

No. 93562-9

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

SKY ALLPHIN, ABC HOLDINGS, INC., and CHEM-SAFE
ENVIRONMENTAL, INC.,

Petitioners,

v.

KITTITAS COUNTY, a municipal corporation and
political subdivision of the State of Washington,

Respondents.

PETITIONER'S ANSWER TO
STATE OF WASHINGTON AMICUS BRIEF

POWERS & THERRIEN, P.S.
Leslie A. Powers, WSBA No. 06103
3502 Tieton Drive
Yakima, WA 98902
(509) 453-8906
Attorneys for Appellant

TABLE OF CONTENTS

I.	Introduction.....	1
II.	Statement of Case.....	2
III.	Issues for Review.....	2
IV.	Analysis.....	3
	A. There is No Controversy for Purposes of RCW 42.56.290.....	3
	B. No Common Interest.....	6
	C. The County Waived the Privilege as Extended by the Common Interest Rule by Misusing Exchanged Information and by Failing to Take Any Action to Maintain Secrecy.....	8
	D. The Records at Issue are Not Held by the Party making the Exemption Claim.....	14
V.	Conclusions	15

TABLE OF AUTHORITIES

Washington Cases

Dawson v. Daly
120 Wn.2d 782, 845 P.2d 995 (1993).....5

Soter v. Cowles Pub. Co.
162 Wn.2d 716, 174 P.3d 60 (2007).....5, 13

Other Cases

Avocent Redmond Corp. v. Rose Electronics, Inc.
516 F.Supp.2d 1199 (W.D. Wash.).....14

Bevill
805 F.2d at 126.....14

In re Subpoenas Duces Tecum, 738 F.2d 1367, 1372 (D.C. Cir.
1984)...10, 11, 12

Rockwell Int'l Corp. v. U.S. Dep't. of Justice
235 F.3d 598, 605, D.C. Cir. 2001).....9

U.S. v. AT & T.
642 F.2d 1285, 1299 (D.C. Cir. 1980).....9, 15

U.S. v. Deloitte, LLP
610 F.3d. 129, 140, (D.C. Cir. 2010).....9, 10, 12, 13

U.S. v. Williams Cos.
562 F.3d 387, 394, (D.C. Cir. 2009).....11

Rules

RALJ 6.1.....4

RALJ 6.2.....4

RALJ 9.1(a),(b)	5
RALJ 9.1(h)	9
RAP 2.3(d)	5

Washington Statutes

RCW	
42.56.290.....	<i>passim</i>

Regulations

WAC 44.14.010(3)	17
WAC 44.14.04004(4)(b)	17
WAC 173-303-310.....	6, 10
WAC 173-340.....	2
WAC 173-350-360.....	10, 16

County Code

KCC 1.10.021(2)	4
KCC 18.02.030.....	2
KCC 18.02.030(6)(f)	4
KCC 18.02.040.....	6

Ordinances

Kittitas County Solid Waste Ordinance No. 1.....	10
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Websites

DOE <http://www.ecy.wa.gov>, 'Document Repository for Chem Safe
Environmental, Inc.'6

I. INTRODUCTION

The AGO Amicus Brief highlights the tension and conflict between the AGO's role as counsel to the various agencies, here the DOE, and its statutory role as the custodian, administrator, enforcer, and administrative law judge over the PRA, the drafter of the PRA's regulation, and the preparer of the manual governing compliance with requests for information under the PRA. Here, we see the AGO advocating a reading of the exemptions covered by RCW 42.56.290 that broadly protect any interagency documents with a shared litigation goal arising when litigation is anticipated or commences. The anticipation of litigation impresses an exemption on records that were otherwise part of ongoing ordinary technical assistance and collaboration between agencies. Under this analysis, there would apparently be at all times a dormant common interest among governmental agencies that is instantiated by the anticipation of litigation. No actual agreement to maintain confidentiality would be necessary. The lack of express statutory division of labor would compel a conclusion that ordinary assistance would become protected by the exemption once litigation against one or the other is anticipated. The AGO reasons, "Without this privilege to protect their communications, government agencies would be disadvantaged in litigation." See discussion pp. 2-4. Based upon this reasoning and in reliance on federal

authority, the AGO Amicus Brief concludes that sharing of information among cooperative agencies in which one or more anticipate litigation does not waive the work product privilege as incorporated in RCW 43.56.290 where the cooperating parties are not adversaries with one another. The AGO further urges that the waiver is impressed on the subject records and continues when delivered to third parties by the receiving agency.

