

COPY

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON  
 IN AND FOR THE COUNTY OF KING

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 LAW OFFICES  
 OF ARAMBURU

PORT OF SEATTLE, a municipal corporation, )  
 )  
 ) Petitioner, ) NO. 99-2-26788-5 KWT  
 )  
 ) v. )  
 )  
 ) RST ENTERPRISES, INC., a, )  
 ) Washington corporation; and )  
 ) KING COUNTY, )  
 ) Respondents. )

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DEPOSITION UPON ORAL EXAMINATION OF  
 JAMES CLAYTON KELLEY

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Taken at 505 Madison Street, Suite 209; Seattle, Washington.

APPEARANCES:

For the Petitioner:                 PRESTON, GATES, ELLIS, LLP  
 BY:   SUSAN DELANTY JONES, ESQ.  
 701 Fifth Avenue  
 Suite 5000  
 Seattle, Washington 98104-7078

For the Respondents:                J. RICHARD ARAMBURU  
 Attorney at Law  
 505 Madison Street  
 Suite 209  
 Seattle, Washington 98104

Also present:                                 DONALD K. SCARBERRY

REPORTED ON:   March 15, 2001  
 REPORTED BY:   Ronald L. Struve, CSR

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SEATTLE, WASHINGTON; THURSDAY, MARCH 15, 2001

9:20 A.M.  
 -- oo O 00 --

JAMES CLAYTON KELLEY,                 being duly sworn, testified  
 under oath as follows:

EXAMINATION

BY MR. ARAMBURU:

Q   Mr. Kelley, please give us your full name and residence  
 address.

A   It's James Clayton Kelley and my residence address is  
 9105 - 170th Avenue Northeast, Redmond 98052.

          MS. JONES: Counsel, I don't want to  
 interrupt, but I think it's Kelley with an E-Y which  
 is --

          THE WITNESS: That's correct.

          MS. JONES: -- a little different  
 spelling than the court may --

Q   (By Mr. Aramburu) Mr. Kelley, have you had your  
 deposition taken before?

A   Yes, I have.

Q   In what sort of matters?

A   A matter where I had interpreted some historical aerial  
 photographs with regard to water being present on a site  
 and presence of wetlands and drainage issues.

Q   Okay. Any other occasions to have your deposition

KELLEY (Exam by Aramburu)

EXAMINATION INDEX

WITNESS:

JAMES CLAYTON KELLEY

EXAMINATION BY:                                 PAGE:

MR. ARAMBURU   3

  

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taken?

A   I don't believe so. I have given testimony frequently  
 at hearings, land use hearings, but I don't think we  
 have gone through formal depositions.

Q   Okay. Just to -- because you have been through  
 depositions before and you have a little familiarity,  
 let me generally tell you how this works. I am going to  
 ask you questions under oath. They're going to be taken  
 down by our court reporter and he may or may not  
 transcribe those into written -- into a written  
 material. The deposition, if it's transcribed, could be  
 used for a variety of purposes. If there's a trial on  
 this matter, it could be used in lieu of your  
 testimony. It could also be used for purposes of  
 impeachment, that is, if we have a trial in this case  
 and if at the time of trial you say something that may  
 be somewhat different than what you tell us today, we  
 may bring up the deposition and say, well, Mr. Kelley,  
 you said something different than than you are saying  
 now. And we're also using the deposition for purposes  
 of finding out what information you have concerning the  
 property here. Do you understand those purposes?

A   Yes.

Q   Now, Mr. Kelley, give us a bit of your educational  
 background please.

KELLEY (Exam by Aramburu)

1 A I have a bachelor of science degree from the University  
2 of Vermont and I studied plant ecology and botany  
3 there. I have a master's of science from Michigan State  
4 University where I studied plant ecology and botany and  
5 a doctoral of science degree from Michigan State  
6 University and my thesis work there evaluated wetland  
7 ecosystems near Lake Michigan.  
8 Q Since the time you got your initial B.A. degree from  
9 Vermont -- by the way, when was that?  
10 A That was in 1978.  
11 Q Can you trace a little bit of your work experience.  
12 A Yeah, I received my Ph.D. from Michigan State in 1985.  
13 Following that I spent two years in Minnesota studying  
14 wetlands as a post-doctoral researcher at the University  
15 of Minnesota and I have lived in Seattle since 1987  
16 working as a wetland consultant. I have been working at  
17 Parametrix, my current employer, since 1988 conducting  
18 wetland studies and evaluating issues regarding wetlands  
19 on property for development of either public or private  
20 sector projects.  
21 Q And do you have a title at Parametrix?  
22 A Yes, the title would be Senior Wetland Ecologist.  
23 Q What has been your involvement with the third runway  
24 project?  
25 A Our firm has been retained to assist with permitting of

KELLEY (Exam by Aramburu)

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1 A Well, we have -- with regard to some of our planning  
2 purposes for storm water management and for in a general  
3 way for wetland studies, we have looked at floodplain  
4 maps, but in terms of evaluating or verifying any  
5 floodplain data, we haven't done that.  
6 Q And do you know if anyone is doing that on the third  
7 runway project?  
8 A I am not aware of exactly what is being done. In  
9 general on our mitigation sites we have evaluated where  
10 floodplains are. We haven't done any specific  
11 hydrologic studies I don't believe to redefine them  
12 based on -- redefine them with regards to the way they  
13 are currently mapped on FEMA maps for example.  
14 Q Now, with respect to the 404 permit, what is the status  
15 of that permit at the current time?  
16 MS. JONES: I am just going to object  
17 that that's not probably calculated to lead to  
18 discoverable evidence in this eminent domain case. You  
19 can go ahead and answer.  
20 THE WITNESS: We are still seeking a  
21 404 permit for the project.  
22 Q (By Mr. Aramburu) And has Parametrix been preparing  
23 materials for submission to the Department of Ecology on  
24 404 permits?  
25 MS. JONES: Same objection.

