

Appendix C

South Port Townsend Bay Legal Framework

Treaties and Subsequent Court Decisions

Treaty of Point No Point, 1855

ARTICLE 4 - The right of taking fish at usual and accustomed grounds and stations is further secured to said Indians, in common with all citizens of the United States; and of erecting temporary houses for the purpose of curing; together with the privilege of hunting and gathering roots and berries on open and unclaimed lands. Provided, however, that they shall not take shellfish from any beds staked or cultivated by citizens.

Boldt Decision

On February 12, 1974, in U.S. v. Washington, Federal Judge George Boldt issued a ruling that affirmed the right of most of the tribes in the state of Washington to continue to harvest salmon up to 50% of the harvestable number of fish. Many opponents of this case couch it as a "grant" of rights to the tribes. More accurately, the decision was simply affirming that when the Tribes released their interest in the millions of acres of land in Washington State through a series of treaties signed in 1854 and 1855, they reserved the right to continue fishing. For example, the Treaty of Point No Point (1855) includes the following language: "The right of taking fish at usual and accustomed grounds and stations is further secured to said Indians, in common with* all citizens of the United States " Most of the treaties negotiated by Territorial Governor Isaac Stevens included this, or very similar, language.

In 1979, the Ninth Circuit Court of Appeals upheld Boldt's ruling, and on July 2, 1979, the U.S. Supreme Court largely affirmed it. Principles established by the Boldt Decision have since been applied to other resources, including shellfish.

*To interpret this article of these treaties, United States District Court Judge Boldt looked at the minutes of the treaty negotiations to determine the meaning of "in common with" as the United States described it to the Tribes, and determined that the United States intended for there to be an equal sharing of the fish resource between the Tribes and the settlers. Of this, Judge Boldt wrote, "By dictionary definition and as intended and used in the Indian treaties and in this decision, 'in common with' means sharing equally the opportunity to take fish.

Rafeedie Decision

After hearing testimony from tribal elders, biologists, historians, treaty experts, as well as testimony from private property owners and non-Indian commercial shellfish growers, Federal District Court Judge Edward Rafeedie followed in the footsteps of the Boldt Decision. He ruled the treaties' "in common" language meant that the tribes had reserved harvest rights to half of all shellfish from all of the usual and accustomed places, except those places "staked or cultivated" by citizens – or those that were specifically set aside for non- Indian shellfish cultivation purposes.

"A treaty is not a grant of rights to the Indians, but a grant of rights from them," Rafeedie wrote in his December 1994 decision, adding that the United States government made a solemn promise to the tribes in the treaties that they would have a permanent right to fish as they had always done. Rafeedie ruled all public and private tidelands within the case area are subject to treaty harvest, except for shellfish contained in artificially created beds.

Since the U.S. Supreme Court's final refusal in 1999 to hear the case, several parties, including the tribes and shellfish growers, have been working on an implementation plan under the guidance of Seattle Federal Court Judge Robert Lasnik.

The Public Trust Doctrine

The Public Trust Doctrine is a legal principle derived from English Common Law that has been adopted by Washington courts. The essence of the doctrine is that the navigable "waters of the state" are a public resource owned by and available to all citizens equally for the purposes of navigation, conducting commerce, fishing, recreation, and similar uses. This trust is not invalidated by private ownership of the underlying land.

The doctrine limits private use of tidelands and other shorelands to protect the public's right to use the waters of the state. The Public Trust Doctrine does not allow the public to trespass over privately owned uplands to access the tidelands. It does, however, generally protect public use of navigable water bodies below the ordinary high water mark.

Protection of the trust is a duty of the State, and the Shoreline Management Act (SMA) is one of the means by which that duty is carried out. The doctrine requires a careful evaluation of the public interest served by any action proposed. This requirement is fulfilled in large part by the planning and permitting requirements of the SMA.

Local governments should consider public trust doctrine concepts when developing comprehensive plans, development regulations, and shoreline master programs. There are few

"bright lines", however, as the Public Trust Doctrine is common law, not statutory law, the extent of its applicability can only be determined by state court decisions.

Public Trust Doctrine – Navigational Uses

- The government has power to regulate the public's right to navigation and anchorage.
- The aquatic lands managed by the DNR are subject to the Public Trust Doctrine, which gives the public the right to engage in navigation, together with incidental rights regarded as corollary to navigation, without authorization from the DNR.
- The right to navigate includes the right to incidental anchorage. However, if a vessel remains anchored in one place too long, it is no longer engaged in navigation.