II. STATEMENT OF CASE

Petitioner adopts the statement of the case set forth on pp. 1-7 of Petitioner's Supplemental Brief.

III. ISSUES FOR REVIEW

The issues raised in this brief are the following.

A. Does a notice of violation and an administrative appeal therefrom constitute a controversy for purposes of RCW 42.56.290 where there is no 'pretrial discovery' or adversarial relationship of the kind found in civil or criminal litigation?

B. Is there a common interest where one governmental agency, the Kittitas County Public Health District ("KCPHD"), is defending a NOVA and its order issued under KCC 18.02.030 and another agency, the Washington Department of Ecology acting through its Model Toxic Control Act ("MTCA") division under Chapter 173-340, WAC, is

investigating the possible release of toxic materials on the same site based on allegations of KCPHD?

C. Did the County waive the work product privilege by initiating the MTCA investigation and sharing documents involved in the NOVA and its appeal with the DOE MTCA Division or by failing to perfect an agreement or arrangement under which the DOE agreed or was otherwise required to maintain confidentiality to support a reasonable expectation thereof?

D. Is the privilege lost when the DOE, the recipient of the County's records, voluntarily turned over the documents in response to Petitioner's PRA request because the records become DOE documents, the DOE is not a party to a controversy, and the DOE has no work product privilege with respect thereto?

IV. ANALYSIS

A. There is No Controversy for Purposes of RCW 42.56.290. Since the County hearing examiner process makes no provision for discovery, the duty to provide the hearing examiner with 'the relevant documents' and the hearing examiner and the appellant with a staff report on the issue must be seen as a substitute for discovery. Given the absence of any carve outs for the documentary requirement must be complete. This is consistent with the treatment of evidence. Relevance is

the only test. Hearsay evidence is admissible. See KCC 1.10.021(2). Thus, the Civil Rules governing pretrial discovery and Evidentiary Rules governing admissibility are not applicable to hearings before hearing examiners. This is consistent with the notion that the hearing examiner process takes the place of hearings before the County Commissioners. It is also consistent with the notion that a party need not be represented by counsel. Hearing examiner procedures while having some formality cannot be seen as adversary proceedings. After all, a discovery by the County that it had made an error cannot be simply disregarded even if the appellant and the hearing examiner are not aware of the error. The hearing examiner process must be seen as an attempt to ensure and maintain proper administration of the rules enforced by local officials. They are fact finding procedures within those rules. The legality of the rules cannot be questioned. Constitutional considerations cannot be raised. In short, the process is not an adversarial process.

Appeal from a hearing examiner is to the Superior Court and is conducted under the Rules for Appeal of Decisions of Courts of Limited Jurisdiction. See KCC 18.02.030(6)(f). Such an appeal is on closed record from the hearing examiner. See RALJ 6.1. Only with the consent of the Superior Court may the County or the Appellant supplement the record. See RALJ 6.2. The Superior Court is charged with a

determination based on the record whether an error of law has occurred or whether a finding of a material fact is not supported by substantial evidence. See RALJ 9.1(a), (b). The decision of the Superior Court may be submitted by the County or appellant for discretionary review by the Court of Appeals under RALJ 9.1(h) and RAP 2.3(d). The appeal process to the Superior Court thus does not give rise to a controversy that could be subject to the pretrial Civil Rules or to claims of privilege. The underlying record was not limited by those considerations. The closed record appeal to Superior Court cannot independently engraft same where they have no application in the matter.

To be a controversy, the matter must involve an actual threat or reasonable anticipation of litigation involving the agency as a party. A controversy is defined as an adversarial proceeding in a court of law, a civil action or suit, either at law or in equity, a justiciable dispute. *Dawson*, p. 791 adopted in *Soter*, p. 732. What is absent here is the adversarial element of litigation as well as the indicia and need for pretrial discovery or the need to protect certain disclosures through recognized privileges. Accordingly, matters arising from administrative appeals ought not be seen to qualify as controversies and the exemptions relating to controversies ought not be seen as available in the context of administrative appeals. This is not a situation like *Dawson* where there is

discovery and there are parallel if not coextensive rules of privilege in criminal litigation. Here, there is simply no discovery.

