

GEORGE B. BACON  
Director  
Idaho Department of Lands  
300 N. 6<sup>th</sup> St., STE 103  
P.O. Box 83720  
Boise, Idaho 83720-0050

BEFORE THE STATE BOARD OF LAND COMMISSIONERS  
STATE OF IDAHO

In the Matter of; )  
)  
Encroachment Permit No. L-95-S-3185B )  
The Falls at Hayden Lake Homeowner's Association )  
)  
Applicant. )  
\_\_\_\_\_ )

**FINAL ORDER**

**I. NATURE OF PROCEEDINGS/ISSUES**

A public hearing was held on January 7, 2010 at 6:00 pm PST at the IDL Staff Office in Coeur d'Alene, Idaho. Kenneth E. Ockfen served as Hearing Coordinator. The Hearing Coordinator issued his Recommendations on February 1, 2010.

My responsibility is to render a decision on the 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 public hearing conducted in Coeur d'Alene, Idaho on January 7, 2010.
- I have reviewed the record including all documents and exhibits.
- I have examined the Hearing Coordinator's Recommendations in light of the entire record.

Encroachments, including docks, placed on the navigable waters, require a permit issued by the Idaho Department of Lands 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 FACT

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

On the basis of the record, it is my order that Encroachment Permit L-95-S-3185B be approved and the permit be issued by the Mica Supervisory Area to the Applicant.

This is a final order of the agency. If the Applicant, or a party who appeared at the hearing, is aggrieved by the director's final decision, they shall have the right to have the proceedings and final decision of the director reviewed by the district court in the county in which the encroachment is proposed. A notice of appeal must be filed within thirty (30) days from the date of the final decision in accordance with IDAPA 20.03.04.030.09.

DATED, this 5<sup>th</sup> day of February, 2010.



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GEORGE B. BACON  
Director

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on this 5<sup>th</sup> day of February, 2010, I caused to be served a true and correct copy of the foregoing document, by the method indicated:

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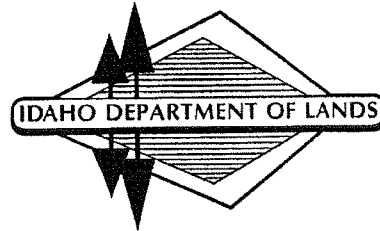
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GEORGE B. BACON, DIRECTOR  
EQUAL OPPORTUNITY EMPLOYER

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

February 1, 2010

## MEMORANDUM

TO: George B. Bacon, Director

FROM: Kenneth E. Ockfen, St. Joe Area Manager

SUBJECT: Public Hearing – Navigational Encroachment L-95-S-3185B for The Falls at Hayden Lake Homeowner's Association

### I. INTRODUCTION

The following document, which includes a recommendation for your consideration, was prepared following a public hearing conducted by the Idaho Department of Lands (IDL). The public hearing was conducted in conjunction with the processing of an encroachment permit (L-95-S-3185B) on Hayden Lake, a navigable lake in Idaho. The application proposes to construct and install a community dock comprised of 23 double slips to hold a maximum of 46 single family watercraft. Jurisdiction in this matter rests with IDL pursuant to Idaho Code § 58-1303, which empowers the State Board of Land Commissioners to regulate, control, and permit encroachments on, in, or above the beds or waters of the navigable lakes of Idaho.

### II. FINDINGS OF FACT

1. On December 6, 2007 McDougal Brothers Investments was given preliminary subdivision approval to create 46 lots on approximately 56 acres of land on the northwest shore of Hayden Lake.
2. Timber Ridge Investments, LLC purchased the acreage (approximately 56 acres) from McDougal Brothers Investments in August of 2008.
3. Timber Ridge Investments, LLC was granted final approval for The Falls at Hayden Lake by the Board of County Commissioners on October 1, 2009 and the plat was recorded on October 22, 2009.
4. On October 26, 2009, Timber Ridge Investments, LLC deeded four parcels (Tracts A, B, C, and D) within The Falls at Hayden Lake subdivision to The Falls at Hayden Lake Homeowners Association, a legal entity registered with the Idaho Secretary of State. Tract D consists of 8.525 acres with 1489.65 feet of lake shore.

