



State of Washington
DEPARTMENT OF FISH AND WILDLIFE

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October 3, 2019

David Bernhardt
Secretary, U.S. Department of the Interior
1849 C Street NW
Washington, DC 20240

RE: Interior Solicitor Opinion M-37034

Dear Secretary Bernhardt:

I am writing to request that Solicitor Opinion M-37034 (Boundary of the Skokomish Reservation along the Skokomish River) be reversed, or at a minimum be withdrawn, based upon extensive new information and associated legal analyses. The opinion concluded that the full width of the Skokomish River – which is navigable – is held in trust by the United States as part of the Skokomish Indian Reservation.

I wish to emphasize that our request is not related to Indian fishing rights reserved by the tribes by federal treaty and/or defined by federal court decisions and orders, nor the sovereign status of the tribes. It is a request to reconsider an opinion on river ownership that was based on incomplete information and resulted in an erroneous conclusion.

At the Washington Department of Fish and Wildlife (WDFW), we take great pride in the co-manager relationship that we have built with the tribes of Washington. It is founded on the principles of government-to-government relationships memorialized in the Centennial Accord between federally recognized Indian tribes and the state of Washington. WDFW respects the values and culture represented by tribal governments and remains committed to co-management and our government-to-government relationship.

Consistent with these principles and our values, we fully appreciate the Skokomish Tribe's deeply held belief that the Skokomish River is part of the Skokomish Reservation, and we can understand why the Tribe requested that the Department of the Interior update its analysis regarding the status of the riverbed forming the Reservation boundary. However, after a thorough analysis of historical and anthropological records collected by recognized experts, we have concluded that Solicitor Opinion M-37034 reached an erroneous conclusion as to the ownership of the Skokomish River.

Let me summarize some of the new information from the exhaustive research conducted by two recognized experts in anthropology, ethnohistory, and waterbody issues¹:

- 1) Neither Congress nor President Grant expressly included the bed of the Skokomish River within the Reservation. We conducted a search of published congressional materials, archival files of members of Congress and presidential administration officials in the late nineteenth century, together with congressional reports and hearings around the time of the creation of Skokomish Indian Reservation and admission of the state of Washington to the Union in 1889. This search revealed no historical evidence *that Congress took any formal actions* before November 11, 1889, through legislation or other means, showing congressional intent that the Skokomish Indian Reservation should include the bed of the navigable Skokomish River within its boundaries (Littlefield, page 32). This comprehensive and conclusive research is essential to application of step 1 of the test for whether a navigable waterbody has been excluded from a state's sovereign ownership as set forth in *Idaho v. United States*, 533 U.S. 262, 101 S. Ct. 1245, 67 L. Ed. 2d 493 (2001).
- 2) Solicitor Opinion M-37034 concludes that available information leaves President Grant's description of the Skokomish Reservation "ambiguous" where the description runs upriver from its mouth at Hood Canal. An extensive new review of maps and correspondence reveals that the Reservation was intentionally located at the north bank of the River, not across its full width to the south bank. The evidence our experts gathered begins with correspondence and mapping preceding President Grant's 1874 proclamation (Littlefield, page 46, *see* map at page 24 and historical correspondence at pages 44-46; Thompson pages 40-49).

An 1873 letter from H.R Clum, Acting Commissioner of Indian Affairs, describes the presumed boundaries of the Reservation to be the meanders along the low-water mark on Hood Canal *to the low-water mark on the Skokomish River* (Littlefield, page 48):

" . . . thence East 40 chains to the line of the low-water mark on the westerly shore of Hood Canal, thence southerly & easterly with the line of low-water mark on said shore with the meanderings thereof, to the Skokomish river, thence up said river with the meanderings thereof, at low-water mark until said rivers intersects the section line between Sec. 15 & 16 . . . "

An 1873 survey of the Reservation was conducted with special instructions to be careful that the surveys fell "within the described limits of the several Indian Reservations mentioned" (William McMicken, Surveyor-General of the Territory of Washington, quoted in Littlefield, page 76). The associated maps and field notes clearly indicate that

¹ Littlefield, D.R. 2019. Historical Report on the Skokomish River and the Southern Boundary of the Skokomish Indian Reservation.

