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## I. SUMMARY OF ARGUMENT

This case is about the Washington Department of Fish and Wildlife's ("WDFW") ongoing and repeated effort to arbitrarily allocate the commercial harvest of wild "chum" or "keta" salmon in the South Puget Sound between the non-tribal commercial gillnetters and commercial purse seiners. Respondent Puget Sound Harvesters Association ("PSHA") represents commercial non-tribal gillnet fishers.

After a near market collapse in 2002 the Puget Sound gillnet fleet began to enjoy several years of increasing success harvesting chum salmon in the South Puget Sound. In response to the gillnet fleet's increasing success, beginning in 2007 WDFW attempted to arbitrarily allocate the fishing time for available South Puget Sound commercial "chum" salmon in order to reduce the gillnet fleet to a "benchmark" of 17% of the available harvest. While WDFW ultimately failed to achieve its arbitrary "benchmark," the 2007 season resulted in the gillnet fleet catching approximately 30% of the harvest, leaving the other 70% to the competing commercial non-tribal purse seine fleet.

PSHA challenged WDFW's 2007 fishing rules for the South Puget Sound chum salmon fishery in Thurston County Superior Court. In its

June 2, 2008 Order, the Superior Court (the Honorable Chris Wickham) declared that “WDFW must allocate the *resource* equitably.”

Shortly after Judge Wickham’s ruling on the 2007 regulations, on July 8, 2008, WDFW issued its 2008 rules for commercial salmon fishing in Puget Sound (“2008 rules”). AR 24-36.<sup>1</sup> PSHA was forced yet again to seek judicial review of the 2008 rules seeking yet again a declaratory ruling that WDFW’s 2008 rules were arbitrary and capricious for failing to equitably allocate the available harvestable fish between the two competing non-tribal commercial fishing groups.

In its 2008 rules WDFW ignored completely Judge Wickham’s ruling on the 2007 rules. WDFW instead arbitrarily decided in its 2008 rules that it will only fairly allocate “harvest *opportunity* between gear groups.” In other words, WDFW decided arbitrarily to focus on an allocation of equitable time on the water as opposed to an opportunity to harvest an equitable number of fish. WDFW knows full well that there is a vast difference in capability to catch fish between the two competing gear groups. WDFW knows full well that providing an equitable allocation of harvest “opportunity” does not provide an equitable

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<sup>1</sup> The reference AR \_\_\_ refers to the Bates stamped page numbers in the certified administrative record.

allocation of the resource – chum salmon. Instead, WDFW once again intentionally and arbitrarily allocated time on the water such that the gillnet fleet would be able to harvest only approximately 30% of the available chum salmon leaving the remaining 70% for the competing purse seine fleet. Once again, Thurston County Superior Court Judge Wickham agreed with PSHA and declared WDFW's 2008 rules arbitrary and capricious. For the second time, Judge Wickham also awarded PSHA its attorneys' fees for successful prosecution of its claim under the Administrative Procedure Act.

WDFW asks this court to reverse the Superior Court's order finding the 2008 rule arbitrary and capricious. But as the Superior Court found, there is no evidence in the record supporting WDFW's decision to allocate based on equal time on the water, given the vast discrepancy in catching power of the two fleets. There is ample evidence in the record, notably the historic catch rates of the two types of fishers, supporting an equal allocation of fish. Although WDFW presented a range of reasons in support of its rule to the Superior Court, and presents an expanded range of reasons here, none of the reasons cited supports WDFW's arbitrary 2008 rule.

## II. RE-STATEMENT OF THE ISSUES

1. Was WDFW's 2008 South Puget Sound (Areas 10 & 11) commercial fishing schedule arbitrary and capricious where, rather than setting a schedule so that the two competing commercial gear groups would have the opportunity to share equitably in the resource – salmon – WDFW instead established a schedule focused on allocating equal time on the water, knowing full well that equal time on the water would result in a significantly larger share of the resource for the purse seine fleet?

2. The Equal Access to Justice Act provides that attorney's fees shall be awarded, unless the court finds that a State agency's actions were substantially justified. The Superior Court found that WDFW's actions were not substantially justified and awarded attorney's fees in this matter. Did the Superior Court abuse its discretion in awarding attorney's fees?

3. The Equal Access to Justice Act allows for attorney's fees on appeal. If the Superior Court's decision is upheld, should PSHA receive attorney's fees for responding to this appeal?

### III. STATEMENT OF THE CASE

WDFW is empowered by RCW 77.04.012 to regulate “the wildlife and food fish, game fish, and shell fish resources in a manner that does not impair the resource.” RCW 77.04.012. RCW 77.50.120 provides guidance to WDFW in how it is to regulate salmon:

It is the intent of the legislature to ensure that a sustainable level of salmon is made available for harvest for commercial fishers in the state. Maintaining consistent harvest levels has become increasingly difficult with the listing of salmonid species under the federal endangered species act. Without a stable level of harvest, fishers cannot develop niche markets that maximize the economic value of the harvest. New tools and approaches are needed by fish managers to bring increased stability to the fishing industry.

In exercising its statutory mandate, WDFW calculates the number of chum or keta salmon returning to Puget Sound on an annual basis. AR 53. A percentage of that annual return is set aside for conservation purposes – to ensure that the salmon stock continues to thrive – and the remainder is then divided amongst commercial fishers. Native tribal fishers (known as “treaty” fishers) are entitled to a percentage of the catch.

The remainder is available for harvest by the non-treaty commercial fishers, comprised of the purse seiners and gillnetters.

WDFW has established six management criteria for allocating the harvest. These management criteria are:

- a. Conservation of target species
- b. Minimize catch or impact on incidental species
- c. Monitor and sample all fisheries
- d. Maintain the economic well-being and stability of the industry
- e. Fully utilize the non-Indian allowable catch
- f. Fairly allocate harvest opportunity

AR 13. WDFW develops rules for commercial salmon fishing through a process called the “North of Falcon” process; at issue in this case are two areas of Puget Sound managed during the North of Falcon process, Areas 10 and 11.