5. Article II of "Declaration of Covenants, Conditions, Restrictions and Easements for The Falls at Hayden Lake", states that the owner of a lot shall automatically, upon becoming an owner of a lot, be a member of the Association, and shall remain a member thereof until such time as his ownership ceases for any reason, in accordance with the bylaws of the Association.

6. On October 27, 2009, The Falls at Hayden Lake Homeowner's Association (Applicant) submitted to IDL an encroachment permit application (L-95-S-1385B) requesting approval to construct an encroachment on Hayden Lake. The application is incorporated into this document by reference. Please refer to Attachment 1 for a list of the application materials.

7. L-95-S-3185B proposes installation and maintenance of a 23-slip community dock consisting of;

- a. 10' x 20' upper and lower piers,
- b. 4' x 31' ramp,
- c. 10' x 10' approach,
- d. and a 304' x 107.5' floating dock with 46 moorages.

8. IDL initiated the processing of L-95-S-1385B as a navigational encroachment pursuant to the Lake Protection Act (Idaho Code § 58-1306) and the associated Rules (IDAPA 20.03.04.030). The Applicant requested that a hearing be scheduled. On November 23<sup>rd</sup>, 2009 and November 30<sup>th</sup>, 2009, IDL published a joint Notice of Application and Notice of Public Hearing in the Coeur d'Alene Press newspaper for the encroachment permit application submitted by Applicant. The Notice of Application and Public Hearing is incorporated into this document by reference.

9. IDL notified several agencies, organizations, and persons of the encroachment permit application and the scheduled hearing, and requested that the parties provide comments to IDL. Those notified included:

- Idaho Department of Fish and Game
- Idaho Department of Environmental Quality
- Idaho Department of Water Resources
- Idaho Department of Transportation
- US Army Corps of Engineers
- Kootenai County Parks, Recreation, and Waterways
- Kootenai County Marine Division
- Kootenai County Building and Planning and Zoning
- Kootenai Environmental Alliance
- Panhandle Health District 1
- Lakes Commission
- Paul Leonard
- Art Brown



The letter is incorporated into this document by reference.

10. Agencies providing written comments were Department of the Army, Corps of Engineers; Idaho Department of Fish and Game; and Kootenai County Building and Planning Department.

- a. A letter dated December 22, 2009 from Department of the Army, Walla Walla District, Corps of Engineers to Mr. Todd Stam stated that the proposed activity did not include the discharge of dredged or fill material into Waters of the United States and therefore would not require a Department of the Army permit.
- b. A letter dated December 2, 2009 from Idaho Department of Fish and Game to IDL stated that in their review of the application they noted that there were only 1,396 lineal feet of shoreline which would only allow 9,772 square feet of dock surface instead of the 10,380 square feet shown in the application. They also noted that two construction periods were mentioned and that their recommendation would be to limit construction to the period from August through mid-October to avoid erosion problems associated with working along the shoreline during periods of wet weather. They expressed their appreciation of the applicant's efforts to incorporate fish-friendly construction practices and materials, however they also pointed out that docks of any size are an encroachment to fish habitat, can disrupt currents, erode submerged lands and shorelines; increase shading of submerged lands and as such can destroy aquatic flora, fish habitat and spawning areas. In the letter they also elaborated on the value of riparian vegetation and recommended re-vegetation of disturbed areas within fifty (50) feet and preferably within seventy-five (75) feet of the shoreline.
- c. A letter dated December 21, 2009 from Kootenai County Building and Planning Department (County) to IDL stated that for community docks they would normally require one (1) parking space for every two (2) boat slips. However, they recognize that this proposed dock is being developed within a subdivision where 17 lots are within reasonable walking distance. Therefore, they have determined that twenty-four (24) spaces will adequately serve the project [sixteen (16) dedicated parking spaces and eight (8) walk-able residential parking spaces].

11. The following substantive written comments from the public were received and focus on littoral rights, water quality, size and location of the structure, safety, wildlife and aesthetics, timing of the public comment period & hearing, and maintenance & oversight.

