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Upper Skagit Indian Tribe v. United States,  
Docket No. 07-35061 (590 F.3d 1020 (9th Cir.  
2010))

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### Response Brief of Intervenors Port Gamble S'Klallam and Jamestown S'Klallam Tribes

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IN THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

FILED  
JUL 16 2007  
CATHY A. CATTERSON, CLERK  
U.S. COURT OF APPEALS

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NO. 07-35061

U.S. District Court Cause No. 70-9213 – Phase I  
(Subproceeding No. 05-3)

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Upper Skagit Tribe,  
Plaintiff - Appellee,

v.

Suquamish Indian Tribe,  
Defendant - Appellant

v.

Swinomish Indian Tribal Community,  
Cross-claimant - Appellee

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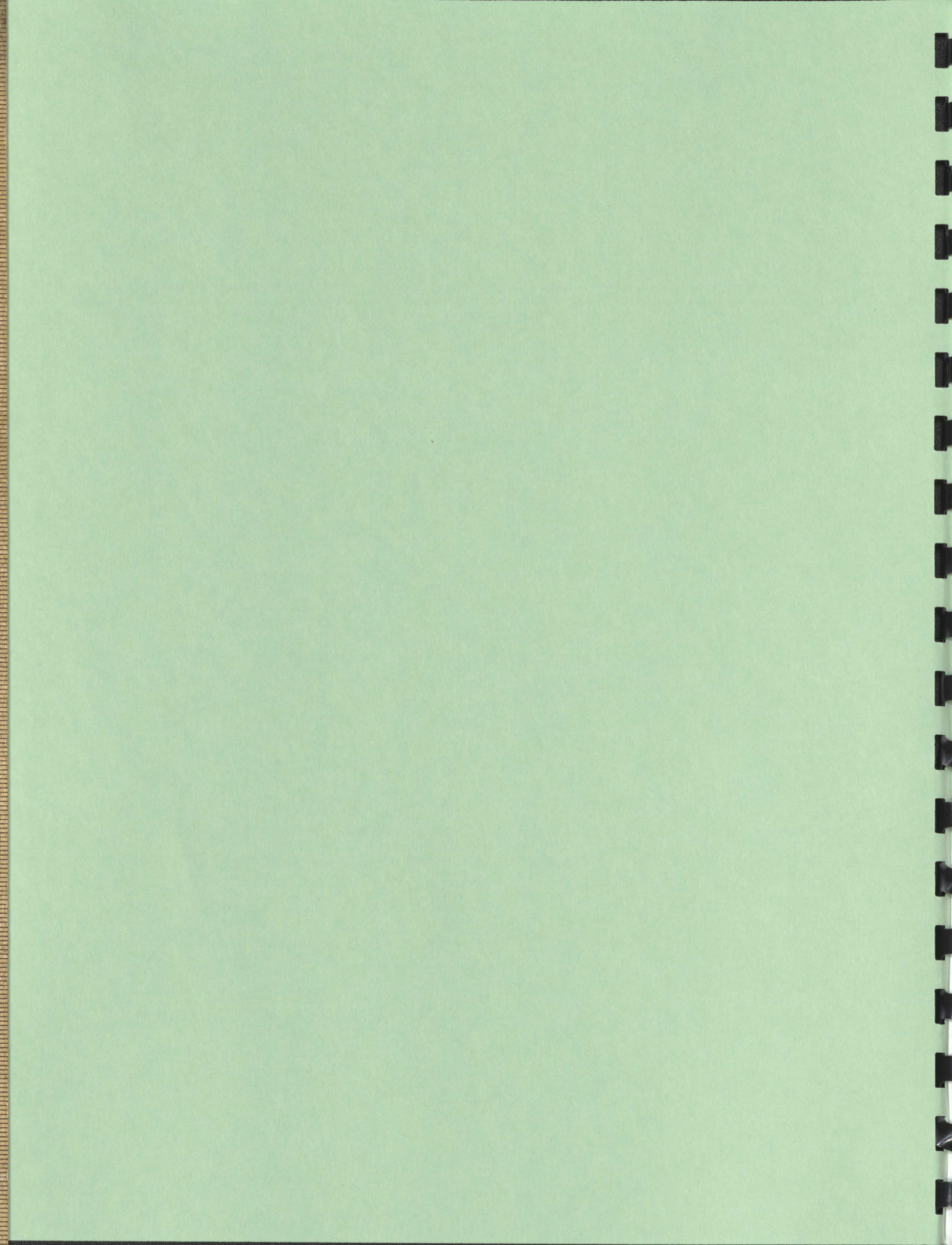
RESPONSE BRIEF OF INTERVENORS PORT GAMBLE S'KLALLAM  
AND JAMESTOWN S'KLALLAM TRIBES

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## CORPORATE DISCLOSURE STATEMENT

Intervenors Port Gamble S’Klallam and Jamestown S’Klallam Tribes are federally recognized Indian tribes. They have issued no shares of stock to the public and have no parent company, subsidiary or affiliate that has done so.

