

Assistant  
Deputy Minister

Some time be  
adjoint

Your file Your file's case

On file Your reference

OCT - 8 1986

Mr. M. Freeman  
Senior Counsel  
Native Law  
Department of Justice  
Justice Building  
Kent & Wellington Street  
Ottawa, Ontario  
K1A 0H8

Dear Mr. Freeman:

You will be aware of the recent exchange of correspondence between our respective Ministers regarding the requirement for a legal clarification of Indian reserve boundaries to facilitate the enforcement of fisheries management regulations (attachments 1 and 2). In view of the recent problems associated with the implementation of Indian band fishing by-laws in British Columbia, clear boundaries of jurisdiction must be defined as soon as possible.

Mr. Hnatyshyn has proposed that a working group of officials be convened to examine the problem and begin a review of individual reserve boundaries. While I realize this will be a major undertaking, it is imperative that those reserves where by-laws are in effect and problems exist, approximately 12 reserves, be reviewed on an urgent basis. I have therefore asked my Director-General of Strategic Policy and Planning, Mr. P. MacNeil, to convene a meeting on October 16, 1986 at 2:00 p.m. at 200 Kent Street. I would appreciate your making yourself available for the meeting, further details on which can be obtained from Mr. MacNeil - phone number 993-2154.



I have asked that the working group list the reserves in order of priority and develop a realistic timetable for review given the problem with resources. It is important, however, that those reserves with active by-laws be reviewed immediately, so that enforcement responsibilities both on and off reserve can be clearly defined in time for the 1987 fishing season.

Thank you for your early attention to this matter.

Yours sincerely,

ORIGINAL SIGNED BY  
ORIGINALE SIGNÉ PAR

D.A. Good

encl. (2)

DISTRIBUTION

ADM (2)  
DG, SP&P (2)  
G.L. Robins (2)  
O.D. Sweitzer (1)

OCT - 8 1986

Mr. G. Raymond  
Surveyor-General  
Legal Surveys Division  
Department of Energy, Mines and Resources  
615 Booth Street  
Room 553  
Ottawa, Ontario  
K1A 0E4

Dear Mr. Raymond:

My Minister and his colleague, the Honourable Ray Hnatyshyn, recently exchanged correspondence on the requirement for a clarification of Indian reserve boundaries to facilitate the enforcement of fisheries management regulations (attachments 1 and 2). In view of the recent problems associated with the implementation of Indian band fishing by-laws in British Columbia, clear boundaries of jurisdiction must be defined as soon as possible.

As you will see from Mr. Hnatyshyn's letter, it is proposed to convene a working group of officials to examine the problem and begin a review of reserve boundaries. While I realize this will be a major undertaking, it is imperative that those reserves where by-laws are in effect and problems exist, approximately 12 reserves, be reviewed on an urgent basis. I have therefore asked my Director-General of Strategic Policy and Planning, Mr. P. MacNeil, to convene a meeting on October 16, 1986 at 2:00 p.m. at 200 Kent Street. Could you, therefore, nominate a representative and have him/her contact Mr. MacNeil to obtain further details.



I would hope that the working group can list the reserves in order of priority and develop a realistic timetable for review given the problem with resources. It is important, however, that those reserves with active by-laws be handled immediately, so that enforcement responsibilities both on and off reserve can be clearly defined in time for the 1987 fishing season.

Thank you for your early attention to this matter.

Yours sincerely,

ORIGINAL SIGNED BY  
ORIGINALE SIGNÉ PAR

*D. A. Good*

encl. (2)

DISTRIBUTION.

ADM (2)

DG, SP&P (2)

G.L. Robins (2)

O.D. Sweitzer (1)



OCT - 8 1986

Mr. D.K. Goodwin  
Assistant Deputy Minister  
Indian and Inuit Affairs Program  
Lands, Revenues and Trusts  
Department of Indian Affairs  
and Northern Development  
Les Terrasses de la Chaudière  
10 Wellington Street  
Room 1642  
Ottawa, Ontario  
K1A 0H4

Dear Mr. Goodwin:

My Minister and his colleague, the Honourable Ray Hnatyshyn recently exchanged correspondence on the requirement for a clarification of Indian reserve boundaries to facilitate the enforcement of fisheries management regulations (attachments 1 and 2). In view of the recent problems associated with the implementation of Indian band fishing by-laws in British Columbia, clear boundaries of jurisdiction must be defined as soon as possible.

As you will see from Mr. Hnatyshyn's letter, it is proposed to convene a working group of officials to examine the problem and begin a review of reserve boundaries. While I realize this will be a major undertaking, it is imperative that those reserves where by-laws are in effect and problems exist, approximately 12 reserves, be reviewed on an urgent basis. I have therefore asked my Director-General of Strategic Policy and Planning, Mr. P. MacNeil, to convene a meeting on October 16, 1986 at 2:00 p.m. at 200 Kent Street. Could you, therefore, nominate a representative and have him/her contact Mr. MacNeil to obtain further details.



I would hope that the working group can list the reserves in order of priority and develop a realistic timetable for review given the problem with resources. It is important, however, that those reserves with active by-laws be handled immediately, so that enforcement responsibilities both on and off reserve can be clearly defined in time for the 1987 fishing season.

Thank you for your early attention to this matter.

Yours sincerely,

ORIGINAL SIGNED BY  
ORIGINALE SIGNÉ PAR

D.A. Good

encl. (2)

DISTRIBUTION

ADM (2)  
DG, SP&P (2)  
G.L. Robins (2)  
O.D. Sweitzer (1)



Level 1 - Reserves which are of the most immediate concern.