From 1973 to 1993, the gillnetters caught approximately 50% of the chum salmon available for non-treaty commercial harvest in Areas 10 and 11. AR 175. Post-1990 saw a general decline in the gillnet fishing leading to levels as low as 5% of the available non-treaty commercial harvest by 2002; the low market price and loss of markets for chum salmon led to a decline in participating gillnet vessels. In order to save the gillnet fishing fleet, in 2003 WDFW responded and increased the number of days available for the gillnet fleet in order to increase their share of the

harvest. WDFW attempted to set a benchmark harvest of 17% for the gillnet fleet. The 17% benchmark was based on an average over the years 1996-2000. AR 59. During 2005 and 2006, the gillnet fleet began to recover and gradually increased its harvest of the available non-treaty chum salmon in Areas 10 and 11. Gillnet harvests increased to 25% both years. *See* AR 175; AR 460.

In response to the gradual increase in gillnet harvest, WDFW proposed reducing the number of days of gillnet fishing for the 2007 season in order to achieve the 1996-2000 “benchmark” of 17%. AR 60-61. WDFW issued fishing rules allocating the fish harvest amongst gillnetters and purse seiners by equally allocating the number of days each group was allowed to fish, rather than allocating the amount of fish caught. In the midst of the 2007 season, after the gillnet harvest appeared to be exceeding expectations and indeed approached 50% of the allowable non-tribal allocation of chum salmon in Areas 10 and 11, WDFW again relied on the 1996-2000 “benchmark” to close the gillnet chum fishing season on November 2, 2008. AR 60. WDFW allowed the purse seine fleet to continue fishing. In one additional day of fishing the purse seine fleet took over 93,000 fish, exceeding both the state’s total target allocation of non-treaty chum, and also dramatically skewing the

season ending results between the two gear groups. AR 60, AR 94. In all, during the short three-week 2007 season, the gillnet fleet had five openings and harvested 31% of the chum salmon in Areas 10 and 11. The purse seine fleet had four openings and harvested 69% of the chum salmon. AR 94, AR 95 and AR 14.

PSHA filed an administrative rule challenge under the Administrative Procedures Act, Ch. 34.05 RCW (“APA”), to challenge the 2007 rules. Despite a timely challenge, because the challenge could not be heard prior to the start (and end) of the 2007 season, WDFW moved to dismiss the challenge as moot. The Thurston County Superior Court determined that the case fell within the substantial public interest exception to the mootness doctrine – in part because of the difficulty in filing and having a case heard between the mid-summer rule adoption and the short fall fishing season. AR 57.

After briefing and oral argument, the court declared in its oral opinion and June 2, 2008 Order that WDFW’s 2007 rules were invalid as arbitrary and capricious. Included within the court’s order is the following significant conclusion:

[T]he Court concludes that WDFW does have authority to allocate the harvestable amount of fish between gillnets and purse

seines for purposes other than conservation.  
*WDFW must allocate the resource equitably.*

AR 61, Conclusion 4 (emphasis added).<sup>2</sup> Neither WDFW nor intervenor Purse Seiners appealed the June 2, 2008 order.

During the pendency of PSHA's challenge to the 2007 rules, WDFW was moving forward with rulemaking for the 2008 non-treaty commercial chum salmon fishing season in Areas 10 and 11. The North of Falcon process for 2008 concluded without agreement from the commercial gear groups. Consistent with its ongoing argument before the court, PSHA maintained that allocation between the gear groups for Areas 10 and 11 needed to be of an equitable number of chum salmon. *See, e.g.*, AR 67-68; AR 206-209. WDFW ignored PSHA's position and continued, consistent with 2007, to propose an allocation based on the number of openings for fishing, weighted in favor of purse seiners.

On April 30, 2008, WDFW issued its first round of emergency rules setting the 2008 Puget Sound commercial fishing rules. AR 438. The emergency rules continued WDFW's trend of reducing the gillnet fleet's opportunity to harvest an equitable number of fish. Indeed, during

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<sup>2</sup> WDFW was obviously aware of the court's conclusion. The italicized sentence in Conclusion 4 is both circled and "starred" in the WDFW certified administrative record. AR 61.

the crucial first three weeks of the season, WDFW proposed allowing the gillnet fleet a total of six openings (including one shortened opening on October 22) and the purse seine fleet a total of four openings. AR 430, AR 436.<sup>3</sup> WDFW's own data confirms that during the 2006 and 2007 season – both of which were good seasons for the gillnet fleet – there was a vast disparity in the catch per hour. In those years, gillnetters caught an average of 725 chum salmon per hour of fishing, while purse seiners caught an average of 4,893 chum salmon per hour of fishing. AR 15.

On May 21, 2008, WDFW issued its draft permanent rules for 2008. There were no changes between the draft rules and the April emergency rules. Despite extensive public comment from PSHA,<sup>4</sup> and despite the Thurston County Superior Court's intervening June 2, 2008 Order finding the nearly-identical 2007 rules arbitrary and capricious, WDFW issued its final rules on July 8, 2008, without amendment. AR 9-36. During the crucial first three weeks of the season, the gillnet fleet was provided six openings with a total of 76 hours of available

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<sup>3</sup> The first three weeks are crucial both because the fish are at their freshest and brightest, but also because, as with 2007, the total non-treaty allocation can be taken by the end of the third week. Indeed, in 2007, the gillnet fleet was allowed to fish for only two weeks. The purse seine fleet only was allowed to fish the third week and ended up exceeding the state's pre-season non-tribal allocation.

<sup>4</sup> See AR 71-72, AR 73-187.

fishing time. The purse seine fleet was provided four openings, including a first day opening during the second week, for a total of 43 hours.

The 2008 rules were issued along with a cover letter from WDFW Director Jeff Koenings and a Concise Explanatory Statement (“CES”). AR 9-10, AR 11-23. According to the Director’s cover letter, the 2008 season rules were constructed in part, to ensure that “harvest opportunity between non-Indian gear groups [would] be fairly allocated.” AR 9. In response to PSHA’s objections to the allocation, the Director responded that PSHA “has not proposed an alternate fishing season schedule” and that the allocation was “agreed upon” by industry officials during the North of Falcon meetings. Both statements are false.<sup>5</sup>

WDFW’s CES similarly confirms, multiple times, that the agency’s intent was to “fairly allocate harvest opportunity” instead of equitably allocating fish. *See* AR 13-14, AR 16-17, AR 22-23 (emphasis added). Because WDFW continued to insist on allocating based on

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<sup>5</sup> PSHA proposed an alternate schedule on April 7, 2008. *See* AR 301, AR 305. The PSHA alternate schedule called for one full Sunday opening and one shortened Wednesday opening each week for the gillnetters and one full Monday opening each week for the purse seiners. AR 305. PSHA submitted its proposal during the North of Falcon process as well as during the public comment period on the draft rules. AR 70-73.

