

68065-0

68065-0

No. 68065-0-I

COURT OF APPEALS  
DIVISION I  
OF THE STATE OF WASHINGTON

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Northwest Territorial Mint, *Appellant*

v.

State of Washington, Department of Revenue, *Appellee*

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OPENING BRIEF OF APPELLANT

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FILED  
COURT OF APPEALS DIV I  
STATE OF WASHINGTON  
2012 OCT 24 PM 4:25

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## **A. Introduction**

Northwest Territorial Mint fully complied with Administrative Procedure Act (APA) jurisdictional requirements by filing a timely appeal with King County Superior Court and obtaining personal jurisdiction over the opposing party, the Department of Revenue (DOR), serving both it and the Attorney General.

The APA also includes a nonjurisdictional procedural requirement to serve a nonparty, the Board of Tax Appeals (Board). This requirement can be satisfied with substantial compliance. The Mint's service of the Board, while after the statutory deadline, met that standard. Though delayed, the Mint's service enabled the Board to file the administrative record well before the Court's deadline, thus satisfying the statutory purpose for requiring service on the Board. The Mint met the APA's jurisdictional and procedural requirements to perfect its appeal. The Mint asks this Court to reverse the Superior Court's order dismissing the petition for judicial review.

**B. Assignments of Error**

1. The Superior Court erred in ruling that the requirement to serve a named entity who is not a party, in this case the Board, must be strictly complied with. COL no. 1, HR 147
2. The Superior Court erred in ruling that, due to the Mint's delayed filing, it had no jurisdiction to review the Board's final order. COL no. 6, HR 148.

**C. Issues Pertaining to Assignments of Error**

1. Is the APA requirement to serve an entity that is not a party to the proceeding jurisdictional?
2. Did the Superior Court have jurisdiction to hear the Mint's petition for judicial review?
3. Can the APA's requirement to serve the Board be satisfied with substantial compliance where the Board is not a party to the appeal?
4. Did the Mint satisfy the purpose of the statutory requirement to serve the Board when the agency served the Board after the statutory deadline but still within time for the Board to submit the record on review 10 days prior to the Court's deadline?

5. Did the Mint substantially comply with the statutory requirement to serve the Board?

**D. Statement of the Case.**

The Board of Tax Appeals denied the Mint's appeal of DOR's petition decision on May 27, 2011. CP 61-77. The Mint timely filed an appeal in King County Superior Court on June 24, 2011, CP 1, after having served DOR and the Attorney General on June 20<sup>th</sup>, 2011. CP 43. Following the Mint's timely filing and service upon the Department the Court issued a scheduling order requiring the Board to submit the administrative record to the Superior Court by August 26<sup>th</sup>, 2011. CP 112, 113.

The Mint served the Board more than 30 days after the Board's order but well before the Court's August 26<sup>th</sup> deadline for submission of the record. CP 47. The Board acknowledged service and receipt of the scheduling order, stating its requirement that the Mint pay a fee prior to submission of the record, arrange for transcription of the tribunal's proceedings, and deliver that transcript to the Board no later than August 10<sup>th</sup>. CP 116, 117. The Mint's counsel submitted the transcript and the required fee by the Board's deadline. CP 119. The Board in turn submitted

the complete administrative record, including the transcript, to the Court on August 16<sup>th</sup>, 10 days before it was due. CP 121, 122.

#### **E. Analysis**

The Mint's delay in serving the Board did not deprive the Court of jurisdiction. That service, although delayed, allowed the Board to timely fulfill the purpose of the RCW 34.05.542(2). The Superior Court expressed some uncertainty: "Well, I think that there is a possibly unresolved question in the courts on substantial compliance versus strict compliance, particularly given Judge Becker's concurrence in *Sprint*." RP p. 27, l. 13-17, but held the statute was jurisdictional and required strict compliance. As discussed in more detail below, this was an error of law. The Mint asks this Court to recognize it substantially complied with the APA requirement to serve the board and reverse the Superior Court order of dismissal, allowing judicial review to proceed on the merits.

