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SUPREME COURT OF THE STATE OF WASHINGTON

QUINAULT INDIAN NATION, FRIENDS OF GRAYS HARBOR,
SIERRA CLUB, GRAYS HARBOR AUDUBON, AND CITIZENS FOR
A CLEAN HARBOR,

Petitioners,

v.

CITY OF HOQUIAM; WASHINGTON STATE DEPARTMENT OF
ECOLOGY; IMPERIUM TERMINAL SERVICES, LLC; WESTWAY
TERMINAL COMPANY, LLC; and WASHINGTON SHORELINES
HEARINGS BOARD,

Respondents.

SUPPLEMENTAL BRIEF OF RESPONDENTS
CITY OF HOQUIAM AND WASHINGTON STATE
DEPARTMENT OF ECOLOGY

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I. INTRODUCTION

The Ocean Resources Management Act (ORMA) requires state and local governments to plan for the management of natural resources “in Washington’s coastal waters.” It directs the Department of Ecology (Ecology) to adopt “ocean use guidelines” to fulfill this requirement. These guidelines, adopted by Ecology in 1991, specify that ORMA only applies to “ocean uses”—i.e., projects located “on” or “in” Washington’s coastal waters—not to projects located on land. Under this regulation, ORMA does not apply to the project at issue here, which is a terminal expansion located on land. The Court of Appeals correctly so held, and its decision should be affirmed.

Ecology’s ocean use regulation has never been challenged, not even in this case. The regulation has been consistently applied by both Ecology and local governments, without objection, for approximately 25 years. Petitioners Quinault Indian Nation, Friends of Grays Harbor, Sierra Club, Grays Harbor Audubon, and Citizens for a Clean Harbor (collectively “Quinault”), however, now contend that Ecology has misapplied ORMA all these years. They argue that the statute is not limited to “ocean uses” but instead applies to any project that may “adversely impact” ocean or coastal resources, even projects located

entirely on land. The Court should reject this ad hoc, overly broad interpretation.

Quinault's interpretation is based on reading a single section of ORMA out of context, in disregard of its other applicable provisions, its overall structure, and its legislative history. The Legislature intended ORMA to fill a gap in existing regulation with regard to uses and activities occurring in the ocean. The Legislature did not intend ORMA to regulate ordinary port facilities on land, which are already covered by the Shoreline Management Act and other laws.

Quinault's interpretation would render ORMA applicable to a wide range of land-based projects that have never before been regulated under that statute. Moreover, their interpretation would add nothing to the environmental protections that the Westway terminal will be required to provide. These protections are already in place under the State Environmental Policy Act (SEPA), the Shoreline Management Act, and other state laws. The Court of Appeals decision should be affirmed.

II. STATEMENT OF THE ISSUES

1. Does the Ocean Resource Management Act, RCW 43.143, apply to Westway's proposed expansion project, when the project is located neither "on" nor "in" Washington's coastal waters, and instead is located entirely on land?

2. Did the Court of Appeals correctly determine that the terminal facility is not an “ocean use” or “transportation use” under ORMA’s enabling regulation, WAC 173-26-360?

III. STATEMENT OF FACTS

Westway Terminal Company, LLC (Westway) owns and operates an existing bulk methanol storage, handling, and transfer facility in the City of Hoquiam. *See Quinault Indian Nation v. City of Hoquiam*, SHB No. 13-012c, at 7–8, Order on Summary Judgment (as Amended on Reconsideration) (Dec. 9, 2013) (Board Decision) CP at 26–27. The facility, constructed in 2009, includes four large storage tanks, rail and truck unloading facilities, a dock, pipelines, and associated structures. Westway seeks to expand these existing facilities to allow for the receipt, storage, and transshipment of crude oil, as well as methanol. The project will involve the construction of up to five additional storage tanks to hold the oil, as well as expanded rail facilities, and additional pumps and pipelines. *Id.*; *see also* Draft Environmental Impact Statement (DEIS), § 2.1.3.2 (available on Ecology’s website at www.ecy.wa.gov/geographic/graysharbor/terminals.html).

The project will utilize the existing pier and dock and consequently no in-water work is required. Administrative Record (AR) at 667. Loading arms and a marine vapor combustion system will be added to the existing

pier. The terminal will receive crude oil by rail, primarily from the Bakken formation in North Dakota, store the oil in on-site storage tanks, and then load it onto vessels for shipment to refineries elsewhere. Approximately two loaded vessel trips per week are anticipated at full build out. *Id*; see also DEIS § 2.1.3.2.

