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BEFORE THE SKAGIT COUNTY HEARING EXAMINER

RE: APPEAL OF DETERMINATION OF NEED TO
COMPLETE CRITICAL AREAS REVIEW

NO. PL21-0348

MILES SAND & GRAVEL CO. and CONCRETE
NOR'WEST

Application Nos. PL16-0097 & PL16-0098

REPLY BRIEF

Appellant,

v.

SKAGIT COUNTY

Respondent.

INTRODUCTION

For the third time in a 5-year process we find ourselves before the Examiner on a preliminary procedural matter. In the first two, the Applicant was struggling to find out what information the County wanted to complete its review. Now, apparently dissatisfied with interpretations made before, new staff wants to start over on an issue decided long ago. This defies not only the Examiner's order and the code itself, but fundamental notions of fairness.

The County deemed Miles Sand & Gravel Co's (Miles') special use permit (SUP) application complete on March 22, 2016. Nearly two years later, after a lengthy comment period and numerous submittals including new reports, the County denied the application

1 on the basis that it was incomplete and Miles filed an appeal. In the course of that appeal,
2 the Hearing Examiner ordered the County to provide a written statement of the specific
3 information and items it claimed were deficient. The County did not comply with that order
4 and instead, after further delay, filed a motion for summary judgment to dismiss the appeal.

5 The Hearing Examiner's decision on summary judgment (the Order) stated unequivocally:

6
7 The overwhelming conviction derived from the record is of an Applicant
8 attempting in every way possible to work with the County to resolve what is
essentially an argument about process.

9 The Examiner is convinced that the Appellant has done what it can to resolve
10 the County's perceived informational gap. The County has not identified any
11 current shortcomings in the quantum of information presented. The Examiner
concludes that the case should move forward, with the application being
evaluated on the basis of the submissions made to date.

12 ... The Application is deemed complete. The County shall prepare a new Staff
13 Report based on the application information presently at hand. Thereafter, a
14 hearing on the merits shall be scheduled in the ordinary course by County Staff.

15 The Examiner ruled that the application was complete and ready for final processing in
16 October of 2019. This includes issues relating to the use of the existing private logging
17 road.

18 Now, more than a year and a half after the Examiner's Order, and a full five years
19 after the County deemed Miles' application complete, the County has changed its mind and
20 has requested a full critical areas review relating to the use of the existing logging road.

21 The County's request is improper for a number of reasons:

22 *First*, the County has a long pattern of requesting additional information and studies
23 from Miles at a point when review should be concluded. This has resulted in years of
24 unnecessary and damaging delay. The Examiner's Order was supposed to put that pattern
25 to an end. The parties are bound by the Examiner's Order. Nothing in the County's brief
26 changes this.

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- On April 12, 2018, Miles filed an appeal in response to the County's April 5, 2018 letter determination.
 - Soon after filing the appeal, however, Miles and the County reached an agreement on a plan for producing all of the information the County deemed necessary for its review. Miles and the County agreed to place the appeal on hold and to continue the permit review process.
 - The information Miles provided included an as-built survey of the private logging road. This was followed by a field meeting between Miles' representatives and the County. The only potential critical areas issue that was raised at that time had to do with a potential widening of a short bridge crossing. This widening was ultimately deemed unnecessary by the County and will not occur as part of the proposal.
 - Despite receiving the agreed-upon information materials and reports, the County sent a letter on February 22, 2019, to Miles stating that the application was incomplete. The determination of incompleteness was based in large part on comments and requirements that the County never previously provided to Miles.
 - On March 22, 2019, Miles' attorney wrote to the Examiner, requesting that this matter be scheduled again for hearing.
 - In the course of that appeal, the Hearing Examiner ordered the County to provide a written statement of the specific information and items it claimed were deficient. The County did not comply with that order. Instead, it filed a motion for summary judgment to dismiss the appeal.
 - On October 17, 2019, the Hearing Examiner issued a decision stating that the application is complete and requiring the County to prepare a new staff report based on the application information presently at hand and to schedule a hearing on the merits.
 - On July 28, 2020, the County requested additional information as to truck traffic on Grip Road and Prairie Road, and requested information as to the logging road and private road standards. In the spirit of cooperation, Miles provided this additional information to the County. None of this had anything to do with critical areas nor did it change anything as to how the road would be used.
 - On April 15, 2021, the County withdrew and then reissued the MDNS. It did so because some of the parties of record were not notified in the original MDNS. The original MDNS and the reissued MDNS are identical as to critical areas.
 - On May 11, 2021, the County withdrew the reissued MDNS and on May 13, 2021 it issued the Determination of Need to Complete a Standard Critical Areas Review. On June 23, 2021, Miles filed a timely appeal of that decision.

