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DIVISION II  
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STATE OF WASHINGTON  
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DEPUTY

No. 47717-3-II

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

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DARRELL de TIENNE and CHELSEA FARMS, INC.

Appellants,

VS

SHORELINES HEARINGS BOARD, PAUL H. GARRISON and  
BETTY N. GARRISON, PIERCE COUNTY, and COALITION TO  
PROTECT PUGET SOUND HABITAT

Respondents

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RESPONDENT GARRISONS' BRIEF

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## FACTS OF THE CASE

### **Background**

Darrell deTienne (hereinafter sometimes referred to as Grower) claims ownership of a portion of a Bush act tract which was originally sold by the State of Washington to J. E. Buckingham in 1910. Appendix A.

The boundary can only be established by following the legal description provided in the deed and using existing monuments. AR 1130.

**Bush Act**, This act is not within the jurisdiction of the Shoreline Hearings Board, but the interests of justice would be well served by resolution of issues raised by this case concerning the Bush Act.

The Bush act (Sessions Law of 1895, ch 24), authorized sale of 3<sup>rd</sup> Class Tidelands, but not sale of subtidal parcels. It does not allow sale, either directly or indirectly, except to citizens of Washington State. Darrell deTienne is a citizen of California and Maija a citizen of Finland. The validity of deTienne ownership is thereby questionable. Appendix B.

Sale of subtidal lands violates the State Constitution, Article 17,

Section 1 adopted August 22, 1889. Appendix C.

Third Class tidelands were eliminated by Sessions Law of 1897, ch 89 at page 248. Appendix D.

The deed from the State of Washington to Buckingham on May 20, 1910 is clearly limited to “tide and shore lands of the second class” occurring within the metes and bounds description. Appendix A.

Tidelands from 1895 to March 8, 1911 extended only to Mean Low Tide (average of all low tides over 18.6 years) Session Law of 1895 Ch 178, Section 2. Appendix E. According to NOAA, Mean Low Tide in Tacoma is +3.33 feet. Appendix F. Tidelands applied for after March 8, 1911 extend to Extreme Low Tide, which is minus 4.5 feet. Appendix G.

RCW 79.135.010(2) Clarification of the Bush and Callow acts:

“The rights granted under subsection (1) of this section do not include the right to use subtidal portions of Bush act and Callow act lands for the harvest and cultivation of any species of shellfish that has not commenced prior to December 31, 2001.”

Findings following this RCW - 2002 c 123 ends as follows:

“It is not the intent of this act to impair any vested rights in shellfish cultivation or current shellfish aquaculture activities to which holder of Bush act and Callow act lands are entitled.”

It is obvious that illegal acts are not intended to vest or everyone would be encouraged to act illegally.

**Property Location (Boundary Survey and Biological Evaluations)**

The site has never had an accurate boundary survey or permanently set corners markers.

We hired a licensed surveyor to critique the information sources used for biological site evaluations for the deTienne application. That was Aspen Land Surveying. AR 1129, 1130.

The firms of Marine Surveys & Assessments and Environ International (Environ) were hired to produce a required biological site evaluation and accurately report upon the location of critical species including eelgrass and kelp which are to be protected by the SMA and SMP . The first report says they relied upon a map from the office of Pierce County Assessor Treasurer. GPS coordinates derived from these records are not to be used to locate property in the field. See Aspen letter AR 1129:

**“THIS IS NOT A SURVEY; DO NOT USE DATA FOUND ON THIS MAP; WE ASSUME NO LIABILITY FOR VARIATIONS ASCERTAINED BY AN ACTUAL SURVEY; FOR ASSESSOR’S USE ONLY”**

Likewise, in 2009 Environ produced another biological site evaluation which was similarly flawed due to lack of an accurate boundary survey and permanent boundary markers. AR 1066

Again in 2012 Marine Surveys & Assessments revisited the site.

This time relying upon information derived from DNR Aquatic Resource Plate 5, which was corrected by DNR Aquatic Resource Plate 5A. See Aspen letter AR 1129:

“Much like the County Assessor’s Map, these maps are intended to be used by the DNR to record the approximate locations of state lands leased to private parties. They do not represent actual surveys and do not contain sufficient information to locate property boundaries on the ground.”

The agencies might otherwise be liable for inaccuracies, resulting encroachment, and damage to adjacent properties, which in this case includes vital habitat located on the adjacent properties.

All three of the biological evaluations were erroneous due lack of survey data. The evaluations actually included adjacent State owned property and adjacent privately owned Bush act parcel. Aspen letter AR 1130:

“It would be foolhardy to attempt to use any of these maps to locate boundaries through visual reference to known property corners or other positions on the ground. Ultimately the boundary can only be established by following the legal description provided in the deed and using existing monuments”

Other site development activities require the applicant/developer to comply with the requirements of RCW 58.09 to field locate the property by performing an accurate boundary survey based upon a legal description, and to set permanent on-site markers.

**Cease and Desist**

Cease and Desist Order of July 25, 2003 to deTienne AR 602 :

“YOU ARE HEREBY NOTIFIED that you are making or partaking in use of the land, development or activity(ies) which are not permitted by County regulation, approved site plan, land use permit, or variance, to-wit:

<u>References:</u>	<u>Description of Violation</u>
PCC Title 20 Section 20.24.030	Harvesting cultivating planting or allowing such activity without required shoreline permits.
PCC Title 18E Section 18E.60.020	Working or allowing working to be done in eelgrass beds without authorization.”

Yet Grower participated in planting in 2005. AR 604, 605, 1879, 1882.

**Failure to Disclose Material Fact in Application**

It is uncontested that Darrell and Maija deTienne (Darrell’s wife at that time), applied for permit to farm geoducks in 2005. The Grower claims to have cultivated geoduck prior to December 31, 2001. Since it was without required permits, he does not have the right to farm geoduck now.

Neither the Grower’s initial JARPA dated 6/6/05, AR 15 -20, nor revised JARPA dated 7/22/2011 AR 135 - 147 disclosed “planting . . . without required shoreline permits” which is a material fact. Lauer v Garrison, 173 Wn.2d 242 , AR 4034 concluded:

“A permit application that is not allowed under the regulations in place at the time it is submitted under knowing . . . omission of material fact confers no rights upon the applicant.”

Therefore cultivation of geoduck prior to 12/31/2001 without required permits, per Cease and Desist Order, does not confers any rights.

