



**TESORO**

Tesoro Refining & Marketing  
Company LLC  
19100 Ridgewood Parkway  
San Antonio, TX 78259

*May 4, 2017*

The Honorable Ryan Zinke  
Secretary of the Interior  
1849 C Street, NW  
Washington, DC 20240

Re: Proposed amendments to the Constitution of the Swinomish Indian Tribal Community

Dear Mr. Secretary:

This letter sets forth a summary of the concerns of Tesoro Refining & Marketing Company LLC (“Tesoro”) with the pending proposal of the Swinomish Indian Tribal Community (“SITC”) to amend its Constitution adopted pursuant to the Indian Reorganization Act of 1934 (“IRA”). For the reasons discussed below, if at all feasible Tesoro urges the Department to temporarily delay the May 23 election. In the alternative, following the election Tesoro urges the Department to disapprove the amendments that relate to the SITC Reservation boundaries and expanded jurisdiction as being contrary to federal law. Tesoro further urges that the Department fully address the concerns that have been raised by stakeholders in Skagit County regarding the proposed amendments, including providing stakeholders with an opportunity to be heard by the Department.

A Secretarial election on the proposed amendments has already been scheduled for May 23, 2017. It is our understanding that if the amendments are adopted by the SITC members, applicable law requires the Bureau of Indian Affairs (“BIA”) to approve or disapprove the amendments within 45 days, and that the BIA cannot approve an amendment that is “contrary to Federal law.”<sup>1</sup> Briefly stated, Tesoro believes that several of the amendments appear to be contrary to law and are likely to foment significant conflicts as the SITC attempts to assert an expanded jurisdiction, in particular on March Point and possibly in other areas outside the boundaries of the Swinomish Reservation as recognized by the SITC since 1935.

Tesoro respectfully acknowledges the status and role of SITC as a federally-recognized Indian tribal government and its government-to-government relationship with the United States. We are mindful of the significant challenges that any tribal government, including SITC, must address as it endeavors to better the lives of its citizens. We commend the remarkable—and successful—efforts of SITC to improve the health, education, and general welfare of the current and future generations of Swinomish tribal members.

Nevertheless, Tesoro is compelled to express our concerns with some of the proposed amendments. The Secretarial election process under the IRA does not appear to accommodate public participation or the exchange of information even if, as here, amendments have the potential to impact the public interest. The process has no formal public outreach or request for input. We, like others in Skagit County, have

---

<sup>1</sup> See, 25 C.F.R. 81.45(c)(3).

had to rely on the Freedom of Information Act (“FOIA”) to obtain information and we have yet to obtain much if not most of the information that we need. This lack of transparency in a federal process is unusual and has contributed to the alarm over what the amendments might mean to landowners, especially those on March Point—an area of land immediately northwest of the Swinomish Reservation, where Tesoro’s Anacortes Refinery and the Shell Oil Refinery are located as well as many other landowners and businesses.

It is clear to Tesoro that the amendments to Article I of the SITC’s Constitution will lead to significant controversy and possibly future litigation over (1) the SITC’s Reservation boundaries, and (2) the nature and extent of SITC jurisdiction over people, land, commercial enterprises, and activities in areas that have been *outside* of the Reservation boundaries as declared in the SITC’s own Constitution.<sup>2</sup> In addition, we believe that the amendments implicating the Reservation boundaries, and any action by the BIA to approve those amendments, will set the stage for the SITC to assert land claims on March Point.

### *Reservation Boundaries*

Since 1935, Article I of the SITC Constitution has included a reference to an 1873 Executive Order of U.S. President Ulysses Grant, which defines the boundaries of the Swinomish Reservation so as to exclude March Point. Enclosed with this letter is a map showing the Reservation boundaries as currently recognized in Article I of the SITC Constitution.

For nearly 82 years, Article I, Section 2, of the Constitution has read as follows:

The jurisdiction of the Swinomish Indians shall include all the territory *within the original confines of the Swinomish Reservation boundaries, as set forth by Executive order of September 9, 1873, in pursuance of article III of the Treaty of Point Elliott, January 22, 1855 (12 Stat. 928), and shall extend to such other lands as may be hereafter added thereto under any law of the United States, except as otherwise provided by law.* [Emphasis added.]