Thompson, G. 2019. Anthropological and Ethnohistoric Information Related to the Riverbed Adjacent to the Skokomish River.

the Skokomish River's north bank was the southern edge of the Skokomish Indian Reservation (Littlefield, page 77).²

- 3) There is also evidence of federal intent regarding the Reservation's description immediately following President Grant's proclamation. About three months after the 1874 Executive Order establishing the Skokomish Reservation boundary (and about nine months after the Clum letter discussed above), Edwin Eells, the U.S. Indian Agent for the Puyallup and Skokomish tribes in Washington Territory, corroborated the understanding that the northern bank of the Skokomish River constituted the southern edge of the Reservation. Eells' letter to Commissioner of Indian Affairs Smith states "*The present reservation lies on the North side of the river [emphasis added]*" (Littlefield, page 50; Thompson, page 38).
- 4) A plat map created within months of the Executive Order defining the Reservation boundaries clearly shows the Reservation boundary on the north bank of the Skokomish River. Importantly, the red lines showing the boundary of the Skokomish Indian Reservation *do not include an island in the middle of the Skokomish River*, instead running along the land side of the northern edge of the river at that location, further confirming that the Reservation's southern boundary was on the northern bank of the Skokomish River (Littlefield, page 80; Thompson, page 40).
- 5) Allotments officially approved by Interior Secretary Schurz in 1881 indicate that the exterior boundaries of the Reservation did not extend into the Skokomish River. Once again, the red coloring on this 1881 survey plat indicated that the *island in the Skokomish River was not included within the Reservation* (Littlefield, map at page 88). No federal survey map before or after that time has shown the boundary of the Skokomish Indian Reservation to be on the south bank of the Skokomish River.
- 6) The Solicitor's Opinion suggests that ownership of the riverbed was essential to ensure that the Tribe could operate weirs to capture salmon and steelhead. This assertion is inconsistent with historical records that indicate weirs were operated on at least eight watersheds draining into Hood Canal, and that only one of the four weirs on the Skokomish River was adjacent to the Reservation (Thompson, pages 17-23). No evidence was found that supported the contention that the government located the reservation or its boundaries to include the weir sites. Instead, *Article 4 of the Point No Point Treaty provided for the right of the Indians to take fish at "usual and accustomed grounds and stations" indicating that ownership of fishing places was not needed.*

With this new information in hand, I am writing to request that Solicitor Opinion M-37034 be reversed, or at a minimum be withdrawn, as was the case with another recent opinion regarding tribal ownership of the bed of the Missouri River in North Dakota.³ To place this request in

² Ultimately, the description of the Skokomish Reservation within President Grant's proclamation dropped the reference to "low water" along the north bank. Thus, the Skokomish Reservation boundary is along the north bank at its normal high water mark, consistent with the normal practice of excluding navigable waters from a terrestrial land conveyance.

³ Solicitor Opinion M-37052 withdrawing Solicitor Opinion M-34044.

perspective, what follows is some relevant background information on the disputed ownership of the Skokomish River, the impact it has had on state-managed fisheries, and our analysis of the legal views contained in Opinion M-37034, particularly in light of the research findings we have obtained. Your immediate attention to this matter would be greatly appreciated as recreational fisheries in the disputed area of the Skokomish River have now been closed for four years, and planning for the next season will be commencing in February 2020.

Background

As Director of WDFW, I work with our state's Fish and Wildlife Commission to open and manage non-treaty fisheries for salmon and other species that reside within the marine and freshwater areas of our state. We do so in cooperation and consultation with the twenty-four Treaty Tribes that have on-reservation and off-reservation fishing rights to a share of harvestable fish. We also coordinate with the eight Executive Order Tribes that have no treaties with the federal government, but have on-reservation fishing rights.