PSHA also strongly objected to both the process and outcome of the North of Falcon meetings and voiced those objections on the record. *See, e.g.*, AR 207-208, AR 308, AR 309.

“opportunity” to harvest as opposed to an equitable allocation of the resource – the fish – PSHA filed a timely challenge to WDFW’s 2008 rules on July 24, 2008.

The Honorable Christopher Wickham issued a letter opinion on April 24, 2009, and on June 2, 2009, Judge Wickham entered his Final Order and Judgment, declaring WAC 220-47-311 and 2009-47-411 invalid because they were arbitrary and capricious. The court found that:

WDFW has amply demonstrated a rational basis for allocating based on opportunity, not catch. However, it is evident that WDFW has ample catch history to enable it to predict an approximate share of the catch based on opportunity. The allocations in this fishery appear calculated to reach an approximate percentage of catch for the two competing fisheries of 30% for the gillnetters and 70% for the purse seiners.

Nowhere in the record is there an explanation of the rational basis for this result.

The allocation for the 2008 non-tribal commercial salmon fishing for gillnets and purse seines in Areas 10 and 11 were willful and unreasoning action, taken without regard to or consideration of the fact and circumstances surrounding the action and therefore arbitrary and capricious.

CP 237-38.

WDFW filed a timely appeal.

#### IV. ARGUMENT

##### A. Standard of Review.

When reviewing an APA appeal, this court stands in the shoes of the Superior Court, and reviews the agency's actions de novo. *Tapper v. State Employment Sec. Dep't*, 122 Wn.2d 397, 402, 858 P.2d 494, 498 (1993). Pursuant to the APA, a court shall declare a rule invalid if it finds that the rule: (1) violates constitutional provisions; (2) exceeds the statutory authority of the agency; (3) violates rulemaking procedures; or (4) is arbitrary and capricious. RCW 34.05.570(2)(c).

An agency action is arbitrary and capricious if its action is willful and unreasonable and taken without regard to the attending facts and circumstances. *Public Employee Relations Comm'n v. City of Vancouver*, 107 Wn. App. 694, 703, 33 P.3d 74 (2001). Although WDFW is entitled to deference, the arbitrary and capricious standard is "not a rubber stamp" for agency action. *Swinomish Indian Tribal Community v. Western Washington Growth Management Hearings Bd.*, 161 Wn.2d 415, 434 n.8, 166 P.3d 1198 (2007).

B. The Superior Court Correctly Concluded that WDFW's Adoption of WAC 220-47-311 and WAC 220-47-411 Was Arbitrary and Capricious.

WDFW is mandated by statute to manage fish, not fishing time. RCW 77.04.012. WDFW is charged with conserving “the wildlife and food fish, game fish, and shell fish resources in a manner that does not impair the resource.” RCW 77.04.012. As discussed above, WDFW’s annual allocation process starts with forecasts of the number of available fish – not a forecast of available hours for fishing. Once the regulators have an estimate of harvestable fish, that level is divided between the tribal and non-tribal interests. Again, the allocation is based on number of fish, not hours of fishing.<sup>6</sup>

Allowing an allocation based on time rather than number of fish invites arbitrary decision-making. In this case, WDFW knows full well the disparity between the two gear groups. WDFW’s 2008 CES confirms that during the 2006 and 2007 season – both of which were good seasons for the gillnet fleet – gillnetters caught an average of 725 chum salmon per

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<sup>6</sup> Even when allocating between commercial and recreational fishing interests, the allocation is based on number of fish caught – not on days or hours on the water. *See* AR 223. For example, in the February 2, 2007 Fish and Wildlife Commission Policy Decision, the allocation of Lake Washington sockeye is based on allowing the recreational fishers to take the first 200,000 non-treaty fish and commercial harvest to operate only after that level is reached.

hour of fishing, while purse seiners caught an average of 4,893 chum salmon per hour of fishing. AR 15. During the first four weeks of the 2008 season, WDFW allocated the gillnet fleet a total of 99 hours and the purse seine fleet 65 hours. Based simply on WDFW's calculated average hourly harvests for 2006 and 2007, this would mean WDFW knowingly attempted to allocate only 18% of the available harvest to the gillnet fleet and 82% to the purse seine fleet:<sup>7</sup>

- Gillnet Fleet: 99 hours x 725 fish/hour = 71,777 fish
- Purse Seine Fleet: 65 hours x 4,893 fish/hour = 318,045 fish

Despite this known disparity, by trying to equilibrate time for harvest, WDFW willfully and unreasonably decided that the gillnet fleet would be limited to significantly less than an equitable share of the harvestable fish. For this reason alone, the Superior Court properly directed that WDFW should allocate only based on equitable harvest – not equitable time.

WDFW is capable of counting fish, rather than time. WDFW gathers information on the number of fish received under a “quick

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<sup>7</sup> By allowing the vastly more powerful purse seine fleet a “first opening” during week 44, the numbers had the possibility to be even more skewed. As happened in November 2007, the purse seine fleet could take almost 100,000 fish in a single opening. AR 94-95. WDFW does not have the ability to know harvest levels mid-day during a particular opening. Thus, it is conceivable in a first opening that the purse seine fleet could take the entire allocated non-tribal share of the resource.

reporting” scheme. WAC 220-47-001. Under this system, receivers of fish are required to report a volume of data to WDFW the day after they receive fish, including what gear it was caught with. WAC 220-69-240(12). Contrary to its argument to this court, WDFW does count fish, and relies on that count to regulate the chum harvest. In 2005 and again in 2007, the gillnet fishers lost a day of fishing when they hit a percentage of the catch – the arbitrary number WDFW decided was their share of the harvest. AR 73, AR 94, AR 459. Even if WDFW chooses to manage based on time, WDFW knows approximately how many fish per hour are going to be caught. The amount of time allotted to each group must be based on an equitable distribution of fish rather than time, meaning that WDFW must take account of the vastly different catch power of the two fleets, and accord more hours to gillnetters. CP 237-38.

C. The 2007 Rules Are Not Equitable.

1. The administrative record supports allocation in the gillnetters’ favor, not in favor of the purse seiners.

In arguing that the Superior Court erred, WDFW broadly and erroneously claims that:

[T]he superior court invalidated the regulations based on the judge’s own belief that the season structure would result in an unfair proportion of catch for the gillnetters.