The 1873 Executive Order sets the northern boundary of the Reservation in such a way that it excludes March Point. Initially, last year, SITC proposed to amend this Article by deleting both the references to the 1873 Executive Order and the reference to Article III of the 1855 Treaty and, instead, inserting language defining its territory as all lands, water, property, etc., “located within the original boundaries of the Swinomish Reservation in pursuance of Article *II* of the Treaty of Point Elliott...” (Emphasis added.) These earlier drafts of the amendments, by deleting the reference to the Executive Order, would have effectively revised the constitutionally defined Reservation boundaries to include March Point. After reviewing the SITC proposal, the BIA in a letter dated September 13, 2016, notified SITC that this amendment as written was contrary to law and would not be approved. As the BIA noted in its letter—

This proposed amendment expands the Swinomish territory *by eliminating any reference to the Executive Order of September 9, 1873.* Issued in accordance with Article III of the Treaty of Point Elliott..., the Executive Order defines the northern boundary of the Swinomish Reservation. *Elimination of the northern boundary would create ambiguities in the Tribe’s territory and invite conflict as the Community exercised its expanded jurisdiction....* [Emphasis added.]

---

<sup>2</sup> Skagit County submitted a letter dated April 11, 2017 (copy enclosed), to the BIA Regional Director and attorneys in the Office of the Solicitor for the Pacific Northwest Region, setting forth the County’s objections and concerns over the off-reservation jurisdictional reach of the amendments. Tesoro shares the County’s concerns expressed in its letter of April 11 regarding the off-reservation, jurisdictional implications of some of the proposed constitutional amendments.

In response, it appears SITC came up with another option. It proposed to revise the amendment by deleting the reference to Article II of the 1855 Treaty—but still omitting the key boundary phrase, “as set forth by Executive order of September 9, 1873.” With no reference to the 1873 Executive Order, the revised amendment would allow SITC to assert that the Reservation boundaries and its “territory” include March Point. Tesoro submits that the revised amendment does nothing to resolve the core problem correctly identified by the BIA in its letter of September 13, 2016: “Elimination of the northern boundary would create ambiguities in the Tribe’s territory and invite conflict as the Community exercised its expanded jurisdiction.” Accordingly, we contend that this proposed amendment is just as “contrary to law” as the previous version was and will “invite conflict” for exactly the same reasons.

### *Jurisdiction*

What are the implications of this change to the boundary provisions in Article I of SITC’s Constitution?

Some of the implications are found in other proposed amendments. For example, the amendment that would change the description of the Reservation boundaries also adds an entirely new Section 3 to Article I of the Constitution, entitled “Jurisdiction.” This amendment declares that—

To the fullest extent possible consistent with applicable federal law and the sovereign powers of the Tribe, the Swinomish Indian Tribal Community shall have jurisdiction over all persons, subjects, property and activities occurring within

- (a) its territory<sup>3</sup> as defined by this Article; and
- (b) the Tribe’s usual and accustomed fishing grounds and stations and all open and unclaimed lands, as guaranteed by treaty for fishing, hunting and gathering, and on such other lands and waters as is necessary for access to such fishing, hunting and gathering areas.

Further, jurisdiction shall extend to all persons, subjects, property and activities that may hereafter be included within the jurisdiction of the tribe.<sup>4</sup>

These provisions are both exceptionally broad and vague in terms of what territorial areas they reach and what forms of jurisdiction they purport to authorize<sup>5</sup>—they would appear to authorize the Tribe to assert regulatory, taxing, civil, and/or criminal jurisdiction over “all persons, property and activities” within the Tribe’s treaty fishing, hunting and gathering areas.

---

<sup>3</sup> Which again, in the proposed amendment, the “territory” is no longer limited by the 1873 Executive Order.

<sup>4</sup> Note that this sentence is *not preceded by the phrase* “To the fullest extent possible consistent with applicable federal law....” Tesoro submits that this provision is not consistent with applicable federal law.

