denial order for Encroachment Application ERL-96-S-219B was received from Applicant on June 29, 2009, via e-mail.
13. Per the letter dated July 23, 2009, IDL notified Applicant that a reconsideration hearing for Encroachment Application ERL-96-S-219B would be held on August 17, 2009. In addition, the following parties were notified of the reconsideration hearing:
Eric Wilson-PMNWM
Carl Washburn-Mica Supervisory Area

John Finney, Attorney at Law
Charles Corsi, IDF&G
Daryl Wheeler, Bonner County Sheriff
George Congleton
Mark Nelson
Judith Chittick
Hal and Ruth Hargreaves
Tom and Marjorie Trulock
Gerald Bringham and
Reginald C. Galusha

14. The reconsideration hearing for Encroachment Application for ERL-96-S-219B was held on August 17, 2009 at 10:00am at IDL's Pend Oreille Supervisory Area office in Sandpoint. Carl Washburn, IDL Specialist Navigable Water/Submerged Lands Leasing, was the hearing coordinator. In attendance were Jim Brady, IDL Resource Specialist, Sr., Ed Robinson, IDL Area Manager, and the Applicant along with his attorney, Mr. John Finney. In addition, Mr. Mark Nelson (Nelson), an objecting party, was in attendance. Testimony was given by the Applicant, in response to questioning by his attorney, John Finney, and Mr. Nelson. The transcript of the hearing is incorporated herein by reference.

15. The Applicant explained in his testimony that he has owned the property for less than two years at the time of the hearing, and that he had no personal knowledge and was unaware of any use of the piling for navigational purposes other than to moor a houseboat at one time, and the past use he learned from his neighbors. (Tr.,p. 14.) The Applicant described a 30'x7' cedar log dock paralleling the shoreline near a dead tree and the existing piling extending out from the water and turning southwest. The Applicant stated that his review of the permit complied with what he saw on the ground as far as the existing encroachment's location on the property. There are three separate items listed in the permit, which he did not review with the area at the time:
 - The piling out of water
 - Dock currently paralleling shoreline
 - A water intake system running underground approximately to the waterward end of the piling, in which the line is hanging from the last two piling from the end of piling line.

The Applicant gave a description of the piling and some approximate measurements of the two dolphins waterward of the artificial high water mark (AHWM). The description states that the water line does not hang on 15 piling. The Applicant thinks it hangs off one piling about two (2) piling landward of the last pile from the waterward-most pile. The line is buried out to that point. The Applicant states that the dolphins do not look like dolphins because they are not tied together, but rather are in groups of two (2).

16. The Applicant also described the application process with the U.S. Army Corps of Engineers and application process with IDL as set forth in ¶¶ 3, 4, 5, 10 and 11, *supra*. The Applicant did not understand the distinction between navigational and non-navigational encroachments at the time that the application was submitted, but does now believe that the piling are navigational in nature. (Tr., p.14.) Applicant described a photo at the reconsideration hearing, "Exhibit 7," that is different from the one submitted with the application, which is a color photograph depicting the existing piling at a period of time the lake level was very near low water at 2051'msl. (Tr., p.18.) The subject piling are in the foreground and in the background is part of the neighboring marina on the other side of the bay. This photograph is taken from the Applicant's property.
17. Applicant described another photograph, "Exhibit 8, taken in the bay with the marina in the foreground, in which the applicant estimated the length of the marina to be hundreds of feet by adding up the boat slips. In addition, the right hand side of the marina, in the photograph, would be the outer most portion of the marina. Applicant property is to the left hand side of the photograph and taken from his property. This photograph was taken at the fall lake level. (Tr., pp.19-20.) The Applicant's opinion is that the encroachment (piling) is a navigational encroachment rather than a non-navigational encroachment as considered by the IDL. His intended use is navigational. Applicant's understanding is that the use of the piling was navigational since their installation. (Tr., pp. 20-21.)
18. Mr. Mark Nelson (Nelson), a neighbor with a long history living in the area, and who provided detailed written comments provided testimony, requested clarification as to the difference between navigational and non-navigational encroachments. He also stated his understanding of the reference to Doug McLean and to an existing encroachment (piling) to support a waterline. (Tr., pp. 23-27.) He believes that the comment letter he submitted is correct. The plan drawing in the file indicates the piling in the 1975 application shows that

the piling support a waterline, and the drawings show what the piling were used for. Nelson stated that the house that Applicant now owns was built on the point in 1930 and believes that was when the piling was driven into the lakebed. Mr. Nelson also confirmed that to his knowledge, the only navigational use for the pilings was at one time mooring a float house. (Tr., p. 26.) Nelson also asked if the mooring of the float home is of navigational use and was advised that it would be considered non-navigational. Nelson also stated that there is significant interest in the bay by neighboring property owners and the public, as use of the bay has grown. (Tr., p. 28.)