DOR relies on *Sprint Spectrum v. Dep't of Revenue*, 156 Wash.App. 949, 235 P.3d 849 (2010), review denied, 170 Wash.2d 1023, 245 P.3d 774 (2011) and *Banner Realty Inc. v. Dep't of Revenue*, 48 Wash.App. 274, 738 P.2d 279 (1987), to argue the Mint's delayed service on the Board requires dismissal. In both *Sprint Spectrum* and *Banner*, the

Petitioner timely filed its petition for judicial review of the Board's decision and served DOR. Both Petitioners failed to serve the Board prior to dismissal of the Petition. In *Sprint Spectrum*, the Court noted that the Petitioner was not arguing substantial compliance, instead arguing the statute did not require service on the Board. *Sprint Spectrum* at 958. Despite this, both the *Banner* and *Sprint Spectrum* Courts left the door open for a substantial compliance analysis by fully explaining how it could apply and then ruling it could not be found where there had never been service, timely or otherwise.

By failing to serve the Board at all, the Petitioners in *Sprint Spectrum* and *Banner* frustrated the purpose of the service statute. The Mint's case, in contrast, includes a salient fact not before the Court in either *Sprint Spectrum* or *Banner*: actual compliance with the statute, albeit procedurally faulty. It is this difference that calls for a different result and a reversal of the Superior Court's dismissal of the petition for judicial review.

#### **1. Standard of Review**

The facts in this case are not in dispute. What is in dispute is: 1) Whether the requirement to serve the Board is jurisdictional; 2) Whether the service requirements for invoking the appellate jurisdiction of the

Superior Court can be met with substantial compliance; and 3) Whether the undisputed facts show substantial compliance. These are questions of law.

DOR's motion for dismissal argued the Court lacks jurisdiction. See DOR's motion to dismiss, CP 49-53. The Superior Court agreed, affirmatively found a lack of jurisdiction due to the late service on the Board, affirming that finding when asked by the Mint's counsel. RP p. 30, l. 7-13. This finding presents a question of law that is reviewed de novo. *Williams v. Leone & Keeble, Inc.*, 171 Wn.2d 726, 254 P.3d 818, 820, (2011).

Evaluating the Superior Courts error in requiring substantial compliance is also subject to de novo review under the error of law standard. The Court is free to substitute its judgment on issues of law *Nationscapital v. Dep't of Fin. Insts.*, 133 Wn. App. 723, 737, 137 P.3d 78 (2006).

## **2. The Mint Properly Invoked the Superior Court's Appellate Jurisdiction**

While dismissing the petition for judicial review for noncompliance with the requirement to serve the Board, the *Sprint Spectrum* Court did not find the Superior Court lacked jurisdiction. The majority opinion: "...carefully stated a rationale for affirming without mentioning the term

‘jurisdiction.’” *Sprint Spectrum*, 965, 967 (Becker J. concurring).

Washington’s Courts recognize “...unfortunately, procedural elements have sometimes been transformed into jurisdictional requirements” but warn against that practice. *Dougherty v. Dep’t of Labor & Industries*, 150 Wn.2d 310, 315, 76 P.3d 1183 (2003). The trend in court decisions is away from the formalism of an earlier era: "Elevating procedural requirements to the level of jurisdictional imperative has little practical value and encourages trivial procedural errors to interfere with the court's ability to do substantive justice." *Dougherty*, 319, quoting *Okanogan Wilderness League, Inc. v. Town of Twisp*, 133 Wash.2d 769, 791, 947 P.2d 732 (1997) (Durham, C.J. concurring). “Treating subject matter jurisdiction as though it were a fleeting and fragile attribute of a court diminishes the authority of the court, creates a trap for the unwary, and prevents worthy cases from being heard on the merits even when the procedural violation has not prejudiced the opposing party.” *Housing Authority of City of Seattle v. Bin*, 163 Wn.App. 367, 376, 260 P.3d 900 (2011), quoting *Sprint Spectrum*, at 965, (Becker, J., concurring).

A Superior Court has jurisdiction over a case when it has subject matter jurisdiction, personal jurisdiction, and the power or authority to render a judgment. *State v. Barnes*, 146 Wn. 2d 74, 85, 43 P.3d 490

(2002). All 3 elements are present in this case.

