

No. 82225-5

SUPREME COURT  
OF THE STATE OF WASHINGTON

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CITY OF PORT ANGELES, Respondent,

v.

OUR WATER-OUR CHOICE, and PROTECT OUR WATERS,  
Petitioners,

v.

WASHINGTON DENTAL SERVICE FOUNDATION, LLC,  
Respondent.

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**RESPONSE OF**

AMICI CURIAE INTERNATIONAL ACADEMY OF ORAL  
MEDICINE AND TOXICOLOGY,  
FLUORIDE ACTION NETWORK,  
WASHINGTON ACTION FOR SAFE WATER, WHIDBEY  
ENVIRONMENTAL ACTION NETWORK, AUDREY ADAMS,  
LINDA MARTIN, BILL OSMUNSON DDS, MPH,  
GERALD H. SMITH MD, AND FLUORIDE CLASS ACTION  
**TO RESPONDENTS' MOTION TO STRIKE THEIR BRIEF**

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I. PRELIMINARY REMARKS

Note that Oregon Citizens for Safe Drinking Water has terminated its status as amicus for this brief.

Therefore, the name of this brief will be: “Amici Curiae Brief of International Academy of Oral Medicine and Toxicology (IAOMT), Fluoride Action Network, Washington Action For Safe Water, Whidbey Environmental Action Network, Audrey Adams, Linda Martin, Bill Osmunson DDS, MPH, Gerald H. Smith MD, and Fluoride Class Action, These Amici will be referred to as the “Nine Amici.” The brief will be referred to herein as the “IAOMT Brief.” All references to appendices will be to the IAOMT Brief appendices, unless otherwise labeled.

[Respondents have filed a motion to strike practically all of the IAOMT Brief along with practically all of its appendices.](#) That brief is in large part made up of scientific books and articles and discussion of them, including some books and articles to which the Respondents have cited. The Court needs to be informed regarding scientific issues as they relate to this case. No part of the IAOMT Brief should be stricken.

II. STRIKING WOULD DISSERVE JUSTICE

The case before the Court does not pose strictly legal issues. It poses legal-scientific issues. In some sense the Court is being asked to

make a scientific decision.<sup>1</sup> The IAOMT Brief was written to inform the court of the relevant science and how the relevant science connects up with the relevant law. It covers The IAOMT Brief covers primarily scientific and legal-scientific issues. Thus, striking any part of it would be a disservice to justice.

The Trial Court made an error in not looking at science and the scientific issues the Initiatives raised. How could the Trial Court possibly have made a decision that the Initiatives were attempting to modify mere administrative matters and not important legislative matters without even considering what was in the Initiatives? It was not an informed decision. Even if counsel chose to avoid these questions, the judge should have requested information on this point. Trial judges too have a duty to protect the rights of citizens.

In asking this Court to strike the IAOMT Brief, the Respondents are asking the Court not to look at the contents of the Initiatives and the

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<sup>1</sup> Should we start down the road of adding chemicals and drugs to drinking water? Is the chemical in question a drug? Yes in the case of fluoride, as noted elsewhere because it is "... intended for use in the diagnosis, cure, mitigation, treatment, or prevention of disease in man or other animal." 21 U.S.C. 321 (g)(1)(B). Dental caries is a disease, and fluoride is added to water to prevent caries. Being a drug, is it harmful to any part of the population, and is it in fact helpful to some or all of the population? How do you control the size of the dose if you are distributing the drug to people who drink varying amounts of water which is at the same concentration level for all? Do some people drink more water than others? Who has the burden of proof? Do those who favor adding it have to prove it causes no harm to anyone? Or do those who oppose adding it have to prove it causes harm to some? What if it takes many years for the harm to set in? Because the Court has to answer these question, it must become well-informed regarding the relevant science. And that is because it is the last protector of individuals' rights.

relevant science. They are asking the Court to make the same mistake that the Trial Court made.

