C O P Y

Memorandum June 20, 1962

To: Bureau of Indian Affairs (Realty)

From: Office of the Regional Solicitor, Portland

Subject: Ownership of tidelands fronting Indian reservations

This is in response to former Superintendent Ringey's memorandum of February 19, 1962 to the Area Director requesting that we review the tidelands situation on various Western Washington reservations. This opinion is intended to supersede and replace prior opinions of this office pertaining to the ownership of tidelands in front of various Western Washington Indian reservations. These prior opinions, which are hereby withdrawn insofar as they express views on the status of tidelands and river or lake beds, are the following:

1. Opinion of March 18, 1960, concerning ownership of tidelands on the Swinomish and Tulalip Reservations.

2. Opinion of August 19, 1960, pertaining to Makah Reservation tidelands.

3. Opinion of September 23, 1960, Skokomish Reservation tidelands.

4. Opinion of September 26, 1960, Port Madison Reservation tidelands.

5. Opinion of February 10, 1961, Shoalwater Reservation tidelands.

6. Opinion of July 12, 1961, Quinault Reservation as including area between high and low water of Quinault Lake.

7. Opinion of August 31, 1961, Quinault Reservation tidelands.

In addition, any statements in the opinions of March 16, 1961 and July 12, 1961, pertaining to the Puyallup Reservation tidelands and river bottom, and the opinion of November 8, 1961 dealing with Makah Reservation tidelands, which are at variance with the views contained herein, are likewise withdrawn.

At the outset we should note that the question of whether the grants or reservations made or established by the Federal government extend to high or low tide is a question of Federal, rather than State, law and the rights conferred or recognized, including the effect of imperceptible accretions, are to be determined by Federal law. United States v. State of Washington, 294 F.2d 830 (9th Cir. 1961), cert. denied 82 Sup. Ct. ____, 7 L.Ed 2d 783. Federal law follows the common law in this regard in recognizing that a party owning the upland bordering the sea or a lake or river owns any additions thereto resulting from imperceptible accretion. The instant case also holds that mean high water mark, such as was there involved, means the line of high water as determined by the course of the tides - the average elevation of all high tides as observed at a location through a complete tidal cycle of 18.6 years. Presumably the same applies in determining the line of mean low tide where that line is involved.

As a rule, general legislation pertaining to the public lands does not extend to tidelands, and unless the contrary is clearly indicated, withdrawals, grants or patents of public lands normally do not include the tidelands or lands under navigable waters. Mann v. Tacoma Land Company, 153 U.S. 273, 14 Sup. Ct. 822, 38 L.Ed. 714 (1894); McGilvra v. Ross, 215 U.S. 70, 30 Sup. Ct. 27, 54 L.Ed. 95 (1909); United States v. Ashton, 170 Fed. 509 (Cir. Ct. W.D. Wash. W. D. 1909) app. Dismissed sub nom Bird v. Ashton, 220 U. S. 604, 55 L.Ed. 605 (1911). The general rule is that prior to statehood the United States Government holds the tidelands and beds of navigable rivers in trust for the states which are to be carved out of the area. United States v. Holt State Bank, 270 U.S. 49, 46 Sup. Ct. 197, 70 L.Ed. 465 (1926). The United States is not precluded from conveying tidelands prior to statehood but such disposals "are not lightly to be inferred, and should not be regarded as intended unless the intention was definitely declared or otherwise made very plain." 70 L.Ed. at 469. Normally it is left to the states to determine by state law "what rights, if any, littoral proprietors have to the soil below high water mark." Montana Power Co. v. Rochester, 127 F.2d 189, 191 (9th Cir. 1942). In the words of the court in the Ashton case, supra, at p. 513, "If there is any exception to [the] general rule, it must rest upon a special grant expressly authorized by a law enacted by Congress [GDD note: or a treaty of the United States] to provide for some peculiar requirement of the national government."

In Washington the beds and shores of all navigable waters up to and including the line or ordinary high tide in tidal areas and high water in navigable rivers and lakes belong to the state. Washington State Constitution, Article XVII. Congress, in the Washington State Enabling Act, required, and the state in Article XXVI of the State Constitution accepted the requirement, that the state disclaim all right and title to all lands