KELLEY (Exam by Aramburu)

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1 the project with regards to wetland issues.  
2 Q And -- go ahead.  
3 A So that's involved identifying wetlands, identifying  
4 wetland mitigation, addressing environmental concerns  
5 that the Department of Ecology, Corps of Engineers have  
6 with regards to wetlands.  
7 Q And you have been working on the 404 permit?  
8 A Yes, I have.  
9 Q And you indicated that Parametrix is generally  
10 responsible for this work for the Port. What's been  
11 your particular role in this third runway work?  
12 A Well, I'm the task manager for the wetland and national  
13 resource permitting. So I have been responsible for  
14 overseeing the field work, completing portions of the  
15 field work, preparing documents and developing  
16 mitigation plans for the project.  
17 Q It would be fair to say you're the lead person for  
18 Parametrix?  
19 A I'm the lead person. We're also doing storm water  
20 management work and other aspects, but for the wetland  
21 work I am the lead person.  
22 Q And are you involved at all in looking at floodplain  
23 delineations?  
24 A No.  
25 Q Is that a job that is also at Parametrix?

KELLEY (Exam by Aramburu)

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1 THE WITNESS: Yes, we have.  
2 Q (By Mr. Aramburu) And do those materials evaluate  
3 wetlands in the vicinity of the property which is the  
4 subject of this action?  
5 A Yes, they do.  
6 Q And what is the latest of those materials that have been  
7 prepared?  
8 A We have submitted reports in December of 2000 that  
9 basically were revisions of 1999 reports that clarified  
10 concerns that both agencies had regarding the permitting  
11 of the project.  
12 Q You said both agencies. Department of Ecology and what  
13 other agency?  
14 A The Department of Ecology and the Corps of Engineers.  
15 Q And when is a decision expected on the 404 permit?  
16 A I don't know that we really know when a decision is  
17 expected.  
18 Q All right. Have you worked at all on mitigation plans  
19 for the 404 permit?  
20 A Yes, I have.  
21 Q And does that include the wetland restoration or wetland  
22 mitigation?  
23 A Yes, it does.  
24 Q Now, you indicated that you had been involved in some  
25 work with respect to wetland delineations in the general

KELLEY (Exam by Aramburu)

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AR 024411

1 vicinity of this project, and I looked back through the  
2 materials and I seen some wetland delineations going  
3 back to January of 1999. In fact, I brought a report I  
4 think done by Parametrix for the Port, Wetland  
5 Delineation Report Revised Draft. Are you familiar with  
6 those documents?  
7 A Yes, I am.  
8 Q Since those documents were prepared, and I have the date  
9 here of August of 1999, has there been additional  
10 wetland delineation or evaluation done?  
11 A Not on this subject parcel.  
12 Q In other areas there have been but not here?  
13 A In other areas there was very minor changes in wetland  
14 delineation since those documents were prepared.  
15 Q Now, the documents here, and I have not copied all of  
16 them and we may want to make some copies for the  
17 deposition here, the Wetland Delineation Reports do deal  
18 specifically with the property at issue here; is that  
19 correct?  
20 A Yes, they do.  
21 Q And I am going to direct your attention here -- let me  
22 put this in front of you first of all and ask you to  
23 identify the document we are referring to.  
24 A It's a Revised Draft - Wetland Delineation Report Master  
25 Plan Update Improvement Seattle-Tacoma International

KELLEY (Exam by Aramburu)

9

1 of the project and were these mapped or was the field  
2 work done by you or people at Parametrix?  
3 A It was completed by people in Parametrix and I reviewed  
4 -- actually I visited the site prior to completing all  
5 the field work and when the field work was completed, I  
6 visited the site again and inspected it.  
7 Q And in terms of who's responsible for the lines on the  
8 map, not physically drawing them, but determining where  
9 they are, would that be something that you would have  
10 done?  
11 A Bill Kleindl, an employee at Parametrix, assisted with  
12 that work.  
13 Q Spell his name for me please.  
14 A It's K-L-I-E -- no. K-L-E-I-D-L.  
15 Q D-L?  
16 A And D-L. Kleindl. That's right.  
17 Q Now, as I understand your testimony, since this wetland  
18 delineation report was prepared in August of 1999, there  
19 haven't really been any changes to any of these areas?  
20 A That's correct.  
21 Q And the map found at, I guess it's Figure C1 in the  
22 report, contains references to prior converted croplands  
23 and there is some delineations on the map for that.  
24 That is prior converted croplands under what criteria?  
25 A That would be under the federal criteria that Corps of

KELLEY (Exam by Aramburu)

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1 Airport. It's prepared for the Port of Seattle by  
2 Parametrix in August of 1999.  
3 Q And with respect to the property that we're concerned  
4 with here, is this the basic wetland delineation  
5 information?  
6 A Yes.  
7 Q And there is a tab in the report that we have just  
8 reviewed here called "Appendix C, Prior Converted  
9 Wetlands on the Vacca Farm, V-A-C-C-A, Property." Are  
10 you familiar with this section of the report?  
11 A Yes, I am.  
12 Q And this section of the report has texts, maps and then  
13 wetland determination field information. Did you write  
14 any portion of this?  
15 A Yes, I believe that I did.  
16 Q And would this text in here be yours?  
17 A To a large degree it would be.  
18 Q Now, and that is page C-1 of the report that we're  
19 referring to and then attached to that is a map showing  
20 wetlands in this general vicinity. Are you familiar  
21 with this map?  
22 A Yes, I am.  
23 Q Did you prepare the map?  
24 A I assisted in preparing the map.  
25 Q And the map shows certain wetland areas in the vicinity

KELLEY (Exam by Aramburu)

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1 Engineers uses. The Food Security Act I believe is what  
2 defines prior converted croplands and takes them out of/  
3 jurisdiction for 404 purposes.  
4 Q Okay. So for purposes of securing a 404 permit, these  
5 areas would not be considered wetlands; is that  
6 correct?  
7 A That's correct.  
8 Q Now, have you reviewed the status of those prior  
9 converted croplands shown on Figure C1 for purposes of  
10 the City of SeaTac's regulations?  
11 A No, I have not.  
12 Q Has anyone in your firm done that?  
13 A No, we have not.  
14 Q I think what I am going to do -- and let me ask you.  
15 Following the map at C1 there is a series of pages  
16 marked drafts that are entitled Wetland Determinations  
17 and there are one, two -- I see about eight pages here.  
18 Can you tell us what information is contained in those  
19 pages.  
20 A Well, these summarize data on vegetation or plants that  
21 are occurring on a particular site, our observations of  
22 the water, particularly the soil water on a site, and  
23 soil conditions on a site, and they're used to evaluate  
24 whether wetland criteria on a particular site are met  
25 according to the Corps of Engineers delineation manual.