The location of a specific fishery area – within or without an established Reservation – has a significant impact on the ability of Washington citizens to access the state's fishery resources. Indeed, federal law makes it a crime to enter a Reservation and fish without authority and permission.⁴ Thus, the state of Washington's ability to open and manage salmon fishing within the Skokomish River in Mason County, Washington, was significantly impacted when the Solicitor's Office issued an opinion – M-37074 – on January 15, 2016, concluding that the full width of the River—which is navigable—is held in trust by the United States as part of the Skokomish Indian Reservation.

Despite its potential to impact the state of Washington, this opinion was issued without any effort to communicate with, or seek the input of, our state government. Nor have federal agencies worked with us in any meaningful way to address its impacts, or obtain our views following its issuance. Thus, we have largely been left to deal with its fallout on our own – a four-year closure of state salmon fisheries within the disputed area of the Skokomish River to avoid exposing state citizens to potential criminal prosecution by the federal government, as well as minimizing the likelihood of open conflict on the River adjacent to the Skokomish Reservation.

To address the opinion, we evaluated its legal merit and obtained expert historical and anthropological reports addressing the foundation of the opinion. Those reports, and our legal analysis, are now complete. Ultimately, they demonstrate why Solicitor Opinion M-37034 reaches an erroneous conclusion as to ownership of the Skokomish River.

Events Preceding the Issuance of Opinion M-37034, and That Have Transpired Since

The Skokomish River is a navigable water body that flows along the southern edge of the Skokomish Indian Reservation and empties into the marine waters of Hood Canal near its southern reach on the Olympic Peninsula. The state of Washington operates two salmon hatcheries – the George Adams and McKernan hatcheries – on its tributaries, which produce

⁴ 18 U.S.C. § 1165.

Chinook, coho, and chum salmon. The George Adams Hatchery is a large producer of Chinook salmon and upon return these adult fish are significant contributors to tribal and, historically, state-managed fisheries. Naturally produced runs of Chinook, coho, and chum salmon also return to the River.

For many years, the state of Washington and the Skokomish Tribe have both opened salmon fisheries on the stretch of the Skokomish River east of Highway 101 below the George Adams Hatchery. From time to time, ownership of the Skokomish River has been a source of contention between the state of Washington and the Skokomish Tribe. The issue of ownership flared up in 2013 with the Skokomish Tribe asserting that it would take civil action against any Washington citizen fishing within the River.

My predecessor at that time, WDFW Director Phil Anderson, communicated with the Chairman of the Skokomish Tribe and both agreed that it was better to have the matter of title resolved as a matter of law rather than have open conflict on the River. Accordingly, both parties agreed to instruct their legal counsel to work together and consider some form of court resolution on the issue of ownership. After an initial round of discussion between our attorneys, no further communication was received from the Skokomish Tribe's attorney, and fishing seasons were successfully established as they had in the past via the annual state/tribal co-management process known as North of Falcon.

However, without communicating this intent to the State, the Tribe approached the Department of the Interior seeking an updated analysis and opinion regarding the ownership of the riverbed forming the Reservation boundary. As noted above, Interior staff never contacted anyone in Washington State to solicit our views on the matter. Instead, Opinion M-37034 was issued in January of 2016, just as we were beginning to work with Puget Sound Tribes on the structure of 2016-2017 salmon fisheries. Because of the serious implications, and potential criminal consequences of fishing within the River now alleged by Interior to be part of the Reservation, WDFW decided to suspend fishing activity in the Skokomish River as we worked to better understand the implications and basis for Opinion M-37034.

At the same time, Skokomish's legal counsel began communicating with the Department's attorneys demanding the issuance of a quitclaim deed from the State to resolve title definitively. Alternatively, if no deed was forthcoming, Skokomish's legal counsel requested that we consider an agreement to waive State immunity from suit so the matter could be brought to a federal district court for judicial resolution.

Since that time, my staff and I have met numerous times with the Skokomish Tribe to consider whether there is a way to reopen a state fishery within the River while reserving both parties' claims to ownership. Unfortunately, no progress has been made with such discussions. More significantly, when the State has tried to raise the issue of resuming a Skokomish River fishery as part of the annual state/tribal fishery planning process, the existence of Opinion M-37034 has been invoked by the tribes during the North of Falcon planning process for salmon fisheries throughout Washington's waters. The Skokomish Tribe and other Puget Sound tribes have indicated that any discussion of the matter is an affront to tribal sovereignty, and that any

discussion of a state-opened Skokomish River fishery is inconsistent with the co-manager process leading to agreement on each year's fisheries throughout Puget Sound.