ARGUMENT

A. THE COUNTY CITES NO AUTHORITY TO SUPPORT ITS ASSERTION THAT MILES CANNOT ENFORCE THE SUMMARY JUDGMENT ORDER.

The County makes a number of arguments regarding Miles’ purported inability to enforce the Hearing Examiner’s October 17, 2019 Summary Judgment Order, none based in law or fact.

1. Miles did not waive any rights by “waiting too long.”

The County argues, without citing legal authority that Miles “waited too long” to try to enforce the summary judgement order. Specifically, the County states:

[Miles] certainly had a right to enforce the Order on Summary Judgment. But until this appeal that was not the decision [Miles] made. The decision of [Miles] to not attempt to enforce the Order until now provides a clear inference of their intent to waive their right to enforce the Order.¹

Tellingly, the County does not dispute that the summary judgment order applies or that it is determinative of the issue. It clearly does apply and is directly applicable to the County’s completely untimely request for critical areas review.

Moreover, the County concedes that Miles had a right to enforce the Order but argues that Miles somehow waived this right. The County provides no authority to support this argument² and the argument is self-defeating. Miles did not earlier make objection to the request for critical areas review because the County only recently made the request.

The County is trying to use its own delay (on top of a history of delay) to diminish Miles’ rights. This theory is not supported by the facts or the law.

¹ County Br., p. 7.

² In its brief, the County cites only the general common law doctrine of waiver, which states that a party [M]ust intend to relinquish such a right, advantage, or benefit; and his actions must be inconsistent with any other intention than to waive them.

County Br., p. 7 (citing *Bainbridge Island Police Guild v. City of Puyallup*, 172 Wn.2d 398, 409, 259 P.3d 190 (2011)). This standard is clearly not met here.

1 **2. Miles did not waive any rights by cooperating with the County.**

2 The County argues that Miles cannot enforce the Examiner’s summary judgment
3 order because it provided information to the County after the date of the Order. While Miles
4 did provide a limited amount of information to the County at the County’s request, this
5 information consisted primarily of additional traffic analysis related to Grip Road and Prairie
6 Road.³ This traffic analysis had nothing to do with critical areas.
7

8 Miles also provided information relating to paving a short section of the logging road
9 in direct response to County comments as to private road standards.⁴ The potential paving
10 of a short section of the logging road (approximately 500 feet) is also not new nor does it
11 implicate the critical areas code. It has been discussed since a County site visit in 2018
12 and in subsequent communications.
13

14 In fact, the purpose of the deviation that triggered the paving suggestion was the
15 avoidance of reconstruction that would have impacted critical areas buffers. This has been
16 under discussion with the County for literally years.⁵ Again, none of the information
17 provided had anything to do with critical areas and did not implicate any critical area code
18 provisions.
19

20 Providing information unrelated to critical areas shows no more than a good-faith
21 effort to assist the County with final review. It did not open the door for the County’s
22 illegitimate and new request for broad critical areas review. Miles should not be punished
23 for its voluntary cooperation.
24

25 _____
26 ³ County Ex. 5.

⁴ *Id.*

⁵ Declaration of Dan Cox (Cox Decl.), ¶ 11.

1 **3. Miles did not waive any rights by not appealing the withdrawal of the MDNS.**

2 The County argues that Miles cannot enforce the summary judgment order because
3 it failed to challenge or appeal the County’s withdrawal of the MDNS. The County withdrew
4 the MDNS and reissued it solely to correct a notice issue. There was absolutely no reason
5 for Miles to appeal the MDNS given the purpose for the withdrawal.
6

7 The County also argues that the reissued MDNS:

8 was not a facsimile of the original MDNS. For start[ers] it reflected the
9 substantial amount of information received since the original MDNS. This new
10 and additional information included information provided by [Miles] after the
11 Hearing Examiner’s decision.⁶

12 In fact, as to critical areas the reissued MDNS and original MDNS are *exactly* the same.⁷

13 To argue that they are different, the County cites to the traffic analyses received after the
14 Order and to several new conditions that were included in the reissued MDNS and that
15 have nothing to do with critical areas or even the existing logging road.⁸ These unrelated
16 changes do not support the County’s argument.

