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No. 35696-1-II

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

FUTUREWISE; EVERGREEN ISLANDS; and SKAGIT AUDUBON SOCIETY,

Petitioners,

v.

WESTERN WASHINGTON GROWTH MANAGEMENT HEARINGS BOARD, an agency of the State of Washington; and CITY OF ANACORTES,

Respondents,

and

WASHINGTON PUBLIC PORTS ASSOCIATION, et al.,

Intervenors.

OPENING BRIEF OF INTERVENOR-APPELLANT WPPA

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GLOSSARY

Anacortes	City of Anacortes
Board	Western Washington Growth Management Hearings Board
Central Board	Central Puget Sound Growth Management Hearings Board
City	City of Anacortes
County	Skagit County
Critical areas	Defined by RCW 36.70A.030 as the following areas and ecosystems: "(a) Wetlands; (b) areas with a critical recharging effect on aquifers used for potable water; (c) fish and wildlife habitat conservation areas; (d) frequently flooded areas; and (e) geologically hazardous areas."
Ecology	Washington State Department of Ecology
Everett	*Everett Shorelines Coalition v. City of Everett and Washington State Department of Ecology*, Central Puget Sound Growth Management Hearings Board Decision #02-3-0009c (January 9, 2003)
ESHB 1933	Engrossed Substitute House Bill 1933[1]:
Futurewise	Refers to Respondents Futurewise, Evergreen Islands, and Skagit Audubon Society; and Intervenors Washington State Department of Community, Trade and Economic Development, and Washington State Department Of Ecology
GMA	Growth Management Act, RCW 36.70A
SEPA	State Environmental Policy Act, RCW 43.21C
SHB	Shoreline Hearings Board

[1] Proper citation would be to the session laws, Chapter 321, Laws of 2003. But, for clarity and consistency, the term ESHB 1933 is used. This is how the legislation is referred to in the Board decision, and by the parties throughout this litigation.

Shoreline	Those areas within SMA jurisdiction, generally areas within 200 feet of the shoreline.
SMA	Shoreline Management Act, RCW 90.58
SMP	Shoreline Master Program
WPPA	Refers to Washington Public Ports Association

I. INTRODUCTION

Intervenor-Appellant Washington Public Ports Association (the "WPPA") respectfully requests that the Court reverse the Superior Court's decision and thereby uphold the Western Growth Management Hearings Board's (the "Western Board") ruling that critical areas located within the jurisdiction of the Shoreline Management Act (the "Shoreline Act" or the "SMA") be primarily managed under that act. The WPPA endorses the positions taken by the Appellant City of Anacortes ("Anacortes") in this appeal; this brief seeks to expand on the positions taken by Anacortes in their opening brief and delve into the broader context for the regulation of shoreline areas intended by ESHB 1933.

The topic of shoreline management and how to implement the SMA for a new generation has been highly controversial for over a decade. The debate has included several failed efforts to update the shoreline guidelines, an unsuccessful effort to develop legislation that would better integrate the SMA and GMA, protracted litigation over adopted shoreline guidelines, and eventual successful adoption of new shoreline guidelines.

The relationship of the SMA and the GMA has likewise been complex and controversial. The Central Growth Management Hearings Board addressed the issue in *Everett Shoreline Coalition v. City of Everett*

and Ecology, #02-3-009c (Jan. 9, 2003), by articulating a "total statutory scheme" that attempted to integrate the two acts. The legislature directly responded to the Central Board's decision in *Everett* by passing ESHB 1933, a piece of legislation designed to further separate the two statutes. The parties to the *Everett* case settled appeals of the Board's decision to the Court of Appeals after protracted and ultimately productive settlement negotiations.

The core issue presented in this appeal is how ESHB 1933 works to separate the GMA and the SMA. There is no dispute that ESHB transfers jurisdiction over shoreline areas from the GMA to the SMA. The question raised in this appeal is *when* that transfer becomes effective. Respondents in this case argued below that the transfer will not happen until the point in the future when a jurisdiction adopts an entirely new shoreline master program. The Western Board rejected this position and concluded, based on reading ESHB 1933 as a whole and on express legislative intent, that the legislature intended a more immediate transfer to the SMA. Specifically, the Western Board concluded that the transfer would apply to any critical area regulations within the shoreline area adopted and/or updated after the effective date of ESHB 1933, because these changes effected the adoption of a segment of a master program contemplated by ESHB 1933.