19. There was some confusion on the part of the Applicant concerning the attempted modification of the permit application referenced in ¶ 10, *supra*. (Tr., pp. 29-32.) The requested modification came to IDL via email without any supporting materials, and Mr. Brady had advised the Applicant in a May 19, 2009, email that another application would be needed. The Applicant was under the impression he could modify the application without starting over because he was not advised otherwise.
20. Mr. Finney and Jim Brady had some e-mail exchanges discussing modification of the application and granting a variance to the dock square footage. (Tr., pp. 29-32.) This relates to the May 17, 2009, email sent to Mr. Brady by the Applicant referenced in ¶10, *supra*. Mr. Brady pointed out the request for modification was not accompanied by an application or the required processing fee. Mr. Finney provided, for the record, that there was no written joint application for the diagram submitted, but rather a responsive e-mail in the process.
21. Mr. Finney asked Applicant if there is now a navigational light on the existing piling, to which the Applicant responded that two lights exist and were installed by the marina owner. The lights were in existence at the time of purchasing the property, but the Applicant did not have any knowledge of how long they have been there. (Tr., pp. 32-33.)
22. Mr. Finney asked the Applicant if his intent is to use the piling for navigational use so he can attach his boats, to which the Applicant stated yes. For the record, he indicated which boats may be moored. Currently Applicant owns a 15-foot wooden boat, his father owns a 42-foot boat and all other family members own wooden boats. The waterline attached to the piling

still exists but is not used. Applicant uses another waterline which runs parallel to the existing water line. (Tr., pp. 33-34.)

23. Mr. Nelson stated that the lights placed on the piling were there solely because the piling is a hazard; they are not navigational of any kind. Mr. Trulock's investigation concluded that the lights on the piling are not defined as an aid to navigation. The lights are to solely warn people that the piling are broken off at the high pool level and cannot be seen. (Tr., p. 34.)
24. One of the photographs submitted by the Applicant at the reconsideration hearing, "Exhibit 7," shows the location of the wood piling at or near the normal low water elevation. Lake Pend Oreille has an artificial high water elevation of 2062.5' and a normal low winter pool of elevation 2051'. Since all of the piling are still below the water level at this low water stage, IDL concludes that all of the subject wooden piling are located below the natural or ordinary high water mark on property owned by the State of Idaho.

III. CONCLUSIONS OF LAW

1. Pursuant to Idaho Code §58-1301 and IDAPA 20.03.04.012.02, all encroachments upon, in or above the beds or waters of navigable lakes of the state be regulated for the protection of property, navigation, fish and wildlife habitat, aquatic life, recreation, aesthetic beauty and water quality. These values shall be given due consideration and weighed against the navigational or economic necessity or justification for, or benefit to be derived from the proposed encroachment.
2. The Idaho Board of Land Commissioners (Board) is designated in Idaho Code §58-104(9) and §58-1303 to regulate, control, and permit encroachments on, in, or above the beds of navigable lakes in the state of Idaho. IDL is the administrative instrumentality of the Board. Idaho Code §58-119.
3. Lake Pend Oreille is a navigable lake as defined by Idaho Code §58-1302(a).
4. IDL must make decisions on proposed encroachments in accordance with the public trust doctrine as set forth by the Idaho Supreme Court in Kootenai Environmental Alliance, Inc. v. Panhandle Yacht Club, Inc., 105 Idaho 622, 671 P.2d 1085 (1983) and subsequent cases

and Idaho Code §58-1201 through 1203. The bed of Lake Pend Oreille is a public trust resource. To analyze the effects of a proposal on the public trust resource, IDL must examine the degree of the effect of the project on public trust uses, navigation, fishing, recreation and commerce; the impact of the individual project on the public trust resource; the impact of the individual project when examined cumulatively with existing encroachments to full use of the public trust resource; the impact to the public trust resource when that resource is examined in light of the primary purpose for which the resource is suited, such as, navigation, fishing, recreation or commerce; and the degree to which broad public uses are set aside in favor of more limited or private ones. Kootenai Environmental Alliance, 105 Idaho at 629-30.

5. The Applicant is the owner of real property contiguous to Pend Oreille Lake, and is thus eligible to make application for an encroachment permit. Idaho Code §58-1302(f). The application was complete and accepted for processing by IDL in accordance with it's the pertinent administrative Rules, IDAPA 20.03.04.
6. The application was processed as a non-navigational encroachment pursuant to Idaho Code §58-1306. The Applicant and IDL satisfied all procedural requirements in the processing of the application, including publication of a Notice of said application.
7. The encroachment sought was for nonnavigational purposes. IDAPA 20.03.04.010.10 and Idaho Code §58-1302 defines a non navigational encroachment as encroachments on, in, or above the beds or waters of a lake, including landfills, bridges, utility and power lines, or other structures not constructed primarily for use in aid of navigation. Although piling such as the piling involved in the instant application often have navigational uses, no navigational use for the piling was specified in the application. The Applicant simply wanted to replace old, deteriorating wood piling with steel piling, and remove some of the old piling, and there was no specification of how this would be in aid of navigation. The public comments establish that there has been no navigational use of the subject piling for over fifty (50) years, and none was proposed in the instant application. The Applicant stated at the hearing that he intended to moor 2 boats to the piling, but such piling are not normally used to moor water vessels, and there would be no easy way to get to the shore. Piling are usually used to support a navigational structure like a dock.