- a. **Littoral Rights.** Several letters and e-mails were received related to the owners of lots without lake frontage being given littoral rights based on their membership in a Homeowner's Association which owns a tract of land with lake

frontage. Gwil Evans, Stephen Shepard and Sandra Mitchell felt that it would not be fair to those with actual lake frontage and are paying the additional taxes for the privilege. Paul Leonard questioned if the proposed dock would be taxed and if so who would pay it. Stan Kolhs suggested that the price of the property in question did not reflect the ability to have so many moorages when it was purchased. Merlyn Duerksen commented that granting lake front privileges without frontage would be inconsistent with past development, while Terry J. Harris representing the Kootenai Environmental Alliance, James Rand, and Ward and Mary Paine commented that it would set a bad precedent.

- b. **Water Quality.** Several written comments were received reflecting a concern that additional watercraft usage on the lake would be detrimental to the water quality of the lake. Cecil Hathaway representing Hayden Lake Watershed Association, Inc. (HLWA), Merlyn Duerksen, Connie Stark, Ward and Mary Paine, and Michael and Ann Mahoney commented that they have observed a steady reduction in water clarity, while Gwil Evans mentioned an increased quantity of trash washing up on the beaches, and Thomas and Diane Kosewic commented that the north end of the lake already looks like raw sewage. Nels Paine submitted comments reflecting on negative impact that too many boats and too many people had on Lake Oswego in Oregon. Berni Clark's comments expressed a concern for the phosphorous level in the lake. Terry J. Harris representing the Kootenai Environmental Alliance (KEA) stated that Hayden Lake has been officially listed as an "impaired water body" because it does not meet the state's water quality standards for total phosphorous. He went on to state that neither a TMDL nor an implementation plan has been established for the lake. Mr. Harris further stated that IDL is included in the designated agencies responsible for implementing Idaho's regulations relating to the Clean Water Act. He stated that the phosphorous problems in Hayden Lake are related to bank erosion and lake sediment disturbance from boat traffic. Steve and Candice Wheeler shared their concern that unlike Coeur d'Alene Lake with a large outflow, Hayden Lake will become increasingly stagnant and polluted. Comments in favor of the project were received from William A. Ogram IV, who commented that this proposal would reduce the number of individual accesses to the lake shore thus minimizing erosion.
- c. **Size and Location.** A few comments were received relative to the size and location of the proposed community dock. Michael and Ann Mahoney's comments expressed a concern that a natural harbor was not available to protect the dock. Comments concerning the distance of the encroachment into the lake were made by Terry J. Harris (KEA) and Sandra Mitchell. Mr. Harris suggested that if the dock were to be approved that it should be smaller in size. William A. Ogram IV's comments favored the project stating that navigation would be improved by further defining the line of navigation in a stretch where it is currently poorly defined. Comments submitted by Life Erickson favored the project because it provided a slip for the Hayden Lake Fire Boat and he felt the community dock would be less intrusive and require less shoreline development

than 19 individual docks.