Imperium, Westway's neighbor, has an existing biodiesel production and storage facility on its site. CP at 27–28. Imperium originally proposed to expand its facility to handle crude oil, similar to Westway, but has since revised its proposal to exclude crude oil.¹

Ecology and the City of Hoquiam are co-lead agencies under SEPA for the Westway and Imperium proposals. CP at 29–30. Initially, the co-leads concluded that the projects, with a number of mitigation measures, would not have any significant adverse environmental impacts. Consequently, they issued mitigated determinations of non-significance (MDNSs) for the proposals. CP at 30; AR at 671. The City also issued shoreline substantial development permits. CP at 31. Quinault appealed the shoreline permits and the MDNSs to the Shorelines Hearings Board. Among other things, Quinault argued that the projects required review under ORMA, RCW 43.143. CP at 24.

¹ Because of this, the volume of oil involved here is substantially reduced. Westway's proposal would involve approximately one loaded train trip every other day. DEIS § 2.1.3.2.

The Board rejected Quinault's argument based on ORMA. CP at 58–61. However, the Board reversed the shoreline permits and the MDNSs on other grounds and remanded the permits to the City of Hoquiam and Ecology. CP at 62. Following remand, the co-leads issued draft environmental impact statements for the projects. The draft environmental impact statements include a number of proposed mitigation measures to address the risk of oil spills. These measures include contingency planning, training, staging of equipment, financial assurances, use of updated rail cars, tug escorts, development of a vessel management system, and other measures. See DEIS §§ 4.4.3 (facility), 4.5.3 (rail), and 4.6.3 (vessels).

Quinault appealed the Board's ORMA decision directly to the Court of Appeals. The Court of Appeals affirmed the Board. *Quinault Indian Nation v. Imperium Terminal Serv., LLC*, 190 Wn. App. 696, 360 P.3d 949 (2015). In doing so, the court focused on Ecology's implementing regulation, WAC 173-26-360, and especially the definitions of "ocean uses" and "transportation" uses. As the court noted, all parties including Quinault agreed these definitions controlled the outcome of the case. *Quinault Indian Nation*, 190 Wn. App. at 714 n.9. The court held that the Westway project fit neither of these definitions because it is

located on land and only incidentally involves ocean transportation. *Id.* at 714. This Court subsequently accepted review.

IV. AUTHORITY AND ARGUMENT

A. ORMA is Limited to Uses and Activities That Occur in Washington's Coastal Waters

1. The goal of statutory interpretation is to implement the intent of the Legislature

Statutory interpretation is a question of law reviewed de novo. *Skagit Cty. Pub. Hosp. Dist. No. 304 v. Skagit Cty. Pub. Hosp. Dist. No. 1*, 177 Wn.2d 718, 723, 305 P.3d 1079 (2013). The primary objective is to ascertain and give effect to the Legislature's intent. *Dep't of Ecology v. Campbell & Gwinn, L.L.C.*, 146 Wn.2d 1, 9, 43 P.3d 4 (2002). The interpretation process begins by examining the plain meaning of the statute, which is derived from "the ordinary meaning of the language at issue, the context of the statute in which that provision is found, related provisions, and the statutory scheme as a whole." *Lake v. Woodcreek Homeowners Ass'n*, 169 Wn.2d 516, 526, 243 P.3d 1283 (2010) (internal citation omitted). This can also include an enacted statement of legislative purpose. *G-P Gypsum Corp. v. Dep't of Revenue*, 169 Wn.2d 304, 310, 237 P.3d 256 (2010).

If, after conducting a plain meaning analysis, a statute remains susceptible to more than one reasonable interpretation, and thus appears

ambiguous, courts will resort to aids in construing the statute, such as legislative history. *Campbell & Gwinn*, 146 Wn.2d at 12. An agency's interpretation of an ambiguous statute is "accorded great weight" if the statute falls within the agency's expertise. *Port of Seattle v. Pollution Control Hearings Bd.*, 151 Wn.2d 568, 587, 90 P.3d 659 (2004). Where a statute is truly subject to more than one reasonable interpretation, "the interpretation which better advances the overall legislative purpose should be adopted." *Weyerhaeuser Co. v. Dep't of Ecology*, 86 Wn.2d 310, 321, 545 P.2d 5 (1976).

