

No. 94084-3

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SUPREME COURT OF THE STATE OF WASHINGTON

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WASHINGTON STATE DEPARTMENT OF NATURAL  
RESOURCES,

Petitioner,

v.

POPE RESOURCES, LP and OPG PROPERTIES, LLC,

Respondents.

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**BRIEF OF *AMICUS CURIAE* SKOKOMISH INDIAN TRIBE**

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EARLE DAVID LEES, III  
WSBA No. 30017  
Skokomish Legal Department  
Skokomish Indian Tribe  
N. 80 Tribal Center Road  
Skokomish Nation, WA 98584  
Email: [elees@skokomish.org](mailto:elees@skokomish.org)  
Tel: 360.877.2100  
Fax: 360.877.2104  
*Attorney for Amicus Curiae*  
*Skokomish Indian Tribe*

**TABLE OF CONTENTS**

I. INTRODUCTION ..... 1

II. IDENTITY AND INTEREST OF AMICUS CURIAE..... 1

III. ISSUE ADDRESSED BY AMICUS CURIAE..... 3

IV. STATEMENT OF THE CASE..... 4

V. ARGUMENT..... 4

    A. DNR in exercising its control over state-owned aquatic lands by choosing to permit or failing to preclude specific uses has caused irreparable harm to the Skokomish Indian Tribe. .... 5

    B. DNR has an ownership interest in the aquatic lands..... 11

    C. DNR failed to consider the greater good..... 13

VI. CONCLUSION..... 14

## TABLE OF AUTHORITIES

### Cases

<i>Breard v. Greene</i> , 523 U.S. 371 (1998) .....	2
<i>Eggleston v. Pierce County</i> , 148 Wn.2d 760 (2003) .....	11
<i>Jametsky v. Olsen</i> , 179 Wn.2d 756 (2014) .....	5, 12
<i>Kiely v. Graves</i> , 173 Wn.2d 926 (2012) .....	11
<i>Lowe v. Rowe</i> , 173 Wn. App. 253 (2012).....	12
<i>McGowan v. State</i> , 148 Wn.2d 278 (2002) .....	5, 12
<i>Mendoza v. Rivera-Chavez</i> , 140 Wn.2d 659 (2000) .....	11
<i>Taliesen Corp. v. Razore Land Co.</i> , 135 Wn. App. 106 (2006).....	5
<i>Unigard Insurance Co. v. Leven</i> , 97 Wn. App. 417 (1999).....	5
<i>United States v. Washington</i> , 157 F.3d 630 (9th Cir. 1998).....	3, 9
<i>United States v. Washington</i> , 384 F. Supp 312 (W.D. Wash. 1974).....	2, 3, 8
<i>United States v. Washington</i> , 898 F. Supp. 1453 (W.D. Wash. 1995) .....	3, 9

<i>United States v. Washington</i> , C70-9213, Sub. No. 89-3, Dkt. 14331 (W.D. Wash.).....	3, 9, 13
<i>United States v. Winans</i> , 198 U.S. 371 (1905).....	1, 3
<i>Washington State Geoduck Harvest Assoc. v. DNR</i> , 124 Wn. App. 441 (2004).....	7, 11, 13
<i>Washington v. Wash. State Commercial Passenger Fishing Vessel Ass’n</i> , 443 U.S. 658 (1979).....	2
<b>Statutes</b>	
12 Stat. 933 .....	1, 2, 8
12 Stat. 933 art. IV .....	1, 3, 8
12 Stat. 933 art. XIV .....	2, 8
Chapter 70.105D, RCW .....	1, 7, 9
Chapter 43.12, RCW.....	6, 10, 11
Chapter 43.30, RCW.....	6, 10, 11
RCW 70.105.040(2).....	4
RCW 70.105D.010(1).....	7
RCW 70.105D.020(22).....	3, 4, 5, 10, 12
RCW 70.105D.020(24).....	4, 7
RCW 70.105D.020(8).....	5, 10, 12
RCW 70.105D.040.....	5, 10, 12
RCW 70.105D.040(1).....	4
RCW 70.105D.040(3).....	13
RCW 70.105D.040(3)(a)(iii) .....	14
RCW 70.105D.910.....	7
RCW 79.105.010 .....	6, 12, 13
RCW 79.105.030 .....	6
Title 79, RCW.....	6, 10, 11
<b>Other Authorities</b>	
BLACK’S LAW DICTIONARY 1138 (8 <sup>th</sup> ed. 2004).....	12
<b>Constitutional Provisions</b>	
U.S. Const. art. VI, cl. 2.....	2, 8
<b>Federal Register</b>	
82 Fed. Reg. 4915, 4918 (January 17, 2017).....	2