### **Damage from Illegal Harvest**

The illegal harvest (poaching) resulted in severe habitat damage according to biological evaluation by Marine Surveys & Assessments, from dive of 4/16/2004 (almost a year after Cease & Desist). AR 1117

“All plants were either partially or wholly dislodged from the substrate with the roots and rhizomes exposed.” . . . “no healthy Eelgrass observed.”

Garrisons witnessed workers removing uprooted vegetation from the hoses and took photos and a DVD AR 1020 and AR 1021.

These violations were allowed by deTienne and he was enriched by them. No mitigation of any kind has been required nor offered. Instead the Grower relentlessly seeks to reduce the buffers to eelgrass and kelp beds, that had been reduced by prior poaching. This would enlarge the cultivation area and increase future profits. It would also prevent these critical species from returning to their former expanse.

### **Adequate Buffers**

Ecology has designated eelgrass a saltwater habitat of special concern. Eelgrass serves essential functions in the development life history of fish and shellfish. WAC 220-110-250. It also provides physical stabilization of the nearshore area and serves as the foundation for thousands of vertebrate and invertebrate species that use it for shelter, foraging, spawning habitat and nurseries. Damage to eelgrass can affect whole populations of fish, including threatened salmon, waterfowl, shellfish, and other animals.

At least two studies, of the many studies introduced by the Grower, refute Grower's claim that reduced buffers are adequate on this site.

The Horwith study revealed spill-over effects of nine meters (approx. 29.5 feet). Extending as much as 19.5 feet into the 10 foot buffer.

The Pearce study indicated effects reach five meters, during calm seas (approx. 16.4 feet) and encroach upon the buffer as well.

These studies were limited to the spill-over effects upon eelgrass itself and did not attempt to determine the effects upon forage fish spawn on-site or on nearby sites.

The turbidity from farming will be in addition to storm activity in this high energy site with high value habitat on and around it.

Environ report of 10/23/2009 AR1066 disclosed accuracy of the

Garmin used to locate the site at plus or minus 33 feet. This exceeds the largest buffers of 25 feet and demonstrates the need for a boundary survey and permanent boundary markers before biological site evaluations begin.

Environ Memorandum of August 12, 2013 AR 2697

acknowledges:

“While available data and professional opinions indicate that a 10 foot buffer may also be protective of eelgrass habitat in the subtidal zone, this information is largely based on a limited number of intertidal geoduck aquaculture studies.”

Correspondence scattered in the AR from 2131 through 2230 between Risvold, and various agencies, and Grower’s representatives discuss the buffer size. There is virtually no science cited. The buffer size was determined not by science, as it should have been, but by negotiation.

The Grower and County agreed to the split-plot buffer, one part 25 feet and the other part only 10 feet. Monitoring was to disclose whether or not the buffer was found to be adequate. However, permit conditions do not require buffers to be increased if they prove to be inadequate.

### Vesting

It is obvious that illegal acts are not intended to vest or everyone would be encouraged to act illegally.

Pierce County Code (PCC):

**“18.160.020 Purpose**

The purpose of this Chapter is to implement plan policies and state laws that provide for vesting. This Chapter is intended to provide property owners, permit applicants, and the general public assurance that regulations for project development will remain consistent during the lifetime of the application.”

PCC interpretation was, in some instances, based upon more liberal changes that had been adopted or anticipated after Grower’s application was complete. Lax application of the regulations for benefit of the Grower will necessarily violate the public’s right to rely upon the regulations to remain consistent. This is not limited to: tolling of the time upon the applications, and Stipulated Agreement that withdraws protection of Z. japonica listed as a weed, 8 years after date of application.

**Pierce County Code (PCC) Application Process was Violated**

The processing of the application (SD 35-05 4040107) did not comply with PCC (as of the date of application) as follows:

Title 20, Shoreline Management Regulations.

20.24.020(A)(3) “Aquaculture shall be conducted in a manner which precludes damage to specific fragile areas and existing aquatic resources.”

In other words - no net loss.

20.76.030(E)(3) Time Periods for Final Decision. AR 1040

“The provisions for issuing a notice of final decision on any application filed pursuant to this Title are set forth in Chapter 18.100, Development Regulations - General Provisions.”

18.100 Time Periods for Final Decision

18.100.020 “The 120 day time period established . . . above shall not apply in the following situations:

18.100.020(A) Any period during which the applicant has been requested by the Department to correct plans, perform required studies, or provide additional information. This period of time shall be calculated from the date the Department or Examiner notifies the applicant of the need for additional information until the Department or Examiner notifies the applicant that the additional information satisfies the request or 14 days after the last required submittal of the information, whichever is earlier;”

18.60 Review Process

18.60.030(C) “ The application shall be deemed null and void if the applicant fails to submit additional information within 180 days of the Department’s or Hearing Examiner’s request, unless the applicant has been granted a time period extension. The applicant shall be granted a 180 day extension if:

18.60.030(C)(1) The applicant requests such an extension in writing prior to the expiration of the initial 180 day time period; and

18.60.030(C)(2) The Director or Hearing Examiner finds that unusual circumstances beyond the applicant’s control have prevented them from providing the additional information within the initial 180 day time period. Only one extension may be granted.”

Pierce County Completed Application for Shoreline Substantial  
Develop and for Environmental Checklist (AR 585 - 588)

“THIS APPLICATION WILL EXPIRE. This application will expire if you take more than 360 cumulative days to respond to requests for additional information Each time you are asked for additional information, the number of days from the request until a complete resubmittal is received is counted. Once you have used a combined total of 360 days this application expires.”

Thus, the application was null and void by 18.60.030(C) above.

SEPA

This is a statute that requires full disclosure and consideration of environmental values prior to decisions being made. The decision to protect *Zostera japonica* as well as *Zostera marina* was disclosed in the public records AR 677 - 681. MDNS of 10/21/2012 at AR 214 indicated “all farming activity must be setback from eelgrass beds” but fails to protect kelp as required by the Critical Areas Ordinance PCC 18E.40.020(D)(10).

We contend that Stipulated Agreement of 9/23/2013 AR 637 - 647 between Grower and Pierce County, was a major change to the MDNS, circumvented the rights of the public to review and comment on changes in the conditions of a permit, and violated SEPA. In the event this Court determines SHB decision is over turned, EIS should be required.

