United States Department of the Interior

OFFICE OF THE SOLICITOR
1849 C STREET N.W.
WASHINGTON, DC 20240

JAN 15 2016

M-37034

Memorandum

To: Assistant Secretary - Indian Affairs
Director, Bureau of Indian Affairs

From: Solicitor

Subject: Boundary of the Skokomish Reservation along the Skokomish River

The memorandum responds to your request for an opinion as to whether the Skokomish River (River) lies within the boundaries of the Skokomish Indian Reservation (Reservation) and whether the United States holds title to the riverbed in trust for the benefit of the Skokomish Indian Tribe (Tribe).[1] Specifically, you have asked me to review a 1971 legal memorandum issued by the Portland Regional Solicitor's Office (1971 Memorandum), which concluded that "the entire width of the Skokomish River along the border of the Skokomish Reservation is a part of the [R]eservation."[2]

For the reasons set forth below, I reaffirm the 1971 Memorandum's conclusion. The legal analysis that follows updates the 1971 Memorandum's analysis to reflect subsequent precedent relevant to the question of riverbed title.

I. FACTUAL BACKGROUND

The Tribe has contacted the Department several times since 2012 seeking an updated analysis regarding the status of the riverbed forming the Reservation boundary.[3] The conclusions herein

---

[1] *See generally*, Letter from Reid Peyton Chambers and Mary J. Pavel, Att'ys, Sonosky, Chambers, Sachse, Endreson & Perry, LLP, to Larry J. Echo Hawk, Assistant Sec'y – Indian Affairs, Dep't of the Interior (Apr. 5, 2012); Letter from Reid Peyton Chambers and Frank S. Holleman, Att'ys, Sonosky, Chambers, Sachse, Endreson & Perry, LLP, to Michael Berrigan, Assoc. Solicitor, Div. of Indian Affairs, Office of the Solicitor (Feb. 5, 2013); Letter from Reid Peyton Chambers, Anne D. Noto, and Frank Holleman, Att'ys, Sonosky, Chambers, Sachse, Endreson & Perry, LLP, to Kevin Washburn, Assistant Sec'y Indian Affairs, Dep't of the Interior (Apr. 3, 2014); Letter from Reid Peyton Chambers, Anne D. Noto, and Frank S. Holleman, Att'ys, Sonosky, Chambers, Sachse, Endreson & Perry, LLP, to Dylan M. Fuge, Att'y-Advisor, Div. of Land and Water, Office of the Solicitor (Apr. 17, 2014).

[2] Memorandum from George D. Dysart, Ass't Reg'l Solicitor, Office of the Reg'l Solicitor, Portland to Area Dir., Bureau of Indian Affairs 15 (Aug. 26, 1971) (1971 Memorandum). The 1971 Memorandum is included with this memorandum opinion as Attachment 1.

[3] *See supra* note 1.

are limited to the approximately seven-mile stretch of the Skokomish riverbed that forms the southern and eastern boundary of the Reservation.[4] Two key documents are relevant to the establishment of the Reservation: (1) the 1855 Treaty of Point No Point,[5] and (2) the 1874 Executive Order.[6] Below is a discussion of the relevant provisions of those agreements and the history of the Reservation.

A. Location

Twana Indians,[7] including those who now make up the Skokomish Indian Tribe, historically inhabited the shores and drainage area of the Skokomish River and Hood Canal, west of Puget Sound, in northwest Washington.[8] The Tribe lived mainly along the River's mainstem, the North Fork Skokomish River, and Hood Canal's western shore.[9]

---

[4] In *Skokomish Indian Tribe v. France*, discussed *infra* Section III.B, the Ninth Circuit held that tidelands along the Reservation boundary on Hood Canal's shore and at the River's mouth passed to the State of Washington upon statehood. 320 F.2d 205, 213 (1963). The United States was not a party to that case and therefore is not bound by the Ninth Circuit's decision. Nonetheless, without adopting or endorsing the Ninth Circuit's decision in *France*, this Opinion does not address those tidelands at issue in *France*. Additionally, in 1944, a Departmental attorney authored a memorandum to the Commissioner of Indian Affairs regarding whether the tidelands along Hood Canal were within the Reservation boundary. Memorandum from John B. Muskat, Assoc. Att'y, Office of the District Counsel, to Comm'r of Indian Affairs (Feb. 21, 1944). To the extent that that memorandum might be interpreted to apply to the facts at issue here, the analysis and conclusions contained herein supersede those in the 1944 memorandum.

[5] Treaty of Point No Point, Jan. 26, 1855, 12 Stat. 933 (1859) (1855 Treaty or Treaty).

[6] Executive Order (Feb. 25, 1874), *reprinted in* EXECUTIVE ORDERS RELATING TO INDIAN RESERVES, FROM MAY 14, 1855, TO JULY 1, 1902, at 134 (1902) (1874 Executive Order).

[7] Following the establishment of the Skokomish Reservation, other Twana Indians who relocated to the Reservation came to be known collectively as "Skokomish." NW. ARCHAEOLOGICAL ASSOC., ETHNOHISTORIC CONTEXT FOR THE DEPARTMENT OF THE INTERIOR'S FEDERAL POWER ACT 4(E) CONDITIONS, CUSHMAN HYDROELECTRIC PROJECT 6 (May 19, 1997). In 1958, the Tribe sued the United States before the Indian Claims Commission seeking compensation for land ceded to the United States for "unconscionable consideration" through the 1855 Treaty. *Skokomish Tribe of Indians v. United States*, 6 Ind. Cl. Comm'n 152, 152-53 (1958). The Commission found that, for purposes of the Indian Claims Commission Act, "the Skokomish, Toandos, Tooanhooch, Twanoh, or Twana are interchangeable and each properly identifies one group of Indians who lived along the entire length and on both sides of Hood Canal." *Id.* at 155. "[T]he present day members of the Skokomish tribe who live on the reservation and in the adjacent northwest area of Washington State are the descendants and successors in interest of the aboriginal Skokomish or Twana Indians which inhabited the Hood Canal area." *Id.* at 156. *See also United States v. Washington*, 384 F. Supp. 312, 376-77 (W.D. Wash. 1974) ("The Skokomish Tribe is . . . . a political successor in interest to some of the Indian tribes or bands which were parties to the Point No Point Treaty. . . . After the treaty all Indians of the Hood Canal drainage system, except the Port Gamble Reservation of Clallam Indians, have been referred to by the United States Government as Skokomish.").

[8] WILLIAM W. ELMENDORF, STRUCTURE OF TWANA CULTURE 20 (1960), *reprinted in* 4 AMERICAN INDIAN ETHNOHISTORY: INDIANS OF THE NORTHWEST, COAST SALISH AND WESTERN WASHINGTON INDIANS 27, 62 (David A. Horr ed., 1974). A map of the Tribe's aboriginal territory is included with this memorandum opinion as Attachment 2. *Id.* at 48 ("Map II: Twana Territory and Sites").

[9] *Id.* at 32-45. Although Elmendorf found that Skokomish Indians resided primarily in the area described, the Indian Claims Commission found that the Tribe's ancestors held "original Indian title to the permanent village sites and

The Reservation is located in the heart of the Tribe's aboriginal territory, along Hood Canal at the mouth of the River, as depicted at Attachment 3.[10] The River is the largest river draining into Hood Canal and the only river running along or through the Reservation.[11] Its two primary tributaries—the North Fork Skokomish River and South Fork Skokomish River (collectively, Forks)—converge to form the River's mainstem, which then flows for approximately nine miles before emptying into Anna's Bay at the Great Bend of Hood Canal. A seven-mile stretch of the River, including the mouth, forms the Reservation's southern and eastern boundary.[12]

B. Pre-Treaty Ways of Life, Including Fishing Methods

The name Skokomish means "the people of the river."[13] The River was central to the Tribe's pre-treaty way of life and continues to be of great importance to this day. Salmon was "the

---

immediate surrounding area extending along the entire length of the Hood Canal." *Skokomish Tribe of Indians*, 6 Ind. Cl. Comm'n at 157.

[10] Division of Real Estate Services, Northwest Regional Office, Bureau of Indian Affairs, Dep't of the Interior, Skokomish Indian Reservation (May 21, 2012).

[11] There are, however, several creeks running through the Reservation including Enetai, Potlach, and Skabob Creeks, as well as a few unnamed seasonal streams.

[12] Today, the Tribe owns a vast majority of the land adjacent to the River's left bank along the Reservation's southern and eastern boundary, as well as several parcels adjacent to the River's right bank. (The term "left bank" refers to "[t]he bank on the left-hand side of a stream or river as one faces downstream." *Left Bank*, GLOSSARY OF B.L.M. SURVEYING AND MAPPING TERMS 35 (Cadastral Survey Training Staff, ed. 1980). *See also id.* at 57 ("right bank")). Undoubtedly, lands adjacent to the River's left bank were allotted to individual Indians and some subsequently transferred out of trust and passed to various individuals or entities in fee. The Tribe has since reacquired most former allotments. Individuals and the State hold fee title to only a few parcels adjacent to the River's left bank. In contrast, owners of land adjacent to the River's right bank include the Tribe, individuals holding fee title, the State of Washington, and Mason County.

This Opinion only addresses title to the riverbed and makes no statement regarding any appurtenant rights that these adjacent landowners may now hold. Furthermore, private ownership adjacent to the River has no bearing on riverbed title because, as discussed *infra* note 117, I presume for purposes of this Opinion that the stretch of the River at issue here is navigable. The Ninth Circuit has recognized that "[t]he general rule . . . is that patents of the United States to lands bordering navigable waters, in the absence of special circumstances, convey only to high water mark." *Montana Power Co. v. Rochester*, 127 F.2d 189, 192 (9th Cir. 1942); *see also Puyallup Indian Tribe v. Port of Tacoma*, 717 F.2d 1251, 1261 (9th Cir. 1983) (citing *Rochester* for proposition that "grants of property bounded by a navigable river are deemed to be bounded by the ordinary high water mark of that river" in context of allotment patents made by the United States where court first determined the riverbed had been conveyed to tribe). Therefore, the allotment of Reservation land and subsequent conveyance to individuals and entities in fee had no effect on riverbed title because those patents conveyed title only to the ordinary high water mark.

The River has changed course over time. This Opinion relates only to whether the Treaty and Executive Order intended to include the River within the Reservation and does not determine whether changes in the River's course were the result of accretion or avulsion nor how those changes may have affected the present-day Reservation boundary.

[13] Skokomish Culture & Art Comm., *Skokomish: Twana Descendants*, *in* NATIVE PEOPLES OF THE OLYMPIC PENINSULA: WHO WE ARE 65, 65 (Jacilee Wray ed., 2002).

backbone of [the Tribe's] subsistence economy."[14] In proceedings before the Indian Claims Commission, the Commission found that the Tribe's "dependence upon a fish eating economy [was its] prime means of subsistence."[15]

Ethnographer William Elmendorf[16] extensively studied the Tribe and observed:

> The most important source of food for all Twana [including Skokomish] was Pacific salmon, four species of which were common in [Hood Canal] and ran up its tributary streams. . . . The bulk of the salmon catch was made in rivers, with weirs, dip nets, and harpoons, during late-summer and fall runs. Salt-water trolling and netting was of minor importance, in particular to the Skokomish with their large river runs of salmon. A large part of the stream catch was smoke dried and stored for winter use.[17]

The Tribe's traditional fishing methods required use and control of the entire width of rivers and their beds. The single-dam salmon weir was the Tribe's most commonly used form of fish trap.[18] Single-dam weirs consisted of "lattice frames on tripod pole supports, with associated dip-net platforms."[19] The lattice frames prevented salmon from moving upstream. Tripod poles supporting the weirs and vertical poles supporting the dip net platforms were "fixed in the river bed."[20] The weirs extended across rivers, from bank-to-bank, and were used in shallow areas of large rivers, such as the Skokomish River.[21] This limited the use of weirs in the River "to fixed sites which became centers of seasonal congregations."[22] Two of the three known fixed weir sites, along with several other traditional fishing sites, were located on the stretch of the River at issue here.[23]

The Tribe considered each of the five species of salmon that frequented their aboriginal territory to be "a 'tribe' or village community of anthropomorphic beings in their own land, which lay far

---

[14] ELMENDORF, *supra* note 8, at 59.

[15] *Skokomish Tribe of Indians v. United States*, 6 Ind. Cl. Comm'n 135, 142 (1958).

[16] The Ninth Circuit recognized Elmendorf as "a well qualified expert in the field of ethnology or cultural anthropology, who did considerable discriminating research among the Skokomish Indians." *Skokomish Indian Tribe v. France*, 320 F.2d 205, 211 (9th Cir. 1963).

[17] ELMENDORF, *supra* note 8, at 57.

[18] *Id.* at 64.

[19] *Id.* at 63.

[20] *Id.* at 64.

[21] *Id.*

[22] *Id.*

[23] *Id.* at 33-34. The third known permanent weir site was located on the River's mainstem between the Forks and the Reservation boundary. *Id.* at 34-35. The Tribe also established more than ten campsites, including the largest winter and summer villages, along the River where it forms the Reservation's southern and eastern boundary. *Id.* at 32-38.

to the west, beyond the ocean."[24] Because "the 'salmon people' were beings with supernatural powers who had to be treated with respect and according to correct procedure if they were to continue visiting the streams," the Tribe engaged in rituals to ensure that the salmon would return to the River.[25] For example, "[t]he river had to be kept clean before salmon started running. . . . [S]tarting in early August . . . no rubbish, food scraps or the like, might be thrown in the river; canoes were not baled out in the river; and no women swam in the river during menstrual seclusion."[26] Each day, Skokomish Indians removed at least one lattice section from the weirs to allow some fish to pass because they "believed that the 'salmon people' would be angered if this was not done, and would refuse to return for the next year's run."[27]

In sum, weir fishing was more than just another way to catch fish; it was an activity that defined all aspects of the Tribe's way of life. Weir fishing on the River allowed the Tribe to accumulate significant surpluses,[28] and preservation techniques allowed storage for winter use.[29] These surpluses led to trade and further wealth accumulation.[30] Weir fishing and the bounty that resulted led the Tribe to organize around the weirs, developing large settlements and a social structure that allowed it to build, operate, and preserve the catch.[31] The Tribe continued fishing with weirs until at least 1877.[32]

C. Early Arrival of Settlers

In 1846, Congress entered into a treaty with Great Britain and thereby acquired land west of the Rocky Mountains—including the Tribe's aboriginal territory[33]—"subject to the aboriginal right of possession held by resident tribes."[34] Thus, this land became subject to Congress's exclusive authority "to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States"[35] and "[t]o regulate Commerce with . . . the Indian

---

[24] *Id.* at 59-60.

[25] *Id.* at 62-63.

[26] *Id.* at 62.

[27] *Id.* at 65-66.

[28] *United States v. Washington*, 384 F. Supp. 312, 377 (W.D. Wash. 1974).

[29] ELMENDORF, *supra* note 8, at 57.

[30] George Gibbs, *Tribes of Western Washington and Northwest Oregon, in* 1 CONTRIBUTIONS TO NORTH AMERICAN ETHNOLOGY 157, 170 (1877).

[31] *See* Bruce G. Miller and Daniel Boxberger, *Creating Chiefdoms: The Puget Sound Case, in* 41 ETHNOHISTORY 270 (Spr. 1994).

[32] Myron Eells, *The Twana Indians of the Skokomish Reservation in Washington Territory, in* 4 BULLETIN OF THE UNITED STATES GEOLOGICAL AND GEOGRAPHICAL SURVEY OF THE TERRITORIES 63, 81 (1877).

[33] Treaty With Great Britain, In Regard to Limits Westward of the Rocky Mountains, U.S.-Gr. Brit., June 15, 1846, 9 Stat. 869.

[34] *Idaho v. United States*, 533 U.S. 262, 265 (2001).

[35] U.S. CONST., art. IV, § 3, cl. 2.

Tribes."[36] On July 5, 1843, before the formation of the Oregon Territory, and apparently without any grant of authority from Great Britain, settlers in Oregon formed the provisional government of Oregon and adopted a constitution.[37] Thereafter, in 1844, the provisional government enacted land laws purporting to entitle each settler to a 640-acre parcel of land.[38] Neither the constitution nor the land laws addressed aboriginal Indian title held by tribes in the region. Consequently, settlers claimed land occupied by Indians, including land along the River and elsewhere within the Tribe's aboriginal territory.[39]

Congress established the Oregon Territory through the Act of August 14, 1848, which included the Tribe's aboriginal territory.[40] In the 1848 Act, Congress declared, "nothing in this act contained shall be construed to impair the rights of person or property now pertaining to the Indians in said Territory, so long as such rights shall remain unextinguished by treaty between the United States and such Indians."[41]

Soon thereafter, Congress took steps to legitimize the land claims made under the provisional government's land laws. First, it enacted the Oregon Indian Treaty Act of 1850 (Treaty Act).[42] The Treaty Act authorized the President to appoint commissioners "to negotiate treaties with the several Indian tribes in the Territory of Oregon, for the extinguishment of their claims to lands lying west of the Cascade Mountains."[43] Next, Congress enacted the Oregon Donation Land Act

---

[36] *Id.*, art. I, § 8, cl. 3.

[37] PROVISIONAL GOV'T OF OR. CONST. (1843), *as reprinted in* THE OREGON ARCHIVES: INCLUDING THE JOURNALS, GOVERNORS' MESSAGES AND PUBLIC PAPERS OF OREGON 28-32 (1853).

[38] An Act in Relation to Land Claims, OR. PROVISIONAL GOV'T LAWS (June 25, 1844), *reprinted in* LAWS OF A GEN. & LOCAL NATURE PASSED BY THE LEGIS. COMM. & LEGIS. ASSEM. 1843-1849, 77-78 (1853). *See also* 2 SAMUEL A. CLARKE, THE PIONEER DAYS OF OREGON HISTORY 663 (1905); Frederick V. Holman, *A Brief History of the Oregon Provisional Government and What Caused Its Formation*, 13 Q. OF THE OR. HIST. SOC'Y, no. 2, 1912, at 123-26 (address delivered by Frederick V. Holman, May 2, 1912).

[39] *See* EMMA B. RICHERT, LONG, LONG AGO IN SKOKOMISH VALLEY OF MASON COUNTY, WASHINGTON 8 (1964) (donation land claim deeded to Thomas Webb); NW. ARCHAEOLOGICAL ASSOC., *supra* note 7, at 10. *See also* H.R. EXEC. DOC. NO. 37-1, pt. 2, at 533 (3rd Sess.1862) (The land ultimately designated as the Skokomish Reservation "include[d] six sections of land, upon a part of which are six settlers or claimants, three of whom are donation claimants"); MYRON EELLS, THE HISTORY OF HOOD CANAL 13 (n.d.) (unpublished manuscript) (by 1860 there were seventeen non-Indian homesites along the River, including some at its mouth); Patents issued to Franklin C. Purdy (Dec. 9, 1864), Jackson Lee and Nancy Morrow (Sept. 27, 1865), Jacob Eckler (Jan. 11, 1866), Thomas Webb (Mar. 6, 1866), *available at* http://www.glorecords.blm.gov/search/ (General Land Office Records).

[40] An Act to Establish the Territorial Government of Oregon, 9 Stat. 323 (1848).

[41] *Id.* § 1.

[42] Act of June 5, 1890, 9 Stat. 437.

[43] *Id.* § 1. The Act also made the laws pertaining to trade with Indians applicable in the Oregon Territory. *Id.* § 5. This provision prevented settlers from taking clean title to Indian lands before the United States properly extinguished Indian title. Although the Treaty Act authorized the President to appoint commissioners, it did not appropriate funds for treaty negotiations. Section 3 of the Act of February 27, 1851, subsequently abrogated the treaty commission's duties and authorized the President to appoint officials from the Indian Department to negotiate treaties with Indian tribes. 9 Stat. 574, 585.

of 1850 (Donation Land Act).[44] The Donation Land Act entitled settlers arriving in the Oregon Territory before December 1, 1850, to claim up to a 640-acre tract of land at no charge.[45] Its purposes were to maintain the status quo for claims made under the provisional government's land laws and to encourage continued emigration to the Oregon Territory.[46] Pursuant to it, more than 8,000 settlers ultimately acquired over 2.8 million acres of land,[47] including several acquisitions within the Tribe's aboriginal territory and within the Reservation boundaries.[48]

The Donation Land Act and other statutes authorizing the issuance of patents in the Oregon Territory were implemented so rapidly that patents to non-Indians often issued before Indian title was extinguished.[49] For example, in 1854, a settler established the first non-Indian homesite along Hood Canal.[50] Reports indicate that by 1860 there were seventeen non-Indian homesites along the River, including some adjacent to its mouth.[51]

On March 2, 1853, Congress created the Washington Territory from the northwest portion of the Oregon Territory, including that portion of the Oregon Territory occupied by the Tribe.[52] In the Act establishing the Washington Territory, Congress provided that the Act shall not "be construed to affect the authority of the government of the United States to make any regulation respecting the Indians of said Territory, their lands, property, or other rights, by treaty, law, or

---

[44] Act of Sept. 27, 1850, 9 Stat. 496, *amended by* 10 Stat. 158 (1853), *amended by* 10 Stat. 305 (1854).

[45] Single men could claim a 320-acre tract, and married men could claim a 640-acre tract. *Id.* § 4. To qualify, the settlers needed to meet certain conditions, including that they resided upon and cultivated the claimed land for at least four years. *Id.*

[46] *See* H.R. REP. NO. 31-271, at 5 (1st Sess. 1850). This report stated:

> Under the late provisional government all American citizens, and foreigners, above 18 years of age, were allowed to hold 640 acres of land .... On these sections of land ... they have made their farms, erected their buildings, and made all their various improvements. Your committee are therefore of the opinion that all sections so taken, up to and including this year, should be confirmed to the respective claimants. ...
>
> They are also further of the opinion, in view of the fact that there must be some inducement held out to emigrants from the States to that country, that liberal donations should be continued by Congress to such American citizens as shall emigrate to and settle in said Territory hereafter.

Id.

[47] *Duwamish Tribe of Indians v. United States*, 7 Ind. Cl. Comm'n 725, 733 (1959); NW. ARCHAEOLOGICAL ASSOC., *supra* note 7, at 10.

[48] *See supra* note 39.

[49] *Id.*

[50] NW. ARCHAEOLOGICAL ASSOC., *supra* note 7, at 10. *See also* RICHERT, *supra* note 39, at 27-28.

[51] EELLS, *supra* note 39. *See also* H.R. EXEC. DOC. NO. 37-1, pt. 2, at 533 (3rd Sess.1862).

[52] An Act to Establish the Territorial Government of Washington, 10 Stat. 172 (1853).

otherwise."[53] In 1854, Congress amended the Donation Land Act and made its terms applicable within the newly formed Washington Territory.[54]

President Pierce appointed Isaac I. Stevens the Washington Territorial Governor and Superintendent of Indian Affairs.[55] In 1854, the Commissioner of Indian Affairs reported to Stevens and Congress the pressing need to negotiate treaties with the tribes in the Oregon and Washington Territories:

> With many of the tribes . . . , it appears to be absolutely necessary to speedily conclude treaties for the extinguishment of their claim to the lands now, or recently, occupied by them.
>
> The policy of the government has favored immigration to, and settlements within, those Territories, by citizens of the States, and in consequence they have been, and are, rapidly filling up with white settlers; yet the Indian tribes still claim title to the lands on which the whites have located, and which they are now cultivating. The jealousy which has resulted from this state of things has naturally led to repeated hostilities, resulting in severe suffering, and in some instances the murder of white settlers, and in hindering the general growth and prosperity of the civil communities of those Territories.[56]

Governor Stevens also emphasized the urgent need to negotiate treaties with the tribes in the Washington Territory and sought appropriations for that purpose:

> The lands of all the Indians . . . are so fast becoming settled by the whites, that within another year there will hardly be a choice claim of land on the sound, or the different streams, but what will be located upon by the settlers, and thus the Indians will be driven from their homes. . . . I cannot urge this matter too strongly on your attention. The longer treaties are delayed, the more difficult it will be to make them satisfactorily; and to make reservations for them in a short time will be impossible, without moving whites from their land claims.[57]

In response to these pleas, Congress made appropriations to negotiate treaties with tribes west of the Cascade Mountains. Stevens and his negotiation team promptly began negotiating treaties with tribes in the Oregon and Washington territories.