Transient uses (e.g., anchorage zones) can be regulated under county ordinance. The DNR also has the ability to promulgate regulation in this regard under the new Recreation WAC, although the DNR's process is more cumbersome than the County process.

Jefferson County and the Shoreline Management Act

Shoreline Management Act (SMA)

Washington's SMA was passed by the Legislature in 1971 and adopted by the public in a 1972 referendum. The goal of the SMA is "to prevent the inherent harm in an uncoordinated and piecemeal development of the state's shorelines".

The Act establishes a broad policy giving preference to uses that: protect the quality of water and the natural environment, depend on proximity to the shoreline ("water-dependent uses"), and preserve and enhance public access or increase recreational opportunities for the public along shorelines.

The SMA establishes a balance of authority between local and state government. Cities and counties are the primary regulators but the state (through the Department of Ecology) has authority to review local programs and permit decisions.

Shoreline Master Program (SMP)

Under the SMA, each city and county adopts an SMP that is based on state guidelines but tailored to the specific needs of the community. More than 200 cities and all 39 counties have SMPs. Local SMPs combine both plans and regulations. The plans are a comprehensive vision of how shoreline areas will be used and developed over time. Regulations are the standards that shoreline projects and uses must meet. Note - On December 7, 2009, after 30 hours of deliberations and weighing hundreds of public comments, Jefferson County commissioners

unanimously approved a an update to the SMP. The next step is submittal to Department of Ecology for final review and approval.

Shoreline permits

Each local government has established a system of permitting for shoreline development. Substantial Development Permits are needed for projects costing over \$2,500, or those that materially interfere with the public's use of the waters. Some projects and activities are simply prohibited by local SMPs or under the policy of the Act. However, it is far more common that the issue is how a development should be done - not whether or not it should be done. Local governments may also issue Conditional Use or Variance permits to allow flexibility and give consideration to special circumstances. Ecology must approve all conditional use and variance permits. Local governments issue approximately 1,000 permits every year.

State Agency Responsibilities

Washington Department of Health (DOH)

Sanitary Control of Shellfish (WAC 246-282)

DOH is responsible for evaluating commercial shellfish growing areas to determine if shellfish are safe to eat. Commercial shellfish growing areas in Washington State are classified as Approved, Conditionally Approved, Restricted, or Prohibited. These classifications have specific standards that are derived from the *National Shellfish Sanitation Program Guide for the Control of Molluscan Shellfish* (NSSP Guide), which is adopted by reference in WAC 246-282.

The NSSP Guide defines a marina as: “any water area with a structure (docks, basin, floating docks, etc...) which is:

- (a) Used for docking or otherwise mooring vessels; and
- (b) Constructed to provide temporary or permanent docking space for more than ten boats.”

The NSSP Guide definition of a marina includes mooring buoys for the purpose of shellfish growing area classification. In counting boats towards the definition of a marina, DOH counts any boat large enough to accommodate a marine toilet.

A permanent marina closure zone is established for areas that always have more than 10 boats docked or moored there. However, many marine areas in Washington reach this number only during the boating or fishing season. For these areas a “conditional closure” is established for those seasons. Also, if there is a confirmed threat of discharge from a boat that endangers water quality, we may establish a temporary closure zone. Criteria for sizing the closure zone are detailed in the NSSP Guide.

Washington Department of Natural Resources (DNR)

Aquatic Land Ownership and Management Authority

Washington State took absolute title to the beds and shores of navigable waters under the Equal Footing Doctrine when it was admitted to the Union in 1889 and the State Legislature has delegated the proprietary authority over state-owned aquatic lands to DNR [RCW 79.105.010 – 030]. Anyone wishing to use state-owned aquatic lands in a way that will interfere with the use by the general public will require authorization from the DNR by way of agreement, lease, permit, or other instrument [WAC 332-30-122]. All uses must comply with statutory requirements [RCW Chapters 79.105 through 79.140].

Point at which DNR Asserts its Proprietary Interest

The DNR asserts its proprietary interest against vessels at the point the vessel ceases navigating and engages in long term moorage or anchoring over state-owned aquatic lands [WAC 332-30-122(1)(a)]. The DNR regards 30 days as the outer limit of transient moorage and anchoring— stays longer than that requires authorization from the DNR by way of agreement, lease, permit, or other instrument [See, e.g., WAC 332-52-155].