- d. **Safety.** Written comments were also received pertaining to safety from Cecil Hathaway (HLWA), Gwil Evans, Michael and Ann Mahoney, Thomas and Diane Kosewic and Todd Langerveld. All parties were concerned about increased traffic of watercraft and increased potential for accidents. Paul Leonard's written comments expressed concern for safety with respect to upkeep of the proposed community dock. He is concerned as to who specifically will be responsible for the dock. Cecil Hathaway (HLWA) and Thomas and Diane Kosewic specifically shared their concern about boat wakes and Diane Thompson was concerned about the increased noise level from power boats. William A. Ogram IV's expressed his support to have moorage for the public safety boat.
- e. **Wildlife and Aesthetics.** Comments were received from Diane Thompson, Allen Worst, Gary Schneidmiller and William A. Ogram IV concerning impacts on wildlife and aesthetics. Ms. Thompson commented that she has observed less wildlife and fish over the years as development has occurred. Mr. Ogram commented in favor of the project because it preserves and protects the beauty of the existing cliff and shoreline by use of a common area. Mr. Schneidmiller also commented in favor of the common area as it minimizes shoreline disturbance and Mr. Worst commented that the community dock would be more aesthetically pleasing than 19 individual docks.
- f. **Time Frame for Comments.** Cecil Hathaway (HLWA) and Paul Leonard expressed concerns relative to the time frame of the public comment period and public hearing. Mr. Hathaway commented that it was difficult during the holiday period for individuals to be informed of these events and be available to participate. He added that since many of homeowners around the lake are only seasonal residents, it is particularly difficult for them to participate. Mr. Leonard commented that there hasn't been debate or analysis on this project, and the issues surrounding this project have not been adequately presented or scrutinized by the public.
- g. **Oversight and Maintenance.** In the December 16, 2009 meeting minutes of the Hayden Lake Watershed Association, Inc, submitted by Cecil Hathaway, comments were made concerning oversight and maintenance of the community dock. It was stated in the minutes that enforcement of the CC&R's is the responsibility of the Homeowner's Association and that in Idaho these associations have very little enforcement authority.

12. On January 7<sup>th</sup>, 2010 IDL held a public hearing at 6:00 pm in the IDL Staff Office in Coeur d'Alene, Idaho. Mr. Kenneth E. Ockfen, St. Joe Area Manager served as the hearing coordinator. Those attending were Mr. Carl Washburn, IDL Navigable Waters Specialist Sr.; Ms. Brittany Baeumel, IDL Administrative Assistant for Mica Supervisory Area; Mr. Mike Denney, IDL Area Manager for Mica Supervisory Area; Mr. John F. Magnuson, representing Applicant; and seventy (70) members of the public. The public

hearing was recorded on audio tape and was subsequently transcribed. The transcript of the public hearing is incorporated into this document by reference.

a. The Applicant, through the testimony of Mr. Magnuson, provided a brief description of the project. Mr. Magnuson stated that the application relates to a community dock on a project known as The Falls at Hayden Lake, a residential subdivision that has already received final approval from Kootenai County. The project includes 1,489 feet of littoral frontage, which will be placed into a common area to be owned and overseen by the Applicant Homeowner Association. He pointed out that the length of the littoral frontage has been established by a survey and is greater than what has been shown on the tax records in years past. Mr. Magnuson stated that the proposed encroachment would consist of 10,380 square feet and be positioned along the littoral frontage 142 feet from the common littoral boundary with Mr. Brown and 937.5 feet from the common littoral boundary with Mr. Ledder. He further stated that the project does not extend beyond the line of navigability, which he said was administratively determined as part of this application based upon an examination of the closest previously approved similar community dock.

b. Public testimony focused on parking, littoral rights, water quality, size of the structure, timing of the public comment period and hearing, maintenance and oversight, aesthetics, safety and recreational fishing.

- i. **Parking.** Bev Twillman expressed concerns over available parking, though most of her comments were referencing Gotham Bay Estates which is not related to the project subject to this hearing.
- ii. **Littoral Rights.** Lynn Anderson, Merlyn Duerksen and Cecil Hathaway (HLWA) expressed concerns that it wasn't fair and set a bad precedent to extend littoral rights to owners of residential lots without lake frontage.
- iii. **Water Quality.** Paul Leonard, Cecil Hathaway (HLWA), Brent Baldwin, Kathleen Kolts, Lynn Anderson, Joi Nelson, Merlyn Duerksen, and Ron Stanley expressed concerns that the water of Hayden Lake is impaired and adding additional boats to the lake will add to the problem. Most of these individuals stated that they have seen the water quality deteriorate over a number of years. Roger Schaefer stated that development has been occurring all the way around the lake which has increased the population as well as contaminates – from lawns, fertilizers to pesticides that end up in the lake. He also stated that blaming contamination on the additional 47 boats is not well thought out.
- iv. **Size of the Structure.** Lynn Anderson, Joi Nelson, Todd Walker, and Paul Leonard were opposed to the sheer size of the proposed community dock and were concerned about the distance it would encroach into the lake. Mr. Walker, representing the Hayden Lake Storm Water

Association, was concerned that it would conflict with boat traffic, and Mr. Leonard stated that it wasn't consistent with surrounding structures in the area.