---

[53] *Id.* § 1.

[54] Act of July 17, 1854, § 6, 10 Stat. 305, 306 (1854).

[55] Journal of the Executive Proceedings of the Senate, from December 6, 1852 to March 3, 1855, inclusive, 32nd Cong., vol. XI, at 77, 81 (1877).

[56] H.R. MISC. DOC. NO. 33-38, at 2-3 (1st Sess. 1854).

[57] *Id.* at 11.

D. Treaty of Point No Point

Governor Stevens negotiated two treaties[58] with other northwest tribes before traveling to Point No Point to negotiate with a group of tribes including the Skokomish.[59] During the negotiations at Point No Point, several Indians reported increasing tension with settlers in their aboriginal territory. One Indian in attendance expressed his hope that "the Governor will tell the Whites not to abuse the Indians as many are in the habit of doing, or ordering them to go away and knocking them down."[60] Stevens reassured the Indians that, among other things, a treaty would provide them a home "where [they could not] be driven away" by settlers and would protect their rights to fish, hunt, and gather berries.[61]

Although not specified in the Treaty of Point No Point (Treaty), the historical record demonstrates that treaty negotiators originally proposed locating the Reservation between the Forks, approximately nine miles upstream of the River's mouth.[62] Several Indians were apprehensive about leaving their homes at the mouth of the River. One Indian stated, "I do not want to leave the mouth of the river, I do not want to leave my old home, and my burying grounds. I am afraid I shall die if I do."[63] Che-law-tch-tat, a Skokomish Indian, said:

---

[58] Treaty of Point Elliott, Jan. 22, 1855, 12 Stat. 927 (1859); Treaty of Medicine Creek, Dec. 26, 1954, 10 Stat. 1132 (1955).

[59] "[A]s a practical matter only three distinct Indian tribes were involved . . . the Du-hle-lips, Skokomish and Kolsids." *Skokomish Tribe of Indians v. United States*, 6 Ind. Cl. Comm'n 135, 142, 155 (1958). Six other treaties negotiated by Stevens -- together with the Treaty of Point No Point, the Treaty of Point Elliott, and the Treaty of Medicine Creek -- make up what are commonly referred to as "Stevens treaties." Treaty between the United States and the Walla-Walla, Cayuses, and Umatilla Tribes, June 9, 1855, 12 Stat. 945 (1859); Treaty with the Tribes of Middle Oregon, June 25, 1855, 12 Stat. 963 (1859); Treaty between the United States and the Yakama Nation of Indians, U.S.-Yakama Nation, June 9, 1855, 12 Stat. 951 (1859); Treaty between the United States and the Nez Perce Indians, U.S.-Nez Perce Indians, June 11, 1855, 12 Stat 957 (1859); Treaty between the United States and the Makah Tribe of Indians, U.S.-Makah Tribe, Jan. 31, 1855, 12 Stat. 939 (1859); Treaty between the United States and the Qui-nai-elt and Quil-leh-ute Indians, July 1, 1855 and Jan. 25, 1856, 12 Stat. 971 (1859).

[60] GEORGE GIBBS, TREATY COUNCIL MINUTES: S'KLALLAMS, SKOKOMISH, AND CHEMAKUMS – TREATY OF HAHDAKUS OR POINT NO POINT 12-13 (Jan. 24-26, 1855), *reprinted in* OFFICE OF INDIAN AFFAIRS, DEP'T OF THE INTERIOR, REPORT ON SOURCE, NATURE, AND EXTENT OF THE FISHING, HUNTING, AND MISCELLANEOUS RELATED RIGHTS OF CERTAIN INDIAN TRIBES IN WASHINGTON AND OREGON TOGETHER WITH AFFIDAVITS SHOWING LOCATIONS AND NUMBERS OF USUAL AND ACCUSTOMED FISHING GROUNDS AND STATIONS, app. A, at 344 (1942) (Treaty Council Minutes).

[61] *Id.* at 13-14.

[62] *See, e.g.*, S. EXEC. DOC. NO. 36-2, pt. 1, at 766 (1st Sess. 1860) (Tribe dissatisfied with location between the Forks); S. EXEC. DOC. NO. 36-1, pt. 1, at 419 (2nd Sess. 1860) ("the treaty of Point-no-Point . . . has secured to [the tribes] as a reservation the land lying between the forks of the Skokomish river"); Letter from Michael T. Simmons, Indian Agent, Wash. Territory, to Edward R. Geary, Superintendent of Indian Affairs, Wash. Territory, at 2 (Dec. 13, 1859) ("Reservation specified in the [Treaty of Point No Point] is the land lying in the forks of the Skokomish River.") NW. ARCHAEOLOGICAL ASSOC., *supra* note 7, at 18-19; EELLS, *supra* note 39, at 36.

[63] Treaty Council Minutes, *supra* note 60, at 11.

> I wish to speak my mind as to selling the land. Great Chief! What shall we eat if we do so? Our only food is berries, deer and salmon – where then shall we find these? . . . I am afraid that I shall become destitute and perish for want of food. I don't like the place you have shown for us to live on.[64]

An Indian Agent reassured the tribes that if they agreed to cede all but a small tract of their aboriginal territory and relocate to the proposed Reservation between the Forks, then they would be allowed to go "wherever else they pleased to fish."[65] In response to the assurances of Governor Stevens and his agents, the Chief of the S'Klallams, also a party to the Treaty, said:

> My heart is good . . . since I have heard of the [treaty] read, and since I have understood Governor Stevens, particularly, since I have been told that I could look for food where I pleased, and not in one place only. . . . We are willing to go up the Canal since we know we can fish elsewhere. We shall only leave there to get salmon, and when done fishing will return to our houses.[66]

After a day of negotiations, the Skokomish Indians were not yet willing to sign the treaty. The parties returned the next morning, and Governor Stevens assured the Indians that the treaty secured their right to fish.[67] Thereafter, the Skokomish Indians and the other tribes agreed to cede to the United States the vast majority of their aboriginal lands and reserved for themselves "six sections, or three thousand eight hundred and forty acres, situated at the head of Hood's Canal . . . for their exclusive use."[68] Importantly, the Treaty did not specify the Reservation's precise location. The historical record demonstrates, however, that the United States intended to locate the Reservation on six sections between the Forks, with the precise boundaries to be set

---

[64] *Id.*

[65] *Id.* at 12.

[66] *Id.* at 13. The S'Klallam Indians (or Clallam Indians) traditionally lived at the mouth of Hood Canal, approximately 15 miles from the present-day Skokomish Reservation. They primarily relied on saltwater fishing for subsistence. Like the Skokomish Indians who were concerned about leaving their homes at the mouth of the River and moving upstream to the Forks, the S'Klallam Indians did not want to relocate from the mouth of the Canal to a reservation on the River near the Canal's head. Assurances that the Indians would be able to leave the Reservation to fish wherever they pleased, *inter alia*, persuaded the S'Klallam Indians to agree to the Treaty. S'Klallam Indians never relocated to the Skokomish Reservation in large numbers. *See United States v. Washington*, 384 F. Supp. 312, 376-77 (W.D. Wash. 1974) (all Hood Canal Indians came to be known as Skokomish except for the Clallam Indians of the Port Gamble Reservation).

[67] Treaty Council Minutes, *supra* note 60, at 13-14 (emphasis added). Stevens said:

> What will I not do for my children and what will you not for yours? Would you not die for them? This paper is such as a man would give to his children and I will tell you why. This paper gives you a home. Does not a father give his children a home? This paper gives you a school? Does not a father send his children to school? It gives you mechanics and a Doctor to teach and cure you. Is not that fatherly? This paper secures your fish? Does not a father give food to his children? Besides fish you can hunt, gather roots and berries.

Id.

[68] 1855 Treaty, *supra* note 5, art. 2.

later.[69] Article Seven of the Treaty authorized the President to "remove [the Tribe] from said reservation to such other suitable place or places within said Territory as he may deem fit."[70]

Four years passed before Congress ratified the Treaty.[71] Meanwhile, tension between Indians and settlers increased largely because of uncertainty regarding the Reservation's boundaries. In 1856, an Indian Agent wrote Governor Stevens regarding the "great anxiety" exhibited by the Indians because the Treaty had not been ratified and the Reservation boundaries had not been set.[72] The Agent warned, "I would give it as my firm conviction that unless the Treaties are ratified and we enter upon the performance of their stipulations within eighteen months – it will not be safe for a white family to live within the limits of the Puget Sound District."[73]

In 1858, the Commissioner of Indian Affairs reported to Congress that the Agent met with Indians in the Puget Sound District to "listen to their grievances and remedy them if possible."[74] The Commissioner's report included a detailed account of this meeting, during which "[the Indians] all urge[d] the ratification of their treaties."[75] The Agent also learned of tension in the general area as several Indians made statements about anxiety caused by the United States' failure to promptly set reservation boundaries. For example, one Snoqualmie Indian expressed frustration with the United States' failure to follow through on promises made in the Treaty of Point Elliott[76] and suggested that violence might ensue if the United States did not comply with his demand that their Reservation be located such that the Snoqualmie Tribe could continue its traditional subsistence activities:

> We saw the Nisquallys and Puyallups get their annuity paid them last year, and our hearts were sick because we could get nothing. We never fought the whites; they did. If you whites pay the Indians that fight you, it must be good to fight. . . . We are willing that the whites shall take the timber, but we want the game and fish, and want our reserves where there is plenty of deer and fish, and good land for potatoes.[77]

---

[69] *See supra* note 62.

[70] 1855 Treaty, *supra* note 5, art. 7.

[71] *Id.*

[72] NW. ARCHAEOLOGICAL ASSOC., *supra* note 7, at 18 (quoting Letter from Michael T. Simmons, Indian Agent, to Isaac I. Stevens, Territorial Governor (Dec. 19, 1856)).

[73] *Id.*

[74] S. EXEC. DOC. NO. 35-1, pt. 1 at 580 (2nd Sess. 1858).

[75] *Id.* at 582.

[76] Like the Treaty of Point No Point, the Treaty of Point Elliott did not precisely delineate that reservation's boundaries. 12 Stat. 927, 928.

[77] S. EXEC. DOC. NO. 35-1, pt. 1 at 581 (2nd Sess. 1858).

A Skokomish Indian similarly complained:

> We want our treaty to be concluded as soon as possible; we are tired of waiting. . . . The white people have taken [our land], and you, Mr. Simmons, promised us that we should be paid. . . . Suspense is killing us. We are afraid to plant potatoes on the river bottoms, lest some bad white man should come and make us leave the place.[78]

Simmons considered "the speeches of all the Indians [in attendance as] in substance the same."[79]

In 1859, Congress ratified the Treaty of Point No Point, but still did not set the Reservation boundaries. Instead, Congress provided that, when necessary, the Reservation would be "surveyed and marked out for [the Indians'] exclusive use."[80] Finally, in 1874, President Grant issued an executive order establishing the Reservation at the River's mouth,[81] as the Tribe and the settlers desired[82] and as further discussed below, not at the Forks as the treaty negotiators originally contemplated.[83]

E. 1874 Executive Order

For fifteen years after ratification of the Treaty, uncertainty with respect to the Reservation boundaries and the growing number of settlers establishing homesites along the River exacerbated tensions between the Tribe and settlers around Hood Canal.[84] Neither the Tribe nor the settlers were satisfied with the Reservation's proposed location between the Forks.

Myron Eells, a missionary in the Puget Sound region, documented the settlers' objections to locating the Reservation between the forks:

> [T]he settlers opposed [locating the Reservation in the Upper Skokomish, between the Forks], because they thought that the good farming land there was

---

[78] *Id.* at 582.

[79] *Id.*

[80] 1855 Treaty, *supra* note 5, art. 2.

[81] 1874 Executive Order, *supra* note 6.

[82] S. EXEC. DOC. NO. 36-2, pt. 1, at 766 (1st Sess. 1860) (Tribe asked that the Reservation be located "at the junction of the Skokomish river and Hood's canal"); EELLS, *supra* note 39, at 36 (settlers requested the Reservation be located at the River's mouth instead of between the Forks).

[83] *See supra* note 62.

[84] *See* Letter from William Morrow, Agency Farmer, Skokomish Agency, to W.G. Gosnell, Indian Agent, Washington Territory 2 (June 30, 1861), *reprinted in* S. EXEC. DOC. NO. 37-1, pt. 1, at 789 (2nd Sess. 1861) ("A good deal of hard feeling exists among the Indians on account of their not having received their annuity goods before this; they say that the whites are settling their land and occupying their fisheries, and that they never receive the payment for the same, which was stipulated in their treaty. I would call your attention to the fact that Messrs. O'Harver and Webb have never been paid for their land claims, which are included within the reservation").

> quite extensive, which they wished to save for white settlers; and also because they thought that if that place should be selected, the Indians would cross the lands of the white settlers below them in going to and returning from the salt water, and this being often, might cause trouble. So they sent a petition, asking that the reservation be at the mouth of the river.[85]

The historical record contains little more about the settlers' concerns. Annual Reports of the Commissioner of Indian Affairs to Congress, however, thoroughly document the concerns of both the Tribe and the United States with respect to the Reservation's ultimate location.

In 1859, the Tribe informed the Indian Agent for the Washington Territory that they were dissatisfied with the location between the Forks and desired instead a reservation "at the junction of the Skokomish river and Hood's canal."[86] The Agent reported the following to the Commissioner after visiting the proposed Reservation location between the Forks:

> At the request of the Indians interested, I have been to visit the place designated by the treaty of Point No-Point as the reserve for the Clallam, Chimicum, Duwans, and Skokomish tribes, and I found that representations they had made to me were correct; that the whole tract was densely timbered, and the Skokomish river so obstructed with drift wood, that it was with difficulty I could reach the place.[87]

The Commissioner relayed the Agent's report to Congress.[88] Then, in his 1860 report, the Agent again informed the Commissioner of problems with locating the Reservation between the Forks:

> I have examined the place [between the Forks] and found it . . . altogether not a convenient or suitable place to establish these tribes, and so I reported to you December 13, 1859. At the same time I gave the bounds of about two sections of land at the mouth of said river that I think will be an excellent place to locate them.[89]

---

[85] EELLS, *supra* note 39, at 36.

[86] S. EXEC. DOC. NO. 36-2, pt. 1, at 766 (1st Sess. 1860).

[87] *Id.*

[88] *Id.*

[89] S. EXEC. DOC. NO. 36-1, pt. 1, at 419 (2nd Sess. 1860). The Agent's December 13, 1859, letter described the two sections of land mentioned here as "near the mouth of the Skokomish River and [] bounded as follows: 'Beginning at the south east corner of W. T. O'Harver's claim on said river and running west to the county road thence north along said road to the line of [illegible] claims, thence east to Hood's Canal and following the meanders of said canal to the mouth of the Skokomish River, thence following the river to the place of beginning." Letter from Michael T. Simmons, Indian Agent, Wash. Territory, to Edward R. Geary, Superintendent of Indian Affairs, Wash. Territory, at 2 (Dec. 13, 1859).

The Commissioner again relayed the Agent's report to Congress.[90] Although neither Congress nor the President had acted to set the Reservation boundaries as the Agent proposed at that point, in 1861 the Indian Service established the Skokomish Indian Agency on the land at the mouth of the River identified by the Tribe in 1859.[91] In addition, as early as 1860, Indians began occupying this land, including a parcel claimed by settler A. D. Fisher pursuant to the Donation Land Act, as if it had been set aside as their Reservation.[92] The Indians did not improve the land, however, because they feared accusations of trespassing upon settlers.[93]

Soon after erecting the Agency building, the Indian Service learned that a significant portion of the two sections at the River's mouth was susceptible to frequent flooding and therefore was not ideal for locating buildings.[94] In 1862, the Superintendent of Indian Affairs, Washington Territory, visited the newly established Agency to address the Indians' need for land not prone to flooding.[95] The Superintendent noted:

---

[90] *Id.*

[91] S. EXEC. DOC. NO. 37-1, pt. 1, at 789 (2nd Sess. 1861). William Morrow, Farmer, Skokomish Indian Agency, reported:

> This place ["at or near the mouth of the [R]iver"] had never been occupied as an Indian reservation previous to my coming here on the 1st of November last. . . . In obedience to your instructions, Mr. O'Harver, the carpenter and myself removed the old log building to the site selected by you for the agency, a distance of half a mile, and Mr. O'Harver has since finished the same in a substantial and workmanlike manner. We have also built a substantial picket fence, six feet in height, around the agency building and grounds, and have enclosed the land lately cultivated by Mr. O'Harver, the late proprietor of the land under a donation title, amounting to about 12 or 15 acres.

Id. The 1861 General Land Office survey of the public lands that subsequently became the Reservation is included with this memorandum opinion as Attachment 4. On this survey, the Reservation's southern and eastern boundary meanders the River's left bank.

[92] Letter from Columbus Delano, Sec'y, Dep't of the Interior, to the Speaker of the House of Representatives (Feb. 28, 1874).

[93] H.R. EXEC. DOC. NO. 37-1, pt. 2, at 448-49 (3rd Sess. 1862).

[94] *Id.* Although the Treaty reserved six sections for the Tribe, the Commissioner identified only two sections at the mouth of the River. The 1874 Executive Order, however, ultimately included within the Reservation boundaries slightly more than six sections of land.

[95] *Id.* The Superintendent provided the following description of the Reservation:

> Their reservation is at the head of Hood's canal, but had never been clearly defined so as to exclude or prevent settlers from taking lands which properly pertained to it. I, accordingly, made an examination in order to determine the boundaries, and in connexion [sic] with the surveyor ran some short lines on the north end of the reservation to connect with the surveyed lines in the adjoining townships in which the most of it laid, and then made the Skokomish river the southern boundary. . . . It includes about six sections of land. . . . No improvements have been made by the Indians, because they have never known where they might improve without trespassing on settlers.

Id. at 533.

> Owing to the inclement state of the weather at the time of my visit, I was unable to make such an examination of the lands adjacent as to enable me to say which side of the canal I would recommend to be included with the river bottom in order to obtain safe and comfortable sites for buildings.[96]

Although doubts remained regarding the suitability of the proposed location for constructing buildings, the Superintendent noted that the land at the River's mouth was fertile and that "[t]he opportunities for fishing are good . . . which is a very important feature, and adds much to the value of this location as a residence for Indians."[97] The Superintendent reported to Congress that the Indians' success depended, in part, on their proximity to an "ample supply of salmon [for subsistence] through the winter, without much, if any, assistance from the government."[98] This recognition is consistent with the Superintendent's admonition that, in establishing reservations, "any change in location that will involve a violent change in habits and pursuits should be avoided"[99] and with the Indian's request for a reservation "at the junction of the Skokomish river and Hood's canal[,]"[100] "where there is plenty of deer and fish, and good land for potatoes."[101]

An 1873 survey of the Reservation places it along the River, adjacent to its mouth, and along Hood Canal's north arm.[102] The surveyor identified "an old bearing tree . . . on the North and left bank of the Skokomish river" as the survey's starting point.[103] In locating the Reservation's southern and eastern boundary, the surveyor meandered the River's left bank. The 1873 survey does not include a meander of the River's right bank, nor any survey of land adjacent to that bank.[104]

Then, in 1874, President Grant issued an executive order finally establishing the Reservation's boundaries:

---

[96] *Id.* As described above in Section I.A, the River empties into Anna's Bay at Hood Canal's "Great Bend." The portion of the Canal that extends north from the Great Bend and from the River is the "north arm" or the "north side" of the Canal; the portion of the Canal that extends roughly east from the Great Bend and from the River is the "south arm" or the "south side" of the Canal. Accordingly, here, the phrase "which side of the canal" is synonymous with "which side of the River."

[97] *Id.* at 534.

[98] *Id.* at 449.

[99] S. EXEC. DOC. NO. 36-1, pt. 1, at 419 (2nd Sess. 1860).

[100] S. EXEC. DOC. NO. 36-2, pt. 1, at 766 (1st Sess. 1860).

[101] S. EXEC. DOC. NO. 35-1, pt. 1, at 581-82 (2nd Sess. 1858). Although these exact words are attributed to a Snoqualmie Indian, the Indian Agent viewed the concerns of the Skokomish Indians and the Snoqualmie Indians to be substantively the same. *See id.*

[102] The 1873 Survey is included with this memorandum opinion as Attachment 5.

[103] Thomas M. Reed, Deputy Surveyor, Transcript of the Field Notes of the Survey of the Skokomish Indian Reservation, at 4 (1873), *available at* www.blm.gov/or/landrecords/survey.

[104] *See* 1873 Survey, *supra* note 102.

> [T]here be withdrawn from sale or other disposition and set apart for the use of the [Skokomish] Indians the following tract of country on Hood's Canal in Washington Territory, inclusive of the six sections situated at the head of Hood's Canal, reserved by treaty with said Indians . . . described and bounded as follows: *Beginning at the mouth of the Skokomish River; thence up said river* to a point intersected by the section line between sections 15 and 16 of township 21 north, in range 4 west; thence north on said line to a corner common to sections 27, 28, 33, and 34 of township 22 north, range 4 west; thence due east to the southwest corner of the southeast quarter of the southeast quarter of section 27, the same being the southwest corner of A.D. Fisher's claim; thence with said claim north to the northwest corner of the northeast quarter of the southeast quarter of said section 27, thence east to the section line between sections 26 and 27; thence north on said line to corner common to sections 22, 23, 26, and 27; thence east to Hood's Canal; thence southerly and easterly along said Hood's Canal to the place of beginning.[105]

The Reservation lies in the heart of the Skokomish Indian's aboriginal territory. This location was central to the Tribe's subsistence activities. The stretch of the River forming the Reservation's southern and eastern boundary includes the sites of the Skokomish Indians' first and second salmon weirs located upstream of Hood Canal, along with several of the Tribe's other traditional fishing spots, campsites, and villages.[106]

In 1889, fifteen years after the 1874 Executive Order set the Reservation's boundaries, Congress admitted Washington into the Union.[107] Congress required the newly formed State government to adopt a constitution and to include in it a disclaimer of "all right and title to . . . all lands lying within [the State] owned or held by any Indian or Indian tribes."[108]

II. LEGAL BACKGROUND

There are two sets of operative legal principles regarding these historical facts, which must be reconciled with care. First, interpretation of Indian treaties requires application of a set of canons of construction specific to that area of law, which generally calls for their liberal interpretation in favor of tribes. Second, in the context of the Equal Footing Doctrine, courts begin with a presumption that title to the beds of navigable waters passes to the state upon admission to the Union.

---

[105] 1874 Executive Order, *supra* note 6 (emphasis added). The 1874 Diagram of the Reservation is included with this memorandum opinion as Attachment 6. This diagram had been included in an April 25, 1874, letter from the Surveyor General to the Commissioner of the General Land Office.

[106] ELMENDORF, *supra* note 8, at 33-35. *Compare* Map II: Twana Territory and Sites (Attachment 2) *with* 1874 Survey (Attachment 6).

[107] Act of Feb. 22, 1889, ch. 180, 25 Stat. 676.

[108] *Id.* § 4.

A. Indian Law Canons of Construction

"[T]he standard principles of statutory construction do not have their usual force in cases involving Indian law."[109] The Supreme Court has developed three primary rules of construction applicable to Indian treaties.[110] First, "treaties with the Indians must be interpreted as they would have understood them."[111] Second, ambiguities or "any doubtful expressions in them should be resolved in the Indians' favor."[112] Third, treaties must be liberally construed in favor of the Indians.[113] Intent in the Indian treaty context is typically a question of fact and may be evidenced by "the history of the treaty, the negotiations, and the practical construction adopted by the parties."[114] Attention must also be paid to traditional lifestyles at the time of a treaty, as evidenced by oral history and archaeology.[115] Additionally, treaty rights can be abrogated only by a subsequent act when Congress clearly expresses intent to abrogate after a careful consideration of the conflict with extant rights.[116]

B. The Equal Footing Doctrine

Under the Equal Footing Doctrine, courts begin with a presumption that "title to land under navigable waters passes from the United States to a newly admitted State" at statehood.[117] This

---

[109] *Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759, 766 (1985).