The Court should always be open to considering the law, and because science is law in a sense, the Court should always be open to considering that too. Science is the structure of our reality, that is to real things. The Court's role is to apply law to real situations. So the Court should prefer to consider scholarly articles and not strike these sections.<sup>2</sup>

The Respondents are saying, in effect, that because the Trial Court chose not to examine the contents of the Initiatives and look at the relevant science, and because the parties did the same, the Supreme Court now is barred from considering the relevant science. Such is a bad rule of evidence. It is never too late for the Court to take a look at the science.

The Respondents accuse the Nine Amici of

### III. OPPOSITION BRIEF HAS SCIENTIFIC INFORMATION TOO

Or should I say “unscientific information”? The Washington Dental Service Foundation (WDSF), Washington State Dental Association (WSDA), and Water Fluoridation Science Committee (WFSC) filed an answer to the IAOMT Brief. It includes page after page of scientific arguments, issues, and scientific documents not presented to the Trial

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<sup>2</sup> In *Condominium Ass'n v. Apartment Sales*, 101 Wn. App. 923, 945, 6 P.3d 74 (2000), the Court refused to strike a law review article despite allegations that it was bringing up issues not raised in the trial court. This is analogous to the case at bar.

Court, including fluoridation endorsements from numerous agencies, and a lengthy article entitled “Water Fluoridation and the Environment,” by Howard F. Pollick. If the opposition is bring forward scientific information, then the Nine Amici should be allowed to do so as well.

I must add that the above Answer written by WDSF, WSDA, and WFSC is riddled with illogical and unscientific statements. The Nine Amici will be asking another attorney to write a response to that Answer. They ask the Court’s permission to present that response.<sup>3</sup>

ISSUES ARE LEGISLATIVE AND NOT ADMINISTRATIVE

The Respondents say that the only issue is whether the proposed initiatives were outside the local initiative power. Respondents’ Motion to Strike, page 5. An issue is within the local initiative power if it is legislative and not administrative. The IAOMT Brief assists the Court with this issue. There are various ways of stating the rule for whether an issue is legislative or administrative. I have proposed not a new rule but a new way of stating the same rule: An initiative is legislative if its purpose

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<sup>3</sup> To illustrate: The Brief acknowledges that a significant percentage of tanker loads of scrubber liquor contain a little arsenic and a little lead. They say there are already some arsenic and lead in the water coming from other sources, so it is okay to is okay to add a little more. Hint: Fluoride dissolves pretty much everything, including lead. Even new pipes, fittings, and solders contain lead, and old ones contain A LOT. [Lead solder for use in plumbing was not outlawed until 1986, so this might explain why lead continues to show up in water fountains in old Seattle schools, at levels up to 1,600 ppb, 80 times the EPA maximum MCL of 20 ppb.](#) See Appendix D attached, “Lead-Tainted Water in Seattle Schools Stuns Parents,” Or click on [http://www.seattlepi.com/health/180495\\_leadwater02.html](http://www.seattlepi.com/health/180495_leadwater02.html).

is to halt or prevent a harmful or potentially harmful activity or to enforce currently unenforced laws. The words “illegal” and “legislative” derive from the same root, that is “law.” Thus, utilization of the initiative process to prevent harmful or potentially harmful activity or to enforce currently unenforced laws, is by definition a legislative matter. This sounds like a new test, but it is really a restatement of a currently accepted test: An issue is legislative if it “prescribes a new policy or plan.”<sup>4</sup>

A fundamental error made by the Respondents is their characterization of fluoride as a mere additive in the same category with chlorine. To the contrary, chlorine treats water and kills pathogens. It evaporates out of water overnight if left in an open pitcher. But fluoride is added to treat those who drink the water, with intent to prevent disease<sup>5</sup>, thus making it fit both the federal and state definitions of a drug. In this case it is a drug which is administered to all who live in the service area, regardless of how much water they drink, their age, their health, whether

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<sup>4</sup> See Supplemental Brief of Petitioners Our Water-Our Choice and Protect Our Waters at 14, Note 44 citing to Hughes v. City of Lincoln, 232 Cal.App.2d 741, 746-47, 43 Cal.Rptr. 306 (Cal.App.Dist.3 1965). The Hughes Court relied on a classical expression (“a declaration of public purpose, and making provision for ways and means of its accomplishment”) of the current standard that a legislative action “prescribes a new policy or plan.” See Appellants’ Opening Brief at 24.