- v. **Timing of the Public Comment Period and Hearing.** Concerns were expressed by Judith Hanna and Cecil Hathaway (HLWA) that timing public comment periods and public hearings from Thanksgiving through the Christmas holidays season makes it difficult for the public to participate.
- vi. **Maintenance and Oversight.** Bev Twillman questioned the homeowner's association's ability to provide maintenance and oversight, stating that homeowner's associations, according to the state of Idaho, have no legal jurisdiction on anything. In support of the project, Roger Schaefer commented that he has seen many individual docks in disrepair, implying that the presence or absence of maintenance is not unique to an ownership type.
- vii. **Aesthetics.** Todd Walker (HLSWA) and Terry Harris (KEA) expressed concerns that the project will negatively impact the aesthetics.
- viii. **Safety.** Paul Leonard, Lynn Anderson, and Judith Hanna expressed concerns that the presence of a community dock in this location would add to boat traffic congestion and increase risk of accidents due to the increased number of boats on the water. Ms. Hanna was particularly concerned about the danger of wakes created by having additional boats on the Lake.
- ix. **Recreational Fishing.** Paul Leonard expressed concerns that the proposed dock would impact one of the most fished parts of the lake, stating that it is fished regularly and heavily.

13. Several exhibits from the Applicant were given to IDL on the night of the hearing. All of the written materials and exhibits are incorporated into this document by reference.

14. On January 6, 2010, Roger Jansson, Operations Chief North for IDL received an e-mail from Diane Thompson asking for a continuance of the public hearing scheduled for January 7, 2010 and be provided more information for further evaluation of the issue. Mr. Jansson replied to Ms. Thompson by e-mail denying her request. He informed her of the notices made and the number of entities involved and pointed out that it would be unfair to all of these entities to continue the hearing at such a late date. He also informed her that her e-mail would be included in the record and directed her to Carl Washburn, Resource Specialist with IDL, for additional information on the proposed project.

### III. CONCLUSIONS OF LAW

1. 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 agency of the Board, as per Idaho Code § 58-119.
2. Hayden Lake is a navigable lake as defined by Idaho Code § 58-1302(a). Pursuant to IDAPA 20.03.04.012.02, encroachments of any kind on, in, or above the beds of a navigable lake require a permit prior to encroaching on the lake.
3. Pursuant to Idaho Code § 58-1301, lake encroachments must be regulated to protect property and the lake value factors of navigation, fish and wildlife habitat, aquatic life, recreation, aesthetic beauty, and water quality. These values must be given due consideration and weighed against the navigational or economic necessity or justification for, or benefit to be derived from, the proposed encroachment.
4. IDL shall make decisions on proposed encroachments in accordance with the Public Trust Doctrine as set forth in Idaho Code § 58-1201 through 1203. This statute protects the property rights of private landowners, including the ability to utilize their riparian rights as a means to access the waters of the navigable lakes of Idaho.
5. IDL shall also make decisions on proposed encroachments in accordance with the Public Trust Doctrine as explained by the Idaho Supreme Court in Kootenai Environmental Alliance, Inc. v. Panhandle Yacht Club, Inc., 105 Idaho 622, 671 P.2d 1085 (1983) (KEA) and subsequent cases. The Supreme Court in KEA determined that public trust uses include those of fish and wildlife habitat, recreation, aesthetic beauty, and water quality. The court in KEA also stated that mere compliance of IDL with its' legislative authority is not sufficient to determine if their actions comport with the requirements of the Public Trust Doctrine.
6. Idaho law, including Idaho Code § 58-1301 et. Seq. (the Lake Protection Act), delegates no authority to IDL for the regulation of boats and water craft. Water craft are regulated by the United States Coast Guard through the Idaho Department of Parks and Recreation, local County Sheriffs' Departments, and Title 67, Chapter 70, Idaho Code (Idaho Safe Boating Act). IDL understands that the proposed dock will increase boat traffic on the lake, but every new dock encroachment does so as well. The question of boat traffic and maritime safety on a lake cannot be addressed on an ad hoc basis through the permitting of individual docks, or by denying an encroachment permit to parties with littoral rights. IDL suggests that the interested parties pursue more comprehensive means of addressing these concerns.
7. Idaho Code 58-1301 requires IDL to weigh the impacts of a lake encroachment on water quality (and other factors) against the navigational or economic necessity or justification for or benefit to be derived from the proposed encroachment. As with boating safety in general as discussed in paragraph #6 of these conclusions, above, so