<sup>5</sup> We also note that a number of the amendments to the enumerated powers of the Swinomish Senate are similarly broad and indefinite. *See*, for example, the amendment to Article VI, Section 1, Clause (k), providing the Swinomish Senate with the power to enact ordinances “governing *the conduct of all persons* within the territory of the Swinomish Tribal Community, as defined in Article I, Section 2 of the Constitution...” (emphasis added). This and the other enumerated powers in Article VI, Section 1, are not preceded by the phrase, “To the fullest extent possible consistent with applicable federal law....” Instead, the enumerated powers are only limited by “the statutes or the Constitution of the United States.” *See* amendment to Article VI, Section 1, “Introduction.” This phrase does not include federal case law, a significant omission. Federal common law enunciated in cases such as *Montana v. United States*, 450 U.S. 544 (1981), represents some of the most important federal law on the jurisdiction of Indian tribes, but that line of federal common law decisions would not be included in the “statutes or the Constitution of the United States” proviso, creating a conflict between some of the new powers and applicable Federal law.

But BIA approval of this amendment, which removes all references to the 1873 Executive Order, will likely have real life consequences for many stakeholders on March Point.

For example, one of the jurisdictional implications of the amendment striking the reference to the 1873 Executive Order relates to SITC's Treatment in a Manner Similar as a State ("TAS") status under the Clean Air Act (CAA). SITC, in its 2004 application to the United States Environmental Protection Agency ("EPA") for CAA TAS, did not request or obtain TAS authority for March Point. However, in its 2004 application SITC stated as follows:

The boundaries described in this section [of the TAS application] are for regulatory purposes only. *The Tribe reserves the right to argue outside of the context of this Air Quality TAS application that the actual boundaries cover a greater area than those described herein.* [Emphasis added.]

As of now, given the current wording of Article I of the Constitution referencing the 1873 Executive Order, SITC cannot realistically expect the EPA to approve an amendment to the territorial scope of SITC's CAA authority to include March Point. However, if the BIA approves the amendment to Article I, Section 2, that barrier will be removed—and, more importantly, it will appear that the BIA agrees with SITC's position that the Executive Order that has been in its Constitution since 1935 has improperly defined the reservation boundaries.

#### *Land Claims*

There is another and far more ominous implication of the proposed amendments to Article I of the SITC Constitution: SITC's land claims to March Point.

In a 1998 letter commenting on Tesoro's acquisition of the Anacortes Refinery, SITC wrote to Christine Gregoire, then the Attorney General of Washington State, to inform her of "the Tribe's land claims to the March Point area."<sup>6</sup> A copy of that letter is also enclosed.

The 1998 letter sets forth the legal theory behind SITC's land claims to March Point, summarized as follows: the 1873 Executive Order unlawfully excluded March Point from the reservation boundaries; the land on March Point was never allotted or otherwise transferred out of SITC ownership; and, therefore, to this day, the land on March Point belongs to SITC. The letter to the Attorney General concludes:

[T]he Swinomish Indian Tribal Community considers March Point, and the land on which the Shell Oil Refinery is located, to be within the current boundaries of the Swinomish Indian Reservation. *Since this land was neither allotted nor otherwise conveyed out of Tribal ownership, it remains the property of the Swinomish Indian Tribal Community.* [Emphasis added.]

The land claims described in the 1998 letter to Attorney General Gregoire are completely inconsistent with Article I of the Swinomish Constitution as it now reads and has read for almost 82 years. As with the TAS authority, SITC cannot today file land claims against March Point because of the reference to the 1873 Executive Order in its Constitution. If the BIA approves the amendments to Article I, the Constitution will no longer stand in the way of SITC's land claims.

In conclusion, Tesoro believes that the BIA has not adequately evaluated the serious implications of the proposed amendments relating to the SITC's Reservation boundaries and jurisdiction. A full, frank and

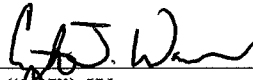
---

<sup>6</sup> Tesoro purchased the Anacortes Refinery in 1998 from Shell which at the time co-owned both the Puget Sound Refinery and Anacortes Refinery on March Point. Shell retained and currently operates the Puget Sound Refinery on March Point.

public discussion of some of the amendments and their implications should occur before any election takes place and before the BIA approves any of the proposed amendments that potentially affect the jurisdiction or authority of the SITC or its Reservation boundaries. To create the space in which a greater degree of public transparency could be brought to these proceedings and with the goal of minimizing confusion within the Skagit County community, Tesoro requests a temporary delay in the May 23 election or, in the alternative, that the amendments relating to the Reservation boundaries and expanded jurisdiction not be approved.