Although this case originally arose in the context of a dispute over a narrow landscaping provision in the Anacortes code, ESHB 1933 must be understood against the contentious and complicated backdrop surrounding the SMA and its delicate balance between shoreline use and protection. Simply stated, ESHB 1933 recognizes that the SMA is the preferred statute for protecting shoreline critical areas because it is capable of reconciling the delicate balance between both use and protection of shorelines. The Western Board's decision below recognized the legislative intent to further separate the SMA from the GMA, and thereby helped maintain the integrity of the overall framework that has resulted from such intense and often rancorous debate.

The Board's decision was well reasoned and supported by the statutory language and legislative history of ESHB 1933. The Board's decision should be upheld.

II. ASSIGNMENTS OF ERROR

A. Assignments of Error

1. The Superior Court erred in reversing and remanding to the Board.

2. The Superior Court erred when it issued a Final Judgment and Order determining that the SMA does not govern any shoreline critical area regulation amendments, unless a jurisdiction amends its entire SMP under the 2003 SMA guidelines.

B. Issues Pertaining to Assignments of Error

ESHB 1933 transferred regulatory authority over shoreline critical areas from the GMA to the SMA. Because of that transfer, do SMA requirements apply when a jurisdiction amends it shoreline critical area regulations?

III. STATEMENT OF THE CASE

The WPPA incorporates by reference Anacortes' "Statement of the Case" found in its opening brief.

IV. SUMMARY OF ARGUMENT

The fundamental question presented in this appeal is not *whether* ESHB 1933 transfers regulatory authority over shoreline critical areas from the GMA to the SMA, but rather, *when* does this transfer become effective. ESHB 1933 provides that this transfer occurs "[a]s of the date the department of ecology approves a local government's shoreline master

program adopted under applicable shoreline guidelines." Relying on the language of the amendments and on express legislative intent to transfer authority over shoreline critical areas from the GMA to the SMA, the Western Board concluded that the transfer need not occur only when an entirely "new" master program is approved. Rather, transfer could and should occur when a jurisdiction amends a segment of its master program as provided in ESHB 1933. The Board's interpretation of ESHB 1933 is entitled to deference by this Court, and is further supported by the statutory language, and express legislative intent, as well as the legislative history surrounding the SMA and the passage of ESHB 1933.

V. ARGUMENT

ESHB 1933 is fundamentally an act that retracts initial efforts to integrate the SMA and the GMA and states the legislature's unequivocal intent that the SMA be used to manage resources, including critical areas, that are in the SMA's jurisdiction. The background leading up to the enactment of ESHB and the plain language of the act makes this clear.

Appellant Anacortes, in its opening brief, correctly argues that the Western Board's decision is supported by the language of the ESHB 1933 and the express legislative purpose. Rather than repeating those arguments, WPPA herby incorporate those arguments by reference. WPPA writes separately to further argue that the Western Board's

decision is adequately supported by (1) the overall scope and legislative history of the SMA and its balance between shoreline use and protection; and (2) the specific language, express intent and legislative history of ESHB 1933.

A. Standard of Review

In reviewing an administrative decision, an appellate court stands in the same position as the superior court. *Biermann v. City of Spokane*, 90 Wn. App. 816, 821, 960 P.2d 434 (1998). Courts review agency interpretations of law de novo, but "give substantial weight to the Board interpretation of the statute that it administers." *Thurston County v. Cooper Point Assn.*, 148 Wn.2d 1, 14, 57 P.3d 1156 (2002) (deferring to Board's interpretation of term "necessary," where consistent with legislative intent). The court will "uphold an agency's interpretation [of the statutes and regulations it administers] if [the interpretation] is plausible and not contrary to legislative intent." *Pitts v. State, Dep't of Soc. & Health Servs.*, 129 Wn. App. 513, 523, 119 P.3d 896 (2005); *Seatoma Convalescent Ctr. v. Dep't of Soc. & Health Servs.*, 82 Wn. App. 495, 518, 919 P.2d 602 (1996).