within the boundaries of the state owned or held by any Indian or Indian tribes. The courts of both the United States and the State of Washington have repeatedly recognized this disclaimer in those cases in which the record clearly shows a Federal intent to include tidelands within a particular Indian reservation established prior to statehood (November 11, 1889). U.S. v. Ashton, supra, at p. 519. Such an intent has been found in those several instances in which the Executive Order establishing the reservation describes the applicable boundary as extending to or along the low-water mark. See for example the Lummi Reservation 1/ discussed in United States v. Stotts, 49 F. 2d 619 (DC Wash. WD, 1930), and United States v. Romaine, 255 Fed. 253 (9th Cir. 1919); Swinomish Reservation 2/ discussed in United States ex rel Corrigan v. Brown, 169 Fed. 477, 480 (DC Wash. WD 1907) (but see discussion of this case in U.S. v. Ashton, supra, at p. 520), State v. Edwards, 188 Wash. 467, 62 P. 2d 1094 (1936), (Western boundary - - "Low-water mark" - - held to mean line of "extreme low tide"), and State v. McCoy, No. 2187, Superior Court for Skagit County (1961 ; appeal pending) (southern boundary defined along Skagit River channel through tide flats); and Tulalip Reservation 3/discussed in Jones v. Callvert,73 Pac. 701 (Wash. 1903). United States v. Snohomish River Boom Co., 234 Fed. 95 (W. D. Wash. 1916), affd. 246 Fed. 112 (9th Cir., 1917) held that a tidelands area near the mouth of Ebey Slough was not a part of the Tulalip Reservation . It affirms that the reservation boundary runs "coincident with the line of low-water mark along the shores of Port Susan, Port Gardner, and Tulalip Bay, "with all the meanderings thereof." but that "tidelands which were wholly separated from the land of the reservation" were not granted to the Indians. 246 Fed. 114, 115.

The seaward boundary of the Quinault Reservation 4/is also expressed in terms of the "low-water mark." The lake boundary runs "around the east shore" of Lake Quinault. See Quinaielt Tribe of Indians v. U.S., 102 Ct. Cl. 822 (1945) for a discussion of the portion of the reservation "taken" by the United States. The Quinault Treaty reserves for the use and occupation of the Indians a tract or tracts of land sufficient for their wants, "to be selected by the President * * * and hereafter surveyed or located **." (Emphasis added.) Article II, Treaty of July 1, 1855 and January 25, 1856, 12 Stat. 971.

1/ Executive Order of November 22, 1873
2/ Executive Order of September 9, 1873
3/ Executive Order of December 23, 1873.
4/ Executive Order of November 4, 1873

In at least two cases where an entire island was reserved as a part of an Indian reservation, the courts have construed this as including the tidelands. United States v. Romaine, supra, (Lummi) and United States v. O'Brien, 170 Fed. 508 (DC Wash. WD 1903), involving the Squaxin Island Reservation. In the latter case, the court stressed the language of the Washington Constitution disclaiming all right and title to all lands "owned or held" by any Indian or Indian tribes. The court construed the reference to lands "held" as meaning "occupied and used" and it held that the Indians were the only ones who occupied and used Squaxin Island.

In the case of the Puyallup Reservation, a court has held that the Executive Orders did not reserve the tidelands as a part of the reservation, or at least not irrevocably so as to be effective after survey and platting of the reservation. U.S. v. Ashton, supra, at p. 517. This is on the basis of a detailed analysis of the many documents and actions affecting that reservation and is made notwithstanding an expression of intent in the communication of the Acting Commissioner of Indian Affairs, upon which the 1873 order was based, that the line was "to follow the shoreline at low-water mark."

The Ninth Circuit Court of Appeals has recognized that the general rule stated in Shively v. Bowlby, 152 U.S. 1, 14 Sup. Ct. 548, 38 L.Ed. 331, that title runs only to the high-water mark "has no relevance to the title to tidelands enclosed by an Indian Reservation made before the entry of the state into the Union." Moore v. United States, 157 F.2d 760 (1946); cert. den. 330 U.S. 827, 67 Sup. Ct. 867, 91 L.Ed. 1277. As indicated in the Moore case, and the cases cited therein, the question of whether tidelands are included within an Indian reservation is one of the intent of the Government when it established the reservation. See United States v. Holt, supra; Alaska Pacific Fisheries v. United States, 248 U.S. 78, 39 Sup. Ct. 40, 63 L.Ed. 138 (1918); Donnelly v. United States, 228 U.S. 243, 33 Sup.Ct. 449, 57 L.Ed. 820, Ann. Case. 1913E, 710 (1913); United States v. Walker River Irrigation District, 104 F.2d 334 (9th Cir. 1939). Among the factors that must be considered in a given case are "the circumstances in which the reservation was created * * * the location and character of the area reserved, the situation and needs of the Indians, and the object to be attained." Alaska Pacific Fisheries v. United States, supra.

As was pointed out in United States v. Stotts, supra, "Each treaty and proclamation must rest upon its own provisions." The Stotts case also pointed out "It is primer law that Indian treaties are to be liberally construed, to the end that Indians will retain the benefits conferred by the treaty at the time of its execution." It also stated that where the treaty

or executive order clearly reserved the tidelands to the Indians, the rights of the Indians could not be prejudiced by the fact that the tidelands were not included in a survey, made after the reservation was established for the purpose of allotting lands to individuals. But see U.S. v. Ashton, supra, and Skokomish Indian Tribe v. France, infra, for examples of weight given to subsequent surveys. One possible distinction is that where the treaty reserves a tract in terms of a geographical description, as in the Point Elliott Treaty, the later survey of that tract cannot omit areas within the description, whereas, when the treaty reserves a tract by reference to a legal subdivision such as a given number of sections, then the survey is necessary to delimit the tract. Note that in the case of Quinault, the treaty reference was to the tract being later "surveyed or located."