Thank you, Mr. Secretary, for your time and attention to this important matter.

Sincerely,

A handwritten signature in black ink, appearing to read "CJ Warner", written over a horizontal line.

Cynthia ("CJ") Warner  
Executive Vice President, Operations

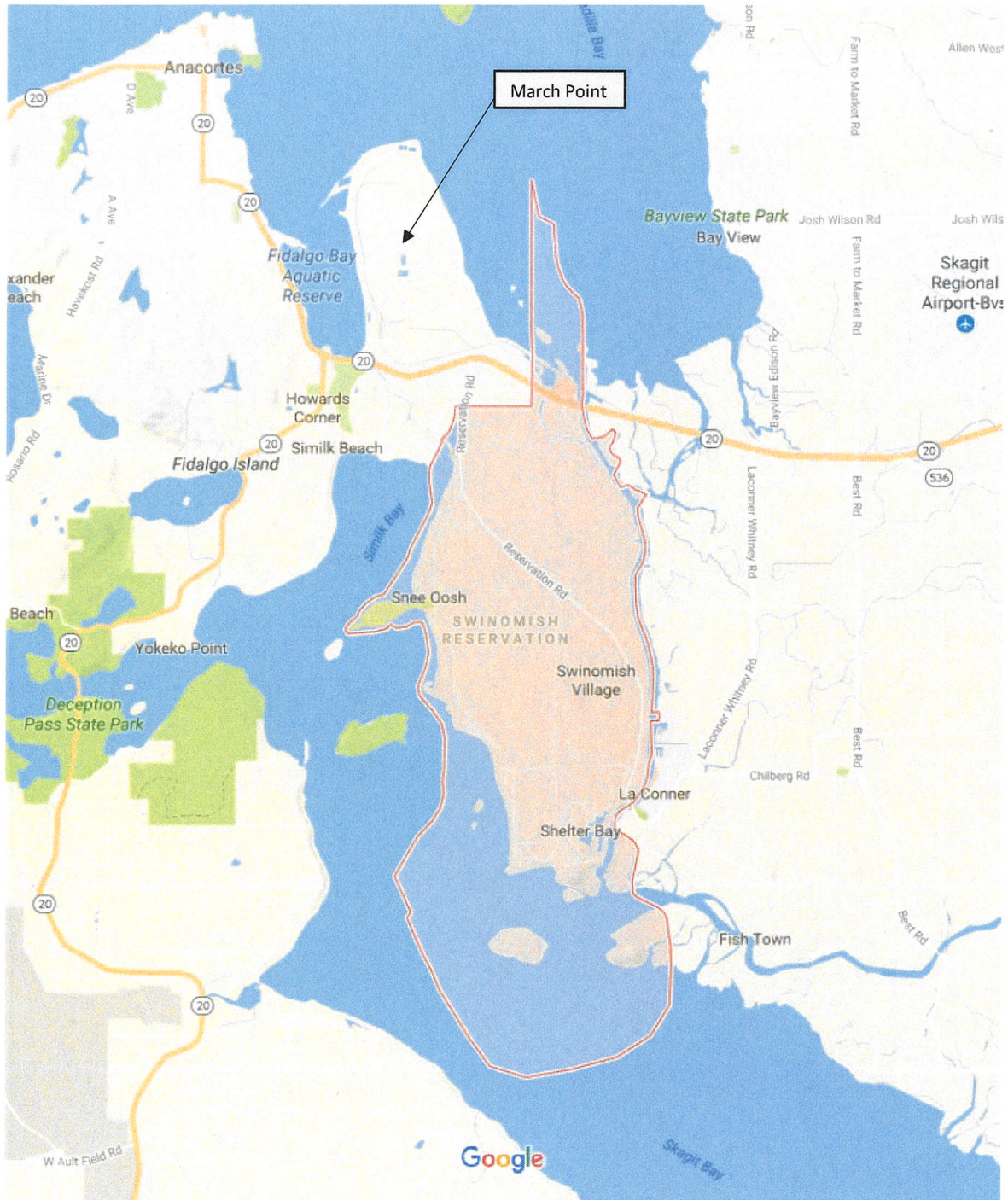
cc: Honorable Patty Murray  
Honorable Maria Cantwell  
Honorable Rick Larsen  
Honorable John Hoeven  
Honorable Tom Udall  
Honorable Rob Bishop  
Honorable Raul Grijalva