17 The County’s assertion that “the decision to require critical areas review is a direct
18 result of the withdrawal of the first MDNS—which [Miles] had no expectation would be
19 identical to the 2016 MDNS” is flatly wrong.⁹ The County’s request for critical areas review
20 is not in the form of a SEPA condition. It is an entirely new permit that the County could
21 have asked for prior to the Order (most appropriately at the beginning of the review in
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25 ⁶ County Br. at p. 6.

26 ⁷ Compare Ex. 3, p. 1 with Ex. 7, p. 3.

⁸ The County sites conditions 9-15 of the reissued MDNS, none of which have anything to do with the logging road or critical areas.

⁹ As discussed, with regards to critical area review, the original MDNS and reissued MDNS are identical.

1 2016) but did not.¹⁰ Miles is not challenging any SEPA action and has no reason to do so.
2 The County is attempting to use the withdrawal and reissuance of the MDNS as an excuse
3 to revisit and completely revise a decision that the County made previously—i.e., to
4 appropriately limit critical areas review to the actual mine site.

5 Again, this is sadly consistent with the County’s long pattern of finding an excuse
6 to request more information that stalls the project. The Hearing Examiner’s ruling on
7 summary judgment is directly applicable to this current action.
8

9 **4. Withdrawal of the MDNS did not somehow make the summary judgment order**
10 **unenforceable.**

11 The County argues that:

12 The withdrawal of the threshold determination significantly affects [Miles’
13 ability to enforce the Order on Summary Judgment at this time. A necessary
14 premise of the Order was the existence of sufficient information to hear the
application on the merits. That is no longer the case because the threshold
determinations were withdrawn.¹¹

15 The County was aware that the existing logging road was part of the haul route from the
16 inception of the application process. In addition to the application itself, it was brought to
17 the attention of the County, by Miles and through early public comments dating back to at
18 least 2017.¹² The idea that use of the road was only recently brought to the County’s
19 attention through public comment associated with the reissued MDNS is simply false.
20

21 The central premise of the Examiner’s Order—that the County has sufficient
22 information to hear the application on the merits—is unchanged. The County provides no
23 evidence that would make the summary judgment order inapplicable or unenforceable.
24

25 ¹⁰ The County has been aware of the planned use of the existing logging road since the applications were
26 submitted in 2016.

¹¹ County Br., p. 6.

¹² Cox Decl., ¶¶ 8-10.

1 **B. THE COUNTY’S CRITICAL AREAS ORDINANCE DOES NOT APPLY TO THE EXISTING**
2 **LOGGING ROAD.**

3 The County argues that the Forest Practices Act does not preempt the County’s
4 authority to require critical areas review of the use of the existing logging road. To be clear,
5 Miles is not relying on a state law preemption argument, but rather on the express language
6 of the County’s code. While preemption likely gave rise to the County’s code provisions that
7 exempt critical areas review of such logging roads, Miles is arguing based on the code itself.

8 The County’s code is clear. While the Critical Areas Ordinance, SCC Ch. 14.24, (CAO)
9 applies broadly, the particular question of whether a critical areas review and written
10 authorization is required is specifically set forth in SCC 14.24.060. That section states:

11 With the exception of activities identified as allowed without standard review
12 under SCC 14.24.070, any land use activity that can impair the functions
13 and values of critical areas or their buffers, including suspect or known
14 geologically hazardous areas, through a development activity or by
15 disturbance of the soil or water, and/or by removal of, or damage to, existing
 vegetation, shall require critical areas review and written authorization
 pursuant to this Chapter.

16 SCC 14.26.060 (emphasis added). Thus, under the County’s code a critical areas review is
17 triggered only in cases where either a “development activity” is planned or where the
18 activity may disturb the soil, water, or existing vegetation.