long as the proposed dock complies with standards for non-polluting construction materials, individual dock applications are not the best way to address water quality. The navigational necessity of the proposed encroachment outweighs any potential water quality impacts that could be attributed to the encroachment.

8. IDAPA 20.03.04.015.03b limits the surface decking area of a community dock to seven (7) square feet per lineal foot of shoreline owned by the applicant. The applicant in this instance owns 1,495.65 feet of littoral frontage. The proposed dock has 10,380.75 square feet, which is in compliance with the cited rule.

9. IDAPA 20.03.04.060.05 establishes a twenty-five (25) foot setback from adjacent littoral property for community docks. The applicant's proposed dock will be 142 feet from the eastern property line and 959 feet from the western property line, so this standard appears to be met. Furthermore, there does not appear to be an infringement on the neighbors' littoral rights.

10. IDAPA 20.03.04.010.06 allows homeowners' associations that are riparian owners, owning a riparian common area including riparian rights, to apply for and obtain a community dock, subject to approval of IDL. Neither Title 58, Chapter 13, Idaho Code, nor IDAPA 20.03.04 require that all members of the homeowner association own waterfront lots.

11. IDAPA 20.03.04.010.20 Defines "Line of Navigability" as a line located at such distance waterward of the low water mark established by the length of existing legally permitted encroachments, water depths waterward of the low water mark, and by other relevant criteria determined by the board when a line has not already been established for the body of water in question. In the case of this proposed encroachment, IDL does not agree with the Applicant's factual assertion that the dock as proposed is within the line of navigability. In light of the existing structures and the geography of the shoreline, the line of navigability would not extend further from the shore than the end of the closest dock to the east owned by Mr. Brown. No other docks are near the proposed dock.

12. IDAPA 20.03.04.015.13.d allows IDL to permit community docks and commercial navigational encroachments beyond the line of navigability.

13. Community docks do not have a parking requirement under IDAPA 20.03.04. County requirements may be applicable, but these requirements are not administered by IDL.

14. IDAPA 20.03.04.030.05 specifies that a notice of the time and place of public hearing on the application shall be published by the director once a week for two (2) consecutive weeks in a newspaper in the county in which the encroachment is proposed, which hearing shall be held within ninety (90) days from the date the application is accepted for filing. This requirement was met.

#### **IV. HEARING COORDINATOR CONCLUSIONS AND RECOMMENDATIONS**

The proposed dock complies with IDL standards for issuance of an encroachment permit. Allowing the proposed dock to extend beyond the line of navigability is allowed by IDAPA 20.03.04.015.13.d, and appears to be justified in this instance for the following reasons;

1. The shoreline is concave between the Brown dock east of the proposed dock and a point of land west of the proposed dock, so watercraft should not find the proposed dock to be a significant obstacle in their path of travel.
2. The compact design provides for less shoreline disturbance, less impact to fish and wildlife habitat along the shoreline, and less impact to sport fishing than a series of single family docks along the same littoral property.

Based upon the information provided to me as the hearing coordinator, I recommend that the Director of IDL issue a Final Order stating that the Mica Supervisory Area of IDL should approve encroachment permit L-95-S-3185B.

Dated this 1<sup>st</sup> day of February, 2010.

  
Kenneth E. Ockfen  
Hearing Coordinator



**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on this 5<sup>TH</sup> day of February, 2010, I caused to be served a true and correct copy of the foregoing document, by the method indicated:

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KENNETH E. OCKFEN  
IDL, St. Joe Area Manager

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