## I. INTRODUCTION

The Court of Appeals concluded that the Washington Department of Natural Resources (“DNR”) is an “owner or operator” at the sites located in Port Gamble Bay. To avoid responsibility, DNR is asking this Court to disregard the plain language of the Washington Model Toxics Control Act (“MTCA”). Chapter 70.105D, RCW. If this Court were to do so, the Skokomish Indian Tribe’s Treaty-right to “take fish” and to “shellfish” in Port Gamble Bay and beyond would be jeopardized by the potential loss of viable habitat or contamination of the harvested resource. 12 Stat. 933 art. IV; *United States v. Winans*, 198 U.S. 371, 381 (1905) (“The right to resort to the fishing places in controversy was a part of larger rights possessed by the Indians, upon the exercise of which there was not a shadow of impediment, and *which were not much less necessary to the existence of the Indians than the atmosphere they breathed.*”)

## II. IDENTITY AND INTEREST OF AMICUS CURIAE

The Skokomish and Twana at Hahdskus, or Point No Point, Suquamiah Head, in the Territory of Washington on January 26, 1855 concluded treaty negotiations with Isaac I. Stevens, governor and superintendent of Indian affairs for the Territory of Washington, who was acting on the part of the United States. 12 Stat. 933; *Washington v. Wash. State Commercial Passenger Fishing Vessel Ass’n*, 443 U.S. 658, 676

(1979) (“A treaty, including one between the United States and an Indian tribe, is essentially a contract between two sovereign nations.”). The Skokomish Indian Tribe is the modern-day successor in interest to the Skokomish and Twana people. *United States v. Washington*, 384 F. Supp 312, 376 at Finding Nos. 133-134 (W.D. Wash. 1974); Indian Entities Recognized and Eligible To Receive Services From the United States Bureau of Indian Affairs, 82 Fed. Reg. 4915, 4918 (January 17, 2017).

The product of these negotiations, the self-executing Treaty of Point No Point, was ratified March 8, 1859, proclaimed April 29, 1859. 12 Stat. 933; 12 Stat. 933 art. XIV (“This treaty shall be obligatory on the contracting parties as soon as the same shall be ratified by the President of the United States”); U.S. Const. art. VI, cl. 2 (“all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.”); *Breard v. Greene*, 523 U.S. 371, 376 (1998) (“[T]reaties are recognized by our Constitution as the supreme law of the land. . . .”). Article IV of the Treaty of Point No Point provides that:

[t]he right of taking fish at usual and accustomed grounds and stations is further secured to said Indians, in common with all citizens of the United States; and of erecting temporary houses for the purpose of curing; together with the privilege of hunting and gathering roots and berries on open and unclaimed lands. Provided,

however, That they shall not take shell-fish from any beds staked or cultivated by citizens.

12 Stat. 933 art. IV; *United States v. Winans*, 198 U.S. 371, 381 (1905) (“[T]he treaty was not a grant of rights to the Indians, but a grant of right from them,-a reservation of those not granted.”). This Treaty-right of taking fish and shellfish extends to public and private aquatic lands located within Port Gamble Bay. *United States v. Washington*, 384 F. Supp. 312, 377 at Finding No. 137 (W.D. Wash. 1974) (“The usual and accustomed fishing places of the Skokomish Indians before, during and after treaty times included all the waterways draining into Hood Canal and the Canal itself.”); *United States v. Washington*, 898 F. Supp. 1453 (W.D. Wash. 1995), *aff’d in relevant part*, 157 F.3d 630 (9th Cir. 1998); *United States v. Washington*, C70-9213, Sub. No. 89-3, Dkt. 14331 (W.D. Wash.).

As *amicus curiae*, the Skokomish Indian Tribe intends to provide this Court with its understanding of the standard for liability. The Skokomish Indian Tribe, as a holder of Treaty-rights in Port Gamble Bay, also has a direct interest in the Court’s interpretation of the “owner or operator” definition under MTCA.

### **III. ISSUE ADDRESSED BY AMICUS CURIAE**

Whether DNR is an “owner or operator” under RCW 70.105D.020(22) of MTCA for the sites located in Port Gamble Bay?

#### **IV. STATEMENT OF THE CASE**

The Skokomish Indian Tribe incorporates by reference the Restatement of the Case in the Respondents' Answer to Petition for Review submitted by Pope Resources and LP/OPG Properties, LLC to the extent the Restatement does not conflict with the rights and privileges guaranteed by the Treaty of Point No Point of January 26, 1855. 12 Stat. 933.