The superior court failed to give any deference to WDFW, despite the technical nature of the decision, and it inappropriately substituted its judgment for the agency's.

Appellant's Brief at 21. This is a blatant misrepresentation of the Superior Court's ruling. The court ruled:

The allocations in this fishery appear calculated to reach an approximate percentage of catch for the two competing fisheries of 30% for the gillnetters and 70% for the purse seiners.

Nowhere in the record is there an explanation of the rational basis for this result.

The allocation for the 2008 non-tribal commercial salmon fishing for gillnets and purse seines in Areas 10 and 11 were willful and unreasoning action, taken without regard to or consideration of the fact and circumstances surrounding the action and therefore arbitrary and capricious.

CP 237-38. WDFW next argues that because there is no statutory right to a set percentage of the fish catch for any particular category of non-treaty fisher, WDFW has unbridled discretion to regulate fishing. Appellant's Brief at 22. But WDFW's discretion is constrained by statute; WDFW asks this court to write out of existence the mandate in RCW 77.04.412 that WDFW allocate fish based only on (1) conservation

purposes; (2) maintaining the economic well-being of the industry; or (3) enhancement or improvement of the industry. WDFW is not free to arbitrarily allocate fish.

As the Superior Court correctly found, the agency record fails to provide a reasonable explanation to support WDFW's decision to allow the purse seine fleet to take over two-thirds of the available harvest regarding any of these three allowable reasons.

First, conservation of chum salmon cannot support a finding that purse seiners should be advantaged; in drafting the rules at issue here, WDFW is allocating fish catch amongst non-treaty commercial fishing groups, theoretically leaving the conservation portion of the chum population intact. As described below, the conservation of other fish species inadvertently caught during chum harvest (bycatch) is either neutral, or favors allocating more fish to the gillnetters.

It is PSHA's position that, in the absence of any justification in the record supporting any other number, 50% of the harvest must be apportioned to each fishing group. While PSHA's goal is only to achieve equity in the annual allocation, if WDFW is allowed to deviate from equity based on the record, then any deviation should be in favor of the gillnet fleet to maintain and enhance the fishing industry. If indeed

WDFW can allocate more fish to one gear group over the other, the record is replete with evidence that all factors weigh in favor of providing a larger share to the gillnet fleet – not smaller. For example:

- Purse seine nets have been known to go as deep as 80 meters in central Puget Sound allowing for very large and uncontrollable catch sizes. AR 109. This is confirmed by the one-day harvest during week 45 of 2007 where the purse seine fleet took 97,537 chum salmon in a single day, both exceeding the total 2007 harvest by the gillnet fleet and exceeding the pre-season allocation of available chum salmon for non-tribal commercial harvest. AR 94-95. This damages conservation; a single purse-seine day could dip into conservation stocks, while the much smaller gillnets could not.
- Purse seines have a much higher rate than gillnets of “bycatch,” the term for catching and killing non-targeted fish accidentally and without authorization in the course of fishing for targeted species. For example, during the 2006 sockeye salmon fishing season, an estimated 1,579 non-target and endangered Chinook salmon were killed by purse seines as “bycatch,” compared to only 113 killed by gillnets. AR 110-167, AR 168-171, AR 172-73. Even when the

Department has required purse seiners to use brailers to reduce bycatch, compliance has been frequently violated. AR 174, AR 71-72.<sup>8</sup>

- There are approximately 204 non-treaty gillnet licensees in Puget Sound. Each gillnetter was required to pay a license fee of \$480 in 2007. AR 18. There are only 75 non-treaty purse seine licensees in Puget Sound. The purse seiners' 2007 licenses cost \$630 each. AR 18. Thus, in total, the gillnet fleet was required to pay \$94,080 in 2007 license fees, while the purse seine fleet paid half as much, \$47,250.
- In 2007, \$115 of each individual license fee was dedicated to support fisheries enhancement. Thus, the gillnet fleet also paid approximately \$20,000 in fees to support fisheries enhancement, compared to approximately \$8,000 paid by purse seiners. AR 74-75.
- In addition to paying license fees, the gillnet fleet voluntarily taxes itself to pay for marketing of Puget Sound chum salmon. Gillnet

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<sup>8</sup> AR 174 is a September 2006 arrest report for a purse seiner failing to use a brailer. AS the arresting WDFW officer notes, when purse seiners fail to use a brailer "prohibited species mortality is very high." The WDFW officer confirms, unfortunately, that the brailing requirement "is still a very frequently violated law."

fishers voted to create the Puget Sound Salmon Commission, overseen by the Washington Department of Agriculture, to enhance the value of local chum salmon and to promote a sustainable local food economy. The self-imposed marketing tax supports the Commission's efforts, at a rate of 2% of the gillnet catch value. AR 75.

- Gillnetters sell fresh chum salmon into local distribution channels, directly to local consumers, including at farmers' markets and straight off their boats. This direct marketing keeps prices low for consumers, spurs market competition, and supports the local economy. AR 96-98, AR 176-179, AR 180-182.
- The Puget Sound Salmon Commission continues to make significant progress on sales of Puget Sound chum salmon. AR 96-108, AR 176-82.
- The purse seine fleet, while benefiting from the Commission's chum salmon marketing, does not share in its cost. Thus, gillnet users not only pay vastly more than purse seine users in state license fees, they also shoulder an extra tax burden averted by their competitors.

Moreover, historic catch rates do not support anything less than an equal allocation. Catch data was first collected in 1973. For the next twenty years, the two fleets were roughly equal. During a brief period, after the chum market crashed, gillnetters either stayed tied to the dock or got out of the business. With heroic efforts from the gillnet association and the Department of Agriculture, the gillnetters have managed to create a niche local market for the rebranded keta salmon, and now are capable of catching and selling their historic 50% of the harvest again. AR 267. There is simply no historic basis to punish them for their efforts by limiting them to the catch rates they managed during a few short depression years.

2. The CES does not provide evidence supporting WDFW's decision to arbitrarily advantage the purse seiners.

WDFW has chosen to regulate fishing in Areas 10 and 11 through a set of six management objectives, set forth in its CES. There is nothing arbitrary or capricious about the management objectives; they are a reasonable interpretation of the Legislature's mandate to conserve fish and the fishing industry. But the CES – WDFW's administrative argument in favor of its rule – does not provide the necessary rational basis justifying using these management objectives to vastly advantage purse seine

vessels. Instead, the management objectives either support a greater share for gillnetters, or at least an equal distribution.