- |                   |                |                  |
|-------------------|----------------|------------------|
| 1. Moricetown #1  | 6. Squamish #5 | 11. Kingslear    |
| 2. Kilsquuecla #1 | 7. Cowichan #1 | 12. Pabineau #11 |
| 3. Kilsquuecla #2 | 8. Skutz #7    | 13. Red Band #4  |
| 4. Kispiox #1     | 9. Skutz #8    |                  |
| 5. Kinggas #37    | 10. Qualicum   |                  |

Level 2 - Reserves in Pacific and Atlantic (#104-111) Regions with by-laws.

- |                               |                       |                        |
|-------------------------------|-----------------------|------------------------|
| 1. Sik-e-dakh #2              | 38. Theik             | 75. Keith Island #7    |
| 2. Agwodin #3                 | 39. Kil-pah-las #3    | 76. Equis #8           |
| 3. Bella Coola #1             | 40. Est-patrolas #4   | 77. Omoah #9           |
| 4. Nooseseck #2               | 41. Tzart-lamr #5     | 78. Numukamis #1       |
| 5. Taleomy #3                 | 42. Kakalatza #6      | 79. Nuchaquis #2       |
| 6. Kwatlana #4                | 43. Cowichan #9       | 80. Dochsupple #3      |
| 7. Mission #1                 | 44. Cowichan Lake     | 81. Sacha #4           |
| 8. Seymour Creek #2           | 45. Moricetown #1     | 82. Sachawill #5       |
| 9. Burrard Inlet #3           | 46. Coryatsaqua #2    | 83. Kirby Point #6     |
| 10. Inlailawatash #4          | 47. Oschawinna #3     | 84. Hamilton Point #7  |
| 1. Skowishin #7               | 48. Alert Bay #1      | 85. Haines Island #8   |
| 2. Chuckchuck #8              | 49. Ches-la-kee #3    | 86. Keeshan #9         |
| 3. Poyam #9                   | 50. Ar-ce-wy-ee #4    | 87. Kichha #10         |
| 4. Skowishin #10              | 51. O-tsa-w-las #5    | 88. Clutus #11         |
| 5. Cheekamus #11              | 52. Tsawwassen        | 89. Anacila #12        |
| 6. Yookwitz #12               | 53. Ahuk #1           | 90. Masit #13          |
| 7. Poquiosin and Skamain #13  | 54. Tsuquanah #2      | 91. Hodayno #2         |
| 8. Waiwakum #14               | 55. Wyak #3           | 92. Loughborough #3    |
| 9. Aikwucks #15               | 56. Cla-oose #4       | 93. Matlaten #4        |
| 10. Siaichem #16              | 57. Burial ground #4A | 94. Campbell River #11 |
| 1. Kowtain #17                | 58. Sarque #5         | 95. Kwa-tsa-lix #4     |
| 2. Yekwaupsum #18             | 59. Carmanah #6       | 96. Tum-bah #5         |
| 3. Stawamus #24               | 60. Iktuksasuk #7     | 97. Kits-ka-hans #6    |
| 4. Kaikalahun #25             | 61. Homitan #8        | 98. Koonwats #7        |
| 5. Checkwelp #26              | 62. Oyces #9          | 99. Chig-in-kaht #8    |
| 6. Checkwelp #26A             | 63. Doobah #10        | 100. Hazelton #1       |
| 7. Defence Island #28         | 64. Malachan #11      | 101. Ksoo-gun-ya #2    |
| 8. Bridge River #1            | 65. Ilclo #12         | 102. Tsitsk #3         |
| 9. Bridge River #2            | 66. Opatseeah #13     | 103. Anlaw #4          |
| 10. Nicola Lake #1            | 67. Wakitsas #14      | 104. Big Hole Tract #8 |
| 1. Quilchena #2               | 68. Chuchummisapo #15 | 105. Eel Ground #2     |
| 2. Douglas Lake #3            | 69. Saouk #16         | 106. Renous #12        |
| 3. Spahomin Creek #4          | 70. Tsahahah #1       | 107. Indian Point #1   |
| 4. Chapperon Lake #5          | 71. Alberni #2        | 108. Red Bank #7       |
| 5. Chapperon Creek Fishery #6 | 72. Tseoowa #4        | 109. Burnt Church #14  |
| 6. Salmon Lake #7             | 73. Ahmitsa #5        | 110. Pokemouche #13    |
| 7. Spahomin Creek #8          | 74. Cleho #6          | 111. Tabusintac #9     |



CABINET DU MINISTRE  
OFFICE OF THE MINISTER

July 24, 1986

The Honourable Tom Siddon, P.C., M.P.  
Minister of Fisheries & Oceans  
House of Commons  
Ottawa, K1A 0A6

CO-RESPONDANCE  
CORRESPONDANCE UNIT

10 24 '86

My dear Colleague.

Thank you for your letter dated June 16, 1986, addressed to my predecessor, and the attached copy of correspondence to our colleague, the Honourable David Crombie, former Minister of Indian Affairs and Northern Development, concerning the possibility of regulations under section 73(1) of the Indian Act.

I note your concern about the certainty of the water boundaries of Indian reserves and the consequent impact on the application of fish management laws. With respect to your request for legal advice on the water boundaries of all reserves in Canada, starting with the reserves cited in your letter, I suggest that the matter be first addressed by our officials and those of the Department of Indian Affairs and Northern Development and the Department of Energy, Mines and Resources. It is important that the problems be well understood and that priorities be set in any work to be done. An undertaking on the scale described in your letter could only be done on the understanding that it would be beyond the present resources of the Department of Justice.