[110] These canons of construction also apply when interpreting statutes, executive orders, regulations, and agreements intended for the benefit of Indians. *E.g.*, *Ramah Navajo Sch. Bd. v. Bureau of Revenue of N.M.*, 458 U.S. 832, 846 (1982) ("We have consistently admonished that federal statutes and regulations relating to tribes and tribal activities must be 'construed generously in order to comport with . . . traditional notions of [Indian] sovereignty and with the federal policy of encouraging tribal independence.'"); *see also* COHEN'S HANDBOOK OF FEDERAL INDIAN LAW § 2.02(1), at 113-15 (Nell Jessup Newton ed., 2012).

[111] *Choctaw Nation v. Oklahoma*, 397 U.S. 620, 631 (1970); *see also Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 196 (1999) ("[W]e interpret Indian treaties to give effect to the terms as the Indians themselves would have understood them."); *United States v. Winans*, 198 U.S. 371, 380-81 (1905) (noting among other things that treaties are not a grant of rights *to* the Indians, but *from* them).

[112] 397 U.S. at 631.

[113] *Cty. of Oneida v. Oneida Indian Nation*, 470 U.S. 226, 247 (1985) ("it is well established that treaties should be construed liberally in favor of the Indians").

[114] *Choctaw Nation of Indians v. United States*, 318 U.S. 423, 432 (1943); *see also Mille Lacs Band*, 526 U.S. at 196 ("we look beyond the written words to the larger context that frames the Treaty").

[115] *See United States v. Washington*, 384 F. Supp. 312 (W.D. Wash. 1974) (examining the pre-treaty role of fishing), *aff'd*, 520 F.2d 676 (9th Cir. 1975).

[116] *Mille Lacs Band*, 526 U.S. at 202; *United States v. Dion*, 476 U.S. 734, 739-40 (1986) (requiring "clear evidence" Congress considered the conflict and chose to resolve it by abrogating the treaty); *United States v. Santa Fe Pac. R.R.*, 314 U.S. 339, 346 (1941) (congressional intent to abrogate tribal property rights must be "plain and unambiguous"); *see also Cobell v. Norton*, 240 F.3d 1081, 1102-03 (D.C. Cir. 2001) (holding Indian canons trump deference to agency interpretation); *Ramah Navajo Chapter v. Lujan*, 112 F.3d 1455, 1461-62 (10th Cir. 1997) (same).

[117] *See, e.g., Idaho v. United States*, 533 U.S. 262, 272 (2001) (internal citations omitted). Determination of navigability in the United States uses the "navigability in fact" test. *E.g.*, *PPL Mont., LLC v. Montana*, 132 S. Ct.

presumption emerged from the recognition that newly admitted states entered the "Union on an 'equal footing' with the original States."[118] Nevertheless, Congress has authority to "convey land beneath navigable waters, and to reserve such land . . . for a particular national purpose such as a[n] . . . Indian reservation," prior to statehood, thereby defeating state title to those submerged lands.[119]

Since issuance of the 1971 Memorandum,[120] the Supreme Court has decided two cases pertaining to ownership of lands under navigable waterways within the boundaries of Indian reservations. In *Montana v. United States*,[121] the Court concluded that the bed and banks of the Bighorn River within the Crow Indian Reservation passed to the State of Montana upon statehood because they were not reserved for the Crow Tribe. Conversely, in *Idaho v. United States*,[122] the Court found that the United States held in trust for the benefit of the Coeur d'Alene Indian Tribe the bed and banks of Lake Coeur d'Alene and the St. Joe River within the boundaries of the Coeur d'Alene Reservation and that title did not pass to the State of Idaho upon its entry into the Union. In both cases, the importance of fishing and use of the waterways to the tribes' diets and ways of life figured prominently in the Court's analysis.

1215, 1227 (2012). Unlike the definition of navigability used in English common law that relied on distinguishing between tidal and non-tidal waters, the test here requires evidence that waters "are used, or are susceptible of being used, in their ordinary condition, as highways for commerce." *Id.* at 1226-27, 1228 (quoting *The Daniel Ball*, 77 U.S. 557, 563 (1871)). Navigability for title also should not be confused with navigability for purposes of the Clean Water Act. *See generally* 33 U.S.C. § 1251 et seq. (Clean Water Act). For equal footing cases, navigability is to be determined as of the time of statehood and "on a segment by-segment basis." 132 S. Ct. at 1227-28, 1229. This Opinion focuses on the test for determining title to lands underlying navigable rivers because, as explained in the 1971 Memorandum, the available evidence indicates that the stretch of the Skokomish River at issue is navigable. *See* 1971 Memorandum, *supra* note 2, at 9. I am aware of no new or more recent evidence that contradicts the evidence offered as to navigability in 1971. Thus, I presume for purposes of this Opinion that the stretch of the Skokomish River at issue here was navigable at the time of statehood.

[118] *Idaho*, 533 U.S. at 272; *see also Alaska v. United States*, 545 U.S. 75, 79 (2005); COHEN'S HANDBOOK, *supra* note 110, § 15.05(3)(a), at 1019. *See also* Thomas H. Pacheco, *Indian Bedlands Claims: A Need to Clear the Waters*, 15 HARV. ENVTL. L. REV. 1, 11 n.56 (1991) ("The equal footing precept has been embodied in a federal statute. The [Submerged Lands] Act specifies that title to land under navigable water lies in the state in which the land is located, except for land lawfully conveyed by the United States to any person, or held by the federal government for the benefit of Indians. 43 USC 1311, 1301(f), 1313(b).").

[119] *Idaho*, 533 U.S. at 272-73. The Equal Footing Doctrine is not explicit in the Constitution. In contrast, the property clause explicitly confers on Congress the authority to reserve or dispose of federally held land. *Compare* U.S. CONST., art. IV, § 3, cl. 1 (permitting admission of new states into the Union) *with* U.S. CONST., art. IV, § 3, cl. 2 (granting Congress exclusive authority to reserve or dispose of federal property). *See also* Pacheco, *supra* note 118, at 14.

[120] The 1971 Memorandum contains a thorough discussion of the key Equal Footing Doctrine cases that preceded it. *See supra* note 2, at 11-15. This Opinion incorporates that discussion by reference.

[121] *Montana v. United States*, 450 U.S. 544 (1981). This suit by the United States followed a dispute between the Crow Tribe and the State of Montana regarding the regulation of hunting and fishing on fee land owned by non-Indians on the Crow Reservation.

[122] 533 U.S. 262.

Several Ninth Circuit cases decided since the 1971 Opinion are also instructive.[123] In *Puyallup Indian Tribe v. Port of Tacoma*, decided two years after *Montana*, the Ninth Circuit established a three-part test for determining whether a reservation includes submerged lands.[124] The Ninth Circuit later applied this test in *United States v. Aam* to determine whether submerged lands beneath a navigable waterway forming the boundary of the Port Madison Indian Reservation passed to Washington upon statehood.[125] These cases are discussed further below.

1. Montana v. United States

In 1975, the United States filed suit to quiet title to the bed and banks of the Bighorn River in the United States as trustee for the Crow Tribe.[126] That the Crow Reservation includes the "land through which the [Bighorn] River flows" was undisputed.[127] The question before the Court was whether the land beneath the Bighorn River was also reserved for the Tribe such that title did not pass to the State. The Supreme Court began "with a strong presumption against conveyance by the United States" to the Tribe, and then applied principles established in *United States v. Holt State Bank*[128] and *Shively v. Bowlby*[129] to determine whether the establishment of the Crow Reservation constituted a "public exigency" such that title to the riverbed did not pass to the State upon statehood.[130] The Court acknowledged that "establishment of an Indian reservation

---

[123] In cases where the record demonstrated tribal reliance on the waterways at issue, the Ninth Circuit found in favor of the tribes and the United States. *See United States v. Milner*, 583 F.3d 1174, 1186 (9th Cir. 2009) (United States owns tidelands in trust for the Lummi Tribe where the Tribe depended on use of the tidelands, earlier decisions quieted title in the United States, and the facts satisfied the *Idaho* two-step inquiry, discussed below); *Puyallup Indian Tribe v. Port of Tacoma*, 717 F.2d 1251, 1261 (9th Cir. 1983) (Puyallup Tribe is beneficial owner of former riverbed where Puyallup Reservation was enlarged to include a segment on the River), *cert. denied*, 465 U.S. 1049 (1984); *Muckleshoot Indian Tribe v. Trans-Canada Enter., Ltd.*, 713 F.2d 455, 458 (9th Cir. 1983) (Muckleshoot Tribe is beneficial owner of former riverbed where Muckleshoot Reservation was enlarged to include Tribe's traditional fisheries), *cert. denied*, 465 U.S. 1049 (1984); *United States v. Washington*, 694 F.2d 188 (9th Cir. 1982) (Quinault Indian Nation owns the bed of the Quinault River), *cert denied*, 463 U.S. 1207 (1983); *Confederated Salish & Kootenai Tribes of the Flathead Reservation v. Namen*, 665 F.2d 951, 962 (9th Cir. 1982) (United States owns in trust for the Confederated Salish & Kootenai Tribes the bed of south portion of lake where application of *Montana* analysis does not support overturning earlier Ninth Circuit cases recognizing Tribes' beneficial title), *cert. denied*, 459 U.S. 977 (1982). *But see United States v. Aam*, 887 F.2d 190, 196-98 (9th Cir. 1989) (tidelands not held in trust for Suquamish Tribe where the disputed tidelands did not supply "a significant amount" of the Tribe's fishery needs and, thus, no public exigency existed); *United States v. Aranson*, 696 F.2d 654, 664 (9th Cir. 1983) (riverbed not held in trust for the Colorado River Indian Tribes where congressional intent to depart from the Equal Footing Doctrine could not be inferred because record did not show history of tribal dependence on river). *Puyallup* and *Aam* are particularly relevant here; I discuss these two decisions in further detail in the main text.

[124] 717 F.2d 1251.

[125] 887 F.2d 190.

[126] *United States v. Montana*, 457 F. Supp. 599 (D. Mont. 1978).

[127] *Montana v. United States*, 450 U.S. 544, 548 (1981).

[128] 270 U.S. 49 (1926).

[129] 152 U.S. 1 (1894).

[130] *Montana*, 450 U.S. at 552.

can be an 'appropriate public purpose' within the meaning of *Shively v. Bowlby*."[131] To determine whether the riverbed had been reserved, the Court first looked to the treaties with the Crow Tribe. Although the Crow Reservation was established before Montana statehood, the Court concluded that the treaties alone, which made no specific mention of the riverbed, were insufficient to overcome the Equal Footing Doctrine's presumption.[132] The Court then briefly analyzed whether the situation of the Crow Tribe at the time of treating constituted a public exigency such that congressional intent to depart from the Equal Footing Doctrine could be inferred.[133] It found that the Crow Tribe was nomadic and depended primarily on buffalo; "fishing was not important to their diet or way of life."[134] Thus, the Court concluded that "the situation of the Crow Indians . . . presented no 'public exigency' which would have required Congress to depart from its policy of reserving ownership of beds under navigable waters for the future States."[135] Accordingly, title passed to the State upon its entry into the Union.[136]

---

[131] *Id.* at 556.

[132] *Id.* at 554-55. Although the Court analogized to *Holt State Bank*, stating that the Crow treaty merely "reserve[d] in a general way for the continued occupation of the Indians what remained of their aboriginal territory," *id.* at 554, some commentators suggest that the Court seriously misread *Holt State Bank*. *See* John P. LaVelle, *Beating a Path of Retreat from Treaty Rights and Tribal Sovereignty: The Story of* Montana v. United States, *in* INDIAN LAW STORIES 535, 572-74 (2011); Russel Lawrence Barsh & James Youngblood Henderson, *Contrary Jurisprudence: Tribal Interests in Navigable Waterways Before and After* Montana v. United States, 56 WASH. L. REV. 627, 677-78, 681-82 (1981); *see also* Dean B. Suagee, *The Supreme Court's "Whack-a-Mole" Game Theory in Federal Indian Law, a Theory That Has No Place in the Realm of Environmental Law*, 7 GREAT PLAINS NAT. RESOURCES J. 90, 118 n.126 (2002); John P. LaVelle, *Sanctioning a Tyranny: The Diminishment of* Ex parte *Young, Expansion of* Hans *Immunity, and Denial of Indian Rights in* Coeur d'Alene Tribe, 31 Ariz. St. L.J. 787, 816 n.111 (1999); Pacheco, *supra* note 118, at 23-24 & nn. 117, 122.

[133] 450 U.S. at 556.

[134] *Id.* The *Montana* Court's analysis regarding Crow fishing habits is not as comprehensive as it could have been. In a prior, related proceeding, Justice Anthony Kennedy, then sitting as Judge on the Ninth Circuit, wrote the majority opinion in *United States v. Finch*, 548 F.2d 822 (9th Cir.1976), reversing the federal district court's conclusion that the Crow Tribe had not shown sufficient evidence of historical fishing. In reversing and vacating the decision of the Ninth Circuit, the Supreme Court made no mention of the circuit court's opinion with respect to fishing, merely concluding that the criminal defendant had indeed been subject to double jeopardy. 433 U.S. 676. Afterward, in the near-parallel proceeding of *United States v. Montana*, the district court again ruled that the Crow Tribe had not shown any meaningful historical evidence of fishing, stating that the Ninth Circuit's opinion in *Finch* had been vacated and that the district judge disagreed with then-Judge Kennedy's reasoning. 457 F. Supp. 599, 600 n.1 (D. Mont. 1978). The Ninth Circuit reversed again, essentially adopting its prior conclusion. 604 F.2d 1162, 1166 (9th Cir. 1979). This time, however, the Supreme Court simply incorporated the district court's characterization of the record without actual analysis, leaving it to a single sentence. 450 U.S. at 556.

[135] *Id.* at 556. As the Ninth Circuit notes, *Montana* cites two cases "apparently to illustrate proper resolutions in the face of the competing principles: *Alaska Pacific Fisheries v. United States* and *Skokomish Indian Tribe v. France*." *Puyallup*, 717 F.2d at 1257-58 (citing *Montana*, 450 U.S. at 556). In *Alaska Pacific Fisheries*, the Court held that the submerged lands at issue did not pass to the State at statehood, but instead were reserved for the Metlakahtla Indians. Importantly, the Metlakahtla Indians relied on the fishing grounds at issue for their survival, Congress was aware of this reliance, and non-Indian fishing methods in the submerged lands surrounding the Annette Islands threatened the Indians' subsistence and way of life. *Alaska Pac. Fisheries v. United States*, 248 U.S. 78, 89 (1918). In contrast, in *Skokomish Indian Tribe*, the Ninth Circuit found that the 1874 Executive Order did not reserve for the Tribe tidelands below the high water mark. *Skokomish Indian Tribe v. France*, 320 F.2d 205, 210 (9th Cir. 1963). *See infra* Section III.B. The dissent rightly pointed out that there was in fact "evidence at trial that the Crow ate fish

2. Idaho v. United States

Twenty years after *Montana*, the Supreme Court resolved a dispute over the Coeur d'Alene Tribe's ownership of submerged lands within its Indian reservation.[137] This time, the Court found in favor of tribal ownership.

The Coeur d'Alene Tribe:

> traditionally used [Lake Coeur d'Alene] and its related waterways for food, fiber, transportation, recreation, and cultural activities. The Tribe depended on submerged lands for everything from water potatoes harvested from the lake to fish weirs and traps anchored in riverbeds and banks.[138]

The United States acquired through a treaty with Great Britain an area including the aboriginal territory of the Coeur d'Alene Tribe.[139] Thereafter, the Tribe agreed to cede to the United States most of its aboriginal territory, reserving for its exclusive use an area including "part of the St. Joe River . . . , and all of Lake Coeur d'Alene except a sliver cut off by the northern boundary."[140] An 1873 executive order established the Coeur d'Alene Reservation within the boundaries described in the agreement between the Tribe and the United States.[141] Through later agreements, the Tribe ceded portions of its reservation, including the northern portion of Lake Coeur d'Alene.[142] Congress ratified these later agreements in 1891, less than one year after passing the Idaho Statehood Act.[143]

The Court in *Idaho* formulated the following "two-step enquiry" for determining whether the establishment of an Indian reservation defeats the Equal Footing Doctrine's presumption: (1) did "Congress intend[] to include land under navigable waters within the federal reservation"?; and, (2) did "Congress intend[] to defeat the future State's title to the submerged lands"?[144] If both are answered affirmatively, then the presumption is rebutted. Where a "reservation clearly

---

both as a supplement to their buffalo diet and as a substitute for meat in times of scarcity." *Id.* at 570 (Blackmun, J., dissenting in part).

[136] *Montana*, 450 U.S. at 556-57.

[137] *Idaho v. United States*, 533 U.S. 262 (2001).

[138] *Id.* at 265 (internal citations omitted).

[139] *Id.* The United States received from Great Britain title "subject to the aboriginal right of possession held by resident tribes." *Id.* This treaty with Great Britain also included the Skokomish Tribe's aboriginal territory.

[140] *Id.* at 266.

[141] *Id.*

[142] *Id.* at 269-70.

[143] *Id.* at 270-71.

[144] *Id.* at 273.

includes submerged lands," congressional intent is met if "Congress was on notice" of such inclusion and "the purpose of the reservation would have been compromised if the submerged lands had passed to the State[.]"[145] When an Executive Order, rather than an Act of Congress, establishes a reservation, "the two-step test of congressional intent is satisfied when an Executive reservation clearly includes submerged lands, and Congress recognizes the reservation in a way that demonstrates an intent to defeat state title."[146]

Applying step one, the Court found that Congress was on notice that the reservation included submerged lands. The State of Idaho conceded, and contemporaneous congressional and executive documents demonstrated, that Congress likely knew that "[a] right to control the lakebed and adjacent waters was traditionally important to the Tribe."[147] Accordingly, the Court concluded that Congress intended to include the submerged lands as part of the reservation.[148]

Next, the Court noted that Congress's dealings with the Coeur d'Alene Tribe "show[ed] clearly that preservation of the land within the reservation, absent contrary agreement with the Tribe, was central to Congress's complementary objectives of dealing with pressures of white settlement and establishing the reservation by permanent legislation."[149] Finding no such agreement by the Tribe to relinquish beneficial ownership of the submerged lands, the Court determined Congress "underst[ood] that the . . . reservation's submerged lands had not passed to the State."[150] Accordingly, the Court held: "Congress recognized the full extent of the . . . reservation . . . it ultimately confirmed, and intended to bar passage to Idaho of title to the submerged lands" within that reservation.[151]

C. Interplay of the Indian Law Canons of Construction and the Equal Footing Doctrine

The Equal Footing Doctrine's presumption was developed outside the context of Indian law.[152] In cases in which other legal presumptions might apply, the Court has set them aside or given

---

[145] *Id.* at 273-74 (citing *United States v. Alaska*, 521 U.S. 1, 41-46, 55-61 (1997)).

[146] *Id.* at 273. *See also Alaska v. United States*, 545 U.S. 75, 79 ("The Federal Government can overcome the presumption and defeat a future State's title to submerged lands by setting them aside before statehood in a way that shows an intent to retain title. The requisite intent must, however, be definitively declared.") (internal citations omitted); *see also* COHEN'S HANDBOOK, *supra* note 110, § 15.05(3)(b), at 1020.

[147] 533 U.S. at 274.

[148] *Id.*

[149] *Id.* at 276.

[150] *Id.* at 279. Also important to the Court's analysis was the course of dealing between the United States and the Coeur d'Alene Tribe. *Id.* at 274-81.

[151] *Id.* at 281.

[152] *See Shively v. Bowlby*, 152 U.S. 1, 48-50 (1894) (discussing origin of doctrine in English common law); *see also Pollard v. Hagan*, 44 U.S. 212, 228-30 (1845) (title to non-coastal tidelands pass to state upon admission to Union; non-Indian law case).

them a different weight when arising in the context of and in conflict with Indian law.[153] When the Court has faced the interplay of the Equal Footing Doctrine and title to lands beneath navigable waters in the Indian law context, however, the Court has applied the presumption while sometimes explicitly invoking the canons and at other times making no mention of them whatsoever.[154]

As noted above, *Montana* and *Idaho* each applied the Equal Footing Doctrine's presumption without analysis of the Indian canons.[155] But neither case overturned those that had previously made explicit use of the canons, such as *Choctaw Nation v. Oklahoma*.[156] In *Choctaw Nation*, the Court wrote that "nothing in the *Holt State Bank* case or in the policy underlying its rule of construction . . . requires that courts blind themselves to the circumstances of the grant in determining the intent of the grantor."[157]

Based on a synthesis of the Court's precedent, then, the analysis in circumstances like these begins with the presumption that title to lands beneath navigable waters passes to the state. In determining whether that presumption is overcome, the inquiry should apply the Indian law canons of construction where appropriate to the facts.[158] Two Ninth Circuit cases, in particular, illustrate the proper application of the Indian canons in the context of the Equal Footing Doctrine: *Puyallup Indian Tribe*[159] and *United States v. Aam*.[160]

---

[153] *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 194 n.5 (1999) (presumed legality of executive orders not given same weight in face of required resolution of treaty ambiguities in favor of Indians); *Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759, 765-66 (1985) (dealing with presumption against repeals by implication); *see also Equal Emp't Opportunity Comm'n v. Karuk Tribe Hous. Auth.*, 260 F.3d 1071, 1082 (9th Cir. 2001) (setting aside normal presumption that omission from Age Discrimination in Employment Act of a Title VII provision indicates deliberate choice by Congress); *Ramah Navajo Chapter v. Lujan*, 112 F.3d 1455, 1461 (10th Cir. 1997) (typical *Chevron* deference not applied); Pacheco, *supra* note 118.

[154] *Compare Choctaw Nation v. Oklahoma*, 397 U.S. 620 (1970) (applying rule that treaties be interpreted as tribe would have understood and resolving doubtful expressions in favor of Indians, while still acknowledging presumption found in Equal Footing Doctrine), *and Alaska Pac. Fisheries v. United States*, 248 U.S. 78 (1918) (appealing to liberal construction in favor of Indians in face of question as to whether United States reserved submerged lands adjacent to islands), *with Idaho*, 533 U.S. 262 (applying the "default" rule presuming passage of navigable streambed title to states), *and Montana v. United States*, 450 U.S. 544 (1981) (applying presumption without mention of canons by majority).

[155] *See* 450 U.S. 544; 533 U.S. 262.

[156] *See* 450 U.S. at 567-68 (Stevens, J., concurring); 533 U.S. 262.

[157] *Choctaw Nation v. Oklahoma*, 397 U.S. at 634.

[158] *See United States v. Idaho*, 210 F.3d 1067, 1073 (9th Cir. 2000) ("Juxtaposed in this case are two principles, both of which must be accorded due weight: the canon of construction favoring Indians and the presumption under the Equal Footing Doctrine that a State gains title to submerged lands within its borders upon admission to the Union."), *aff'd, Idaho*, 533 U.S. 272.

[159] 717 F.2d 1251 (9th Cir. 1983).

[160] 887 F.2d 190 (9th Cir. 1989).

Puyallup, decided two years after *Montana*, involved a question of title to part of the former bed of the Puyallup River.[161] After carefully considering *Montana*, the Ninth Circuit noted:

> [W]hen faced with a claim by an Indian tribe that it owns the bed of a navigable stream that flows through its reservation, we must accord appropriate weight to both the principle of construction favoring Indians and the presumption that the United States will not ordinarily convey title to the bed of a navigable river.[162]

Based on this view, the Ninth Circuit developed the following analytical framework for resolving the question of whether the United States holds title to submerged lands in trust for Indian tribes such that the Equal Footing Doctrine's presumption is rebutted:

> [W]here a grant of real property to an Indian tribe includes within its boundaries a navigable water and the grant is made to a tribe dependent on the fishery resource in that water for survival, the grant must be construed to include the submerged lands if the Government was plainly aware of the vital importance of the submerged lands and the water resource to the tribe at the time of the grant.[163]

Thus, *Puyallup* established this three-part test: "(1) [Whether] the reservation grant includes the navigable waters within its borders; (2) [Whether] the tribe is dependent on the fishery resource in that water for survival; and (3) [Whether] the government was plainly aware of the vital importance of the water resources to the tribe at the time of the grant."[164] Satisfaction of this test "warrants the conclusion that the intention to convey title to the waters and lands under them to the Tribe is 'otherwise made very plain' within the meaning of *Holt State Bank*, as quoted in *Montana*."[165] *Puyallup*'s test corresponds with the first step in *Idaho*'s two-step enquiry: whether Congress intended to include land beneath the navigable waterway within the reservation.[166]

---

[161] 717 F.2d at 1253.