WDFW argues that “[a]lthough fair allocation was only one (and in fact, the lowest priority) of the six management criteria relied upon by WDFW, it was a central consideration during the season setting process[.]” Brief of Appellant at 27. But the other five criteria either had no impact on how gillnet and purse seine portions of the catch were allocated, or weighed in favor of more catch for gillnetters. The following discusses each of the six management objectives in order:

**a. Conservation of target species**

The CES concludes:

Conservation of target species is assured, given the proven capability of WDFW to meet spawning goals for South Puget Sound chum salmon. Meeting the conservation objective in 2008 will likely require a more conservative approach to in-season assessment of biological and fishery information and a consideration of the increasing catch power of purse seine and gillnet gears demonstrated in recent fishing seasons.

AR 22. Nothing in this conclusion supports the inequitable harvest. Instead, this explanation confirms that WDFW can, and indeed

expects to, keep close tabs on catch numbers through the season.<sup>9</sup> This is necessary, as the CES confirms, to ensure that conservation numbers are not exceeded. There is no evidence in the record or this statement that would support an argument that the smaller gillnet fishery risks exceeding the conservation goals. To the contrary, as the record demonstrates, in 2007 the Department's decision to allow the purse seine fleet a solo first-day opening during the third week of the season (week 45) resulted in a one-day harvest by the purse seine fleet of 97,537 fish resulting overall in the State exceeding at least the pre-season estimate of its allowable conservation harvest. AR 94.

**b. Minimize catch or impact on incidental species**

The CES provides:

In this fishery, existing gear restrictions, geographical closures, and season timing effectively minimize bycatch.

AR 20. There is thus no basis, even assuming the CES was accurate, to weight catch rates in favor of purse seiners based on bycatch. In the CES, WDFW rejects PSHA's argument that the record demonstrates that the purse seine fleet has a higher rate of bycatch than the

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<sup>9</sup> Contrary to WDFW's implication that it does not have the resources to monitor and make adjustments in-season.

gillnet fleet. But the record contains extensive evidence that supports PSHA's argument. For example, during the 2006 sockeye salmon fishing season, an estimated 1,579 non-target and endangered Chinook salmon were killed by purse seines as bycatch, compared to 113 by gillnets. AR 110-167, AR 168-171, AR 172-173. Even when the Department has required the purse seiners to use bailers to reduce bycatch, compliance has been frequently violated. AR 174, AR 71-72.

Indeed, WDFW does not dispute the bycatch statistics provided by PSHA nor the poor record of compliance by purse seiners in the use of bailers. Instead, at best WDFW argues in its CES that it does not have sufficient information on gillnet bycatch but expects to gather more evidence in the future. AR 21. WDFW ignores the January 1997 Pacific Salmon Commission Report on bycatch, which studied incidental mortality from *all* forms of commercial fishing. AR 110-162. WDFW fails to explain why, in the face of undisputed evidence showing higher bycatch by purse seiners, it has allocated in favor of the purse seiners.

WDFW asserts in its CES, perhaps again as rationalization for its inequitable allocation, that "Tribal, state and federal scientists agree that 100% of the coho and Chinook salmon encountered by gillnet gear will die from handling while a significant portion of the salmon encountered

by purse seine gear can be released alive.” CES, AR 21. But there is absolutely no data in the administrative record that backs up this extraordinary allegation.

Out of concern for this inflammatory statement, PSHA requested, through the Public Records Act, that WDFW produce “all peer reviewed scientific data and studies which WDFW bases” this statement on. In response, PSHA was provided the following written response:

There are no peer-reviewed scientific data or studies. The mentioned assertion is not based on peer-reviewed data and studies, but rather reflects the opinion of the author of the Concise Explanatory Statement that, if release of coho salmon or Chinook salmon caught by gillnet gear were required in a Puget Sound marine non-Indian commercial fishery, the tribal, state and federal scientists charged with estimating incidental mortality from those fisheries would assume that 100% of the released coho or Chinook salmon would not survive.

November 19, 2008 Letter to Pete Knutson. CP 181.

Apparently the CES author did not review the agency record prior to reaching this opinion. The only evidence in the record documenting mortality is the January 1997 Pacific Salmon Commission Report on Incidental Fishing Mortality. AR 110-162. After reviewing results in

various fisheries, the report concluded “these results indicate that gill net release mortality rates can be highly variable and may be substantially lower than 90% for salmon in their final year of life and close to maturity.” AR 157.

The record does not support the conclusion that restricting the gillnet fleet to less than one-third of the available harvest furthers the conservation objective of minimizing bycatch. To the contrary, as the CES explains, bycatch of both fish and birds is controlled by a combination of gear restrictions for both fishing groups and in-season monitoring combined with in-season modifications if necessary; the record suggests that bycatch is actually less for gillnet vessels than purse seiners. AR 19-21.

**c. Monitor and sample all fisheries**

The record does not support that restricting the gillnet fleet to less than one-third of the available harvest furthers the conservation objective of monitoring and sampling all fisheries.

**d. Maintain the economic well-being and stability of the industry**

The CES concludes:

The fishery is designed to ensure that the economic well-being and stability of the

fishing industry is maintained. The gillnet industry's interest in a season that promoted local/niche marketing initiatives is addressed by including weekly, mid-week openings for gillnet gear.

AR 22. While two Wednesday and two Thursday openings are provided for the gillnet fishers in the first four weeks of the 2008 season, this does not support a conclusion that the management objective is protected, nor does it provide any justification whatsoever for reducing the gillnet catch. The economic well-being and stability of the gillnet industry is certainly not protected by WDFW's inequitable allocation. Nor does the record contain any evidence that the purse seine industry demands two-thirds of the allocated harvest in order to remain stable.

**e. Fully utilize the non-Indian allowable catch**

The CES concludes:

The fishery is designed to fully utilize the non-Indian allowable catch. However, observing recent increases in the rate of harvest for the Area 10 and 11 chum fishery, WDFW may need to make very conservative in-season decisions to ensure that conservation objectives are met, potentially reducing harvest to less than the full non-Indian allowable catch.

AR 22. Nothing in this conclusion supports a finding that

WDFW's decision to limit time for the gillnet fleet sufficient to harvest less than one-third of the non-Indian allocation in any way supports this management objective. To the contrary, based on the ability of the purse seine fleet to harvest at least four-times the number of fish in an hour, if WDFW's concern, as implied in the above statement, is to make sure the non-Indian allocation is not exceeded, then the regulation should have favored the smaller, more controllable gillnet fishers.

