City of Hailey

115 MAIN STREET SOUTH, SUITE H
HAILEY, IDAHO 83333

(208) 788-4221
Fax: (208) 788-2924

March 9, 2009

John Campbell
c/o Old Cutters, Inc..
P.O. Box P.O. Box 4944
Ketchum, Idaho, 83340

Re: Cutters

Dear Mr. Campbell:

The City of Hailey would like to thank Old Cutters, Inc. and acknowledge the generous and thoughtful donation to the City of 71.1 acres of land and improvements thereon known as Parcel B of the Old Cutters Subdivision. We know that the previous county zoning of Parcel B permitted portions of it to be developed for residential uses. We appreciate your desire to have all of Parcel B remain undeveloped forever and have therefore placed all of it in the City's RGB zoning district. The land will be used for valuable public purposes, including the dedication of open space, the allowance of public trails, the use of land for a public water tank, and the establishment of city access to the properties. The gift will be a tremendous asset to Hailey citizens and to wildlife.

The City also acknowledges the additional donation by Old Cutters, Inc. of any credit it is entitled to under our Development Impact Fee Ordinance for the conveyance of the park and its improvements known as Parcel A of the Old Cutters Subdivision and will cooperate with you in providing documentation that may be required to claim that donation.

Sincerely,

Richard L. Davis, Mayor

Martha Burke, Council President

Don Keirn, Council Member

Carol Brown, Council Member

Fritz Haemmerle, Council Member

cc: Jim Speck, Esq.

SPECK & AANESTAD
A PROFESSIONAL CORPORATION
ATTORNEYS

JAMES P. SPECK
jim@speckandaanestad.com

DOUGLAS J. AANESTAD
doug@speckandaanestad.com

120 EAST AVENUE
P. O. BOX 987
KETCHUM, IDAHO 83340

TELEPHONE
(208)726-4421
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(208)726-0752

March 6, 2009

VIA E-MAIL - wlo@cox-internet.com
ORIGINAL WILL NOT FOLLOW
Mr. Ned Williamson
WILLIAMSON LAW OFFICE, PLLC
115 Second Avenue South
Hailey, Idaho 83333

Re: Old Cutters, Inc. - Amendment to Annexation Agreement
Our File No. 882/050070

Dear Ned:

John and I very much appreciate the time and effort Fritz and you have put into the meetings and discussions over our concerns for the Old Cutters Subdivision (the "Subdivision"). I now want to list and explain all of the changes my client, Old Cutters, Inc. ("OCI") is requesting in the Annexation, Services and Development Agreement dated April 10, 2006 and recorded April 27, 2006 as Instrument No. 534733in the records of Blaine County, Idaho (the "Agreement"), the subsequent decisions approving the Subdivision and related ordinances.

1. Water Rights. Paragraph 8 of the Agreement provides that OCI is to retain ownership of all water rights appurtenant to the Subdivision and may sell and move those water rights off of the Subdivision. OCI, in reliance on this provision, entered into a contract to sell to Dry Lot, LLC ("Dry Lot") that portion of these water rights used to historically irrigate 58.5 acres of the land which is now the Subdivision, and Dry Lot has filed with the Idaho Department of Water Resources (the "Department") the applications required to consummate its purchase of such water rights and move them off of the Subdivision. As a part of its protest to Department approval of the Dry Lot applications, Indian Creek Ranch Owners Association, Inc. ("ICROA") has asserted that Idaho Code Section 67-6537 (the "Statute", which became effective July 1, 2005 during the pendency and processing of OCI's application for annexation into the City) prohibits moving such water rights off of the Subdivision.

The relevant part of the Statute reads: "The intent of this section is to encourage the use of surface water for irrigation. All applicants ***proposing to make land use changes*** shall be required to use surface water, ***where reasonably available***, as the ***primary water source*** for irrigation." (emphasis added). The Statute defines the term "where reasonably available" as it applies to the Subdivision as follows: "Surface water shall be deemed reasonably available if: (a) A surface water right is, or reasonably can be made, appurtenant to the land." Although I firmly believe the current paragraph 8 of the Agreement was legal and valid when signed in March, 2006 before the application for subdivision was filed (subdivision is a "land use change", annexation is not), rather than tie up both the

Subdivision and my client's water rights in extensive litigation to resolve the issue, OCI, with the agreement of Dry Lot, will convey to the City surface water rights from the Big Wood River with a March 24, 1883 priority date for the irrigation of 31 acres.