Here, the Court of Appeals properly gave Ecology's interpretation of ORMA deference because ORMA is within Ecology's expertise and Ecology is the agency charged with administering it. *Quinault Indian Nation*, 190 Wn. App. at 710–11, (citing *Cornelius v. Dep't of Ecology*, 182 Wn.2d 574, 585, 344 P.3d 199 (2015)).

2. The Legislature intended ORMA to apply to projects "in" the coastal waters

Quinault focuses its argument on RCW 43.143.030. *See* Petition for Review (Pet.) at 10. The very first subsection of that statute establishes ORMA's scope:

When the state of Washington and local governments develop plans for the management, conservation, use, or development of natural resources *in Washington's coastal*

waters, the policies in RCW 43.143.010 shall guide the decision making process.

RCW 43.143.030(1) (emphasis added).

Although phrased in terms of planning, this language demonstrates that the Legislature was concerned not with all projects that may affect the coast, but instead was concerned with projects located specifically “in Washington’s coastal waters.” Subsection (2) goes on to provide that:

Uses or activities that require federal, state, or local government permits or other approvals and that will adversely impact renewable resources, marine life, fishing, aquaculture, recreation, navigation, air or water quality, or other existing ocean or coastal uses, may be permitted only if the criteria below are met or exceeded.

RCW 43.143.030(2). Quinault reads subsection (2) in isolation from subsection (1), arguing that ORMA applies to any project that may “adversely impact” Washington’s coastal resources, including projects like Westway’s that are located on land. Pet. at 9–10. This is incorrect. The two subsections must be read together. *See Am. Legion Post No. 149 v. Dep’t of Health*, 164 Wn.2d 570, 588, 192 P.3d 306 (2008) (statutes are to be read together to achieve a harmonious statutory scheme); *Hallauer v. Spectrum Props., Inc.*, 143 Wn.2d 126, 146, 18 P.3d 540 (2001) (statutes dealing with the same subject matter must be construed together).

In particular, subsection (2) must be read as setting forth the review criteria to be applied within the context of the planning called for

by subsection (1). See *Key Bank of Puget Sound v. City of Everett*, 67 Wn. App. 914, 917, 841 P.2d 800 (1991); *Arbitration of Mooberry v. Magnum Mfg., Inc.*, 108 Wn. App. 654, 658, 32 P.3d 302 (2001) (when two subsections of the same statute are enacted at the same time, they must be read together). The entire statute, when read as a whole, calls for planning to address use or development of natural resources “in Washington’s coastal waters” and then lays out the planning and project review criteria to be applied to uses and activities in those waters. RCW 43.143.030.

Quinault’s bifurcated reading of the two subsections leads to unlikely, strained, or absurd results. If subsection (2) is read in isolation, then any project within the four coastal counties that requires a permit, and which has any adverse impact on “renewable resources, marine life, fishing, aquaculture, recreation, navigation, air or water quality, or other existing ocean or coastal uses,” would be subject to ORMA’s review criteria. *Id.* This would include a wide variety of projects throughout the four coastal counties, potentially even those located far inland. Read as Quinault urges, ORMA would add restrictive review criteria to almost every port project in the four coastal counties, even though the environmental impacts of those projects are already addressed by other

state laws.² The Legislature is unlikely to have intended ORMA to have such broad effect. Instead, ORMA's review criteria should be construed consistent with subsection (1) as applicable only to projects located "in Washington's coastal waters." See *State v. Hall*, 168 Wn.2d 726, 737, 230 P.3d 1048 (2010); *State v. McDougal*, 120 Wn.2d 334, 351, 841 P.2d 1232 (1992) (court should avoid statutory construction that leads to absurd or unjust results).