**f. Fairly allocate harvest opportunity**

WDFW argues extensively that providing an "equal" amount of time means that harvest opportunity is fairly allocated. PSHA has argued extensively in section (B) of this brief, *supra* at 14-16, that equal time on the water does not mean equal opportunity, when purse seine vessels pull 4,893 fish per hour and the gillnet fleet only 725 fish per hour. AR 15. Tellingly, WDFW does not believe its own rhetoric that equal time = fair opportunity; time on the water in the 2008 rules is not equal, but instead provides more (but not enough) hours to gillnetters.

**D. There are No Other Rational Bases to Advantage Purse Seiners.**

WDFW argues on appeal that it considered net depth, bycatch, licensing and marketing fees, perceptions regarding the advantage of "first

starts,” and local niche marketing in deciding how to allocate fish. Brief of Appellant at 34. On appeal, WDFW correctly recognizes that none of these factors justify providing an advantage to purse seiners. Brief of Appellant at 33. Some of these factors, though, would support a larger share of the catch going to gillnetters.

1. Net size.

WDFW rejected PSHA’s argument that the larger, deeper nets used by the purse seine fleet should result in increased time on the water by the gillnet fleet. According to WDFW’s CES, limiting the size or depth of purse seine nets would “decrease the economic efficiency of the purse seine fleet” and only benefit late-season gillnet fishers. CES at AR 15. While this may be true, allowing the purse seine fleet to have massive nets so they can catch fish economically is fine, provided that these new, larger nets do not allow the purse seiners to grab an unfair share of the overall harvest. PSHA’s suggestion to reduce net size was one option to achieve fairness. Other options include reducing the number of days allotted to purse seine vessels, or just counting the fish caught and allocating them fairly.

2. “First Starts”.

Likewise, WDFW rejected PSHA’s argument that starting first made an impact on catch rates. Thus, “first starts” cannot now be relied upon to justify a larger share of the harvest for purse seiners.

3. Licensing fees.

The amount of licensing fees paid supports advantaging gillnetters, and certainly does not support advantaging the purse seine fleet. The gillnet fleet was required to pay \$94,080 in 2007 license fees, while the purse seine fleet paid half as much, \$47,250. AR 18.

4. Local niche market.

The support of a local niche market provides the strongest evidence that gillnetters should receive *more* of the harvest, not less. Gillnetters have developed a local niche market. AR 211-13. WDFW is mandated by statute to “enhance and improve . . . commercial fishing.” RCW 77.04.012. While WDFW argues that gillnetters no longer need the lifeline they did in the early part of this decade, it provides no explanation for why it is not doing everything in its power to assist the gillnet industry in enhancing its efforts to expand the niche market and increase value for local fresh keta salmon. Enhancing and improving local markets by

ensuring a broader supply of fresh keta will result in higher fish prices, enhancing and improving the industry.

WDFW's note that it properly gave gillnetters fishing opportunities on the days that mattered to them for their local niche market is correct. Failing to do so would have been arbitrary and capricious, given that purse seine operators have not expressed a preference for which days of the week they fish. But giving gillnetters the correct days of the week cannot be a justification for unfairly limiting their share of the harvest; the two concepts are unrelated.

E. WDFW's Other Arguments on Appeal Have No Merit.

1. WDFW's intent is irrelevant.

WDFW argues that the Superior Court erred in concluding that WDFW intended for purse seiners to achieve a larger share of the catch. Brief of Appellant at 2-3, 23-26. But WDFW's intent is irrelevant. An action is arbitrary and capricious if it is "willful and unreasonable and taken without regard to the attending facts and circumstances." *Public Employee Relations Comm'n v. City of Vancouver*, 107 Wn. App at 694. There is no requirement that the court find that WDFW intended to hurt gillnetters or advantage the purse seine industry; it is enough that WDFW knew of the impacts, and ignored the evidence in the record showing that

the purse seiners would acquire 70% of the catch. Moreover, WDFW's actions in enacting the same rule two years running despite a ruling that it was arbitrary and capricious, coupled with the statements in the CES regarding WDFW's knowledge that the rule would advantage the purse seine industry, demonstrate conclusively that WDFW *did* intend to benefit one group to the detriment of the other.

2. WDFW had the means to predict and count the catch.

WDFW also argues that the trial court erred by finding that WDFW had the means to predict the catch of the two types of fishers. Brief of Appellant at 2-3. Although unclear, WDFW's core argument appears to be that it was impossible for it to track the actual catch (fish taken), and therefore choosing the inferior method of allocating opportunity (days on the water) was not arbitrary and capricious. But this is flat nonsense. The record incontrovertibly shows that WDFW could predict how many fish would be caught by each type of fisher per day, and could and did track the catch as it occurred.

The CES provides average catch rates for 2006-07 for both the purse seine and gillnet fleets. In those years, gillnetters caught an average of 725 chum salmon per hour of fishing, while purse seiners caught an

average of 4,893 chum salmon per hour of fishing. AR 15. There is no reason to believe the catch rates would have been any different in 2008. WDFW also collects data from fishers on how many fish were caught as the season progresses. The CES notes that “[s]eason schedules described in the proposed 2008 Puget Sound Commercial Salmon Regulations . . . will be changed as the chum salmon runsize is updated and **catch rate information is collected from the fishery**. The fishery is unlikely to be opened for the entire number of days scheduled.” AR 16 (emphasis added); see also WAC 220-47-001 (mandating quick reporting); AR 458 (letter from Jeremy Jording, WDFW Puget Sound Commercial Salmon Fishery Manager, stating that “the Department monitors catches and landings via the Quick Reporting system”). In 2007, this data collection resulted in the gillnetters losing a fishing day to keep them at an artificially low percentage of the catch. AR 73, 94.

3. Variability in fishing effort is pure speculation.

WDFW also claims it considered “variability in the fishing effort of individual fishers in each fleet.” Brief of Appellant at 31. But WDFW supplies nothing more than speculation about whether a particular fisher or category of fishers will exert more “effort.” Without data showing which

type of fisher exerts more “effort,” allowing more fish to purse seiners based on this nebulous and unquantified criteria is arbitrary.