[162] *Id.* at 1257.

[163] *Id.* at 1258. *See also Muckleshoot Indian Tribe v. Trans-Canada Enter., Ltd.*, 713 F.2d 455, 457 (9th Cir. 1983).

[164] *Aam*, 887 F.2d at 194 (paraphrasing *Puyallup*, 717 F.2d at 1258).

[165] *Puyallup*, 717 F.2d at 1258 (quoting *Montana*, 450 U.S. at 552 (quoting *Holt State Bank*, 270 U.S. at 55)).

[166] *United States v. Idaho*, 95 F. Supp. 2d 1094, 1098-99 (D. Idaho 1998), *aff'd*, 210 F.3d 1067 (9th Cir. 2000), *aff'd*, 533 U.S. 262 (2001). The district court explained:

> Ninth Circuit cases have formulated a three-part test that bears on the first inquiry under [*United States v.*] *Alaska*[, 521 U.S. 1 (1997)] as to whether the Executive intended to include submerged lands within the reservation. . . . Ninth Circuit decisions have allowed a plaintiff to establish federal intent on this issue by showing (1) the reservation included "within its boundaries a navigable water," (2) the tribe depended on the watercourse for a significant portion of the tribe's needs; and (3) the "Government was plainly aware of the vital importance of the submerged lands and the water resource to the tribe at the time of the [reservation]."

In *United States v. Aam*, the Ninth Circuit applied *Puyallup*'s framework to determine whether the United States held in trust for the benefit of the Suquamish Tribe tidelands adjacent to its reservation such that title did not pass to Washington under the Equal Footing Doctrine.[167] The court noted that "the first *Puyallup* test—whether the navigable waters at issue are within the boundaries of the reservation—was not at issue" in *Montana*, *Puyallup*, or other Ninth Circuit cases because the relevant navigable waters ran through or were enclosed by the respective reservation boundaries.[168] In contrast, because the tidelands at issue formed the boundary of the Suquamish Tribe's reservation, *Puyallup*'s first factor was squarely at issue in *Aam*.[169] The court determined that "the first *Puyallup* test should be understood to require only that the grant be capable of being interpreted to include the navigable waters within the reservation boundaries."[170] In determining whether the tidelands were "within" the reservation, the court "looked beyond the words of the grant" and "conclude[d] that the treaty language, when construed favorably for the Indians, supports the tribe's contention that the tidelands may arguably have been intended to be a part of the reservation."[171] Accordingly, through application of the Indian canons, the court determined that the Tribe satisfied the first *Puyallup* factor by

---

Id. (quoting *Muckleshoot*, 713 F.2d at 457 (quoting *Puyallup*, 714 F.2d at 1258)). In its appeal, the State of Idaho "concede[d] that the 1873 executive order was intended to reserve title to the submerged lands for the benefit of the Tribe." 210 F.3d at 1070 n.3. The Supreme Court noted that the State's concession was "a sound one" because, *inter alia*, "[a] right to control the lakebed and adjacent waters was traditionally important to the Tribe." 533 U.S. 262, 274 (2001).

The Port of Tacoma unsuccessfully sought United States Supreme Court's review of the Ninth Circuit's decision in *Puyallup*. Petition for Writ of Certiorari, *Port of Tacoma v. Puyallup Indian Tribe*, 465 U.S. 1049 (1984). In its petition, the Port squarely challenged the Ninth Circuit's three-part test and its application of the Indian canons of construction. *Id.* at 6. In its opposition to the Port's petition, the Puyallup Tribe argued, among other things, that the Ninth Circuit's application of the Indian canons was consistent with the Supreme Court's decision in *Montana*, noting that the Supreme Court applied the canons in *Alaska Pacific Fisheries* and also cited that case with approval in *Montana*. Brief of the Puyallup Indian Tribe in Opposition, *Port of Tacoma v. Puyallup Indian Tribe*, 465 U.S. 1049, at 8 (1984). Similarly, Trans-Canada Enterprises unsuccessfully sought the Supreme Court's review of *Muckleshoot Indian Tribe*—a case the Ninth Circuit decided on the same day as *Puyallup*. Petition for Writ of Certiorari, *Muckleshoot Indian Tribe v. Trans-Canada Enter., Ltd.*, 465 U.S. 1049 (1984). In its petition, Trans-Canada specifically asked the Court to determine that historical tribal dependence on fishing does not overcome the Equal Footing Doctrine's presumption. *Id.* at 12-15.

Furthermore, with respect to the *Namen* case, the State and Mr. Namen unsuccessfully sought *certiorari* and explicitly argued that the circuit court had relied on a prior decision involving Flathead Lake, *Montana Power Co. v. Rochester*, 127 F.2d 189 (9th Cir. 1942), that was irreconcilable with *Montana*. Petition for Writ of Certiorari at 16-19, *Namen v. Confederated Salish & Kootenai Tribes of Flathead Reservation*, 459 U.S. 977 (No. 82-22). The petitioners further argued that *Namen*'s result "would virtually eviscerate the Equal Footing Doctrine in most of our Western states." *Id.* at 19. The Court denied *certiorari*. *Polson v. Confederated Salish & Kootenai Tribes of Flathead Reservation*, 459 U.S. 977 (1982).

[167] 887 F.2d 190 (9th Cir. 1989).

[168] *Id.* at 195.

[169] *Id.*

[170] *Id.* (citing *Puyallup*, 717 F.2d at 1258 n.7).

[171] *Id.*

showing that the relevant treaty and secretarial order were "capable of being interpreted to include the possibility that tidelands at issue are 'within' the reservation boundaries."[172]

Ultimately, however, the Ninth Circuit in *Aam* held that title passed to the state at statehood. The court determined that the second *Puyallup* test—whether the tribe depended on the water resource for its survival—"requires that the disputed water resource supply a significant amount of the tribe's fishery needs."[173] The Ninth Circuit found that the Suquamish Tribe failed to satisfy this requirement because "the Suquamish Indians did not normally rely on shellfish and other resources gathered from the disputed tidelands, but instead relied on salmon, shellfish, and other food resources from traditional hunting, fishing, and food gathering locations away from the reservation."[174] Next, the court found that the Suquamish Tribe failed to satisfy the third *Puyallup* test—whether the government was plainly aware of the importance of the disputed water resource to the tribe—because, "[a]lthough it is true that the reservation was obviously designed to assure the Indians' access to the water, there was insufficient proof that the United States perceived that the tribe depended upon those particular tidelands for survival."[175] Although the facts satisfied the first *Puyallup* test, the Ninth Circuit determined that title passed to the state at statehood because the facts did not satisfy the second and third *Puyallup* tests.

As the above cases demonstrate, the presence of an intent to include lands beneath navigable waters in a reservation and the presence of an accompanying intent to defeat future state title to such lands are necessarily factual inquiries that turn on interpretation of both the controlling documents—here, the 1855 Treaty and 1874 Executive Order—as well as the historical circumstances surrounding entry into those agreements. Interpretation of treaties and agreements are at the heart of the canons, and nothing in recent Supreme Court precedent prohibits applying the canons in such an interpretation.[176] Thus, I will proceed within the framework of *Idaho*'s equal footing analysis with an eye toward the canons where interpretation of the treaty and executive order are necessary.

---

[172] *Id.* at 196.

[173] *Id.*

[174] *Id.* at 197.

[175] *Id.*

[176] The canons are rooted in otherwise standard common-law presumptions regarding treaties: "treaties are construed more liberally than private agreements, and to ascertain their meaning [courts] look beyond the written words to the history of the treaty, the negotiations, and the practical construction adopted by the parties." *E. Airlines, Inc. v. Floyd*, 499 U.S. 530, 535 (1991) (quoting *Choctaw Nation of Indians v. United States*, 318 U.S. 423, 431-32 (1943)); *see also Mille Lacs Band*, 526 U.S. at 198. Analogues to these rules exist in contract law and property law, which also favor a construction benefitting the Tribe. For example, contracts are to be construed against the drafter. *See, e.g., Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 62 (1995); Cole v. Burns Int'l Security Serv., 105 F.3d 1465, 1486 (D.C. Cir. 1997); RESTATEMENT (SECOND) OF CONTRACTS § 206. Here the drafter would be the United States. In property law, a deed is construed against the grantor. *See, e.g.*, New York Indians v. United States, 170 U.S. 1, 25-26 (1898). Applying these rules, the United States was the entity recognizing title in the Tribe.

III. ANALYSIS

A. The 1855 Treaty and 1874 Executive Order Reserved the Bed of the Skokomish River Along the Boundary of the Reservation such that Title to the Riverbed Did Not Pass to the State of Washington under the Equal Footing Doctrine

For the reasons that follow, I reaffirm the 1971 Memorandum's conclusion that "the entire width of the Skokomish River along the border of the Skokomish Reservation is a part of the [R]eservation."[177] I also adopt the 1971 Memorandum's analysis of the cases that preceded it. Accordingly, the discussion below focuses on more recent precedent, although some of the older cases are still discussed to the extent relevant to the instant analysis.

The Supreme Court in *Idaho* began with the recognition that the United States acquired title to the lands of the Oregon Territory, including those at issue here, through treaty with Great Britain[178] and subject to the aboriginal right of possession enjoyed by peoples already residing on that land.[179] The Court established a two-part inquiry to determine whether a federal reservation includes riverbed title and overcomes the presumption in favor of title passing to the State under the Equal Footing Doctrine: whether Congress intended to include submerged lands within a reservation and, if so, whether Congress intended to defeat state title (*e.g.*, by looking to whether the purpose of the reservation would be compromised if title passed to the state).[180] Where a federal reservation is created by executive order rather than by statute, this two-part test is satisfied if "the Executive reservation clearly includes submerged lands" and "Congress recognizes the reservation in a way that demonstrates an intent to defeat state title."[181] I find that the situation here meets this two-part test. Therefore, I conclude that the bed of the Skokomish River did not pass to the State of Washington upon its entry into the Union, but instead the United States continues to hold it in trust for the Tribe.

1. Intent to Include Riverbed in the Reservation

Here, because an Executive Order established the Reservation boundaries, the relevant question is whether the "Executive reservation clearly includes submerged lands."[182] Because the River does not run through the interior of the Reservation, but instead forms part of the Reservation's

---

[177] 1971 Memorandum, *supra* note 2, at 15. As discussed *supra* note 4, this Opinion addresses only ownership of the bed of the Skokomish River and does not address ownership of the tidelands at issue in *Skokomish Indian Tribe v. France*, 320 F.2d 205, 213 (1963).

[178] Treaty With Great Britain, In Regard to Limits Westward of the Rocky Mountains, U.S.-Gr. Brit., June 15, 1846, 9 Stat. 869.

[179] *Idaho v. United States*, 533 U.S. 262, 265 (2001).

[180] *Id.* at 272-73.

[181] *Id.*

[182] *Id.* at 273.

boundary, I will apply the three-part analytical framework established in *Puyallup* to determine whether the situation here satisfies the first prong of the *Idaho* test. *Puyallup*'s analytical framework requires demonstrating that: "(1) the reservation grant includes the navigable waters within its borders; (2) the tribe is dependent on the fishery resource in that water for survival; and (3) the government was plainly aware of the vital importance of the water resources to the tribe at the time of the grant."[183] Based on the following analysis, I find that the facts here satisfy both *Puyallup*'s three-part test and thus the first prong of the *Idaho* test.

a. Is the Skokomish River Within the Reservation Boundaries?

Satisfying the first prong of the *Puyallup* test requires finding that the River is within the Reservation.[184] As detailed below, the language of both the 1855 Treaty and the 1874 Executive Order is ambiguous with respect to whether the Reservation includes the River within its boundaries. The historical record, however, supports interpreting these documents to include the River within the Reservation boundaries.[185] The Indian canons of construction, although not essential for purposes of this analysis, further support this conclusion.

The Treaty reserved for the Tribe "six sections . . . situated at the head of Hood's Canal,"[186] but it did not clearly identify the specific land reserved. Instead, by ratifying the Treaty, Congress delegated to the executive the responsibility to "set apart, . . . survey[] and mark[] out" land for the exclusive use of the Tribes.[187] Congress also authorized the President to "remove [the Indians] from said reservation to such other suitable place or places within said Territory as he may deem fit" when necessary to promote the interests of the Territory and the welfare of the Indians.[188] This express grant of authority to the President indicates Congress' intent to defer to the President in setting the Reservation boundaries.

---

[183] *United States v. Aam*, 887 F.2d 190, 194 (9th Cir. 1989) (paraphrasing *Puyallup*'s three-part test).

[184] *Puyallup Indian Tribe v. Port of Tacoma*, 717 F.2d 1251, 1253 (9th Cir. 1983).

[185] When interpreting statutes or treaties, the first question is always "whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for . . . the agency[] must give effect to the unambiguously expressed intent of Congress." *Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842-43 (1984). If a statute is silent or ambiguous, then courts give deference to an agency's reasonable interpretation of statutory schemes under its administration. *Id.* Similarly, "[i]n light of an agency's presumed expertise in interpreting executive orders charged to its administration, [courts] review such agency interpretations with great deference." *Kester v. Campbell*, 652 F.2d 13, at 15 (9th Cir. 1981). *See also Udall v. Tallman*, 380 U.S. 1, 16-18 (1965) (deferring to agency interpretation of executive orders where the agency's interpretation is "not unreasonable" and "the language of the [executive] orders bears [the agency's] construction"). An agency's interpretation of an executive order is reasonable "unless it is plainly erroneous or inconsistent with the [order]." *Kester*, 652 F.2d at 16 (quoting *United States v. Larionoff*, 431 U.S. 864, 872 (1977)).

[186] 1855 Treaty, *supra* note 5, art. 2.

[187] *Id.*

[188] *Id.* art. 7.

The 1874 Executive Order placed the Reservation's southern and eastern boundary at "the mouth" of and "up the River."[189] These calls to natural monuments are ambiguous and leave unresolved, without more, whether "at the mouth" refers to the entire width of the river channel where it intersects the Hood Canal or whether "up the River" means up a particular bank, up the medial line, or something else. By itself, the boundary call "up the River" ordinarily means up the thread of the river or up a river's bank.[190] But here, the boundary call regarding the river follows "at the mouth," which potentially alters and determines the meaning of "up the river." As the Ninth Circuit noted, "the mouth of a stream cannot be ascertained with mathematical precision."[191] The ambiguity inherent in a boundary call beginning "at the mouth" renders "up the river" ambiguous. In order to resolve this ambiguity, it is necessary to look to the historical record to determine whether the President intended to include the River within the Reservation boundaries. As discussed immediately below, the historical record supports interpreting the Executive Order to include the River within the Reservation boundaries.

As noted above in Section I.D, the Treaty did not specify the Reservation's precise location, but the historical record demonstrates that the United States intended to locate the Reservation on six sections between the Forks.[192] In the years between Treaty ratification and issuance of the 1874 Executive Order that formally set the Reservation boundaries, it became apparent that the land between the Forks was not a suitable location for the Reservation.[193] The Tribe repeatedly reported to the Indian Agent that it was "dissatisfied" with the location because it was "densely timbered, and the Skokomish river so obstructed with drift wood" that it was difficult to reach.[194] The use of fishing weirs was impracticable because of obstructions in the River; farming was

---

[189] 1874 Executive Order, *supra* note 6.

[190] In the early years of the United States, the interpretation of boundary calls, such as "up the river," derived from the English common law. Pursuant to the English common law, ownership of riverbeds depended on whether the river was subject to the ebb and flow of the tides. Lord Chief Justice Hale, "De Jur Maris" in Hargrave, *A Collection of Tracts Relative to the Law of England* 5 (1787) ("Fresh rivers [not subject to the ebb and flow of the tides] of what kind soever, do of common right belong to the owners of the soil adjacent; so that the owners of one side have, of common right, the propriety of the soil . . . *usque filum aquae.* And if a man be owner of the land of both sides, in common presumption he is the owner of the whole river . . . ."). *See also Banks v. Ogden*, 69 U.S. (2 Wall.) 57, 68 (1864) ("[A] grant of land bordering on a road or river, carries to the center of the river or road, unless the terms or circumstances of the grant indicate a limitation of its extent by the exterior lines.").

[191] *Booth Fisheries Co. v. United States*, 6 F.2d 500, 501 (9th Cir. 1925). Contemporaneous dictionaries define "mouth" as "[t]he part or channel of a river by which its waters are discharged into the ocean or into a lake." *Mouth*, AN AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE 544 (Noah Webster ed.,1857); *Mouth*, 3 THE ROYAL DICTIONARY-CYCLOPÆDIA: FOR UNIVERSAL REFERENCE 1050 (Thomas Wright ed., Oxford Univ. 1862). This arguably weighs in favor of interpreting the Executive Order as including the entire mouth but, without more, is not determinative. The United States has offered various definitions of the word "mouth." For example, in *Johnson v. United States*, the Ninth Circuit quotes a Departmental regulation defining the mouth of salmon rivers in Alaska as "a line drawn between the extremities of its banks at mean low tide." 206 F.2d 806, 808-09 (9th Cir. 1953).

[192] *See supra* note 62.

[193] *See supra* Section I.E.

[194] *Id.* Agent Simmons made this report just months after Congress ratified the Treaty.

unreasonably difficult because the land was so densely timbered. Furthermore, the location did not include any of the Tribe's three known permanent weir sites on the River.[195]

In light of these problems with the location between the Forks, the Tribe requested that the Reservation be situated at the River's mouth. In 1858, during a meeting with an Indian Agent, a Snoqualmie Indian suggested that violence might ensue if the United States did not provide his tribe with a reservation "where there is plenty of deer and fish, and good land for potatoes."[196] The Indian Agent characterized the Skokomish Indians' concerns as substantively identical to those of the Snoqualmie Indians.[197] Accordingly, the Agent most likely understood the Skokomish Tribe also to require a Reservation that included both land—for hunting and agricultural purposes—and inland freshwater for salmon fishing purposes. As early as 1859, the Tribe asked the United States to locate its Reservation "at the junction of the Skokomish river and Hood's canal" rather than between the Forks.[198] The Tribe's proposed location at the River's mouth included two of the Tribe's three known fixed weir sites on the River in addition to several of their other traditional fishing sites, more than ten campsites, and several permanent village locations.[199] That the Tribe desired a reservation at the River's mouth and unfettered access to the River and riverbed because of the fishery resources located there could hardly have been clearer.

Similarly, settlers expressed their opposition to locating the Reservation between the Forks and urged the United States to establish the Reservation at the River's mouth.[200] As reported by a missionary residing among the Skokomish Indians, settlers worried that if the Reservation were located between the Forks, then conflicts with Indians would arise because Indians would frequently cross settlers' lands to access downstream fishing sites.[201] Accordingly, to reduce the likelihood of conflict, settlers asked the United States to locate the Reservation at the River's mouth.[202]

Finally, and perhaps most important for purposes of discerning executive and Congressional intent, executive branch officials repeatedly reported to Congress that the land between the Forks was not a suitable place to locate the Reservation and that the location at the River's mouth was far superior. An Indian Agent visited both sites—between the Forks and at the mouth—and

---

[195] *See* ELMENDORF, *supra* note 8, at 33-35.

[196] S. EXEC. DOC. NO. 35-1, pt. 1 at 581 (2nd Sess. 1858). During treaty negotiations, Skokomish Indians similarly informed executive branch officials that their "only food [was] berries, deer and salmon." Treaty Council Minutes, *supra* note 60, at 11.

[197] S. EXEC. DOC. NO. 35-1, pt. 1 at 581 (2nd Sess. 1858).

[198] S. EXEC. DOC. NO. 36-2, pt. 1, at 766 (1st Sess. 1860).

[199] ELMENDORF, *supra* note 8, at 33-35. The third known permanent weir site was located on the River's mainstem between the Forks and the Reservation boundary. *Id.* at 34-35.

[200] EELLS, *supra* note 39, at 36.

[201] *Id.*

[202] *Id.*

agreed with the Tribe that "[t]he land [at the mouth] is well adapted to the purpose [of the Reservation]"[203] and also that the land between the Forks was "not a convenient or suitable place to establish [the Reservation]."[204] Importantly, the Agent advised the President and Congress that the Skokomish Indians' success depended in part on their proximity to an "ample supply of salmon [for subsistence]."[205] The Tribe's use of weirs—that were affixed to the riverbed and stretched from bank-to-bank—was well known at the time, and the land between the Forks was not suitable for weir fishing because the River was difficult to reach and obstructed with driftwood.[206] Accordingly, the Agent recommended locating the Reservation at the River's mouth, as the Tribe requested,[207] because this location provided both fertile farmland and good opportunities for weir fishing.[208]

The President heeded the advice of the Indian Service and exercised his authority under the Treaty when he issued the 1874 Executive Order and set the Reservation boundaries.[209] Rather than locating the Reservation between the Forks, the President selected the land that the Tribe requested and that settlers recommended—at the junction of the Skokomish River and Hood Canal—as the Reservation's permanent location. The 1874 Executive Order placed the Reservation's southern and eastern boundary "at the mouth" of and "up the River."[210] In light of the above-described interactions between the Indian Service and the Tribe, it is reasonable to conclude that the President intended these ambiguous boundary calls to include the entire width of the River within the Reservation's boundaries. Moreover, it was necessary to reserve the entire width of the River to provide the Tribe direct access to an ample supply of salmon and the ability to conduct its traditional fishing methods that required use of the entire width of the River and riverbed. In addition, reservation of the entire width of the River would serve to reduce the likelihood of conflict between Indians and settlers by reducing, but not eliminating, the need for Indians to venture off-Reservation to engage in subsistence activities.

Importantly, the Treaty's reservation of off-Reservation fishing rights does not undermine the need to provide the Tribe with unfettered access to on-Reservation fishery resources. Like all other Stevens treaties, the Treaty reserved for the Tribe "[t]he right of taking fish at usual and accustomed grounds and stations" outside of the Reservation boundaries.[211] This is in addition to the exclusive right to take fish in rivers or streams running through or bordering

---

[203] S. EXEC. DOC. NO. 36-2, pt. 1, at 766 (1st Sess. 1860).

[204] S. EXEC. DOC. NO. 36-1, pt. 1, at 419 (2nd Sess. 1860).

[205] H.R. EXEC. DOC. NO. 37-1, pt. 2, at 449 (3rd Sess. 1862).

[206] S. EXEC. DOC. NO. 36-1, pt. 1, at 419 (2nd Sess. 1860).

[207] S. EXEC. DOC. NO. 36-2, pt. 1, at 766 (1st Sess. 1860).

[208] H.R. EXEC. DOC. NO. 37-1, pt. 2, at 534 (3rd Sess. 1862).

[209] 1874 Executive Order, *supra* note 6.

[210] *Id.*

[211] 1855 Treaty, art. IV, 12 Stat. 933, 934.

reservations.[212] Several courts have found that other tribes were granted lands underlying navigable water because of their reliance on the fisheries resource of that water, even though their respective treaties also reserved off-reservation fishing rights.[213] Similarly, here, although the Tribe reserved off-Reservation fishing rights, the United States' recognized the importance of locating the Reservation to include important fisheries notwithstanding the Tribe's right to fish off-Reservation.