<sup>5</sup> “[T]he addition of fluoride to the Chehalis water supply is intended solely for use in prevention of tooth decay primarily in children up to 14 years of age, and particularly between the ages of 6 and 14 and will prevent some tooth decay in some children. Kaul v Chehalis, 45 Wn.2d 616, 277 P.2d 352 (1954) at 618.

their kidneys are failing and can no longer excrete fluoride, what diseases they might have, and therefore which can be harmful to some.

Respondents say that this case is not about fluoride, and this is true. It is about adding drugs in general to drinking water. However, fluoride is currently the only drug which Port Angeles is adding to its water, and so we should not ignore it.

#### V. JUDICIAL NOTICE OF SCIENTIFIC FACTS

The IAOMT Brief discusses judicial notice as a method whereby the Court can admit evidence regarding the facts of fluoridation and its possible harms. The Court can take judicial notice of well-known facts at any stage, even on appeal.<sup>6</sup> Yet the respondents brush aside the request made by the Nine Amici that the Court take judicial notice of certain scientific facts.

The IAOMT Brief cited *Houser v. State*, which said this Court should look at the science and take judicial notice of it.<sup>7</sup> Respondents argue that *Houser v. State* was overturned by *State v. Smith*, 93 Wn.2d 329, 610 P.2d 869 (1980). While this is true, it is also true that *State v.*

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<sup>6</sup> ER 201(f) Judicial notice may be taken at any stage of the proceeding.

<sup>7</sup> This Court said that it was obligated to: “look beyond the case reports and statute books into a world that is rich with probability and conjecture and almost devoid of settled certainty. It must make the best assessment it can from the best information it can obtain. Reputable scientific studies are one source of such information, increasingly utilized by courts in constitutional decision making.” 85 Wn.2d 803, 540 P.2d 412 at 807 (1975) at 807.

Smith overturned Houser on a different point. Further, the Washington Supreme Court cited Houser on the subject of judicial notice after it handed down State v. Smith. See Wyman v. Wallace, 94 Wn.2d 99, 615 P.2d 452 (1980). This shows that the Court continued to endorse its statement in Houser regarding judicial notice.

The Respondents argue second that Houser was not referring to judicial notice of adjudicative facts but to judicial notice of legislative facts, and because the IAOMT Brief cited ER 201, which only covers adjudicative facts, the court should not take judicial notice at all of any of the scientific facts presented in said brief. The Federal Rules of Evidence has an ER 202, which specifically covers judicial notice of legislative facts. Washington does not have an ER 202 that is complementary to the federal ER 202. However, such cases as those cited above make it clear that judicial notice of legislative facts is practiced by Washington Courts.

The Evidence Project of Washington College of Law at American University goes into detail regarding judicial notice of judicial and adjudicative facts.<sup>8</sup> The Evidence Projects considers adjudicative facts to be more “evidentiary” and legislative facts to be more “procedural,” and for this reason judicial notice of legislative facts is often not included in

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<sup>8</sup> “[A]s with the distinction between adjudicative and legislative facts, a delineation between evidentiary and procedural matters is often unclear.” It also says, “Background facts are more difficult to distinguish because they are both adjudicative and legislative.”

rules of evidence, although it is included in the Federal Rules of Evidence. See selected pages from the Evidence Project attached as Appendix A. See Aaron S. Bayer, “Judicial Notice on Appeal,” by National Law Journal, Dec. 8, 2003, labeled as Appendix B.