RCW 90.58.195, which is a section of ORMA that was codified in the Shoreline Management Act, further indicates that the Legislature intended ORMA to apply only to uses and activities in the ocean. The statute requires Ecology to adopt "ocean use guidelines" to guide local planning efforts under ORMA. RCW 90.58.195(1). It also requires local governments to implement ORMA—including both subsections of RCW 43.143.030—through the existing framework of their shoreline master programs. RCW 90.58.195(2). By using the term "ocean use guidelines," the statute demonstrates the Legislature's intent that ORMA apply only to ocean uses as defined by Ecology. Moreover, by specifying a single regulatory framework to implement ORMA, the statute demonstrates the Legislature's intent that ORMA's planning and project review criteria be

² Such laws include the Shoreline Management Act, the State Environmental Policy Act, and in this case RCW 88.40, which requires onshore facilities that handle oil to provide financial assurances to compensate for damages caused by an oil spill.

applied together, in the same geographic area, not in the widely disparate manner advocated by Quinault.

In short, when read as a whole, and in conjunction with Ecology's unchallenged implementing regulation discussed below, ORMA contemplates that the review criteria in RCW 43.143.030(2) be applied consistent with the planning requirement in RCW 43.143.030(1), to projects located "in Washington's coastal waters" as more fully defined by Ecology. In the present case, this means that the review criteria do not apply to Westway's expansion project, because none of that project occurs in or on Washington's coastal waters. *See* AR at 666–67. The project is located entirely on land and is not an "ocean use" under Ecology's regulation. The Court of Appeals decision should be affirmed.

B. Legislative History Confirms ORMA's Application to Uses Occurring "in" or "on" the Coastal Waters

ORMA was enacted in response to the perceived threat of oil and gas leasing by the federal government on the outer continental shelf. *See* Final Legislative Report, 51st Leg., 1st Ex. Sess., at 166 (Wash. 1989) (Final Report); Quinault Court of Appeals Opening Brief at App'x 65–67. The statute, as originally enacted, is replete with references to oil and gas drilling off the coast, and the Final Report is explicit that the statute was enacted in response to a pending lease sale by the federal Mineral

Management Service. Final Report at 166-67. Obviously, oil and gas drilling off the coast is an activity that occurs "in" or "on" the coastal waters—it does not occur on land.

According to the Final Report, the Legislature perceived a need for additional planning to address uses potentially occurring in Washington's coastal waters:

There are at present few statewide regulations, guidelines, or policies for the use or development of Washington's coastal resources. While local, coastal governments have some authority to regulate coastal resources, these governments have done little to address coastal resource management through their shoreline management programs or under existing laws.

Final Report, at 166.

The Report goes on to clarify that the needed planning is for uses or activities, like off shore oil drilling, that occur in Washington's coastal waters. In reference specifically to the policies established in RCW 43.143.010, the Final Report refers to those policies as applicable in waters "off" Washington's coast:

Legislative policies regarding coastal waters off Washington are adopted. These policies will guide the decision-making process for the management, conservation, use, and development of natural resources in Washington's coastal waters.

Final Report at 167.

ORMA focuses on uses and activities “off” the coast because, under the Shoreline Management Act, local governments were already required to adopt planning and review criteria for activities occurring on land within 200 feet of the shoreline. *See* RCW 90.58.080. There was no need for the Legislature to adopt new planning and review criteria for uses occurring on land. The gap referred to in the Final Report—the gap filled by ORMA—is with regard to planning and review criteria for projects located off the coast, “in” the coastal waters, and particularly those located in the area from 3 to 200 miles out, the “exclusive economic zone.”

In the exclusive economic zone, the state does not have jurisdiction to permit or deny projects authorized by the federal government. *See* RCW 43.143.005(4). However, as discussed in the Final Report at pages 166–67, the state can condition or potentially deny federal activities there through its Coastal Zone Management Plan adopted under the Coastal Zone Management Act, 16 U.S.C. §§ 1451–1466. ORMA’s evident purpose was to provide the necessary review and planning criteria to be applied in that zone for adoption into the Coastal Zone Management Plan. Indeed, immediately after ORMA was enacted, the state incorporated it into the state’s Coastal Zone Management Plan for that purpose. *See* Washington State Department of Ecology, *Managing Washington’s Coast*,

Washington State's Coastal Zone Management Program, 101 (Ecology Pub. No. 00-06-029) (2001).³

Prior to ORMA, local governments on the coast had not engaged in planning beyond the three mile limit because the SMA only applies to the limit of state jurisdiction. See RCW 90.58.030(2)(f)(i) (shoreline jurisdiction extends to the "western boundary of the state"). ORMA changed that by providing planning and review criteria for projects located "on" or "in" the coastal waters. This is why ORMA declares that the state has an "inherent interest" in the management of natural resources in the area from 3 to 200 miles out. RCW 43.143.005(4). It is also why ORMA requires the state to participate in "federal ocean and marine resource decisions to the fullest extent possible" RCW 43.143.010(6).