KELLEY (Exam by Aramburu)

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AR 024412

1 Q And so this would basically be field data taken by, I  
2 guess, Mr. Kleindl?  
3 A Yes, that's correct.  
4 MR. ARAMBURU: Go off the record a  
5 second and make a couple copies.  
6 MS. JONES: Thank you.  
7 (Discussion off the record.)  
8 (Exhibit #1 was marked.)  
9 MR. ARAMBURU: Back on the record.  
10 Q I am handing you what's been marked as Exhibit No. 1 to  
11 this deposition. Can you identify that document. I am  
12 going to open the report that you previously referred to  
13 Revised Draft - Wetland Delineation Report Master Plan  
14 Update Improvement Seattle-Tacoma International Airport,  
15 Parametrix, August 10, 1999. And can you identify  
16 Exhibit No. 1?  
17 A Yes, this is Appendix C out of the previous identified  
18 report and it pertains to mapping of prior converted  
19 cropland on Parcel 92.  
20 Q And can you identify for me on our map here the area  
21 that is the subject matter of this litigation.  
22 A How do you want me to do that?  
23 Q I am going to leave that in front of you because the  
24 other one has the colors on it. Let's have you take  
25 this red pen, if you would, and draw around the area of

KELLEY (Exam by Aramburu)

13

1 THE WITNESS: Parcel 92.  
2 Q (By Mr. Aramburu) So we will just refer to it that  
3 way.  
4 A Okay.  
5 Q And have you done any work that on this property that  
6 might indicate how these wetlands might be modified for  
7 any kind of development of the property?  
8 A No, I have not. Only the development of mitigation on  
9 the property.  
10 Q And can you generally describe what that is.  
11 A Generally it's -- would be conducting a restoration  
12 project on this site. There is generally a high water  
13 table and it would be planting native trees and shrubs  
14 to the area to replace the farmland with wetland  
15 vegetation and then there would be some minor grading on  
16 the site required to implement the mitigation.  
17 Q And those plans for wetland mitigation have been  
18 presented to the Corps and to the Department of  
19 Ecology?  
20 A Yes, they have.  
21 Q Now, in that work that's being done, is this being  
22 counted as the wetland restoration or is this -- are  
23 these replacement wetlands?  
24 A Well, it's being viewed as wetland restoration and  
25 wetland enhancement, and the wetland restoration aspect

KELLEY (Exam by Aramburu)

15

1 the property which is the subject matter of this case.  
2 A (Witness complies.) What I am not certain about is  
3 exactly where to draw the north property boundary on  
4 this figure because it's a black line that's kind of  
5 blended in with horizontal screening.  
6 MR. ARAMBURU: I think it's here.  
7 Let's go off the record for a second.  
8 (Discussion off the record.)  
9 Q (By Mr. Aramburu) Okay. And you have drawn on the map  
10 there the area on Exhibit 1 Figure C1 in red the area of  
11 the property which is at issue in this case?  
12 A (Witness nods head up and down.)  
13 Q Now, let's talk a little bit about that property. Other  
14 than your general work for the 404 permit for the third  
15 runway, have you done any specific additional work on  
16 this piece of property?  
17 A No. Our work on this property has been to identify  
18 wetlands for 404 jurisdictional purposes and to design  
19 wetland mitigation for filling wetlands elsewhere and to  
20 develop wetland mitigation on this site. In other  
21 words, improve the wetland condition and restore  
22 wetlands to the site.  
23 Q Okay. And I think for purposes of the deposition we are  
24 calling this Lot 92?  
25 MS. JONES: We call it Parcel 92.

KELLEY (Exam by Aramburu)

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1 of the project would be -- would apply to areas that are  
2 designated as prior converted and the wetland  
3 enhancement aspect of the project would be applied to  
4 areas that are existing either farmed wetland or just  
5 regular vegetative wetlands.  
6 Q Okay. Now, you used the word "farmed wetlands" and  
7 "prior converted croplands." Is there a difference in  
8 your mind?  
9 A Yes, there is. Prior converted croplands are areas that  
10 are outside of Corps 44 jurisdiction. Farmed wetlands  
11 are areas that are currently farmed but because of the  
12 presence of water on the site for long duration. During  
13 the growing season, they meet the criteria of wetlands  
14 that are not prior converted.  
15 Q Okay. And going back here and as we go through this, we  
16 will keep your colored map handy. So as I understand  
17 it, the prior converted croplands are shown by the  
18 crosshatch on Figure C1?  
19 A Yes, the horizontal cross.  
20 Q And the wetlands shown on that property, I guess you are  
21 calling them Water V1 and Water V2?  
22 A Yes, the wetlands shown on this property are in green  
23 and they're vertical lines versus the horizontal which  
24 is prior converted, and then there is another  
25 designation that the Corps made on this property is that

KELLEY (Exam by Aramburu)

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AR 024413

1 there is some drainage ditches on the site and they  
2 determined that those met the criteria for water of the  
3 United States which is just distinguishes that it might  
4 not necessarily be wetland, but it is under federal  
5 jurisdiction as a water.  
6 Q And so Water V1 and Water V2 are the two green lines or  
7 I guess dark lines --  
8 A Um-hum.  
9 Q -- on Exhibit 1 that are the ditches dug out to  
10 essential dewater the area?  
11 A Presumably, yes.  
12 Q And then the remainder on the property -- the remainder  
13 of the areas are then wetlands?  
14 A That's correct.  
15 Q So wetland -- I guess Wetland FW11 and Wetland, I guess  
16 it's FW10 are both on the subject property; is that  
17 right?  
18 A Actually the FW11 is on the subject property and then  
19 Wetland A1 is what extends down and captures this area  
20 here (indicating).  
21 Q Okay. So portions of Wetland A1 and Wetland FW11 may be  
22 farmed wetlands if they're being farmed?  
23 A That's correct.  
24 Q And would you agree that is the proper classification  
25 for them?