#### **V. ARGUMENT**

DNR is a "state government agency," and thus is a "person" under MTCA. RCW 70.105D.020(24). The "following persons are liable with respect to a facility: (a) The owner or operator of the facility; (b) Any person who owned or operated the facility at the time of disposal or release of the hazardous substances." RCW 70.105D.040(1). "Each person who is liable under [RCW 70.105.040] is strictly liable, jointly and severally, for all remedial action costs and for all natural resource damages resulting from the releases or threatened releases of hazardous substances." RCW 70.105.040(2).

The term "owner or operator," is jointly defined in MTCA and refers to a single category of liable persons. RCW 70.105D.020(22). "Owner or operator means . . . [a]ny person with any ownership interest in the facility or who exercises any control over the facility." *Id.*

The term “facility” includes “any site or area where a hazardous substance . . . has been deposited, stored, disposed of, or placed, or otherwise come to be located.” RCW 70.105D.020(8).

**A. DNR in exercising its control over state-owned aquatic lands by choosing to permit or failing to preclude specific uses has caused irreparable harm to the Skokomish Indian Tribe.**

DNR argues that it did not exercise sufficient control at sites in Port Gamble to have liability under MTCA. DNR’s reliance on CERCLA (Comprehensive Environmental Response, Compensation, and Liability Act of 1980) and related cases to support its argument is misplaced, as the language in MTCA and CERCLA is simply different. *Taliesen Corp. v. Razore Land Co.*, 135 Wn. App. 106 (2006); *Unigard Insurance Co. v. Leven*, 97 Wn. App. 417 (1999). Under MTCA, “[a]ny person . . . who exercises any control over the facility” or “any site or area” is liable. RCW 70.105D.020(22); RCW 70.105D.020(8); RCW 70.105D.040. This plain language is unambiguous and is the product of State law. *McGowan v. State*, 148 Wn.2d 278, 288 (2002) (“Once enacted, initiatives are interpreted according to the same rules of statutory construction as apply to the Legislature’s enactments.”); *Jametsky v. Olsen*, 179 Wn.2d 756, 762 (2014) (“plain meaning is derived from the context of the entire act as well as any ‘related statutes which disclose legislative intent about the provision in

question.”). To achieve the interpretation desired by DNR, MTCA would need to be amended.

By operation of State law, DNR is expressly delegated the responsibility “to manage [state-owned aquatic lands] for the benefit of the public.” RCW 79.105.010. DNR’s management or “control” includes exercising the right of exclusion (i.e. trespass), determining best use and the leasing of land. Chapters 43.12 and 43.30, RCW; Title 79, RCW. “The management of state-owned aquatic lands,” however, “shall be in conformance with constitutional and statutory requirements.” RCW 79.105.030. To be in conformance with RCW 79.105.030, DNR must affirmatively manage (or control) these lands to protect “[t]he public benefits provided by state-owned aquatic lands” which “are varied and include . . . [e]ncouraging direct public use and access . . . [f]ostering water-dependent uses. . . [e]nsuring environmental protection. . . [u]tilizing renewable resources.” RCW 79.105.030 (“balance of public benefits”). “Under the public trust doctrine,” DNR’s affirmative obligations are further defined, as:

DNR must protect various public interests in state-owned tidelands, shore lands and navigable water beds. The traditionally protected interests include commerce, navigation, and commercial fishing. *Orion Corp. v. State*, 109 Wash.2d 621, 641, 747 P.2d 1062 (1987). But our Supreme Court has expanded this list to include “incidental rights of fishing, boating, swimming, water skiing, and other related recreational purposes generally regarded as corollary to the right of

navigation and the use of public waters.” *Caminiti v. Boyle*, 107 Wash.2d 662, 669, 732 P.2d 989 (1987) (quoting *Wilbour v. Gallagher*, 77 Wash.2d 306, 316, 462 P.2d 232 (1969)). This necessarily obligates the state to balance the protection of the public’s right to use resources on public land with the protection of the resources that enable these activities.

*Washington State Geoduck Harvest Assoc. v. DNR*, 124 Wn. App. 441, 448-449 (2004).