B. No Common Interest. The problem with this position is evident from a review of the sealed documents. Items 1 and 7 cover or deal with a document drafted by Mr. Peck of the DOE MTCA Division for his superior's signature (the "Peck Memo") that was addressed to be addressed to Petitioner as its sampling requirement sent in final form on August 2, 2011. See Website, DOE <http://www.ecy.wa.gov>, 'Document Repository for Chem Safe Environmental, Inc.' (the "Website"), listing the August 2, 2011 sampling requirement; CP 1499. The DOE MTCA Division ("MTCA") administers identification and remediation of toxic waste releases into the environment and the threat thereof. MTCA relied on information supplied to it by the County. See Website, 'Site Description'. It sent its early notice letters to Petitioner's owners on June 22, 2011. The Peck Memo confirms that the occurrence of an actual release was still speculative on July 18, 2011. The sampling order issued under MTCA's independent authority on information it received from the County and information it independently discovered. The order was not dependent on the NOVA's existence or the fact of the administrative appeal. Compare WAC 173-303-310 with KCC 18.02.040. It is highly likely that the correspondence referenced in items 1 and 7, and for that

matter the items occurring before 2012 on the first privilege log related to the MTCA actions and not to any ‘cooperation’ in the administrative appeal or enforcement of the NOVA. Mr. Peck’s first record involvement in the administrative appeal the filing of his declaration on June 14, 2012 as a quasi-expert witness for the County in the administrative appeal and specifically a motion for reconsideration therefrom. The correspondence between Becker and Peck on July 18, 2011 did not relate to the NOVA or its enforcement. CP Rather it related to a potential MTCA order. CP 1499. The two agencies, State and County were not conjoined.

As Mr. Peck repeatedly noted and pointedly noted in the July 18, 2011 draft, no evidence had been presented that there was in fact any release of toxic materials at the site, the sine qua non for a remediation order requiring invasive testing. CP 1499. The remediation for ‘threat of release’ is to remove the threat, not invasively to test. Peck also rejected the County’s notion that Petitioner’s site could be closed under MRW protocols because MRW protocols were inapplicable to a DOE permitted regulated dangerous waste transporter with a transfer facility. Thus, Peck confirmed in the document he circulated in draft exactly what Petitioner had unsuccessfully argued to the HE, that it was duly permitted to handle both regulated dangerous waste and moderate risk waste and that the NOVA should accordingly have been withdrawn.

While the circulated drafts of Peck's declaration submitted by the County in defense of the NOVA exchanged between Becker or Lowe and Peck in 2012 could reasonably be considered work product and be entitled to an exemption on that basis, it is questionable that the County's delivery of documents to MTCA and Mr. Peck's later involvement in connection therewith could be seen as part of that same litigation. Mr. Peck was not involved in the administrative appeal of the NOVA until June 14, 2012, and then as a declarant witness. CP 03013. Prior thereto, he acted as a representative of the MTCA division. Involvement of a representative of an agency in its own investigation of a site and a year later as a witness in the administrative appeal, without more cannot be seen to establish a coordinate interest of the DOE, generally, in the County administrative appeal.

C. The County Waived the Privilege as Extended by the Common Interest Rule by Misusing Exchanged Information and by Failing to Take Any Action to Maintain Secrecy. The central argument of the AGO Amicus Brief that a disclosure of work product, here the County to the DOE, does not trigger a waiver of the exemption from disclosure to a PRA request if the third party is not an adversary misstates the defense to waiver. Properly stated, a disclosure of work product to a third party, unlike the disclosure of attorney client privileged material to a

third party does not automatically waive the work product privilege as applicable through RCW 42.56.290. Disclosing work product to a third party can waive protection if such disclosure under the circumstances, is inconsistent with the maintenance of secrecy from the disclosing party's adversary. See *U.S. v. AT & T.*, 642 F.2d 1285, 1299 (D.C. Cir. 1980); *Rockwell Int'l Corp. v. U.S. Dep't. of Justice*, 235 F.3d 598, 605, D.C. Cir. 2001); *U.S. v. Deloitte, LLP*, 610 F.3d. 129, 140, (D.C. Cir. 2010). Further inquiry is required. That inquiry here leads inevitably to the conclusion that the disclosure by the County to the DOE in fact waived the privilege as it applied to the administrative appeal of the NOVA.

For the disclosure to be protected, there must be evidence that there was an intent to maintain confidentiality. A two part factually intensive test applies to the 'maintenance of secrecy' standard: First, the Court must consider whether the disclosing party has engaged in self interested selective disclosure revealing its work product to some adversaries but not others. Second, the Court must examine whether the disclosing party had a reasonable basis for believing that the recipient would keep the disclosed material confidential. *Deloitte*, p. 141, 142.