KELLEY (Exam by Aramburu)

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1 from the west under Des Moines Memorial Drive that would  
2 contribute to the water in this location?  
3 A That's what appears, yeah.  
4 Q Any of the water in this location come from runoff from  
5 the road surface?  
6 A That's probably likely as well.  
7 Q And have you reached any opinions as to whether this  
8 wetland could be filled, modified, moved?  
9 A No, I haven't. We're not seeking a permit to fill or  
10 modify any of these wetland. So we haven't evaluated  
11 that.  
12 Q Do you think it would be possible, given your  
13 background, to replace Wetland A1a elsewhere on the  
14 site?  
15 A It would require obtaining a 404 permit and that would  
16 be dependent on a wide variety of issues. So I wouldn't  
17 want to speculate on whether you could do that or not.  
18 Q And you have not looked into that issue?  
19 A No.  
20 Q And what is the -- Wetland A1a then is not farmed  
21 wetland?  
22 A It's not farmed wetland.  
23 Q And do you have a -- is one of your wetland  
24 determination reports that is attached to the report  
25 show a wetland determination for A1a? I will put that

KELLEY (Exam by Aramburu)

19

1 A Yes.  
2 Q Now, you have also designated on the Figure C1 Wetland  
3 A1a. Do you see that?  
4 A Yes, I do.  
5 Q And what is that wetland? Can you describe that.  
6 A Yeah. That occurs on along the edge of Des Moines  
7 Memorial Drive where groundwater and seepage water  
8 collect.  
9 Q And is that actually on this property or is that on the  
10 public right-of-way?  
11 A I believe that there is some that is on this property  
12 and some that is on the public right-of-way.  
13 Q We need a more detailed map to determine that?  
14 A Yeah, I think if you had a more detailed map you'd see  
15 there were some locations where the wetland extended  
16 onto Parcel 92.  
17 Q And have you seen such maps?  
18 A Yes.  
19 Q Okay. Do you have those with you today?  
20 A No, I don't.  
21 Q And what's the source of water for Wetland A1a?  
22 A It's primarily an area where it appears that there is  
23 groundwater that's seeping from the embankment or the  
24 slope that Des Moines Memorial Drive is built on.  
25 Q So would there be a flow of groundwater that would come

KELLEY (Exam by Aramburu)

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1 in front of you if you want to take a look.  
2 A Yeah, I would have to check. I am not sure that -- I  
3 don't believe we were asked to collect a data sheet for  
4 that wetland.  
5 Q I have marked here some other text having to do with  
6 that.  
7 A No, we did not collect the data sheet in that wetland.  
8 Q And so how do we know it's a wetland?  
9 A It's based on our field work and the review of that work  
10 by the Corps of Engineers.  
11 Q What's the nature of the field work that you have done?  
12 A A site inspect to evaluate whether the site meets the  
13 criteria for wetland, having wetland plants, a high  
14 water table during the growing season and wetland  
15 characteristics.  
16 Q But I guess the question is: Typically, as I understand  
17 it, you would have one of your people go out and prepare  
18 a data sheet indicating field data, correct?  
19 A That's correct.  
20 Q But no such field data sheet exists for Wetland A1a?  
21 A Well, you can't -- as a matter of practicality, you  
22 can't document every square inch of land with field  
23 data. We evaluated this entire area for the presence of  
24 wetland, but we don't have field data for all of that.  
25 You take the -- you do your field work and evaluate what

KELLEY (Exam by Aramburu)

20

AR 024414

1 is wetland. The Corps requires a representative set of  
2 data to be collected from a site and that representative  
3 data should be representative of wetlands and  
4 nonwetlands and then they do a field verification and  
5 identify -- well, you show them where you have flagged  
6 the wetland edge and they verify that as correct or  
7 incorrect.  
8 Q And was Wetland Ala flagged in the field?  
9 A Yes, it was.  
10 Q And did you flag it?  
11 A No, I did not. I inspected the flags on that after it  
12 had been done.  
13 Q Okay. And who made the initial determination about this  
14 wetland?  
15 A We looked at that site in the winter of 1999 with the  
16 Corps of Engineers and they -- I believe that this was  
17 prior to the Port having physical access to the  
18 property. So we drove by the site and they were  
19 interested in the site as potential mitigation and we  
20 should start planning for use of the site as mitigation.  
21 We needed to start identifying what might or might not  
22 be wetland and I think at that time we identified the  
23 potential of wetland on the site.  
24 Q Okay. And was that your work or was that Mr. Kleindl's  
25 works?

KELLEY (Exam by Aramburu)

21

1 Q Other than the wetlands has Parametrix identified any  
2 other sensitive areas with respect to Parcel 92?  
3 A Well, we know there's a stream on the east of the parcel  
4 and drainage, some drainage systems that connects to  
5 that stream. I don't believe those are exactly on the  
6 parcel. And we know that the area is generally in a  
7 floodplain, but we haven't done any specific studies of  
8 that that I am aware of.  
9 Q And is this an erosion hazard area?  
10 A I haven't evaluated that.  
11 Q Landslide hazard area?  
12 A I haven't evaluated that.  
13 Q Steep slope hazard area?  
14 A I haven't evaluated that.  
15 Q Have you looked at the King County Sensitive Area Folio  
16 to determine if there are other sensitive areas on the  
17 site?  
18 A We would have used only the Sensitive Areas Folio to  
19 look at the map, the stream mapping and the wetland  
20 mapping.  
21 Q And have you -- you were discussing the streams here.  
22 Have you made an evaluation as to the stream  
23 classification?  
24 A Per -- we've had to identify what kind of fish might be  
25 in the stream and evaluate it in terms of endangered

KELLEY (Exam by Aramburu)

23

1 A I was with the Corps when that determination was made  
2 and Mr. Kleindl was with me at the same time.  
3 Q Okay. And when you say you with the Corps, you were  
4 with a person from the Corps?  
5 A Yes, that's right.  
6 Q Okay. And who would that person be?  
7 A That would have been Gayle Teerzi.  
8 Q Can you spell the last name for me please.  
9 A T-E-E-R-Z-I. And Jonathan Friedman.  
10 Q And are those pretty much the two people you have been  
11 working with on these wetland determination issues?  
12 A Yes, that's correct.  
13 Q Did you do any of these wetland determinations or  
14 reviews with the Department of Ecology?  
15 A Not on Parcel 92. Not in the field on Parcel 92, but  
16 they have reviewed the report.  
17 Q And who would be the responsible person at the  
18 Department of Ecology?  
19 A That would have been Eric Stockdale.  
20 Q Is he pretty much the lead person on these issues for  
21 DOE?  
22 A Yes, that's correct.  
23 Q Anyone else at the Corps besides Miss Teerzi and  
24 Mr. Friedman?  
25 A No.