[http://www.wiggin.com/pubs/articles\\_template.asp?ID=8141012172003](http://www.wiggin.com/pubs/articles_template.asp?ID=8141012172003)

If the scientific facts set forth in the IAOMT Brief are legislative and not adjudicative, then the Washington Supreme Court is more and not less likely to take judicial notice of them.

Respondents offer *State v. Way*, 88 Wn.App. 830, 946 P.2d 1209 (1997) as proof that Washington courts take judicial notice of only certain and incontrovertible facts which are buttressed by standard authorities.

However, in *State v. Way* no standard authorities were cited at all.

Respondents offer *State v. Karsunky*, 197 Wash. 87, 84 P.2d 3900 (1938) at page 98, on the same point, but in this case the authority offered was a pamphlet published by a manufacturer of insulin, which is hardly a standard or reliable authority. The 2006 NRC Report is in a different league. Thus, the Respondents’ frontal attack against the Court taking judicial notice of certain highly credible documents fails.<sup>9</sup>

## VI. FACTS THE COURT SHOULD NOTICE JUDICIALLY

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<sup>9</sup> This is “Fluoride in Drinking Water: A Scientific Review of EPA’s Standards,” a 2006 report prepared by the National Research Council, a branch of the National Academy of Sciences, the most prestigious and authoritative research institute in the country.

The IAOMT Brief asked that scientific facts coming from well-recognized sources be noticed. Some of those facts are repeated here to make for easy reading. For example, the 2006 NRC Report at page 25 makes it clear that people drink widely varying amounts of water.<sup>10</sup> This is elucidated in the chart on page 381 of the 2006 NRC Report, in IAOMT Brief Appendix D-1. The average person drinks the equivalent of six 8-ounce glasses of water per day.<sup>11</sup> Many drink four or more times this much.<sup>12</sup>

Regarding fluoride, the EPA set a 2% secondary maximum contaminant level, SMCL, which was calculated to hold the level of

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<sup>10</sup> “[S]ome members of the U.S. population could have intakes from community water sources of as much as 4.5 – 5.0 L/day (as high as 80 mL/kg/day for adults). Some infants have intakes of community water exceeding 200 mL/kg/day.” See 2006 NRC Report p. 25. See IAOMT Brief Appendix D-2.

<sup>11</sup> Mean water consumption is 21 mL of water per kg of body weight, meaning that a 70 kg person would be getting 1,470 mL per day. A liter is around a quart. There are 32 fluid ounces in a quart, around four 8 ounce glasses. That’s around six glasses of water per day if you are a standard sedentary person. At the 95<sup>th</sup> percentile there is 5% of the general population who drink 50 mL of water per kg of body weight, that is 2.38 times the mean. A 70 kg person would thus be getting 3,500 mL per day, or 3.5 mg. At the 99<sup>th</sup> percentile there is 1% of the general population who drinks 87 mL per day of water per kg of body weight, 4.14 times the mean. A 70 kg person would be getting 6,090 mL of fluoride per day, or 6.09 mg. Thus, there is a very wide variation in water consumption, and dosing everyone with the same 1.0 mg/L is unwise.

<sup>12</sup> Soldiers in training guzzle water: “The Army’s planning factor for individual tap water consumption ranges from 1.5 gallons/day (5.7 L/day) for temperate conditions to 3.0 gallons/day (11.4 L/day) for hot conditions (U.S. Army 1983).” Diabetics sip continuously: Most patients with central diabetes insipidus have urine volumes of 6-12 L/day (Robinson and Verbalis 2002). Patients with primary polydipsia might ingest and excrete up to 6 L of fluid per day (Beers and Berkow 1999).” 2006 NRC Report page 26.

moderate enamel fluorosis down to 15% of exposed population. See 2006 NRC Report at page 8, attached as IAOMT Brief Appendix D-32:

Since 1993, there have been no new studies of enamel fluorosis in U.S. communities with fluoride at 2 mg/L in drinking water. Earlier studies indicated that the prevalence of moderate enamel fluorosis at that concentration could be as high as 15%.