In interpreting a statute, the fundamental task of the court is to give effect to the intent of the legislature. *Towle v. Washington State Department of Fish and Wildlife*, 94 Wn. App. 196, 207, 971 P.2d 591 (1999). Courts determine the meaning of a statute based on "all that the Legislature has said in the statute and related statutes which disclose

legislative intent about the provision in question." *State Dep't. of Ecology v. Cambell & Gwinn, L.L.C.,* 146 Wn.2d 1, 12, 43 P.3d 4, 11 (2002). Consequently, the Legislature's "statement of intent can be crucial to interpretation of a statute." *Spokane County Health District v. Brockett,* 120 Wn.2d 140, 151, 839 P.2d 324 (1992); *Postema v. Postema Enters., Inc.*, 118 Wn. App. 185, 198, 72 P.3d 1122 (2003) (clear statements of intent clarify statute's meaning). Where a statute has more than one reasonable meaning, the court may consider legislative history. *State Dep't of Ecology,* 146 Wn.2d at 12.

B. Statutory History of the SMA Supports The Western Board's Interpretation

1. The SMA is Specifically Designed to Manage Shoreline Activities

Most simply stated, the SMA is the proper statute to guide protection of shoreline critical areas because the SMA codifies long-standing common law that recognizes both the <u>use</u> of and <u>protection</u> of shoreline resources.

The SMA codifies the common law public trust doctrine. *See* Ralph W. Johnson et al., "The Public Trust Doctrine and Coastal Zone Management in Washington State," 67 Wash. L. Rev. 521, 524 (1992). The public trust doctrine articulates the state's interest in managing and protecting the navigable waters and shorelines on the public's behalf. *Caminiti v. Boyle*, 107 Wn.2d 662, 670, 732 P.2d 989 (1987). In

Washington State, the historical application of the doctrine has been to manage shorelines for navigational purposes:

> [T]he public has an easement in such waters for the purposes of travel, as on a public highway, which easement . . . gives to the state the right to use, regulate, and control the waters for the purposes of navigation[.]

City of New Whatcom v. Fairhaven Land Co., 24 Wash. 493, 504, 64 P. 735 (1901).[2]

The SMA codifies the common law protection of navigational uses. RCW 90.58.020 (stating policy that public rights of navigation and corollary rights should be protected by SMA). Thus, in addition to conserving and protecting shoreline resources, the SMA gives preference to water-dependent uses such as port uses. Water-dependent uses are those uses that cannot exist except on a shoreline location.[3] Wharves, docks, and piers that provide moorage for vessels are examples of water-dependent uses. *Brown v. City of Seattle*, No. 49719-7-I, 2003 WL 21001013 (Wash. Ct. App. 2003) (moorage of vessel is water-dependent use); *Hayes*, 87 Wn.2d at 295 (*citing* Ian L. McHarg, *Design with Nature* 58 (1969) (SMA's policy preference for water-dependent uses "reflect[s]

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[2] Port uses are among those uses embraced by the public trust doctrine, because port districts were established for the purposes of owning, operating, and developing facilities that enhance the public's ability to navigate, fish, and boat in public waters. RCW 53.04.010.

[3] *Hayes v. Yount*, 87 Wn.2d 280, 552 P.2d 1038 (1976).

the Legislature's careful attention to the important concept of environmentally sound land use planning"); *Skagit County v. Dep't of Ecology*, 93 Wn.2d 742, 613 P.2d 115 (1980) (mooring of barges is water-dependent use of shoreline).

The Shoreline Act's explicit protection for navigational uses and resources distinguishes it from the GMA, which applies broadly to lands under city and county jurisdiction without special attention to the special circumstances of state shorelines. This distinction is one of the reasons why the SMA, rather than the GMA, is the preferred statute for protecting shoreline critical areas.

2. The Shoreline Guidelines Reflect the Same Delicate Balance Between Use and Protection

One of the original provisions of the SMA required Ecology to promulgate guidelines for the development of shoreline master programs (SMPs) by local governments. RCW 90.58.060. In 1995 the Legislature directed Ecology to review and, if necessary, update the guidelines, which had remained essentially unchanged since 1972. Chapter 347 Washington Laws 1995, Section 304; RCW 90.58.060. Ecology determined that the original guidelines had become inadequate and initiated an effort to update the guidelines. *See AWB et al. v. Ecology*, SHB No. 00-037 (2001).