MTCA serves to expressly limit DNR’s discretion when conducting this balancing test. DNR cannot lawfully ignore the restrictions on and liability for the discharge of hazardous materials, as well as, MTCA’s underlying policy, which provides that:

Each person has a fundamental and inalienable *right to a healthful environment, and each person has a responsibility to preserve and enhance that right*. The beneficial stewardship of the land, air, and waters of the state is a solemn obligation of the present generation for the benefit of future generations.

RCW 70.105D.010(1); RCW 70.105D.020(24) (DNR is a “state government agency,” and thus is a “person.”); RCW 70.105D.910 (“The provisions of [MTCA] are to be liberally construed to effectuate the policies and purposes of this act.”); Chapter 70.105D, RCW.

The Skokomish Indian Tribe’s fisheries are directly impacted by DNR’s management decisions, which include permitting uses or failing to preclude others. The Skokomish Indian Tribe’s protected interests in their

fisheries is derived from reserved rights guaranteed by the Treaty of Point No Point of January 26, 1855. 12 Stat. 933.

As for background, the Skokomish Indian Tribe is a successor in interest to the Skokomish and Twana people, the signatories to the self-executing Treaty of Point No Point. 12 Stat. 933. The Treaty was ratified March 8, 1859, proclaimed April 29, 1859, and is the supreme law of the land. 12 Stat. 933 art. XIV (“This treaty shall be obligatory on the contracting parties as soon as the same shall be ratified by the President of the United States”). The United States Constitution expressly dictates that “all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.” U.S. Const. art. VI, cl. 2. Article IV of the Treaty of Point No Point provides that “[t]he right of taking fish at usual and accustomed grounds and stations is further secured to said Indians.” 12 Stat. 933 art. IV. This Treaty-right of taking fish and shellfish extends to public and private aquatic lands located within Port Gamble Bay. *United States v. Washington*, 384 F. Supp. 312, 377 at Finding No. 137 (W.D. Wash. 1974) (“The usual and accustomed fishing places of the Skokomish Indians before, during and after treaty times included all the waterways draining into Hood Canal and the Canal itself.”); *United States*

*v. Washington*, 898 F. Supp. 1453 (W.D. Wash. 1995), *aff'd in relevant part*, 157 F.3d 630 (9th Cir. 1998); *United States v. Washington*, C70-9213, Sub. No. 89-3, Dkt. 14331 (W.D. Wash.). The Court in *United States v. Washington*, under the Implementation Plan (1995) and the later Revised Shellfish Implementation Plan (2002), also provided that:

In effectuating the rights of the Tribes to take shellfish under the Treaties, ***this Order also recognizes the State's responsibilities for conservation of public shellfish resources***, subject to the Treaty right to take fish at usual and accustomed places.

*United States v. Washington*, C70-9213, Sub. No. 89-3, Dkt. 14331 at § 1.1 (W.D. Wash.). DNR is specifically named in the Implementation Plans, having court ordered obligations with respect to the coordinating of the exercise of Treaty-rights on state-owned aquatic lands that are leased or to be leased. *Id.* at § 8.2. DNR has also taken a role in the development of the annual Bivalve Management Plan for Public Tidelands in Region 8: Hood Canal.

As discussed, the unlawful release of hazardous materials on uplands and aquatic lands is expressly prohibited. Chapter 70.105D, RCW. Without habitat to support a viable population of fish or shellfish, or when contamination compromises the food safety of a harvested resource, this Treaty-right is hollow.

Now, Pope and Talbot and its predecessors (“P&T”) “openly conducted sawmill operations throughout the Bay and the adjacent uplands for nearly 150 years. *See* CP 78, 149, 266.” Respondents’ Answer to Petition for Review at pp. 2-3. “Despite its knowledge of P&T’s unauthorized operations throughout the Bay, DNR did not require P&T to enter a lease until 1974. CP 103.” *Id.* at 3. “Even then, DNR required P&T to lease only a portion of the areas where P&T openly operated.” *Id.* DNR admits that “Pope and Talbot, spent well over a hundred years polluting.” Supplemental Brief of Petitioner DNR at p. 1.