This is an admission that water at 2 ppm causes moderate fluorosis. As pointed out above, some drink double or quadruple the average amount of water and would consume 3 mg or 6 mg or more of fluoride per day or more. Simple mathematical calculation would tell you that they are consuming enough water that their fluoride consumption at 1.0 ppm would equal and exceed what a person drinks the average 1.47 litres per day of 4 mg/L would get.

The 2006 NRC Report makes it clear that moderate dental fluorosis will afflict up to 15% of those who drink water fluoridated at 2.0 mg. (or who drink twice the average amount of water at 1.0 mg).<sup>13</sup> Athletes, soldiers, and laborers should beware as well as parents of babies.<sup>14</sup>

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<sup>13</sup> “The committee finds that it is reasonable to assume that some individuals will find moderate enamel fluorosis on front teeth to be detrimental to their appearance and that it could affect their overall sense of well-being.” 2006 NRC Report, page 4 and 8. See IAOMT Brief Appendix D-32:

<sup>14</sup> “The prevalence of severe enamel fluorosis is very low (near zero) at fluoride concentrations below 2 mg/L. From a cosmetic standpoint, the SMCL [2 mg/L] does not completely prevent the occurrence of moderate enamel fluorosis. EPA has indicated that the SMCL was intended to reduce the severity and occurrence of the condition to 15% or

Even a mother who drinks fluoridated water delivers very little fluoride to her nursing baby.<sup>15</sup> There is a fluoride concentration of 9.8 ppb in milk from mothers who drink water fluoridated at 1,000 ppb and 4.4 ppb in milk from mothers who drink water in nonfluoridated communities. A baby is a human being, the same species as children and adults. At what point in the aging and growth continuum does a baby go from needing 100 to 250 times as much fluoride? Did God or Nature make a mistake in our design? This is a fair question.

Those with kidney disease must strive vigilantly to eliminate every speck of fluoride from their diet. Even a healthy kidney can only excrete 50% of fluoride consumed, so it accumulates in us all and in the kidney. A weakened kidney stores fluoride it cannot excrete, furthering the downward death spiral. 2006 NRC Report page 140.<sup>16</sup>

Next we turn to the World Health Organization, which supports fluoridation. The WHO's Data Report of 2004 entitled "DMFT (Decayed, Missing & Filled teeth) Status for 12 year olds by Country" is of

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less of the exposed population. The available data indicate that fewer than 15% of children will experience moderate enamel fluorosis of aesthetic concern (discoloration of the front teeth) at that concentration." Emphasis added. 2006 NRC Report p. 8. See IAOMB Brief Appendix D-34.

<sup>15</sup> The 2006 NRC Report at pages 27, attached as IAOMT Brief Appendix 26 states: "Measured fluoride in samples of human breast milk is very low. Dabeka et al. (1986) found detectable concentrations in only 92 of 210 samples (44%) obtained in Canada, with fluoride ranging from <0.004 to 0.097 mg/L. The mean concentration in milk from mothers in fluoridated communities (1 mg/L in the water) was 0.0098 mg/L; in nonfluoridated communities, the mean was 0.0044 mg/L."

<sup>16</sup> See the attached Appendix C, Carol Clinch, "Fluoride and Kidneys," which cites to page 140 of the 2006 NCR Report.

unquestionable reputation and credibility. See IAOMT Brief Appendix D-31. The full results appear at <http://www.whocollab.od.mah.se/euro.html>. That report makes it abundantly clear that tooth decay rates are just as low or lower in mostly unfluoridated continental Europe than in the United States. This is evidence that fluoride is at best ineffectual.