The task proved more difficult, politically and technically, than anyone imagined. After numerous focus groups and an unscheduled hiatus for the failed Land Use Study Commission GMA-SMA integration

effort, Ecology finally proposed revisions to the guidelines in 1999. *Id.* That draft rule was met with significant negative comment and was withdrawn by the agency. In response to some of the comments received on the 1999 draft, Ecology proposed a revised draft rule in the spring of 2000. Ecology adopted the rule in November 2000. The Association of Washington Business (AWB) and other groups challenged to rule before the Shorelines Hearings Board (SHB). *Id.* The SHB invalidated the rule, holding that Ecology had exceeded its statutory authority in some parts of the rule and that the agency had not followed the proper procedure in adopting the rule. *Id.* Ultimately, the parties to the case, including the Governor and the Attorney General, resolved these conflicts through mediation and negotiation. AR 00654-55.

The WPPA was not a party to the litigation over the rules and was concerned that the compromise guidelines did not sufficiently recognize the Shoreline Act's preference for water-dependent uses. The WPPA submitted comments requesting that language be included to ensure that the SMA's policies were accurately reflected in the guidelines. As a result of these efforts, language was added to the guidelines that strengthened the traditional, balanced reading of the SMA for water-dependent uses. AR 00654-55.

The multiple false starts, intensive litigation, and ultimate adoption of compromise guidelines demonstrate that the current guidelines represent a hard-fought and politically delicate compromise on the issue of shoreline resource management. The Western Board's ruling respects this

compromise by recognizing that the SMA and its guidelines, rather than the GMA, must guide regulation of critical areas in shoreline jurisdiction.

C. The Legislative History of ESHB 1933 Further Supports the Western Board's Decision

ESHB 1933 is fundamentally an act that retracts initial efforts to integrate the SMA and the GMA and states the legislature's unequivocal intent that the SMA be used to manage resources, including critical areas, that are in the SMA's jurisdiction. A brief overview of the history of regulatory reforms to the SMA reveals that the legislature abandoned previous legislative attempts to reconcile the SMA and the GMA, and specifically overruled an attempt by the Central Growth Management Hearings Board ("Central Board") to do the same. Collectively, these factors support the Western Board's conclusion that the legislature in passing ESHB 1933 did not intend to stall transfer of control to the SMA until some future date when the jurisdiction adopted an entirely new shoreline master program.

1. Previous Legislative Attempts to Reconcile SMA and GMA Were Not Completed

In 1995, the legislature passed ESHB 1724, Chapter 347 Washington Laws, 1995 which implemented the recommendations of the Governor's task force on regulatory reform. Among other things, these reforms included significant provisions that (a) integrate the Growth Management Act and SEPA, (b) significantly revise local governments' review of land use projects, (c) create a specific exclusive appeals

mechanism for land use decisions, (d) create state standards for the process used by local governments to process land use permits, and (4) authorize local governments to enter into Development Agreements.[4]

The legislation also took a preliminary step towards integrating the GMA and the SMA. This limited integration (a) made SMP policies one of a comprehensive plan's elements and SMP regulations GMA development regulations, (b) made the SMP policy section in RCW 90.58.020 a GMA goal, and (c) transferred the appeals of SMP amendments by GMA planning cities and counties from the Shoreline Hearings Board to the Growth Management Hearings Boards.

Significantly, the legislature recognized that its efforts at regulatory reform were incomplete. To address this unfinished business the legislature created the Land Use Study Commission and directed it to comprehensively examine the State's land use statutes. As part of this examination the legislature directed the Commission to integrate and consolidate the "state's land use and environmental laws into a single, manageable statute." Chapter 347 Washington Laws 1995, Section 802. Such a code would have fully integrated the SMA and GMA, as well as a myriad of other land use laws. The Commission's term expired without it

[4] ESHB 1724 is codified in numerous sections of the RCW. *See e.g.* chapter 36.70C RCW (Land Use Petition Act) and chapter 36.70B RCW (local permit process and development agreements).

accomplishing this task,[5] leaving the state of the integration of SEPA and the GMA with the preliminary steps taken in 1995.