Residential use of State owned Aquatic lands

Residential use, including living aboard a vessel, is considered a non-water dependent use of state-owned aquatic lands. Non water dependent uses are defined as a use that can operate in a location other than on the waterfront [RCW 79.105.060(11)]. Non-water dependent use of state-owned aquatic lands is a low-priority use providing minimal public benefits and shall not be permitted to expand or be established in new areas except in exceptional circumstances where it is compatible with water-dependent uses occurring in or planned for the area [RCW 79.105.210(2)].

In 2002 the Board of Natural Resources adopted additional rules regarding residential use of State owned Aquatic lands. Such that the amount of residential use on State owned aquatic lands were limited to marinas and designated/established open water moorage and anchorage areas and were limited to ten percent of the total vessels; furthermore, vessels used for residential use and floating houses shall be moored, anchored or otherwise secured only at a marina, pier or similar fixed moorage facility that is connected to shoreline or in open water moorage and anchorage area [WAC 332-30-171]. Additionally, local governments had a one-time opportunity (a five year period from 2002 to 2007) to establish Open Water moorage and Anchorage areas [WAC 332-30-139(5)]. An Open Water Moorage and Anchorage Area was not established in South Port Townsend Bay; as a result no residential uses are allowed outside of the established marinas in this vicinity.

Residential use is defined as a floating house, or a vessel when any person or succession of different persons residing on the vessel in a specific location, and/or in the same area on more

than a total of thirty days in any forty-day period or on more than a total of ninety days in any three hundred sixty-five-day period. "In the same area" means within a radius of one mile of any location where the same vessel previously moored or anchored on state-owned aquatic lands. A vessel that is occupied and is moored or anchored in the same area, but not for the number of days described in this subsection, is considered used as a recreational or transient vessel [WAC 332-30-106(62)].

Leases and Licenses:

For leases and licenses, the DNR follows its general authority regarding authorizing uses of state-owned aquatic lands. The general process after receiving an application is as follows:

1. The DNR considers:
 - if the use is appropriate at the requested location,
 - whether applicant has secured all regulatory permits, and
 - if applicant addresses any other concerns
2. The DNR then decides whether to process or deny application.
3. If the application is NOT denied, then the DNR will issue an authorization contract.

NOTE - Licenses are revocable authorizations; Leases are not.

Registrations:

People may register their mooring buoy for a free use (RCW 79.105.430 below), if they meet the following standards:

1. They are abutting (waterfront) residential landowners.
2. It is not in a harbor area and there are no prior rights to the land.
3. The boat moored is for private recreational use of the occupant of the abutting waterfront property.
4. The boat is not used commercially or for a residence (i.e. a live-aboard).
5. The boat is not over 60 feet in length.
6. The use meets all other local, state, and federal rules and regulations.

The general process after receiving a registration form (similar to Leases and Licenses above) is as follows:

1. The DNR considers:
 - if the use is appropriate at the requested location,
 - whether applicant has secured all regulatory permits, and

- if applicant addresses any other concerns
2. If the above conditions are met, the DNR will assign an authorization number and notify the user that the registration has been processed. The DNR does not issue written lease or license documents for mooring buoys registered under authority of RCW 79.105.430.

NOTE - Registrations can be revoked by the DNR through a "Finding of Public Necessity" [RCW 79.105.430(3)].

Excerpts from RCW 79.105.430 - Mooring buoys

The abutting residential owner to state-owned shorelands, tidelands, or related beds of navigable waters, other than harbor areas, may install and maintain a mooring buoy without charge if the boat that is moored to the buoy is used for private recreational purposes, the area is not subject to prior rights, including any rights of upland, tideland, or shoreland owners and the buoy will not obstruct the use of mooring buoys previously authorized by the department.

The buoy cannot be sold or leased separately from the abutting residential property. The buoy cannot be used to moor boats for commercial or residential use, or to moor boats over sixty feet in length.

The permission granted for installing a mooring buoy is subject to applicable local, state, and federal rules and regulations governing location, design, installation, maintenance, and operation of the mooring buoy, anchoring system, and moored boat.