**a. The Court Has Subject Matter Jurisdiction.**

DOR claimed the Court lacked subject matter jurisdiction in *Sprint Spectrum* because the plaintiff never served the Board, *id.* 964, (Becker J. concurring). It makes the same claim here. However, subject matter jurisdiction flows from the law, not the parties, Wash. Const. art. 4, § 6.

The critical concept in determining whether a court has subject matter jurisdiction is the "type of controversy." *Marley v. Dep't of Labor & Indus.*, 125 Wash.2d 533, 539, 886 P.2d 189 (1994). "If the type of controversy is within the subject matter jurisdiction, then all other defects or errors go to something other than subject matter jurisdiction." *Marley*, 125 Wash.2d at 539, 886 P.2d 189 (quoting Robert J. Martineau, *Subject Matter Jurisdiction as New Issue on Appeal: Reining in an Unruly Horse*, 1988 BYU L.Rev. 1, 28).

*Dougherty* at 316. "'Type' means the general category without regard to the facts of the particular case." *id.* at 317. A Court's subject matter jurisdiction depends upon the authority of a Court to act in a given type of case, it "does not depend on procedural rules." *ZDI Gaming, Inc. v. State ex rel. Washington State Gambling Com'n*, 151 Wn.App. 788, 214 P.3d 938, 945 (2009) citing *Dougherty* at 315.

The Subject matter jurisdiction of the Superior Court sitting in its Appellate capacity is determined by the law defining that jurisdiction, not

the acts of the parties. *Bin* rejected the claim that the plaintiff's failure to follow statutory notice provisions deprived the Court of subject matter jurisdiction, cautioning against the imprecise use of that term, *Bin* at 375, 376. While the APA generally deprives the Superior Court of subject matter jurisdiction over original adjudications of agency actions other than rule-making<sup>1</sup>, it confirms the Court's subject matter jurisdiction over review of final agency orders, i.e. this case, RCW 34.05.510. The Mint's petition for judicial review is within the subject matter jurisdiction of the King County Superior Court. The Mint's delayed service of the Board, therefore, goes to "something other than subject matter jurisdiction." *Dougherty* 316.

**b. The Court Has Personal Jurisdiction over DOR.**

Service Requirements directed at parties implicate personal jurisdiction, not subject matter jurisdiction. Serving a party is a notice requirement, i.e. a Constitutional due process requirement. *Weiss v. Glemp*, 127 Wn.2d 726, 730, 903 P.2d 455 (1995). The Mint timely served the Respondent, DOR, and the Attorney General, a statutorily designated non-

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<sup>1</sup> Other than as specifically provided in law, i.e. RCW 34.05.570(4).

party. At issue here is service of the Board, not the Department.

But the Board is not a party to this case, *Sprint Spectrum*, 963.

Delayed service of the Board raises no constitutional due process issues because the Board is not faced with any deprivation. Requiring service on a nonparty is somewhat unusual, *Sprint Spectrum* at 853, but it is not jurisdictional.

In dismissing the Mint's petition the Court below relied upon *Union Bay Preservation Coalition v. Cosmos Development & Administration Corp.*, 127 Wash.2d 614, 902 P.2d 1247 (1995), an APA case adjudicating RCW 34.05.542's requirement to serve "all parties of record." RP p. 27, l. 13 - p. 29, l. 16. The *Union Bay* Court focused on the APA's precise definition of "party," to find service on the party's attorney inadequate, *Union Bay* 618. Noting that service on the party's attorney had been authorized in the prior APA but left out of the current APA, the Court required strict compliance with the requirement to serve a party. *Union Bay* does not speak to the requirement to serve an entity that is not a party:

The analysis in *Union Bay* focused on the legislature's deletion, as opposed to mere omission, of approval for service on a party's attorney of record. *Union Bay*, 127 Wash. 2d at 618-19, 902 P.2d 1247, it was only in light of this fact that the court declined to apply the doctrine of substantial compliance. *Id.* at 620, 902 P.2d 1247. Indeed, in *Union*

*Bay*, the court stated that its conclusion had " no bearing on other statutes and other requirements of service." *Id.*

*Skinner v. Civil Service Com'n of City of Medina*, 168 Wn.2d 845, 854, 855, 232 P.3d 558 (2010). The personal jurisdiction lacking in *Union Bay* is not an issue here, because the delay in service was not on a party.