During periods of time when Pope and Talbot engaged in activities without a lease on aquatic lands in Port Gamble Bay, DNR’s decision not to preclude such unlawful activities was and is a direct exercise of “control” under MTCA. RCW 70.105D.020(22); RCW 70.105D.020(8); RCW 70.105D.040; Title 79, RCW. DNR’s management decision to lease, was and is also a direct exercise of “control.” *Id.*; Chapters 43.12 and 43.30, RCW. DNR raised as a defense that, “[t]he leases prohibited hazardous, toxic, or harmful substances, and the accumulation of debris. CP at 113, 119, 268.” Supplemental Brief of Petitioner DNR at pp. 4-5. Yet, DNR turned a blind-eye to unlawful activities that lasted “well over a hundred years.” Supplemental Brief of Petitioner DNR at pp. 1, 5. DNR, as such, knowingly entered into an unlawful venture, leasing and continuing leases

from “1974 until 1996, when Pope and Talbot requested that DNR cancel its leases. CP at 268.” Supplemental Brief of Petitioner DNR at p. 4. Any disclaimer of liability clause contained in the leases is null and void, being contrary to the public trust doctrine and public policy. *Washington State Geoduck Harvest Assoc. v. DNR*, 124 Wn. App. 441, 448-449 (2004) (“public trust doctrine”); *Mendoza v. Rivera-Chavez*, 140 Wn.2d 659, 662-663 (2000) (“a contract will not violate public policy unless it is ‘prohibited by statute, condemned by judicial decisions, or contrary to the public morals.’”).

In sum, DNR’s management or “control” includes exercising the right of exclusion (i.e. trespass), determining the use and the leasing of land. Chapters 43.12 and 43.30, RCW; Title 79, RCW. DNR exercised and continues to exercise “control” over the sites in Port Gamble Bay to Skokomish’s detriment, placing the Treaty-right in jeopardy. DNR, as such, is an “owner or operator” and is liable under MTCA.

**B. DNR has an ownership interest in the aquatic lands.**

Under Washington’s common law, property “is certain rights pertaining to a thing, not the thing itself.” *Eggleston v. Pierce County*, 148 Wn.2d 760, 783 (2003). “Property is often analogized to a bundle of sticks representing the right to use, possess, exclude, alienate, etc.” *Kiely v. Graves*, 173 Wn.2d 926, 936 (2012); *Lowe v. Rowe*, 173 Wn. App. 253, 264

(2012) (“[c]ontrol over the land is part of the bundle of sticks associated with land ownership and use.”); *see also* BLACK’S LAW DICTIONARY 1138 (8<sup>th</sup> ed. 2004) (Ownership is “[t]he bundle of rights allowing one to . . . manage . . . property.”).

Under MTCA, liability attaches to “[a]ny person with any ownership interest in the facility,” and the term facility includes “any site or area.” RCW 70.105D.020(22); RCW 70.105D.020(8); RCW 70.105D.040. The plain and unambiguous language used in constructing the phrase, “any ownership interest,” demonstrates an unquestionable intent to extend liability beyond just fee simple owners. *McGowan v. State*, 148 Wn.2d 278, 288 (2002); *Jametsky v. Olsen*, 179 Wn.2d 756, 762 (2014). Deferring to Washington’s common law principles of property ownership is also appropriate in this situation, considering the plain language of the statute.

As earlier discussed, DNR is expressly delegated the responsibility “to manage [state-owned aquatic lands] for the benefit of the public.” RCW 79.105.010. This statutory delegation to “manage” or “control” is part of the bundle of sticks (rights), establishing ownership. DNR, therefore, falls within the single category of “owner or operator” under MTCA. RCW 70.105D.020(22).

**C. DNR failed to consider the greater good.**

Any effort by DNR to distance itself from liability for sites located in Port Gamble Bay is legally, factually and morally deficient. DNR's decision to permit Pope and Talbot's activities is most certainly a breach of DNR's affirmative obligation "to manage [state-owned aquatic lands] for the benefit of the public." RCW 79.105.010; *Washington State Geoduck Harvest Assoc. v. DNR*, 124 Wn. App. 441, 448-449 (2004) ("public trust doctrine"). DNR's poor choices, also demonstrate a total disregard of the "responsibilities for conservation of public shellfish resources." *United States v. Washington*, C70-9213, Sub. No. 89-3, Dkt. 14331 at §§ 1.1, 8.2 (W.D. Wash.). DNR should not be permitted to benefit from this wrongdoing. The plain language of MTCA should be applied and DNR held accountable as an "owner or operator." RCW 70.105D.020(22).

The Skokomish Indian Tribe is not suggesting that DNR can never manage state-owned aquatic tidelands without having a possible defense. In fact, DNR may avoid liability in limited circumstances, such as, by asserting a third-party defense. RCW 70.105D.040(3). This defense, however, comes with certain limitations, one for example provides that:

This defense only applies where the person asserting the defense has *exercised the utmost care* with respect to the hazardous substance,

the foreseeable acts or omissions of the third party, and the foreseeable consequences of those acts or omissions . . .

RCW 70.105D.040(3)(a)(iii).