KELLEY (Exam by Aramburu)

22

1 species issues. We have not had to classify the stream  
2 according to the City of SeaTac regulations or any King  
3 County regulations.  
4 Q Are you familiar with what those classifications are?  
5 A In a general sense, but there can be variations between  
6 cities and municipalities. So I couldn't say  
7 specifically what it is unless I were to sit down with  
8 the regulation and do that.  
9 Q Okay. And you have indicated there has been some  
10 evaluation of the stream in this area. In the vicinity  
11 of Lot 92 have there been any salmonid identified?  
12 A I am not aware of any salmonids identified in Miller  
13 Creek in this location. The resource agencies -- the  
14 Corps, the Department of Fisheries, National Marine  
15 Fisheries -- believe that this stream could support  
16 salmonids.  
17 Q And now this stream -- Let's talk --  
18 A Ask your question.  
19 Q Okay. Let's identify here for purposes of just the  
20 stream reach so to speak, the area of the stream which  
21 lies north of 156th Street on Exhibit C1.  
22 A So the stream that I would be referring to is Miller  
23 Creek which is east of the property?  
24 Q Yes, east of the property and that the reach of the  
25 stream which is north of 156th?

KELLEY (Exam by Aramburu)

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1 A That's correct.  
2 Q Now, in this area has there been any identification of  
3 salmonids?  
4 A I am not aware that there have been and Parametrix has  
5 looked for salmonids in this area, but we did not find  
6 any.  
7 Q And how far downstream do we have to go before we find  
8 salmonids?  
9 A It probably would be approximately a quarter mile.  
10 Q Quarter mile south of 156th?  
11 A Quarter mile south of 156th.  
12 Q And is there -- and at that location is there any kind  
13 of a stream blockage that would prevent the fish from  
14 going up stream?  
15 MS. JONES: Lacks foundation.  
16 THE WITNESS: There's not a stream  
17 blockage per se. There's a small waterfall there and  
18 various fisheries people have various opinions on to  
19 what degree it does or does not block fish.  
20 Q (By Mr. Aramburu) And has Parametrix reached any  
21 conclusions as to whether it does or doesn't?  
22 A Well, we think that it could impede their migration or  
23 movement under certain flows, but it's not a complete  
24 blockage.  
25 Q But in the area north of that small waterfall, I think

KELLEY (Exam by Aramburu)

25

1 A I believe that accompanying Bill would have been Randy  
2 Jerek, and Randy is no longer at Parametrix.  
3 Q Could you help us with the spelling of his last name.  
4 A Oh, it's J-E-R-E-K.  
5 Q Do you know where Mr. Jerek is now?  
6 A My recollection is that he went to a firm called R2. R2  
7 Resources perhaps.  
8 Q Now, have you undertaken any evaluations that might  
9 indicate the required setbacks from the wetlands on the  
10 Lot 92 site or Parcel 92 site?  
11 A No, I haven't.  
12 Q Has anyone in your firm done that?  
13 A No.  
14 Q Do you have any opinions with respect to what backs  
15 would be required for these wetlands?  
16 MS. JONES: Lacks foundation.  
17 THE WITNESS: I would have to review  
18 the city ordinances and our project is exempt from city  
19 ordinances so we have not had to look at that. At the  
20 state level there's various setbacks and various  
21 opportunities to modify those setbacks depending on what  
22 the nature of the project and we haven't looked at  
23 that.  
24 Q Now, you said that your project is exempt from city  
25 regulations. Why is that?

KELLEY (Exam by Aramburu)

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1 was your term for it, there haven't been any salmonids  
2 found?  
3 A Not that I am aware of.  
4 Q And has the stream been examined for presence of  
5 salmonids?  
6 MS. JONES: Lacks foundation.  
7 THE WITNESS: Yes, we did.  
8 Q (By Mr. Aramburu) And what sort of investigations were  
9 undertaken?  
10 A We did electroshocking of the stream channel which  
11 temporarily stuns fish and you can collect and identify  
12 them and release them back to the stream and we did not  
13 find any salmonids.  
14 Q Did you find any kind of native fish at all?  
15 A I believe we found -- I believe we found some pumpkin  
16 seed and maybe some sunfish, probably some sculpins. I  
17 don't know what else we might have found there.  
18 Q And who at Parametrix would be the lead on these fish  
19 issues?  
20 A Bill Kleindl would have been present during the  
21 electroshocking.  
22 Q And that electroshocking was done by Parametrix  
23 personnel?  
24 A Yes, that's right.  
25 Q Anyone else?

KELLEY (Exam by Aramburu)

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1 A The Port entered into an interlocal agreement with the  
2 city regarding wetland regulations and I guess in a  
3 nutshell the city feels that the wetland protection will  
4 occur through the federal and state permitting process.  
5 Q So they're not taking an active involvement in wetland  
6 modification restoration, et cetera?  
7 A That's correct.  
8 Q You have been identified by the Port as a possible  
9 witness in the case involving Parcel 92. What is your  
10 understanding about the kind of testimony or information  
11 you will be providing?  
12 A My understanding is that it would be simply focused on  
13 the presence or absence of wetlands on the site and how  
14 that determination was made.  
15 Q And as I understand the way things are now, and you have  
16 done some evaluation that we see here, you haven't done  
17 any evaluation on Lot 92 since the August 1999 report;  
18 is that correct?  
19 A That's correct.  
20 Q Has the Port asked you to do any other work out there in  
21 preparation for this trial?  
22 A No, they have not, just -- I was just only asked to be  
23 familiar with what we did out there prior to this  
24 deposition.  
25 Q Okay. And so you reviewed your reports?