5/3/2017

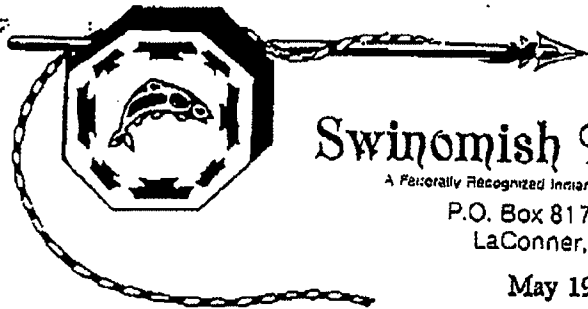
Swinomish Reservation - Google Maps

# Google Maps Swinomish Reservation



Map data ©2017 Google 1 mi

<https://www.google.com/maps/place/Swinomish+Reservation,+WA/@48.4211284,-122.5353253,12z/data=!4m5!3m4!1s0x54856524d2626bf3:0x2637bfbd05638c...> 1/2



Phone (360) 466-3163  
Fax (360) 466-5309

## Swinomish Tribal Community

A Federally Recognized Indian Tribe Organized Pursuant To 25 U.S.C. § 476

P.O. Box 817 • 950 Moorage Way  
LaConner, Washington 98257

May 19, 1998

Christine O. Gregoire  
Attorney General of Washington  
1125 Washington Street SE  
P.O. Box 40100  
Olympia, Wa. 98504-0100

Re: Request For Comments Regarding Sale of Shell Oil's  
Anacortes Refinery To The Tesoro Petroleum Corporation

Dear Attorney General Gregoire:

We are in receipt of your letter of May 1, 1998 concerning the Attorney General's review of the intended acquisition of Shell Oil Company's Anacortes Refinery by the Tesoro Petroleum Corporation. Apart from your letter, the Tribe has very little information regarding the Tesoro Petroleum Corporation and its plans for the refinery. We do, however, want to make you aware of the Tribe's land claims to the March Point area where the refinery is located and related concerns to any conveyance of title to this property.

As you are undoubtedly aware, the Swinomish Indian Tribal Community occupies a reservation on Fidalgo Island that was established in 1855 by the Treaty of Point Elliott. The Treaty describes the Swinomish Indian Reservation as the "peninsula at the southeastern end of Perry's (Fidalgo) Island called Shais-quihl." Isaac Stevens, the first territorial governor of the Washington Territory, negotiated the treaty on behalf of the United States, and filed a map of the Swinomish Reservation with the Indian Office in Washington D.C. at the time the treaty was made. That map and other contemporary maps and correspondence describe the Swinomish Indian Reservation as that part of Fidalgo Island east of a line running from Fidalgo Bay due south to Similk Bay. This boundary line corresponds to a marshy intertidal area that connected Fidalgo Bay and Similk Bay at the time the treaty was signed. This intertidal area is the current location of Similk Beach Golf Course. The significance of this boundary line for purposes of the pending sale of the Shell Refinery is that the Reservation established by the Point Elliott Treaty includes all of March Point and the land where the Shell Oil Company's Refinery is located.

Attached for your reference is a copy of Governor Stevens map which was sent by Superintendent T. J. McKenny, Olympia Office of Indian Affairs with a letter to E. S. Parker, Commissioner of Indian Affairs on April 11, 1871. In his letter, Superintendent McKenny described the map as a:

"...map of the reservation at it appears in the Stevens map a copy of which was filed in the office at Washington at the time the treaty was made and which has so appeared in all the reports of the Surveyor Generals for many years."