19 “Development” is a specific defined term under the code:

20 **Development:** construction or exterior alteration of structures, dredging,
21 drilling, dumping, filling, earth movement, clearing or removal of vegetation
22 (except activities meeting the definition of forest practices), storage of
23 materials or equipment in a designated floodway, or other site disturbance,
24 other than internal logging roads, which either requires a permit, approval or
 authorization from the County or is proposed by a public agency.

25 SCC 14.04.020 (emphasis added). The County’s definition of “Forest Practices” includes
26 “any activity conducted on or directly pertaining to forest land and related to growing,
harvesting or processing timber as described in Chapter 222-16 WAC....” SCC 14.04.020.

1 Under WAC 222-16, forest practice activities specifically include “Road and trail
2 construction.” WAC 222-16-010.¹³ The Forest Practices Act also defines a Forest Road”
3 as:

4 “Forest road,” as it applies to the operation of the road maintenance and
5 abandonment plan element of the forest practices rules on small forestland
6 owners, means a road or road segment that crosses land that meets the
definition of forestland, but excludes residential access roads.

7 RCW 76.09.020(21). In addition, under the relevant regulations “‘Forest road’ means ways,
8 lanes, roads, or driveways on forest land used since 1974 for forest practices....” WAC 222-
9 16-010. The existing logging road is most certainly a “forest road” under the jurisdiction of
10 forest practice rules.

11
12 Other than the use of the existing private logging road, the only activity potentially
13 planned for the road is the paving of a single, short section where the grade is greater than
14 12%. This paving will match the dimensions of the current road and no widening will occur.
15 One impervious surface will simply be replaced by another. No alteration to any structures,
16 no dredging, no drilling, no dumping, and no vegetation removal is contemplated.

17 **1. The interim and limited use of the existing logging road is not a conversion of forest**
18 **land.**

19 The County argues that the exclusion of forest practices and specifically internal
20 logging roads from the definition of development, and thus from the critical areas review,
21 does not apply to the existing logging road in this case because the use of the road
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25 ¹³ Under the Forest Practices Act, RCW Ch. 76.09, the definition of “Forest Practices” also specifically includes
logging roads:

26 “Forest Practice” means any activity conducted on or directly pertaining to forestland and
relating to growing, harvesting, or processing timber, including but not limited to: (a) Road and
trail construction....

RCW 76.09.020(17).

1 constitutes a “conversion of forest land.”¹⁴ This is not accurate.

2 The entire 722-acre Grip Road property, except the three mining parcels, is
3 managed under Department of Natural Resources (DNR) Forest Practice rules, RCW Ch.
4 76.09 and WAC Title 222, allowing for ongoing forest management of the entire property.¹⁵
5 This Forest Practices Act property (FPA Property) is subject to a Forest Management Plan
6 (Plan) approved by the DNR.¹⁶ The Plan contemplates the very long-term use of the FPA
7 property as a forest plantation.¹⁷ That use will continue well beyond the life of the mine,
8 which will terminate with reclamation and replanting of timber on the mine site.¹⁸ Under
9 the Plan, timber harvest will continue to occur during the life of the mine and for many
10 decades afterward.¹⁹ The Plan addresses the maintenance of the plantation forest roads,
11 and all work on the roads to date has been under the auspices of and approved by the
12 DNR.²⁰
13

14 The three mining parcels were converted to a non-forestry use with the participation
15 of the County in 2016.²¹ The application to the County for conversion, which included the
16 DNR forest-practices conversion application, was very specific as to the area of forest land
17 that was being converted to a mining use, limiting the area to the 3-parcel mining site. The
18 existing logging road was not included as part of the conversion.²² The environmental
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22 ¹⁴ County Br., pp. 8-10.

¹⁵ Cox Decl., ¶ 3.

¹⁶ *Id.*, ¶ 4.

¹⁷ *Id.*, ¶ 5.

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.*, ¶ 6 & Ex. B.

²¹ *Id.*, ¶ 7 & Ex. C.

²² *Id.*, ¶ 7 & Exs. B-C.