2. The Everett Shoreline Master Plan and the Central Board's Attempt to Reconcile SMA and GMA

In 2002, the City of Everett adopted a comprehensive update to its shoreline master program. Everett designed its plans to comply with the 2000 shoreline guidelines described above. While Ecology was reviewing the plan, the SHB invalidated the 2000 guidelines. The SHB's action, however, did not reinstate the old guidelines. Because of the substantial time and money that it had invested in its update and uncertainty over when new guidelines would be in place, the City asked Ecology to approve the SMP. Ecology did so using the statute as the basis for review. Several parties appealed the SMP to the Central Board. The Everett case was the first case that presented a Growth Board with the question of the relationship of the SMA and GMA when reviewing a comprehensive SMP update.

Instead of recognizing that the 1995 regulatory reform legislation had not fully integrated the two statutes, the Central Board created what it called a "total statutory scheme"[6] which wove together the two acts.

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[5] On this point the Court may take judicial notice of the fact that there is no consolidated land use code and that no significant amendments to the SMA or GMA took place until the Legislature adopted ESHB 1933.

[6] The elaboration of this integrated scheme takes 14 pages of the Central Board's decision. *See ESC v. City of Everett*, pages 13-27.

Based on this "scheme" the Central Board made the following significant rulings:

- all shorelines of statewide significance constitute critical areas under the GMA (under this ruling even a fully developed port facility would be considered a critical area because of its location in a shoreline of statewide significance);
- best available science applied to "all shoreline master program element provisions and development regulations" that applied to shorelines of statewide significance;
- shoreline master programs must "be guided substantively by the protect, preserve, enhance and restore goals of RCW 36.70A.202(8), (10) and (14);"[7]
- the primary and paramount policy mandate of the SMA "within the context of the goals and overall growth management structure . . . is one of shoreline preservation, protection, enhancement, and restoration;"[8]

To reach these conclusions the Board rejected Ecology's, the City's, and the WPPA's arguments based on longstanding case law interpreting the SMA, including case law that recognized the SMA's priority for water-dependent uses. *ESC v. Everett*, at 13.

3. ESHB 1933 Overruled Everett

The legislature responded immediately to the Central Board's ruling in *Everett* by passing ESHB 1933.[9] ESHB 1933 reversed each of the Central Board's major rulings. Specifically, the legislation states that

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[7] *Everett Shoreline Coalition*, at 26.
[8] *Id.* at 22.
[9] The Board issued its Final Decision and Order on January 3, 2003. The legislature passed ESHB 1933 in April 2003.

- Shorelines of statewide significance are not GMA critical areas unless a specific part of the shoreline is designated as such.
- GMA goals are not to be used in reviewing SMPs.
- The GMA goals are not listed in priority order.
- With limited exceptions, the SMA is the sole basis for Ecology's and the Board's review of shoreline master programs
- That the requirements of chapter 36.70A.172 do not apply to SMPs.

The legislature also specifically corrected the Central Board's approach to SMA case law and stated its intent that the shoreline management act "be read, interpreted, applied, and implemented as a whole consistent with decisions of the shoreline hearings board and Washington courts prior to the central Puget Sound growth management hearings board in *Everett Shorelines Coalition v. City of Everett and Washington State Department of Ecology."* In short, the legislature undid the Central Board's "total statutory scheme." Moreover, the Board clarified and made explicit the essential separateness of each statute.

ESHB 1933 must be read against this backdrop of the legislature's strong disagreement with the Central Board's substantive rulings, such as the elevation of environmental protection as the paramount goal of the SMA and the GMA, and the fact that these rulings essentially assumed the legislative role. *See Viking Props., Inc. v. Holm*, 155 Wn.2d 112, 127, 118

P.3d 322 (2005) (elevating one GMA goal over another "is a legislative prerogative"). Likewise, the Western Board's ruling, which was informed by the above account of ESHB 1933's legislative history,[10] properly understood that the legislature intended to use the SMA and its guidelines for future regulation of shoreline critical areas and wanted to make sure that the boards were clear on this intent.