With kindest regards, I remain,

Yours sincerely,



Ray Hnatyshyn



1986

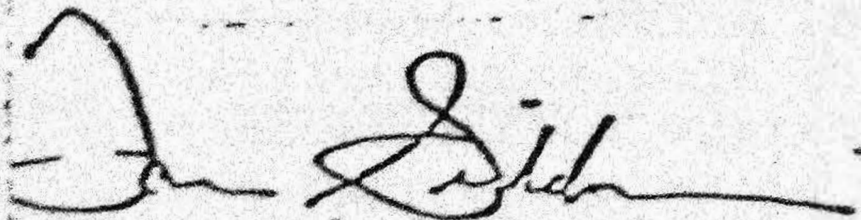
The Honourable John C. Crosbie, P.C., M.P.  
Minister of Justice and Attorney General of Canada  
House of Commons  
Room 418 N, Centre Block  
Ottawa, Ontario  
K1A 0E6

Dear Colleague:

Please find attached a letter to our colleague the Honourable David Crombie, Minister of Indian Affairs and Northern Development seeking an interim resolution to the conflict over by-laws passed by Indians bands under the authority of the Indian Act for fishing on reserves and regulations pursuant to the Fisheries Act. The letter proposes the introduction of an Order-in-Council authorized by Section 73 of the Indian Act. This regulation would confirm my overall mandate for preserving and conserving the resource through proper management and control of seacoast and inland fisheries. I am requesting your support for this initiative.

In order to ensure proper implementation of fishing plans whether under the Fisheries Act or the band by-laws it is imperative that the exact limits of reserve boundaries are known in law and on site. To that end, I would ask that you direct your departmental staff to consult, on a priority basis, with officials of the Department of Energy, Mines and Resources to provide legal advice on the water boundaries of all reserves in Canada beginning with the Skeena, Fraser and Nimpkish Rivers in British Columbia, the Restigouche River in Quebec, and the St. John and Miramichi Rivers in New Brunswick. Following legal determination of these boundaries our colleague the Honourable Pat Carney, Minister of Energy Mines and Resources should be requested to instruct the Surveyor-General for Canada to physically mark the boundaries of these reserves.

Yours sincerely,



Tom Siddon, P.C., M.P.

C.C. The Honourable Pat Carney, P.C., M.P.  
The Honourable David Crombie, P.C., M.P.

It's our year! C'est notre année!

immigration

immigration

Ottawa, Canada K1A 0E6



Mrs. A. Lefebvre-Anglin  
Mr. D. Good-

Director  
Legal Services

|                                      |
|--------------------------------------|
| TO CLOUTY - CANTONMENT - 11 OCT 1986 |
| OUR FILE/VOTRE REFERENCE             |
| F 3300-2                             |
| YOUR FILE/VOTRE REFERENCE            |
| DATE                                 |
| September 8, 1986                    |

SUBJECT  
OBJET

Ownership of the bed of the Skeena River

I enclose copy of a legal opinion received from  
the Assistant Deputy Minister, Public Law Branch,  
Department of Justice, on this issue.

PA/ds

Pierre Asselin



1 350072

September 5, 1986

Mr. Pierre Asselin, Q.C.  
Senior Counsel  
Legal Services Unit  
Department of Fisheries & Oceans  
15th Floor, Centennial Towers  
200 Kent Street  
Ottawa, Ontario  
K1A 0E6

Dear Mr. Asselin:

An opinion was requested as to the ownership of the bed of the Skeena River where it passes Gitwangak Indian Reserves No. 1 and 2 in British Columbia. The essential question is whether the river bed at these points forms part of the reserves, and are thereby held by the federal Crown in trust for the Indians, or whether they were retained by the provincial Crown and never formed part of the reserves. Based on the available factual and historical evidence, it is our conclusion that the river bed was not included in these Indian reserves.

The factual basis for this conclusion is:

1. the reserves were originally allotted by a metes and bounds description, confirmed in Minutes of Decision dated 1891, and an official plan of survey prepared in 1900;
2. the Skeena River is non-tidal, and based on available information, it is navigable where it flows through Gitwangak Indian Reserve No. 1 and alongside Reserve No. 2;
3. both reserves were conveyed by the province of British Columbia to the Dominion government by provincial Order in Council in 1938 (O.C. 1036).

A major question is the applicability of the ad medium filum aquae rule to these two reserves. This is a rule of construction whereby the owner of land whose property abuts a body of water is deemed to own to the center line of the stream, in the absence of evidence to the contrary. If the property in question runs on both sides of the water, the owner of the property would be deemed to own the entire water bed.

Canada



It should be noted that this common law rule is the most appropriate principle to consider in the case of the Gitwangak reserves, since it appears that British Columbia did not have legislation prior to 1907 which would have abrogated the common law rule. Legislation to this effect was later passed, but at the time of the initial allotment and subsequent survey of the Gitwangak reserves, no legislation affected the common law rule. Even if the creation and surveys had occurred after legislation abrogated the rule, the legislative provisions appear to have applied to Crown grants to private persons, and not to the allocation of Indian reserves. Finally, British Columbia legislation adopted after 1938 would not have been able to diminish the federal Crown's title in the reserves. It appears, therefore, that no B.C. legislation existed at the key times to abrogate the ad medium filum rule with respect to Indian reserves. Nevertheless, the existence of such legislation with respect to private grants suggests at a minimum that the province generally intended to retain the ownership of river beds in its property dealings.

It appears, however, that the ad medium filum rule does not apply to navigable rivers in many Canadian provinces, including British Columbia. The laws of England as of 1858 were the basis for the common law of British Columbia, in so far as the laws were not inapplicable based on local circumstances (English Law Ordinance, 1867, S.B.C. 1867, c. 7). Based on the experience of other provinces, in particular—Manitoba and Alberta, and Ontario until 1908, there are convincing arguments that the rule was not intended to apply to navigable rivers. While case law from British Columbia is not conclusive on the question, the best conclusion seems to be that the ad medium filum rule does not apply to navigable rivers in that province. As noted above, this opinion assumes, on the basis of available evidence, that the Skeena River was navigable at these two reserves during the relevant periods, namely the allotment, the surveys, and the conveyance.