This number represents an accurate estimate of the maximum irrigated area within the Subdivision at its build out (excluding the three large lots[1]). The Statute does NOT require that ALL surface water rights appurtenant to land which is subdivided MUST be used to irrigate the new subdivision. Instead, it only requires that the "primary water source" (not the exclusive source) for irrigation shall be surface water rights. Therefore, the City's municipal water supply can and should be the "supplemental" source of water for irrigation within the Subdivision[2]. The proposal described in the previous paragraph satisfies the requirements of the Statute to the extent it applies to the Subdivision.

2. Annexation Fees. We have provided you with documentation and other information that supports valuing the water rights at significantly more than $30,000 per acre. Nonetheless, OCI is willing to use that amount to determine the credit it should receive against the annexation fees due pursuant to paragraph 4 of the Agreement. The payment due November 29, 2008 with the proper CPI adjustment is $883,962.13. We propose to apply the $930,000 value of the water rights to satisfy this payment. The remaining portion of the water rights value in the amount of $46,037.87 should reduce the balance of the annexation fees due from $2,625,375 to $2,579,337.13. In further consideration of the actual value of the water rights we request that any interest accruing on the amount due November 29,2008 be deemed satisfied. For example, if the water rights were valued at $32,000 per acre, which is clearly justified in today's market, that would cover $62,000 of accrued interest which is significantly more than the amount calculated using the statutory default rate of 12% (that amounts to approximately $38,071 as of March 9, 2009).

We propose that the balance of $2,579,337.13 will be due in three (3) installments: (1) the sum of Eight Hundred Twenty-nine Thousand Eighty-seven and 13/100ths Dollars ($829,087.13) shall be due November 29, 2011, (2) the sum of Eight Hundred Seventy-five Thousand One Hundred Twenty-

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[1] The irrigation of those three lots, and the water rights for the two ponds situated on those three lots, will be provided by the portion of the OCI water rights used to historically irrigate 7.5 acres. The water will continue to be delivered to these three lots through the Hiawatha Canal and the High Ditch. These water rights will be conveyed to and owned by the owners of the three large lots (see Article 6 of the CCR's for the Subdivision).

[2] Surface water may be the "source" of water for irrigation in one of two ways. First, it can be delivered and applied directly to irrigate the land which would require two completely separate delivery systems to all irrigated areas within the Subdivision. I'm sure you recall that complications relating to such a dual system were among the reasons the City decided it did not want the OCI water rights back in March 2006. Second, the surface water can be "stored" in an underground inflitration basin and then diverted in the form of ground water from the City's municipal system.

five Dollars ($875,125) shall be due November 29, 2013, and (3) the sum of Eight Hundred Seventy-five Thousand One Hundred Twenty-five Dollars ($875,125) shall be due November 29, 2014. Each installment will be adjusted by the CPI according to paragraph 4.f of the Agreement. We will also apply to the payment of these installments the sum of $50,000 from the closing of the sale of every market rate single family or duplex lot in the Subdivision commencing with the next closing. These payments, adjusted by the CPI according to paragraph 4.f of the Agreement, shall be paid directly to the City out of the closing escrow for the sale of each such lot. The City would thus be paid in full upon closing the sale of 52 more such lots. Since 18 lot sales have already closed, this means the City will be paid in full after the closing of the sale of the 70th lot. The current payment schedule anticipates the fees would be paid in full after 92 of the 108 (85%) market rate lots are sold. I want to emphasize that OCI is **NOT** asking that any portion of the annexation fees be waived. Instead, the City is paid as the project succeeds and the impact to city services occurs, and there continue to be deadlines for OCI to meet and the corresponding risk for OCI to bear.

3. Community Housing. Paragraph 3.b of the Agreement provides that OCI will construct within the Subdivision 25 community housing units as required by the City's Inclusionary Community Housing Ordinance. 13 of those units are to be income restricted and the remaining 12 are to be workforce housing. I believe the this Ordinance will be struck down if challenged in court for the reasons briefly described in my January 23, 2009 letter to my client a copy of which I am including with this letter. OCI, however, does not intend to make this challenge and is very willing to provide workforce community housing within the Subdivision. It does not want to provide income restricted units. Therefore, OCI proposes to build 25 workforce housing units and deliver them at the rate of one (1) workforce housing unit offered for sale for every two (2) certificates of occupancy issued for market rate single family residences or duplex units within the Subdivision. The City's Ordinance only requires one (1) community housing unit for every five (5) such certificates of occupancy, so this delivers community housing available for the City's resident workers two and one-half times faster!