While a Solicitor Opinion has no force of law, its weighty effect is apparent. Indeed, the practical effect of the Opinion is so significant that the Skokomish Tribe has now abandoned any desire to have the matter resolved judicially, and has informed the Department of Justice (DOJ) of its desire to maintain this new status quo. Thus, when we have inquired about testing the merits of Opinion M-37034 in a court of law, DOJ officials have simply responded that it is not their practice to do so where there is no tribal request for such resolution.

Again, the practical effect of the Opinion is quite clear and places the State in an untenable position – submit to the status quo, or test Washington State's belief in its ownership of the Skokomish River by reopening the fishery and potentially subjecting state citizens to criminal prosecution. We question whether such a confrontational approach is in the best interests of federal, state, and tribal treaty relations given the long history of controversy associated with Judge Boldt's 1974 historic ruling regarding treaty-fishing rights – a troubling and sad history that is now starting to heal in an evolving fishery co-manager environment.

Our Perspective on the Factual and Legal Merits of Opinion M-37034

We appreciate the Skokomish Tribe's deeply held belief that the Skokomish River is part of its Reservation and that such ownership is a core attribute of tribal sovereignty. We are able to empathize with this position precisely because the same holds true for the state of Washington's view on this matter – ownership of the River is a core sovereign interest of the State.

The U.S. Supreme Court has stated that "lands underlying navigable waters within a state belong to the state in its sovereign capacity and may be used and disposed of as it may elect." *United States v. Holt Bank*, 259 U.S. 49, 55 (1926). In other words, ownership of navigable waters is a fundamental aspect of state sovereignty. Each state took title to aquatic lands upon entry into the Union on an equal footing with preceding states.

Recognizing this important state sovereign interest, the Supreme Court has concluded that any pre-statehood conveyance by the federal government defeating a state's interest in navigable waters must be based upon exceptional circumstances and undertaken in a clear and unequivocal manner. *Id.* See also *Montana v. United States*, 450 U.S. 544, 552 (1981) ("But because control over the property underlying navigable waters is so strongly identified with the sovereign power of government ... it will not be held that the United States has conveyed such land except because of "some international duty or public exigency."). Indeed, there is a "strong presumption against conveyance by the United States." *Montana* at 552.

Washington State's Constitution asserts this sovereign interest in Article XVII, Section 1:

"The state of Washington asserts its ownership to the beds and shores of all navigable waters in the state up to and including the line of ordinary high tide, in

waters where the tide ebbs and flows, and up to and including the line of ordinary high water within the banks of all navigable rivers and lakes.”⁵

Most recently, the United States Supreme Court articulated a clear two-part test for resolving whether a navigable water body is part of an established Indian Reservation and held in a manner defeating a state’s Equal Footing Doctrine interest in the ownership of such waterbodies. *See Idaho v. United States*, 533 U.S. 262, 101 S. Ct. 1245, 67 L. Ed. 2d 493 (2001). Again, starting with a strong presumption in favor of state ownership, the Court stated that this presumption can only be overcome by clear evidence showing each of the following questions can be answered affirmatively:

“We ask whether Congress intended to include land under navigable waters within the federal reservation and, if so, whether Congress intended to defeat the future State’s title to the submerged lands.”

Id. at 273.

On its own, Solicitor Opinion M-37034 fails this test. In response to the first inquiry – whether the Skokomish River is actually located within the Reservation or simply flows along its southern border on the north bank of the River – the Opinion provides no clear evidence the Skokomish River is actually within the Skokomish Reservation. Instead, the Opinion finds that President Grant’s 1874 Executive Order establishing the Reservation is ambiguous, and then resorts to Indian canons of construction to interpret alleged ambiguity over the River’s inclusion within the Reservation in favor of federal tribal trust ownership. Opinion at 28. We assert that, for purposes of overcoming presumptive state ownership, an ambiguous boundary can never meet the unequivocal evidence standard mandated in *Idaho v. United States*.