KELLEY (Exam by Aramburu)

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1 A That's right.

2 Q Okay. Have you reached a conclusion as to the

3 classification of the wetlands on this site Class I, II,

4 III, IV, V, VI?

5 A Using which classification system?

6 Q Well, any classification system.

7 A Department of Ecology I believe that these wetlands were

8 rated a Class II wetland.

9 Q And Mr. Stockdale could help us with that, correct?

10 A Yes, and I believe in other reports we have documented

11 that as well.

12 Q Okay. Any other classifications? Does the Corps have

13 its own classification?

14 A Well, they tend to classify things as in terms of more a

15 scientific classification, a shrub, scrub shrub wetland,

16 a forested wetland and emergent wetland. These would be

17 palustrine scrub wetlands and palustrine emergent

18 wetlands.

19 Q Why don't you spell palustrine for us for our court

20 reporter.

21 A P-A-L-U-S-T-R-I-N-E.

22 Q And what does that mean?

23 A That just simply means a wetland that is relatively

24 isolated from surface water as opposed to being a

25 wetland that was immediately on a river shore, lake

KELLEY (Exam by Aramburu)

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1 prior converted versus the typical Corps wetlands

2 classification is different. And for FW11 the criteria,

3 because this has been plowed, there is no vegetation on

4 the site and it's been in farm use for a long period of

5 time, the criteria for defining a wetland would be that

6 there is standing water on the site versus a vegetated

7 area that has not been farmed for some period of time

8 where the criteria would be the presence of plants, high

9 soil water table and hydric soil conditions.

10 Q (By Mr. Aramburu) So as I understand, the delineation

11 of FW11 was basically based upon the presence of

12 standing water?

13 A That's correct.

14 Q And how many years did you evaluate the presence of

15 standing water on that site?

16 A We evaluated it based on observations that were made

17 with the Corps in 1999 and then identified aerial

18 photographs of this area that extended back a number of

19 years. I don't recall the exact period of record that

20 we had for aerial photographs. And then we used an

21 aerial photograph from March of 1974. I believe that

22 that photograph was used to map the area of standing

23 water on the site.

24 Q Okay. So as I understand, the particular shape of FW11

25 is based upon the area which is covered by water a

KELLEY (Exam by Aramburu)

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1 shore or marine water.

2 Q Now, let me ask you here, and it may be helpful if we

3 get to a colored map. I was somewhat interested in your

4 delineation of Wetland FW11 which has very much kind of

5 odd unique shape and I notice then it's also adjacent to

6 the Wetland A1. Would then -- do I understand correctly

7 then that FW11 would be considered a separate wetland

8 from the A1 even though it seems to have a couple of

9 boundaries right with it?

10 MS. JONES: I am just going to object

11 that FW11 does not appear to be in I think a part of

12 Parcel 92 and therefore would not lead to discoverable

13 evidence.

14 MR. ARAMBURU: I think we've shown

15 that as on that site at least on our diagram here FW11.

16 MS. JONES: I thought -- Oh, FW11 is

17 this whole one.

18 MR. ARAMBURU: Yes.

19 MS. JONES: Excuse me.

20 MR. ARAMBURU: Yes.

21 MS. JONES: I withdraw that objection,

22 counsel. Thank you.

23 THE WITNESS: FW11 is distinguished

24 from Wetland A1 because of its farm nature and the

25 criteria for identifying that as a farmed wetland versus

KELLEY (Exam by Aramburu)

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1 period of time?

2 A That's correct.

3 Q So do I understand correctly that the actual drawing of

4 the line around FW11 was based upon the March 1974

5 aerial photograph?

6 A That's correct.

7 Q And why was that used as opposed to other data?

8 A That was a high quality aerial photograph. It was a

9 black and white aerial photograph. It was taken during

10 a period of time that was early in the growing season so

11 that you -- in the summertime the site can be dry, but

12 the Corps regulates wetlands that are wet for short

13 periods of time early in the growing season. So we

14 needed a photograph from that period of time and it was

15 also a period of time when the rainfall was

16 approximately normal. It wasn't excessively dry or

17 excessively wet. So it turned out to be a good

18 photograph to use to do that.

19 Q And what is the criteria for the length of time a site

20 must be inundated?

21 A If more than 14 days I believe. Fourteen or 15 days.

22 Q During the growing season?

23 A During the growing season.

24 Q When does the growing season begin?

25 A Typically it's March 1st, but various people have

KELLEY (Exam by Aramburu)

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1 opinions about that and many wetland scientists feel  
2 like in Puget Sound the growing season is all year long  
3 in lowland Puget Sound.  
4 Q What's your opinion?  
5 A Well, the Corps generally goes with March 1st unless  
6 there's -- if they are out on a site and they see a lot  
7 of plant growth in February, they may claim that it's  
8 the growing season.  
9 Q So what about this site here, would March 1st be --  
10 A This site they were comfortable with March 1st and with  
11 our March aerial photograph and --  
12 Q But you only have a single moment aerial photograph in  
13 March of 1974, correct?  
14 A Well, what -- we actually have a series of other  
15 observations on the site that show ponding and flooding  
16 during the winter months for a variety of other years  
17 since I have been planning work in this area starting  
18 probably in 1997 and then we had the Corps out there in  
19 1999. So there's an understanding that this whole area  
20 has poor drainage. Some of the drainage is poor and  
21 results in ponding for long duration and we needed to  
22 identify areas where there was this long duration  
23 ponding.  
24 Q And -- but you don't know whether in March of 1974  
25 whether or not the particular area of inundation had

KELLEY (Exam by Aramburu)