Next we turn to the CDC, Centers for Disease Control, which Respondents would regard as a highly credible source. The CDC supports water fluoridation, however, it is honest enough to admit in the fine print that fluoride's effect is primarily topical,<sup>17</sup> meaning applied as toothpaste, mouthwash, and dental gels, not by eating or drinking it. The same is true of the July, 2000, cover story in the prestigious Journal of the American Dental Association by Dr. John Featherstone. See IAOMT Brief Appendix D-3. Dr. Featherstone supports fluoridation but also points out that fluoride works primarily topically. Note that the Respondents did not move to strike the Featherstone article, and thus both parties recommend it as useful and authoritative.<sup>18</sup>

## VII. DR. SPITTLE'S BOOK SHOULD NOT BE STRICKEN

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<sup>17</sup> “[L]aboratory and epidemiologic research suggests that fluoride prevents dental caries predominately after eruption of the tooth into the mouth, and its actions primarily are topical for both adults and children. Morbidity and Mortality Weekly Report, Oct 22, 1999/48(41), 933-940 at paragraph 14. See IAOMT Brief Appendix D-21. See the full article at <http://www.cdc.gov/mmwr/preview/mmwrhtml/mm4841a1.htm>.

<sup>18</sup> It is my observation that all these agencies contain scientifically principled people who try to get the critical word out about fluoride. They can say critical things about water fluoridation, provided they also make the amazing simultaneous statement that they support it.

The respondents' Motion to Strike demands that Dr. Bruce Spittle's book, "Fluoride Fatigue" be stricken as an appendix. See IAOMT Brief Appendix B. The Nine Amici vigorously dissent.<sup>19</sup> I included Dr. Spittle's book for several reasons. At page 10 this medical doctor summarizes the findings of the 2006 NRC Report regarding the adverse gastrointestinal effects of fluoridated water as substantiated by double-blind studies. Such studies are the "gold standard" of scientific studies because "they rule out the possibility of psychosomaticism and bias." Spittle says:

[The 2006 NRC Report] ... notes that the primary symptoms of gastrointestinal injury are nausea, vomiting, and abdominal pain, and that these had been reported in case studies by Waldbott and Petraborgf as well as in a double-blind clinical study by Grimbergeng involving the research group of doctors in the Netherlands with Dr Hans Moolenburgh. The report noted that the case reports were well documented and that the authors could have been examining a group of patients whose gastrointestinal (GI) tracts were particularly hypersensitive. [The 2006 NRC Report, page 230] noted:

The possibility that a small percentage of the population reacts systematically to fluoride, perhaps through changes in the immune system, cannot be ruled out. ... "Perhaps it is safe to say that less than 1% of the population complains of GI symptoms after fluoridation is initiated (Feltman and Kosel 1961h).

Note that the 2006 NRC Report quotes the study done by Feltman and Kosel with approval. Feltman was a strong supporter of drinking water fluoridation. He was

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<sup>19</sup> The book by Dr. Bruce Spittle, M.D., entitled "Fluoride Poisoning: is fluoride in your drinking water—and from other sources—making you sick?" 2008, ISBN 978-0-473-12991-0, can be downloaded from <http://www.pauapress.com/fluoride/files/1418.pdf>.

out to prove fluoride was effective at reducing tooth decay. Christopher Neurath, summarizes the study that Feltman did:<sup>20</sup>

Dr Reuben Feltman, a dental researcher ... conducted a large study in the 1950s with over 1000 pregnant women and their children. The main goal of his investigation was to find out whether systemic fluoride, ingested in the form of daily tablets, reduced tooth decay. However, his study included clinical observations that revealed about 1% of his subjects were sensitive to fluoride at a dose of 1 mg of fluoride ion/day. Feltman described symptoms identical to those reported by Waldbott and others.