In sum, neither the language nor the legislative history of ORMA suggests that it was intended to apply to projects like the present one that are located entirely on land.

C. Under Ecology's Regulation, ORMA Does Not Apply to the Westway Project Because It Is Not an Ocean Use or a Transportation Use

Ecology's "ocean use guidelines," adopted in 1991 as WAC 173-26-360, are consistent with and serve to implement the statutory structure of RCW 43.143. The regulation begins by stating its purpose:

³Available on Ecology's website at www.ecy.wa.gov/programs/sea/czm/prgm.html.

The law [ORMA] requires the department of ecology to develop guidelines and policies *for the management of ocean uses* and to serve as the basis for evaluation and modification of local shoreline management master programs of coastal local governments in Jefferson, Clallam, Grays Harbor, and Pacific counties.

WAC 173-26-360(1) (emphasis added).

Critically, the regulation defines “ocean uses” as:

[A]ctivities or developments involving renewable and/or nonrenewable resources that occur *on Washington’s coastal waters* and includes their associated off shore, near shore, inland marine, shoreland, and upland facilities

WAC 173-26-360(3) (emphasis added).

With respect to the permit review criteria in RCW 43.143.030(2), the regulation provides that those review criteria should be applied when local governments “permit ocean or coastal uses and activities as a substantial development, variance or conditional use” WAC 173-26-360(6).⁴ Under the regulation, ORMA’s review criteria only apply to “ocean uses”—those occurring “on Washington’s coastal waters.” See WAC 173-26-360(5).

The regulation’s definition of ocean uses as those occurring “on Washington’s coastal waters” mirrors the language of ORMA in both RCW 43.143.030(1)—which uses the phrase “in Washington’s coastal waters,” and RCW 90.58.195(1)—which uses the term “ocean use guidelines.” The regulation is thus fully consistent with the statute, and

⁴ Substantial development, variance, and conditional use, are types of permits issued under the SMA. See RCW 90.58.140.

indeed, has never been challenged. As the Court of Appeals noted, all parties relied on it below. *Quinault Indian Nation*, 190 Wn. App. at 713 n.8. Further, as the Court of Appeals correctly determined, the Westway project does not meet this definition because it occurs on land, not on the water. *Quinault Indian Nation*, 190 Wn. App. at 712–14.

Quinault nevertheless argues the project qualifies as an “ocean use” because it involves marine transportation. According to Quinault, marine transportation is an integral component of the project such that it should be considered an ocean use. Pet. at 12–13. This interpretation is incorrect, however, for two reasons. First, as discussed below, marine transportation by itself is not an “ocean use” under the regulation. Only transportation associated with another ocean use (such as an offshore drill rig) is covered. See WAC 173-26-360(3). If transportation by itself was an ocean use, then every ship passing through Washington’s coastal waters and stopping at a Washington coastal port would have to satisfy ORMA’s review criteria. This clearly would be an overbroad and unreasonable reading of the regulation.⁵

Second, the permitted facilities here—the storage tanks, pumps, pipelines, etc.—are located on land, most of them more than 200 feet from

⁵ Such a reading would also be inconsistent with the statute insofar as the statute exempts “currently existing commercial uses” from its coverage. RCW 43.143.010(5). Marine transportation is clearly such a use.

the shoreline. These facilities do not qualify as “ocean uses” under the regulation because they are not affiliated with a covered activity or use that occurs “on Washington’s coastal waters.” As a result, the Westway proposal is neither an ocean use itself nor is it associated with any ocean use. It is instead an ordinary port facility like many others located on Washington’s coast.