Where the Act or executive order establishing a pre-statehood reservation uses express language that shows a clear intent to include the tidelands, such as a reference to the low-water mark, there is usually no problem. Not all of the Western Washington reservations, however, are described in this manner and in those cases we must look to all of the facts in order to ascertain the Federal intent at the time the reservation was established. It is difficult, if not impossible, to reconcile all of the various cases and the statements which they contain in support of the result in each one. One generalization that appears to apply is that the courts are extremely reluctint to upset titles which have been asserted over many years where expensive improvements or operations have been made or conducted in reliance upon present or prior state ownership of the tidelands.

In the case of Quillayute Reservation, the Ninth Circuit Court of Appeals, after reviewing the facts pertaining to that reservation in considerable detail, held that the tidelands were a part of the reservation. Moore v. United States, supra. The treaty had promised the Indians a reservation "sufficient for their wants" and the facts that these Indians were fishermen by occupation, that the lands of the reservation were not suited for agriculture and that the Indians needed the beaches and tidelands to carry on their livelihood, combined to form the basis for the court's conclusion. In a prior case involving the same reservation, the court had found to the contrary, but that holding was on the basis of an erroneous factual premise, namely that the reservation was created after Washington statehood and after the tidelands had already been conveyed to the State of Washington. Taylor v. United States, 44 F. 2d 531 (1930).

In the case of the Skokomish Reservation, the United States District Court for the Western District of Washington has recently held, after reviewing all of the facts presented to it, that the reservation does not include the tidelands on Hood Canal. Skokomish Indian Tribe v. France, No. 1183, decided January 22, 1962. (Appeal pending.) There the court found that neither the treaty nor the executive order described the tidelands nor purported to include them in the description of the reservation. The court found that the Point No Point Treaty reserved an area of six sections or 3,840 acres at the head of Hood Canal "to be hereafter set apart and so far as necessary surveyed and marked out * * *." (Emphasis the court's.) The executive order defined the Hood Canal portion of the reservation boundary as "thence southerly and easterly along said Hood's Canal to the place of beginning." The actual reservation was 4,173.31 acres computed shoreward of the meander line. The court further found that the entire frontage of the reservation along Hood Canal was surveyed into Indian lots, allotted and disposed of by the allottee, and that no portion of such frontage remains in the reservation. The court also found that at the time of the treaty and executive order, these Indians were dependent for their livelihood in part upon fish, but that the primary fish so used was salmon which were easily procured in the rivers and creeks. Shell fish were used by the Indians only to a limited extent and "the livelihood of the Indians was not dependent in material degree upon shell fish or any type of fishing on or from the tidelands in issue." The usual locations at which shell fish were procured were miles from the reservation and the tidelands in issue here were not a source of native shell fish in usable quantities. Moreover, a portion of the reservation was purchased by the United States for the purpose of adding it to the then existing reservation. In none of the proceedings connected with the purchase was any interest shown or attempt made to encompass into the reservation any of the tidelands abutting thereon. In its conclusion of law the court held that as used in the executive order "the expression 'along Hood's Canal' means the official government meander line according to the official government survey of the exterior boundaries of the reservation." In this case, the court stated:

> "* * * this court is fully satisfied that not any one of the parties negotiating the Treaty of 1855 [Point No Point Treaty] had the slightest thought or intention that the Treaty or the Executive Order to follow would vest ownership of the tidelands in question in the Skokomish or in any other Indian Tribe * * * . Nothing in the Treaty or in the Treaty negotiations suggests the parties intended or the Indians thought ownership of land above or below water at Indian fishing grounds or stations was to vest in the Indians merely because they were to have the right to fish at those places."

This opinion, unless overturned on appeal, nullifies the decision of this office on the tidelands situation in the Skokomish Reservation and casts considerable doubt on our prior opinions concerning the tidelands situation at the Port Madison Reservation, the Shoalwater Reservation, and to a lesser extent, the Makah Reservation and the shoreline of Lake Quinault on the Quinault Reservation. Those opinions relied heavily upon the headnote in the Moore case, supra, which stated that:

> "The means by which the Indian tribes earn their living determines the Government's intent in making reservations for them."

However, as seen above, this is only one of the factors which helps determine the Government's intent.

It is interesting to note that in the Stotts case, supra, the District Court in support of its conclusion that the Lummi Reservation included tidelands, stated:

> "* * * 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 * * *."