OCI also asks the City to exempt all community housing units from any development impact fees under the City's Development Impact Fee Ordinance (the "DIF Ordinance"). Mayor Rick Davis has previously been provided with information from municipalities in California, Florida, Minnesota, New Mexico and Texas describing the waiver or reduction of building permit fees, development impact fees and other types of development related fees for affordable housing projects. He briefly discussed them at the February 9, 2009 city council meeting. I am adding to that copies of the relevant portions of the Town of Telluride's zoning ordinance which waives the water and sewer tap (hookup) fees for deed restricted affordable housing. As you know, Telluride is the model for the workforce housing deed restriction units OCI is providing at the Subdivision. The City's Inclusionary Community Housing Ordinance provides only for the deferral of building permit and water and sewer hookup fees until the certificate of occupancy is issued. The City is presently charging OCI's community housing Rimrock Cottages the same development impact fee it charges any other detached single family residence in the City, no matter how big it may be! The total of all of the fees charged by the City for the five (5) Rimrock Cottages that will be community housing is $44,944, which represents 4% of their total sales price (assuming they will all be workforce housing). The BKHA Fee adds another 3%, so the total of all City and BKHA fees is 7% of the total sales price. We believe a waiver of the

development impact fees for any community housing is more in line with the current trends in other states and will provide more incentive for developing this needed public resource.

4. Development Impact Fee Credits. Pursuant to the requirements of the Agreement and the conditions of approval of the Subdivision, OCI will have constructed and delivered to the City the park (Parcel A) in the Subdivision which qualifies as a "System Improvement" under the DIF Ordinance. OCI is entitled to a "credit" for this System Improvement pursuant to Section 15.16.050.01 of the DIF Ordinance. The amount of the credit is limited by I.C. § 67-8209(3) to the difference between the value of the System Improvement conveyed to the City (in our case, Parcel A - the park - and its improvements) and the Subdivision's "proportionate share" of City park facilities improvement costs. Under the DIF Ordinance definition of "Development Impact Fee", the proportionate share of City park facilities improvement costs is set forth in Exhibit A of the DIF Ordinance at $934 for a detached single family residence and $782 for other types of residences. The Subdivision's proportionate share of City park facilities improvements can then be calculated based on the numbers of each type of residence that can be built in the Subdivision at build out. The credit would then be paid to OCI out of the parks portion of development impact fees collected by the City in the future. OCI, as a donation to the City, will waive its right to receive this credit. In return, the City must agree to sign such appropriate documents as may be necessary for OCI to substantiate this donation with the Internal Revenue Service.

5. Parcel B. I previously delivered to you a fully executed and acknowledged Gift Deed conveying Parcel B to the City. OCI asks the City to acknowledge this gift by signing the letter we previously worked on, a copy of which I am again enclosing. This will allow OCI to pursue an appropriate charitable deduction in the same manner as it would have been able to do if Parcel B had been conveyed to the Wood River Land Trust. That is what my client was promised when he agreed to instead convey this land to the City.

We are pleased to present a proposal that is mutually beneficial to the City and OCI. Please call me right away if you have any questions.

Sincerely yours,

SPECK & AANESTAD
A Professional Corporation

James P. Speck

JPS/jp
(enclosures)
cc: client (w/ enclosures)

MEMORANDUM

TO: Hailey City Council Members

FROM: Ned C. Williamson

DATE: March 9, 2009

RE: Proposed Second Amendment to Cutters' Annexation Agreement

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For several months, Council Member Haemmerle and I have conducted negotiations involving a proposed amendment to the Cutters' Annexation Agreement. During these discussions, we have explored a conveyance of water rights in lieu of a cash payment for the annexation fees. The negotiations have been complicated because of the number of parties involved in the water rights discussions. As permitted by the original annexation agreement, Old Cutters entered into an agreement to sell their water rights to an entity called Dry Lot, who are owners of Valley Club lots. Indian Creek Ranch Owners' Association objected to the transfer based, in part, on an interpretation of Idaho Code § 67-6537. To complicate the matter further, the Big Wood Canal Company filed an objection to the proposed transfer from Old Cutters to Dry Lot.