In this context, it is important to recognize that the activities proposed by Westway—storage, handling, and shipment of crude oil—are from the standpoint of ORMA not significantly different from the existing uses occurring at the site, as well as the uses and activities occurring at the neighboring Imperium site, and presumably at a variety of other sites in ports along the coast. Imperium and Westway currently handle, store, and ship methanol and biodiesel, respectively. Port facilities by their very nature ship products over the ocean. Grain elevators, for example, store, handle, and ship grain over the ocean. These facilities are not “ocean uses” within the meaning of ORMA simply because they ship goods over the ocean. The Legislature did not intend to regulate through ORMA every port facility on the coast.⁶

⁶ Under Ecology’s regulation, facilities on land are subject to ORMA if they are associated with an ocean use located “on” or “in” the water. WAC 173-26-360(3). For example, a supply dock on land serving an offshore oil rig would be covered by ORMA. Here, as the Court of Appeals correctly held, there is no such ocean use. The reference in

As discussed above, ORMA's focus was on closing a gap in the state's regulatory structure. That gap related to uses occurring in the ocean, and especially those like oil and gas drilling that occur more than three miles from the coast. There is nothing in the language of the statute or the legislative history to suggest that it was meant to apply to port facilities generally. Rather, those facilities are regulated by the Shoreline Management Act, which fully protects shoreline resources. To read ORMA as Quinault does, as applicable to every port facility on the coast, would vastly expand the reach of the statute in a way not consistent with the intent of the Legislature or with the way the statute has been implemented for the last 25 years. *See* CP at 60.

Quinault also argues that the Court of Appeals erred in its interpretation of the regulatory definition of "transportation." WAC 173-26-360(12) defines "ocean transportation" to include "[s]hipping, transferring between vessels, and offshore storage of oil and gas; transport of other goods and commodities; and offshore ports and airports." Quinault claims that, under this definition, ORMA should apply to any ship transporting oil through Washington's waters. Pet. at 16-17. The Court of Appeals, however, correctly held that only transportation incidental to an "ocean use" is covered. *Quinault Indian Nation*, 190

the regulation to associated upland facilities underscores the fact that such upland facilities are not by themselves "ocean uses."

Wn. App. at 716. As the Court of Appeals noted, the regulation begins by stating that its purpose is to provide guidelines for the management of “ocean uses.” WAC 173-26-360(1). “Ocean use” is thus the key term to which the regulation applies. The transportation definition in the regulation does not identify a separate type of “ocean use,” but instead defines the types of transportation activities incidental to an ocean use that are covered. To hold otherwise would require every commercial ship calling at a Washington coastal port to pass ORMA’s review criteria.

The fact that ORMA does not apply here does not mean that the Westway project escapes environmental review or lacks environmental protections. As noted above, the project is undergoing full environmental review under SEPA and there are a number of other environmental laws and regulations that apply. *See, e.g.*, WAC 173-180 (facility oil handling standards); 173-182 (oil spill contingency planning); 173-183 (oil spill damage assessment); 173-184 (vessel oil transfer requirements). The draft environmental impact statement includes numerous proposed mitigation measures to address the risk of oil spills from the facility, the rail line, and from vessels. In addition, the City of Hoquiam will have to determine that the proposal meets the policies of the Shoreline Management Act and local shoreline master program. WAC 173-27-150(1).

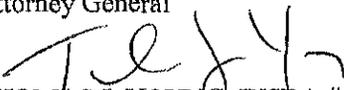
Quinault contends that the Court of Appeals decision in this case “stripped ORMA of meaning,” “skipped the language of the statute entirely,” and “threatens to render ORMA irrelevant and superfluous, as it would only apply to activities already banned.” Pet. at 8. Nothing could be further from the truth. The Court of Appeals engaged in an appropriate preliminary analysis of ORMA’s statutory provisions before turning to Ecology’s implementing regulation, which more directly addressed the question raised by Quinault in its appeal. The Court of Appeals applied a straightforward, plain meaning analysis to both the statute and regulation, and simply found that neither supported the overly broad interpretation advanced by Quinault. Respondents respectfully ask this Court to affirm.

V. CONCLUSION

For the reasons stated above, this Court should affirm the Court of Appeals.

RESPECTFULLY SUBMITTED this 27 day of June, 2016.

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CERTIFICATE OF SERVICE

Pursuant to RCW 9A.72.085, I certify that on the 27th day of June, 2016, I caused to be served Ecology's Supplemental Brief in the above-captioned matter upon the parties herein as indicated below:

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Attached for filing in Supreme Court Case No. 92552-6, *Quinault Indian Nation, et al. v. City of Hoquiam, et al.*, is the Supplemental Brief of Respondents City of Hoquiam and Washington State Department of Ecology, with attached Certificate of Service. Thank you for your attention to this matter.

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