Even if it is admitted that the common law rule did apply to navigable rivers, there appears to be evidence to rebut the ad medium filum rule. None of the factors cited below are sufficient in themselves to rebut the rule, but their cumulative effect is persuasive. The most important facts are:

1. considerable emphasis was placed on acreage during the process of establishing reserves in British Columbia by Royal Commission and Orders in



Council, and in the conveyance of the reserves to the Dominion government by O.C. 1036. The acreage of the Gitwangak reserves does not appear to have included the riverbed;

2. the markings and shadings on the original survey plan suggested that the river bed was excluded;
3. claims made by B.C. Indians to the Scott-Cathcart Royal Commission for the foreshores of reserves along rivers suggests that the river beds had not been included in previous allotments;
4. even in the absence of B.C. legislative provisions with respect to Indian reserves, there is evidence to suggest the province's predisposition to retain river beds, unless expressly stated otherwise;
5. the sketch included with the original 1891 metes and bounds description of the reserves suggests that the river bed was not included;
6. the practice of the McKenna-McBride Royal Commission to allot fishing rights in specific instances suggests that the province intended as a general rule to retain its underlying ownership in river beds.

However, the strongest evidence to rebut the common law rule would seem to be the navigability of a water course, and its actual usage as a commercial waterway. As noted above, this is a factual assumption based on the information presently available. If it is ultimately proven that the Skeena is non-navigable at these reserves, then it is quite likely that the other facts cited above may not be enough to rebut the ad medium filum rule.

In conclusion, it appears that the ad medium filum rule did not apply to the allotment and conveyance of the Gitwangak reserves, even in the absence of legislation to abrogate the rule, because the river is navigable at the relevant portions. Alternatively, if the rule did apply to navigable rivers in British Columbia, then the fact of navigability in conjunction with other evidence rebuts the rule's presumption. In either case, the river bed was not allotted with the reserve lands, nor was it conveyed to the Dominion government in 1938. It should be stressed, however, that this opinion relies on the particular facts surrounding the



two Gitwangak reserves. Other reserves, even ones elsewhere in British Columbia, would have to be carefully examined in terms of the factual background to their establishment before any conclusion could be drawn as to water boundaries.

I trust that this corresponds to your request. You may wish to speak directly to the Native Law Section with any specific questions.

Yours sincerely,

*Mary Dawson*

Mary Dawson  
Assistant Deputy Minister  
Public Law Branch

cc. R.J. Green, Q.C.

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LEGAL SERVICES

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*Ent*

RECORDS



MESSAGE TRANSMITTED BY TELETYPE

NOTES  
ET  
OCEANS  
SEP 11 1986

|                                                                  |                       |                           |                             |         |
|------------------------------------------------------------------|-----------------------|---------------------------|-----------------------------|---------|
| Name<br>Expéditeur O.D. Sweitzer                                 |                       |                           |                             |         |
| Address and Branch<br>el direction Native Affairs Division, P&PP |                       |                           |                             |         |
| City<br>Ottawa                                                   |                       |                           |                             |         |
| Inter-<br>ment                                                   | 1 9 1 4               | Floor<br>Étage 11th Floor | Station n°<br>N° de station | 1 1 5 8 |
| Phone n°<br>Téléphone                                            | (613) 9 9 0 1 0 1 8 2 | Date<br>September 9, 1986 |                             |         |

COMPLETED / TERMINÉ

ED

Operator / Opérateur

Subject  
Ownership of the bed of the Skeena River

Pages to follow:  
Pages à suivre: 5

ADDRESSEE'S NAMES / NOMS DES DESTINATAIRES

CITY / VILLE

Pat Chamut, Department of Fisheries and Oceans

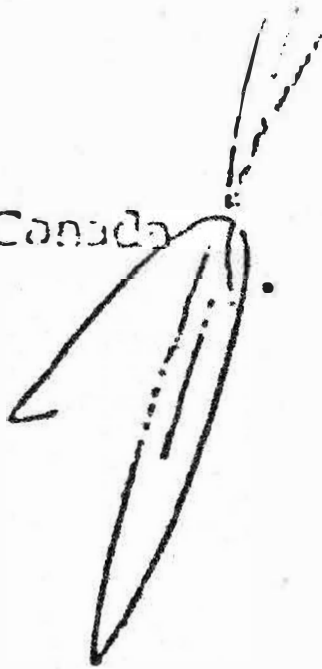
Vancouver

SPECIAL INSTRUCTIONS / INSTRUCTIONS SPÉCIALES

Attention: Al Gibson



Mr. Donald D. Tamm  
Associate Deputy Minister  
Fisheries and Environment Canada  
240 Sparks Street  
2nd Floor  
Ottawa, Ontario  
K1A 0E6



Dear Don:

This refers to the joint request by your Minister and the Minister of Indian & Northern Affairs for an opinion respecting which would govern, in case of conflict, between a by-law made by the Council of an Indian Band pursuant to paragraph 81(o) of the Indian Act pertaining to the preservation, protection and management of fish on a reserve and a regulation dealing with the same subject matter made pursuant to Section 34 of the Fisheries Act.

In my opinion, the by-law made by the Council of a Band would govern. This conclusion is based on the proposition that where a wide ranging subject such as fishing is dealt with in a particular manner in relation to a particular place by or pursuant to an Act of Parliament - - in this case by-laws by Band Councils for the preservation, protection and management of fish on a reserve - it follows that statutory provisions such as section 34 of the Fisheries Act which authorizes the same subject to be dealt with on a general basis are to be construed as being subject to whatever is occupied by the particular laws.