8. IDAPA 20.03.04.030.02 states “[e]ncroachments not in aid of navigation in navigable lakes will normally not be approved by the Department and will be considered only in cases involving major environmental, economic, or social benefits to the general public. Approval under these circumstances is authorized only when consistent with the public trust doctrine and when there is no other feasible alternative with less impact on public trust values.” In the matter at hand, there is no environmental, economic or social benefit to the general public from authorizing the piling replacement. To the contrary, as established by numerous commentors, including the Bonner County Sheriff, the piling are a hazard to navigation, and maintenance of the piling in this manner in this bay offer no public benefit of any kind.
9. As set forth in ¶10 of the Findings, *supra*, the Applicant attempted to “modify” its application to include a navigational structure, a dock. The application could not be amended in this manner, and the Applicant should have withdrawn the pending application and reapplied for a new one that included the dock. A permit application such as this cannot be amended at that stage of the proceedings. Public notice for the original application had already been published and circulated, and the agencies and public had commented on the application that was before it at the time, i.e. it did not include a dock or the other changes. Consideration of the new proposal by the Applicant could not have been processed by IDL as a nonnavigational encroachment, and it would have had to start the whole process again, including publication of a new notice and circulation of the application to interested agencies and parties.
10. It may have been the Applicant’s motive to first obtain approval of the new piling and then submit another application for dock facilities. Such a motive was implied at the reconsideration hearing. Encroachment permit applications, however, cannot be piecemealed in this manner – each application has to stand and fall on its own merit. IDL attempted to explain this to the Applicant thorough the emails contained in the record, but the Applicant decided to proceed with the application as it was.
11. The Applicant made a timely request for reconsideration of the IDL decision pursuant to Idaho Code §58-1306(d) and IDAPA 20.03.04.030.08.b on June 29, 2009, twenty (20) days after the initial decision was rendered by IDL.

12. The purpose and the procedure to be used for reconsideration hearings such as the one held in this matter are not specified in the Lake Protection Act of the Lake Encroachment Rules. Reconsideration by a Court is addressed by I.R.C.P. 11(a)(2)(B), and allows the Court to take into account any new facts presented by the moving party, which party also bears the burden of bringing such new facts to the attention of the Court. *Johnson v. Lambros*, 143 Idaho 468, 471-72, 147 P.3d 100 (Ct. App. 2006). IDL follows this guideline with respect to its reconsideration. In the matter at hand, the Applicant presented little if any new evidence for IDL. The main thing clarified at the hearing was that the Applicant has no personal knowledge of the history of the pilings and encroachments in the area, having owned the property for less than two (2) years at the time of the hearing.
13. The Applicant also testified at the hearing that the subject piling are navigational, his intended use is navigational and that the use of the piling had been navigational since their installation in about 1933. ¶17, Findings of Fact, *supra*. The Applicant, however, has no personal knowledge of the use of the area prior to his purchase of the property less than two (2) years prior at the time of the hearing. ¶17, Findings of Fact, *supra*. This statement is also refuted by the undisputed record, including the comment letter submitted by the various neighbors in the area who have extensive personal knowledge of what has happened in Glengary Bay for decades. Based upon the information submitted to it, IDL concludes than any navigational use of the subject piling has ceased to exist for fifty (50) years or more.

IV. HEARING COORDINATOR CONCLUSIONS AND RECOMMENDATIONS

The existing piling have been in place for over seventy-five (75) years. The pilings have been utilized as anchors to suspend a water intake line as permitted on January 3, 1975, under Notice of an Encroachment on a Navigable Lake or Navigable Stream for an existing 30'x7' dock, including an existing water intake line suspended on 15 piling and 2 dolphins (three piling each) extending approximately 280 feet water ward of the AHWM of Pend Oreille Lake. There has been no navigation use of the piling for over fifty (50) years.

Encroachments not in aid of navigation are normally not approved by IDL and are only considered in cases involving environmental, economic or social benefits to the general public. In addition, approval under these circumstances will only be approved when consistent with the

public trust and no other feasible alternative with fewer impacts on the public trust value exist. The application did not provide information or indicate any environmental, economic or social benefit to the citizens of Idaho.

In addition, all the comments received from the public and adjacent property owners cited that the piling are a hazard to navigation and should be removed from the lake. The Bonner County Sheriff recommended denying the proposed application based on the piling being a hazard to navigation and suggested they be removed. The Idaho Department of Fish and Game also cited a hazard to navigation and suggested the piling be removed.

Based on the information provided to me as the Hearing Coordinator, and the encroachment application and comments generated from the notice of encroachment and agency notification, I recommend that the Director of IDL Lands issue a final order stating that the Pend Oreille Supervisory Area of IDL deny the applicant's request for a non-navigational permit due to the lack of demonstration of an environmental, economic, or social benefit to the citizens of Idaho.

Other conditions may also be added as appropriate.

DATED this 5th day of January 2010.


CARL WASHBURN
Hearing Coordinator

CERTIFICATE OF SERVICE

I hereby certify that on this _____ day of January, 2010, I caused to be served a true and correct copy of the foregoing document, by the method indicated:

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Otis Orchards, WA 99027

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