The permission to install and maintain a recreational dock or mooring buoy may be revoked by the DNR, or the DNR may direct the owner of a recreational dock or mooring buoy to relocate their dock or buoy, if the DNR makes a finding of public necessity to protect waterward access, ingress rights of other landowners, public health or safety, or public resources. Circumstances prompting a finding of public necessity may include, but are not limited to, the dock, buoy, anchoring system, or boat posing a hazard or obstruction to navigation or fishing, contributing to degradation of aquatic habitat, or contributing to decertification of shellfish beds otherwise suitable for commercial or recreational harvest. The revocation may be appealed. Nothing in this section authorizes a boat owner to abandon a vessel at a recreational dock, mooring buoy, or elsewhere.

Unauthorized uses:

The following process has been used to address unauthorized mooring buoys:

1. The DNR places tag on buoy, notifying owner that buoy is not authorized and that the owner needs to contact the DNR to seek authorization or remove the buoy;

2. If the DNR receives contact, they proceed with the appropriate process as described above; if the DNR does not receive contact, a second tag is placed that provides 30-day notice of removal unless the owner makes contact with the DNR;
3. Proceed with enforcement, which may involve removal or trespass action in court.

Washington Department of Fish and Wildlife (WDFW) - Hydraulic Project Approval (HPA)

WDFW review and approval is needed for all structures proposed and activities conducted in the water, including mooring buoys. The WDFW reviews applications to ensure the protection of fish and shellfish and their habitats and has specific requirements for structures in or near water through their HPA. The WDFW may require mitigation for damage to fish life or habitat resulting from project installation and construction. Construction on your project can only occur during designated timeframes or work windows. Contact the Area Habitat Biologist to determine specific requirements for your location and to determine work windows. Note - If your buoy has been installed longer than 2 years, you do not need an HPA from the WDFW.

Federal Agency Responsibilities

U.S. Army Corps of Engineers (Corps) – Section 10

The mission of the regulatory program of the U.S. Army Corps of Engineers (Corps) is to protect the nation's aquatic resources, while allowing reasonable development through objective permit decisions. The Corps permit evaluation process balances the need for proposed project with protection of the nation's aquatic environment. The Corps evaluates permit applications for essentially all construction activities occurring in the nation's waters under Section 10 of the Rivers and Harbors Acts of 1899. Section 10 covers the construction, excavation, or deposition of materials in, over, or under navigable waters of the U.S., or any work that would affect the course, location, condition, or capacity of those waters. Under Section 10, the Corps also maintains and protects navigation of the nation's waters and finally, Section 10 is the Corps regulatory authority related to mooring buoys.

The level of the Corps permit evaluation is commensurate with the level of the environmental impacts and the aquatic functions and values involved in the particular area being impacted. All permit decisions made by the Corps follow an evaluation process involving avoidance, minimization, and compensation for unavoidable losses of aquatic functions and values. All permit decisions are subject to various other Federal laws and the Corps consults with other agencies for compliance. Important among these other laws are the Endangered Species Act, the National Historic Preservation Act, the Magnuson-Stevens Fisheries Conservation and Management Act (involving protection of essential fish habitat), Water Quality Certifications, Coastal Zone Management Consistency Determinations, and Tribal trust issues. Compliance

with each of these authorities often requires consultation with other agencies and results in additional restrictions on the proposed work and compensatory mitigation for impacts to the resources protected by these Federal laws.

The type of permit review process used by the Corps to issue a permit depends on the design and location of the project. The different processes include standard individual, letter of permission (LOP), nationwide (NWP), and regional general (RGP) permits, in order of most to least complex and/or impacting project. The standard individual permit is for larger, more complex or controversial projects and includes a 30-day public notice comment period. The LOP is for Section 10-only projects that do not meet the terms and conditions of a NWP/RGP, but are not controversial. Typically, this is for individual pier, ramp, or float moorage facilities.

NWPs and RGPs must be minimally impacting, both individually and cumulatively, and are issued on either a national or regional basis. Projects must meet all the terms and conditions of the NWP/RGP. Verification letters are issued for those requiring a pre-construction notification to the Corps or for those projects submitted to the Corps for review. Most NWPs require notification to the Corps because of the presence of ESA listed species or critical habitat. Relative to mooring buoys, two common NWPs are the NWP 10 for construction and installation of mooring buoys (non-commercial, single boat) and the NWP 3 for the repair, rehabilitation, or replacement of any previously authorized, currently serviceable structure.

Note – The Corps' authorities also include Section 404 of the Clean Water Act that covers the discharge of dredged or fill material into waters of the United States, including wetlands. As this does not pertain to mooring buoys, please visit the Corps' web site for details regarding this authority.