Apparently, however, the court felt a little unsure that this by itself was enough, for it went on to point out that the proclamation establishing the reservation expressly extended the boundaries to the low-water mark, And, in an apparently not too well researched effort to distinguish the Ninth Circuit Court's holding that the Quilayute Reservation did not include tidelands, he added that the proclamation establishing the Quilayute Reservation "does not contain any inference that the reserve for the Indians extended below high tide * * *." This was before the Moore case had found otherwise.

In State v. Edwards, supra, the Washington court put emphasis upon the Indians' use of the tidelands for the digging of clams as supporting the inclusion of the area within the Swinomish Reservation.

The Makah Reservation is described in somewhat different terms from the others which have been discussed above. The Treaty of January 31, 1855 reserved a tract of land described in part as "commencing on the beach at the mouth of a small brook * * * thence along the shore * * *." The executive order of October 21, 1873 which enlarged the reservation

used this same term with reference both to the Neah Bay and Pacific Ocean portions of the boundary. While the case is not as strong as those in which the term "low-water mark" is used; nevertheless, we are of the opinion that this description placed the tidelands, including those bordering the so-called agency reserve (see our opinion of November 8, 1961), within the reservation. There is no evidence of any intention to make a distinction between reservations created by or pursuant to these almost simultaneously negotiated treaties with these western tribes, most or all of which depended heavily upon fishing for their livelihood.

In Elliot v. Stewart, 14 Pac. 416 (Ore. 1887), the court quoted with approval the following statement as indicating the nature of the term "shore":

> "Lands belonging to the state by reason of its sovereignty include the shores of the sea, and its bays and inlets, in the common law definition of the word 'shore;' that is, the land usually overflowed by neap or ordinary tides."

In other words, the shore lands go to the political body by reason of its sovereignty. There would therefore be a strong argument that in recognizing the rights of the Indians to a specific reservation, the Government intended to recognize their rights to the shorelands.

The construction of the term "along the shore" as including the tidelands is given support in Oakes v. DeLancey, 24 N. Y. Supp. 539 (Sup.Ct. N.Y. 1893), in which the court was construing a deed which contained a description "along the shore." It stated that this deed would go to the low-water mark to fill the requirements of a deed which reserved nothing to the grantor. It pointed out that the original English patent to the area in question included all woods, beaches, marshes, pastures, creeks, waters, lakes, fishing, hunting and fowling. In other words, where the deed intended to convey the entire area and reserve, no part of it to the grantor, the phrase "along the shore" was taken to mean along the seaward side of the shore. We believe the same argument would apply in the case of the Makah Reservation, both in terms of the original reservation as set out in the treaty and the enlarged reservation as described in the 1873 Executive Order. It is to be noted that this order was prior to Washington statehood.

As noted earlier, the description of the Lake Quinault portion of the Quinault Reservation boundary also refers to the shore. The words are "around the east shore." In view of the apparent intent to place this entire inland lake within the reservation, we would construe this language as referring to the high-water mark of the lake. While this may sound inconsistent with our view on the Makah boundary, we believe the interpretations are compatible. In both cases, our interpretation results in the reservation to the tribe of all of the land or water described. In the case of the Makahs, it was a reservation of land and extended as far as the land went even at the tide, or at least the average tide, which produced the greatest amount of land - i.e., low tide. In the Quinault case, this portion of the description was to encompass within the reservation an inland body of water and our interpretation likewise extends the reservation to encompass the entire body of water at the tide, or at least average tide at which that body is the greatest, namely, high tide. Since under Washington law, the upland owners own only to the high tide line, a contrary view of the reservation boundary wouldleave a narrow strip of lake shore between high and low tide in state ownership - a result which finds no support in logic or on any other basis.

In the case of the Port Madison Reservation, the Point Elliot Treaty reserves "two sections or twelve hundred and eighty acres, surrounding the small light at the head of Port Madison." This was enlarged by an October 21, 1864 order of the Secretary of the Interior reserving an additional area as shown on an "accompanying plat." This information is not sufficient to enable us to give an informed opinion as to whether tidelands are included in this reservation.

The Shoalwater Reservation was created by Executive Order of September 22, 1866 which refers to a tract "as indicated on the within diagram" and to a letter of the Secretary of the Interior dated September 18, 1866. From this meager information, we cannot say whether it includes the tidelands. However, we are inclined to agree with the analysis and conclusion stated in Mr. Vaninetti's memorandum of October 2, 1961 to the Western Washington Agency Superintendent that the reservation does not include tidelands.

Finally, it should be noted that the question of Indian ownership of tidelands is not affected by the Submerged Lands Act of 1953 (67 Stat. 29). Section 5(b) of that act excepts from the operation of Section 3, the section confirming tidelands rights in the states,

> "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."

For the Regional Solicitor

(Signed) GEORGE D. DYSART

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