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## I. COUNTERSTATEMENT OF ISSUES PRESENTED

1. Have the District Court and this Court already ruled in United States v. Washington that the definition of “Puget Sound” is ambiguous, and does this preclude the Suquamish Tribe’s argument that the definition of “Puget Sound” can be as broad and unambiguous as the Tribe now claims?

2. Is Suquamish Tribe’s usual and accustomed fishing ground description patently ambiguous if, as the Suquamish Tribe argues, “Puget Sound” includes all bays and inlets and yet lists areas that are within the alleged concise definition separately (i.e. Hood Canal, Haro and Rosario Straits)?

## II. COUNTERSTATEMENT OF THE CASE

The Port Gamble S’Klallam and Jamestown S’Klallam Tribes’ interest in this case arises out of their desire to reduce litigation in United States v. Washington and avoid the relitigation of issues already decided by the District Court or this Court. As the Court has recognized, this case has many docket entries and this Court has raised doubts about finality. United States v. Washington, 394 F.3d 1152, 1162 (9<sup>th</sup> Cir. 2005) (noting the number of docket entries in the 34 years of litigation). The Tribes that began this case saw it as a battle for their rights to be recognized by the State. The passing of the guard to the next generation has created a loss of memory and with it the desire to challenge that which has already been challenged or in some cases long ago settled. This type of relitigation must end. The Suquamish Tribe is taking

advantage of the system in arguing that the description of their usual and accustomed areas can trump the evidence that supported it.

The Port Gamble S’Klallam and Jamestown S’Klallam<sup>1</sup> have actively participated in this case because, in part, they do not want to see the relitigation of the issue that they litigated and won seven years ago. United States v. Lummi, 235 F.3d 443, 449 (9<sup>th</sup> Cir. 2000).

### III. COUNTERSTATEMENT OF STANDARD OF REVIEW

The Port Gamble S’Klallam and Jamestown S’Klallam agree that the grant or denial of summary judgment can be reviewed *de novo*. Br. of Appellant at 5. In so far as the Suquamish Tribe is attempting to receive relief from the case of United States v. Lummi, 235 F.3d 443, the order is not reviewable *de novo*. This decision can only be appealed to the Supreme Court within the operative time period. This decision is final.

### IV. SUMMARY OF ARGUMENT

The Suquamish Tribe argues that the “actual meaning” of Puget Sound results in a “concise and unambiguous description of the geographical extent of

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<sup>1</sup> The Port Gamble S’Klallam and Jamestown S’Klallam for the sake of efficiency will not brief all of the issues in this matter, and have consolidated their excerpts of record with the Swinomish and Upper Skagit Tribes. Their participation in this matter is linked to the two issues addressed.



Suquamish's U & A." Br. of Appellant at 18. The Tribe argues that this unambiguous definition supports a broad definition of Puget Sound, which is all encompassing and without eastern or western boundaries. Br. of Appellant at 8. There is no doubt that Suquamish Tribe is attempting to relitigate previously decided issues.

The Suquamish Tribe's argument is barred by United States v. Lummi, 235 F.3d at 443<sup>2</sup>, because it claims a definition of Puget Sound which has already been litigated and lost. The Suquamish argument is also barred by the express limitation in this subproceeding to "not define the term 'Puget Sound' as used by Judge Boldt..." but rather the inquiry is limited to "the Court's determination as to whether that area [subproceeding area] is included in the Suquamish Tribe's U & A...." ER 482-483.

The subproceeding is expressly limited by court order to the waters named in Upper Skagit Tribe's Request for Determination, which focused on Saratoga Passage and Skagit Bay [ER 0001-0007] and Swinomish Tribe's Request for Determination regarding Catch Reporting Area 24C. ER 0007;

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<sup>2</sup> This case could also potentially run afoul of United States v. Lower Elwha, 642 F.2d 1141 (9<sup>th</sup> Cir. 1981) where the court defined a primary area for the Klallam and a joint use area with the Makah Tribe in areas which could be considered part of the Strait of Juan de Fuca.