Setting aside that legal position, our historical and anthropological experts have discovered extensive evidence contradicting any sense that there is ambiguity over the description of the southern boundary of the Skokomish Indian Reservation. We refer you to the enclosed reports examining this issue as part of the overall analysis of whether the United States federal government felt a need to include the Skokomish River within the Skokomish Indian Reservation. The analyses (Littlefield, summaries on pages 30, 60, and 96; Thompson, pages 38-47) review the mapping history for the Skokomish Reservation and provide ample basis to conclude the Reservation’s southern boundary is located at the north bank of the Skokomish River, and thus does not include the full width bed of the River to its south bank.

Perhaps the most significant piece of evidence on this point is a May 25, 1874, letter from federal Indian Agent Edwin Eells that we located in the National Archives. That correspondence was sent three months after President Grant’s Executive Order establishing the boundaries of the Skokomish Indian Reservation. At the time, Agent Eells was in charge of attending to the Skokomish Tribe’s needs and was intimately involved in establishing their Reservation. In

⁵Washington Constitution article XVII, section 2 disclaims any title to certain “tide, swamp, and overflowed” lands patented by the United States prior to statehood. But this simply begs the question as to whether the test for pre-statehood conveyances set forth in *Holt Bank* and *Montana* has been met.

discussing the scope of the Reservation for purposes of considering whether it should be expanded even more to accommodate Indians then resident at the Puyallup Reservation, Agent Eells described the location of the Skokomish Reservation in relation to the Skokomish River:

“The present reservation lies on the North side of the river extending from the mouth about 3 1/2 miles up the river.”

This federal Indian agent correspondence was apparently never discovered or considered by the author of Opinion M-37034. The correspondence clears any ambiguity about whether the local federal Indian agents intended the Reservation to extend across the entire River to its south bank and encompass the River’s full width—they did not. Indeed, the 1874 Eells letter makes it clear that the southern boundary of the Skokomish Reservation extends only to the north bank of the Skokomish River. This 1874 letter is bolstered by the contemporaneous federal surveys showing that a small island within the Skokomish River channel was not included within the Reservation.

The Supreme Court’s test for whether presumed state ownership can be overcome requires a river to be clearly and intentionally located within an established reservation. That clear showing is necessary for the second test to have any practical application – whether Congress confronted this reality and then formally acted with a clear and unambiguous intention to defeat the State’s Equal Footing Doctrine interest in sovereign ownership of a navigable water body. Opinion M-37034 identifies no such clear evidence. Indeed, the available evidence contradicts any conclusion that the Skokomish River was intentionally located within the Skokomish Reservation.

At this point, the inquiry should end with a conclusion that the River became the sovereign land of the state of Washington when it entered the Union in 1889.

Nevertheless, if we address that second question – whether Washington State’s ownership in the Skokomish River was explicitly confronted by Congress, and then resolved with an express intention to defeat the State’s ownership interest – Opinion M-37034 again provides no evidence that such an evaluation or conclusion ever occurred. In the absence of any evidence that Congress made this determination, the Opinion’s author instead asserts it would have been important to include the River in the Reservation to provide access to important fishery resources. The Opinion cites several Ninth Circuit opinions that had discussed the importance of particular resources when determining whether certain lands were included within reservation boundaries. But most of the Ninth Circuit cases relied upon by the Opinion pre-date the refined test articulated in *Idaho v. United States*, and those older cases cannot justify ignoring the clear mandate that Congress must have taken some kind of definitive action expressly approving an intended decision to defeat the State’s ownership.

Furthermore, the Skokomish Tribe’s access to the River was already secured by the off-reservation fishing rights guaranteed under Article 4 of the 1855 Point No Point Treaty. Thus, there was no motivation or need to place the riverbed within the Reservation to secure access to salmon. Indeed, that observation was made by federal courts when determining that the

saltwater tidelands fronting the Skokomish Indian Reservation are not a part of the Reservation.⁶ Moreover, the anthropological report we have enclosed casts substantial doubt on claims that it was crucially important for the federal government to include the bed of the Skokomish River within the Reservation. The Twana peoples obtained salmon after the 1855 Point No Point Treaty throughout the Hood Canal area from numerous off-reservation weirs and other fishing sites, proving that tribal ownership of the bed of the River was not a necessity.