The application of the Indian canons further supports this conclusion because at the time of the Executive Order the Tribe most likely understood the Reservation to include the entire width of the River. As the Ninth Circuit noted in *Aam*, "*Puyallup*'s first factor should be applied flexibly to fit the facts and circumstances of each given case."[214] Where the navigable waterway at issue forms the border of an Indian reservation, as it does here, it is appropriate to apply the Indian canons to determine whether the Tribe would have understood the Reservation to include the disputed waterway at the time of the Reservation's establishment.[215] Accordingly, even where the treaty does not mention the disputed waterway, application of the Indian canons supports the conclusion that the River is within the reservation boundaries if the tribe would have understood this to be so.[216]

As discussed above, in 1859, the Tribe identified land "at the junction of the Skokomish river and Hood's canal" as an ideal location for its Reservation.[217] This location, at the heart of the Skokomish Indians' aboriginal territory,[218] was profoundly significant to the Tribe because of the abundance of key fishing spots here. It included two of the Tribe's permanent weir sites, several other fishing sites, campsites, and at least two of the Tribe's villages.[219] Based on the nature of the Tribe's use of and reliance on the River, the Tribe likely would not have understood the

---

[212] Some Stevens treaties explicitly stated provided Tribes "[t]he exclusive right of taking fish in all streams, where running through or bordering [their] Reservation." Treaty between the United States and the Yakama Nation of Indians, U.S.-Yakama Nation, June 9, 1855, 12 Stat. 951, art. 3 (1859). The Treaty of Point No Point does not explicitly include the exclusive right. Nonetheless, the District Court for the Western District of Washington found that Stevens Treaty tribes implicitly reserved exclusive on-Reservation fishing rights even where the specific treaty at issue does not include this explicit language. *United States v. Washington*, 384 F. Supp. 312, 343 (W.D. Wash. 1974).

[213] *Compare, e.g., Confederated Salish & Kootenai Tribes v. Namen*, 665 F.2d 951, 960-62 (9th Cir. 1982) (Flathead Reservation includes submerged lands) *with* Treaty of Hell Gate, art. 3, 12 Stat. 975, 976 (1859) (providing for off-reservation fishing rights for Indians of the Flathead Reservation). *See also* Pacheco, *supra* note118, at 41 n.199.

[214] *United States v. Aam*, 887 F.2d 190, 196 (9th Cir. 1989).

[215] *Id.* at 195.

[216] *Id.* Conversely, where the operative document explicitly contradicts the Tribe's understandings, application of the Indian canons do not operate to defeat the document's plain meaning. *Oregon Dep't of Fish and Wildlife v. Klamath Indian Tribe*, 473 U.S. 753, 774 (1985).

[217] S. EXEC. DOC. NO. 36-2, pt. 1, at 766 (1st Sess. 1860).

[218] As noted previously, the Tribe's aboriginal territory encompassed the drainage area of Hood Canal and the Skokomish River, including land on both sides of the River and on both arms of the Canal. *See supra* Section I.A.

[219] ELMENDORF, *supra* note 8, at 33-35.

words "at the mouth" and "up the river" to include anything less than the entire width of the River—from bank-to-bank—within the Reservation boundaries. It is reasonable to conclude that when the Tribe requested a Reservation at the mouth of the River, it was not requesting a Reservation that would exclude such an important fishery resource from its boundaries. Absent plain language to the contrary, the Executive Order must be interpreted as the Tribe would have understood it;[220] that is, it must be interpreted to include the entire width of the River.

Finally, the Department's subsequent treatment of land at the mouth of the River lends further support to this conclusion. In the early 1900s, when the Reservation was allotted to individual Indians, the United States allotted lands within the Skokomish Flats between the midline and the ordinary high water mark on the right bank.[221] The Skokomish Flats is an approximately 1,000-acre estuary in the delta formed by the River's mouth and is arguably part of the River's mouth. In 1955, non-Indians acquired fee title to some of this allotted land.[222] The Tribe has since acquired a majority of this land.[223] Because the Skokomish Flats is arguably within the River's mouth, the Department's allotment of the Skokomish Flats supports the conclusion that the Executive Order includes the entire width of the river, bank-to-bank, within the Reservation boundary.

The historical record thus supports the conclusion that the President intended to include the entire width of the River within the Reservation boundaries. Furthermore, because the Tribe required a Reservation that provided plenty of fish, identified this location as ideal for its Reservation, relied on the River for its livelihood, and utilized fishing techniques that required use of the entire width of the River, the Tribe most likely understood the Reservation to include the entire width of the River at the time of the Executive Order. Accordingly, I find that the River is within the Reservation boundaries and, therefore, the facts here satisfy the first prong of the *Puyallup* test.

Having determined that the Executive Order includes the River within the Reservation boundaries, one outstanding issue that must be addressed pertains to contemporaneous surveys of the Reservation. The United States first surveyed lands in the Washington Territory that would become the Reservation in 1861[224] and surveyed the Reservation as a subdivision in 1873.[225] A

---

[220] *Choctaw Nation v. Oklahoma*, 397 U.S. 620, 631 (1970); *see also Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 196 (1999) ("[W]e interpret Indian treaties to give effect to the terms as the Indians themselves would have understood them."); *United States v. Winans*, 198 U.S. 371, 380-81 (1905) (noting among other things that treaties are not a grant of rights *to* the Indians, but *from* them).

[221] *See generally* Patent issued to James Pulsifer (May 6, 1907); Patent issued to Dick Tyee (Apr. 16, 1920). The Skokomish Flats sometimes appear to be islands on contemporary maps of the Reservation, at the mouth of the River between the midline and the right bank.

[222] *See generally* Patent issued to James Nalley (July 27, 1955).

[223] The Tribe now owns a vast majority of land within the Skokomish Flats. The State of Washington uses at least one parcel in the Skokomish Flats. The Tribe agreed to the use of that parcel for power transmission facilities in the settlement of litigation brought by the Tribe regarding FERC licensing at Cushman Dam. That litigation and settlement is beyond the scope of this opinion.

[224] 1861 Survey, *supra* note 91, included with this opinion as Attachment 4.

diagram was prepared in 1874, based on existing surveys including the 1873 subdivision, to reflect the Reservation's general location.[226] The 1873 survey meanders the left bank of the Skokomish River, but makes no reference to the River's right bank, and neither meanders nor surveys lands located on that right (or opposite) bank. That neither the 1873 survey, nor the 1874 diagram drew the Reservation's southern and eastern boundary on the River's right bank so as to include clearly the entire width of the River within the Reservation is not determinative. Importantly, as a matter of law, meander lines are not legal boundaries defining the ownership of lands adjacent to the water; they merely depict the sinuosities of a waterway.[227] Furthermore, a survey cannot divest a Tribe of submerged land reserved for its exclusive use.[228]

In *Northern Pacific Railway Company v. United States*, the Supreme Court determined that an erroneous survey did not divest the Yakama Nation of title to land reserved by it through a treaty with the United States.[229] Similarly, in *United States v. Romaine*, the Ninth Circuit addressed whether certain tidelands were within the boundaries of the Lummi Indian Reservation even though those tidelands were not included within the Reservation on the government survey of that reservation. As the Ninth Circuit aptly found:

> The power to survey the lands so reserved in the treaty was the power to cause the whole or any portion of the reserved lands to be surveyed into lots, and to assign the same to individuals or families for permanent homes. The land in controversy was not adapted to such individual use, and there was no occasion to survey it, or to take from the Indians on the reservation the common right to use it for the purposes of fishing and digging shellfish, or other purposes, and the surveyor general, in causing the survey to be made, had no authority to exclude any of the reserved lands from the boundaries of the reservation. The error in failing to extend the survey so as to include the lands in controversy cannot prejudice the rights of the Indians.[230]

---

[225] 1873 Survey, *supra* note 102, included with this opinion as Attachment 5.

[226] 1874 Diagram, *supra* note 105, included with this opinion as Attachment 6.

[227] *United States v. Lane*, 260 U.S. 662, 664-67 (1923); *Jeems Bayou Fishing & Hunting Club v. United States*, 260 U.S. 561, 564 (1923); *Meander Line*, BLACK'S LAW DICTIONARY (8th ed. 2004) ("A survey line (not a boundary line) on a portion of land, usu[ally] following the course of a river or stream.").

[228] *See Sekaquaptewa v. McDonald*, 626 F.2d 113, 118 (9th Cir. 1980) (erroneous survey does not alter boundaries of an Indian reservation); *United States v. Romaine*, 255 F. 253, 260 (9th Cir. 1919) (survey does not prejudice the rights of the Indians); *N. Pac. Ry. Co. v. United States*, 191 F. 947, 958 (9th Cir. 1911) (erroneous survey did not diminish Yakama Reservation), *aff'd*, 227 U.S. 355 (1913). *See also* Pacheco, *supra* note118, at 39-40.

[229] 227 U.S. 355, 366-67 (1913) ("It must be borne in mind that the Indians had the primary right. The rights the Government has are derived through the cession from the Indians. If the Government may control the cession and control the survey and by the action of its agents foreclose inquiry or determine it, an easy means of rapacity is afforded, much quieter but as effectual as fraud.")

[230] 255 F. 253, 260 (9th Cir. 1919). *See also Moss v. Ramey*, 239 U.S. 538 (1916) (that a surveyor fails to survey an island does not make that island any less a part of the public domain).

Like the treaty at issue in *Romaine*, the Treaty of Point No Point contemplated the allotment of the Reservation.[231] Thus, the surveyors "subdivide[d] the arable lands within the limits of the [] Reservation[] into forty acre tracts,"[232] consistent with instructions from the Surveyor General's Office.[233] Accordingly, it was reasonable for the surveyor not to include the River as within the Reservation boundary because submerged lands are "not adapted to such individual use."[234] By surveying land adjacent to the River's left bank, but not extending the survey to the River's right bank, the surveyor included only that land suitable for allotment consistent with contemporaneous surveying practices.[235] As in *Romaine*, the surveyor's failure to survey the River as within the Reservation boundary "cannot prejudice the rights of the Indians."

Admittedly, the facts in *Romaine* are distinguishable from those here.[236] Specifically, the executive order establishing the Lummi Indian Reservation unambiguously included within that reservation submerged land to "low-water mark" along a navigable waterway.[237] Although the Treaty of Point No Point and the 1874 Executive Order are ambiguous with respect to the precise location of the Reservation boundary, the historical record discussed above supports reading the Executive Order to allow for inclusion of the River. The Ninth Circuit did not suggest that the power to survey is any more expansive in instances where the relevant documents, be they

---

[231] 1855 Treaty, art. VII (The president may "cause the whole or any portion of the lands hereby reserved, or of such other land as may be selected in lieu thereof, to be surveyed into lots, and assign the same to such individuals or families as are willing to avail themselves of the privilege, and will locate thereon as a permanent home[.]")

[232] Surveyor General's Office, Olympia, Washington Territory, Contract and Bond No. 174 (Aug. 16, 1873).

[233] Special Instructions from the Surveyor General's Office to Surveyor Reed (Aug. 16, 1873).

[234] *Romaine*, 255 F. at 260. Allotments adjacent to navigable waterways typically do not convey below the ordinary high water mark. *See generally Puyallup Indian Tribe*, 717 F.2d 1251, 1261 (9th Cir. 1983) (citing *Montana Power Co. v. Rochester*, 127 F.2d 189 (9th Cir. 1942) for proposition that "grants of property bounded by a navigable river are deemed to be bounded by the ordinary high water mark of that river" in context of allotment patents made by the United States where court first determined the riverbed had been conveyed to tribe).

[235] *See* Instructions To the Surveyors General of Public Lands Of The United States (1855) *available at* http://www.glorecords.blm.gov/reference/manuals/1855_manual.pdf.

[236] In *Skokomish Indian Tribe v. France*, discussed *infra* Section III.B, the Ninth Circuit noted that in both *Northern Pacific Railway Company* and *Romaine*, "surveys were found to be inconsistent with the understanding of the parties to the treaties and [] the applicable documents contained language supporting the boundary claims of the Indians. The documents and historical background materials in this case do not manifest an intention of the treaty makers to include the tidelands in the Skokomish Reservation." 320 F.2d 205, 213 (9th Cir. 1962). The court's conclusion that the treaty makers did not intend to include the tidelands within the Reservation turned entirely on the Tribe's dependence on the River. *Id.* at 211.

[237] *Romaine*, 255 F. at 259-60.

treaties or executive orders, are silent or ambiguous.[238] Such a conclusion would not withstand scrutiny in light of the Indian canons of construction, discussed above in Section II.A.[239]

Based on the foregoing, it is reasonable to conclude that the Executive Order includes the entire width of the River within the Reservation boundary. Below, I conclude that the Reservation also includes the submerged lands and ultimately find that the riverbed was reserved for the Tribe such that title did not pass to the State. This determination is consistent with the current Interior policy regarding both surveying of Indian reservations and also interpreting pre-statehood grants of real property to Indian tribes, as reflected in the Manual of Surveying Instructions.[240]

b. Was the Tribe Dependent on the River?

The *Puyallup* test's second prong asks whether the Tribe depended upon the disputed waterway for its survival.[241] Similarly, in *Idaho*, the Supreme Court found that the Coeur D'Alene Tribe's well-established reliance on submerged land for fishing and other purposes supported finding that Congress intended to reserve the submerged land for the Tribe.[242] The Court noted that the Coeur D'Alene Tribe "depended on submerged lands for everything from water potatoes harvested from the lake to fish weirs and traps anchored in riverbeds and banks."[243]

As discussed above in Sections I.B and III.A.1.a, the historical record overwhelmingly demonstrates that the Skokomish Tribe relied on the entire width of the River, as well as the bed,

---

[238] In *United States v. Stotts*, after analyzing the same treaty and executive order considered in *Romaine*, the district court stated that, "[t]he right of the Indians to the lands of the reservation was a common right, and the allotment of a part of the reservation to some Indians does not destroy the common right to the enjoyment of the unallotted portion for any use to which it was adapted. And the fact that the survey did not include the tidelands cannot prejudice the rights of the Indians." 49 F.2d 619, 620 (W.D. Wash. 1930).

[239] *See also N. Pac. Ry. Co.*, 227 U.S. at 366-67.

[240] The Bureau of Land Management's 2009 Manual of Surveying Instructions provides specific instructions with respect to surveying Indian reservations where a grant includes a navigable river within the Reservation's boundaries:

> [N]early all surveys and resurveys enclosing or abutting the beds of navigable waters shall segregate those beds from the Federal interest lands. . . . The principal exception to this rule occurs along the boundary of some Federal Reservations and Indian Reservations where the beds or portions of the beds of navigable waters are included within the reservation boundary as described by an act of Congress, treaty, Executive order, or where specified in binding litigation. *Where a prestatehood grant of real property to an Indian tribe includes navigable waters within the grant boundaries and the grant is construed to include the submerged lands, title to the bed was granted to the Tribe.*

UNITED STATES BUREAU OF LAND MANAGEMENT, MANUAL OF SURVEYING INSTRUCTIONS 190-91 (2009), *available at* http://www.blm.gov/pgdata/content/wo/en/prog/more/cadastralsurvey/2009_edition.html.

[241] *Puyallup Indian Tribe v. Port of Tacoma*, 717 F.2d 1251, 1253 (9th Cir. 1983).

[242] *Idaho v. United States*, 533 U.S. 262, 274 (2001).

[243] *Id.* at 265.

and its resources for its survival. Salmon from the River was the Tribe's primary food source and weir fishing was central to the Tribe's way of life. Ethnographer Elmendorf observed:

> The most important source of food for all Twana [including Skokomish] was Pacific salmon[.] . . . The bulk of the salmon catch was made in rivers, with weirs, dip nets, and harpoons, during late-summer and fall runs. Salt-water trolling and netting was of minor importance, in particular to the Skokomish with their large river runs.[244]

In proceedings before the Indian Claims Commission, the Commission similarly found that the Tribe's "dependence upon a fish eating economy [was its] prime means of subsistence."[245] And, as discussed more below in Section III.B, in *Skokomish Indian Tribe v. France*, "[t]he dispositive factor in construing the [1874] Executive Order to exclude a grant of the tidelands was the fact that the Tribe did not rely on the particular tidelands included in the reservation as an important food source" but instead primarily relied upon the Skokomish River's fisheries.[246] Weir fishing on the River allowed the Tribe to accumulate significant surpluses,[247] and preservation techniques allowed storage for winter use.[248] These surpluses led to trade and further wealth accumulation.[249] Weir fishing and the surpluses it produced led the Tribe to organize around the weirs, developing large settlements and a social structure that allowed it to build, operate, and preserve the catch.[250] Weir fishing was so much more than a fishing method, it was an activity that defined every aspect of life for Skokomish Indians.

Based on this analysis and on the additional facts discussed above in Section I of this Opinion, I find that the Tribe depended on the River for its livelihood, and therefore the second prong of the *Puyallup* test is satisfied.

c. *Was the Government Plainly Aware of the Importance of the River to the Tribe?*

The third prong of the *Puyallup* test asks whether the "government was plainly aware of the vital importance of the water resources to the tribe at the time of the grant."[251] The historical record shows that the United States—including both the executive branch and Congress—was plainly

---

[244] ELMENDORF, *supra* note 8, at 57.

[245] *Skokomish Tribe of Indians v. United States*, 6 Ind. Cl. Comm'n 135, 142 (1958).

[246] *Puyallup Indian Tribe v. Port of Tacoma*, 717 F.2d 1251, 1258 (9th Cir. 1983) (citing *Skokomish Indian Tribe*, 320 F.2d at 210-11).

[247] *United States v. Washington*, 384 F. Supp. 312, 377 (W.D. Wash. 1974).

[248] ELMENDORF, *supra* note 8, at 57.

[249] George Gibbs, *Tribes of Western Washington and Northwest Oregon, in* 1 CONTRIBUTIONS TO NORTH AMERICAN ETHNOLOGY 157, 170 (1877).

[250] *See* Bruce G. Miller and Daniel Boxberger, *Creating Chiefdoms: The Puget Sound Case, in* 41 Ethnohistory 270 (Spr. 1994).

[251] *United States v. Aam*, 887 F.2d 190, 194 (9th Cir. 1989) (paraphrasing *Puyallup*'s three-part test).

aware of the Tribe's dependence on the River for its livelihood. Specifically, treaty council minutes and Indian Service reports document the treaty negotiators' and Indian Agents' knowledge and appreciation of the Tribe's dependence on the River. Annual Reports of the President to Congress alerted Congress to the Tribe's dependence on the River for its survival.

During the first day of treaty negotiations, a Skokomish Indian expressed hesitance to move upstream, away from the Tribe's most productive fishing spots:

> I wish to speak my mind as to selling the land. Great Chief! What shall we eat if we do so? Our only food is berries, deer and salmon – where then shall we find these? . . . I am afraid that I shall become destitute and perish for want of food. I don't like the place you have shown for us to live on.[252]

Governor Stevens returned the next day and assured the Indians that the treaty protected the Indian's ability to fish: "This paper secures your fish? Does not a father give food to his children?"[253] Statements such as this one show that the United States knew that the Tribe depended upon the River's fisheries for its survival.

After signing the Treaty, Skokomish Indians repeatedly informed Indian Agents that they wanted their Reservation to be located where they could continue their traditional subsistence practices. In 1858, when Agent Simmons met with Indians in the Puget Sound District to "listen to their grievances and remedy them if possible," the Indians there—including Skokomish Indians—expressed a strong desire that the United States situate their reservations to include important fishery resources within their boundaries.[254] At this meeting, a Skokomish Indian complained that they were "afraid to plant potatoes on the river bottoms, lest some bad white man should come and make us leave the place."[255] Later, in 1859, the Tribe expressed continued dissatisfaction with the location between the Forks and instead requested a reservation "at the junction of the Skokomish river and Hood's canal."[256] After examining both locations, the Indian Agent agreed that the location at the River's mouth was the preferred option because "[t]he opportunities for fishing [were] good" there and the Indians' success depended, in large part, on their proximity to an "ample supply of salmon."[257]

In 1861, the Indian Office established the Skokomish Indian Agency near the mouth of the River.[258] After an Indian Agent reported that the land at the River's mouth was not a suitable place for constructing buildings because of its susceptibility to flooding, the Superintendent of

---

[252] Treaty Council Minutes, *supra* note 60, at 11.

[253] *Id.* at 13-14.

[254] S. EXEC. DOC. NO. 35-1, pt. 1 at 580-81 (2nd Sess. 1858).

[255] *Id.* at 582.

[256] S. EXEC. DOC. NO. 36-2, pt. 1, at 766 (1st Sess. 1860).

[257] H.R. EXEC. DOC. NO. 37-1, pt. 2, at 534 (3rd Sess. 1862).

[258] S. EXEC. DOC. NO. 37-1, pt. 1, at 789 (2nd Sess. 1861).

Indian Affairs, Washington Territory, visited the newly established Agency to address the Indians' need for additional land.[259] The Superintendent's remarks show that he understood direct access to the River to be an essential feature of this Reservation:

> Owing to the inclement state of the weather at the time of my visit, I was unable to make such an examination of the lands adjacent as to enable me to say which side of the canal I would recommend to be included with the river bottom in order to obtain safe and comfortable sites for buildings.[260]

Stated differently, in order to provide the Tribe with higher ground on which to construct buildings, the Superintendent did not consider moving the Tribe away from the River. Instead, the Superintendent only considered adding to the Reservation additional, higher land on either side of the River.

In sum, the historical records demonstrate that the United States was aware of the importance of the River to the Tribe, and therefore I find that these facts satisfy the third prong of the *Puyallup* three-part test. Having satisfied *Puyallup*'s three-part test, the first prong of the *Idaho* test is also satisfied.[261]

2. *Intent to Defeat State Title*

The next question is whether Congress intended to defeat Washington's title to the submerged lands reserved for the Tribe. When a Reservation is established by Executive Order, the second prong of the *Idaho* test is satisfied if "Congress recognizes the reservation in a way that demonstrates an intent to defeat state title" (*e.g.*, whether the purpose of the reservation would be compromised if title passed to the State).[262] The 1874 Executive Order put Congress on notice as to the extent of the Reservation prior to Washington's admission to the Union, which admission was accompanied by a general disclaimer of all Indian lands.[263] Furthermore, two key purposes of the Reservation—providing a tribal homeland with the necessary resources for the Tribe's livelihood and addressing tensions caused by the influx of settlers—would have been defeated had Congress passed title to the State.

Washington became a state in 1889,[264] thirty years after Congress ratified the Treaty and fifteen years after the 1874 Executive Order established the Reservation's boundaries. The Act of February 22, 1889, required the government of the newly formed State to adopt a constitution

---

[259] *Id.*

[260] H.R. EXEC. DOC. NO. 37-1, pt. 2, at 449 (3rd Sess. 1862).

[261] *See supra* note 166.

[262] *Idaho v. United States*, 533 U.S. 262, 272-73 (2001).

[263] *See id.* at 273.

[264] Act of Feb. 22, 1889, ch. 180, 25 Stat. 676.

and to include in it a disclaimer of all Indian lands within the state boundaries.[265] The Idaho Constitution contained a similar disclaimer and the Court in *Idaho* noted this fact.[266] As demonstrated above through application of the *Puyallup* analytical framework, the Executive Order included within the Reservation boundaries the submerged lands at issue here. The President's issuance of the Executive Order before Washington statehood placed Congress and the State on notice that the stretch of the River along the southern and eastern boundary of the Reservation was included within the Reservation and, once on notice, the disclaimer in the state constitution prevented passage of title to the State.[267]

Perhaps more important, the Court in *Idaho* placed great emphasis on "whether the purpose of the reservation would have been compromised if the submerged lands had passed to the State."[268] As the Court explained, "[w]here the purpose [of a treaty] would have been undermined . . . 'it is simply not plausible that the United States sought to reserve only the upland portions [of a river].'"[269] Congress's awareness of "the vital importance of the submerged lands and the water resource to the tribe at the time of the grant" leads to the conclusion that Congress intended to defeat state title.[270] Support for this conclusion is found in the fact that the riverbed title was a component critical to achieving two key goals in negotiating the Treaty and creating the Reservation: providing a tribal homeland with the necessary

---

[265] *Id.* § 4: "That the people inhabiting said proposed States do agree and declare that they forever disclaim all right and title . . . to all lands lying within said limits owned or held by any Indian or Indian tribes." Several pre-*Montana* decisions by federal and state courts in Washington State found that the disclaimer prevented certain submerged lands from passing to the State at statehood. *See, e.g.*, *Corrigan v. Brown*, 169 F. 477 (C.C.W.D. Wash. 1907) (tidelands within Swinomish Reservation did not pass to State); *United States v. O'Brien*, 170 F. 508 (C.C.W.D. Wash. 1904) (title to beach and shore on Squaxon Island did not pass to State where such were "held and claimed" by Indians at time of statehood); *State v. Edwards*, 188 Wash. 467 (1936) (Swinomish Reservation); *Pioneer Packing Co v. Winslow*, 159 Wash. 655 (1930) (Quinault Indians); *Jones v. Callvert*, 32 Wash. 610 (1903) (State did not receive title to submerged lands within Tulalip Reservation). *See also* Pacheco, *supra* note 118, at 20-22.