We are recommending that the City receive water rights sufficient to irrigate 31 acres. Under this arrangement, Old Cutters would use some of the water rights to irrigate three large lots and for two ponds within the Cutters Subdivision and convey the remainder of the water rights to Dry Lot. We have calculated the approximate acreage for the park and the smaller lots which would be irrigated in the Cutters' Subdivision to be approximately 31 acres. We believe that the retention of the water rights needed to irrigate 31 acres should resolve the objection of Indian Creek. The water rights that Hailey would retain could be used for surface water irrigation and/or for mitigation for ground water rights. Indian Creek may maintain that more water rights should be obtained by Hailey for additional acreage and/or that the water has to be used on the Cutters Subdivision.

We believe the Big Wood Canal Company's objection has been satisfactorily resolved. Big Wood agreed with Dry Lot that some of the water transferred to Dry Lot would remain in the Big Wood River, but that agreement does not impact the water that Hailey would receive from Old Cutters.

The Agreement presently requires Old Cutters to pay annexation fees of $3,500,500 in four annual installments of $875,125 beginning in November, 2008. We would propose that Cutters receive full credit for the first installment due in November, 2008, and a partial credit of $46,037.87 for the second payment. In return, Hailey would receive the water rights described above. In addition, we would suggest that Cutters pay annexation fees of $50,000 per lot upon closing of a lot. The deadline to pay the remaining three installments would then be extended to

November 29, 2011, 2013 and 2014. Of course, interest would accrue on the annexation payments until paid in full.

I am enclosing a copy of a proposed Second Amendment to the Cutters' Annexation Agreement and a letter from Jim Speck outlining the proposed amendment and other issues. .

As part of the discussions, Old Cutters asserted that it was entitled to a credit for the value of the land donated as part of the park and the improvements thereon, along with the value of the off-site sidewalk installed by Cutters. Old Cutters has agreed not to pursue any credits.

By this proposed amendment, we would also resolve the conveyance of Parcels A and B (the park and the hillside open space) and the easement. I am also enclosing a proposed letter which describes the gifts for the open space and credits for development impact fees.

Old Cutters also raised issues about community housing during the negotiations. We decided not to try to resolve the community housing issues. I anticipate that Old Cutters will raise these issues at our Monday meeting. Old Cutters' position on community housing is outlined in the enclosed letter from Jim Speck.

If you have any questions, please contact me. Thank you.

cc: Jim Speck (w/ encl.)

RECORDING REQUESTED BY AND
WHEN RECORDED MAIL TO:
James P. Speck, Esq.
SPECK & AANESTAD
A Professional Corporation
Post Office Box 987
Ketchum, Idaho 83340

(Space above line for Recorder's use)

SECOND AMENDMENT TO ANNEXATION, SERVICES AND DEVELOPMENT AGREEMENT

THIS SECOND AMENDMENT TO ANNEXATION, SERVICES AND DEVELOPMENT AGREEMENT ("Second Amendment") is dated this ____ day of March, 2009 by and between the CITY OF HAILEY, IDAHO, a municipal corporation (the "City") and OLD CUTTERS, INC., an Idaho corporation ("OCI," and together with the City, the "Parties")

RECITALS

A. The City and OCI entered into that certain Annexation, Services and Development Agreement Old Cutters Planned Unit Development (the "Agreement") dated April 10, 2006 and recorded April 27, 2006 as Instrument No. 534733, records of Blaine County, Idaho.

B. The City and OCI entered into that First Amendment to Annexation, Services and Development Agreement Old Cutters Planned Unit Development (the "First Amendment") dated June 11, 2007 and recorded May 1, 2008, as Instrument No. 557818, records of Blaine County, Idaho. The First Amendment only amended Paragraph 7 of the Agreement.

C. OCI thereafter obtained approval of Old Cutters Subdivision (the "Subdivision") for its land annexed into the City, recording the final plat for the Subdivision on November 29, 2007 as Instrument No. 563364, records of Blaine County, Idaho.