Where there are common interests in the same litigation, there may be a basis for finding that coordinate parties had the requisite intent to

maintain confidentiality.¹ *In re Subpoenas Duces Tecum*, 738 F.2d 1367, 1372 (D.C. Cir. 1984). *Deloitte*, p. 142, cautions, that here the coordinate interest must be in the same litigation. Thus, it observed that the interest of Dow in a tax issue involving possible litigation in connection with an acquisition candidate was not the same as Deloitte, its accountant, in preparing financial statements for third party disclosures.

¹ While the DOE may have articulated some precatory desire to help local agencies engaged in activities over which the DOE had ultimate administrative authority, it had no duty under the applicable regulation to act as a litigation assistant. DOE Solid Waste Division adopted the regulations governing the County's administration and enforcement of duties under the Kittitas County Solid Waste Ordinance. See Chapter 173-350, WAC. The duty was administered through the DOE's Solid Waste Division, not through its Dangerous Waste Division which administered the transport and transfer facilities engaged in transporting regulated dangerous waste and receiving, temporarily storing and loading same, that regulated Petitioner and for whom Mr. Granberg worked. See Chapter 173-303, WAC. Mr. Granberg is not the authority on or authorized to speak about the requirements of an MRW facility, Mr. Bleeker and his staff members were. Why then was the February 4-7th, 2011 email chain between Mr. Granberg and Ms. Becker, the Kittitas County Civil Deputy who was overseeing the NOVA matter? The email chain provided a questionable opinion basis by an unqualified DOE representative for Ms. Becker to continue to urge the enforcement of the NOVA after discovering that Petitioner had requisite DOE permits. Mr. Granberg's statement that Petitioner was subject to MRW compliance or could be is, of course, in conflict with WAC 173-350-360, and particularly (1)(b) thereof. and the Kittitas County Solid Waste Ordinance No. 1. Petitioner simply could not hold both permits. As found by the hearing examiner, cited in the County's supplemental brief, an MRW facility is not allowed to accept regulated dangerous waste. Statement of Law 4, 10, 13, CP 01278. In fact, inconsistent with the NOVA's recited basis, Ms. Becker with Mr. Granberg's assistance added a second count, in the form of Mr. Rivard's Declaration in Support of the NOVA, March 8, 2011, based on a misreading of a photograph of a drum label, that Petitioner had P016, a regulated dangerous waste, at its facility, a violation of the Kittitas County Solid Waste Ordinance No. 1, the practical basis for the hearing examiner's upholding of the NOVA. Statement of Law 13, CP 01278. Parenthetically, the hearing examiner found that there was no direct reported evidence of a toxic release. Finding of Fact 23, CP 01276. Under the administrative appeal protocols, the County should have corrected its error, not compounded it. The County had a duty to act properly under its regulations. Certainly RCW 42.56.290 cannot be properly invoked to suppress evidence of misbehavior that the County and the DOE had independent duties to correct.

Alternatively, there must be a showing of actual intent of the disclosing party to maintain confidentiality of the records. Deloitte observes that “a reasonable expectation of confidentiality may be rooted in a confidentiality agreement or similar arrangement between the disclosing party and the recipient”. There, the Court further states that “a confidentiality agreement must be sufficiently strong and sufficiently unqualified to avoid waiver”. The Court then analyzes the requirements under *In re Subpoenas at pp. 1372-4*, and *U.S. v. Williams Cos.*, 562 F.3d 387, 394, (D.C. Cir. 2009). There, the Courts found that an agreement to give notice of a third party claim for the records under the FOIA or an assurance of best efforts were insufficient to demonstrate intent to maintain confidentiality. However, in the facts before the Court in *Deloitte*, p. 142, the duty of confidentiality of a certified public accountant under AICPA Code of Prof. Stand. Sec. 301.01 sufficiently demonstrated intent of the parties to preserve confidentiality in the hands of the third party certified public accountant.