[266] *Idaho*, 533 U.S. at 270 (citing Idaho Const. art. XXI, § 19); *see also Alaska v. United States*, 545 U.S. 75, 110 (2005); *United States v. Milner*, 583 F.3d 1174, 1185-86 (9th Cir. 2009) (holding that general disclaimers of title to Indian lands, like the one made in connection with Idaho's admission, were sufficient to evidence Congressional intent to defeat a state claim to the bed of a navigable river). In *Milner*, the Court found that the Lummi Tribe held title to certain tidelands based on a reservation created by a treaty and subsequent Executive Order. The Ninth Circuit noted that the Executive Order finalizing the reservation boundary expressly extended it to the low-water mark. 583 F.3d at 1185. The Executive Order satisfied the congressional intent prong of the *Idaho* two-step test because it put Congress on notice as to the extent of the reservation prior to Washington's admission into the Union, which admission was accompanied by a general disclaimer of all Indian lands. *Id.*

[267] *See* 533 U.S. at 270. Although the Court in *Montana* made no mention of nearly identical language in the Montana enabling act and state constitution, Act of Feb. 22, 1889, 25 Stat. 676, 677; Mont. Const. art. I, that omission is not surprising because the Court there found that Congress had not intended to reserve the bed for the tribe. 450 U.S. at 554. Without a reservation of land prior to statehood (per the *Idaho* first step), there was no Indian-held land to disclaim. In other words, the disclaimer is relevant to *Idaho*'s second step, and the *Montana* Court had no reason to reach that inquiry.

[268] *Idaho*, 533 U.S. at 274.

[269] *Id.* (citing *United States v. Alaska*, 521 U.S. 1, 39-40 (1997)).

[270] *Puyallup Indian Tribe v. Port of Tacoma*, 717 F.2d 1251, 1258 (9th Cir. 1983). *See also Muckleshoot Indian Tribe v. Trans-Canada Enter., Ltd.*, 713 F.2d 455, 457 (9th Cir. 1983).

resources for the Tribe's livelihood and addressing tensions caused by the influx of settlers.[271] If Congress had reserved and then conveyed title to the bed and banks of the River to the State, it would have undermined both goals.

With respect to the first goal, the historical evidence shows that tribal representatives and government negotiators understood that fish were a key resource to the Tribe and that the Tribe relied on a highly-developed form of fishing that used weirs, dams and dip net platforms, and other methods that utilized structures affixed to the riverbed.[272] The Tribe traditionally exercised extensive control over the River in order to ensure the return of the salmon.[273] In proceedings before the Indian Claims Commission, the Commission found that the Tribe's "dependence upon a fish eating economy [was its] prime means of subsistence."[274] During Treaty negotiations, many Indians expressed deep concern about their ability to continue fishing if they agreed to cede large portions of their aboriginal territory.[275] Several Indians expressed great dissatisfaction with moving away from the mouth of the River.[276] After Treaty negotiations but before issuance of the 1874 Executive Order, the Tribe requested a reservation "where there is plenty of deer and fish, and good land for potatoes,"[277] and specifically identified "the junction of the Skokomish river and Hood's canal"[278] as an ideal location for its Reservation. The Superintendent agreed that this location at the River's mouth was an appropriate place for the Reservation because it provided direct access to an "ample supply of salmon" upon which the Indians depended for their subsistence and success.[279] Accordingly, it was necessary for the Reservation to include within its boundaries this important fishery resource; access to off-Reservation usual and

---

[271] Although so-called "Stevens treaty" rights to fish off-Reservation at "usual and accustomed grounds and stations . . . , in common with all citizens of the United States" are immensely important, the United States and many tribes quickly learned that such guarantees oftentimes were inadequate to satisfy the tribes' subsistence needs where Indian reservations did not include significant fishery resources within their boundaries. For example, although the Treaty of Medicine Creek guaranteed the Puyallup Tribe the right to fish at usual and accustomed grounds and stations, President Grant enlarged the Puyallup Indian Reservation by executive order to include within its boundaries vital tidelands. Executive Order (Sep. 6, 1873), *reprinted in* EXECUTIVE ORDERS RELATING TO INDIAN RESERVES, FROM MAY 14, 1855, TO JULY 1, 1902, at 133 (1902); *see also Puyallup Indian Tribe*, 717 F.2d 1251. Similarly, President Grant established the Muckleshoot Reservation, to include within its boundaries fishery resources that were important to the Muckleshoot Tribe. Executive Order (Apr. 9, 1874) *reprinted in* EXECUTIVE ORDERS RELATING TO INDIAN RESERVES, FROM MAY 14, 1855, TO JULY 1, 1902, at 128 (1902); *see also Muckleshoot Indian Tribe*, 713 F.2d at 458. Accordingly, in such instances, in order to accomplish the purposes of the reservations, it was necessary for Indian reservations to include fishery resources within their boundaries in addition to the treaty-protected right to fish at usual and accustomed grounds off-Reservation.

[272] *See, e.g., supra* Section I.B.

[273] ELMENDORF, *supra* note 8, at 62-73.

[274] *Skokomish Tribe of Indians v. United States*, 6 Ind. Cl. Comm'n 135, 142 (1958).

[275] Treaty Council Minutes, *supra* note 60, at 11-14.

[276] *Id.*

[277] S. EXEC. DOC. NO. 35-1, pt. 1 at 581-82 (2nd Sess. 1858).

[278] S. EXEC. DOC. NO. 36-2, pt. 1, at 766 (1st Sess. 1860).

[279] H.R. EXEC. DOC. NO. 37-1, pt. 2, at 449 (3rd Sess. 1862).

accustomed fishing grounds alone likely would have been insufficient to satisfy the Tribe's needs. Had Congress passed title to the State, it would have defeated the first goal of the Treaty by jeopardizing the Tribe's ability to continue their traditional lifestyle, which included reliance on fishery resources and use of the entire width of the River and its bed.

The importance of the River to the Tribe is directly relevant to the second goal of the Treaty and Executive Order: to address tensions caused by the influx of settlers. The Reservation was intended to secure for the Skokomish Indians a place where they could establish homes and farms and continue their traditional ways of life without being further displaced by settlers.[280] It was clear during and after the negotiations that the Indians were concerned about the steady influx of settlers into their aboriginal territories and their continued ability to access the River during ever-important salmon runs.[281] Tensions between Indians and settlers increased as time passed, settlement increased, and the United States delayed fixing the Reservation boundaries. The Tribe repeatedly asked that the Reservation boundaries be set because they were afraid of establishing their homes and commencing farming only to have settlers displace them. Similarly, settlers opposed locating the Reservation between the Forks because they feared conflict with Indians traveling between the Forks and their usual fishing spots on the River's main stem near its mouth.[282] In response to the Tribe's request and the settlers' concerns, and in order to reduce the likelihood of conflict between them, the Office of Indian Affairs repeatedly recommended that the Reservation be located on Hood Canal at the River's mouth.

As discussed above, during Treaty negotiations, the United States proposed locating the Reservation between the Forks.[283] In ratifying the Treaty, however, "Congress gave the President the discretionary power to alter the boundaries of the reservation"[284]:

> The President may hereafter, when in his opinion the interests of the Territory shall require, and the welfare of said Indians be promoted, remove them from said reservation to such other suitable place or places within the Territory as he may deem fit.[285]

In 1874, when the President set the Reservation boundaries, he exercised his discretionary authority to relocate the Reservation from the proposed site between the Forks to the current location at the River's mouth. The Annual Reports of the President demonstrate that the executive branch was well aware of the significant potential for conflict if the Reservation did

---

[280] 1855 Treaty, *supra* note 5. *See also* S. Exec. Doc. No. 36-1, at 419 (2nd Sess. 1850).

[281] *See, e.g.*, *supra* Sections I.C.-E.

[282] EELLS, *supra* note 39, at 36.

[283] NW. ARCHAEOLOGICAL ASSOC., *supra* note 7, at 18-19. *See also* S. EXEC. DOC. NO. 36-2, pt. 1, at 766 (1st Sess. 1860); S. EXEC. DOC. NO. 36-1, pt. 1, at 419 (2nd Sess. 1860).

[284] *United States v. Milner*, 583 F.3d 1174, 1185 (9th Cir. 2009).

[285] 1855 Treaty, *supra* note 5, art. 7.

not provide direct access to the Tribe's fishing spots.[286] Similarly, settlers communicated to the United States their preference that the Reservation be located at the River's mouth rather than between the Forks so as to reduce the likelihood of conflict between Indians and settlers when the Indians would inevitably travel from the Forks to downstream fishing places.[287] Presumably in light of the increasing tension between the Indians and settlers, President Grant took action to resolve the controversy. The President's determination to establish the Reservation at the mouth of the River, rather than between the Forks, would ensure the survival of the Indians as well as reduce the likelihood of conflict by providing the Tribe direct access to, and control over, the River while also eliminating the Indians' need to cross over settlers' property to access this important site. By so doing, the President promoted the "interests of the Territory" and the "welfare of said Indians."

During this period, President Grant issued several executive orders expanding or relocating other northwest Indian reservations to provide direct access to water resources that were important to the respective tribes.[288] For example, on September 6, 1873, the President issued an executive order enlarging the Puyallup Indian Reservation to provide the Puyallup Tribe "a mile of water frontage directly north of Puyallup River and free access to the waters of Commencement Bay."[289] Then on April 9, 1874, in order to provide Muckleshoot Indians direct access to traditionally important fisheries, the President issued an executive order establishing the Muckleshoot Indian Reservation on parcels including portions of the White River.[290] These actions by the President demonstrate a concerted effort to resolve or prevent conflict between Indians and settlers stemming from the Indians' insistence on having direct access to traditionally important waterways. Decisions of the Ninth Circuit have confirmed that the

---

[286] *See, e.g., supra* Sections I.D.-E.; H.R. MISC. DOC. NO. 33-38, at 2-3, 11 (1st Sess. 1854).

[287] EELLS, *supra* note 39, at 36.

[288] In 1859, after recommending that the Skokomish Reservation be located at the River's mouth, Simmons recommended modifications to the boundaries of several other Indian reservations in order to provide the affected Indians unrestricted access to important fishing places:

> I shall also recommend that the Calallams, living on the Straits of Fuca, be allowed a reserve at Calallam bay. My reasons are, that their habits of life will have to change if they are moved up into narrow waters; and I will further recommend that the reserve for the Suquamish and Dwamish tribes, as specified in the treaty of Point Elliott, have its lines so changed as to take in some productive land and an excellent salmon stream that is adjacent.

S. EXEC. DOC. NO. 36-2, pt. 1, at 766 (1st Sess. 1860).

[289] Letter from H. R. Clum, Acting Comm'r of Indian Affairs, to W. H. Smith, Acting Sec'y, Dep't of the Interior (Aug. 26, 1873), *reprinted in* EXECUTIVE ORDERS RELATING TO INDIAN RESERVES, FROM MAY 14, 1855, TO JULY 1, 1902, at 132. *See also* Executive Order (Sep. 6, 1873), *reprinted in* EXECUTIVE ORDERS RELATING TO INDIAN RESERVES, FROM MAY 14, 1855, TO JULY 1, 1902, at 133 (1902); *Puyallup Indian Tribe v. Port of Tacoma*, 717 F.2d 1251 (9th Cir. 1983).

[290] *See Muckleshoot Indian Tribe v. Trans-Canada Enter., Ltd.*, 713 F.2d 455, 458 (9th Cir. 1983) (reservation enlarged to include Tribe's fisheries). Before issuance of this Executive Order, the Muckleshoot Tribe had been located on the Puyallup Reservation. This location was ultimately unsatisfactory because it did not provide the Muckleshoot Tribe direct access to its traditional fisheries. *Id. See also* Executive Order (Apr. 9, 1874) *reprinted in* EXECUTIVE ORDERS RELATING TO INDIAN RESERVES, FROM MAY 14, 1855, TO JULY 1, 1902, at 128 (1902).

United States holds in trust for the benefit of the Puyallup and Muckleshoot Tribes title to the submerged land at issue in these executive orders.[291]

In light of the preceding discussion, it is reasonable to conclude that when establishing the boundaries of the Skokomish Reservation, President Grant proactively located the Reservation adjacent to several of the Tribe's traditional fishing spots and permanent villages to reduce the likelihood of both conflict between the Tribe and settlers in the area and any future need to relocate the Reservation. The Office of Indian Affairs understood that locating the Reservation at the River's mouth was necessary to provide the Tribe direct access to and control over the River, and the Office communicated that to Congress several times. Had Congress passed title to the State upon statehood, Congress would have undermined its own purposes in establishing the Reservation.

In sum, I find the Executive Order included within the Reservation the submerged lands at issue here and that Congress recognized the reservation in such a way as to demonstrate an intent to defeat future state title. Any other conclusion would contradict key purposes of the 1855 Treaty. Accordingly, title to the Skokomish riverbed within the Reservation did not pass to the State of Washington upon its admittance to the Union. Instead, the United States holds in trust for the benefit of the Tribe title to the bed of the River where the River forms the Reservation's southern and eastern boundary.

B. This Determination is Consistent With the Ninth Circuit's Decision in *Skokomish Indian Tribe v. France* Because the Tribe Depended on the River for Its Survival

In *Skokomish Indian Tribe v. France*, the Tribe claimed title to tidelands along Hood Canal and at the River's mouth based on the 1855 Treaty and 1874 Executive Order.[292] In its analysis, the court quoted Elmendorf's ethnographic studies of Twana Indians at length. The court noted that the Tribe relied on salmon for its survival, that "[t]he bulk of the salmon catch was made in rivers," and that "[s]almon, as well as other types of fish, were also trolled for with hook and line from canoes in salt water, but this method furnished a relatively small proportion of the catch."[293] Based largely on Elmendorf's studies, the court found that "the tidelands were not essential to the livelihood of the Indians at the time of the treaty and the executive order providing for the reservation."[294] Accordingly, the Court held that title to adjacent tidelands vested in the State of Washington upon statehood.[295]

---

[291] *Puyallup Indian Tribe*, 717 F.2d 1251; *Muckleshoot Indian Tribe*, 713 F.2d 455.

[292] 320 F.2d 205 (9th Cir.1963).

[293] *Id.* at 211 (quoting ELMENDORF, *supra* note 8).

[294] *Id.* at 212.

[295] *Id.* at 213.

The present situation is easily distinguished from that at issue in *France*. First, the Ninth Circuit's decision pre-dated the seminal Supreme Court cases—*Choctaw Nation*, *Montana*, and *Idaho*—concerning whether an Indian reservation presents a public exigency such that the Equal Footing Doctrine's presumption is rebutted. As discussed above, subsequent Supreme Court and Ninth Circuit decisions support the conclusions contained herein. Second, as the Ninth Circuit later noted in *Puyallup*, "[t]he dispositive factor in construing the Executive Order to exclude a grant of the tidelands [in *France*] was the fact that the Tribe did not rely on the particular tidelands included in the reservation as an important source of food."[296] In contrast, the historical record leaves no doubt that the Tribe relied on the River's resources for its livelihood. The Tribe's dependence on River's fisheries was, in fact, a key factor in the Ninth Circuit's determination in *France* that it did not hold title to the tidelands along Hood Canal.[297] Thus, conversely, the Tribe's reliance on the River's fisheries already recognized by the Ninth Circuit directly supports the conclusion that the Tribe *does* hold title to the riverbed at issue here. Third, the United States was not a party in *France* and not bound by the Ninth Circuit's decision. Finally, this Opinion does not address title to the tidelands at issue in *France*. Therefore, this determination that the United States holds in trust for the benefit of the Tribe the bed of the Skokomish River where the River forms the Reservation boundary is wholly consistent with the Ninth Circuits decision in *France*.

C. Finding that the United States Holds Title to the Riverbed in Trust for the Tribe is Consistent With the State's Early Treatment of the Reservation

Through various actions, the State of Washington has previously acknowledged these conclusions regarding title to the Skokomish riverbed. As noted in the 1971 Memorandum, the Washington Department of Fisheries historically treated this stretch of the River as a part of the Reservation.[298] In 1928, the State Attorney General responded to an inquiry regarding the rights of Indians to fish on the Skokomish Reservation and stated that "there is no restriction upon the right of Indians to fish within such reservation commercially or for any other purpose."[299] Importantly, the River is the only waterway within the boundaries of the Reservation.

From the mid-1940s until at least the 1950s, the Tribe and the State coordinated fisheries regulation. In 1946, the Tribe and the State worked together to restore good salmon runs on the Skokomish River.[300] In furtherance of these goals, the Tribe "adopte[d] appropriate rules for fishing in harmony with the plans of the [State] Fisheries Department."[301] These rules applied to

---

[296] *Puyallup Indian Tribe v. Port of Tacoma*, 717 F.2d 1251, 1258 (9th Cir. 1983) (citing *Skokomish Indian Tribe*, 320 F.2d at 210-11).

[297] *Skokomish Indian Tribe*, 320 F.2d at 213.

[298] 1971 Memorandum, *supra* note 2, at 15.

[299] Letter from Assistant Att'y Gen., State of Washington, to Chas. G. Miller (Apr. 27, 1928).

[300] Resolution, Skokomish Tribal Council, at 1 (Dec. 3, 1946).

[301] Letter from Melvin Helander, Superintendent, Tahloah Indian Agency, Dep't of the Interior, to Theodor Pulsifer, Chairman, Skokomish Tribal Council (Dec. 3, 1946).

fishing "in the Skokomish River within the jurisdiction of the Skokomish Reservation."[302] Among other things, the regulations required a permit *from* the Tribe to fish in the Skokomish River.[303] Then again in 1952, the State and the Tribe agreed to specific regulations that applied to "salmon fishing on the Skokomish river *within* [*the*] *boundaries of the Skokomish Indian reservation.*"[304] The Tribe coordinated with the Department of the Interior to enforce fishing regulations on the Reservation.[305]

In 1947, the Director of Fisheries for the State of Washington sent a letter to the Hood's Canal Sportsmen's Club, describing the boundaries of the Skokomish Reservation.[306] In response to complaints that the State had not been enforcing restrictions on setting nets across the entire width of the River, the Fisheries Director explained: "The Reservation line extends across the Skokomish [River] a considerable distance above the highway bridge, and it is just possible that the nets referred to were on the Reservation and therefore outside the jurisdiction of this Department."[307] The Director went on to note that "several arrests [had] been made in the Skokomish River above the reservation line."[308] Here, the State explicitly recognized the extent of the Reservation and appropriately deferred to tribal jurisdiction over the River within the Reservation.

The State more explicitly recognized the limits of State jurisdiction within the Skokomish Reservation in a letter to the Skokomish Tribal Council, wherein the Director of Fisheries stated:

> The commercial fisheries regulations of the state however do not apply to the waters of any river or stream within the boundaries of any Presidentially proclaimed Indian Reservation. The regulations within the boundaries of such reservation are under the jurisdiction of the U.S. Indian Service and the Tribal Council of the tribe residing thereon.
>
> This Department of course may not enter an Indian Reservation to enforce the fisheries laws of the State of Washington . . . .

---

[302] Resolution, Skokomish Tribal Council, at 1 (Dec. 3, 1946).

[303] *Id.*

[304] Agreement between Skokomish Tribal Council and Washing Department of Fisheries (May 20, 1952) (emphasis added).

[305] Letter from Thurmon A. Wilson, Area Special Officer, Portland Area Office, to George Adams, Chairman, Skokomish Tribal Council (Oct. 28, 1953). *See also* Letter from Raymond H. Bitney, Superintendent, Western Washington Indian Agency, to Mr. Phillips, State Fisheries Department (Oct. 27, 1953).

[306] Letter from Milo Moore, Dir., Washington Dep't of Fisheries, to W. F. McCann, Hood's Canal Sportsmen's Club (Oct. 14, 1947).

[307] *Id.* at 1.

[308] *Id.*

> This Department feels that, as you do, there has been an over-fishery by the Indians on the Skokomish Reservation, and that drastic regulations should be provided by the Council to control this over-fishery. However, this Department cannot send a man onto the Reservation to regulate the fishery. Should the operation occur outside the boundaries of the Skokomish Reservation, by either white or Indian fishermen, our Inspectors have been instructed to arrest such fishermen.[309]

According to news publications, this was true at least until 1978 when the State acknowledged that sport fishing on the portion of the River within the Reservation required a permit from the Tribe.[310] The State's position seems to have changed, however, by 1987, when the State and the Tribe entered into a Memorandum of Understanding concerning the fishing on the Skokomish River. This Memorandum of Understanding states: "[T]he Washington State Department of Fisheries does not acknowledge that the Skokomish River is part of the Skokomish Reservation, and the Skokomish Tribe does not acknowledge that it is not."[311] Since that time, the State has purported to regulate fishing on the River within the Reservation.[312] A thorough search of State court decisions and attorney general opinions, however, has revealed no documented legal basis that would support the State's reversal of its position at the time.

In 1963, the State Attorney General issued an opinion finding that the treaty establishing the Yakama Reservation reserved to the Yakama Nation the exclusive right to fish in the Yakima River where it forms that reservation's boundary, and therefore the State lacked the authority to

---

[309] Letter from Milo Moore, Dir., Washington Dep't of Fisheries, to Horace J. Strong, Skokomish Tribal Council (Nov. 16, 1948).

[310] *Salmon fishing is a year-round sport*, The Shelton-Mason County Journal, June 15, 1978, at S-120, *available at* http://smc.stparchive.com/Archive/SMC/SMC06151978p154.php. ("Skokomish River: Downstream from mouth of Vance Creek to Skokomish Indian Reservation. Open July to January 31. . . . Sport fishing on the portion of Skokomish River within the reservation requires a license from the Indian Tribal Council. These permits are good for one year, cost $5, and are available at Hoodsport and Shelton sporting goods stores. Seasons and bag limits for salmon and steelhead, both covered by the license, are the same as those of the state."); *Salmon fishing dates set by tribal council*, The Shelton-Mason County Journal, June 15, 1967, at 30, *available at* http://smc.Stparchive.com/Archive/SMC/SMC06151967p50.php ("The Skokomish Indians exercise treaty rights to salmon runs in the lower Skokomish River. Within their reservation, which runs several miles north and west of the river, the Skokomish Tribal Council regulates both commercial and sport salmon fishing. . . . Indian and sport fishermen and commercial salmon buyers are licensed by the council. . . . Severe penalties are prescribed for both tribe members and non-members who break the rules. These are enforced by two wardens for the Indians, one for the sportsmen and three tribal magistrates, backed up by the U.S. Bureau of Indian Affairs.").

[311] Memorandum of Agreement, ¶ 7 (Sep. 2, 1987).

[312] *See, e.g.*, WASH. ADMIN. CODE § 220-310-190(326) (2015) (purporting to regulate sport fishing on the entire length of the River's mainstem, from the mouth to the Forks).

permit non-Indians to fish there.[313] Notably, the Yakama Treaty set the reservation's boundaries, in pertinent part, "up the Yakima River"[314] much like the 1874 Executive Order places the boundary of the Skokomish Reservation "up the [Skokomish] River."[315] But, in addition to reserving to the Yakama Tribe the right to fish at usual and accustomed places off-reservation, the Yakama Treaty also explicitly reserved for the Tribe the "[t]he exclusive right of taking fish in all streams, where running through or bordering said reservation."[316] That the Treaty of Point No Point does not contain a similar provision is unsurprising because the Treaty did not set the reservation boundaries. Furthermore, as the Supreme Court held in *Winans*:

> the treaty was not a grant of rights to the Indians, but a grant of rights from them—a reservation of those not granted. And the form of the instrument and its language was adapted to that purpose. Reservations were not of particular parcels of land, and could not be expressed in deeds as dealings between private individuals. The reservations were in large areas of territory and the negotiations were with the tribe. . . . *There was an exclusive right of fishing reserved within certain boundaries.* There was a right outside of those boundaries reserved "in common with citizens of the Territory."[317]

Accordingly, in *United States v. Washington*, the district court noted that "[a]n *exclusive* right of fishing was reserved by the tribes within the area and boundary waters of their reservations."[318] The Skokomish Tribe was a party to that case, and the State of Washington did not deny or challenge the Tribe's exclusive right to fish in the Skokomish River where it forms the Reservation boundary despite the absence of the exclusive fishing clause in the 1855 Treaty.[319] Accordingly, the conclusions contained in the 1963 State Attorney General opinion should apply equally here.