D. Paragraph 8 of the Agreement provides that OCI is to retain ownership of all water rights appurtenant to the Subdivision and may sell and move those water rights off of the Subdivision. OCI, in reliance on this provision, entered into a contract to sell to Dry Lot, LLC ("Dry Lot") that portion of these water rights used to historically irrigate 58.5 acres of the land which is now the Subdivision, and Dry Lot has filed with the Idaho Department of Water Resources (the "Department") the applications required to consummate its purchase of such water rights and change the nature of use and place of use of those water rights, including moving those rights off the Subdivision.

E. As a part of its protest to Department approval of the Dry Lot applications, Indian Creek Ranch Owners Association, Inc. ("ICROA") has asserted that Idaho Code Section 67-6537 (the "Statute") prohibits the transfer of such water rights off of the Subdivision. OCI and the City have agreed that the maximum irrigated area within the Subdivision (excluding Lots 13 and 14, Block 2, and Lot 1, Block 3 (the "Large Lots"))will be thirty one (31) acres at full development and build out of the Subdivision, and that the conveyance by OCI to the City of that portion of the water rights used to historically irrigate thirty one (31) acres of the land which is now the Subdivision and

the retention by OCI of that portion of the water rights used to historically irrigate seven and one-half (7.5) acres of the land which is now the Subdivision will allow OCI and the City to comply with the requirements of the Statute. Dry Lot has agreed to this conveyance to the City.

F. OCI and the City have agreed that the value of the water rights to be conveyed to the City by OCI is $930,000 and that such value shall be applied in part to satisfy in full the annexation fee payment which was due November 29, 2008 in the amount of $883,962.13, and the remainder to reduce the balance of annexation fees due under the Agreement.

AGREEMENT

NOW, THEREFORE, in consideration of the mutual covenants, promises, agreements, terms and conditions set forth herein, the parties covenant and agree as follows:

1. The Recitals set forth above are an integral part of this Agreement and are fully incorporated herein by this reference.

2. Paragraph 8 of the Agreement shall be amended by the deletion of Paragraph 8 in its entirety and the addition of a new Paragraph 8 as follows:

> **8. WATER RIGHTS.** To comply with the requirements of Idaho Code Section 67-6537, OCI shall (a) within thirty (30) days of this Second Amendment, convey by grant deed to the City 0.19 cfs of Water Right No. 37-21130, 1.50 cfs of Water Right No. 37-21137 and 0.18 cfs of Water Right 37-21139, used for the irrigation of 31 acres within the 66 acre place of use for such water rights, pursuant to the partial decrees for such water rights issued January 21, 2009 in *In Re SRBA*, Twin Falls District Court Case No. 39576 (the "City Water Rights") and (b) retain that portion of Water Rights 37-21130, 37-21137 and 37-21139 used for the irrigation of 7.5 acres within the 66 acre place of use to be used to irrigate the maximum irrigated area at full development of Lots 13 and 14, Block 2 and Lot 1, Block 3, of the Subdivision and to provide water for the two ponds located on these 3 lots. Irrigation on these 3 lots by the City's municipal water system shall not exceed one-half (2) acre per lot. OCI may sell to Dry Lot the remaining portion of Water Rights 37-21130, 37-21137 and 37-21139 used for the irrigation of 27.5 acres within the 66 acre place of use. The parties agree that the conveyance of water rights to the City in an amount less than the appurtenant water rights may not be considered a precedent or binding in future annexation or subdivision applications.

3. OCI and the City agree that the annexation fee payments due pursuant to paragraph 4.a of the Agreement was timely made and the conveyance of the City Water Rights to the City satisfies in full the payment due pursuant to paragraph 4.b of the Agreement. OCI and the City further agree the conveyance of the City Water Rights to the City reduces the payment due pursuant to paragraph 4.c of the Agreement by $46,037.87, so that the principal amount of the payment due pursuant to paragraph 4.c is $829,087.13.