### **SHB Decision**

The Horwith study and Pearce study were presented by the Grower and considered along with other studies. These two studies alone verify the buffers approved by Pierce County Hearing Examiner are not adequate. The permit should have provided positive prevention of future damage.

Garrison DVD and photo show that sedimentation and trampling are not the only source of degradation of this crucial habitat and these protected species. The customary method to harvest under water is for divers using hand operated water jets under pressure, supplied by hoses from boats, loosen the geoducks which are then collected by the diver. During the poaching, the hoses were dragged across "protected" habitat, leaving the area a "war zone". The zig zag boundaries of the split-plot buffer would be particularly susceptible to this type of damage.

Ms Meaders is an expert in certain areas of geoduck farm issues. She has been hired by shellfish growers to testify before the SHB in several cases and cannot be considered unbiased.

Ms Meaders was asked to testify in the absence of a recognized expert with whom she had had discussions. Such testimony would have been hearsay. SHB members questioned her and did not accept such testimony.

A number of studies were admitted. Relevance and weight was

decided by the Board.

The DNR SEIS must be relied upon unless a more relevant EIS is available. It was for subtidal harvest and this application is for subtidal farming.

Pierce County's Mr. Risvold memorandum of April 24, 2013 AR 2436 - 2439 in which he responded to several last minute changes proposed by the Grower. He steadfastly required protection for all eelgrass, both native and non-native; retained existing language to protect kelp; opposed buffer reduction to 10 feet; supported the DNR 2 feet vertical buffer in deeper water. Changes were the result of lobbying, not science.

SHB heard from Palazzi, with DNR, that the project, being subtidal, was not likely to result in trampling. However, the Garrison DVD AR 1019 and AR 1020 shows that hoses dragged across the prior poached area caused severe damage. The zig zag boundaries of the split-plot buffer would be particularly subject to this type of damage.

This is a site of extreme value to the entire marine habitat due to the extensive eelgrass and kelp beds and must not be devastated again.

**Time Limits for SHB Decision**

RCW 34.05.080 Variation from time limits.

In an adjudicative proceeding, any agency whose time

limits vary from those set forth in this chapter shall provide reasonable and adequate notice of the pertinent time limits to persons affected. The notice may be given by the presiding or reviewing officer involved in the proceeding.

SHB complied with this. SHB may assume the time limit was waived by the parties since no objection was raised.

*Ericition Co. v Dept. of Labor & Ind.*, Headnote 13, Department loss of jurisdiction resulted in preserving appealant's right of appeal. In *deTienne v SHB* the result would be termination of the right of Garrisons and the Coalition to appeal.

*Danzer* 104 Wn. App. 307 as amended and published declined to extend the *Ericition Co.* decision regarding loss of jurisdiction to *Danzer*.

The time requirements for SHB action are ambiguous and *Ericition Co.* should not extend to this case.

A party can inundate SHB with studies containing little, or even no, direct information on which make a decision. They may introduce unacceptable evidence, etc. thus extending the duration of the Hearing and abbreviating the time for review and decision. Yet the Board members must consider each piece. This may cause the time, in which to render a decision, to be inadequate. Review of the Grower's list of proposed Exhibits and Witnesses, and that of the Coalition to Protect Puget Sound, may well have contributed to the SHB's delay issuing their decision.

The Garrisons submitted the earliest Petition to SHB. It was dismissed. The dismissed petition should not start the time in which a decision is to be issued.

If an agency infraction requires a penalty, the penalty must not result in gross injustice to the parties. We should not suffer due to actions over which we have no control.

### **Summary**

The Bush act authorized sale of tidelands only to citizens of the U.S. and State of Washington. Buckingham purchased tidelands just to Mean Low Tide which lay within a metes and bounds described parcel. There was no authority and no intent to sell a subtidal parcel.

The Grower poached within eelgrass and kelp beds and they sustained serious damage from the under water hose. These species are vital to the Puget Sound ecological system. Mitigation was neither required nor offered.

The reduced split-plot buffer will not adequately protect the critical species from the hazards of under water harvests,

The Grower applied for permit to farm geoduck in 2005 knowingly omitting the material fact that geoduck planting he claimed took place prior to December 31, 2001 was without required permits and therefore

not allowed in 2005. Lauer v Garrison, 173 Wn. 2d 242 AR 4034

concluded:

“A permit application that is not allowed under the regulations in place at the time it is submitted under knowing . . . omission of material fact confers no rights upon the applicant.”

The material fact was knowingly omitted. The permit confers no rights.

Application for a Shoreline Substantial Development and Critical Areas permits from Pierce County involves more than just PCC Title 20 since it references other Titles. It is abundantly evident the processing severely violated PCC. These applications were, in fact, null and void for a very long time. Lax application of the Code for the benefit of the applicant can not avoid violating rights of the public.

Through the entire 8 year application process the Grower diligently pursued reduced protection for eelgrass beds; ignored the existence of kelp beds (leaving them vulnerable) to maximize the farm area and increase financial gain.

The Grower did not and has not obtained an accurate boundary survey and set permanent corner markers as other developers must. This short cut left Marine Assessments & Surveys as well as Environs seeking boundary information from inappropriate, inaccurate sources. Results: 3 expensive, yet worthless, biological evaluations.

Along with abundant evidence, the SHB was given the task of determining the relevance and weight to be awarded each exhibit, study and testimony from both sides. Five of the six SHB members concluded the permit should not be allowed.

In his dissent, SHB member Grant Beck suggests the project might serve as a study to determine if buffer reduction to only 10 feet might be appropriate. AR 1014 -1018 This application, however, is not proposed as a limited time study. It is proposed as a farm, without expiration.

### **Conclusion**

The SHB accepted abundant evidence and testimony in this case. Members determined the degree of relevance of each study and the weight to be given to the testimony of each claim and counter claim. This is clearly demonstrated in Findings of Fact, especially numbers 36 - 48, 50 - 52, 54, and 60 - 63. Time limits for a decision are ambiguous.

The SHB based their decision on the facts presented to them concerning the various facets of this case. They included, but were not limited to: the importance of eelgrass and kelp, and the appropriate buffer; the related impact to herring and other forage fish; interruption of public recreational activities which are of substantial statewide importance.

Reduced buffers will assure that eelgrass and kelp beds, damaged

by prior poaching activities of this Grower, will never return to their prior  
expanse and unable to provide their prior level of vital function.