What is clear here is that the County waived all of the records it exchanged with the DOE in connection with the administrative appeal of the NOVA. As the DOE recites, the County conducted all or part of the initial investigation and provided ‘information’ to MTCA thereon. See Webpage. Initially it waived the confidentiality of these records by

delivering them or information contained or referred to therein and continuing to deliver them in connection with the MTCA investigation of the site. The MTCA involvement was helpful to the County because a MTCA order of remediation would protect the order of abatement contained in the NOVA. That disclosure was voluntary, had nothing to do with the precise 'litigation', the administrative appeal of the NOVA, and was designed to provide a benefit to the disclosing party, namely a means of protecting the County against claims that the NOVA unlawfully caused damage to Petitioner by illegally closing Petitioner's transfer facility.

Here, the County is in the same position as Tesoro making disclosures to the SEC under an agreement lessening its penalties that did not fully protect the disclosures from further disclosures to third parties. It is a use of the information in a manner inconsistent with the purpose of the work product rule. It constitutes a type of selective disclosure. It automatically vitiates the work product protection. *Deloitte*, pp. 141, 142; *In re Subpoenas*, p. 1367.

In addition, there is no evidence of any contemporaneous actions on the part of the County to maintain the secrecy of its exchanges with the DOE. Both Ms. Becker and Ms. Lowe after her denied that the County and the DOE were coordinate; the DOE through its counsel has consistently maintained that it was acting for itself, not the County. CP

1499, 1500, 2445, RP 18:20-19:1; see also discussion in Petitioner's brief in opposition to the acceptance of the AGO's Amicus Brief dated February 10, 2017. Both the County and the DOE have confirmed the absence of any agreement to maintain confidentiality as to their exchanges, let alone an agreement meeting the conditions imposed by *Deloitte*. There was no duty of the type imposed on certified public accountants by AICPA Prof. Stand. Sec. 301.01. There was neither a request for or promise of confidentiality.

A related failure of the AGO Amicus Brief's argument is that the exemption attaches without regard to any intent of the parties. Clearly, in *Soter* there was an understanding that the investigator's work was for the benefit of the school district and subject to the direction of its counsel. Here, one of the parties, the DOE, through its counsel denied that there was a confidentiality agreement or understanding regarding the retention of records in confidence. Moreover, under the advice of the AGO, Mr. Johnson, the DOE's PRA officer, turned over the records after Ms. Lowe, the County's civil deputy had reviewed them and asked that they be retained under the work product exemption under RCW 42.56.290. Obviously, the AGO that reviewed the documents and the PRA request for the DOE did not consider any of the documents contained on the disc that it provided to Petitioner as exempt or that it had any agreement with Ms.

Lowe to treat them as work product. When Ms. Lowe filed a TRO to claw back a portion of the documents released by the DOE, the DOE did not cooperate and was an adverse party to the County in the TRO hearings. CP 1499, 1500, 2445, RP 18:20-19:1. The common interest doctrine simply cannot be seen to apply when one of the parties who shared confidences denies that there was any agreement to retain the records in confidence and voluntarily shares the documents in question with the opposing party in the controversy. *Avicent*, pp. 1203, 1204; *Bevill*, p. 126. The AGO Amicus Brief advocates an ‘automatic’ understanding that intervenes to protect all records and does not arise from the agreement or conduct of the governmental parties. That position does not reflect the requirement that common interest protection of confidentiality be supported by agreement and behavior.

D. The Records at Issue are Not Held by the Party Making the Exemption Claim. RCW 42.56.290 is not consistent with the application of the common interest doctrine. It exempts from an agency’s duty to provide a requester with records relevant to a controversy in which the agency is a party and which would be privileged under the pretrial civil rules. The agency here is the County, not the DOE. Even if the records in the hands of the DOE were County work product, they are not the DOE’s work product. Further, the DOE is not a party to the

controversy. Absent the party relationship, the DOE cannot resist the PRA request on the basis of the exemption because the records are not its work product and the County cannot resist because the DOE is not a party to its controversy. See *AT&T v. U.S.*, p. 1297, requiring the County to become an intervenor in the US case to protect its work product. Absent an arrangement or agreement to retain confidentiality such as would be the case of the records collected by an investigator working for counsel in the controversy, where does the County have a right to enforce confidentiality of records that are not its own records. The Court of Appeals made a critical determination that certain records, there the ‘smoking gun memo to the extent provided to the County by the DOE in the copy of the disc it provided to Petitioner, is not a County record. Why then are records in the DOE files entitled to protection as ‘county records’ unless a further action is undertaken, entering an agreement or arrangement providing for the documents confidentiality as work product.