D. The Express Statutory Language and Intent of ESHB 1933 Supports the Western Board's Decision

The Western Board's interpretation is entirely consistent the history and events leading up to the passage of ESHB 1933. Moreover, the Western Board's conclusion that the amendment of critical area ordinances within the shoreline area effects a transfer of jurisdiction to the SMA is supported by the express language of ESHB 1933.[11] ESHB 1933 provides that critical areas within the shorelines of the state will be governed by the SMA "[a]s of the date the department of ecology approves a local government's shoreline master program adopted under applicable shoreline guidelines." RCW 36.70A.480(3)(a). Rather than

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[10] *See* AR 000647-000665.

[11] While the board concluded that the timing of the transfer was "ambiguous," it construed the meaning of that provision based on "legislative intent" as evidenced by the language of the act and reading the provisions of the act as a whole. *See* Final Decision and Order at 26-30. Use of these considerations is within the "plain meaning rule" as articulated by the Washington Supreme Court. *See State Dep't. of Ecology v. Cambell & Gwinn, L.L.C.,* 43 P.3d 4, 11 (2002).

reading this provision in isolation, the Western Board considered ESHB 1933's other provisions allowing Ecology to approve a segment of a master program. *See* RCW 90.58.090(4) (allowing Ecology to adopt a segment of a master program provided it meet certain protection standards).

In addition, the Western Board considered the express legislative intent: "[t]he Legislature intends that all critical areas within the jurisdiction of the shoreline management act shall be governed by the shoreline management act." ESHB 1933, Ch. 321 Washington Laws, 2003. Section (1)(3). In considering these indicators of legislative intent, the Board properly concluded that amendment of a critical area ordinance within the shoreline area transferred jurisdiction to the SMA. *See State Dep't. of Ecology,* 146 Wn.2d at 12 (courts determine meaning of statute based on "all that the Legislature has said in the statute and related statutes which disclose legislative intent about the provision in question.").

The Western Board's interpretation does not leave a "protection gap" as the Respondents argued below. Section 3(4) specifies that the master program must provide "a level of protection of critical areas at least equal to that provided by the local government's critical areas ordinances adopted and thereafter amended pursuant to RCW 36.70A.060(2)." The meaning is straightforward. If the local government has adopted a critical

areas ordinance that applies to a shoreline resource, the SMP or SMP segment must be as protective as that adopted ordinance. If the local government has adopted and amended its ordinance, the SMP or SMP segment must be as protective as the amended ordinance.

Thus, ESHB 1933's amendments to the SMA unambiguously implement the legislature's intent that critical areas in shorelines be managed under the SMA. There is no indication, in the language of ESHB 1933 or its legislative history suggesting that this management be held in abeyance pending the approval of an entirely new shoreline master program. By contrast, ESHB 1933 expressly allows for the approval of segments of a shoreline master program. Collectively, ESHB 1933 evinces clear intent to make any updates or additions to critical area ordinances with the shoreline area subject to the SMA. Moreover, because the subject matter of ESHB 1933 is within the Western Board's area of expertise, and its interpretation is plausible and not contrary to legislative intent, the Court should uphold the Board's interpretation. *Pitts v. State, Dep't of Soc. & Health Servs.*, 129 Wn. App. 513, 523, 119 P.3d 896 (2005).

VI. CONCLUSION

The Shoreline Act recognizes that the shorelines of the state are a scarce resource requiring careful management. The statutory and

regulatory framework for accomplishing this careful management is equally fragile, the product of painstaking efforts of compromise. The WPPA respectfully requests the Court to honor the fragile balance achieved through the concerted efforts to adopt the current version of the Shoreline Guidelines by upholding the Western Board's ruling that local governments should use the SMA and its guidelines when they adopt new measures to protect shoreline critical areas.

RESPECTFULLY SUBMITTED this 13th day of April, 2007.

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DEPUTY

Declaration of Service

I declare under penalty of perjury under the laws of the State of Washington that the following is true and correct:

That I am a citizen of the United States, a resident of the State of Washington, and over the age of eighteen years, not a party to the above-entitled action and competent to be a witness therein;

That on the 13th day of April, I caused the following document to be served on the persons and organizations listed below in the manner and on the date shown:

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I certify under penalty of perjury pursuant to the laws of the State of Washington that the foregoing is true and correct.

SIGNED on April 13, 2007 at Seattle, Washington.

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