1 checklist that was attached to the application and the County’s approval letter made clear
2 that the mining site—i.e., the actual conversion area—“will access onto Grip Road from an
3 existing private forest road....”²³

4 The City’s code defines “Conversion” as follows:

5 [A] use other than commercial timber operations that is a bona fide conversion
6 to an active use which is incompatible with timber growing, or where the
7 landowner has declared a conversion as part of the forest practice application
approved by the Washington State Department of Natural Resources (DNR).

8 SCC 14.04.020 (emphasis added). This definition applies to the mine site but it does not
9 apply to the existing logging road. There is no bona fide conversion to an active use of the
10 existing logging road that is “incompatible with timber growing,” as the road can and will
11 continue to be used for forestry purposes.²⁴ Nor has the landowner declared a conversion
12 as to the road “as part of the forest practice application approved by the Washington State
13 Department of Natural Resources (DNR).” The road was specifically not part of the
14 application.²⁵

15
16 The forest practice application approved by DNR made clear that the conversion of
17 land to non-forestry use was limited to the mine site parcels, as indicated on the map
18 attached to the application and approval.²⁶ This was approved by the County without any
19 mention or idea of “conversion” of the existing logging road.
20
21

22 ²³ *Id.*, Ex. C.

23 ²⁴ The County’s definition of “Forest Practices” also states that conversion is a use that is “incompatible” with
24 forestry uses:

25 **Forest practices:** any activity conducted on or directly pertaining to forest land and related to
growing, harvesting or processing timber as described in Chapter 222-16 WAC. This does not
26 include the conversion of forested land to a use incompatible with growing timber.

Again, the proposed use of the road is not in any way incompatible with the existing forestry purposes.

²⁵ *Id.*, Ex. B.

²⁶ *Id.*

1 **2. Use of the existing logging road does not constitute a “development activity.”**

2 The County argues that:

3 The development activity is the mine itself, and this activity includes the use of
4 the haul road.... Standard critical areas review is for the “development activity”
5 and not the individual components of the development activity.²⁷

6 This argument ignores the plain language used in the definition of “Development” under
7 the code.

8 Under the code’s rules of interpretation, “all words used in the Code shall have their
9 normal and customary meanings, unless specifically defined otherwise in the Code.” SCC
10 14.02.030. The code also states that “unless specifically defined, words or phrases used
11 shall be interpreted so as to give them the meaning they have in common usage and to
12 give this Title its most reasonable application.” *Id.* While the term “Development Activity” is
13 not defined under the code, the term “Development” is specifically defined and includes
14 the following activities:

15 construction or exterior alteration of structures, dredging, drilling, dumping,
16 filling, earth movement, clearing or removal of vegetation ... storage of
17 materials or equipment in a designated floodway, or other site disturbance....
18 which either requires a permit, approval or authorization from the County or is
19 proposed by a public agency.

20 These are the *development activities* that are contemplated under the code. These are the
21 types of activities that disturb land and therefore trigger critical areas review. Increased
22 traffic volume is not a “development activity.”

23 These types of activities will occur at the 3-parcel mine development site, and
24 critical areas review has appropriately been performed as to those mining parcels.
25 However, other than the shared use of the existing logging road, the only activity potentially
26 planned for the road is the paving of a single, short section where the grade is greater than

²⁷ County Br., p. 9.

1 12%. This paving will match the dimensions of the current road and no widening will occur.
2 No alteration to any structures, no dredging, no drilling, no dumping, and no vegetation
3 removal is contemplated. In other words, no development activities will occur.
4

5 Even if development activities were planned for the existing logging road, critical
6 areas review would still not be required. Explicitly excluded from the definition of
7 development that would trigger critical areas review are “activities meeting the definition
8 of forest practices” and site disturbances involving “internal logging roads.” These activities
9 are excluded, no doubt, because under RCW 76.09.240(6), the County is prohibited from
10 regulating forest practices and forest roads. That includes the existing logging road that is
11 necessarily subject to specific maintenance requirements of the Forest Management Plan.

12 **3. The proposed use is exempt under SCC 14.24.070(3).**

13 Miles’ limited proposed maintenance of the private logging road is specifically
14 exempt under SCC 14.24.070(3), which states that:
15

16 The following developments, land use activities and associated uses are
17 allowed without standard critical areas review; provided, that they are
18 consistent with other applicable provisions of this Chapter and other
19 chapters of the Skagit County Code....

20 ...