The standard for reversal of the SHB decision, in our opinion, has  
not been met.

We ask you to uphold the SHB decision.

In the event the SHB decision is overturned, we ask the Stipulated  
agreement that withdraws protection of *Z. japonica* be declared invalid.

Due to the possibility that Grower may submit a future application,  
we also ask that you find the State did not sell any Bush Act lands this  
Grower claims, that lay below Mean Low Tide.

Further, we ask you to uphold the citizenship requirement of the  
Bush Act and declare that portion of the sale to deTienne to be invalid.  
See Statutory Warranty Deed Mickelsen to deTienne recorded under  
Auditor's Fee No. 9811200496 as to Parcels D and E. Appendix H

Respectfully submitted this 5<sup>th</sup> day of January, 2016.

By Paul H. Garrison

By Betty H. Garrison

# Appendix A

# State of Washington.

8599  
In lieu of { Contract No.....  
{ Application No. 5272.....

In consideration of forty-five and no/100 (\$ 45.00 ) DOLLARS.

the receipt of which is hereby acknowledged, the STATE OF WASHINGTON does hereby grant, bargain, sell and convey unto

J. E. Buckingham, his

heirs and assigns, the following described tide land of the

second class, suitable for the cultivation of oysters, and being situate in Pierce County, Washington, to-wit:

All tide and shore lands of the second class, owned by the State of Washington, described by metes and bounds as follows:

Beginning at a point from which the meander corner to fractional sections fourteen (14) and twenty-three (23), township twenty-two (22) north, range one (1) east of the Willamette Meridian bears north 13° 39' 39.6" east 58.845 chains distant; thence south 83° 25' west 40.00 chains; thence south 28° 35' east 9.00 chains; thence north 83° 25' east 40.00 chains; thence north 28° 35' west 9.00 chains to the place of beginning, containing an area of 38.00 acres, more or less, according to the map on file in the office of the Commissioner of Public Lands at Olympia, Washington.

To have and to hold the said premises, with their appurtenances, unto the said

J. E. Buckingham, his

heirs and assigns forever.

It is Expressly Agreed, That if from any cause any tract or tracts, parcel or parcels of said land shall become unfit or valueless for the purpose of oyster planting, the party having so purchased and being in the possession of the same, upon certifying such fact under oath to the Commissioner of Public Lands and to the Auditor of the county wherein such lands are situated, and also upon filing under oath a certificate of abandonment of such tract or tracts, parcel or parcels of land, in the office of each of such officials, shall then be entitled to again make purchase of oyster lands pursuant to the provisions of an act of the Legislature of the State of Washington, entitled "An act providing for the sale and purchase of tide lands of the third class, and manner of conveying the same, for the purposes of oyster planting, to encourage and facilitate said industry, and declaring an emergency," approved March 2, 1895; and such certificate shall be and be deemed to be a reconveyance to the State of Washington of the lands therein described as having become unfit and valueless for the purpose of oyster planting.

Witness the Seal of the State, affixed this 20th

day of May 1900.

H. E. HAY

# Appendix B

## CHAPTER XXIV.

[H. B. No. 5.]

## RELATIVE TO OYSTER PLANTING.

AN ACT providing for the sale and purchase of tide lands of the third class and the manner of conveying the same for the purposes of oyster planting, to encourage and facilitate said industry, and declaring an emergency.

*Be it enacted by the Legislature of the State of Washington:*

SECTION 1. It shall be lawful for any person who is entitled to purchase tide lands pursuant to the act of March 26, 1890, as being an occupant of land planted with oysters, to survey or cause to be surveyd at his own expense, the land that pursuant to said act he is entitled to purchase, not exceeding one hundred acres in area: *Provided*, That the party making application to purchase under the provisions of this act shall accompany such application with a certificate under oath to the effect that lands purchased under the provisions of this act shall be used for oyster planting purposes only.

Duplicate records kept.

SEC. 2. Survey and description in duplicate of such tract shall be subject to the direction, oversight and approval of the board of state land commissioners, and one description of said tract as surveyed shall be filed with and be recorded by the county auditor of the county in which said tide lands are situated, in a book kept by him for such especial purpose, and a duplicate description in the office of the commissioner of public lands.

Lines of survey.

SEC. 3. The survey of such lands, as provided in the foregoing sections of this act, may not be required to follow the lines of United States government survey, but may follow the direction of the oyster beds actually occupied by the party proposing to purchase the same; the persons entitled to purchase such oyster beds under the provisions of this act may purchase the same at the rate of one dollar and twenty-five cents per acre, one-fourth of which price shall be paid at time of making such purchase, and the remaining three-fourths in three equal annual payments, each of which sums shall draw interest at the rate of eight per cent. per annum, the unpaid portion re-

Price per acre, and how sold.

maining as a lien upon said land until all payments shall be made in full, and the purchaser shall thereupon be entitled to a deed to the same; said deed shall be executed by the governor, attested by the secretary of state with the seal of the state thereunto attached, which deed shall contain the conditions of defeasance in this act provided.

SEC. 4. Any person having the right to purchase such tide lands as provided by this act, and being an actual occupant of the same, shall have the prior right to purchase for a period of six months from and after the passage of this act and its being signed and approved by the governor. Prior right.

SEC. 5. Upon the filing of a description of the survey of such land, as provided for by the foregoing sections of this act, the person or persons having occupied or desiring to occupy such lands as described in section one of this act, may file with the commissioner of public lands an application to purchase said lands, together with a description of the lands applied for, by metes and bounds, and upon the receipt of the same the commissioner of public lands shall, at the expense of the applicant, publish, or cause to be published, for three successive weeks in any newspaper of general circulation printed and published in the county where such lands are situated, a notice of such application to purchase, giving therein a description of lands applied for. Application to purchase, notice of.

During the next thirty days following the last publication of said notice, any person claiming a prior right to purchase such tide lands may file with the commissioner of public lands a contest for the purpose of establishing a prior right to purchase, or, upon petition of ten citizens who shall be residents of the county wherein such lands are situated, a contest may be filed as hereinbefore provided, and such contest shall be upon the right of applicant to purchase, as provided in the foregoing sections of this act. Adverse claimant.

If the party making contest shall fail to establish a prior right to purchase, said party shall be liable for the costs resulting direct from such contest, except private attorney fees, and the sum of such costs shall be paid by such contestant into the state treasury department, and, upon such payment being made, shall be entitled to a receipt for the same.