V. CONCLUSIONS

Notwithstanding the position urged in the AGO Amicus Brief, there is nothing coordinate about the activities of two different government agencies even if their performance is statutorily intertwined unless they are parties to a controversy or one is working as the agent of

the other.² The County misused and vitiated any claim for the exemption by voluntarily providing records and information to the MTCA on the County's investigation, i.e. the NOVA and events surrounding same. The County made no reference to any restriction on the DOE's use of records or correspondence. There was no assurance by the DOE that it would not pass on the records or correspondence in compliance with a future PRA request. In short, the records became the DOE's records. Since it was not subject to any controversy, it could and did provide them. Applying the common interest doctrine without the arrangement or agreement requirements casts a work product exemption over not only the agency responding to the requester but all other agencies with which the first agency may have corresponded on any of the issues in the controversy when there is anticipation it might become a party.

Because the common interest doctrine is a defense to waiver, it is not available to the other agencies as an exemption. It can only be asserted by the first agency because it is not an exemption recognized as to the second agency. The position of the AGO Amicus Brief states but then

² Here, parenthetically, a fair reading of Chapter 173-350, WAC makes local government the agent of the DOE to administer on the ground the policies the DOE adopted and articulated therein. WAC 173-350-360 is a clear example. It allows local government administration but the policy rules and requirements placed on local government are set forth in that regulation and overseen by the DOE's solid waste division personnel. How then does the DOE's MTCA division become the acting agent of the County, a position that underlies the arguments in the County's supplemental brief and the AGO's Amicus Brief.

ignores the requirement that the agency itself be entitled to the exemption which makes the records in question the property of the agency holding the exemption.

Making the common interest doctrine virtually automatic when one or another agency parties 'reasonably anticipates' litigation. By eliminating the agreement or understanding and the behavior requirements, it supports a conservative rather than liberal interpretation of the duties of disclosure encouraged under the PRA.

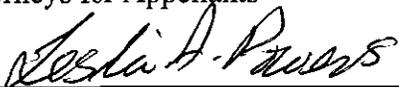
The position of the AGO Amicus Brief must be rejected. It conflicts the position articulated by the AGO in WAC 44.14.010(3) setting forth the purpose of the PRA and WAC 44.14.04004(4)(b) dealing with redaction compliant with that purpose. It supports the view of common interest adopted by the Trial Court and its obvious rejection of the principles of WAC 44.14.04004(4)(b) dealing with redaction and the content requirement of work product. It rejects the common law requirement of understanding or agreement among the agencies as to confidentiality. It also waters down the notion that there must be a real controversy that invokes the discovery rules or a patent threat of one that applies to the party agencies. In short, it creates a hybrid exemption that is not set forth in the PRA and not included by reference therein. Notwithstanding a statement of the County's supplemental brief to the

contrary, it does make the common interest doctrine an automatic bar to waiver and by doing so creates an exemption not recognized under the PRA.

Respectfully submitted this 1st day of March, 2017.

POWERS & THERRIEN, P.S.

Attorneys for Appellants

By: 
Leslie A. Powers, WSBA # 06103

CERTIFICATE OF SERVICE

I certify under penalty of perjury under the laws of the State of Washington, that on this day I served a true copy of this document on the following, properly addressed as follows:

NEIL CAULKINS
Deputy Prosecuting Attorney
Kittitas County
205 West Fifth, Room 213
Ellensburg, WA 98926

by:
 US First-Class Mail, postage
prepaid
 Electronic Mail:
neil.caulkins@co.kittitas.wa.us

KENNETH W. HARPER
QUINN N. PLANT
Menke Jackson Beyer, LLP
807 North 39th Avenue
Yakima, WA 98902

by:
 US First-Class Mail, postage
prepaid
 Electronic Mail:
kharper@mjbe.com
qplant@mjbe.com

NICHOLAS J. LOFING
Davis Arneil Law Firm LLP
PO Box 2136
Wenatchee, WA 98807

by:
 US First-Class Mail, postage
prepaid
 Electronic Mail:
nick@dadkp.com

TRAVIS BURNS
LEE OVERTON
Attorney General's Office
PO Box 40117
Olympia, WA 98504-0117

by:
 US First-Class Mail, postage
prepaid
 Electronic Mail:
travisb@atg.wa.gov
lee.overton@atg.wa.gov

Supreme Court
PO Box 40929
Olympia, WA 98504-0929

by:
 Electronic Mail:
supreme@courts.wa.gov



03/01/2017

Signed

Date