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September 23, 2009

The Honorable Rick Larsen  
U.S. House of Representatives  
108 Cannon House Office Building  
Washington, D.C. 20515

RE: NOAA Proposal for "No-Go" Zone in Haro Strait; West Side of San Juan Island

Dear Representative Larsen:

The National Oceanic and Atmospheric Administration (NOAA) has proposed a regulation which, if adopted, will establish a seasonal zone extending one-half mile on the west side of San Juan Island in Haro Strait and the eastern end of the Strait of Juan de Fuca. These straits, together with Boundary Pass and a portion of the Strait of Georgia are the "boundary straits" of the Pacific Northwest and have carried international marine traffic for more than 150 years. As such, the vessels using these straits enjoy the use of waters and have a unique legal status that recognizes the critical role straits play in international navigation and commerce.

The international boundary was established through the straits in the Oregon Treaty of 1846 between the United States and Great Britain. That treaty principally established a dividing line between the two nations at the 49<sup>th</sup> parallel of latitude at the western rockies and west to "the middle of the channel which separates the continent from Vancouver's Island; and, thence, southerly, through the middle of the said channel and of Fuca's Straits, to the Pacific Ocean." In fact, there are two main channels between Vancouver Island and the mainland, and the boundary was fixed at Haro Strait and Boundary Pass by arbitration before the Emperor of Germany in 1872. This decision gave the territory that would become San Juan County to the United States.

The Treaty of 1846 goes on to provide that "the navigation of the whole said channel and straits south of the 49<sup>th</sup> parallel of north latitude, would remain free and open to both parties."

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This provision was inserted at the request of the chief negotiator of the treaty, Secretary of State (and future President) James Buchanan who stated in a letter the reason for inserting the provision:

*“The Strait of Juan de Fuca is an arm of the sea, and under the public law all nations would possess the same right to navigate it, throughout its whole extent, as they now have to the navigation of the British Channel. Still, to prevent future difficulties, this ought to be clearly and distinctly understood.”*

In 1892 the Ninth Circuit Court of Appeals ruled that this treaty “secures to each nation a right of free navigation over **all** the waters of the strait.” *The Pilot*, 53 Fed. 11 (1892) (emphasis added). By restricting navigation over a portion of the eastern one-half mile of the strait, the proposed “no-go zone” runs afoul of the rights to free navigation over **all** the waters of the strait.

We are aware that the Department of Justice, the United States Coast Guard and perhaps other federal agencies have expressed an opinion regarding the legal status of Haro Strait and the Strait of Juan de Fuca. (See attached Memorandum from Mr. David A Colson, Department of State, dated January 25, 1982; and letter of reply dated March 3, 1982, by Carol E. Dinkins, Assistant Attorney General; copies attached). We agree with the conclusion of Ms. Dinkins that the waters of the boundary straits are properly classified as “internal waters” and properly the subject of a jointly negotiated vessel traffic management agreement. But, we also believe that such waters remain subject to the rights of the citizens of Canada and the United States as negotiated in the Oregon Treaty of 1846 because a treaty has superior status over federal and state legislation.

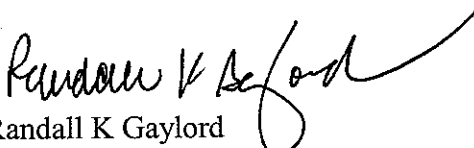
The classification of the waters as “internal waters” is not the end of the analysis when such waters are international straits. Even internal waters in international straits are subject to maritime rights of “innocent passage” by all nations. See United Nations Convention on the Law of the Sea Section 3, Articles 21 through 26. The difficulty that is present in the current “no go” zone proposed by NOAA is that the proposed regulation may run afoul of the doctrine of “innocent passage” as expressed in the common law and the Law of the Sea Treaty. Moreover, the legal authority of the Law of the Sea Treaty is uncertain because Secretary of State Hillary Clinton has expressed a desire to ratify the treaty, but the United States is only a signatory to the Law of the Sea Treaty.