21 (3) Normal maintenance, repair, or operation of existing structures,
22 utilities, sewage disposal systems, potable water systems, drainage
23 facilities, detention/retention ponds, or public and private roads and
24 driveways associated with pre-existing residential or commercial
development, provided any maintenance or repair activities shall use
best management practices (BMPs) with the least amount of potential
impact to the crucial areas and nay impact to a critical area or its buffer
shall be restored after the maintenance to the extent feasible. (Emphasis
added.)

25 Miles’ proposed activities associated with the private logging road fit squarely within this
26 exemption. The small amount of paving that is proposed constitutes normal maintenance

1 and repair of a “private road” associated with a pre-existing commercial use—i.e., timber
2 production. This maintenance is contemplated under the Forest Management Plan and
3 Road Maintenance and Abandonment Plan for the property. While maintenance and repair
4 will need to comply with the BMP requirements and other provisions of SCC 14.24.070(3),
5 a separate critical areas review under SCC 14.24.060 is not required.

6 In its brief, the County argues that this provision does not apply because:
7

8 [T]here is no associated pre-existing commercial development as no mine
9 current[ly] exists..... The Code requires a direct link between the use and
maintenance of the road and the existing commercial development.²⁸

10 The code does not require any “direct link” between the maintenance of an existing road
11 and the existing commercial development. The focus and purpose is instead on excluding
12 normal maintenance and repair of existing roads.

13 In addition, the County’s argument ignores the fact that all work on the existing
14 logging road to date has been under the auspices of and approved by the DNR, that the
15 limited proposed work is contemplated under the Forest Management Plan, and that all
16 future maintenance and repair work will be subject to the Plan. The road is not being
17 “converted” to another use—it is and will continue to be used for a forestry purpose. The
18 FPA property is zoned “Rural Resource—Natural Resource Lands” under the County’s code.
19

20 The purpose of this zone is

21 to recognize and encourage the conservation of those lands which have the
22 characteristics of both long-term commercially significant agriculture and
23 forestry either on-site or on adjacent sites.... It is the intent of this district to
24 restrict incompatible non-resource related uses and to retain a long-term,
25 commercially significant natural resource land base.
26

²⁸ County Br., p. 10.

1 SCC 14.16.430. The forestry practices on the FPA property are a “commercial” use under
2 the code, and the existing logging road is associated with this preexisting use. Normal
3 maintenance and repair is therefore associated with a forestry use that will continue during
4 the mining operation and for many decades afterward.

5 **CONCLUSION**

6 The facts here are simple: The County simply changed its mind and now wants full
7 critical areas review. This is not allowed under the Examiner’s Order. And even if it was, it
8 is not allowed under the County’s code. The Examiner should bring the process to the end
9 expected in 2019, either by simply enforcing the Order or by concluding that critical areas
10 review is not required under SCC 14.24 because the road is an existing logging road
11 currently used for timber purposes.
12

13
14 Dated this 11th day of August, 2021.

15 GORDON THOMAS HONEYWELL LLP

16
17 By _____

18 
William T. Lynn, WSBA No. 07887

blynn@gth-law.com

Reuben Schutz, WSBA No. 44767

rschutz@gth-law.com

Attorneys for Appellant
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DECLARATION OF SERVICE

I hereby declare that on August 11, 2021, in Tacoma, Washington, I caused the foregoing **REPLY BRIEF** documents to be served on the following parties in the manner indicated herein:

Skagit County Hearing Examiner
1800 Continental Place
Mount Vernon, WA 98273
skivi@co.skagit.wa.us

- Via Legal Messenger
- Via U.S. Mail
- Via Facsimile:
- Via E-filing Notification/LINX
- Via Email

Jason C. D'Avignon
Skagit County Prosecuting Attorney
Civil Division
605 South 3rd Street
Mt. Vernon, WA 98237
prosecutor@co.skagit.wa.us
jasond@co.skagit.wa.us

- Via Legal Messenger
- Via U.S. Mail
- Via Facsimile:
- Via E-filing Notification/LINX
- Via Email

I DECLARE UNDER THE PENALTY OF PERJURY OF THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

/s/ Julia Alexander
Julia Alexander, Legal Assistant
jalexander@gth-law.com
GORDON THOMAS HONEYWELL LLP