4. Variation in market circumstances is irrelevant.

WDFW next claims it considered “variations in market circumstances,” meaning that the price of chum salmon has increased, benefitting both types of fishing groups. Brief of Appellant at 32. The reduced market price in the 2001-2003 seasons caused a dramatic decline in the size of the gillnet fleet. Thus, to preserve the industry, WDFW properly provided extra days to gillnetters to ensure that the gillnet fleet would survive. But the recovery of the gillnet industry, and its ability to regain historic levels of 50% of the catch, is not a basis to punish the gillnetters by keeping their share of the catch arbitrarily low by limiting their respective fishing opportunity. Absent some evidence that purse seiners today, like gillnetters between 2001-03, need some assistance in order to survive, giving purse seiners 70% of the fish because gillnetters have recovered economically is arbitrary.

5. The amount of economic investment supports gillnetters.

WDFW next argues that it considered the relative economic investments of the large purse seiners and smaller gillnetters, noting that

gillnetters have smaller boats, and use one to two crew, while purse seines have larger boats and rely on a crew of five or six. Brief of Appellant at 33. This theory is not based on any evidence whatsoever. Significantly, there are far fewer purse seine vessels on the water than gillnet boats (75 purse seine vessels as opposed to 204 gillnet vessels). With 70% of the catch allocated to 75 vessels and the remaining 30% left to be shared by 204, any difference in start-up costs compared to percentage of the harvest vanishes. Moreover, gillnet fishers are generally sole proprietors and often families. The startup cost of operating – or losing due to unfair fishing conditions – a gillnet boat has a substantially greater impact on gillnet operators than the corporately-controlled purse seine vessels. AR 97 (letter from Matt Marinkovich, explaining why he sold out of the fishery when there were limited opportunities to fish “because it didn’t make sense to pay my boat and marketing expenses with such limited opportunity to recoup my costs”). WDFW allocated chum fishing in 2008 to let purse seiners reap the majority of the catch profits, leaving the smaller gillnetters to subsist on a diminished share.

F. WDFW's Reliance on Its Public Comment Process to Justify Its Arbitrary Decision is Disingenuous.

WDFW argues that its extensive public comment process provides a basis to conclude that its decision to allocate 70% of the fish to one type of fisher is not arbitrary and capricious. Brief of Appellant at 27-29. But the extensive public comment, and WDFW's decision to ignore it, is exactly what is arbitrary and capricious. The gillnet industry provided a volume of data on the implications of assigning roughly equal fishing opportunity to the purse seiners. AR 66-183; AR 241-42; AR 206-211; AR 267; AR 301; AR 306; AR 308-09; AR 365-423. The extensive public comment process thus provided WDFW with the information necessary to fairly allocate the harvest. That WDFW ignored this information is the basis for the court's finding that its rule was arbitrary and capricious.

WDFW demonstrates the arbitrary nature of its decision in briefing to this court. WDFW notes that the gillnetters wanted WDFW to allocate catch, while the purse seiners requested allocation based on opportunity. Brief of Appellant at 28. WDFW said that it would "consider a catch-based allocation if the industry groups (gillnetters and purse seiners) could

agree on one.” *Id.* When the groups could not agree, WDFW abandoned all attempts to fairly allocate the catch, and simply divided the number of days on the water. This process placed total discretion in the hands of the purse seiners to decide how WDFW would allocate the harvest. If the purse seiners chose, they could agree to a catch calculation method, and WDFW would allocate fish. If they chose not to agree, then WDFW would allocate days on the water – what purse seiners had wanted all along. The purse seiners chose self-interest, and refused to agree to a catch allocation method, thereby getting from WDFW what they wanted: equal time on the water, leading inescapably to a majority percentage of the harvest. Allowing one party to dictate the method of allocation is arbitrary and capricious.

In sum, WDFW’s reasons for allocating 70% of the catch to purse seine vessels simply do not support its decision. The decision is arbitrary and capricious, and was correctly reversed.

G. WDFW’s Argument that the Trial Court Erred in Its Findings of Fact is Specious.

Contained in its grab-bag of objections to the Superior Court’s ruling, WDFW argues that insufficient evidence supports two of the findings of fact, in addition to WDFW’s arguments on whether it can

forecast the catch, and whether it intended to allocate 70% of the fish to the purse seiners. Brief of Appellant at 2-3. WDFW fails to support these assignments of error with briefing, and with one irrelevant exception it is wrong. WDFW first argues that insufficient evidence supports the trial court's finding that the two gear groups have historically divided the fish more or less equally, and that in the early 1990s the gillnet industry declined precipitously. But WDFW has supplied catch data as part of the record, and that data shows a nearly-equal harvest, on average, from 1973 to 1993. AR 175. WDFW is correct that it was the late 1990s and early part of this century that saw the decline, but fails to explain why this typographical error affects the court's ruling. WDFW next argues that the Superior Court erred in finding that the gillnetters' share of the catch dropped to 5% "in the early 1990s." Again, the trial court did err in picking 1990 rather than the actual year (2002), but WDFW fails to explain why this error is worth raising on appeal.

H. The Award of Attorney's Fees Should be Upheld.

WDFW asks this court to reverse the award of attorney's fees, even if the trial court's holding that it acted arbitrarily and capriciously is upheld. Brief of Appellant at 36-40. WDFW's argument fails because it was not substantially justified in acting arbitrarily and capriciously. The

Equal Access to Justice Act provides for the mandatory award of attorney's fees:

- (1) Except as otherwise specifically provided by statute, a court shall award a qualified party that prevails in a judicial review of an agency action fees and other expenses, including reasonable attorneys' fees, unless the court finds that the agency action was substantially justified or that circumstances make an award unjust. A qualified party shall be considered to have prevailed if the qualified party obtained relief on a significant issue that achieves some benefit that the qualified party sought.

RCW 4.84.350. A trial court's award of attorney's fees is reviewed for abuse of discretion. *Moen v. Spokane City Police Dep't*, 110 Wn. App. 714, 717, 42 P.3d 456 (2002). An agency is "substantially justified" only when it is "justified to a degree that would satisfy a reasonable person." *Id.*, 110 Wn. App. at 721 (Finding no abuse of discretion in awarding fees where agency misapplied law and failed to give notice of forfeiture hearing). In order to demonstrate that it was substantially justified, the agency must show that "its position ha[d] a reasonable basis in law and fact." *Silverstreak, Inc., v. Washington State Dep't of Labor and Industries*, 159 Wn.2d 868, 892, 154 P.3d 891 (2007) (internal quotations omitted).