Feltman found that:

One percent of our cases reacted adversely to the fluoride. By the use of placebos, it was definitely established that the fluoride and not the binder was the causative agent. These reactions, occurring in gravid women and in children of all ages in the study group affected the dermatologic, gastrointestinal and neurological systems. Eczema, atopic dermatitis, urticaria, epigastric distress, emesis, and headache have all occurred with the use of fluoride and disappeared upon the use of placebo tablets, only to recur when the fluoride tablet was, unknowingly to the patient, given again.<sup>21</sup>

Dr. Spittle's book, beginning at page 11, contains dozens of case studies of people whose symptoms stopped when they were taken off fluoridated water. Starting at page 50 Spittle examines the cases of animals which developed illnesses as soon as they began drinking city water newly fluoridated at 1 ppm. Their maladies disappeared when they were given non-fluoridated water to drink. Animals do not malingering or suffer from psychosomatic illnesses. Dr. Spittle's book then is highly

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<sup>20</sup> Fluoride 40(4) 253-254, October-December 2007

<sup>21</sup> Feltman R. Prenatal and postnatal ingestion of fluorides: a progress report. Dent Digest 1956; 62:353-7; Feltman R, Kosel G. Prenatal and postnatal ingestion of fluoride: fourteen years of investigation; final report. J Dent Med 1961;16:190-8.

useful in informing the Court generally regarding the scientific issues pertaining to this case.

VIII. ALL SECTIONS OF IAOMT BRIEF SHOULD BE PRESERVED

“Judicial Notice of Well Known Scientific Facts” beginning at page 5 of the IAOMT Brief is valuable to the Court and has already been discussed. “The Standard to be Applied” section beginning at page 9 discusses the Safe Drinking Water Act, binding on water systems as small as 15 hookups. The SDWA Maximum Contaminant Level Goal, MCLG, is “the level at which no known or anticipated adverse effects on the health of persons occur and which allows an adequate margin of safety.” The Respondents did not challenge the McQuillan on Initiatives section on page 9 nor the discussion of RCW 57.08.012 beginning on page 9. Likewise valuable to the Court is the section on the Safe Drinking Water Act beginning on page 10. It discusses how the City is required to conform its water to NRC standards under WAC 246-290-220(3), how NRC is a sham regulatory organization which assures all that it does toxicological studies, when in fact there either are no toxicological studies or they are not published because they are proprietary information, and how even NRC’s regulations are not public and must be bought for \$325. The “Fluoride and Fluoridated Water are Unapproved Drugs” section beginning on page 23 are valuable to the Court because they show

fluoridated water meets federal and state definitions of a drug. The Sections entitled “Where does Fluoride Come From” and “Why Do We Fluoridate?” give the Court historical perspective.

IX. NO APPENDICES SHOULD BE STRICKEN

The Respondents challenge the letters of Adams and Martin in IAOMT Brief Appendix A. Their stories about their hypersensitivity to fluoride were not as intended as proof of any scientific matter but in order to show their background and reason for concern.

Respondents accept some Appendices such as the article by Dr. Featherstone, which says fluoride works primarily topically (D-3 – D-15).

They do not challenge the inter-agency treaty by which the FDA illegally transferred responsibility to regulate chemicals such as fluoride to the EPA, a responsibility the EPA was forbidden by law to impose on anyone (D-39 – D-42).

They do not challenge the letter from the Washington Department of Health which makes it clear that the fluoridation material which Port Angeles is using is fluorosilicic acid (D-71), nor the page from the CFR showing that the MCLG for lead and arsenic are both zero (D-72), which means none should be added to drinking water.

Respondents do not challenge RCWs (D-75 – D-76).

Respondents challenge Appendices which come from the 2006 NRC Report (D-1, D-2, D-26 through D-30, D-32 through D-35, D-55), although the WDSF, WSTDA, and WFSC delivered a copy of the 2006 NRC Report on disk to the Court, thus endorsing it.