SEC. 6. This act shall in no manner apply to the provisions of the act of March 26, 1890, providing for the appraisal and disposition of tide and shore lands in the State of Washington except as far as it relates to lands actually used or to be used for the purpose of oyster planting.

SEC. 7. Any person desiring to purchase tide lands for the purposes of oyster planting may purchase tide lands of the third class not included in any natural oyster beds or any reserve pursuant to the provisions of this act, in subordination to any preëmption right confirmed by said act of March 26, 1890. Nothing in this act shall be construed so as to effect [affect] the preference rights of shore or upland owners, or improvers, as conferred by the provisions of said act or other provisions of law.

Persons authorized to purchase.

SEC. 8. No person shall be entitled, directly or indirectly, to the privileges of this act who is not an actual resident and citizen of the United States and State of Washington, and no person not a citizen of the State of Washington shall be competent to acquire deeds to any lands sold by the state under the provisions of this act: *Provided*, That any citizen of the United States and not a citizen of the State of Washington, or any corporation organized under the laws of any other state other than the State of Washington that has planted and cultivated and planted in oysters any tract or tracts or parcels of such lands for the period of five years next preceding January 1, 1895, shall have the exclusive right to purchase such tract or tracts or parcels of land so planted and cultivated as aforesaid, but not exceeding one hundred acres in the aggregate, such prior right to be within six months after the approval of this act. And failure to make application to purchase said lands within said six months by such person or corporation shall forfeit the right hereby granted to such person or corporations to purchase any such lands.

Abandoned oyster lands, how purchased.

SEC. 9. If from any cause any tract or tracts, parcel or parcels of land purchased under the provisions of this act shall become unfit and valueless for the purposes of oyster planting, the party having so purchased and being in the possession of the same may upon certifying such fact under

oath to the commissioner of public lands and to the auditor of the county wherein such lands are situated and also upon filing under oath a certificate of abandonment of such tract or tracts, parcel or parcels of land, in the office of each of said officials, such party shall then be entitled to again make purchase as hereinbefore provided; or if said land be used by the purchasers or any successors in interest of such purchaser in whole or in part for other than the purposes specified in this act, then upon application by any citizen to the state land commissioner such sale may be canceled, and the said land shall revert to the state and shall be subject to sale as herein provided, but not to such defaulting purchaser or such defaulting successor in interest.

SEC. 10. The provisions of this act shall not apply to such lands as have already been surveyed, appraised and platted.

SEC. 11. Whereas, planters of oysters not being adequately protected in the possession of their property, and it being the desire of certain oyster planters to engage in the planting of eastern oysters, and the season for ordering a supply of eastern oysters for spring planting being already at hand, an emergency is declared, and this act shall be in full force and effect upon its passage and approval by the governor.

Passed the house February 13, 1895.

Passed the senate February 27, 1895.

Approved March 2, 1895.

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## CHAPTER XXV.

[H. B. No. 399.]

### RELATING TO THE SALE OF OYSTER LANDS.

AN ACT relating to the purchase and sale of oyster lands, and declaring an emergency.

*Be it enacted by the Legislature of the State of Washington:*

SECTION 1. That all persons having the qualifications provided by law to enable them to purchase tide lands

Right to purchase.

# Appendix C

**ARTICLE XVI  
SCHOOL AND GRANTED LANDS**

**SECTION 1 DISPOSITION OF.** All the public lands granted to the state are held in trust for all the people and none of such lands, nor any estate or interest therein, shall ever be disposed of unless the full market value of the estate or interest disposed of, to be ascertained in such manner as may be provided by law, be paid or safely secured to the state; nor shall any lands which the state holds by grant from the United States (in any case in which the manner of disposal and minimum price are so prescribed) be disposed of except in the manner and for at least the price prescribed in the grant thereof, without the consent of the United States.

**SECTION 2 MANNER AND TERMS OF SALE.** None of the lands granted to the state for educational purposes shall be sold otherwise than at public auction to the highest bidder, the value thereof, less the improvements shall, before any sale, be appraised by a board of appraisers to be provided by law, the terms of payment also to be prescribed by law, and no sale shall be valid unless the sum bid be equal to the appraised value of said land. In estimating the value of such lands for disposal, the value of the improvements thereon shall be excluded: *Provided*, That the sale of all school and university land heretofore made by the commissioners of any county or the university commissioners when the purchase price has been paid in good faith, may be confirmed by the legislature.

**SECTION 3 LIMITATIONS ON SALES.** No more than one-fourth of the land granted to the state for educational purposes shall be sold prior to January 1, 1895, and not more than one-half prior to January 1, 1905: *provided*, that nothing herein shall be so construed as to prevent the state from selling the timber or stone off of any of the state lands in such manner and on such terms as may be prescribed by law: and *provided, further*, that no sale of timber lands shall be valid unless the full value of such lands is paid or secured to the state.

**SECTION 4 HOW MUCH MAY BE OFFERED IN CERTAIN CASES — PLATTING OF.** No more than one hundred and sixty (160) acres of any granted lands of the state shall be offered for sale in one parcel, and all lands within the limits of any incorporated city or within two miles of the boundary of any incorporated city where the valuation of such land shall be found by appraisal to exceed one hundred dollars (\$100) per acre shall, before the same be sold, be platted into lots and blocks of not more than five acres in a block, and not more than one block shall be offered for sale in one parcel.

**SECTION 5 INVESTMENT OF PERMANENT COMMON SCHOOL FUND.** The permanent common school fund of this state may be invested as authorized by law. [AMENDMENT 44, 1965 ex.s. Senate Joint Resolution No. 22, part 2, p 2817. Approved November 8, 1966.]

Amendment 1 (1894) — Art. 16 Section 5 INVESTMENT OF SCHOOL FUND — *None of the permanent school fund of this state shall*

*ever be loaned to private persons or corporations, but it may be invested in national, state, county, municipal or school district bonds.* [AMENDMENT 1, 1893 p 9 Section 1. Approved November, 1894.]