I should add, however, that the Council of a Band acting pursuant to paragraph 81(o) cannot make by-laws inconsistent with regulations made by the Governor in Council pursuant to paragraph 73(1)(a) of the Indian Act which provides:

"73.(1). The Governor in Council may make regulations

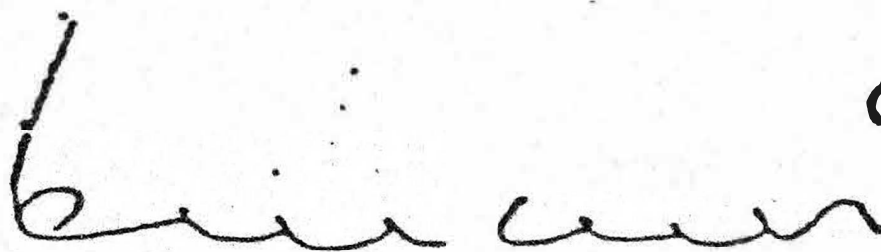
(a) for the protection and preservation of fur-bearing animals, fish and other game on reserves."

ENTERED  
21 1978  
ON CARDS



As a result, therefore, if by-laws made by Band Councils for the purposes indicated in paragraph 81(c) are considered inadequate the solution rests with the Governor in Council who may take whatever steps in that regard which he considers appropriate as authorized by paragraph 73(1) (a).

Yours sincerely,

A handwritten signature in dark ink, appearing to read 'Roger Tassé', with a stylized, cursive script.

Roger Tassé  
Deputy Minister of Justice.



November 16, 1978.

Mr. Donald D. Tansley,  
Associate Deputy Minister,  
Fisheries & Environment Canada,  
Ottawa, Ontario.  
K1A 0E6

Dear Mr. Tansley:

Following our meeting in your office on October 13, 1978 at which Mr. Christie and I discussed with you the implications for your Department of Mr. Tassé's opinion of August 17, 1978, we undertook to let you have a further opinion as to whether the words "on the reserve" in section 81(o) of the Indian Act include rivers.

We have, of course, not been able to examine the legal description of all reserves but we have examined a number of descriptions of reserves in British Columbia and New-Brunswick including reserves along the Fraser and its tributaries and the Kingsclear Reserve. Based on this evidence, it is our opinion that boundaries of reserves generally stop at the river's edge. In other words, they do not include the rivers along which they run.

There could conceivably be exceptions to this rule - as I say we have not examined the descriptions of all the reserves in the country - but in the absence of evidence to the contrary, you can assume that the situation is that rivers do not form part of reserves.

There are cases where it is provided that the Indians may draw water from the rivers for certain purposes. For example, the description of the Stullawheets Indian Reserve No. 8 along the Fraser River says that "fifty inches of water for irrigation and other purposes are assigned from the above creek or any other sources of water supply which, on survey, may be found available."



... does not make the river part of the reserve which  
is elsewhere described as being a reserve "on the  
right bank of the Fraser River" and bounded by the River.

If we can be of further assistance to you,  
please let us know.

Yours truly,

ORIGINAL SIGNED BY

Paul M. Ollivier, Q.C.,  
Associate Deputy Minister.



FILE

Native Fisheries Advisor  
Native Affairs Division  
Strategic Policy and Planning

SECURITY - CLASSIFICATION - DE SÉCURITÉ

OUR FILE/NOTRE RÉFÉRENCE

8423-1

YOUR FILE/VOTRE RÉFÉRENCE

DATE

October 29, 1986

CT

Definition of Navigable Waters

- Telecom October 29, 1986 with Ms. Côté, Navigable Waters Protection Act Programs, Transport Canada
- Definition of navigable waters in Act not adequate but attempts to amend have been unsuccessful.
- Operationally Transport defines navigable as any waters that can support navigation, including canoes.
- Problems arise where farmers who own land on either side of water bodies run fences across the water to keep stock in or out. In situations where such fences interfere with water traffic (ie. recreational canoeing) the farmer is requested to remove the obstruction, or modify, to accommodate passage of vessels. Litigation which would clarify the question has apparently not resulted to date.
- Main contact person will be Ms. Janet Bourassa, Chief, Navigable Waters Protection Act Programs.



O.D. Sweitzer

c.c.: G.L. Robins



MEMORANDUM

NOTE DE SERVICE

NOV 28 1986

Larry Duke, DFO, Victoria  
Fred Fraser, DFO, New Westminster  
Paul Sproat, DFO, Prince Rupert

Native Fisheries Advisor  
Native Affairs Division  
Headquarters

SECURITY - CLASSIFICATION - DE SÉCURITÉ

OUR FILE/NOTRE RÉFÉRENCE

8423-1

YOUR FILE/VOTRE RÉFÉRENCE

DATE

November 26, 1986

Reserve Boundary Review - Navigable Waters

Attached please find a package of information regarding the establishment of a working group (Justice, EMR, DIAND, DFO) to review Indian reserve boundaries.

The Departments of EMR and IAND are proceeding to gather information relating to the surveys, maps, plans and legal documentation used to establish the reserves. DFO is responsible for determining navigability of the waters involved. Discussions with Transport Canada have confirmed that no firm definition of navigability exists therefore we are inclined to follow the Transport rule of thumb that if a waterway is navigable by canoe it is considered navigable.

I am requesting your assistance in securing information, either historical or present day, on the navigability of rivers on or adjacent to the reserves found on the attached list within your jurisdiction. Priority will be given to the first ten reserves but all reserves will have to be reviewed at some time.

I believe there is considerable information available but I have located little here in Ottawa. Historical information must exist in literature relating to paddlewheelers and the early fur trade and up to date information on recreational canoeing might provide references which would satisfy the Department of Justice. I am hoping that members of your staff may be familiar with some of this literature and may even have it in their personal libraries. If such is the case photocopies would be appreciated.