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1 A Yes, once you know there is hydric soil there, then it's  
2 on inundation.  
3 Q I guess my question to you is: Given that the area of  
4 inundation may be small or larger during the 14-day  
5 period or whatever period there is inundation on the  
6 site, how do you pick the date and time to actually go  
7 out and figure out where to draw these lines?  
8 A Well, as I mentioned earlier, we reviewed that aerial  
9 photograph record to see, you know, what -- whether  
10 aerial photographs would be helpful and in doing that  
11 review, we looked for a photograph that would be early  
12 in the growing season that would be during a period of  
13 time -- taken during a period of time where there was  
14 not excessive rainfall events like a week of where we  
15 might have received 5 or 6 inches of rain during that  
16 week and we had flooding. So that was the screening  
17 method. Alternatively you could do your study during  
18 the wintertime, during one winter, and identify ponding  
19 on the site and flag that out.  
20 Q What you really want to know is what it is during the  
21 growing season. That would be the time you would  
22 actually draw the --  
23 A During the early growing season would be the ideal time,  
24 during the early growing season during a March that had  
25 exactly average precipitation. Two weeks after March

KELLEY (Exam by Aramburu)

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1 existed for one day, two days, twelve days or two  
2 months, correct?  
3 A Well, what we've reached through observations on the  
4 site is that we have reached an understanding that aside  
5 from periods of excessive rainfall, large storms, that  
6 the water on the site is not flashy and that when you  
7 get an area of ponding on the site, it will persist for  
8 several weeks. And even this winter that area has been  
9 ponded with water and this has been an excessive dry  
10 year. So I guess the observations I made this winter  
11 confirms what we did based on that aerial photograph.  
12 Q Okay. And would the area that you observed in recent  
13 times be exactly this area, that is, the area shown on  
14 Figure C1 as FW11?  
15 A Yes, that would be my conclusion that there really --  
16 that accurately represents the degree of ponding on the  
17 site for most periods outside of a heavy rain period.  
18 Q Now, in terms of evaluating the actual area of a wetland  
19 in which you don't have soils or plant data which you do  
20 not for FW11, correct?  
21 A Um-hum. We have soils data. We know that the soils are  
22 hydric soil, that it's a peat type soil and that it  
23 formed under wetland conditions.  
24 Q But, as I understand, the determination here is  
25 primarily based on the area of inundation?

KELLEY (Exam by Aramburu)

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1 1st would be when you would go out and do your study.  
2 You never have ideal conditions to do this kind of work.  
3 So you have to use professional judgment. You have to  
4 rely on guidance that Corps of Engineers' staff provide  
5 on how to handle or how to identify wetlands when the  
6 absolute ideal information may not be available.  
7 Q Okay. We got into talking about Wetland 11 because  
8 we've indicated that that is a separate designation from  
9 A1 in this location. A1, a little sort of point of the  
10 larger Wetland A1, has sort of a point to the west just  
11 to the north of FW11. How was that point delineated?  
12 A That would have been based on field delineation based on  
13 collecting information in the field as you walk the  
14 wetland edge.  
15 Q And is the manner in which you delineated the point for  
16 Wetland A1 any different than the way you delineated the  
17 boundaries of FW11?  
18 A No, it really would be based on the same criteria, the  
19 same approach.  
20 Q Okay. And the point I guess of Wetland A1 is also  
21 farmed wetland, correct?  
22 A Well, the difference there would be that that area would  
23 have vegetation present and so the vegetation criteria  
24 was also used I believe.  
25 Q So let me understand. Now, we are talking about A1 now,

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1 not FW11?  
2 A Yeah.  
3 Q For Wetland A1 there was an identification of plant  
4 types consistent with a wetland determination which is  
5 different than what was done for FW11?  
6 A That's my recollection, yes.  
7 Q Okay. Now --  
8 A We did not use an aerial photograph to determine those  
9 lines.  
10 Q Okay. So the lines for A1 were done based upon data  
11 regarding plant types. How about soils?  
12 A Yes, we would use soils.  
13 Q But you did not use the criteria of inundation for a  
14 period of more than 14 days during the growing season?  
15 A I don't believe we did.  
16 Q Okay. But is the area that's the little point of A1  
17 here, is that also farmed wetland?  
18 A Well, it's not as we mapped it, and I guess I feel like  
19 I have a little bit of uncertainty in terms of that  
20 question.  
21 Q Would --  
22 A We've tried to distinguish farmed wetlands from  
23 nonfarmed wetlands and we have done that in this  
24 location.  
25 Q Now, you're looking there at FW3?

KELLEY (Exam by Aramburu)

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1 adjacent to Parcel 92, there would be some minor grading  
2 to assure that water flow through the area occurs. Some  
3 of that minor grading might extend into Parcel 92 and  
4 Wetland A1 and farmed wetland, but primarily what we  
5 would be doing is planting wetland plants there.  
6 Q Okay. And -- but if we looked at your specific plans,  
7 we could tell what's being graded and what isn't being  
8 graded?  
9 A That's right. That's right.  
10 Q What's the last rendition of those plans?  
11 A December 2000.  
12 Q And that was part of the submitting to the Corps?  
13 A That's correct.  
14 Q As a part of the restoration work, is anything going to  
15 be done in the vicinity of Wetland A1a?  
16 A Well, where Wetland A1a extends onto Parcel 92, that  
17 would also be subject to planting with native wetland  
18 plants.  
19 Q So that's part of the mitigation plan?  
20 A That would be part of the mitigation plan as well.  
21 Q Have you been asked by the Port to prepare any kind of  
22 a special report on Lot 92?  
23 A We prepared I believe a very brief, basically a  
24 transmittal summary of what was done here and provided a  
25 map to the landowner I believe and, of course, the Port

KELLEY (Exam by Aramburu)

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1 A That's correct. And FW3 is exactly analogous to FW11 in  
2 that we used aerial photographs and evidence of flooding  
3 and we distinguish that from Wetland A1 based on this  
4 area here had not been recently plowed and hadn't  
5 vegetation that was used to determine wetland boundaries  
6 and I guess I don't have absolute recollection of  
7 conditions on this point to know all the way out on both  
8 those lines on the north and south side of the point  
9 exactly what was done.  
10 Q Would reference to any of your field data sheets help  
11 that are in our report here?  
12 A No, I don't think they would. I think I would have to  
13 go and look at an earlier photograph or visit the site.  
14 Q Okay. So your recollection is getting hazy on that?  
15 A It's hazy on, you know --  
16 Q Very well.  
17 A There's thousands of flags that get hung to identify  
18 these wetland boundaries and on this particular flag I  
19 am not sure. I don't recall the details.  
20 Q Let me ask you a little bit about the mitigation work  
21 that you're doing. In the area of FW11 and the point of  
22 A1, what's going to happen to those areas under your  
23 wetland restoration project?  
24 A As I said earlier, primarily the area would be planted  
25 with native trees and shrubs. There would be in areas