Original text — Art. 16 Section 5 INVESTMENT OF PERMANENT SCHOOL FUND — *None of the permanent school fund shall ever be loaned to private persons or corporations, but it may be invested in national, state, county or municipal bonds.*

*Funds for support of education: Art. 9 Section 3.*

**SECTION 6 INVESTMENT OF HIGHER EDUCATION PERMANENT FUNDS.** Notwithstanding the provisions of Article VIII, sections 5 and 7 and Article XII, section 9, or any other section or article of the Constitution of the state of Washington, the moneys of the permanent funds established for any of the institutions of higher education in this state may be invested as authorized by law. Without limitation, this shall include the authority to invest permanent funds held for the benefit of institutions of higher education in stocks or bonds issued by any association, company, or corporation if authorized by law. [AMENDMENT 102, 2007 Substitute House Joint Resolution No. 4215, p 3145. Approved November 6, 2007.]

**ARTICLE XVII  
TIDE LANDS**

**SECTION 1 DECLARATION OF STATE OWNERSHIP.** The state of Washington asserts its ownership to the beds and shores of all navigable waters in the state up to and including the line of ordinary high tide, in waters where the tide ebbs and flows, and up to and including the line of ordinary high water within the banks of all navigable rivers and lakes: *Provided*, that this section shall not be construed so as to debar any person from asserting his claim to vested rights in the courts of the state.

*Harbors and tide waters: Art. 15.*

**SECTION 2 DISCLAIMER OF CERTAIN LANDS.** The state of Washington disclaims all title in and claim to all tide, swamp and overflowed lands, patented by the United States: *Provided*, the same is not impeached for fraud.

**ARTICLE XVIII  
STATE SEAL**

**SECTION 1 SEAL OF THE STATE.** The seal of the State of Washington shall be, a seal encircled with the words: "The Seal of the State of Washington," with the vignette of General George Washington as the central figure, and beneath the vignette the figures "1889."

*Custody of seal: Art. 3 Section 18.  
State seal: RCW 1.20.080.*

**ARTICLE XIX  
EXEMPTIONS**

**SECTION 1 EXEMPTIONS — HOMESTEADS, ETC.** The legislature shall protect by law from forced sale a certain portion of the homestead and other property of all heads of families.

# Appendix D

who shall have complied with all the provisions of this act relating to such purchasers or grantees, and nothing in this section shall be construed to prevent prospecting by miners upon said state lands, or the removal of mineral therefrom for assaying purposes.

#### TIDE AND SHORE LANDS.

Tide and  
shore lands,  
classification.

SEC. 39. The tide and shore lands of the State of Washington, which are not reserved from sale by the constitution and laws of the state, shall be divided into two classes:

(1) Tide and shore lands of the first class, which shall comprise all tide and shore lands within or in front of the limits of any incorporated city or town, or within two miles thereof on either side, including submerged lands lying between the line of mean low tide and the inner harbor line, wherever harbor lines have been established or shall be established.

(2) All tide and shore lands in the state not included in the above class shall be known as second class tide and shore lands, and shall be leased and sold as in the manner provided in this act.

Harbor line  
commission,  
its duties.

SEC. 40. It shall be the duty of the harbor line commission provided for in this act to survey, plat, examine and appraise any tide or shore lands of the first class not heretofore platted and appraised, and may establish harbor lines in front of incorporated cities and towns where such harbor lines have not been heretofore established under the provisions of art. xv of the constitution of this state.

Laying out  
streets, etc.

SEC. 41. In surveying tide or shore lands of the first class the said harbor line commission shall have power to act, and it shall be their duty to lay out streets and alleys which shall thereby be dedicated to the public use, subject to the control of cities, with due regard to the convenience of commerce and navigation: *Provided*, That all alleys, streets, avenues, boulevards and other public thoroughfares heretofore located and platted on the tide or shore lands of the first class by boards of tide land appraisers or the board of state land commissioners are hereby validated as public highways and dedicated to the use of the public for the purposes for which they were intended, and no im-

# Appendix E

## CHAPTER CLXXVIII.

[S. B. No. 361.]

## RELATING TO THE PUBLIC LANDS OF THE STATE.

AN ACT to provide for the selection, survey, management, lease and disposition of the state's granted, tide, oyster and other lands, harbor areas, and for the confirmation and completion of the several grants to the state by the United States, creating a board of state land commissioners, defining their duties, and authorizing them to act as the commission provided for in article xv of the state constitution, and declaring an emergency.

*Be it enacted by the Legislature of the State of Washington:*

SECTION 1. That for the purpose of this act all lands belonging to and under the control of the state shall be divided into the following classes:

1. Granted lands: (a) Common school lands and lieu and indemnity lands therefor. (b) University lands and lieu and indemnity lands therefor. (c) Other educational land grants. (d) Lands granted to the State of Washington for other than educational purposes, and lieu and indemnity lands therefor. (e) All other lands, including lands acquired or to be hereafter acquired by grant, deed of sale, or gift, or operation of law.

2. Tide lands: All lands over which the tide ebbs and flows from the line of ordinary high tide to the line of mean low tide, except in front of cities where harbor lines have been established or may hereafter be established, where such tide lands shall be those lying between the line of ordinary high tide and the inner harbor line, and excepting oyster lands.

3. Shore lands: Lands bordering on the shores of navigable lakes and rivers below the line of ordinary high water and not subject to tidal flow.

4. Oyster lands: All natural oyster beds, and lands suitable for the cultivation of oysters.

5. Harbor lines and areas: Such lines and areas as are described in article xv of the constitution of the State of Washington and which have been established according to law. All of which outer harbor lines so established as aforesaid are hereby ratified and confirmed, also all such

# Appendix F

## 9446545 TACOMA, WA

Home (/) / Products (products.html) / Datums (stations.html?type=Datums) /  
9446545 TACOMA, WA ▾

Station Info ▾    Tides/Water Levels ▾    Meteorological Obs.    Phys. Oceanography

## Datums for 9446545, TACOMA WA

### Elevations on Station Datum

Station: 9446545, TACOMA, WA

Status: Accepted (Aug 6 2004)

Units: Feet

T.M.: 120

Epoch: (/datum\_options.html#NTDE) 1983-2001

Datum: STND

Datum	Value	Description
MHHW (/datum_options.html#MHHW)	12.29	Mean Higher-High Water
MHW (/datum_options.html#MHW)	11.41	Mean High Water
MTL (/datum_options.html#MTL)	7.37	Mean Tide Level
MSL (/datum_options.html#MSL)	7.35	Mean Sea Level
DTL (/datum_options.html#DTL)	6.38	Mean Diurnal Tide Level
MLW (/datum_options.html#MLW)	3.33	Mean Low Water
MLLW (/datum_options.html#MLLW)	0.47	Mean Lower-Low Water
NAVD88 (/datum_options.html)	3.07	North American Vertical Datum of 1988
STND (/datum_options.html#STND)	0.00	Station Datum
GT (/datum_options.html#GT)	11.83	Great Diurnal Range
MN (/datum_options.html#MN)	8.09	Mean Range of Tide
DHQ (/datum_options.html#DHQ)	0.88	Mean Diurnal High Water Inequality

# Appendix G

## CHAPTER 36.

[H. B. 253.]