**c. The Court Has Authority to Render a Judgment.**

The final jurisdictional question is whether the Court has jurisdiction over this particular case, as opposed to the subject matter jurisdiction inquiry focusing on the type of case. A court has authority to render judgement in a specific case, assuming subject matter and personal jurisdiction, if it has been properly filed. This case was timely filed and is properly before the Court.

All the elements of jurisdiction are present in this case. Elevating the procedural requirement to serve the Board to a jurisdictional level is inconsistent with both the majority and the concurrence in *Sprint Spectrum*. The Mint asks the Court to correct this error of law, *Dougherty* at 315-319.

### 3. **The Mint Substantially Complied With APA Procedural Requirements.**

This case concerns the appellate jurisdiction of the Superior Court.

“When reviewing an administrative decision, the superior court is acting in its limited appellate capacity, and all statutory procedural requirements must be met before the court's appellate jurisdiction is properly invoked.” *Union Bay* 617; citing *Seattle v. PERC*, 116 Wash.2d 923, 926, 809 P.2d 1377 (1991). The question is: What is necessary to meet the statutory procedural requirements for invoking appellate jurisdiction? Washington's Courts consistently answer: substantial compliance.

Washington's application of substantial compliance is not new:

“Amendable defects, such as the one in question, have not been held fatal unless injury directly caused thereby has been shown, and it seems to us now that this is the just rule.” *Whitney v. Knowlton*, 33 Wash. 319, 322, 323, 74 P. 469 (1903). More recent opinions adopt that policy when evaluating compliance with procedural requirements for invoking the appellate jurisdiction of Washington's Superior Courts. “It is the distinct preference of modern procedural rules to allow appeals to proceed to a hearing on the merits in the absence of substantial prejudice to other parties.” *Dougherty* at 320, citing *Black v. Department of Labor & Indus.*,

131 Wash.2d 547, 552, 933 P.2d 1025 (1997). See also *Crosby v. Spokane County* 137 Wn.2d 296, 303 971 P.2d 32 (1999), citing *Griffith v. City of Bellevue*, 130 Wash.2d 189, 192-93, 922 P.2d 83 (1996), (“Our approach [approving substantial compliance to invoke Superior Court appellate jurisdiction] is consistent with sound public policy expressed in *Griffith* that the merits of controversies be reached.”)

**a. Substantial Compliance with APA Service Requirements Invokes Appellate Jurisdiction.**

The rule in Washington is “... substantial compliance with service requirements is generally sufficient to invoke a superior court's appellate jurisdiction.” *Skinner*, at 854, citing *Black*, at 552-53, and *In re Saltis*, 94 Wash.2d 889, 896, 621 P.2d 716 (1980). The Superior Court’s insistence on strict compliance in this case, RP p. 27, l. 18, - p. 28, l. 1, is inconsistent with that authority.

In *Saltis* the petitioner seeking Superior Court review of a final order by the Board of Industrial Insurance Appeals served the Board but not the Director of the Department of Labor and Industries. The Court rejected a motion to dismiss for lack compliance with service requirements:

In cases considering the court's *general* jurisdiction, we have stated that "substantial compliance" with procedural rules is sufficient, because "delay and even the loss of lawsuits

(should not be) occasioned by unnecessarily complex and  
vagrant procedural technicalities:"

*Saltis*, 895, 896, (emphasis in original) quoting *Curtis Lumber Co. v. Sortor*, 83 Wash.2d 764, 767, 522 P.2d 822 (1974) and its disapproval of the “sporting theory of justice.”

After identifying the purpose of the statute, *Saltis* found the appellant’s service satisfied its objectives, thus substantially complying with its requirements, *Saltis*. at 896. 23 years later *Dougherty* relied on *Saltis* and its focus on the purpose of the statute’s procedural requirements to find substantial compliance. *Dougherty*, 326. Both *Dougherty* and *Saltis* overruled or severely limited earlier precedent that had been read to require strict compliance. Both highlight the weight of current authority to accept substantial compliance absent a showing of prejudice.

**b. Washington’s Courts Do Not Require Strict Compliance.**

The Superior Court cited *Union Bay* and *PERC* to conclude strict compliance was required in this case. Yet, as subsequent Courts and the opinions themselves make clear, those cases stand for the proposition identified in *Skinner* that substantial compliance is the correct tool for

analysis. The cases could not find substantial compliance under their facts. That is far cry different from requiring strict compliance.