In support of its position that the trial court abused its discretion in awarding attorney's fees, WDFW cites a line of cases wherein plaintiffs prevailed against an administrative agency on the merits but attorney's fees were denied based on a finding that the agency was substantially justified. Tellingly, though, in none of the cases cited was the agency's action found arbitrary and capricious.

In *Silverstreak, Inc., v. Washington State Dep't of Labor and Industries*, 159 Wn.2d 868, 154 P.3d 891 (2007), the court found that the Department had correctly interpreted the law as it applied to a prevailing wage issue, but was estopped from enforcing its order because it had taken a contrary position in an earlier policy memorandum. The court, applying a de novo standard to the attorney's fees issue, held that plaintiffs were not entitled to fees because the department was substantially justified in its interpretation of the law, even though that interpretation was a change from an earlier policy memorandum. In this case, WDFW was not estopped from correctly applying the law; it was arbitrary and capricious in its failure to adhere to it.

Similarly, in *Kettle Range Conserv. Group v. Washington Dep't of Natural Res.*, 120 Wn. App. 434, 85 P.3d 894 (2003), the Department of Natural Resources ("DNR") relied on a road inventory and sediment

calculations that were later shown to be inaccurate. Although the case was remanded for reconsideration of the issues based on a corrected road inventory and sediment analysis, the court denied attorney's fees on appeal under a de novo standard because there was no evidence DNR knew of the factual errors. In this case, there is no change to the material information presented to WDFW: unlike DNR in *Kettle Range*, WDFW chose to ignore the facts it was presented with, rather than reasonably relying on them. Finally, in *Plum Creek Timber Co. v. Washington Forest Practices Appeals Bd.*, 99 Wn. App. 579, 596, 993 P.2d 287 (2000), the court found the agency's actions substantially justified where the agency weighed "a complicated regulatory scheme as well as the subjective issue of aesthetics" and its decision was supported by substantial evidence. Here, although WDFW does its best to confuse the issue, the regulatory scheme is simple: it is to fairly allocate fish. Its decision is not supported by substantial evidence, because it ignored uncontroverted evidence in the record that its allocation scheme would result in an inequitable fish catch.

WDFW next mistakenly relies on federal cases interpreting the federal EAJA in arguing that WDFW's arbitrary and capricious decision to ignore the factual record and the governing statute was substantially justified. WDFW first argues that *Omni Packaging, Inc. v. United States*

*I.N.S.*, 940 F. Supp. 42 (D.C. Puerto Rico 1996) stands for the proposition that “an agency decision might be substantially justified for purposes of EAJA even if the decision was found to be arbitrary and capricious.” Brief of Appellant at 38. But *Omni Packaging* in fact held:

[A]n agency action may be arbitrary and capricious *because it is accompanied by an inadequate explanation*, even though the decision itself is justified under the statute.

*Omni Packaging*, 940 F. Supp. at 46 (emphasis added). In this case, WDFW’s action was not reversed for more explanation; the *decision* was reversed because it was arbitrary and capricious and thus unjustified. *Omni Packaging* is inapposite. Likewise, WDFW’s reliance on *Andrew v. Bowen*, 837 F.2d 875 (9<sup>th</sup> Cir. 1988) in support of the same proposition is ill-placed. In *Andrew*, the Ninth Circuit held that an agency’s belief that its conduct was not arbitrary and capricious was no defense, even though the court acknowledged precedent noting that an arbitrary and capricious decision might possibly also be substantially justified.

We ask this court to reject WDFW’s proposition that a decision can be both arbitrary and capricious and substantially justified. To the extent that Federal law suggests otherwise, we ask that you clarify that in Washington, a finding of arbitrary and capricious action in an agency

decision is a finding that the agency's decision was not substantially justified under the EAJA. Even if this court chooses not to rule that arbitrary and capricious action is always unjustified, we ask that this court uphold the Superior Court's award of fees in this matter. Unlike the federal cases cited by WDFW, there was no reasonable basis for WDFW to knowingly set fishing regulations that unfairly favored one gear-type over another.

I. Attorney's Fees Should be Awarded on Appeal.

The EAJA allows for attorney's fees on appeal unless the agency can prove its position was substantially justified. *Schrom v. Board For Volunteer Firefighters*, 117 Wn. App. 542, 551, 72 P.3d 239 (2003), *rev'd on different grounds*, 153 Wn.2d 19, 100 P.3d 814 (2004). In this case, the agency has been twice told by a Superior Court judge that its fishing rules are arbitrary and capricious. The evidence demonstrates that the Superior Court was correct. WDFW is not asking this court for a novel legal interpretation nor is it arguing for a change in the law; there is no substantial justification, and attorney's fees should be awarded.

V. CONCLUSION

For the reasons discussed herein, the Superior Court's Final Order and Judgment declaring WAC 220-47-311 and WAC 220-47-411 invalid

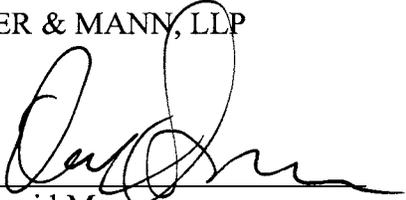
as arbitrary and capricious and awarding PSHA its attorneys' fees and costs should be affirmed. This Court should also award PSHA its reasonable attorneys' fees and costs on appeal.

DATED this 17<sup>th</sup> day of September, 2009.

Respectfully submitted,

GENDLER & MANN, LLP

By:

  
David Mann,  
WSBA No. 21068  
Keith Scully  
WSBA No. 28677  
Attorneys for Appellants

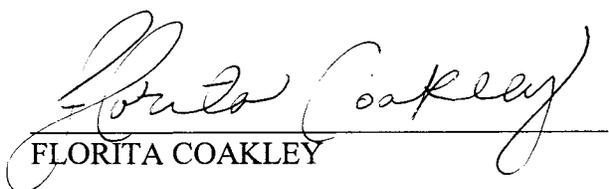


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Joseph E. Shorin III  
Senior Assistant Attorney General  
Michael B. Ferguson  
Assistant Attorney General  
Attorney General of Washington  
1125 Washington Street S.E.  
P.O. Box 40100  
Olympia, WA 98504-0100  
(Attorneys for Respondent)

- By United States Mail
- By Legal Messenger
- By Facsimile
- By Federal Express/Express Mail
- By Electronic Mail

DATED this 17<sup>TH</sup> day of SEPTEMBER, 2009, at Seattle, Washington.



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