IV. CONCLUSION

Based on the foregoing analysis, I reaffirm the conclusion in the 1971 Memorandum that the bed of the Skokomish River along the southern and eastern boundary of the Reservation, as established by the 1855 Treaty and 1874 Executive Order, is located within the Reservation boundaries, was reserved for the benefit of the Tribe, and did not pass to the State of Washington at statehood. Thus, this decision reaffirms the Department's nearly forty-year-old position that

---

[313] 1963 Wash. AG LEXIS 108 (June 18, 1963).

[314] Treaty between the United States and the Yakama Nation of Indians, U.S.-Yakama Nation, June 9, 1855, 12 Stat. 951, art. 3 (1859).

[315] 1874 Executive Order.

[316] Treaty with the Yakama Nation, 12 Stat. 951.

[317] 198 U.S. 371, 381 (1905) (emphasis added).

[318] 384 F. Supp. 312, 332 (W.D. Wash. 1974) (emphasis in original).

[319] *Id.* at 332 n.12.

the bed of the Skokomish River along the Reservation's southern and eastern boundary is held in trust by the United States for the benefit of the Tribe.[320]

Hilary C. Tompkins

Attachments

[320] This Opinion would not have been possible without the stellar legal research and drafting of Attorney-Advisors Sarah Foley and Andrew Engel, and Assistant Solicitor - Branch of Water and Power, Division Indian Affairs, Scott Bergstrom, and several peer reviewers, including Associate Solicitor for Land and Water Laura Brown, Assistant Solicitor - Branch of Public Lands, Division of Land and Water, Aaron Moody, and Attorney-Advisors Elizabeth Carls and Michael Schoessler. Special Recognition goes to Deputy Solicitor for Water Resources Ramsey Kropf and Associate Solicitor for Indian Affairs Eric Shepard for coordinating the efforts of this multi-disciplinary team of attorneys within the Solicitor's Office.

Attachment 1

Supt Wash. Woe

United States Department of the Interior

OFFICE OF THE SOLICITOR
PORTLAND REGION, 1002 N. E. HOLLADAY ST.
P. O. Box 3621, Portland, Oregon 97208

August 26, 1971

In reply refer to:

Memorandum

To: Area Director, Bureau of Indian Affairs

From: Office of the Regional Solicitor, Portland

Subject: Skokomish Indian Reservation--river boundary

You have asked whether the lower portion of the Skokomish River, including the portion within Secs. 6, 7 and 12, T. 21 N., R. 3 W., W.M., is within and a part of the Skokomish Indian Reservation and whether fishing by non-Indians on said portion is subject to the provisions of 18 U.S.C. § 1165. In our opinion the answer to both questions is "yes."

18 U.S.C. § 1165 provides:

> "Whoever, without lawful authority or permission, willfully and knowingly goes upon any land that belongs to any Indian or Indian tribe, band, or group and either are held by the United States in trust or are subject to a restriction against alienation imposed by the United States, or upon any lands of the United States that are reserved for Indian use, for the purpose of hunting, trapping, or fishing thereon, or for the removal of game, peltries, or fish therefrom, shall be fined not more than $200 or imprisoned not more than ninety days, or both, and all game, fish and peltries in his possession shall be forfeited."

The Skokomish Indian Reservation was established pursuant to the Treaty of January 26, 1855, with the "Skallams * * * Skokomish, Toan-hooch and Chemakum Tribes," 12 Stat. 933. This treaty, known as the Treaty of Point No Point, was ratified March 8, 1859, and proclaimed April 29, 1859. In it the aforementioned Indians ceded, relinquished and conveyed to the United States "all their right, title and interest" in and to certain described lands along the Straits of Juan de Fuca and Hood Canal. There was expressly reserved,

> " * * * for the present use and occupation of said tribes * * * the amount of six sections, or 3,840

acres, situated at the head of Hood's Canal to be hereafter set apart, and so far as necessary surveyed and marked out for their exclusive use." (Article 2)

Subsequently a specific tract of land along the Skokomish River was selected and surveyed. On February 25, 1874, the President signed an Executive Order withdrawing from sale or other disposition and setting apart,

> " * * * for the use of the S'Klallam Indians the following tract of country on Hood's Canal in Washington Territory, inclusive of the six sections situated at the head of Hood's Canal reserved by treaty with said Indians January 26, 1855 * * * described and bounded as follows: Beginning at the mouth of the Skokomish River; thence up said river to a point intersected by the section line between sections 15 and 16 of Township 21 North, in Range 4 West, thence north on said line * * * thence southerly and easterly along said Hood's Canal to the place of beginning."

The Executive Order was issued in fulfillment of a treaty obligation of the United States. In determining whether the reservation includes the entire width of the Skokomish River, certain rules of construction of Indian treaties should be kept in mind.

> " * * * these treaties are not to be considered as exercises in ordinary conveyancing. The Indian Nations did not seek out the United States and agree upon an exchange of lands in an arm's-length transaction. Rather, treaties were imposed upon them and they had no choice but to consent. As a consequence, this Court has often held that treaties with the Indians must be interpreted as they would have understood them, see, e.g., Jones v. Meehan, 175 US 1, 11, 44 L Ed 49, 54, 20 S Ct 1 (1899), and any doubtful expressions in them should be resolved in the Indians' favor." Choctaw Nation v. Oklahoma, 397 U.S. 615, 620 (1970).

> "We will construe a treaty with the Indians as 'that unlettered people' understood it, and 'as justice and reason demand in all cases where power is exerted by the strong over those to whom they owe care and protection,' and counterpoise the inequality 'by the superior justice which looks only to the substance of the right without regard to technical rules.'" U.S. v. Winans, 198 U.S. 371, 380 (1905).

"But in the government's dealings with the Indians the rule [regarding strict construction of tax exemptions] is exactly the contrary. The construction, instead of being strict, is liberal; doubtful expressions, instead of being resolved in favor of the United States are to be resolved in favor of a weak and defenseless people, who are wards of the nation, and dependent wholly upon its protection and good faith. This rule of construction has been recognized, without exception, for more than a hundred years, * * *." Choate v. Trapp, 224 U.S. 665, 675 (1912).

"The language used in treaties with the Indians should never be construed to their prejudice. If words be made use of which are susceptible of a more extended meaning than their plain import, as connected with the tenor of the treaty, they should be considered as used only in the latter sense. * * * How the words of the treaty were understood by this unlettered people, rather than their critical meaning, should form the rule of construction." Worcester v. Georgia, 31 U.S. (6 Peters) 515, 582 (1832).

The Washington State Supreme Court has ruled in similar language:

"Under well-settled law laid down by the Supreme Court of the United States, we are bound to construe the grant contained in the treaty, as fixed by the executive order, as it would naturally be understood by the Indians.

"'The Indian tribes within the limits of the United States are not foreign nations; though distinct political communities, they are in a dependent condition; and Chief Justice Marshall's description, that "they are in a state of pupilage," and "their relation to the United States resembles that of a ward to his guardian" has become more and more appropriate as they have grown less powerful and more dependent. * * *

"'In construing any treaty between the United States and an Indian tribe, it must always (as was pointed out by the counsel for the appellees) be borne in mind that the negotiations for the treaty are conducted, on the part of the United States, an enlightened and powerful nation, by representatives skilled in diplomacy, masters of a written language, understanding the modes and forms of creating the various technical estates known to their law, and assisted by an interpreter employed by themselves; that the treaty is drawn up by them and in their

> own language; that the Indians, on the other hand, are a weak and dependent people, who have no written language and are wholly unfamiliar with all forms of legal expression, and whose only knowledge of the terms in which the treaty is framed is that imparted to them by the interpreter employed by the United States; and that the treaty must therefore be construed, not according to the technical meaning of its words to learned lawyers, but in the sense in which they would naturally be understood by the Indians.' Jones v. Meehan, 175 U.S. 1, 20 S.Ct. 1, 5, 44 L.Ed. 49." State v. Edwards et al., 188 Wash. 467, 62 P.2d 1094 at 1095 (1936).

Light is shed on the meaning of the treaty to the Indians by the official records of the negotiations, which were conducted with the Clallams or S'Klallams, Chemakums, and Sko-Komish or Too-an-hooch, also spelled To-an-hooch. These negotiations show that several spokesmen for the Skokomish, or Too-an-hooch, Indians expressed concern about selling their lands. One asked,

> "What shall we eat if we do so? Our only food is berries, deer and salmon. Where then shall we find these? * * * I don't like the place you have chosen for us to live on--I am not ready to sign the paper."

Another said,

> "I do not want to leave the mouth of the River, I do not want to leave my old home, and my burying ground * * * ."

The interpreter, a Mr. Shaw, "explained to them that they were not called upon to give up their old modes of living and places of seeking food, but only to confine their houses to one spot."

Governor Stevens stated:

> "The Great Father wants to put you where you cannot be driven away. The Great Father besides giving you a home will give you a school, protect you in taking fish, break up your land, give you clothes * * * ."

The Clallams apparently were then ready to sign the treaty but the Skokomish said they would rather wait until the next day. They would talk it over. Accordingly the Council was adjourned until the next morning, when Governor Stevens again addressed them and again assured them, in part:

> "This paper gives you a home. * * * This paper secures your fish. Does not a father give fish to his children? Besides fish you can hunt, gather roots and berries * * * ."

Thereupon the Skokomish chief stated that "we have thrown away the feelings of yesterday and are now satisfied." Amid further expressions of good faith from the Government representatives, the Indians signed the treaty.

The boundaries of the area to be set aside as the Skokomish Reservation were surveyed 18 years later and the survey was approved on December 2, 1873. (An additional tract on the north side of the reservation was added later.) Both the map accompanying the survey and the field notes pertaining to it indicate that the survey extended only to the meander line on the left bank, or reservation side, of the Skokomish River. This, however, was in accordance with usual land surveying practices and is not relevant to what was promised to the Indians in consideration for their acceptance of the treaty. United States v. Romaine, 225 F. 253 (9th Cir. 1919); United States v. Stotts, 49 F.2d 619 (W.D. Wash. 1930) (both involving the Lummi Reservation).

There the Treaty of Point Elliott, 12 Stat. 928, negotiated with other western Washington tribes by the same treaty negotiator four days before this treaty, used the same language with respect to surveying the reservation--"which tracts shall be set apart, and so far as necessary surveyed and marked out for their exclusive use." (Emphasis added) The Executive Order delineating the Lummi Reservation was issued November 22, 1873, a few months ahead of the Skokomish Reservation Order. The survey in that case also went only to the high water or meander line but the court in Romaine said:

> "The power to survey the lands so reserved in the treaty was the power to cause the whole or any portion of the reserved lands to be surveyed into lots, and to assign the same to individuals or families for permanent homes. The land in controversy was not adapted to such individual use, and there was no occasion to survey it, or to take from the Indians on the reservation the common right to use it for the purposes of fishing and digging shellfish, or other purposes, and the surveyor general, in causing the survey to be made, had no authority to exclude any of the reserved lands from the boundaries of the reservation. The error in failing to extend the survey so as to include the lands in controversy cannot prejudice the rights of the Indians."

And in Stotts the court said:

"The right of the Indians to the lands of the reservation was a common right, and the allotment of a part of the reservation to some of the Indians does not destroy the common right to the enjoyment of the unallotted portion for any use to which it was adapted. And the fact that the survey did not include the tidelands cannot prejudice the rights of the Indians. Moss v. Ramey, 239 U.S. 538, 36 S.Ct. 183, 60 L.Ed. 425; United States v. Romaine, supra.

" * * *

"It may not be said that the United States held these lands in trust for the state when admitted. While it held the land, the United States had the right to grant for appropriate purposes, titles, or rights in the land below the high-water mark or tidewater, and, the United States having acted in accordance with the interests of the Indians and the object for which the right was reserved, and, in this connection, I think the court may judicially know that the Indians subsisted during this time by hunting and fishing, and the tidelands were a necessary perquisite to the enjoyment of fishing, and which was evidenced by the proclamation of the President carrying the reservation to low water, and this treaty having been promulgated and these rights having been enjoyed by the Indians from time immemorial and until after the admission of the territory as a state and to the present, the defendants may not complain. Shively v. Bowlby, 152 U.S. 1, 14 S.Ct. 548, 38 L.Ed. 331; United States v. Romaine, supra.

" * * *

" * * * The allotments of the upland did not release the abutting tidelands from the reserved right as long as the land is used by the Indians, as here." (pp. 620-621)

The Indians were assured that they would not have to leave their home at the mouth of the Skokomish River, the principal salmon river for the entire Hood Canal area. They were assured they would not have to give up "their old modes of living and places of seeking food", that the Great Father will "protect you in taking fish", that the treaty paper "secures your fish." The reservation was to be for the Indians' "use" as well as their occupation.

The evidence is clear that the Indians used weirs which they constructed across the entire width of the Skokomish River as one of the principal means of taking salmon.

> " * * * the salmon were easily procured in the rivers and creeks, particularly in the Skokomish River, and were ordinarily caught there with traps. The Indians had their basic villages up the rivers in sheltered wooded areas close to the rivers and creeks where salmon abounded and other game was readily procurable.
>
> " * * *
>
> " * * * the bulk of the salmon catch was made in rivers, with weirs, dip nets and harpoons during late summer and fall runs. Salt water trolling and netting was of minor importance, in particular to the Skokomish with their large river runs of salmon.
>
> " * * *
>
> "River fishing for all these fish (King, silver, humpback, dog and steelhead) was primary, with weirs and associated dip net structures the most productive method. * * * ." Skokomish Indian Tribe v. France, 320 F.2d 205 at 209 and 211 (9th Cir. 1963) (quoting findings of District Court, W.D. Wash., Boldt, Judge)

The Superintendent of Indian Affairs for Washington Territory, in a report dated January 2, 1862, noted that the S'Klallams were dissatisfied with their lot on the reservation, that many of them will not reside at the place and will "only make annual visits to * * * catch fish at their old fishing grounds." Findings of Fact of the Indian Claims Commission in Docket No. 296, The Skokomish Tribe of Indians v. United States of America (1968), 6 Ind.Cls.Comm. 140. The Indian Claims Commission has found that the Skokomish Indians depended "upon a fish eating economy as the prime means of subsistence." Id. at 142. Edward S. Curtis in Volume IX of his publication "The North American Indian" (1913), observed, "The dominating cultural influence of the tribes [Salishan Tribes of the coast] * * * was their dependence upon seafood." Id. at 143. Dr. William W. Elmendorf, who has made extensive studies of the Twana Indians, has concluded, "Geographic location of winter village sites accorded with patterns of food economy." Id. at 144. The Government's expert witness in the Indian Claims Commission case, Dr. Carroll R. Riley, discussing the matter of exclusive use of areas, stated, "Your feeling of exclusiveness, inasmuch as there was a feeling of exclusiveness, would be in the village area, the winter village area or perhaps a tiny spot peripheral to the village area * * * ." Id. at 146. Dr. Elmendorf agreed:

"Territorial interests were indistinguishable from subsistence interests, and these adhered to useable stretches of territory. The environs of a winter village community settlement were used intensively by and regarded as property of that community. Away from the village environs meant away from the local watercourse and the feeling of group ownership faded out as watershed drainage area boundaries were reached." Id. at 148.

The Indian Claims Commission concluded, "Their economy rests primarily upon the seasonal uses of the bays and rivers * * * ." Id. at 150.

Dr. Elmendorf, in his extensive study "The Structure of Twana Culture", published as Monographic Supplement No. 2, Research Studies, Washington State University, Vol. XXVIII, No. 3, Supplement, September 1960, states:

"The Twana placed five species of salmonid fishes in a single class and recognized them as the backbone of their subsistence and economy. * * * The five kinds were those usually denoted in western Washington by the English terms king, silver, humpback, dog and steelhead. River fishing for all these fish was primary, with weirs and associated dip-net structures the most productive method. Salmon, as well as other types of fish, were also trolled for with hook and line in canoes in salt water but this method furnished a relatively small proportion of the catch." (at 59-60, footnotes omitted)

Discussing the single-dam salmon weir, Dr. Elmendorf said:

"These conditions limited this type of weir in large rivers, such as the Skokomish, to fixed sites which became centers of seasonal congregation. The location of some winter villages may have been determined by adjacent weir sites, as with yila 'lqo, the chief Skokomish settlement, but annually used weir sites also existed, at least on the Skokomish, without any nearby village." (at 64)

(That particular site is slightly upstream of the existing Skokomish Reservation. However, other weir sites were located on the portion of the river that was within the reservation. See Id. at pp. 33-34.)

Promises under Indian treaties "must be interpreted as they would have understood them." Choctaw Nation v. Oklahoma, supra.

The language of the Executive Order establishing the reservation describes one of its boundaries as "Beginning at the mouth of the Skokomish River; thence up said river * * * ." There are only three interpretations that could possibly be placed upon that language. The reservation boundary could run up the north bank of the river, up the middle of the river, or up the south bank. If interpretation of an agreement with an Indian tribe were not involved, such choice of words would probably denote a boundary up the middle of the river unless they were used to describe a conveyance to a private party in which case the boundary would be along the near side high water mark (meander line). The evidence supports a conclusion that this portion of the Skokomish River is a navigable waterway. A 1941 Corps of Engineer map for an authorized Flood Control Survey shows the head of navigation at a point about in Sec. 14, T. 21 N., R. 4 W., which is within the reservation but above the point involved here.

But this was not a private conveyance. This was a treaty reservation, "a reservation of [rights] not granted [to the United States]." Winans v. United States, supra. In the Choctaw case, supra, the Supreme Court noted:

> "The grants to petitioners were undoubtedly to them as 'a political society' and any 'well founded doubt' regarding the boundaries must, of course, be resolved in their favor."

It has long been well established that while the United States held a domain as a territory, it may convey away the right to the bed of a navigable river, not retaining that property for transfer to a future state. Shively v. Bowlby, 152 U.S. 1, 48 (1894).

> "We cannot doubt, therefore, that Congress has the power to make grants of lands below high-water mark of navigable waters in any territory of the United States, whenever it becomes necessary to do so in order to perform international obligations, or to effect the improvement of such lands for the promotion and convenience of commerce with foreign nations and among the several states, or to carry out other public purposes appropriate to the objects for which the United States holds the territory."

There can be no question that reservation or grant of a river bed to an Indian tribe as part of the agreement for cession of the tribe's claim to other lands and as part of a federal purpose to advance the

welfare and self-sufficiency of the Indians is carrying out of a public purpose.1/ It should be remembered that the peaceful extinguishment of Indian claims by treaty was repeatedly mandated by Congress as a precondition to widespread settlement and granting of lands to settlers in the area. See, for example, the Act of August 14, 1848, 9 Stat. 323, establishing the Oregon Territory, the Act of June 5, 1850, 9 Stat. 437, authorizing the negotiation of treaties with Indians in the Oregon Territory west of the Cascade Mountains, the Act of March 2, 1853, 10 Stat. 172, creating Washington Territory out of the then existing Oregon Territory, the Act of March 3, 1853, 10 Stat. 226, 238, authorizing treaties with western Indian tribes, and the Act of July 31, 1854, 10 Stat. 315, 380, making appropriations for negotiating treaties with Indian tribes in Washington Territory.

The Act of August 14, 1848, provided that nothing contained in it "shall be construed to impair the rights of person or property now pertaining to the Indians in said Territory, so long as such rights shall remain unextinguished by treaty between the United States and such Indians * * * ." Section 14 of that act extended the Northwest Ordinance of 1787, 1 Stat. 51, n. a, to the Oregon Territory. Article 3 of that Ordinance provides that "good faith shall always be observed toward the Indians; their lands and property shall never be taken from them without their consent."

The Act of June 5, 1850, authorized the appointment of commissioners to "negotiate treaties with the several Indian tribes in the territory of Oregon [which then included the area now comprising the State of Washington], for the extinguishment of their claims to lands lying west of the Cascade Mountains * * * ."

The Organic Act of March 2, 1853, created Washington Territory, provided that the territorial governor should also be Superintendent of Indian Affairs, and provided that nothing in it "shall be construed to affect the authority of the Government of the United States to make any regulation respecting the Indians of said Territory, their lands, property, or other rights, by treaty, law, or otherwise, which it would have been competent to the Government to make if this act had never been passed."

The Appropriation Act of March 3, 1853, authorized the President to enter into negotiation with Indian tribes west of the States of Missouri and Iowa "for the purpose of securing the assent of said

---

1/ The policy of Congress in this regard was reaffirmed by Congress in the Submerged Lands Act of 1953 when it expressly exempted from confirmation of state title "such lands beneath navigable waters held, or any interest in which is held by the United States for the benefit of any tribe, band, or group of Indians or for individual Indians." (Act of May 22, 1953, 67 Stat. 29, 32, 43 U.S.C. § 1313 (1970 Ed.))

tribes to the settlement of the citizens of the United States upon the lands claimed by said Indians, and for the purpose of extinguishing the title of said Indian tribes in whole or in part to said lands; * * * ."

The Appropriation Act of July 31, 1854, authorized use of appropriations for making treaties in several territories, including Washington, prior to July 1, 1855.

And in 1946 Congress, in recognition that some lands were taken without Indian consent, or for an inadequate consideration, enacted the Indian Claims Commission Act, 60 Stat. 1049, to make belated recompense.

Moreover, Congress imposed on Washington and several other states, as a precondition to statehood, a requirement that the people of the state forever disclaim all right and title to all lands owned or held by any Indian or Indian tribes and that until the title thereto shall have been extinguished by the United States, the same shall be and remain subject to the disposition of the United States, and shall remain under the absolute jurisdiction and control of Congress. Act of February 22, 1889, § 4, 25 Stat. 676. Washington accepted this requirement and incorporated it into Article XXVI of the State Constitution. See State v. Edwards, supra (Swinomish Reservation); Jones v. Callvert, 32 Wash. 616, 73 P. 701 (1903) (Tulalip Reservation); United States v. O'Brien, 170 F. 508 (Cir.Ct. D.Wash. W.D. 1940) (Squaxin Island Reservation).

As recently as 1970 the U. S. Supreme Court reaffirmed "well settled" holdings that the United States can dispose of lands underlying navigable waters and said that the question was whether it intended to convey (or perhaps more accurately in the Skokomish case, to reserve) title to the river bed to the Indians--citing Alaska Pacific Fisheries v. United States, 248 U.S. 78, 87 (1918) (Annette Island Reservation); Moore v. United States, 157 F.2d 760, 763 (9th Cir. 1946) (Quileute Reservation); Donnelly v. United States, 228 U.S. 243, 259 (1913) (Hoopa Valley Reservation Extension). Acknowledging that such "disposals by the United States during the territorial period are not lightly to be inferred, and should not be regarded as intended unless the intention was definitely declared or otherwise made very plain", the Court nevertheless viewed the circumstances of the grant to the tribe and "the countervailing rule of construction that well-founded doubt should be resolved in the [Indians'] favor" when construing grants pursuant to Indian treaties, as compelling it to hold that the river bed belonged to the tribe. Choctaw Nation v. Oklahoma, supra.

The same conclusion is applicable in the case of the lower portion of the Skokomish River. See also United States v. Larry Haug, et al., Misc.Crim. No. 511, U.S. Dist. Ct. Montana, Billings Div., June 9, 1971 (unpublished opinion), sustaining prosecution under 18 U.S.C. § 1165 for fishing on a navigable river within the Crow Indian Reservation.

In The Alaska Pacific Fisheries v. United States, supra, the Congress had set apart for the Indians "a body of lands known as the Annette Islands." The Supreme Court held that the reservation included the adjacent fishing waters and submerged land, finding that the fishing grounds were essential to the subsistence and economic development of the tribe and, accordingly, Congress must have intended to include them.