In addition, despite an exhaustive search in historical records within Washington State and in the National Archives, none of our experts found any evidence that the issue of defeating Washington's ownership interest in the Skokomish River was ever explicitly or implicitly proposed, or even considered in the halls of Congress. That should come as no surprise given Agent Eells' correspondence revealing that the Reservation is located on the north side of the Skokomish River's banks. With no intent to include the Skokomish River within the Reservation, there would, of course, be no need for Congress to ever consider such a proposition.

This Matter Needs Full and Final Resolution

The Skokomish River provides unique fishing opportunities for Washington's citizens. Salmon fishing from the River's southern banks (outside the Skokomish Reservation) previously drew thousands of anglers because salmon could readily be caught, and fishing did not require a boat and the other equipment necessary to fish in marine areas. Moreover, absent an opportunity to fish in the River below the George Adams Hatchery, recreational anglers' ability to access Chinook salmon produced from the George Adams Hatchery is severely constrained by fishery management measures in marine areas designed to protect Endangered Species Act-listed Chinook salmon.

Ultimately, this is a matter affecting the State's and Skokomish Tribe's sovereign interests in the Skokomish River, including the fishery resources managed by the Washington Department of Fish and Wildlife. Again, we appreciate that the Skokomish Tribe also feels a strong sovereign interest in the River. That is why the matter has likely not been amenable to a mutually agreed basis for opening a state fishery while reserving conflicting legal claims to ownership. Both sides deserve an answer. However, that answer should be based upon a full set of facts and a proper legal inquiry. As demonstrated above, Solicitor Opinion M-37034 was issued without input by Washington State, and our subsequent analysis shows it is factually and legally deficient.

On that basis, I am asking that Opinion M-37034 be reversed, or at least withdrawn. If not reversed or withdrawn, it will continue to have the corrosive effect on state/tribal relations described above, and will likely lead to an untenable and conflict-prone stalemate.

I trust that you will understand the urgency of this issue and look forward to your response.

⁶ *Skokomish Tribe v. France*, 320 F.2d 205 (W.D. Wash. 1963). Interestingly, the federal district court that adjudicated this matter was presided over by Judge Boldt – the same Judge who presided over and issued the 1974 decision in *United States v. Washington*. Thus, it can hardly be claimed this early decision on the breadth of the Skokomish Indian Reservation reflected any lack of empathy for Skokomish tribal interests.

David Bernhardt
October 3, 2019
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Sincerely,



Kelly Susewind
Director

Enclosures:

Anthropological and Ethnohistoric Information Related to the Riverbed Adjacent to the Skokomish River. Gail Thompson, Ph.D.
Historical Report on the Skokomish River and the Southern Boundary of the Skokomish Indian Reservation. Douglas R. Littlefield, Ph.D.
Edwin Eells May 25, 1874 letter to Edward P Smith, Commissioner of Indian Affairs
Transcription of Edwin Eells letter of May 25, 1874

cc: Tara Katuk Mac Lean Sweeney, Assistant Secretary, Indian Affairs
Daniel Jorjani, Acting Solicitor, Interior Department
Kyle Scherer, Deputy Solicitor, Indian Affairs
Lynn Peterson, Regional Solicitor
Bryan Mercier, Regional Director, Northwest Region Regional Office
Rudy Peone, Natural Resource Officer, Northwest Region Regional Office
Guy Miller, Chairman, Skokomish Indian Tribe
Lorraine Loomis, Chair, Northwest Indian Fisheries Commission
JT Austin, Governor Jay Inslee's Executive Policy Office
Washington Fish and Wildlife Commission
Patty Murray, United States Senator
Maria Cantwell, United States Senator
Derek Kilmer, United States Representative
Kevin Van de Wege, Washington State Senator
Brian Blake, Washington State Representative