In adjudicating the APA's requirement to serve a party, The *Union Bay* Court stated its opinion "had no bearing on other statutes and other requirements of service." *Union Bay* at 620. This was confirmed in *Skinner*, where the Court expressly limited *Union Bay* to cases where the petitioner failed to obtain personal jurisdiction by service over a party.

Similarly, Courts declining to find substantial compliance on the facts are clear that they are not requiring strict compliance: "We will assume, without deciding, that a person seeking review of an administrative decision can substantially comply with the APA's judicial review filing requirement. Cf. *Seattle v. PERC*, 116 Wash.2d 923, 928, 809 P.2d 1377 (declining to decide whether substantial compliance is applicable to APA)" *Clymer v. Employment Security Dep't*, 82 Wn.App. 25, 28, 917 P.2d 1091 (1996). Subsequent cases have decided that issue by authorizing substantial compliance, *Skinner* at 854.

Recent decisions have found substantial compliance with administrative appeal procedures even when appellants miss a filing deadline. In *Ruland v. State, Dept. of Social and Health Services*, 144

Wn.App. 263, 182 P.3d 470 (2008), as here, the State's dismissal motion claimed only strict compliance could satisfy a deadline requirement, citing *PERC*, at 928-929. The *Ruland* court recognized that reading is too broad. As made clear by *Saltis* and its progeny, substantial compliance depends upon the facts of the case. The *Ruland* court reversed the lower court's dismissal of the case, holding the facts established substantial compliance with the statute's notice requirements despite the late filing, *Ruland* at 274, 275, citing *Saltis*. A finding of substantial compliance is even more appropriate here. The Mint, unlike the Rulands, does not need to distinguish *PERC*. Even as it rejected substantial compliance with a filing deadline, *PERC* acknowledged that substantial compliance was properly applicable to service requirements. *PERC* at 928-929.

**c. The Mint Substantially Complied With the Requirement to Serve the Board.**

Having established that the Court should apply a substantial compliance analysis, the next question is, what does that analysis require? "Substantial compliance is 'actual compliance in respect to the substance essential to every reasonable objective of [a] statute.'" In the cases where substantial compliance has been found, there has been actual compliance

with the statute, albeit procedurally faulty." *Union Bay*, p. 619, quoting *In re Santore*, 28 Wn.App. 319, 327, 623 P.2d 702, review denied, 95 Wn.2d 1019 (1981).

Just as *Ruland* recognized a factual difference from *PERC* and found substantial compliance under its unique facts, the Mint asks the Court here to recognize that different facts here call for a different result from *Sprint Spectrum* and *Banner* cases. The appellants in those cases, unlike the Mint, either failed to serve the Board at all, *Sprint Spectrum*<sup>2</sup>, or did not serve the Board until after the petition for judicial review had been dismissed. In both cases the Court ruled the appellant's noncompliance barred a finding of substantial compliance.

Despite this *Sprint Spectrum* endorsed *Banner*'s thorough review of the law of substantial compliance. "The [*Banner*] court stated that substantial compliance requires that a " 'statute has been followed sufficiently so as to carry out the intent for which the statute was adopted.' " That determination depends on the facts of each particular case." *Sprint Spectrum* at 958. The Supreme Court states the rule thus: "However, as noted, the key to substantial compliance is the satisfaction of the substance

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<sup>2</sup> The Court noted 5 separate times that the petitioner "never served the board." *Sprint Spectrum* at 952, 955, 958, 963.

essential to the purpose of the statute” *Crosby*, 302.

**1. The Mint’s Service on the Board Satisfied the Essential Purpose of the Statute.**

The substance essential to RCW 34.05.542(2)'s requirement to serve the Board was explained in *Sprint Spectrum* and *Banner*:

Both parties acknowledge that one of the principal objectives of RCW 34.04.130(2) and its 30-day service requirement is to assure that judicial review is promptly sought and accomplished. Service on the agency rendering the final decision in question is a prerequisite to and triggers transmittal of the administrative record to the court. RCW 34.04.130(4). In turn, RCW 34.04.130(5) largely confines judicial review to the record before the administrative agency. Service on the agency, therefore, is vital to the timely functioning of the review process. Without such service, there is no record before the superior court and thus, no basis for review.