Lastly, if DNR feels that the taxpayers are better served by limiting DNR's liability, DNR can seek a legislative fix. But until then, the law is enforceable as written.

## VI. CONCLUSION

For the above-stated reasons, DNR falls within the single category of "owner or operator" for liability purposes under MTCA. If DNR is not an "owner or operator," the size and health of the Treaty fisheries will ultimately decline and the Skokomish Indian Tribe will continue to be irreparably harmed. This was not the purpose behind MTCA.

Respectfully submitted this 11<sup>th</sup> day of August, 2017.



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EARLE DAVID LEES, III  
WSBA No. 30017  
Skokomish Legal Department  
Skokomish Indian Tribe  
N. 80 Tribal Center Road  
Skokomish Nation, WA 98584  
Email: [elees@skokomish.org](mailto:elees@skokomish.org)  
Tel: 360.877.2100  
Fax: 360.877.2104  
*Attorney for Amicus Curiae*  
*Skokomish Indian Tribe*

**CERTIFICATE OF SERVICE**

I certify under the penalty of perjury under the laws of the State of Washington that on August 11, 2017, I filed and served the foregoing document on:

Counsel for Pope Resources, LP and OPG Properties, LLC:

David Ubaldi  
Robert Miller  
Nick Verwolf  
777 108th Ave NE suite 2300  
Bellevue, WA 98004  
davidubaldi@dwt.com  
robertmiller@dwt.com  
nickverwolf3@gmail.com

Counsel for DNR:

Edward D. Callow  
Assistant Attorney General  
1125 Washington Street S.E.  
Olympia, WA 98504  
tedc@atg.wa.gov

Counsel for Georgia-Pacific LLC:

Jason T. Morgan  
Sara A. Leverette  
Stoel Rives LLP  
600 University Street, Suite 3600  
Seattle, WA 98101  
jason.morgan@stoel.com  
sara.leverette@stoel.com

Counsel for City of Seattle:

Laura B. Wishik  
Assistant City Attorney  
Seattle City Attorney's Office  
701 – 5th Avenue, Suite 2050  
Seattle, WA 98104-7097  
laura.wishik@seattle.gov

Counsel for City of Bellingham:

Amy Kraham  
Senior Assistant City Attorney  
Office of the City Attorney  
City of Bellingham  
210 Lottie Street  
Bellingham, WA 98225-4089  
akraham@cob.org

Counsel for Washington Association of Municipal Attorneys:

Adam Rosenberg  
Williams, Kastner & Gibbs, PLLC  
601 Union Street, Suite 4100  
Seattle, WA 98101-2380  
arosenberg@williamskastner.com

Counsel for City of Tacoma:

Christopher D. Bacha  
Chief Deputy City Attorney  
Tacoma City Attorney's Office  
747 Market Street, Suite 1120  
Tacoma, WA 98402-3767  
CBacha@ci.tacoma.wa.us

Counsel for Washington State Department of Ecology:

Andrew A. Fitz  
Assistant Attorney General  
Office ID No. 91024  
PO Box 40117  
Olympia, WA 98504-0117  
andyf@atg.wa.gov

Counsel for Jolene Unsoeld, Janice Niemi, and David Bricklin:

David Bricklin  
Bricklin & Newman LLP  
1001 Fourth Ave, Suite 3200  
Seattle, WA 98154  
bricklin@bnd-law.com

Counsel for Washington Environmental Council:

Ken Lederman  
Foster Pepper PLLC  
1111 Third Ave, Suite 3400  
Seattle, WA 98101-3299  
ledek@foster.com

Counsel for City of Port Angeles:

Rodney Brown  
Tanya Barnett  
Cascadia Law Group PLLC  
1201 Third Ave, Suite 320  
Seattle, WA 98101  
rbrown@cascadialaw.com  
tbarnett@cascadialaw.com

DATED this 11<sup>th</sup> day of August, 2017.



EARLE DAVID LEES, III  
WSBA No. 30017  
*Attorney for Amicus Curiae*  
*Skokomish Indian Tribe*

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- jason.morgan@stoel.com
- jhager@williamskastner.com
- ken.lederman@foster.com
- laura.wishik@seattle.gov
- lisa.levias@seattle.gov
- litdocket@foster.com
- nickverwolf3@gmail.com
- rbrown@cascadialaw.com
- robertmiller@dwt.com
- sara.leverette@stoel.com
- susanbright@dwt.com
- tbarnett@cascadialaw.com
- tedc@atg.wa.gov

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---

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