> "As an appreciation of the circumstances in which words are used usually is conducive and at times is essential to a right understanding of them, it is important, in approaching a solution of the question stated, to have in mind the circumstances in which the reservation was created,--the power of Congress in the premises, the location and character of the islands, the situation and needs of the Indians, and the object to be attained.
>
> "That Congress had power to make the reservation inclusive of the adjacent waters and submerged land, as well as the upland, needs little more than statement. All were the property of the United States and within a district where the entire dominion and sovereignty rested in the United States, and over which Congress had complete legislative authority. National Bank v. Yankton County, 101 U.S. 129, 133, 25 L. ed. 1046, 1047; Shively v. Bowlby, 152 U.S. 1, 47, 48, 58, 38 L. ed. 331, 348, 349, 14 Sup.Ct.Rep. 548; United States v. Winans, 198 U.S. 371, 383, 49 L. ed. 1089, 1093, 25 Sup.Ct.Rep. 662. The reservation was not in the nature of a private grant, but simply a setting apart, 'until otherwise provided by law,' of designated public property for a recognized public purpose,--that of safeguarding and advancing a dependent Indian people dwelling within the United States. See United States v. Kagama, 118 U.S. 375, 379 et seq., 30 L. ed. 228, 229, 6 Sup.Ct.Rep. 1109; United States v. Rickert, 188 U.S. 432, 437, 47 L. ed. 532, 536, 23 Sup. Ct.Rep. 478.
>
> " * * * While bearing a fair supply of timber, only a small portion of the upland is arable, more than three fourths consisting of mountains and rocks. Salmon and other fish in large numbers frequent and pass through the waters adjacent to the shore, and the opportunity thus afforded for securing fish for local consumption and for salting, curing, canning, and sale gives to the islands a value for settlement and inhabitance which otherwise they would not have.

"The purpose of the Metlakahtlans in going to the islands was to establish an Indian colony which would be self-sustaining and reasonably free from obstacles which attend the advancement of a primitive people. They were largely fishermen and hunters, accustomed to live from the returns of those vocations, and looked upon the islands as a suitable location for their colony, because the fishery adjacent to the shore would afford a primary means of subsistence and a promising opportunity for industrial and commercial development.

" * * *

"The purpose of creating the reservation was to encourage, assist, and protect the Indians in their effort to train themselves to habits of industry, become self-sustaining, and advance to the ways of civilized life. * * *

"The circumstances which we have recited shed much light on what Congress intended by 'the body of lands known as Annette islands.' The Indians could not sustain themselves from the use of the upland alone. The use of the adjacent fishing grounds was equally essential. Without this the colony could not prosper in that location. The Indians naturally looked on the fishing grounds as part of the islands and proceeded on that theory in soliciting the reservation. * * * .

"This conclusion has support in the general rule that statutes passed for the benefit of dependent Indian tribes or communities are to be liberally construed, doubtful expressions being resolved in favor of the Indians. Choate v. Trapp, 224 U. S. 665, 675, 56 L. ed. 941, 945, 32 Sup. Ct.Rep. 565, and cases cited." (pp. 87-89)

The Skokomish Executive Order should be contrasted with the Executive Order establishing the Hoh Reservation. The latter describes that reservation as "commencing at a point in the middle of the mouth of the Hoh River, Jefferson County, Washington, and running thence up said river in the middle channel thereof one mile, thence due south to the south bank of said river * * * ." (Executive Order of Sept. 11, 1893; emphasis added)

If it were intended to limit the Skokomish Indians to only a portion of the river that was so essential to their way of life, so significant a feature in determining the location of their reservation, and whose reference figured so prominently in the treaty negotiations, then surely this intent would have been more precisely expressed--as it was in the case of the Hoh Reservation.

What the Washington Supreme Court said about the term "low water mark" as used in the Executive Order defining the Swinomish Indian Reservation is equally applicable to the term "beginning at the mouth of the Skokomish River, then up said river" in the Executive Order for the Skokomish Reservation:

> "'low water mark' may have had a technical meaning in 1873, when used in the executive order referred to, but it cannot be assumed that the Indians, whose rights were affected, knew of any such meaning or would understand the words as meaning anything other than that their rights extended just so far as the water ever receded on each side of their peninsula." State v. Edwards, supra, at 1095.

See also United States v. O'Brien, supra. By each of the tests referred to by the Supreme Court in the first quoted paragraph from the Alaska Pacific Fisheries case, supra, the Skokomish Reservation must be construed as including the entire width of the lower Skokomish River. Certainly the Skokomish Indians, with their fish weirs and associated dip net structures and their traps, used and needed to use the entire width of the Skokomish River, their principal source of livelihood and the principal reason for the choice of location of their reservation. A promise that "this paper gives you a home * * * . This paper secures your fish" could not be expected to be understood as being substantially qualified sub silento, if not nullified, by a design to allow non-Indians to come on to the principal fishing area at that home to remove fish free from the control of the Indians.

We cannot state the case any clearer than the Ninth Circuit Court of Appeals did in the Annette Island case (Alaska Pacific Fisheries v. United States (9th Cir. 1917, 240 F. 274, 281). There, as here, the reservation was set aside for the use of the Indians as well as for their home.

> "What use? These Indians were not agriculturalists * * * . These Indians were fishermen and hunters and they obtain their living by fishing and hunting, mainly by fishing in waters such as surround Annette Island. The island was then reserved for the habitation of these Indians and for their use in obtaining their food supply from the waters immediately surrounding the island."

The fact that the Skokomish treaty also secures the right of the Indians to leave their reservation and return to any or all of their usual and accustomed fishing sites in other areas, where they may fish in common with non-Indians (Article 4) does not in any way impair or restrict

their expressly reserved right of exclusive use of the reservation area set aside for them pursuant to Article 2.

Although it is not necessarily a relevant factor in construing this Executive Order, it is worthy of note that the Washington Department of Fisheries apparently acknowledges that this stretch of the river is a part of the reservation. Its regulations open the Skokomish River to fishing "downstream from mouth of Vance Creek to boundary of Skokomish Indian Reservation." The Department of Fisheries regulations, as a general rule, exclude reservation waters from open areas under state regulations. The Department of Game regulations, on the other hand, make no distinction between waters on or off the reservation and, in fact, consistently purport to open on-reservation rivers to fishing under state game regulations.

Conclusion

Rules of interpretation of Indian treaties require that wherever possible they be construed as the Indians understood them. The Skokomish Indians were concerned about their source of food and were assured that the treaty gave them a home and secured their fish. They were dependent upon the river for their livelihood, and their methods of fishing require that they be able to exercise control over the river. Applying these rules and facts to the wording of the treaty and the Executive Order, the logical conclusion is that the entire width of the Skokomish River along the border of the Skokomish Reservation is a part of the reservation.

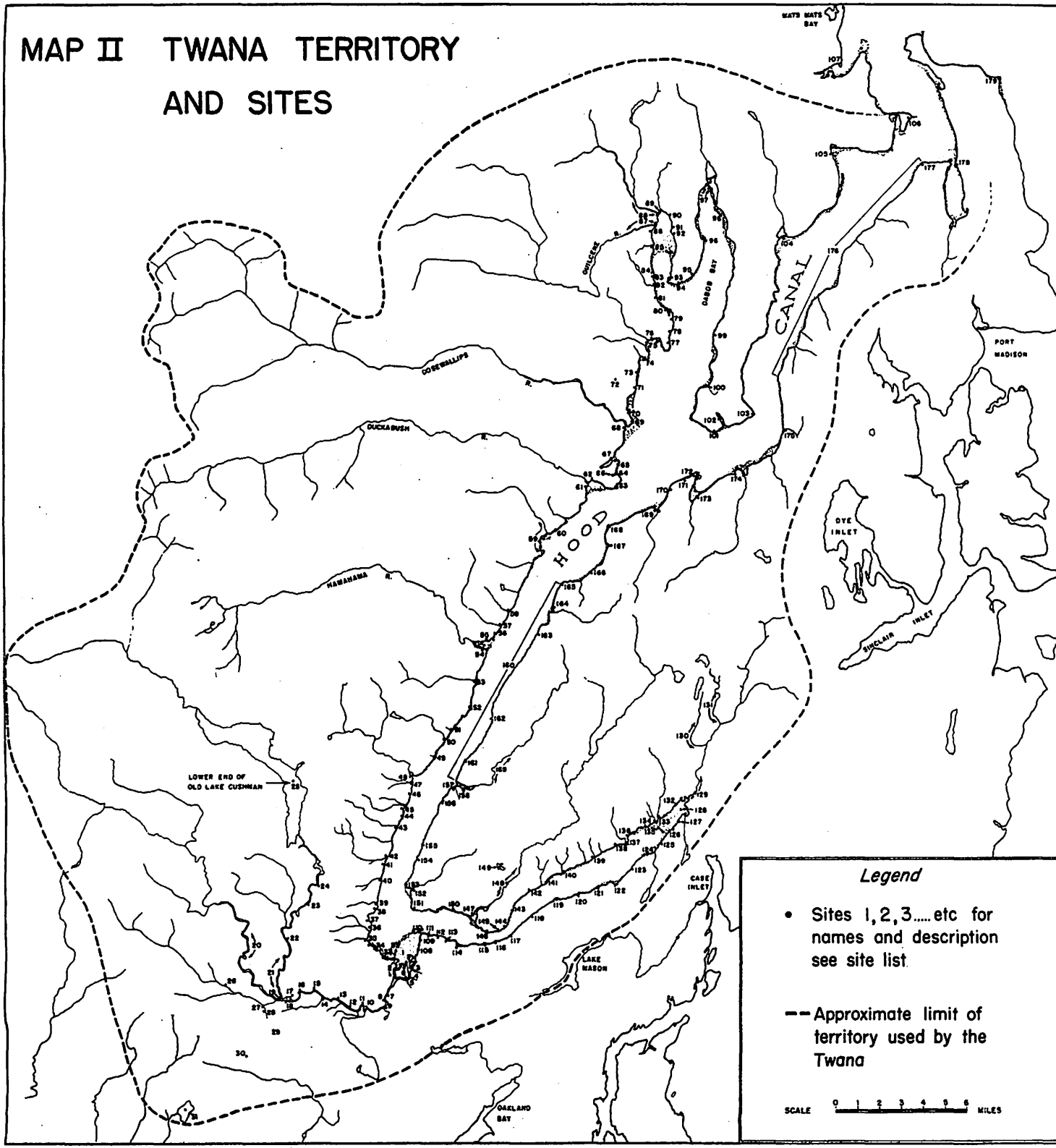
For the Regional Solicitor

George D. Dysart

George D. Dysart
Assistant Regional Solicitor

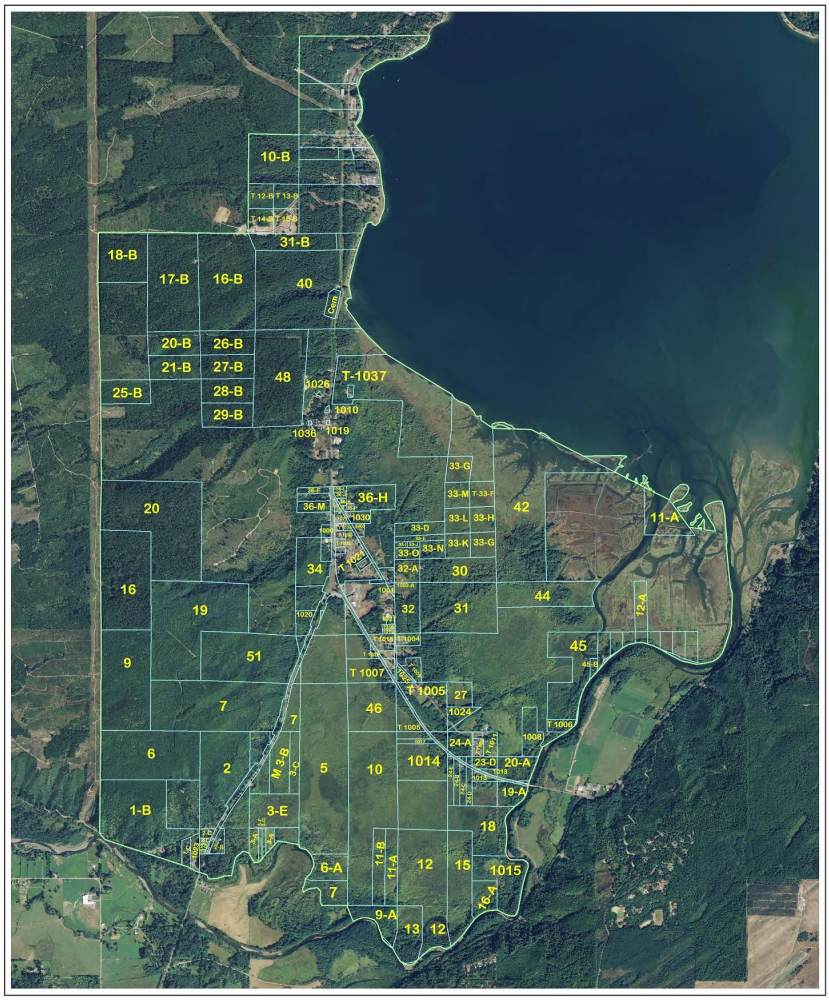
Attachment 2

MAP II TWANA TERRITORY AND SITES



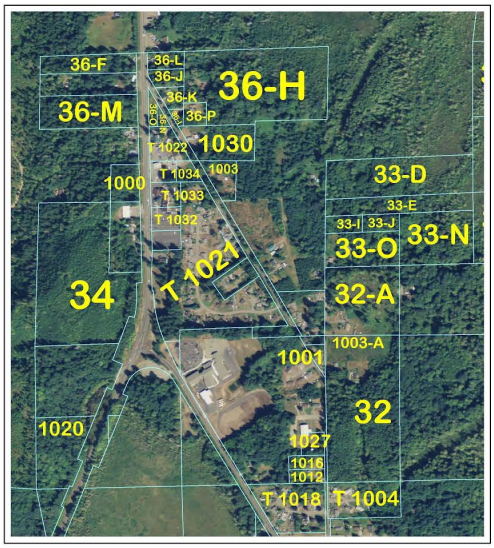
Attachment 3

Skokomish Indian Reservation



N

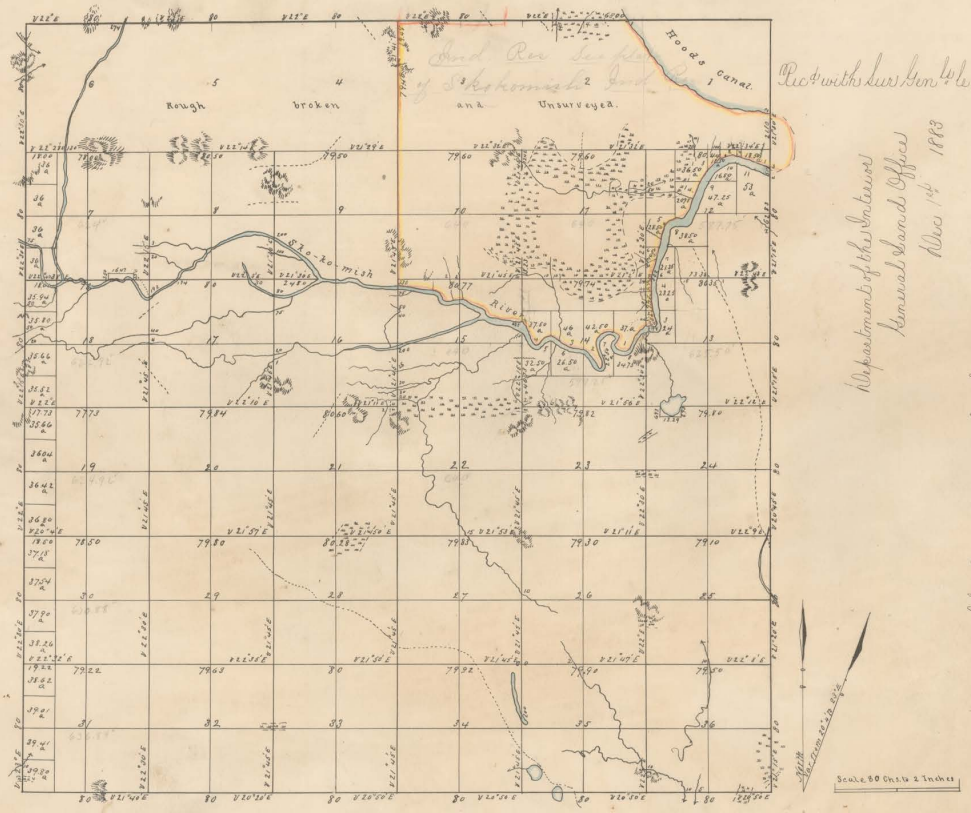
Northwest Regional Office
Division of Real Estate Services
Cartography
Skokomish 120
Map Date: 05/21/12



Attachment 4

21-4W-A

Township No 21 North Range No 4 West Will. Mer



Rec'd with his Surv Gen'l Letter of Nov 25 1861

Approved by the Surveyor General's Office Nov 14th 1863

I hereby certify that the above is a true photo-lithographic copy of the original on file in this Office

A. H. Kenney
Acting Commissioner

Surveys disconnected	By whom Surveyed	Contract No	Contract Date	Amount of Survey Miles	Amount of Survey Chains & Links	When Surveyed	When Chargeable in the Gen'l Land Accts
North and West Boundary	N. H. Tuttle	52	Aug. 29th 1860	10	65 00	Sept 5th 1861	Fiscal year ending 1861
Subdivisions	" " "	57	May 10th 1861	53	39 10		" " "
Meanders	" " "	"	" " "	7	51 46		" " "
Total No of Acres 18972.06							

The above Map of Township No 21 North of Range No 4 West of the Willamette Meridian in the Territory of Washington is strictly conformable to the field notes of the Survey thereof on file in this Office which have been examined and approved.

Surveyor Generals Office
Olympia W. T. Nov 23rd 1861

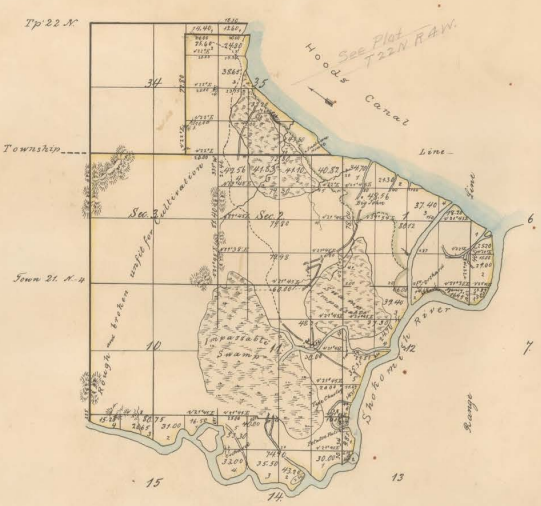
Anson G. Henry
Surveyor General of W. T.

Attachment 5

21-4W-B

Skokomish Indian Reservation Township No 21 N R 3 West and Sp 22 N R 4 West Will Mer

Rec'd with Surveyor Gen. letter of Dec 1873.



I hereby certify that the above is a true photo-lithographic copy of the original on file in this Office.

Acting Commissioner.

Approved

Commissioner of the General Land Office

May 16 1894

Surveys designated	By whom Surveyed	Contract No	Contract Date	Amt of Survey Miles	Amt of Survey Chains	Amt of Survey Links	When Surveyed
Exterior boundaries	Thomas M Reed	174	16th August 1873	1	36	05	
Subdivisional				19	71	39	
Meanders				8	27	47	9th Oct. 1873
Total No of Acres	4173.31						

The above Map of the Subdivisional lines and Meanders of the Skokomish Indian Reservation in Township No 21 North Range 3 West, and Township No 22 North Range 4 West of the Willamette Meridian in the Territory of Washington is strictly conformable to the field notes of the survey thereof on file in this Office, which have been examined and approved.

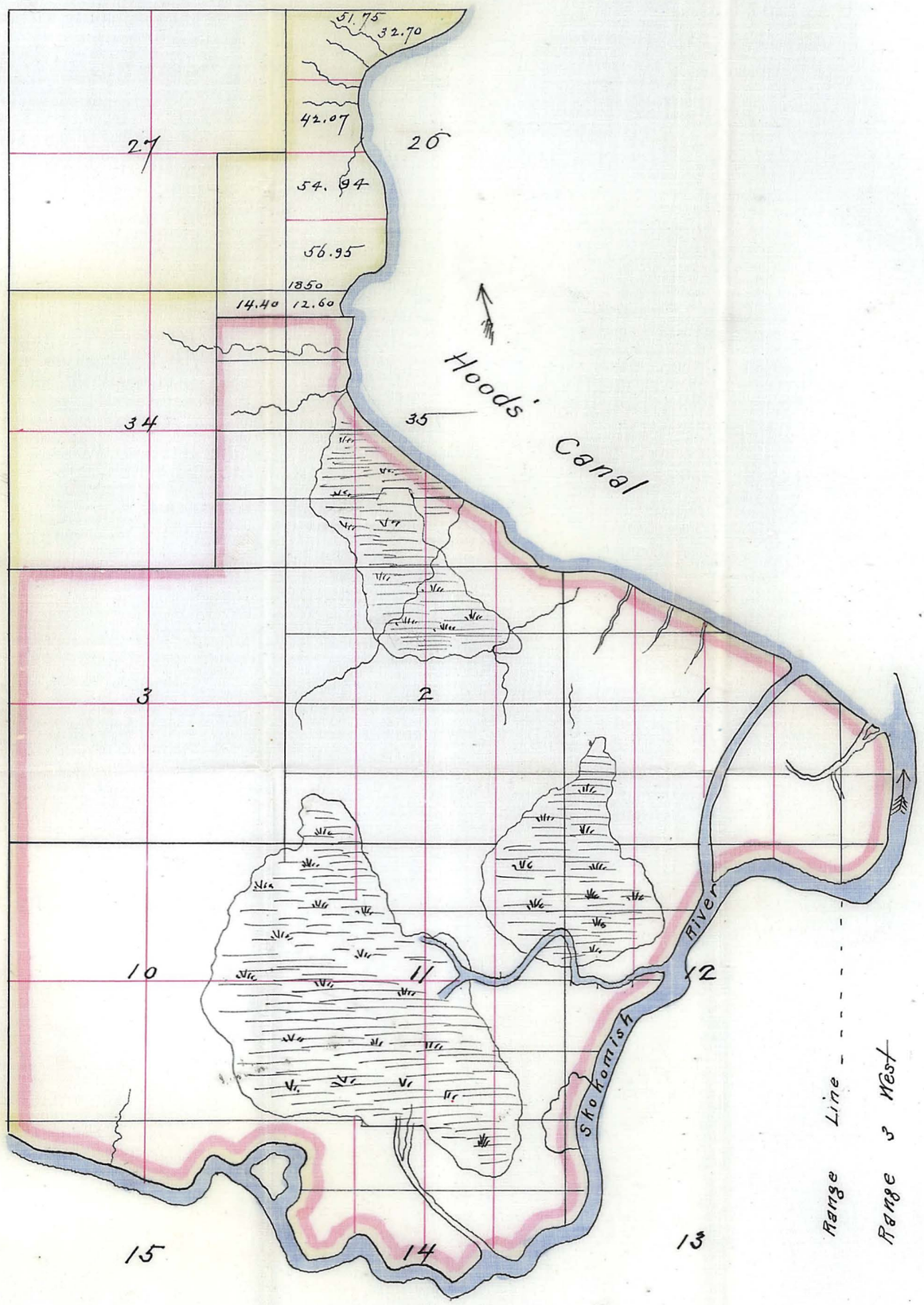
Surveyor Generals Office
at Olympia W.T. Dec. 24 1873.

N McMicken
Surveyor General W.T.

Attachment 6

Diagram of a Part of Townships 21 & 22 N. R Nos 3 & 4 West of the Willamette Mer
Showing addition to the Skokomish Indian Reservation.

Copy



I hereby certify that the above Diagram of Part of Townships Nos 21 and 22 North, Ranges 3 and 4 West of the Willamette Meridian in the Territory of Washington showing the addition to the Skokomish Indian Reservation as per Executive Order dated the 25th day of February 1874 is a true copy of the original on file in this office

Surveyor Genrals Office
Olympia W.T. April 24. 1874

W McMicken
Surveyor Genral W.T.