In that this review has been instigated by DFO and is for our benefit it is incumbent upon us to provide information on navigability without delay. I appreciate that this is yet another demand on your staff's time therefore if you cannot respond to this request please call me (990-0182) as soon as possible and other arrangements will have to be made.

O.D. Sweitzer



Assistant Deputy Ministers  
Regional Directors General  
Directors General  
for AFS and P&FF

A/Assistant Deputy Minister  
Policy and Program Planning

|                                         |
|-----------------------------------------|
| SECURITY - CLASSIFICATION - DE SÉCURITÉ |
| OUR FILE/VOTRE RÉFÉRENCE                |
| YOUR FILE/VOTRE RÉFÉRENCE               |
| DATE<br>NOV 14 1986                     |

SUBJECT  
OBJET

Indian Reserve Boundary Review

At the suggestion of the Honourable Ray Hnatyshyn, Minister of Justice, a meeting to discuss the reserve boundary issue took place on October 20, 1986.

I am attaching a package of information resulting from that meeting. This includes background material, follow-up letters to DIAND and EMR and a letter to Justice asking their opinion on a number of key questions which will provide the legal framework for the review.

As you will see from the attachments the complexities relating to the establishment of Atlantic Indian reserves resulted in the decision to begin the review with reserves in B.C. This will serve to define the review process and provide an understanding as to the magnitude of the task and the resources needed to do the job. The process is expected to improve as each successive reserve is completed. With the experience gained from the review of the ten priority B.C. reserves a start will then be made on the key Atlantic reserves.

You will be kept informed of the progress made by the working group.

ORIGINAL SIGNED BY  
ORIGINALE SIGNÉ PAR

David A. Good

Distribution

D.A. Good (2)  
P.H. MacNeil (2)  
G.L. Robins (1)  
O.D. Sweitzer (1)



Deputy Minister

SECURITY - CLASSIFICATION - DE SÉCURITÉ

OUR FILE/NOTRE RÉFÉRENCE

YOUR FILE/VOTRE RÉFÉRENCE

DATE NOV 10 1986

Acting Assistant Deputy Minister  
Policy and Program Planning

### Reserve Boundary Review

Paul MacNeil chaired a meeting to discuss the reserve boundary issue was convened on October 20. The following people were in attendance:

|                 |         |
|-----------------|---------|
| B. Menoury      | DFO     |
| G.L. Robins     | DFO     |
| O.D. Sweitzer   | DFO     |
| D. Brock        | DFO     |
| S. McDougall    | DIAND   |
| H. Ryan         | DIAND   |
| D. Snowling     | EMR     |
| S. Repstock     | EMR     |
| M.E. Fitzgerald | Justice |
| M. Freeman      | Justice |

There was general agreement that the by-law situation constituted a serious problem for DFO. Our proposed approach was to seek some broad principles from Justice against which reserves could be reviewed to determine whether the subject water was a part of the reserve. Justice was unsure that such a process would be easy to achieve given the legal peculiarities surrounding the establishment of each reserve. They did agree, however, that specific questions should be directed to Justice. In the meantime work will begin on the list of priority reserves, and both DIAND and EMR have agreed to provide whatever information they have to assist Justice in their analysis of the boundaries of the Moricetown reserve. This exercise will serve to identify the magnitude of the task and the time and resources required to complete it.

One promising idea to emerge from the discussion at this point was the development of a standard approach which could be followed by legal staff in the line departments or by legal consultants to spread the load and thereby speed up the process. Justice agreed to examine this option.



DIAND was of the opinion that reserves east of the Manitoba/Ontario border and especially in the Maritimes are much more difficult to research due to the paucity of documentation, the occurrence of land grants to establish reserves, and the presence of very old treaties and the Royal Proclamation. For these reasons it was decided to identify priority reserves in both B.C. and the Atlantic, on the understanding that the initial review will concentrate primarily on B.C.

In order to move forward with a review of their reserves the following working group was established.

|                       |          |
|-----------------------|----------|
| Obert Sweitzer        | Chairman |
| Mary Ellen Fitzgerald | Justice  |
| Sandy McDougall       | DIAND    |
| Sten Repstock         | EMR      |

The first thirteen B.C. and Atlantic reserves listed on the attached paper will be considered the priority reserves.

Attached for your signature is a separate letter seeking Justice's clarification of the existing legal framework relating to the issue of Indian reserve boundaries. Justice officials have already indicated their concurrence that the attached questions be put forward to Mr. Iacobucci and once Justice makes an official reply, their opinions will be used by the working group to facilitate their review of the reserves.

I will provide information packages to ADMs and RDGs outlining the decisions of the October 20th meeting including the establishment of the working group.

Original Signed by  
Original si gné par  
D. GOOD

David A. Good

encl. (1)

Distribution

D.A. Good (2)  
P.H. MacNeil (2)  
G.L. Robins (1)

~~O.D. Sweitzer (1)~~



Priorization for Reserve Review

Level 1 - Reserves which represent the most immediate concern.

- |                   |                |                  |
|-------------------|----------------|------------------|
| 1. Moricetown #1  | 6. Squamish #5 | 11. Kingsclear   |
| 2. Kitsequecla #1 | 7. Cowichan #1 | 12. Pabineau #11 |
| 3. Kitsequecla #2 | 8. Skutz #7    | 13. Red Band #4  |
| 4. Kispiox #1     | 9. Skutz #8    |                  |
| 5. Kisgegas #37   | 10. Qualicum   |                  |

Level 2 - Reserves in Pacific and Atlantic (#104-111) Regions with by-laws.