The map had been introduced into evidence in a case brought by the Territorial government in 1871 to restrain the local agent of the Bureau of Indian affairs from ejecting trespassers from the March Point area. The case was decided against the Territory.

On February 4, 1873, Superintendent R.H. Milroy, McKenny's successor, submitted a detailed report on the Swinomish Reservation boundary to the Commissioner of Indian Affairs. In his report, Milroy reviewed the history of events surrounding the location of the Reservation Boundary:

It will be seen by reference to the map forwarded by Gov. I.I. Stevens as before stated that the whole easterly division of the island is marked and colored as included in and constituting the reservation as set apart by the treaty; and the old Indians now on the reservation who resided there at the time of the treaty have assured me that this was the reservation as they understood it to have been set apart by the treaty:

The western boundary of the reservation according to this apparent understanding of Gov. Stevens and of the Indians would be about the section line across the isthmus between section 4 & 5, 8 & 9 in T 34 N R 2 E from where said line intersects the waters of Similk Bay on the South to where it intersects the waters of Fidalgo Bay on the north, the eastern shores of Fidalgo Bay, Similk Bay and of the Sound on the west shore of said eastern division.

Despite the clear intent of Governor Stevens and the other parties to the treaty, Milroy went on to recommend that an Executive Order be issued diminishing the reservation and defining the northern boundary so as to exclude the March Point area. His reasons for doing so were largely reasons of expediency. There had been an ongoing effort by the Bureau of Indian Affairs to eject trespassers that had been attempting to settle and lay claim to the March Point area. Milroy incorrectly reported that most of these lands had already been sold by the Government to white settlers and that the Indian population had decreased by over half. He recommended that the northern boundary should be moved to avoid "much trouble, expense, litigation and ill feeling." However, according to the records of original patents held by the Bureau of Land Management in Portland, no patents were issued for any land in the March Point area prior to March 1, 1875.

Milroy recommended that March's Point be excluded from the Reservation rather than "authoritatively declared to be a legal part of the Swinomish Reservation in accordance with the stipulations of the treaty..." In his report, Milroy proposed and described the location of a new northern boundary. An Executive Order defining the Swinomish Reservation's northern boundary was issued by President Grant on September 9, 1873. The Executive Order was based on and essentially adopted Milroy's proposed boundary.



However, the authority to diminish a reservation can only be granted by Congress and it must be in clear and express terms. The President of the United States does not possess inherent authority to extinguish aboriginal title, nor can the President alone remove lands from an Indian Reservation by executive order. No treaty, statute or other act of Congress contains a delegation of authority to the President to diminish the Swinomish Indian Reservation. Consequently, the Swinomish Indian Tribal Community considers March Point, and the land on which the Shell Oil Refinery is located, to be within the current boundaries of the Swinomish Indian Reservation. Since this land was neither allotted nor otherwise conveyed out of Tribal ownership, it remains the property of the Swinomish Indian Tribal Community.

Thank you for taking the time to solicit our comments and concerns. If you would like to discuss these issues further, please feel free to contact Mr. Allan Olson, Tribal Attorney, at (360) 466-7221.

Sincerely,



Brian Cladoosby, Chairman  
Swinomish Indian Tribal Community

cc: w/enc.

Washington State Attorney General's Office  
Antitrust Section  
Shell Anacortes Refining Company  
Tesoro Petroleum Corporation