ER 0008-0014. This Court cannot enter the broad decision requested by the Suquamish Tribe and should affirm the District Court's Decision.

## V. ARGUMENT

- A. The Record Cannot Show that Judge Boldt had a Specific Definition of "Puget Sound" If the Definition Contradicts Itself When Applied to the Suquamish Tribe's Usual and Accustomed Fishing Area Designation

The Suquamish Tribes U & A is described as follows:

The marine waters of Puget Sound from the northern tip of Vashon Island to the Fraser River including Haro and Rosario Straits, the streams draining into the western side of this portion of Puget Sound and also Hood Canal.

Finding of Fact #5 ("FF 5"), United States v. Washington, 459 F.Supp. 1020, 1049 (W.D. WA 1978), ER 16. The Suquamish Tribe argues that this definition is unambiguous. Br. of Appellant at 10. It is undisputed that Judge Boldt specifically describes "Haro and Rosario Straits" and "also Hood Canal" as part of the Suquamish Tribe's U & A and lists no other areas besides the northern tip of Vashon and the Fraser River. ER 16. Despite the lack of descriptors or geographical anchors, Suquamish lays claim to the subproceeding area and many additional other areas not previously claimed or fished by the Tribe.

Suquamish contends their reasoning to be that “Puget Sound” is “a broad area encompassing all the saltwater areas inward from the entrance to the Strait of Juan de Fuca.” Br. of Appellant at 11. It is true that the Suquamish Tribe cites at least one instance where this definition was used. Id. at 12. There are other instances where it was not used, for example, Judge Boldt’s “common understanding” as described in the Pretrial Order, which lists the Strait of Juan de Fuca and Puget Sound separately, as well as Hood Canal and the Hoko River (a river that drains into the Strait of Juan de Fuca). Appellant Br. at 12; ER 12. The Suquamish Tribe does recognize that the designation of Hood Canal and the Strait of Juan de Fuca separately, means they are separate regions. ER 0019-0020; Br. of Appellant at 13. But after citing at least two interpretations of Puget Sound, the Suquamish erroneously conclude that “Judge Boldt had a specific geographic area in mind when using the term ‘Puget Sound.’” Br. of Appellant at 14. As long as Judge Boldt used the term “Puget Sound” in more than one way, the term is ambiguous.

In addition, Suquamish Tribe’s U & A is patently ambiguous in that if the Suquamish Tribe is correct, and “Puget Sound” includes all of the waters from the Fraser River to Vashon and has no boundaries, then the finding of fact for

the Suquamish Tribe makes no sense because the Suquamish Tribe fished in both “Puget Sound” and “also Hood Canal” and “Haro and Rosario Straits.”

In United States v. Washington the term “Puget Sound” cannot include the waters claimed by the Suquamish Tribe.

B. A Lack of Eastern or Western Boundaries Also Makes the Determination Ambiguous

The Suquamish Tribe asserts that it is clear that Judge Boldt had a specific or concise definition of Puget Sound and it included everything. Br. of Appellant at 10; id. at 18. However, the case law refutes this argument.

1. The Ninth Circuit Has Found Ambiguity When Boundaries were Not Defined

In the case of United States v. Lummi, 235 F.3d at 449, this Court has held that where a Tribe’s fishing area description simply extends from one place to the other, the question of a lack of western boundary is subject to examination. In particular, this Court held:

The phrase used by Judge Boldt is ambiguous because it does not delineate the western boundary of the Lummi's usual and accustomed grounds and stations.

United States v. Lummi, 235 F.3d at 449. The Lummi usual and accustomed fishing grounds were listed as follows:

46. *In addition to the reef net locations listed above, the usual and accustomed fishing places of the Lummi Indians at treaty times included the marine areas of Northern Puget Sound from the Fraser River south to the present environs of Seattle, and particularly Bellingham Bay.* Freshwater fisheries included the river drainage systems, especially the Nooksack, emptying into the bays from Boundary Bay south to Fidalgo Bay.

Id. at 446 (emphasis in original). The Lummi definition had a similar phrase, it described the “marine areas of Northern Puget Sound from the Fraser River south to the Present environs of Seattle.” Id. The court found that definition ambiguous because, in part, it lacked a western boundary.

The Suquamish Tribe’s description of its usual and accustomed fishing area also lacks boundaries.

It is important to note that the Lummi Tribe already argued to this Court and the District Court that the term “Puget Sound” was all encompassing and that therefore there should be no scrutiny:

The Lummi argue strenuously that the term "Puget Sound" encompasses "the Strait of Juan de Fuca." Evidence in the record, however, demonstrates that Judge Boldt did not intend the term "Puget Sound" to be so inclusive.