## RELATING TO STATE LANDS AND THEIR MANAGEMENT.

AN ACT to amend section 4 of an act entitled, "An act to provide for the selection, survey, management, reclamation, lease and disposition of the state's granted school, tide, oyster and other lands, harbor areas and for the confirmation and completion of the several grants to the state by the United States; creating a board of appraisers and a board of harbor line commissioners, as required by articles 15 and 16 of the state constitution, which shall be generally known as the board of state land commissioners; defining their duties and making an appropriation therefor, and declaring an emergency. Approved March 16, 1897," and to grant to former purchasers of tide lands of the second class, their grantees and successors in interest, the prior and preference rights to purchase all lands over which the tide ebbs and flows, lying between the line of mean low tide and the line of extreme low tide, and lying in front of such tide lands of the second class heretofore sold or conveyed to such purchasers, their grantees and successors in interest by the State of Washington, and declaring an emergency.

*Be it enacted by the Legislature of the State of Washington:*

SECTION 1. That section 4 of an act entitled "An act to provide for the selection, survey, management, reclamation, lease and disposition of the state's granted, school, tide, oyster and other lands, harbor areas, and for the confirmation and completion of the several grants to the state by the United States; creating a board of appraisers and a board of harbor line commissioners, as required by articles 15 and 16 of the state constitution, which shall be generally known as the Board of State Land Commissioners; defining their duties and making an appropriation therefor, and declaring an emergency, approved March 16, 1897," be amended to read as follows, to-wit:

Sec. 4. That for the purpose of this act all lands belonging to and under the control of the state shall be divided into the following classes:

(1) *Granted Lands.* (a) Common school lands and lieu and indemnity lands therefor. (b) University lands

[Amending  
§ 6641,  
Rem.-Bal.]

and lieu and indemnity therefor. (c) Other educational land grants. (d) Lands granted to the State of Washington for other than educational purposes, and lieu and indemnity lands therefor. (e) All other lands, including lands acquired or to be hereafter acquired by grant, deed of sale, or gift, or operation of law, including arid lands.

**Tide lands.** (2) *Tide Lands.* All lands over which the tide ebbs and flows from the line of ordinary high tide to the line of extreme low tide, except in front of cities where harbor lines have been established or may hereafter be established, where such tide lands shall be those lying between the line of ordinary high tide and the inner harbor line and excepting oyster reserves.

**Shore lands.** (3) *Shore Lands.* Lands bordering on the shores of navigable lakes and rivers below the line of ordinary high water and not subject to tidal flow.

**Harbor lines.** (4) *Harbor Lines and Areas.* Such lines and areas as are described in article 15 of the constitution of the State of Washington and which have been established according to law. All of which outer harbor lines so established as aforesaid are hereby ratified and confirmed, also all such harbor lines and areas as may and shall be hereafter established.

**Preferred rights.** SEC. 2. That the prior and preference right to purchase all tide lands of the second class lying between the line of mean low tide and the line of extreme low tide in front of all tide lands of the second class heretofore sold or conveyed by the State of Washington is hereby granted for the period of ninety days from the date this act goes into effect to the purchasers, their grantees or successors in interest of any tide lands of the second class heretofore sold or conveyed by the State of Washington. Such additional tide lands may be so purchased at the rate of one dollar per lineal chain measurement to be based on the United States government meander lines bordering the said tide lands heretofore sold. Upon application and payment for such additional tide lands within said ninety days to the land commissioner of the State of Washington,

[See §§ 6756-6757, Rem.-Bal.]

deed shall be issued to the respective purchaser or purchasers therefor. If such application and payment is not made within said ninety days by the parties to whom the preference rights under this section are given then such additional tide land shall be sold as other tide lands are sold under the laws of the State of Washington.

Sec. 3. An emergency exists and this act shall take effect immediately. Emergency.

Passed the House February 14, 1911.

Passed the Senate March 2, 1911.

Approved by the Governor March 8, 1911.

## CHAPTER 37.

[H. B. 12.]

### LIMITING HOURS OF EMPLOYMENT OF FEMALES.

AN ACT to regulate and limit the hours of employment of females in any mechanical or mercantile establishment, laundry, hotel or restaurant; except establishments engaged in harvesting, packing, curing, canning or drying certain perishable articles and providing a saving clause as to such exception; to provide for its enforcement and a penalty for its violation.

*Be it enacted by the Legislature of the State of Washington:*

SECTION 1. No female shall be employed in any mechanical or mercantile establishment, laundry, hotel or restaurant in this state more than eight hours during any day. The hours of work may be so arranged as to permit the employment of females at any time so that they shall not work more than eight hours during the twenty-four: [Amending  
§ 0580,  
Rem.-Bal.]  
*Provided, however,* That the provisions of this section in relation to the hours of employment shall not apply to, nor affect, females employed in harvesting, packing, curing, canning or drying any variety of perishable fruit or vegetable, nor to females employed in canning fish or shellfish. If it shall be adjudicated that the foregoing proviso and exception shall be unconstitutional and invalid Eight hours.

# Appendix H

PIERCE COUNTY, WA  
9811200496

11-20-1998 12:10 PM  
Fee Amt: \$10.00

AFTER RECORDING RETURN TO:

DARRELL DE TIENNE  
3435 ARMY ST. SUITE 314  
SAN FRANCISCO, CA.  
94110

(FULFILLMENT)

Statutory Warranty Deed

THE GRANTOR Alvie L. and Anita J. Mickelsen, husband and wife,

for and in consideration of final fulfillment of real estate contract in hand paid, conveys and warrants to Darrell A. and Maija R. DeTienne, husband and wife, the following described real estate, situated in the County of Pierce, State of Washington:

See attachment A, listing parcels A-E and incorporated herein by this reference thereto. This Deed is given as full and final satisfaction of that particular real estate contract between the parties and supplements any and all partial fulfillment Deeds herein before delivered.