- |                                |                       |                        |
|--------------------------------|-----------------------|------------------------|
| 1. Sik-e-dakh #2               | 38. Theik             | 75. Keith Island #7    |
| 2. Agwadin #3                  | 39. Kil-pah-las #3    | 76. Equis #8           |
| 3. Bella Coola #1              | 40. Est-patrolas #4   | 77. Omoah #9           |
| 4. Nooseseck #2                | 41. Tzart-lamr #5     | 78. Numukamis #1       |
| 5. Taleomy #3                  | 42. Kakalatza #6      | 79. Nuchaquis #2       |
| 6. Kwatlana #4                 | 43. Cowichan #9       | 80. Dochsupple #3      |
| 7. Mission #1                  | 44. Cowichan Lake     | 81. Sacha #4           |
| 8. Seymour Creek #2            | 45. Moricetown #1     | 82. Sachawill #5       |
| 9. Burrard Inlet #3            | 46. Coryatsaqua #2    | 83. Kirby Point #6     |
| 10. Inlailawatash #4           | 47. Oschawwinna #3    | 84. Hamilton Point #7  |
| 11. Skowishin #7               | 48. Alert Bay #1      | 85. Haines Island #8   |
| 12. Chuckchuck #8              | 49. Ches-la-kee #3    | 86. Keeshan #9         |
| 13. Poyam #9                   | 50. Ar-ce-wy-ee #4    | 87. Kichha #10         |
| 14. Skowishin #10              | 51. O-tsaw-las #5     | 88. Clutus #11         |
| 15. Cheakamus #11              | 52. Tsawwassen        | 89. Anacle #12         |
| 16. Yookwitz #12               | 53. Ahuk #1           | 90. Masit #13          |
| 17. Poquiosin and Skamain #13  | 54. Tsuquanah #2      | 91. Homayno #2         |
| 18. Waiwakum #14               | 55. Wyak #3           | 92. Loughborough #3    |
| 19. Aikwucks #15               | 56. Cla-oose #4       | 93. Matlaten #4        |
| 20. Siaichem #16               | 57. Burial ground #4A | 94. Campbell River #11 |
| 21. Kowtain #17                | 58. Sarque #5         | 95. Kwa-tsa-lix #4     |
| 22. Yekwaupsum #18             | 59. Carmanah #6       | 96. Tum-bah #5         |
| 23. Stawamus #24               | 60. Iktuksasuk #7     | 97. Kits-ka-hans #6    |
| 24. Kaikalahun #25             | 61. Homitan #8        | 98. Koonwats #7        |
| 25. Checkwelp #26              | 62. Oyces #9          | 99. Chig-in-kaht #8    |
| 26. Checkwelp #26A             | 63. Doobah #10        | 100. Hazelton #1       |
| 27. Defence Island #28         | 64. Malachan #11      | 101. Ksoo-gun-ya #2    |
| 28. Bridge River #1            | 65. Ilclo #12         | 102. Tsitsk #3         |
| 29. Bridge River #2            | 66. Opatseeah #13     | 103. Anlaw #4          |
| 30. Nicola Lake #1             | 67. Wakitsas #14      | 104. Big Hole Tract #8 |
| 31. Quilchena #2               | 68. Chuchummisapo #15 | 105. Eel Ground #2     |
| 32. Douglas Lake #3            | 69. Saouk #16         | 106. Renous #12        |
| 33. Spahomin Creek #4          | 70. Tsahaheh #1       | 107. Indian Point #1   |
| 34. Chapperon Lake #5          | 71. Alberni #2        | 108. Red Bank #7       |
| 35. Chapperon Creek Fishery #6 | 72. Tseoowa #4        | 109. Burnt Church #14  |
| 36. Salmon Lake #7             | 73. Ahmitsa #5        | 110. Pokemouche #13    |
| 37. Spahomin Creek #8          | 74. Cleho #6          | 111. Tabusintac #9     |



NOV 12 1986

Mr. F. Iacobucci, Q.C.  
Deputy Minister  
and Deputy Attorney General  
Department of Justice Canada  
Justice Building  
Kent & Wellington Street  
Ottawa, Ontario  
K1A 0H8

Dear Mr. Iacobucci:

As you know recurring disputes over the application of Indian band fishing by-laws made under the authority of section 81(1)(o) of the Indian Act gave rise to correspondence between our respective Ministers (copies attached) in an endeavour to seek the assistance of your department, DIAND and EMR in determining whether by-law jurisdiction extends to waters adjacent to, on or between reserves.

Since the Indian Act clearly states that bands may make by-laws for "the preservation, protection and management of ... fish ... on the reserve", it is imperative that bands and government management agencies clearly understand where the by-laws apply and where the Fisheries Act applies. The present unclear picture of by-law jurisdiction has resulted in some serious confrontations and litigation. The effect has been one of frustration for Indian bands and departmental management and enforcement staff. In addition, the public is confused about the government's inability to resolve problems created by its own legislation.

Without addressing the paramountcy issue it is now necessary to move forward to clarify, wherever possible, exactly where reserves end in relation to neighbouring water bodies.

...2



A meeting of officials, as suggested by your Minister, was held on October 20, 1986 with officials of our respective departments, DIAND and EMR. Justice was represented by Mr. M. Freeman and Ms. M.E. Fitzgerald. A working group, chaired by DFO, was formed to review reserve boundaries, beginning with a number of the most controversial reserves. The working group will review the legal instruments which established the reserves, the navigability of the water on or adjacent to the reserves and the details of survey plans for the reserves. Given that the catch-up phase alone -- reviewing all reserves of bands which presently have fishing by-laws in Atlantic and Pacific Region will require the review of 124 reserves -- there is a need for clarification of the existing legal framework to guide both the working group in its review, and DIAND in its review of new by-laws as they are submitted to that Department for approval.