Given the complexities of the legal status of the boundary straits, we think it is appropriate that you ask the Department of State, Department of Commerce, and Justice Department to issue a formal memorandum regarding the authority of the NOAA to establish a “no-go zone” in Haro Strait and the Strait of Juan de Fuca. If necessary, we request that you

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employ your offices to assure that appropriate officials in Ottawa are given notice of the proposed regulations and consulted so that the concerns regarding the southern resident killer whale are addressed in a way that honors existing rights of navigation and protects the southern resident killer whale.

Very truly yours,

  
Randall K Gaylord  
San Juan County Prosecutor

RKG/tb

c: County Council  
Pete Rose, County Administrator  
John Manning, CD&P  
Kit Rawson, Chair of San Juan County Marine Resources Committee  
Mary Knackstedt, Marine Resources Coordinator  
Lynne Barre, NW Regional Office of NOAA  
NOAA Assistant Regional Administrator



U.S. Department of Justice  
Land and Natural Resources Division

Office of the Assistant Attorney General

Washington, D.C. 20530

March 3, 1982

David Colson, Esquire  
Assistant Legal Advisor  
Department of State  
Washington, D. C. 20520

Dear Mr. Colson:

By memorandum of January 25, 1982, you requested the views of the Department of Justice on a number of questions and suggestions related to the status of the waters in the Strait of Juan de Fuca. We appreciate the opportunity to comment on these matters.

Before responding to the particular questions asked, let me summarize our position on the status of Juan de Fuca and the vessel traffic system (VTS) which the Coast Guard seeks to implement jointly with Canada. We fully support the vessel traffic system proposal. Moreover, we concur in the conclusion that there is a sufficient historic claim to the Strait of Juan de Fuca as internal waters. We see no reason, however, for any formal announcement or proclamation of that claim at this time, and would prefer to simply act in accordance with the claim. Thus, we do not recommend any mechanism for further stating or justifying the claim to internal waters in the Strait of Juan de Fuca.

Our responses to your particular questions and suggestions are as follows:

1. Does your Department or Agency concur that the Strait of Juan de Fuca is internal waters?

Because of the physical nature of the Strait of Juan de Fuca, the only basis on which the United States can treat U.S. waters in that Strait as internal waters is under an historic claim. As a matter of international law, a valid historic claim requires open and effective exercise of authority over the area, continuity of the exercise of authority, and acquiescence by foreign nations in the claim. We have reviewed the material prepared by the Legal Advisor's office concerning the facts which support the United States claim, and they appear to be very strong. Our claim dates from at least 1846, has been supported by continuous exercise of authority and reflects considerable foreign acquiescence. Thus, it appears that we have made a valid historic internal waters claim.

We are concerned, however, about the effect of this historic claim on the pending and recurrent litigation we have with the coastal states of the United States concerning the baseline for measurement of the territorial sea. While our claim to Juan de Fuca is considerably stronger than claims which certain coastal states forward to assert that straits or bays off of their shores are historic internal waters, many of the indicia of jurisdiction on which we rely to claim Juan de Fuca are similar to the indicia of jurisdiction asserted by coastal states. These include regulation of fisheries and navigation, as well as laws or compacts which reference the particular waters as part of a boundary. Because of these concerns, we desire maintaining close coordination on this matter so that we do not jeopardize any litigation.

2. Does it concur with the implementation of the VTS system at this time?

The Justice Department has no objection to the implementation of the VTS at this time.

3. On the assumption that all Departments and Agencies support or at least concur in the conclusion that the Strait of Juan de Fuca is internal waters, we need to decide what action, if any, to take. The possibilities range from not worrying about how, when or where our position is made clear to seeking a Presidential Proclamation on the subject in the near future.

We believe that no special action should be taken to announce the United States' position. Our claim to the Strait as internal is based on our continuous action treating it as internal; this action dates back to at least 1846. It would seem incongruous to require any additional assertion of the claim at this point, and perhaps even be inconsistent with our position that we have a valid historic claim.

We suggest that the VTS be implemented, and that the United States print baselines and territorial sea lines on its nautical charts which reflect the claim. The prior assertions and the 1975 conclusions of the Legal Advisor's office should be sufficient basis for those actions, and no further steps need be taken. It is sufficient both domestically and internationally to act consistent with the claim, without further pronouncement.