4. OCI and the City agree that OCI has conveyed title to the Park, Open Space and Easements pursuant to Paragraphs 5.a, 5.b and 5.c of the Agreement, and has constructed or will be constructing improvements to the Park pursuant to Paragraph 5.a of the Agreement or improvements described in Paragraph 7 of the Agreement and First Amendment. OCI, for itself and its successors, heirs and assigns, as a gift and donation to the City, hereby waives the right that OCI or any of its successors, heirs or assigns, has to any credit pursuant to Idaho Code Section 67-8209 and Section 15.16.050.01 of the City's Development Impact Fee Ordinance (the "DIF Ordinance") against the Development Impact Fees otherwise due for the same City Capital Improvements in connection with the Subdivision, for the conveyance to the City of the Park and its improvements. OCI further agrees for itself and its successors, heirs and assigns, that it shall not seek any other credit against any obligation for an impact or capital facilities fee, hookup fee, building permit fee, development impact fee created in accordance with Idaho Code Sections 67-8201 *et seq.*, as amended, or similar fee associated with the development of the Property, that accrues or may accrue by virtue of the conveyance of title to the Park, Open Space and Easements pursuant to Paragraphs 5.a, 5.b and 5.c of the Agreement, or the construction of improvements to the Park pursuant to Paragraph 5.a of the Agreement or improvements described in Paragraph 7 of the Agreement and First Amendment.

5. Paragraphs 4.c, 4.d and 4.e of the Agreement shall be amended by the deletion of Paragraphs 4.c, 4.d and 4.e in their entirety and by the addition of the following language in Paragraph 4.c, 4.d and 4.e, as follows:

c. The sum of Eight Hundred Twenty-nine Thousand Eighty-seven and 13/100ths Dollars ($829,087.13) shall be due November 29, 2011,

d. The sum of Eight Hundred Seventy-five Thousand One Hundred Twenty-five Dollars ($875,125) shall be due November 29, 2013.

e. The sum of Eight Hundred Seventy-five Thousand One Hundred Twenty-five Dollars ($875,125) shall be due November 29, 2014.

6. Paragraph 4 of the Agreement is amended by the addition of the following new Paragraph 4(g):

g. As partial payment of the installments of annexation fees due under Paragraphs 4.c, 4.d and 4.e, above, OCI shall instruct the title company handling the real estate closings of every Market Rate Lot commencing with the next closing after the effective date of this Second Amendment to apply to the payment of these installments the sum of $50,000, adjusted as described below, from each closing of the sale of every Market Rate Lot. The payments described in this Paragraph 4.g shall be adjusted by the Index according to paragraph 4.f of the Agreement and shall be paid directly to the City out of the closing escrow for the sale of each such lot.

7. OCI and the City agree to cooperate with each other and Dry Lot in connection with the defense by Dry Lot to any challenge to the transfer of the water rights to Dry Lot referenced in Paragraph 2 of this Second Amendment, based upon either Idaho Code § 67-6537 or any other action or inaction of the City which may be alleged in connection with a challenge to such a transfer.

8. Each of the persons executing this Second Amendment represents and warrants that he has the lawful authority and authorization to execute this Second Amendment, as well as all deeds, easements, liens and other documents required hereunder, for and on behalf of the entity executing this Second Amendment.

9. All other terms and conditions of the Agreement and First Amendment shall remain unchanged and in full force and effect.

IN WITNESS WHEREOF, the Parties have executed this Second Amendment the day and year written herein.

DATED this _____ day of March, 2009.

CITY OF HAILEY

By: _____
Martha Burke, Council President

ATTEST:

_____
Mary Cone, Hailey City Clerk

OLD CUTTERS, INC.

By: _____
John Campbell, President

STATE OF IDAHO)
: ss.
County of Blaine)

On this _____ day of March, 2009, before me the undersigned Notary Public in and for said State, personally appeared MARTHA BURKE, known or identified to me to be the Council President of Hailey and the person whose name is subscribed to the within instrument, and acknowledged that she executed the same on behalf of the City of Hailey.

IN WITNESS WHEREOF, I have hereunto set my hand and seal the day and year in this certificate first above written.

_____
Notary Public for Idaho
Residing at: _____
Comm. Expires: _____

STATE OF IDAHO)
: ss.
County of Blaine)

On this _____ day of March, 2009 before me the undersigned Notary Public in and for said State, personally appeared JOHN CAMPBELL, known or identified to me to be the president of Old Cutters, Inc., and the person who executed the foregoing instrument on behalf of said company and acknowledged to me he executed the same on behalf of said company.

IN WITNESS WHEREOF, I have hereunto set my hand and seal the day and year in this certificate first above written.

_____
Notary Public for Idaho
Residing at: _____
Comm. Expires: _____