With this in mind, I am seeking Department of Justice opinions on the attached questions about the existing legal framework in respect of the jurisdiction of Indian bands over internal and adjacent waters.

If we are to minimize confrontations between fishery officers and Indian fishermen during the 1987 fishing season, we must resolve as many of the boundary issues as possible before the season opens in May. It would be appreciated, therefore, if you could give a high priority to this matter and provide opinions at the earliest possible date.

Given the importance of this matter to Mr. Rawson and Mr. Kroeger, I have provided copies of this letter to them.

Yours sincerely,  
Original Signed by  
P. MEYBOOM  
A signé l'original

Peter Meyboom

c.c.: Mr. B. Rawson  
Mr. A. Kroeger

DISTRIBUTION

Deputy Minister (1)  
Senior Assistant Deputy Minister (1)  
ADM, P&PP (2)  
DG, SP&P (2)  
~~Mr. J. J. J. J. J.~~  
O.D. Sweitzer (1)



## Reserve Boundary Questions for Justice Opinion

1. Does the ad medium filum rule apply to navigable waters whether adjacent to reserves, flowing between reserves or flowing through a reserve? If the ad medium filum rule does not apply, is there some other rule (e.g. the high water mark) which applies?
2. Does the ad medium filum rule apply to non-navigable waters whether adjacent to a reserve, flowing between reserves or flowing through a reserve? If not, is there some other rule which applies?
3. Where erosion over time has caused rivers to encroach onto reserve lands, does the existing high water mark form the boundary of the reserve?
4. Where re-channelization occurs over the short term causing the river to encroach onto the reserve, does the "new" river channel form part of the reserve?
5. Where reserves are adjacent to tidal waters, either on the lower reaches of rivers/streams or on the ocean shore, do their boundaries stop at the high water mark?



100-70-20418-86  
CABINET DU MINISTRE  
OFFICE OF THE MINISTER

July 24, 1986

The Honourable Tom Siddon, P.C., M.P.  
Minister of Fisheries & Oceans  
House of Commons  
Ottawa, K1A 0A6

MINISTRE DE CORRESPONDANCE  
CORRESPONDENCE UNIT  
JUL 26 10 34 AM '86

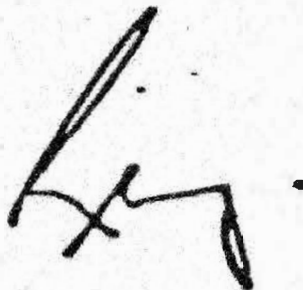
My dear Colleague.

Thank you for your letter dated June 16, 1986, addressed to my predecessor, and the attached copy of correspondence to our colleague, the Honourable David Crombie, former Minister of Indian Affairs and Northern Development, concerning the possibility of regulations under section 73(1) of the Indian Act.

I note your concern about the certainty of the water boundaries of Indian reserves and the consequent impact on the application of fish management laws. With respect to your request for legal advice on the water boundaries of all reserves in Canada, starting with the reserves cited in your letter, I suggest that the matter be first addressed by our officials and those of the Department of Indian Affairs and Northern Development and the Department of Energy, Mines and Resources. It is important that the problems be well understood and that priorities be set in any work to be done. An undertaking on the scale described in your letter could only be done on the understanding that it would be beyond the present resources of the Department of Justice.

With kindest regards, I remain,

Yours sincerely,



Ray Hnatyshyn



June 16, 1986

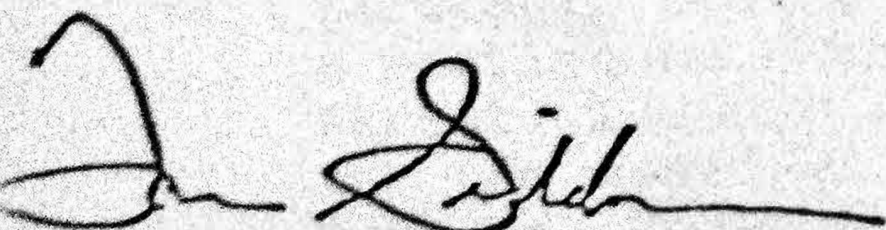
The Honourable John C. Crosbie, P.C., M.P.  
Minister of Justice and Attorney General of Canada  
House of Commons  
Room 418 N, Centre Block  
Ottawa, Ontario  
K1A 0E6

Dear Colleague:

Please find attached a letter to our colleague the Honourable David Crombie, Minister of Indian Affairs and Northern Development seeking an interim resolution to the conflict over by-laws passed by Indians bands under the authority of the Indian Act for fishing on reserves and regulations pursuant to the Fisheries Act. The letter proposes the introduction of an Order-in-Council authorized by Section 73 of the Indian Act. This regulation would confirm my overall mandate for preserving and conserving the resource through proper management and control of seacoast and inland fisheries. I am requesting your support for this initiative.

In order to ensure proper implementation of fishing plans whether under the Fisheries Act or the band by-laws it is imperative that the exact limits of reserve boundaries are known in law and on site. To that end, I would ask that you direct your departmental staff to consult, on a priority basis, with officials of the Department of Energy, Mines and Resources to provide legal advice on the water boundaries of all reserves in Canada beginning with the Skeena, Fraser and Nimpkish Rivers in British Columbia, the Restigouche River in Quebec, and the St. John and Miramichi Rivers in New Brunswick. Following legal determination of these boundaries our colleague the Honourable Pat Carney, Minister of Energy Mines and Resources should be requested to instruct the Surveyor-General for Canada to physically mark the boundaries of these reserves.

Yours sincerely,



Tom Siddon, P.C., M.P.

c.c. The Honourable Pat Carney, P.C., M.P.  
The Honourable David Crombie, P.C., M.P.

It's our year!

C'est notre année!

in my or in his

en mon ou en son

Ottawa, Canada K1A 0E6