TAX PARCEL #: Parcel A: Lot 1 - 01-22-23-7-017, Lot 2 - 01-22-23-7-018, Lot 3 - 01-22-23-7-019, Lot 4 - 01-22-33-7-020; Parcel B: 01-22-23-3-114, Parcel C: 01-22-23-3-006, Parcel D: 01-22-23-3-064, Parcel E: 01-22-23-3-064  
ABBR. LEGAL DESCRIPTION: Lots 1-4 of SP8301260146; GOV'T Lot 5, sec. 23, TWP22N, R1EWM and Tideland/Oysterlands abutting.

This deed is given in final fulfillment of that certain real estate contract between the parties hereto, dated April 20, 1990, and conditioned for the conveyance of the above described property, and the covenants of warranty herein contained shall not apply to any title, interest or encumbrance arising by, through or under the purchaser in said contract, and shall not apply to any taxes, assessments or other charges levied, assessed or becoming due subsequent to the date of said contract.

Real Estate Excise Tax was paid on this sale or stamped exempt on 4/25/90,  
Rec. No. 754083

Dated this 20 day of November, 1998.  
By Alvie L. Mickelsen and Anita J. Mickelsen

STATE OF WASHINGTON )  
COUNTY OF Pierce ) ss.

On this day personally appeared before me ALVIE L. MICKELSEN to me known to be the individual decedent who executed the within and foregoing instrument, and acknowledged that she is the same as her free and voluntary act and deed, for the uses and purposes therein mentioned.

GIVEN under my hand and official seal this 20 day of November, 1998  
Notary Public in and for the state of Washington, residing at TACOMA WA

Ledena D. Mendiola My commission expires: 4-19-2001  
Print Name LEDENA D. MENDIOLA

EXCISE TAX PAID 0 None  
Rs. No. 754083 Dist. 20 98  
Pierce County

[Signature] Auth Sig

9811200496

10-

LEGAL DESCRIPTIONPARCEL A:

Lot 1 of Short Plat recorded January 26, 1983 under Auditor's  
File No. 8301260146, records of Pierce County, Washington  
Tax Parcel No. 01-22-23-7-017

Lot 2 of Short Plat recorded January 26, 1983 under Auditor's  
File No. 8301260146, records of Pierce County, Washington  
~~EXCEPT~~ that portion of Lot 2 lying East of the boundary line  
as described in decree entered June 15, 1984 in Pierce County  
Superior Court Case No. 02-2-05942-6  
Tax Parcel No. 01-22-23-7-010

Lot 3 of Short Plat recorded January 26, 1983 under Auditor's  
File No. 8301260146, records of Pierce County, Washington  
~~EXCEPT~~ that portion of Lot 3 lying East of the boundary line  
as described in decree entered June 15, 1984 in Pierce County  
Superior Court Case No. 02-2-05942-6  
Tax Parcel No. 01-22-23-7-019

Lot 4 of Short Plat recorded January 26, 1983 under Auditor's  
File No. 8301260146, records of Pierce County, Washington  
Tax Parcel No. 01-22-23-7-020

Situate in the County of Pierce, State of Washington

PARCEL B:

The East 130 feet of Government Lot 9 in Section 23, Township  
22 North, Range 1 East of W.M., in Pierce County, Washington  
~~EXCEPT~~ that portion lying East of the boundary line as  
described in decree entered June 15, 1984 in Pierce County  
Superior Court Case No. 02-2-05942-6

Tax Parcel No. 01-22-23-3-114

Situate in the County of Pierce, State of Washington

PARCEL C:

Tidelands of the second class abutting upon the East 130 feet  
of Government Lot 9 in Section 23, Township 22 North, Range 1  
East of the W.M., in Pierce County, Washington.

981120049 6

EXCEPT any portion thereof lying within the oyster land tract conveyed by the State of Washington to J. R. Buckingham by deed recorded in Book 354 of Deeds at page 83, records of Pierce County Auditor.

Tax Parcel No. 01-22-23-3-006

Situate in the County of Pierce, State of Washington.

PARCEL D:

That portion of oyster land tract conveyed by the State of Washington to J. R. Buckingham, dated May 20, 1910, recorded in Book 354 of Deeds at page 83, records of Pierce County Auditor and in Volume 9 of State Records of Tide Land Deeds at page 197, lying in front of the following described property:

The East 130 feet of Government Lot 5 in Section 23, Township 22 North, Range 1 East of the W.M., in Pierce County, Washington, the side lines of which oyster land tract conveyed herein are the lines extending at right angles from the intersection of the above described upland tract with the State of Washington boundary line shown on the plat of Tidelands, in front of Section 23, Township 22 North, Range 1 East of the W.M., filed in the office of the Commissioners of Public Lands at Olympia, Washington, on December 20, 1916.

Tax Parcel No. 01-22-23-3-064

Situate in the County of Pierce, State of Washington.

PARCEL E:

That portion of oyster land tract conveyed by the State of Washington to J. E. Buckingham, dated May 20, 1910, recorded in Book 354 of Deeds at page 83, records of Pierce County Auditor and in Volume 9 of State Records of Tide Land Deeds at page 197, lying West of land conveyed to the McKinley Avenue Friends Church, by deed dated December 16, 1966 and recorded January 11, 1967 under Pierce County Auditor's No. 2174441.

Tax Parcel No. 01-22-23-3-064

Situate in the County of Pierce, State of Washington.

0011200496

CERTIFICATE OF SERVICE BY MAIL

I certify that I mailed a copy of the foregoing RESPONDENT GARRISON'S BRIEF by first class mail on January 5, 2016, to the following counsel of record at the following addresses:

Samuel W. Plauche' (billy@plauchecarr.com)  
Jesse DeNike (jesse@plauchecarr.com)  
Robert M. Smith (robert@plaluchecarr.com)  
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Portland, OR 97201  
Of Attorneys for Respondent Coalition to Protect Puget Sound Habitat

Dated January 5, 2016

  
Betty N. Garrison  
Respondent Pro Se

FILED  
COURT OF APPEALS  
DIVISION II  
2016 JAN -5 PM 1:04  
STATE OF WASHINGTON  
BY  DEPUTY