Respondents challenge common encyclopedia articles. (D-56 – D-58, D-68 – D-70, D-81 – D-85, D-97) The Court needs to be able to have access to encyclopedia articles in order to understand scientific reality so it can calculate how that reality links up with law.

Respondents challenge the chart (D-73) which shows the relative toxicity of lead, arsenic, and fluoride. This is taken from a recognized reference work and should not be stricken.

Respondents challenge documents from the CDC (D-37 – D-38) and the World Health Organization (D-31), RCWs (D-36), both of which support fluoridation and are considered credible by some.

Respondents challenge a document from the FDA about unapproved drugs. (D-74) The Court needs to be informed about such matters.

Respondents challenge a letter from NSF (D-43 – D-52) and a publication by NSF (D-59 – D-66) which explain how NSF received its authority to regulate fluoride from the EPA, which had no such authority to assign, and how the regulations are written in part by the manufacturers

which produce the fluoride. NSF is the trade organization which promulgates the sham guidelines, available only by purchase for \$325, to which the City is required to conform under WAC 246-290-220(3). These are the documents which show that many shipments of fluoridation materials contain arsenic and lead. These documents are valuable to the Court because it should have a full understanding as to how fluoridation came about and how it works in practice. They should not be stricken.

Respondents challenge an article which states that dried eggs contain up to 900 ppm. The Court needs to know that there are sources of fluoride other than drinking water. (D-54)

Respondents challenge an FDA article which explains how the City could get approval of the fluoridated water drug. (D-77 – D-80)

Respondents challenge photographs of gypsum piles and cooling ponds where scrubber liquor from fertilizer factory smokestacks is dumped, the same scrubber liquor that is shipped to Port Angeles in tankers. They challenge photos of the stadium size sinkholes which opened up and drained scrubber liquor into the Florida aquifer. They challenge an article about how destructive the phosphate fertilizer industry is. (D-86 – D-97). The Court should understand the environmental implications of fluoridation.

Respondents challenge the letter from the EPA which states that putting fluoride in drinking water is a way of disposing of toxic waste. To them this must be an “inconvenient” truth. (D-99)

The Respondents challenge the statement for \$6,214 for 12.5 tons of fluorosilicic acid. (D-100) The Court should be aware of just how expensive this toxic waste is.

The Respondents challenge a letter from the Public Health Service which states that “fluoride, when used in the diagnosis, cure, mitigation, treatment, or prevention of disease in man or animal, is a drug that is subject to ... FDA regulation.” (D-101) The Court needs to know that the FDA does consider fluoridated water to be a drug.

#### X. KAUL SHOULD BE DISTINGUISHED

The Kaul Court agreed that fluoride was added to prevent tooth decay.<sup>22</sup> Yet is also agreed that in fluoridating its water a city “is not engaged in selling drugs, practicing medicine, dentistry, or pharmacy as defined by statute.” These two findings conflict. Even in 1954 both the federal and Washington definitions, for example, 21 U.S.C. 321 (g)(1)(B),. said something is a drug if it is “... intended for use in the diagnosis, cure,

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<sup>22</sup> “That the addition of fluoride to the Chehalis water supply is intended solely for use in prevention of tooth decay primarily in children up to 14 years of age, and particularly between the ages of 6 and 14 and will prevent some tooth decay in some children.” *Kaul v Chehalis*, 45 Wn.2d 616, 277 P.2d 352 (1954) at 618.

mitigation, treatment, or prevention of disease in man or other animal.”  
Fluoride is a drug because its intent is to prevent decay, and the Kaul  
Court was wrong. Kaul can be rationalized as that rare case where both  
plaintiff, defendant, and judge agreed that fluoridated water was good for  
all the children, harmful to absolutely no one, and even “wholesome.” Id.  
p. 621. This aspect of Kaul should be distinguished.

Dated this 17<sup>th</sup> day of February, 2010.

Respectfully submitted,

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