....

It is clear that Judge Boldt viewed Puget Sound and the Strait of Juan de Fuca as two distinct regions, with the Strait lying to the west of the Sound. Had he



intended to include the Strait of Juan de Fuca ...he would have used that specific term, as he did elsewhere in *Decision I*.

Id. at 451-452.<sup>3</sup>

Lummi definitively addressed the ambiguity issue regarding the term “Puget Sound” in Judge Boldt’s findings and whether it was inclusive or narrow.

## 2. The Arguments Made by The Suquamish Tribe Have Been Decided

Not only did this Court address the issue, an in-depth examination of the District Court pleadings shed light on the exactness of the argument. The Suquamish argument here yields to a feeling of *déjà vu*. For example, Lummi argued on Summary Judgment:

The Lummi Tribe contends that the disputed areas are plainly within the broad award by Judge Boldt in Finding of Fact 46 (384 F.Supp. at 360) of essentially all of the marine waters of Puget Sound north of the environs of Seattle.

ER 0489 (emphasis added).

Suquamish argues here that:

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<sup>3</sup> The District Court here recognized the Lummi as governing the question of Puget Sound and the Strait of Juan de Fuca as two distinct areas. ER 19, fn. 2.

The only proper interpretation...that Judge Boldt fully understood the broad geographic extent of the term ‘Puget Sound...’

Br. of Appellant at 8. Lummi also raises arguments that the term “Puget Sound” was used broadly in the United States v. Washington record:

The Court and the parties have consistently treated the Strait of Juan de Fuca as within the marine waters of northern Puget Sound. Judge Boldt repeatedly referred to Puget Sound as encompassing essentially all of the inland marine waters of Washington State including the Strait of Juan de Fuca.

ER 0494.

Suquamish Tribe should not be able to revisit the same issue that the Lummi “strenuously argued” and lost. Lummi, 235 F.3d at 451. Suquamish appeared and participated in subproceeding 89-2. ER 0484-0485 (Notice of Appearance). The District Court examined the issue, found Lummi’s U & A determination to be ambiguous and examined at the record in front of Judge Boldt. ER 0499.

C. An Examination of the Record is Not Inconsistent

In Lummi the court found it proper to look to the record that was cited as the authority for the Finding of Fact in Question. ER 0499. An examination of this record here shows that Barbara Lane testified that the Suquamish Tribe

fished in “Part of Area 1” ER 0471; ER 0110. “Part of Area 1”, does not include many of the waters Suquamish Tribe is claiming as unambiguously included within the concise definition of “Puget Sound.” Br. of Appellant at 18; ER 0453; ER 0471.

D. An Examination of the Swinomish’s U & A is Not Part of This Case

Suquamish argues that because the Swinomish Tribe’s U & A description does not include the disputed waters, that is determinative of an issue in this case. Br. of Appellant at 26. This is a red herring. The Swinomish Tribe has not had its U & A challenged here and thus the question of what is or is not included is not before the court.

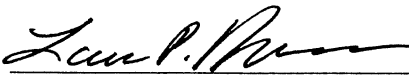
## VI. CONCLUSION

The Port Gamble S’Klallam and Jamestown S’Klallam respectfully request that the Court in making its determination in this case consider the cases that have come before and will come after. It should not be possible to return to the Court and make the same losing argument another Tribe made, when at that time, there was that ability to influence the outcome or appeal it and chose to do neither.

Dated this 14<sup>th</sup> day of June, 2007.

Respectfully submitted,

GENDLER & MANN, LLP

By:   
\_\_\_\_\_  
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Certificate of Compliance Pursuant to Fed. R. App. P. 32(a)(7)(C) and  
Circuit Rule 32-1 for Case Number 07-35061

I certify that: (check appropriate option(s))

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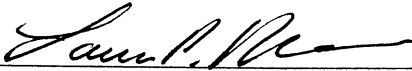
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Date

  
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## CERTIFICATE OF SERVICE

I certify that on June 15, 2007, I caused to be served two copies of the **Response Brief of Intervenors Port Gamble S’Klallam and Jamestown S’Klallam Tribes and Motion to Be Included in the Docket or Alternatively to Intervene** by mailing them by First Class Mail, postage pre-paid, addressed to the following, who are counsel for all parties who filed a Notice of Appearance or a Notice of Participation in *U.S. v. Washington*, W.D. Wash. No. 70-9213, Subp. 05-3:

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