4. Is there a way to legally justify the mandatory VTS system without reference to internal waters?

The 1975 memorandum of the Legal Advisor states that the mandatory VTS would be inconsistent with the right of innocent passage, which is a territorial sea right. It also states that there would be no authority to impose the system on the high seas. We believe, however, that there is foundation in international law for the VTS based on either a territorial sea claim or even under

some circumstances on the high seas and therefore question some of the Legal Advisor's conclusion.

The Convention on the Territorial Sea and Contiguous Zone recognizes that vessels exercising innocent passage in the territorial sea must nonetheless abide by navigational safety regulations of the coastal state. Thus, Article 17 provides:

Foreign ships exercising the right of innocent passage shall comply with the laws and regulations enacted by the coastal state in conformity with these articles and other rules of international law and, in particular with such laws and regulations relating to transport and navigation. 15 U.S.T. 1606, 1611.

The official commentary to this article includes examples of proper regulation adopted by the 7th session of the International Law Commission. These include regulation for: (a) "The safety of traffic and the protection of channels and buoys; (b) The protection of the waters of the coastal state against pollution of any kind from ships;" Whiteman, Digest of International Law, Vol. 4, p. 387. The concept was included in all ILC drafts of the Convention since 1930.

Thus, Article 17 would appear to authorize just the type of regulation proposed by the Coast Guard. At a minimum, this would allow consideration of whether Juan de Fuca need be claimed as historic internal waters or rather may be treated as historic territorial waters. We recognize that this latter concept is somewhat unusual.

Moreover, Article 16 may provide additional justification. It provides, in pertinent part, that:

In the case of ships proceeding to internal waters, the coastal State shall also have the right to take the necessary steps to prevent any breach of the conditions to which admission of those ships to those waters is subject.  
15 U.S.T. 1606, 1611, Art. 16(2).

Without reference to the location of the vessel, that Article seems to authorize imposition of navigational controls on vessels on the high seas or in territorial waters which are in transit to coastal ports. Traffic entering the Strait is proceeding to a U.S or Canadian port and thus falls within this provision. Reliance on this article, however, may require a change in domestic legislation regarding the jurisdiction of the Coast Guard.

Articles 16 and 17, seem to provide a justification in international law for imposing the mandatory VTS without reference to internal waters. We would appreciate further review of this option since it might eliminate any concern about the precedential effect of treating Juan de Fuca as internal.

You also asked for a response to certain suggestions on how to proceed with implementation of the VTS and we offer the following comments:

1) Coast Guard would proceed to implement the VTS system as planned.

We concur in this suggestion.

2) In coordination with all concerned, State would develop a short statement for use as needed should the matter be brought up in international fora, i.e. how we would respond if asked at the LOS conference, IMCO or elsewhere.

Assuming concurrence in the historic internal claims, this appears to be a reasonable suggestion. We would like the opportunity to review any such preparation.

3) If all concur that the Strait of Juan de Fuca is internal waters, at the next scheduled reprinting of the NOS coastline chart 18480 of the NW Washington State coast (October, 1983) the Interagency Baseline Committee would take up the question with a view to putting the closing line on the chart across the mouth of our portion of the Strait and indicating a territorial sea seaward of the closing line.

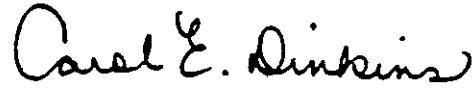
We agree that the limits of the internal waters claim should be reflected on the nautical charts marked by the coastline committee.

4) In coordination with all concerned, Justice would develop the analysis that would be used should the matter be raised in domestic litigation.

We will have the responsibility to address this matter in domestic litigation, should it arise. However, we do not think that such an analysis should be done in the absence of a specific case. Only then will the issues and the government interests be clearly defined. Moreover, we would retain flexibility to protect the particular governmental interests at stake by not committing to a rigid analysis at this time. Because of the sensitivity of these matters, we would, of course, coordinate with other concerned agencies if issues arise in domestic litigation.

We appreciate the opportunity to address these questions. Michael Reed will continue to have responsibility within my office for coordination of this matter.

Sincerely,

A handwritten signature in cursive script that reads "Carol E. Dinkins". The signature is written in dark ink and is positioned above the typed name and title.

Carol E. Dinkins  
Assistant Attorney General