KELLEY (Exam by Aramburu)

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1 would have asked us to do that.  
2 Q Okay. So you have given this to the Port. When you  
3 said the landowner, is that my client or is that the  
4 Port?  
5 A That would have been the owner of the property, your  
6 client presumably.  
7 Q Okay. Okay. And have you been asked to do any other  
8 kinds of particular reports on Lot 92?  
9 A No.  
10 Q Are you anticipating doing one for trial?  
11 A I haven't been asked to.  
12 MR. ARAMBURU: I think that's all the  
13 questions I have of Mr. Kelley.  
14 MS. JONES: Thank you. I have no  
15 questions.  
16 MR. ARAMBURU: Okay. You're free to go  
17 if you want. You want to hang around.  
18 THE REPORTER: Signature?  
19 MR. ARAMBURU: Signature?  
20 MS. JONES: Yeah, you'll want to read  
21 your signature. Would you like to read the deposition  
22 before --  
23 THE WITNESS: Oh, yes, definitely.  
24 MS. JONES: And I would like you to  
25 read it.

KELLEY (Exam by Aramburu)

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1 THE WITNESS: Okay.  
2 MS. JONES: The answer is yes.  
3 THE WITNESS: Okay. So I will receive  
4 that in a few days probably?  
5 MS. JONES: If we have it transcribed.  
6 We haven't decided. If we do have it transcribed, then  
7 you'll get a chance to read and sign it before  
8 submission.  
9 THE WITNESS: All right. Great.  
10 MR. ARAMBURU: Why don't we take a  
11 MS. JONES: A short break?  
12 MR. ARAMBURU: A short break.  
13 (Whereupon the deposition  
14 concluded at 10:30 a.m.)  
15 (Signature was not waived.)  
16 (There was 1 exhibit.)  
17  
18  
19  
20  
21  
22  
23  
24  
25

KELLEY (Exam by Aramburu)

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1 A F F I D A V I T  
2  
3 STATE OF WASHINGTON )  
4 ) ss.  
5 COUNTY OF KING )  
6  
7 I have read my within deposition and the same is  
8 true and accurate, save and except for changes and/or  
9 corrections, if any, as indicated by me on the CORRECTION  
10 SHEET hereof.  
11  
12  
13 \_\_\_\_\_  
14 JAMES CLAYTON KELLEY  
15  
16  
17  
18 SUBSCRIBED AND SWORN TO before me this  
19 \_\_\_\_\_ day of \_\_\_\_\_, 2001.  
20  
21  
22 \_\_\_\_\_  
23 NOTARY PUBLIC in and for the State of  
24 Washington residing at \_\_\_\_\_  
25 My Commission expires \_\_\_\_\_

Reporter: Struve

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1 C E R T I F I C A T E  
2  
3 STATE OF WASHINGTON )  
4 ) ss.  
5 COUNTY OF KING )  
6 I, the undersigned Certified Shorthand Reporter  
7 and an officer of the Court, under my commission as a  
8 Notary Public in and for the State of Washington, do  
9 hereby certify:  
10 That the annexed and foregoing deposition  
11 of each witness named herein was taken stenographically  
12 before me and reduced to typewriting under my direction;  
13 I further certify that the witness examined,  
14 read and signed the deposition after the same was  
15 transcribed, unless indicated in the record that the  
16 parties and the witness waive the signing;  
17 I further certify that all objections made at  
18 the time of said examination to the manner of taking the  
19 deposition or to the conduct of any party have been  
20 noted by me upon each said deposition;  
21 I further certify that I am not a relative or  
22 employee or attorney or counsel of any of the parties to  
23 said action, or a relative or employee of any such  
24 attorney or counsel, and that I am not financially  
25 interested in the said action or the outcome thereof;

Reporter: Struve

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1 I further certify that each witness before  
2 examination was by me duly sworn to testify the truth;  
3 I further certify that the deposition, as  
4 transcribed, is a full, true and correct transcript of  
5 the testimony, including questions and answers, and all  
6 objections, motions and exceptions of counsel made and  
7 taken at the time of the foregoing examination;  
8 I further certify that I am sealing the  
9 deposition in a window envelope which shows the case  
10 title and witness name, and delivering the same to the  
11 appropriate authority;  
12 I further advise you that as a matter of firm  
13 policy, the electronically-stored Stenographic notes of  
14 this transcript will be destroyed three years from the  
15 date appearing on this Certificate unless notice is  
16 received otherwise from any party or counsel hereto on  
17 or before said date;  
18 IN WITNESS WHEREOF, I have hereunto set my  
19 hand and seal this 15th day of May, 2001.  
20  
21 \_\_\_\_\_  
22 Ronald L. Struve  
23 NOTARY PUBLIC  
24 MY COMMISSION EXPIRES 1-18-05  
25 Notary Public in and for the State  
of Washington, residing at Redmond.  
My commission expires January 18, 2005  
CSR No. ST-RU-VR-L584CJ

Reporter: Struve

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Please make all changes or corrections on this sheet, showing page, line and reason, if any, for correction. Sign this sheet. Sign the Affidavit page of the deposition before a Notary Public on the line provided and return them both to me at 1415 N. 200th Street, Suite B-7, Shoreline, Washington, 98133-3220.

=====

PAGE	LINE	CORRECTION AND REASON
6	12	Change "national" to "natural" - mis-quote
12	2	remove "/" - typo
16	5	change "vegetative" to "vegetated" - mis-quote
16	12	remove "."; and combine with next sentence - misquote
21	11	add "wetland" <del>and</del> between "that" and "after" - missing word
22	7	Change "Teerzi" to "Terzi" mis-spelling
22	9	change to Terzi
22	19	Change "Eric" to "Erik" mis spelling
34	9	change "excessive" to "excessively" mis-quote

  
 \_\_\_\_\_  
 Signature here and on Affidavit

ATTN: Ronald L. Struve

AR 024421