*Sprint Spectrum* at 956, 957, quoting *Banner* at 278. *Sprint Spectrum* applied *Banner*'s holding on the prior APA service statute to the current one, holding: “that service on the agency whose order is the subject of a petition is required to accomplish that objective [timely provision of the administrative record to the superior court] under these circumstances.” *Sprint Spectrum* at 957.

In both *Banner* and *Sprint Spectrum* DOR could point to noncompliance frustrating the statutory objective. Not so here. Despite

tardy service, the Board filed the administrative record with the Superior Court well before the deadline. The Mint substantially complied with statutory notice requirements, thus enabling the Board to accomplish the statute's objective. The Mint's appeal is not subject to dismissal.

## **2. The Delayed Service Caused No Prejudice.**

The absence of prejudice is key in finding substantial compliance. Beginning at least as early as 1903 with *Whitney* and echoed again in *Saltis* at 896, *Dougherty* at 320, and more recently in *Skinner* at 856. As in *Skinner*, the absence of prejudice supports a finding of substantial compliance.

There is no prejudice to DOR, the party seeking dismissal. The Mint's petition was timely filed and served on DOR and the Attorney General. Tardy service on the Board could potentially prejudice the Department if it compromised the timely functioning of the review process, *Banner* at 278. That did not occur here, as the Mint's curative service on the Board and payment of required fees resulted in the Board submitting the record 10 days before the Superior Court's deadline.

Tardy service on the Board could potentially prejudice the Board if it were a party and it did not receive actual notice. But the Board is not a

party, and its own actions demonstrate a lack of prejudice. The Board has voiced no objection nor claim of prejudice. If it believed that the Mint's delayed service prejudiced it, it could have rejected service, declined to submit the record, and raised a claim of prejudice. It has raised no such claim. The delay in service caused no prejudice to the Board, as evidenced by its willingness to provide the record and its timely action in doing so.

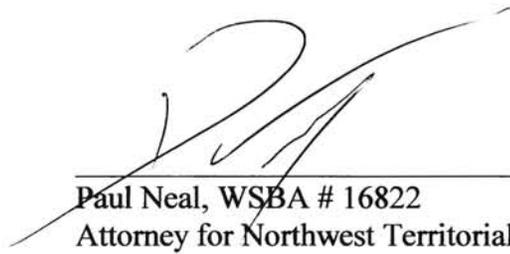
While there is no prejudice to the Board or the Department with allowing substantial compliance, there is severe prejudice to the Mint and to modern Court policy, "... the preference of modern courts, in the absence of serious prejudice to other parties, is to allow appeals to proceed." *Dougherty*, at 315.

**d. The Mint Asks The Court to Reverse the Order of Dismissal.**

Substantial compliance is sufficient to meet the statutory requirement to serve the Board. *Skinner* at 854. The Mint's service, although procedurally faulty, complied with the substance essential to every reasonable objective of the statutory requirement to serve the Board. The purpose of that requirement is to allow a timely transmittal of the administrative record to the court. That was accomplished in this case.

There is no prejudice to DOR in finding substantial compliance. The Mint asks the Court to follow the rule enunciated in *Skinner*, reverse the Superior Court's order of dismissal, and remand this action to the Superior Court to proceed on the merits.

Respectfully submitted this 24th day of April, 2012



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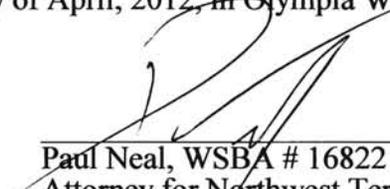
Paul Neal, WSBA # 16822  
Attorney for Northwest Territorial Mint

CERTIFICATE OF SERVICE

I certify that on the 24<sup>th</sup> day of April, 2012, I served a true and correct copy of the Appellant's Opening Brief on counsel for the Department of Revenue by hand delivering the same to:

Callie Castillo, Counsel for Dept. of Revenue  
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Signed this 24<sup>th</sup> day of April, 2012, in Olympia Washington

  
\_\_\_\_\_  
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2012 APR 24 PM 4:25