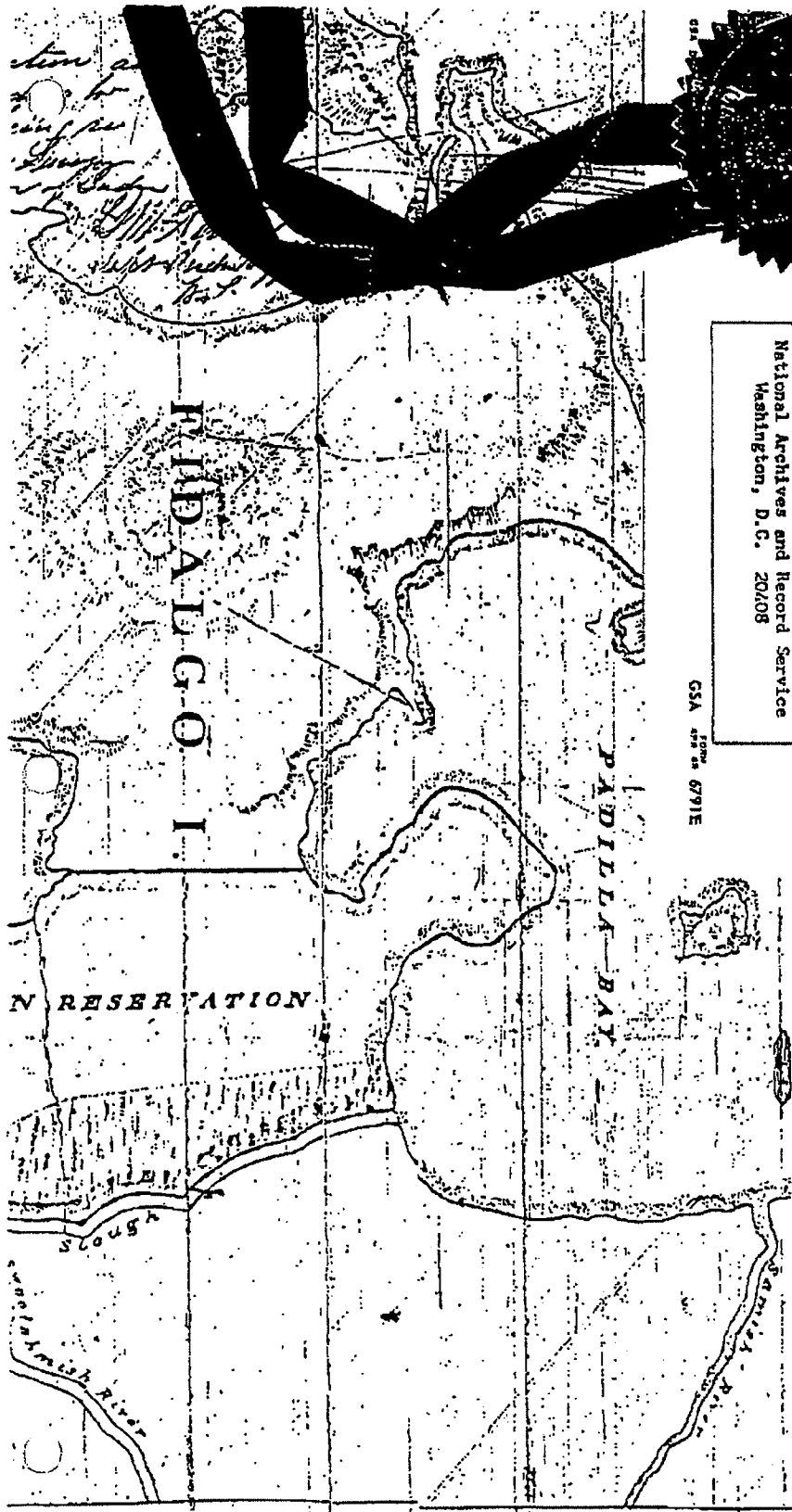
# GENERAL SERVICES ADMINISTRATION National Archives and Records Service

These presents shall come, Offering:

By virtue of the authority vested in me by the Administrator of General Services, I certify on his behalf, under the seal of the United States General Services Administration, that the attached production(s) is a true and correct copy of documents in his custody.

SIGNATURE	
<i>James B. Dyers</i>	DATE
James B. Dyers	12/23/79
OFFICE	
Chief, General Research Room	
National Archives and Record Service	
Washington, D.C. 20408	

GSA GEN. REG. NO. 6791E



*Olympia Wt March 10<sup>th</sup> 1871*  
*I certify that the Swinimish Reservation as*  
*shown by this map is correctly given according to*  
*my understanding from visiting the tract, it being re-*  
*ceived and laid out in all the Maps in the Survey*  
*General's Office, Land Office and Commissioner of Land*  
*Office*

